PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW
For the time being, the political project of basing the European Union on a document entitled ‘Constitution’ has failed. The second, revised and enlarged edition of this volume retains its title nonetheless. Building on a scholarly rather than black-letter law account, it shows European constitutional law as it presently stands and as it will look following the Treaty of Lisbon, with the EU’s foundational treaties mandating the exercise of public authority, establishing a hierarchy of norms and legitimising legal acts, providing for citizenship, and granting fundamental rights. In this way the treaties shape the relations between legal orders, between public interest regulation and market economy, and between law and politics. The contributions demonstrate in detail how a constitutional approach furthers understanding of the core issues of EU law, how it offers theoretical and doctrinal insights, and how it adds critical perspective.

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Principles of European Constitutional Law

Second Revised Edition

Edited by
Armin von Bogdandy
and
Jürgen Bast

HART PUBLISHING

Verlag CH Beck
Preface

The friendly reception of this book’s German as well as English edition has encouraged its second edition six years after it first appeared. It handles the developments of the subject and takes up suggestions that arose from the many reviews. This requires considerations that go beyond the scope of a preface; the new introduction on The Constitutional Approach to EU Law is dedicated to them.

At this place it remains to express our gratitude and appreciations. This project continues to be indebted to the Fritz Thyssen Stiftung. Again it enabled the authors’ co-operation in a generous and unbureaucratic manner. The editorial team was headed by Franziska Sucker, acting jointly with the signers. It consisted of Victoria Beinert, Nicole Betz, Anuscheh Farahat, Felix Hanschmann, Marc Jacob, Daniel Oberhofer, Johannes Pöttzl, Maja Smrkolj, Ingo Venzke, and Christian Wohlfahrt. Marc Jacob, Grant Van Eaton, and Naila Widmaier have been proof-reading the draft English versions.

Armin von Bogdandy and Jürgen Bast
Heidelberg, March 2008
Short Contents

The Constitutional Approach to EU Law 1
   Armin von Bogdandy and Jürgen Bast

Part I: Defining the Field of European Constitutional Law 9

1 Founding Principles 11
   Armin von Bogdandy

2 Federalism and Democracy 55
   Stefan Oeter

3 National Constitutional Law Relating to the European Union 83
   Christoph Grabenwarter

4 The Constitutional Role of International Law 131
   Robert Uerpmann-Wittzack

5 Pouvoir Constituant—Constitution—Constitutionalisation 169
   Christoph Möllers

6 On Finality 205
   Ulrich Haltern

Part II: Institutional Issues 235

7 The Political Institutions 237
   Philipp Dann

8 The Federal Order of Competences 275
   Armin von Bogdandy and Jürgen Bast

9 Foreign Affairs 309
   Daniel Thym

10 Legal Instruments and Judicial Protection 345
    Jürgen Bast

11 Multilevel Constitutional Jurisdiction 399
    Franz C Mayer
### Short Contents

#### Part III: The Legal Position of the Individual

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>12</td>
<td>Union Citizenship</td>
<td>443</td>
</tr>
<tr>
<td></td>
<td><em>Stefan Kadelbach</em></td>
<td></td>
</tr>
<tr>
<td>13</td>
<td>Fundamental Rights</td>
<td>479</td>
</tr>
<tr>
<td></td>
<td><em>Jürgen Kübling</em></td>
<td></td>
</tr>
<tr>
<td>14</td>
<td>Fundamental Freedoms</td>
<td>515</td>
</tr>
<tr>
<td></td>
<td><em>Thorsten Kingreen</em></td>
<td></td>
</tr>
<tr>
<td>15</td>
<td>The Area of Freedom, Security and Justice</td>
<td>551</td>
</tr>
<tr>
<td></td>
<td><em>Jörg Monar</em></td>
<td></td>
</tr>
</tbody>
</table>

#### Part IV: The Constitution of the Social Order

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>16</td>
<td>The Economic Constitution within the Internal Market</td>
<td>589</td>
</tr>
<tr>
<td></td>
<td><em>Armin Hatje</em></td>
<td></td>
</tr>
<tr>
<td>17</td>
<td>The Labour Constitution</td>
<td>623</td>
</tr>
<tr>
<td></td>
<td><em>Florian Rödl</em></td>
<td></td>
</tr>
<tr>
<td>18</td>
<td>Competition Law as Part of the European Constitution</td>
<td>659</td>
</tr>
<tr>
<td></td>
<td><em>Josef Drexl</em></td>
<td></td>
</tr>
</tbody>
</table>

#### Part V: Contending Visions of European Integration

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>19</td>
<td>The European Union as a Federal Association of States and Citizens</td>
<td>701</td>
</tr>
<tr>
<td></td>
<td><em>Ulrich Everling</em></td>
<td></td>
</tr>
<tr>
<td>20</td>
<td>The European Union of States</td>
<td>735</td>
</tr>
<tr>
<td></td>
<td><em>Paul Kirchhof</em></td>
<td></td>
</tr>
<tr>
<td>21</td>
<td>The Advantages of the European Constitution</td>
<td>763</td>
</tr>
<tr>
<td></td>
<td><em>Manfred Zaleeg</em></td>
<td></td>
</tr>
</tbody>
</table>

Index                                                                 | 787  |
Contents

Preface v
List of Contributors xxix
Table of Cases xxxi

The Constitutional Approach to EU Law—From Taming Intergovernmental Relationships to Framing Political Processes 1
Armin von Bogdandy and Jürgen Bast

I. The Idea of the Volume 1
II. The Structure of the Volume 3
III. Reaction to Critique 5

Part I: Defining the Field of European Constitutional Law 9

1 Founding Principles 11
Armin von Bogdandy

I. Aims, Theses and Premises 11
II. Theoretical Issues Regarding the Union’s Founding Principles 13
1. Founding Principles and Constitutional Scholarship 13
2. Three Functions of a Legal Doctrine of Principles 14
   a) Doctrinal Constructivism 14
   b) The Role of Legal Doctrine for Legal Practice 17
   c) Maintenance and Development of a ‘Legal Infrastructure’ 17
3. Perspectives of Legal and Integration Policy 18

III. General Issues of a European Doctrine of Principles 20
1. The Subject Matter 20
   a) Principles in European Law 20
   b) The Union’s Founding Principles and Their Constitutional Character 21
   c) Principles of Public International Law 23
2. On the Role of Constitutional Principles of the Member States 24
3. Uniform Founding Principles in View of Heterogeneous Primary Law 26

IV. On the Relationship between the Union and its Member States 28
1. The Creation of Unity under the Rule of Law Principle 28
   a) Rule of Law and Supranational Law 28
   b) The Effectiveness Principle 29
   c) The Principle of Comprehensive Legal Protection 32
2. Principles of the Political Process 33
   a) The Rule of Law and the Legality Principle 33
   b) Principles of the Order of Competences 35
   c) The Principle of the Free Pursuit of Interests 37
3. Principles of the Composite (Verbund) of Union and Member States 38
   a) The Composite (Verbund) as a New Perspective 38

ix
b) A Principle of Structural Compatibility or a Principle of Homogeneity? 40

c) The Principle of Loyalty and the Federal Balance 41

V. On the Relationship between the Individual and the Union 42

1. The Principle of Equal Liberty 43

2. The Principle of Protection of Fundamental Rights 45

3. The Rule of Law Principle 47

4. The Principle of Democracy 47

a) Development and Basic Features 47

b) The Principle of Democracy and the Institutional Structure 50

c) Transparency, Participation, Deliberation and Flexibility 51

d) Supranational Democracy: An Evaluation 52

5. The Solidarity Principle 53

VI. Concluding Remarks 54

2 Federalism and Democracy 55

Stefan Oeter

I. Introduction: ‘Understanding the European Union as a Federal Polity’ 55

II. The Different Federalism Discourses—An Outline 57

III. The European Union as a Mixed System of a Federative Character 59

IV. The Benefit of Federal Analogies—Or the Central State as a ‘Leitmotiv’ of Political Theory 62

1. The Question of Sovereignty 63

2. ‘Divided Sovereignty’ and the Principle of People’s Sovereignty 64

3. People’s Sovereignty and the ‘Constitution’ of the European Union 65

V. The Role of the Principle of Democracy in a Federal Commonwealth 68

VI. The Construction of Democratic Responsibility—Experiences of Federal Systems 72

VII. Conclusions: The Federal ‘Union’ as a Promising Construction 78

3 National Constitutional Law Relating to the European Union 83

Christoph Grabenwarter

I. Introduction 83

II. The Relationship between Union Law and National Constitutional Law 84

1. Full Primacy of Community Law 85

2. Limited Primacy of Community Law over Constitutional Law 85

3. Primacy of the Constitution 90

4. The Situation in the Legal Systems of New Member States 91

5. Similarities and Differences in Justifications 93

6. The Legal Situation According to the Lisbon Treaty 95

III. Contents of National Constitutional Law Relating to the European Union 95

1. Sovereignty and Transfer of Sovereign Rights 95

2. Structural Safeguard Clauses 100

3. Federal and Decentralised Entities 102

4. The Position of National Parliaments 108

5. Fundamental Rights 116
a) Expanding the Scope of National Guarantees of Fundamental Rights Demanded by Community Law: The Example of the Right to Vote in Municipal Elections 116
b) Increasing the Protection of Fundamental Rights within the Scope of Community Law: The Example of Equal Treatment of Men and Women 118
c) Reinforcing and Changing the Effect of the European Convention on Human Rights in the National Area 120
d) Community Law Indirectly Affecting the Scope of National Guarantees of Fundamental Rights 120
e) Matching National Fundamental Rights with Increased Standards at European Level 122

IV. Conclusions: The Relationship between National Constitutional Law and Union Law 123
1. Bodies Acting under the Constitutional Order 123
2. Interdependencies between the Constitutional Orders of Member States 125
3. Typology According to Substantive Orientation: Adaptations that are Receptive and Defensive towards Integration 126
4. Development towards a Reciprocal Linking of Constitutions 127

4 The Constitutional Role of International Law 131
Robert Uerpmann-Wittzack

I. A Constitutional Question: The Exposure of a Legal Order to International Law 131
II. Giving International Constitutional Law Direct Effect within EC Law 135
1. Automatic Implementation of International Custom 135
2. Accession to International Supplementary Constitutions 137
   a) WTO 137
      aa) Article 300(7) EC as a Starting Point 138
      bb) The Theory of Direct Effect 139
      cc) Delimiting Different Jurisdictions 141
      dd) The Principle of Reciprocity 141
      ee) The Scope for Negotiation 142
      ff) Unilateral Council Action 144
      gg) Internal Effect without Direct Effect 145
      hh) The ECJ between Monism and Dualism 147
   b) ECHR 147
3. Legal Succession by Virtue of Functional Succession and Other Forms of Indirect Obligation 149
   a) GATT 1947 149
   b) ECHR 150
      aa) Legal Succession in a Narrower Sense 150
      bb) Direct Responsibility of EC Member States 151
      cc) The Member States’ Responsibility to Guarantee the Observance of Human Rights by the European Community 152

III. Transforming International Constitutional Law into Union Law 153
1. Incorporation by Primary Law 153
   a) Legal Succession under Union Law 154
b) Explicit Incorporation in Primary Law—Particularly Article 6(2) EU

c) General Principles of Law 156

2. Incorporation by Secondary Law—The Implementation of UN Sanctions 157

IV. Assessment and Perspectives 159

1. Reasons for Different Ways of Implementation 159
   a) Ensuring Sovereignty 159
   b) European Integration through Human Rights 161
      aa) Increasing Reference to the ECHR and the Strasbourg Court 161
      bb) Intensified Review of the Member States’ Action 162
      cc) Attempting an Explanation 163
   c) A Special Problem: UN Sanctions 163

2. The Lisbon Treaty 165

5 Pouvoir Constituant—Constitution—Constitutionalisation 169

Christoph Möllers

I. Constitutional Rhetoric: Levels of Meaning 169

II. Theoretical Prerequisites: Two Types of Constitutions 170

1. Founding of a New Order: Constitution as Politicisation of Law 171
   a) Foundation of a New Political Order 171
   b) Normativity, Supremacy and Written Form of the Constitution 172
   c) Result 173

2. Shaping of the Powers: Constitution as Juridification of Politics 173
   a) Limiting Powers by Legalisation of Government 174
   b) Restricted Normativity of the Constitution 175
   c) In Particular: Constitutional Treaties 176
   d) Result 176

3. The Traditions Correlated: Constitution as Coupling of Politics and Law 177

III. Basic Positions in the Constitutional Discussion—A Critical Inventory 178

1. Assignment of the Constitution to the Nation-State 178

2. Constitutional Elements—Constitutional Functions 180

3. Heteronomy, Autonomy or Fragmentation of EU Law 182

4. Limited Relevance of the Discussion Fronts 184

IV. Three Concepts of the Constitution in Europe 184

1. Pouvoir Constituant—the Criterion for Equal Freedom 185

2. Constitution: The European Treaties as a Formal Constitution for the Union 189
   a) The Treaties in Written Form 190
   b) Supremacy of the Treaties 192
      aa) Constitution as a Legal Argument—the ECJ and Hierarchies within the Treaties 192
      bb) Supremacy of Treaty Law 193
   c) The Treaties as a Formal Constitution: Supranational Over-juridification and Intergovernmental Politicisation 194

3. Constitutionalisation 195
   a) Common European Constitutional Law—Establishing Principles 196
   b) Charter of Fundamental Rights 197
   c) Administrative Constitutionalisation and Governance 197
d) The Legitimacy of Evolutionary Constitutionalisation
V. European Constitutional Law—A Legal Field and its Academia
VI. Epilogue: From Constitution to Reform
   1. Constitutional Deliberation: Convention and Intergovernmentalism
   2. Constitutional Moments: The Political Remaining Outside
   3. Constitutional Honesty: The Limits of Constitutional Nominalism

On Finality

Ulrich Haltern
I. Entangled Discourses on Finality
II. Post-politics and Law: The State of the Union
   1. A Cultural Study of Law
   2. The Union’s Birth from Reason
   3. Europe as Style, Expertise and Project
   4. Europe as Imagined Community
   5. Europe’s Iconography
   6. A Cultural-legal Study of the Union’s Problem
III. The Middle Ground: Politics Gone Awry
   1. Europe and Consumer Aesthetics
   2. The EU Charter of Fundamental Rights as Consumer Aesthetics
   3. The Problem with Consumer Aesthetics
IV. Post Post-politics: The Court Steps In
   1. Cautious Beginnings: Konstantinidis
      a) Advocate General Jacobs
      b) The Court
      c) Conclusion and Critique
   2. The Way Forward?—Evolving Union Citizenship
V. Politics and Post-politics
   1. The Murmuring Nation
   2. Europe’s Legal Imagination of the Political
   3. Finality: Eros? Civilisation?

Part II: Institutional Issues

Philipp Dann
I. Introduction and Purpose
II. Past Research and Recurrent Questions
   1. Addressing Council and Commission through Principles and Procedures
   2. European Parliament: The Pet Object
   3. Changing Tides: Research on Institutions since the 1990s
III. Conceptual Framework: The Structure of Executive Federalism
IV. The Institutional Framework
   1. Council
      a) Form Follows Function: Members, Organisation and Competences
      b) Mode of Decision-taking: Majority-voting and the Resilience of Consensus
2. European Parliament 250
   a) Co-Elector: Appointment Power and Negative Competence 251
   b) Oversight Function: Control via Organisation 254
   c) Co-Legislator: Law-making by Co-operation and Consensus-building 255
3. European Commission 257
   a) The Problem of Leadership 257
   b) Organisational Structure: The Outlook of a Consensual Government 258
   c) Functions: Agenda-setter, Mediator and Guardian 259
      aa) Agenda Setting 259
      bb) Mediating Interests 259
      cc) Federal Guardian 260
   d) Conclusion and an Unresolved Problem of Leadership 260
4. European Council 261
   a) Composition and Form: The Ideal of the ‘Fireside Chat’ 261
   b) Functions 263
      aa) Steering Committee 263
      bb) Final Arbiter and Co-ordinator 263
      cc) Treaty Negotiator and Constitutional Motor 264
   c) Conclusions 265
      aa) An Institution from the Playbook of Executive Federalism 265
      bb) European Council and European Commission as Twofold Government 266
   d) A Threefold Government? The Lisbon Treaty and the New High Representative for Foreign Affairs and Security Policy 266
V. Legitimacy of the Institutional System 267
1. The Dilemma of the National Parliaments 267
2. The EP and its Representational Limits 269
VI. Summary and Prospects 272

8 The Federal Order of Competences 275
   Armin von Bogdandy and Jürgen Bast
I. Introduction 275
II. The Current Order of Competences 278
   1. Terminological and Theoretical Foundations 278
      a) The Competence Requirement as an Evolutionary Achievement 278
      b) On the Scope of the Principle of Attributed Powers 280
      c) Empowering Provisions and Substantive Standards of Legality 283
      d) Horizontal and Vertical Competences 284
      e) Union and Member State Competences 285
      f) Rules Regarding the Exercise of Powers 287
   2. Types of Federal Competences 287
      a) Exclusive Powers 289
      b) Concurrent Powers 290
      c) Parallel Powers 294
      d) Non-regulatory Powers 295
I. Introduction
II. Constitutional Foundations
   1. Particularity of Foreign Affairs
   2. Transformation of the International Context
III. Supranational External Relations
   1. Reach of Community Competences
      a) Expansive Phase
      b) Constitutional Consolidation
   2. The Court of Justice and International Law
      a) Judicial Control
      b) Political Questions?
      c) Substantive Orientation
   4. Substantive Constraints of Foreign Affairs
      a) Judicial Control
      b) Political Questions?
      c) Substantive Orientation
IV. Intergovernmental Foreign Policy
   1. Intergovernmental Decision-Making
   2. Executive Authority in Military Matters
   3. Characteristics of Intergovernmental Union Law
V. Coherence and Complementarity
   1. Vertical Co-operation: European Union & Member States
   2. Horizontal Co-operation: European Union & European Community
   3. Unity of External Representation: Reform Perspectives
VI. Conclusion
Contents

10 Legal Instruments and Judicial Protection

Jürgen Bast

I. Exercise of Public Authority and its Judicial Control as Complementary Constitutional Issues

II. Sketching the Discipline’s Development: Interplaying Discourses on Legal Instruments and Judicial Protection

1. The ECSC as an Administrative Union: Supranational Decisions and Direct Actions of the Enterprises Concerned

2. The EEC as a Legislative Union: Regulations and Indirect Judicial Protection
   a) The Regulation as the Standard Legal Instrument
   b) Preliminary References as a Means of Legal Protection

3. Legislation and Administration in a Composite Polity: Directives and Protection of Rights Derived from Community Law
   a) Discovery of the Directive as an Instrument of Legislation
   b) The Protection Mandate of National Courts

4. The EU of the Reform Decade: Proliferation of Instruments and Discovery of Old and New Deficits in Protection
   a) Framework Decisions and the Deficits in Legal Protection Connected to the Pillar Structure
   b) Simplification or Systematisation? Options for Reform of the Legal Instruments
      aa) The Calls for Hierarchy and Simplification
      bb) The Contribution of Legal Scholarship to the Reform of Legal Instruments
   c) System Change or Fine-tuning the System? Options for the Reform of Judicial Protection

III. Doctrinal Analysis I: The Long Road to Formal Neutrality of Legal Protection

1. The Concept of Reviewable Acts According to Article 230(1) EC: The General Clause of Judicial Control

2. The Concept of Contestable Decisions According to Article 230(4) EC: The General Clause of Direct Legal Protection
   a) Challenging Decisions Addressed to Individuals
   b) Challenging Decisions Taken ‘In the Form of a Regulation’

IV. Doctrinal Analysis II: Structural Choices Regarding the Order of Legal Instruments

1. Structural Choice in Favour of an Open System of Legal Instruments
   a) The Structure of Article 249 EC
   b) No Exhaustive Enumeration of Legal Instruments
   c) Limits of the System’s Flexibility

2. The Structural Choice in Favour of a Non-hierarchical Unity of Secondary Law
   a) Equality of Law-making Institutions
   b) Equality of Law-making Procedures
   c) Equality of Binding Instruments
   d) Equality of Treaty-based and Delegated Acts
   e) Is the Lack of Hierarchy an Anomaly of the System?

3. Structural Choice for a Differentiation of Legal Instruments According to Legal Effects
a) The Regime of Validity: Form-specific Requirements Concerning
   Legality and Effectuality 383
   aa) Requirements for Taking Effect in Law 383
   bb) Legality Requirements 384
b) Operating Mode as the Key to the System of Instruments 386

V. Legal Instruments and Judicial Protection after the Lisbon Treaty 388
   1. Restructuring the Legal Instruments: Inventing the European ‘Domain of Laws’ 388
      a) Simplification 388
      b) Hierarchisation 389
         aa) A Comparative Approach to the European Concept of Legislation 390
         bb) Reinforcing Public Scrutiny as the Defining Feature of the Concept of ‘Legislation’ 392
   2. Innovations for the Legal Protection of Individuals 394
      a) Extending the Constitutional Standard Case: The Dismantling of the Third Pillar 394
      b) Modifying the Constitutional Standard Case: The Modest Reform of the Action for Annulment 395

11 Multilevel Constitutional Jurisdiction 399
   Franz C Mayer
I. Taking Stock: The ECJ and the Highest National Courts—Conflict or Co-operation? 400
   1. Adopting a Procedural Perspective: The Duty to Make Preliminary References under Article 234(3) EC (Article 267(3) TFEU) 401
      a) Supreme National Courts and the Duty to Make References from the Perspective of European Law 402
      b) The Preliminary Reference Practice of Supreme National Courts 403
   2. The Courts’ Relationship from the Perspective of Substantive Law 407
      a) The Perspective of the ECJ 407
      b) The Perspective of the Highest National Courts 410
         aa) The German BVerfG 410
               (2) Powers and Competences: The German Maastricht Decision (1993) 412
               (3) The Consistency of the BVerfG’s Case law: Controlling the Bridge 415
         bb) Other High Courts of the EU 15 415
         cc) The Highest Courts of the Youngest Members of the EU 27 and Prospective Member States 418
   3. Interim Summary 420
II. Adopting an Analytical and a Theoretical Perspective 421
   1. Dealing with the Question of Ultimate Jurisdiction 421
   2. Adopting a Theoretical Perspective 425
      a) Existing Approaches 425
      b) Embedding the Problem into a Modern Concept of Constitutionalism 426
   (1) Constitutions and the Concept of Verfassungsverbund 427
   (2) Multilevel Systems 429
bb) The Role of Courts in a Multilevel System 430
c) Objections to Composite and Multilevel European Constitutional Adjudication 431
   aa) Asymmetry 431
   bb) The Evaporation of Responsibilities—Who is to Define the Common Good? 434
   cc) Is There any Added Value in Theories of Composite Structures of Adjudication? 434

3. Interim Summary 434

III. Recent Developments in the Relationship between European and National Courts 435
   1. The Courts and the Core Topics of the Constitutional Reform Process 435
   2. Open Questions 436

IV. Summary and Conclusion 438

Part III: The Legal Position of the Individual 441

12 Union Citizenship 443
   Stefan Kadelbach 443
   I. Introduction 443
   II. The Notion of Union Citizenship 445
      1. History 445
      2. The Legal Concept of European Citizenship 449
         a) Nationality 449
         b) Citizenship 449
         c) Union Citizenship 450
            aa) Nationality as a Condition for Union Citizenship 450
            bb) Union Citizenship as a Complement to State Citizenship 451
   III. Elements of Union Citizenship in Positive Law 452
      1. Individual Rights Based on EC Law 452
         a) Fundamental Freedoms 452
         b) Secondary Law: Union Citizens as Taxpayers, Welfare Recipients and Consumers 453
      2. Rights of Union Citizens 454
         a) Freedom of Movement 454
         b) Political Rights 455
            aa) The Right to Vote and to be Elected at the Local Level 455
            bb) Rights to Vote and to Stand for Elections to the European Parliament 456
         c) Petition, Information, Access to Documents 457
         d) Protection by Diplomatic and Consular Authorities 459
      3. Rights of Union Citizens and Prohibition of Discrimination 461
         a) The Link between Union Citizenship and the General Prohibition of Discrimination 461
         b) Derivative Social Rights 462
c) Derivative Cultural Rights
463

4. The Relationship between Union Citizenship and Fundamental Rights
464

5. Duties of Union Citizens?
466

6. Interim Evaluation
467

IV. Union Citizenship in the Lisbon Treaty
468

V. The Future of Union Citizenship
469

1. Union Citizens in the European Multi-level System
469
   a) Citizen Status and Identity
      aa) The Multinational Tradition
      bb) Universalist Visions
   b) Identities of Citizenship in Multi-level Systems
   c) The Complementary Relationship between Citizen Status and Political Participation
473

2. Union Citizenship and Democracy in Europe
475

3. Union Citizenship and European Constitution-making
477

VI. Concluding Remarks
477

13 Fundamental Rights
479
Jürgen Kühling

I. Introduction
479

II. Phases of Development of Fundamental Rights Protection
482

1. The Development of Fundamental Rights Protection by the ECJ
483

2. The Fundamental Rights Debate in the Era of the Charter of Fundamental Rights of the European Union
484
   a) Time for a Radical Re-orientation of the Development of Fundamental Rights?
   b) Catalyst Effect, but not Legally Binding
   c) Charter of Fundamental Rights and ‘Exit Protocol’—Cracks in the Community of Values?
488

III. Core Elements of a Legal Doctrine of Fundamental Rights
489

1. Functions and Necessary Development of the Legal Doctrine of Fundamental Rights
489

   a) Functions of the Legal Doctrine of Fundamental Rights against the Background of Diverging Fundamental Rights Cultures
489
   b) The Necessity of Further Development of the Present Legal Doctrine of Fundamental Rights of the ECJ
491

2. Functions and Classification of Fundamental Rights
492

   a) Possible Classifications
492

   b) Subjective (Negative) Rights and Positive Obligations
492

      aa) The Difference between Subjective (Negative) Rights and Positive Obligations
492

      bb) Duty to Protect as Central Positive Obligation
493

      cc) Derived Participatory Rights Corresponding with the Positive Obligation to Give Access to Collective Benefits
494

      dd) Original Rights to Performance Corresponding with Positive Obligations to Provide Benefits
495
3. Who is Bound by Fundamental Rights? The Reach of Fundamental Rights
   a) The Binding Effect on the Institutions of the EC and the EU
   b) The Binding Effect on the Member States as a Determinant of the
      Vertical Scope of the Fundamental Rights of the Union
      aa) The Position of the ECJ—Fundamental Rights within the Scope of
          Application of Community law
      bb) The Future Consolidation of the ECJ's Point of View
      cc) Increase of the Case Categories (Situations)?

4. Who May Assert Fundamental Rights?

5. The Structure of Examination of Fundamental Rights
   a) Overview of the System of Examination
   b) The Area Protected by Fundamental Rights and Interference Therein
   c) Justification of an Interference with Fundamental Rights
      aa) Interference Must be Founded on a Legal Basis
      bb) Legitimate Objective
      cc) The Principle of Proportionality
         (1) Suitability
         (2) Necessity
         (3) Proportionality in the Narrow Sense
         (4) Degree of Control and Margin of Appreciation
      dd) The Guarantee of the Essence of Rights (Wesensgehaltsgarantie)
   d) Particularities of the Examination of the Equality Principle and Positive
      Obligations

IV. Outlook: An Institutional and Substantive Working Programme

14 Fundamental Freedoms
Thorsten Kingreen

I. The Fundamental Freedoms in the Jurisprudential Discourse

II. The Fundamental Freedoms in the Processes of Europeanisation and
    Constitutionalisation
   1. The Political Institutional Context I: The Horizontal Relationship between
      the ECJ and the European Legislator
      a) The Fundamental Freedoms during the EC Crisis
      b) The Fundamental Freedoms after the Single European Act
      c) The Fundamental Freedoms in the Era of Constitutionalisation
   2. The Political Institutional Context II: The Vertical Relation between the ECJ
      and the Legislators of the Member States
      a) Fundamental Freedoms as Multi-level Norms
      b) The Fundamental Freedoms in the Constitutional Federation of the
         European Member States
   3. Transnational Integration or Supranational Legitimation?

III. Methodological Implementation of the Context Analysis
   1. The Theoretical Structure and Scope of the Fundamental Freedoms
      a) The Fundamental Freedoms as Prohibition of Discrimination
         aa) Review of an Understanding of the Fundamental Freedoms as
             Rights of Freedom
bb) A New Attack on the Keck Formula: The Opinion of AG Maduro in *Alfa Vita Vassilopoulos* 534
   b) Consequences on the Test of the Justification of the Interference 538
2. The Reservation of Statutory Powers 542
3. The Union as Addressee of the Fundamental Freedoms? 543
4. The Fundamental Rights as Part of the Test of Proportionality of Means and Ends 543
IV. The Horizontal Effect of the Fundamental Freedoms 545
   1. Direct Horizontal Effect? 545
   2. The Alternative: The Right to Protection 547
V. Conclusion 549

15 The Area of Freedom, Security and Justice 551
   Jörg Monar
   I. Introduction 552
      1. Relevance of the Subject 552
      2. Scope of the Subject 553
      3. Methodology 554
   II. The Fundamental Treaty Objective and its Conceptual Dimension 554
      1. The AFSJ as a Fundamental Treaty Objective 554
      2. The Concept of Area 556
      3. The Concept of Freedom 558
      4. The Concept of Security 559
      5. The Concept of Justice 560
   III. The AFSJ in the Treaty Architecture 562
      1. The Pillar Divide 562
      2. Implications of the Pillar Divide 564
      3. A Contested Divide 565
      4. The Abolition of the Pillar Structure by the Treaty of Lisbon 567
   IV. Differentiated Participation as a Constitutional Component of the AFSJ 569
      1. Differentiation as a Constitutional Issue 569
      2. The Opt-outs 569
      3. The Opt-in Possibilities 570
      4. The ‘Enhanced Cooperation’ Possibilities 571
      5. The position of the Schengen ‘Associates’ 572
   V. An Area of Cooperation rather than Integration 573
      1. The Cooperative Orientation of the Current Treaty Framework 573
      2. The Commission and the Court as (Limited) Factors of Integration 575
      3. The Reaffirmation of the Cooperation Rationale by the Treaty of Lisbon 578
   VI. The Place of the Individual in an Area of Cooperating Member States 578
      1. The Individual as a Passive Beneficiary of the AFSJ 578
      2. Two Missed Opportunities: The Charter of Fundamental Rights and Union Citizenship 579
      3. The Protection of the Rights of the Individual 580
   VII. Conclusions 584
Part IV: The Constitution of the Social Order 587

16 The Economic Constitution within the Internal Market 589

Armin Hatje

I. Economic Constitution and European Integration 589

1. Relevance of the Subject 589

2. Terminology and Functions of the Economic Constitution 590

   a) Approach 590
   b) Definitions 591
   c) Delimitations 592

3. The European Economic Constitution 592

   a) Expansion of the Debate to a Superior Reference System 592
   b) The Composite Character of the European Economic Constitution 593
   c) Functional Characteristics of the European Economic Constitution 593

4. Scope for Economic Policy Formation 594

II. A Systemic Choice and its Legal Guarantees 594

1. The Choice in Favour of an Open Market Economy and Free Competition 594

   a) Legal Quality 595
   b) Contents 595

2. Guarantees of a Market Economy 596

   a) Private Autonomy as Fundamental Requirement for a Market Economic System 596

      aa) The Economic Participant as Legal Person 596
      bb) Individual and Entrepreneurial Freedom of Action 597
      cc) Equal Rights for Market Participants 597

   b) Co-ordination through Trade on the Open Markets 597

      aa) Assured Availability of Products and Services 598
          (1) Private Property 598
          (2) Stable Currency 598
      bb) Reduction of Market Barriers through Fundamental Freedoms 599
          cc) Freedom of Communication 600
          dd) Limited External Access 600

   c) Competition as an Instrument of Co-ordination 601

      aa) Legal Framework 601
      bb) Areas Excluded from Competition 602
      cc) Competition and Market Malfunction 603


   a) Goals of Community Activities 603
   b) Instruments 603
   c) Consequences for a Theory of a European Economic Constitution 604

III. Formative Scope of the Community in Economic Policy 604

1. Instruments of Economic Policies 604

2. Areas of Community Economic Policies 605

   a) Regulatory Policy (Ordnungspolitik) 605
      aa) Opening the Market by Approximation 605
      bb) Liberalising Regulated Markets 606
   b) Procedural Policy 606
aa) Financial Policy 606  
bb) Structural Assistance Measures 607  
cc) Employment Policy 607  
dd) Environmental Policy 608  
c) Distribution and Social Policies 609  
   aa) Distribution Policy Goals of the Community 609  
   bb) Supplementary Social Policy 610  
      (1) Co-ordination of the Systems Providing Social Services 610  
      (2) Supplementation of National Activities 610  
   cc) Starting Points for European Employment and Social Order 610  
d) Freedom of Choice in the Framework of Comprehensive Clauses 611  
3. Formative Boundaries 611  
a) Increased Effectiveness of Market Integrative Instruments 611  
   aa) Levels of Autonomy 611  
   bb) Procedural Safeguards 612  
b) Substantive Safeguards 612  
   aa) Principle of Subsidiarity 612  
   bb) Reservation Clauses 612  
      (1) Provisions Supporting the Establishment and Functioning of  
         the Internal Market 612  
      (2) Provisions Ensuring Undistorted Competition 613  
   cc) Effectiveness 613  
c) Burden of Justification 614  
   aa) Subjective Rights and the Necessity of Justification 614  
   bb) Proportionality or a Minimum of Intervention Rule 614  
4. The Monetary Union in the Economic Constitution 615  
IV. The Discretionary Power of the Member States in the Field of Economic Policy 615  
1. National Constitutional Law 615  
a) Systemic Choices 615  
b) Guarantees of a Market Economy 616  
c) Interventionist Tendencies 616  
2. Market Relevant Discretionary Powers 616  
a) Regulatory Policy Regulations 617  
   aa) National Systems of Property Ownership 617  
   bb) Guarantees in Favour of Services of General Economic Interest 617  
   b) Scope for Procedural Policy Formulation 618  
   c) Scope for Distribution Policy 618  
   d) The Problem of System Competition 619  
3. Limits of Discretionary Powers 619  
a) Market Economic Orientation 619  
b) Quantitative Limitation of Financial Intervention Potential 620  
c) Proportionality as a Limit to Intervention 620  
   aa) Legitimisation Based upon European Standards 620  
   bb) Aptitude and Necessity as Precept of Minimum Intervention 620  
V. Perspectives 622
The Labour Constitution

I. Introduction
   1. European Constitution and Social Order
   2. The Concept of a Labour Constitution

II. The EEC Labour Constitution and the Social Compromise for Integration
   1. The Basic Norms of the EEC Labour Constitution
   2. The Foundation and Function of the EEC Labour Constitution
      a) The Promise of Neoclassical Economics
      b) The Social Compromise for Integration
   3. The Form of the European Labour Constitution and Social Change

III. The Current State of the EU Labour Constitution
   1. A Survey of the Relevant Norms
      a) Rights
      b) Guiding Norms
      c) Competences
   2. The Core Problem of Missing Congruence

IV. The Form of the European Labour Constitution
   1. An Integrated European Labour Constitution ‘in the Making’?
      a) Milestones in the Development of the EU Labour Constitution
         dd) Innovations in the Treaty of Lisbon
      b) A Historically and Politico-economically Hardened Asymmetry
   2. A Post-regulatory Labour Constitution for the EU?
   3. The EU Labour Constitution in an Association of Labour Constitutions
      a) Protection of Member State Labour Constitution Autonomy
         aa) Horizontal Protection: Conflict of Labour Laws and Fundamental Freedoms
         bb) Vertical Protection: European Competition Law and Internal Market Law
      b) Competences for a Market-functional Substantive Labour Law
         aa) Anti-discrimination Law
         bb) The Harmonisation of Markets for Machinery, Production Material and Facility Sites
         dd) The Labour Law Annex to European Company Law
      c) Transnationalisation of Labour-constitutional Rights
         aa) Transnational Freedom of Exercise of Profession
18 Competition Law as Part of the European Constitution

Josef Drexl

I. Introduction: Between the Lisbon Treaty and the Economic Approach 659

II. The Effects of the Lisbon Treaty on Competition Law 661

1. Protecting Undistorted Competition in the Internal Market—Still an Objective of Union Law? 662
   a) Analysis of the Lisbon Treaty’s New Provisions 662
   b) The Guarantee of Undistorted Competition as a Limitation to the Possibility to Outbalance the Competition Goal by Reference to Conflicting Goals 664
   c) Harming the ‘Structure of Competition’ as an Abuse of Market Dominance 665

2. Repositioning the Guarantee of the ‘Open Market Economy with Free Competition’ in the Lisbon Treaty 667

III. The Economic Approach to Competition Law as a Response to an Application Problem 669

1. Historic Development and Characterisation of the More Economic Approach 669
   a) The Block Exemption Regulation on Vertical Agreements of 1999: The New ‘Effects-Based’ Approach 669
   b) Direct Application of Article 81(3) EC 671
   c) Reform of Merger Control Law 672
   d) Reform of the Application of Article 82 EC 673
   e) Reforming Competition Law Enforcement and Strengthening Private Enforcement 676
   f) Conclusion 679

2. Lack of Legal Certainty 679

3. Making Predictions on Future Effects 681

4. The Excessive Claim of Knowledge 682

5. The Disregard of the Institutional Dimension 684

6. Plea for an ‘Even More Economic Approach’ 684

IV. The Objectives of Competition Law from an Economic Perspective 685

1. Consumer Welfare as an Objective of European competition law 685
   a) The Recognition of Consumer Welfare as an Objective by Community Institutions 685
   b) The Objective of Consumer Welfare in European Competition Policy 685
   c) Consumer Welfare as an Objective from the Perspective of the European Constitutional Order 686

2. The Consumer Surplus Standard in European Competition Law 687
   a) The Economic View 687
   b) The Legal Situation under European competition law 688
   c) The Consumer Surplus Approach and the Efficiency Defence from the Perspective of the European Constitutional Order 689
Contents

3. Consumer Harm as a Requirement for a Restraint of Competition 690
   a) The Economic View 690
   b) Practice of European Competition Policy 691
   c) The Consumer Harm Requirement from the Perspective of the European Constitutional Order 692
4. Conclusion 693

V. The Economic Approach in the Light of Constitutional Objectives 694
   1. The Freedom Paradigm 694
      a) The Economic Freedom of Action of Individual Market Participants 694
      b) Protecting the Freedom of Competition 695
   2. Economic Integration 696

VI. Conclusion 697

Part V: Contending Visions of European Integration 699

19 The European Union as a Federal Association of States and Citizens 701
   Ulrich Everling
   I. Introduction 701
   II. Foundations of the European Union 703
      1. Goals of the Union 703
         a) Establishment of the Union 703
         b) Development of the Original Goals 704
      2. The European Union as a Political Union 705
         a) The Political Core of the Economic Integration 705
         b) Connection to the Politics of the Member States 706
      3. The European Union as an Economic Union 708
         a) Opening of the National Markets 708
         b) Competition Policy and Other Economic Policies 710
   III. The Institutions in the System of the European Union 711
      1. Peculiarities of the Institutional System 711
         a) Pluralism of the Political Parties 711
         b) Participation of the Administrations in the Decision-making Process 712
      2. The Union’s Decision-making Process 713
         a) Majority Decisions 713
         b) Delegation of Implementing Measures 715
      3. Competences and Legitimation of Law-making in the Union 716
         a) Distribution of Competences 716
         b) Legitimacy of Law-making 718
   IV. The Constitutional and Legal Order of the European Union 720
      1. The Constitutional Structure of the Union 720
         a) Discussion on the Constitution of the Union 720
         b) Organisational Structure of the Union 721
      2. The Union as a Community of Law 722
         a) Principles of the Rule of Law 722
         b) General Principles of Law 724
      3. System of Judicial Protection 725
         a) The European Judiciary 725
V. The Legal Nature and Future of the European Union

1. The Position of the Member States in the Union
   a) The Identity of the Member States
   b) Restrictions Imposed on the Member States

2. Grouping the Views on the Union’s Legal Nature
   a) An Attempt at Interpretation
   b) Summing up the Different Views in the Federal Principle

3. Conclusions and Outlook

II. The Relationship between Constitutional Law and European Law

1. The Constitutional Requirements for the Application of European Law
2. The European Union as a Union of States
3. The Europeanisation of Constitutional Law
4. A Multi-level Model?

III. The State

1. Statehood and Openness to Europe
2. The People Encountered in Liberty
3. Sovereignty
4. New Challenges for the State

IV. The State in a Union

1. Development of a Common Constitutional Law in the Aftermath of the Maastricht Treaty
2. Supranationality
3. The Vitality of the State Declared Dead
4. The Mandate of Co-operation
5. Modern Forms of Balance of Powers
   a) The Legal Sources
   b) The Liberty-ensuring Balance of Powers
   c) Correctness of and Responsibility for Decisions
   d) Organisations for the Future and the Present
      aa) The Future-oriented European Power
      bb) The Present-oriented Power of the Member States
   e) Co-operation between Powers
6. A Europe of States as an Opportunity for Peace and Freedom
I. The European Constitution—A Fact

II. The Advantages in Detail

1. The Advantages of the European Institutions
   a) The European Community as a Community Based on the Rule of Law
   b) The Treaties as the Foundation of the European Constitution
   c) The Organisational Structure
   d) The Legislative Process of the European Union
   e) Legal Acts

2. Tasks and Objectives

3. The Distribution of Powers

4. Constitutional Principles
   a) Democracy
   b) The Rule of Law
   c) Federative Principles
   d) Protection of Fundamental Rights

5. The European Legal Order’s Structural Characteristics

6. The Constitution’s Scope

III. Recent Developments

1. The Need for a Constitution

2. The Manageability of the European Constitution

3. The Lisbon Treaty and the Further Constitutionalisation of the Union
   a) Adjustment to Future Challenges
   b) Form and Content of the Treaties after Lisbon
   c) The Institutional Structure of the Union post-Lisbon
   d) The Strengthening of Democracy and the Rule of Law in the EU
   e) Fundamental Rights
   f) The Distribution of Competences between Member States and Union

4. Differentiated Co-operation Instead of Renunciating Integration

IV. Forecast

Index
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Table of Cases

European Court of Justice (Judgments and Orders)

<table>
<thead>
<tr>
<th>Case Details</th>
<th>Page Numbers</th>
</tr>
</thead>
<tbody>
<tr>
<td>8/55 Fédéchar v High Authority [1956] ECR 245</td>
<td>778</td>
</tr>
<tr>
<td>9/56 Meroni v High Authority [1958] ECR 133</td>
<td>36, 45, 198</td>
</tr>
<tr>
<td>36/59–38/59 and 40/59 Geitling v High Authority [1960] ECR 887</td>
<td>483</td>
</tr>
<tr>
<td>7/61 Commission v Italy [1961] ECR 317</td>
<td>17</td>
</tr>
<tr>
<td>17/61 and 20/61 Klöckner-Werke at al v High Authority [1962] ECR 325</td>
<td>511</td>
</tr>
<tr>
<td>24/62 Germany v Commission [1963] ECR 63</td>
<td>384</td>
</tr>
<tr>
<td>23/63, 24/63 and 52/63 Usines Émile Henricot et al v High Authority [1963] ECR 467</td>
<td>349</td>
</tr>
<tr>
<td>90/63 and 91/63 Commission v Belgium and Luxembourg [1964] ECR 625</td>
<td>35, 279, 369</td>
</tr>
<tr>
<td>111/63 Lemmerz-Werke v High Authority [1965] ECR 677</td>
<td>281, 379</td>
</tr>
<tr>
<td>56/64 and 58/64 Grundig et al v Commission [1966] ECR 299</td>
<td>671</td>
</tr>
<tr>
<td>16/65 Schwarze [1965] ECR 877</td>
<td>352</td>
</tr>
<tr>
<td>56/65 Société Technique Minière [1966] ECR 235</td>
<td>671</td>
</tr>
<tr>
<td>2/67 De Moor [1967] ECR 197</td>
<td>405</td>
</tr>
<tr>
<td>14/67 Welchner [1967] ECR 331</td>
<td>403</td>
</tr>
<tr>
<td>17/67 Neumann [1967] ECR 441</td>
<td>403</td>
</tr>
<tr>
<td>5/68 Sayag [1968] ECR 395</td>
<td>405</td>
</tr>
<tr>
<td>2/69 and 3/69 Brachfeld [1969] ECR 211</td>
<td>779</td>
</tr>
<tr>
<td>15/69 Südmilch [1969] ECR 363</td>
<td>403</td>
</tr>
<tr>
<td>29/69 Stauder [1969] ECR 419</td>
<td>446, 483, 497, 596</td>
</tr>
<tr>
<td>38/69 Commission v Italy [1970] ECR 47</td>
<td>35, 280</td>
</tr>
<tr>
<td>40/69 Bollmann [1970] ECR 69</td>
<td>351</td>
</tr>
<tr>
<td>9/70 Grad [1970] ECR 825</td>
<td>29, 355</td>
</tr>
</tbody>
</table>
Table of Cases

22/70 Commission v Council [1971] ECR 263. . . . 192, 282, 290–1, 309, 317–18, 368–9, 384
25/70 Köster [1970] ECR 1161. .............................. 36, 351, 483
30/70 Scheer [1970] ECR 1197 ............................... 378
34/70 Syndicat national du commerce extérieur des céréales [1970] ECR 1233. .......................... 405
36/70 Getreide-Import [1970] ECR 1107 .......................... 403
78/70 Deutsche Grammophon [1971] ECR 487 .......................... 546
93/71 Leonesio [1972] ECR 287 .............................. 408
21/72–24/72 International Fruit Company [1972] ECR 1219 .......................... 144, 149, 321
39/72 Commission v Italy [1973] ECR 101 .......................... 54, 351
57/72 Westzucker [1973] ECR 321 .............................. 37
34/73 Variola [1974] ECR 981 ............................... 351
36/73 Nederlandse Spoorwegen [1973] ECR 1299 .......................... 405
181/73 Haegeman [1974] ECR 449 .............................. 30, 139, 321
185/73 König [1974] ECR 607 ............................... 351
2/74 Reyners [1974] ECR 631 ............................... 446, 599
8/74 Dassonville [1974] ECR 837 .............................. 520, 535
9/74 Casagrande [1974] ECR 773 .............................. 286
15/74 Centrafarm [1974] ECR 1147 .......................... 405
16/74 Centrafarm [1974] ECR 1183 .......................... 546
32/74 Haaga [1974] ECR 1201 .............................. 403
33/74 van Binsbergen [1974] ECR 1299 .......................... 446, 520, 599
36/74 Walrave [1974] ECR 1405 .............................. 545–6
41/74 van Duyn [1974] ECR 1337 .............................. 322, 355, 446, 599, 779
100/74 CAM v Commission [1975] ECR 1393 .......................... 372
43/75 Defrenne [1976] ECR 455 .............................. 35, 192, 223, 279, 629
59/75 Manghera [1976] ECR 91 .............................. 192, 279
87/75 Bresciani [1976] ECR 129 ............................... 142
113/75 Frescassetti [1976] ECR 983 .......................... 369
119/75 Terrapin [1976] ECR 1039 .......................... 546
13/76 Donà [1976] ECR 1333 .............................. 545–6
15/76 and 16/76 France v Commission [1979] ECR 321 .......................... 384, 775
33/76 Rewe [1976] ECR 1989 ............................... 359
41/76 Donckerwolcke [1976] ECR 1921 .......................... 289
87/76 Hoffmann-La Roche v Commission [1979] ECR 461 .......................... 666
114/76 Bela-Mühle Josef Bergmann [1977] ECR 1211 .......................... 773
38/77 Enka [1977] ECR 2203 ............................... 357
94/77 Zerbone [1978] ECR 99 ............................... 351
xxxii
<table>
<thead>
<tr>
<th>Case Number</th>
<th>Case Description</th>
<th>References</th>
</tr>
</thead>
<tbody>
<tr>
<td>106/77</td>
<td>Simmenthal II [1978] ECR 629</td>
<td>84, 94, 359, 409, 777</td>
</tr>
<tr>
<td>26/78</td>
<td>Viola [1978] ECR 1771</td>
<td>278</td>
</tr>
<tr>
<td>31/78</td>
<td>Bussone [1978] ECR 2429</td>
<td>351</td>
</tr>
<tr>
<td>83/78</td>
<td>Pigs Marketing Board [1978] ECR 2347</td>
<td>599</td>
</tr>
<tr>
<td>98/78</td>
<td>Racke [1979] ECR 69</td>
<td>383, 504</td>
</tr>
<tr>
<td>101/78</td>
<td>Granaria [1979] ECR 623</td>
<td>779</td>
</tr>
<tr>
<td>110/78 and 111/78 van Wesemael [1979] ECR 35</td>
<td>538</td>
<td></td>
</tr>
<tr>
<td>120/78</td>
<td>Rewe [1979] ECR 649</td>
<td>521, 538, 541</td>
</tr>
<tr>
<td>138/78</td>
<td>Stölting [1979] ECR 713</td>
<td>607</td>
</tr>
<tr>
<td>141/78</td>
<td>France v UK [1979] ECR 2923</td>
<td>387</td>
</tr>
<tr>
<td>151/78</td>
<td>Sukkerfabriken Nykøbing [1979] ECR 1</td>
<td>405</td>
</tr>
<tr>
<td>175/78</td>
<td>Saunders [1979] ECR 1129</td>
<td>453</td>
</tr>
<tr>
<td>230/78</td>
<td>Eridania [1979] ECR 2749</td>
<td>351</td>
</tr>
<tr>
<td>32/79</td>
<td>Commission v UK [1980] ECR 2403</td>
<td>38, 318</td>
</tr>
<tr>
<td>34/79</td>
<td>Henn and Darby [1979] ECR 3795</td>
<td>405</td>
</tr>
<tr>
<td>44/79</td>
<td>Hauer [1979] ECR 3727</td>
<td>156, 496, 598, 768</td>
</tr>
<tr>
<td>61/79</td>
<td>Denkavit Italiana [1980] 1205</td>
<td>358</td>
</tr>
<tr>
<td>113/80</td>
<td>Commission v Ireland [1981] ECR 1625</td>
<td>17, 539</td>
</tr>
<tr>
<td>203/80</td>
<td>Casati [1981] ECR 2595</td>
<td>515</td>
</tr>
<tr>
<td>270/80</td>
<td>Polydor [1982] ECR 329</td>
<td>322</td>
</tr>
<tr>
<td>15/81</td>
<td>Gaston Schul [1982] ECR 1409</td>
<td>525</td>
</tr>
<tr>
<td>60/81</td>
<td>IBM v Commission [1981] ECR 2639</td>
<td>371</td>
</tr>
<tr>
<td>76/81</td>
<td>Transporoute [1982] ECR 417</td>
<td>405</td>
</tr>
<tr>
<td>104/81</td>
<td>Kupferberg [1982] ECR 3641</td>
<td>137, 139, 323</td>
</tr>
<tr>
<td>261/81</td>
<td>Rau [1982] ECR 3961</td>
<td>540</td>
</tr>
<tr>
<td>283/81</td>
<td>CILFIT [1982] ECR 3415</td>
<td>402</td>
</tr>
</tbody>
</table>
Table of Cases

168/82 Ferriere Sant’Anna [1983] ECR 1681 .................................................. 353
237/82 Jongeneel Kaas [1984] ECR 483 ......................................................... 351
14/83 von Colson [1984] ECR 1891. ............................................................. 356, 778
15/83 Denkavit [1984] ECR 2171. ............................................................... 543
16/83 Prantl [1984] ECR 1299. ................................................................. 540
37/83Rewe-Zentral [1984] ECR 1229 ......................................................... 355, 614
69/83 Lux v Court of Auditors [1984] ECR 2447 ....................................... 376
70/83 Kloopenburg [1984] ECR 1075 ....................................................... 355
107/83 Klopp [1984] ECR 2971. ............................................................... 520
117/83 Könecke [1984] ECR 3291. ........................................................... 504
142/83 Nevas [1983] ECR 2969. ............................................................... 405
177/83 Kohl [1984] ECR 3651 ................................................................. 539
182/83 Fearon [1984] ECR 3677 ............................................................... 405
207/83 Commission v UK [1985] 1201. .................................................. 540
229/83 Leclerc [1985] ECR 1 ................................................................. 667
254/83 Commission v Italy [1984] ECR 3395 ........................................ 778
294/83 Les Verts v Parliament [1986] ECR 1339 ................................. 2, 15, 29, 34, 189, 193, 278,
354, 395, 409, 443, 741, 766, 773–4, 777
44/84 Hurd [1986] ECR 29 ................................................................. 35, 280, 368, 775
175/84 Krohn v Commission [1986] ECR 753 ........................................ 369
178/84 Commission v Germany [1987] ECR 1227 .................................... 536
205/84 Commission v Germany [1986] ECR 3755 .................................. 515
216/84 Commission France [1988] ECR 793 ............................................ 621
222/84 Johnston [1986] ECR 1651 .......................................................... 33, 359, 497, 501, 774
89/85 et al Ahlström Osakeyhtiö et al v Commission (Cellulose) [1988] ECR 5193. ....... 136
311/85 VVR [1987] ECR 3801 .............................................................. 546
407/85 Drei Glocken [1988] ECR 4233 .................................................... 536
12/86 Demirel [1987] ECR 3719 .......................................................... 134, 322
14/86 Pretore di Salò [1987] ECR 2545 .................................................. 358
46/86 Romkes [1987] ECR 2671 ............................................................ 380
65/86 Bayer [1988] ECR 5249 .............................................................. 546
68/86 UK v Council [1988] ECR 855 ...................................................... 35–6, 192, 279
197/86 Brown [1988] ECR 3205 ............................................................ 462
222/86 Heylens [1987] ECR 4097 .......................................................... 359

xxxiv
<table>
<thead>
<tr>
<th>Case Reference</th>
<th>Decision Year</th>
<th>ECR Issue</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>292/86 Gullung</td>
<td>1988</td>
<td>11</td>
<td>451</td>
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<tr>
<td>297/86 CIDA et al v Council</td>
<td>1988</td>
<td>3531</td>
<td>365</td>
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<tr>
<td>70/87 Fediol v Commission</td>
<td>1989</td>
<td>ECR 1781</td>
<td>146-7, 365, 372</td>
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<tr>
<td>97/87-99/87 Dow Chemical Ibérica et al v Commission</td>
<td>1989</td>
<td>ECR 3165</td>
<td>157</td>
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<tr>
<td>165/87 Commission v Council</td>
<td>1988</td>
<td>ECR 5545</td>
<td>379</td>
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<tr>
<td>206/87 Lefebvre v Commission</td>
<td>1989</td>
<td>ECR 275</td>
<td>352</td>
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<tr>
<td>235/87 Matteucci</td>
<td>1988</td>
<td>ECR 5589</td>
<td>280, 451</td>
</tr>
<tr>
<td>241/87 Maclaine Watson v Council and Commission</td>
<td>1990</td>
<td>ECR I-1797</td>
<td>328</td>
</tr>
<tr>
<td>242/87 Commission v Council</td>
<td>1989</td>
<td>ECR 1425</td>
<td>296, 365, 447</td>
</tr>
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<td>265/87 Schräder v Commission</td>
<td>1989</td>
<td>ECR 2237</td>
<td>510, 773-4</td>
</tr>
<tr>
<td>2/88 Imm Zwartveld</td>
<td>1990</td>
<td>ECR I-3365</td>
<td>41, 765, 775</td>
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<tr>
<td>5/88 Wachauf</td>
<td>1989</td>
<td>ECR 2609</td>
<td>162, 223, 329, 497, 504, 777</td>
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<td>6/88 and 7/88 Spain v Commission</td>
<td>1989</td>
<td>ECR 3639</td>
<td>380</td>
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<tr>
<td>8/88 Germany v Commission</td>
<td>1990</td>
<td>ECR I-2321</td>
<td>774, 779</td>
</tr>
<tr>
<td>16/88 Commission v Council</td>
<td>1989</td>
<td>ECR 3457</td>
<td>380</td>
</tr>
<tr>
<td>25/88 Wurmser</td>
<td>1989</td>
<td>ECR 1105</td>
<td>539-40</td>
</tr>
<tr>
<td>68/88 Commission v Greece</td>
<td>1989</td>
<td>ECR 2965</td>
<td>774, 778</td>
</tr>
<tr>
<td>70/88 Parliament v Council</td>
<td>1990</td>
<td>ECR I-2041</td>
<td>36, 378, 768</td>
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<td>103/88 Fratelli Costanzo</td>
<td>1989</td>
<td>ECR 1105</td>
<td>779</td>
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<td>217/88 Commission v Germany</td>
<td>1990</td>
<td>ECR I-2879</td>
<td>775</td>
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<td>303/88 Italy v Commission</td>
<td>1991</td>
<td>ECR I-1433</td>
<td>602</td>
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<td>322/88 GrimaldI</td>
<td>1989</td>
<td>ECR 4407</td>
<td>296, 356, 369</td>
</tr>
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<td>361/88 Commission v Deutschland</td>
<td>1991</td>
<td>ECR I-2567</td>
<td>356</td>
</tr>
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<td>366/88 France v Commission</td>
<td>1990</td>
<td>ECR I-3571</td>
<td>370</td>
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<td>10/89 CNL-SUCAL</td>
<td>1990</td>
<td>ECR I-3711</td>
<td>598</td>
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<tr>
<td>59/89 Commission v Germany</td>
<td>1991</td>
<td>ECR I-2607</td>
<td>356</td>
</tr>
<tr>
<td>69/89 Nakajima v Council</td>
<td>1991</td>
<td>ECR I-2069</td>
<td>146-7, 157-8, 328</td>
</tr>
<tr>
<td>106/89 Marleasing</td>
<td>1990</td>
<td>ECR I-4135</td>
<td>323, 356</td>
</tr>
<tr>
<td>113/89 Rush Portuguesa</td>
<td>1990</td>
<td>ECR I-1417</td>
<td>648</td>
</tr>
<tr>
<td>205/89 Commission v Greece</td>
<td>1991</td>
<td>ECR I-1361</td>
<td>539</td>
</tr>
<tr>
<td>213/89 Factortame</td>
<td>1990</td>
<td>ECR I-2433</td>
<td>30, 89, 359, 409, 416, 775, 777</td>
</tr>
<tr>
<td>244/89 Commission v France</td>
<td>1991</td>
<td>ECR I-163</td>
<td>775, 778</td>
</tr>
<tr>
<td>248/89 Cargill v Commission</td>
<td>1991</td>
<td>ECR I-2987</td>
<td>384</td>
</tr>
<tr>
<td>251/89 Athanasopolos</td>
<td>1991</td>
<td>ECR I-2797</td>
<td>775</td>
</tr>
<tr>
<td>290/89 Commission v Belgium</td>
<td>1991</td>
<td>ECR I-2851</td>
<td>775</td>
</tr>
<tr>
<td>298/89 Gibraltar v Council</td>
<td>1993</td>
<td>ECR I-3605</td>
<td>368</td>
</tr>
<tr>
<td>300/89 Commission v Council</td>
<td>1991</td>
<td>ECR I-2867</td>
<td>47, 50, 378, 772</td>
</tr>
<tr>
<td>309/89 Codorniu v Council</td>
<td>1994</td>
<td>ECR I-1853</td>
<td>372</td>
</tr>
<tr>
<td>312/89 Conforama</td>
<td>1991</td>
<td>ECR I-997</td>
<td>516, 649</td>
</tr>
<tr>
<td>314/89 Rau</td>
<td>1991</td>
<td>ECR I-1647</td>
<td>16</td>
</tr>
<tr>
<td>332/89 Merchandise</td>
<td>1991</td>
<td>ECR I-1027</td>
<td>649</td>
</tr>
</tbody>
</table>

xxxv
Table of Cases

C-353/89 Commission v Netherlands [1991] ECR I-4069 ........................................ 541
C-1/90 and C-176/90 Aragonesa [1991] ECR I-4151 ..................................... 539-41
C-33/90 Commission v Italy [1991] ECR I-5987 .................................................. 376, 778
C-159/90 Society for the Protection of Unborn Children [1991] ECR I-4685 ... 89, 497, 508
C-269/90 Technische Universität München [1991] ECR I-5469 ......................... 774
C-31/91 et al Lageder [1993] ECR I-1761 ....................................................... 774
C-72/91 and C-73/91 Sloman Neptun [1993] ECR I-887 .................................. 650
C-98/91 Herbrink [1994] ECR I-223 ............................................................... 16
C-112/91 Werner [1993] ECR I-429 ............................................................... 453
C-126/91 Yves Rocher [1993] ECR I-2361 ......................................................... 523
C-188/91 Deutsche Shell [1993] ECR I-363 ...................................................... 369
C-320/91 Corbeau [1993] ECR I-2533 .............................................................. 621
C-325/91 France v Commission [1993] ECR I-3283 .......................................... 376
C-13/92 et al Driessen [1993] ECR I-4751 ....................................................... 773
C-37/92 Vanacker [1993] ECR I-4947 .............................................................. 293
C-93/92 CMC Motorradcenter [1993] ECR I-5009 ......................................... 516
C-188/92 Textilwerke Deggendorf [1994] ECR I-833 ....................................... 354
C-228/92 Roquette Frères [1994] ECR I-1445 ...................................................... 354
C-292/92 Hünermund [1993] ECR I-6787 ......................................................... 537
<table>
<thead>
<tr>
<th>Case Reference</th>
<th>Decision Year</th>
<th>Case Title</th>
<th>Table of Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>C-393/92 Almelo</td>
<td>[1994]</td>
<td>ECR I-1477</td>
<td>621</td>
</tr>
<tr>
<td>C-405/92 Mondiet</td>
<td>[1993]</td>
<td>ECR I-6133</td>
<td>289</td>
</tr>
<tr>
<td>C-431/92 Commission v Germany</td>
<td>[1995]</td>
<td>ECR I-2189</td>
<td>408</td>
</tr>
<tr>
<td>C-23/93 TV10</td>
<td>[1994]</td>
<td>ECR I-4795</td>
<td>498</td>
</tr>
<tr>
<td>C-51/93 Meyhui</td>
<td>[1994]</td>
<td>ECR I-3879</td>
<td>543</td>
</tr>
<tr>
<td>C-143/93 Van Es Douane Agenten</td>
<td>[1996]</td>
<td>ECR I-431</td>
<td>376</td>
</tr>
<tr>
<td>C-465/93 Atlanta</td>
<td>[1995]</td>
<td>ECR I-3761</td>
<td>408</td>
</tr>
<tr>
<td>C-469/93 Chiquita Italia</td>
<td>[1995]</td>
<td>ECR I-4533</td>
<td>142</td>
</tr>
<tr>
<td>C-473/93 Commission v Luxembourg</td>
<td>[1996]</td>
<td>ECR I-3207</td>
<td>409</td>
</tr>
<tr>
<td>C-83/94 Leifer et al</td>
<td>[1995]</td>
<td>ECR I-3231</td>
<td>146</td>
</tr>
<tr>
<td>C-120/94 Commission v Greece</td>
<td>[1996]</td>
<td>ECR I-1514</td>
<td>328</td>
</tr>
<tr>
<td>C-158/94 Commission v Italy</td>
<td>[1997]</td>
<td>ECR I-5789</td>
<td>589</td>
</tr>
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<td>C-159/94 Commission v France</td>
<td>[1997]</td>
<td>ECR I-5815</td>
<td>589</td>
</tr>
<tr>
<td>C-253/94 P Roujansky v Council</td>
<td>[1995]</td>
<td>ECR I-7</td>
<td>34</td>
</tr>
<tr>
<td>C-1-95 Gerster</td>
<td>[1997]</td>
<td>ECR I-5253</td>
<td>118</td>
</tr>
<tr>
<td>C-34/95, C-35/95 and C-36/95 De Agostini</td>
<td>[1997]</td>
<td>ECR I-3843</td>
<td>540</td>
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<td>C-84/95 Bosphorus</td>
<td>[1996]</td>
<td>ECR I-3953</td>
<td>327</td>
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<td>C-120/95 Decker</td>
<td>[1998]</td>
<td>ECR I-1831</td>
<td>610</td>
</tr>
</tbody>
</table>
Table of Cases

<table>
<thead>
<tr>
<th>Case Reference</th>
<th>Citation</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>C-188/95 Fantask</td>
<td>[1997] ECR I-6783</td>
<td>356</td>
</tr>
<tr>
<td>C-261/95 Palmisani</td>
<td>[1997] ECR I-4025</td>
<td>30</td>
</tr>
<tr>
<td>C-299/95 Kremzow</td>
<td>[1997] ECR I-2629</td>
<td>157, 497</td>
</tr>
<tr>
<td>C-341/95 Bettati</td>
<td>[1998] ECR I-4355</td>
<td>543</td>
</tr>
<tr>
<td>C-409/95 Marschall</td>
<td>[1997] ECR I-6363</td>
<td>119, 511</td>
</tr>
<tr>
<td>C-54/96 Dorsch Consult</td>
<td>[1997] ECR I-4961</td>
<td>408</td>
</tr>
<tr>
<td>C-64/96 Uecker</td>
<td>[1997] ECR I-3171</td>
<td>453</td>
</tr>
<tr>
<td>C-114/96 Kieffer</td>
<td>[1997] ECR I-3629</td>
<td>543</td>
</tr>
<tr>
<td>C-176/96 Lehtonen</td>
<td>[2000] ECR I-2681</td>
<td>545–6, 548</td>
</tr>
<tr>
<td>C-262/96 Sürül</td>
<td>[1999] ECR I-2685</td>
<td>446</td>
</tr>
<tr>
<td>C-266/96 Corsica Ferries France</td>
<td>[1998] ECR I-3949</td>
<td>535</td>
</tr>
<tr>
<td>C-274/96 Bickel &amp; Franz</td>
<td>[1998] ECR I-7637</td>
<td>228–9, 454, 463, 466</td>
</tr>
<tr>
<td>C-369/96 and C-376/96 Arblade</td>
<td>[1999] ECR I-8498</td>
<td>648</td>
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<tr>
<td>C-77/97 Unilever</td>
<td>[1999] ECR I-431</td>
<td>778</td>
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<td>C-93/97 Fédération belge des chambres syndicales de médecins</td>
<td>[1998] ECR I-4837</td>
<td>405</td>
</tr>
<tr>
<td>C-107/97 Rombi and Arkopharma</td>
<td>[2000] ECR I-3367</td>
<td>357</td>
</tr>
<tr>
<td>C-158/97 Badeck</td>
<td>[2000] ECR I-1875</td>
<td>511</td>
</tr>
<tr>
<td>C-224/97 Ciola</td>
<td>[1999] ECR I-2517</td>
<td>31, 540–1</td>
</tr>
<tr>
<td>C-255/97 Pfeiffer</td>
<td>[1999] ECR I-2835</td>
<td>538</td>
</tr>
<tr>
<td>C-387/97 Commission v Greece</td>
<td>[2000] ECR 5047</td>
<td>776</td>
</tr>
<tr>
<td>C-17/98 Emesa Sugar</td>
<td>[2000] ECR I-665</td>
<td>437</td>
</tr>
</tbody>
</table>

xxxviii
<table>
<thead>
<tr>
<th>Case Number</th>
<th>Title</th>
<th>Year</th>
<th>Report</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>C-64/98</td>
<td>P Petrides v Commission</td>
<td>1999</td>
<td>ECR I-5187</td>
<td>378</td>
</tr>
<tr>
<td>C-165/98</td>
<td>Mazzoleni</td>
<td>2001</td>
<td>ECR I-2213</td>
<td>648</td>
</tr>
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<td>C-174/98</td>
<td>Netherlands v Commission</td>
<td>2000</td>
<td>ECR I-1</td>
<td>502</td>
</tr>
<tr>
<td>C-190/98</td>
<td>Graf</td>
<td>2000</td>
<td>ECR I-493</td>
<td>649</td>
</tr>
<tr>
<td>C-224/98</td>
<td>d’Hoop</td>
<td>2002</td>
<td>ECR I-6191</td>
<td>229, 463</td>
</tr>
<tr>
<td>C-235/98</td>
<td>Pafitis</td>
<td>2000</td>
<td>OJ C63</td>
<td>405</td>
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<td>C-281/98</td>
<td>d’Hoop</td>
<td>2000</td>
<td>ECR I-4139</td>
<td>547</td>
</tr>
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<td>C-300/98</td>
<td>and C-392/98 Dior</td>
<td>2000</td>
<td>ECR I-69</td>
<td>39</td>
</tr>
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<td>C-379/98</td>
<td>PreussenElektra</td>
<td>2001</td>
<td>ECR I-2099</td>
<td>437, 540</td>
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<tr>
<td>C-405/98</td>
<td>Gourmet International Products</td>
<td>2001</td>
<td>ECR I-1795</td>
<td>533, 535</td>
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<tr>
<td>C-407/98</td>
<td>Abrahamsson</td>
<td>2000</td>
<td>ECR I-5539</td>
<td>511</td>
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<td>Albore</td>
<td>2000</td>
<td>ECR I-5965</td>
<td>328</td>
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<tr>
<td>C-473/98</td>
<td>Toolex</td>
<td>2000</td>
<td>ECR I-5681</td>
<td>535</td>
</tr>
<tr>
<td>C-29/99</td>
<td>Commission v Council</td>
<td>2002</td>
<td>ECR I-11221</td>
<td>296</td>
</tr>
<tr>
<td>C-89/99</td>
<td>Schieving-Nijstad</td>
<td>2001</td>
<td>ECR I-5851</td>
<td>138</td>
</tr>
<tr>
<td>C-95/99</td>
<td>et al Khalil</td>
<td>2001</td>
<td>ECR I-7413</td>
<td>292</td>
</tr>
<tr>
<td>C-107/99</td>
<td>Italy v Commission</td>
<td>2002</td>
<td>ECR I-1091</td>
<td>385</td>
</tr>
<tr>
<td>C-143/99</td>
<td>Adria-Wien Pipeline</td>
<td>2001</td>
<td>ECR I-8365</td>
<td>406</td>
</tr>
<tr>
<td>C-157/99</td>
<td>Smits</td>
<td>2001</td>
<td>ECR I-5473</td>
<td>506, 599</td>
</tr>
<tr>
<td>C-163/99</td>
<td>Portugal v Commission</td>
<td>2001</td>
<td>ECR I-2613</td>
<td>352</td>
</tr>
<tr>
<td>C-164/99</td>
<td>Portugalia Construções</td>
<td>2002</td>
<td>ECR I-787</td>
<td>648</td>
</tr>
<tr>
<td>C-169/99</td>
<td>Schwarzkopf</td>
<td>2001</td>
<td>ECR I-5901</td>
<td>543</td>
</tr>
<tr>
<td>C-172/99</td>
<td>Liikenne</td>
<td>2001</td>
<td>ECR I-745</td>
<td>406</td>
</tr>
<tr>
<td>C-192/99</td>
<td>Kaur</td>
<td>2001</td>
<td>ECR I-1237</td>
<td>451</td>
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<td>C-239/99</td>
<td>Nachi Europe</td>
<td>2001</td>
<td>ECR I-1197</td>
<td>354</td>
</tr>
<tr>
<td>C-255/99</td>
<td>Humer</td>
<td>2002</td>
<td>ECR I-1205</td>
<td>374</td>
</tr>
<tr>
<td>C-262/99</td>
<td>Louloudakis</td>
<td>2001</td>
<td>ECR I-5547</td>
<td>506</td>
</tr>
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<td>C-268/99</td>
<td>Jany</td>
<td>2001</td>
<td>ECR I-8615</td>
<td>44</td>
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<tr>
<td>C-274/99</td>
<td>P Connolly v Commission</td>
<td>2001</td>
<td>ECR I-1611</td>
<td>492, 501–2, 508</td>
</tr>
<tr>
<td>C-307/99</td>
<td>OGT Fruchhandelgesellschaft</td>
<td>2001</td>
<td>ECR I-3159</td>
<td>141</td>
</tr>
<tr>
<td>C-324/99</td>
<td>Daimler Chrysler</td>
<td>2001</td>
<td>ECR I-9897</td>
<td>293</td>
</tr>
<tr>
<td>C-340/99</td>
<td>TNT Traco</td>
<td>2001</td>
<td>ECR I-4112</td>
<td>486</td>
</tr>
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<td>C-413/99</td>
<td>Baumbast</td>
<td>2002</td>
<td>ECR I-7091</td>
<td>454</td>
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<tr>
<td>C-424/99</td>
<td>Commission v Austria</td>
<td>2001</td>
<td>ECR I-9285</td>
<td>359</td>
</tr>
<tr>
<td>C-453/99</td>
<td>Courage</td>
<td>2001</td>
<td>ECR I-6297</td>
<td>677–8, 694</td>
</tr>
<tr>
<td>C-20/00 and C-64/00</td>
<td>Booker Aquacultur and Hydro Seafood</td>
<td>2003</td>
<td>ECR I-7411</td>
<td>357</td>
</tr>
<tr>
<td>C-27/00 and C-122/00</td>
<td>Omega Air</td>
<td>2003</td>
<td>ECR I-2569</td>
<td>142</td>
</tr>
<tr>
<td>C-37/00</td>
<td>Weber</td>
<td>2002</td>
<td>ECR I-2013</td>
<td>136</td>
</tr>
<tr>
<td>Case Reference</td>
<td>Reference</td>
<td>Pages</td>
<td></td>
<td></td>
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<tr>
<td>C-41/00 P Interporc [2003] I-2125</td>
<td>ECR I-6677</td>
<td>17, 19, 359, 366, 426, 432, 771</td>
<td></td>
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<tr>
<td>C-50/00 P Union de Pequeños Agricultores v Council [2002] ECR I-6677</td>
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<tr>
<td>C-55/00 Gottardo [2002] I-413</td>
<td></td>
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<tr>
<td>C-60/00 Carpenter [2002] ECR I-06279</td>
<td></td>
<td>46, 162–3, 302, 436, 499, 544</td>
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<td>C-76/00 P Petrotub and Republica v Council [2003] ECR I-79</td>
<td></td>
<td>146</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C-99/00 Lyckeskog [2002] ECR I-4839</td>
<td></td>
<td>401–2</td>
<td></td>
<td></td>
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<tr>
<td>C-112/00 Schmidberger [2003] ECR I-5659</td>
<td></td>
<td>161, 408, 492–3, 547, 600</td>
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<tr>
<td>C-416/00 Morellato [2003] ECR I-9343</td>
<td></td>
<td>536</td>
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<td></td>
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<tr>
<td>C-465/00, C-138/01 and C-139/01 ORF [2003] ECR I-4989</td>
<td></td>
<td>16, 46, 293, 499, 501–2, 506</td>
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<td>C-76/01 P Eurocoton v Council [2003] ECR I-10091</td>
<td></td>
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<td>C-92/01 Stylianakis [2003] ECR I-1291</td>
<td></td>
<td>454</td>
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<tr>
<td>C-109/01 Akrich [2003] ECR I-9607</td>
<td></td>
<td>162</td>
<td></td>
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<tr>
<td>C-114/01 AvestaPolarit Chrome [2003] ECR I-8725</td>
<td></td>
<td>37</td>
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<tr>
<td>C-117/01 KB [2004] ECR I-541</td>
<td></td>
<td>302</td>
<td></td>
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<tr>
<td>C-187/01 and C-385/01 Gözütok and Brügge [2003] ECR I-1345</td>
<td></td>
<td>577, 583</td>
<td></td>
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<td>C-206/01 Arsenal [2002] ECR I-10273</td>
<td></td>
<td>407</td>
<td></td>
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<tr>
<td>C-224/01 Köbler [2003] ECR I-10239</td>
<td></td>
<td>33, 376, 403</td>
<td></td>
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<tr>
<td>C-245/01 RTL [2003] ECR I-12489</td>
<td></td>
<td>161</td>
<td></td>
<td></td>
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<tr>
<td>C-256/01 Allonby [2004] ECR I-873</td>
<td></td>
<td>408</td>
<td></td>
<td></td>
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<tr>
<td>C-276/01 Steffensen [2003] ECR I-3735</td>
<td></td>
<td>357, 499, 501</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C-317/01 and C-369/01 Abatay [2003] ECR I-12301</td>
<td></td>
<td>44</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C-322/01 Deutscher Apothekerverband [2003] ECR I-14887</td>
<td></td>
<td>533–4, 537</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C-361/01 P Kik v OHIM [2003] ECR I-8283</td>
<td></td>
<td>17, 385, 458</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C-466/01 Kaba II [2003] ECR I-2219</td>
<td></td>
<td>454</td>
<td></td>
<td></td>
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<tr>
<td>C-475/01 Commission v Greece [2004] ECR I-8923</td>
<td></td>
<td>514</td>
<td></td>
<td></td>
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<tr>
<td>C-482/01 and C-493/01 Orfanopoulos [2004] ECR I-5257</td>
<td></td>
<td>455</td>
<td></td>
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<tr>
<td>C-491/01 British American Tobacco Investments [2002] ECR I-11453</td>
<td></td>
<td>37, 291, 293, 378</td>
<td></td>
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</tr>
<tr>
<td>C-496/01 Commission v France [2004] ECR I-2351</td>
<td></td>
<td>396</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C-502/01 and C-31/02 Gaumain-Cerri and Barth [2004] ECR I-6483</td>
<td></td>
<td>463</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C-25/02 Rinke [2003] ECR I-8349</td>
<td></td>
<td>403</td>
<td></td>
<td></td>
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<tr>
<td>C-36/02 Omega [2004] ECR I-9609</td>
<td></td>
<td>23, 507–8, 600</td>
<td></td>
<td></td>
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<tr>
<td>C-93/02 P Biret International v Council [2003] ECR I-10497</td>
<td></td>
<td>143–4</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C-94/02 P Établissements Biret v Council [2003] ECR I-10565</td>
<td></td>
<td>143</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C-138/02 Collins [2004] ECR I-2703</td>
<td></td>
<td>462</td>
<td></td>
<td></td>
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<tr>
<td>C-201/02 Wells [2004] ECR I-723</td>
<td></td>
<td>357</td>
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<tr>
<td>C-224/02 Pusa [2004] ECR I-5763</td>
<td></td>
<td>463</td>
<td></td>
<td></td>
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<tr>
<td>C-239/02 Douwe Egberts [2004] ECR I-7007</td>
<td></td>
<td>535</td>
<td></td>
<td></td>
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<tr>
<td>C-255/02 Halifax [2006] ECR I-1609</td>
<td></td>
<td>23</td>
<td></td>
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<tr>
<td>C-262/02 Commission v France [2004] ECR I-6569</td>
<td></td>
<td>293</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
**Table of Cases**

- C-263/02 P Commission v Jégo-Quéré [2004] ECR I-3425
- C-304/02 Commission v France [2004] ECR I-6263
- C-365/02 Lindfors [2004] ECR I-7183
- C-377/02 Van Parys [2005] ECR I-1465
- C-387/02, 391/02 and 403/02 Berlusconi [2005] ECR I-3565
- C-105/03 Pupino [2005] ECR I-5285
- C-110/03 Belgium v Commission [2005] ECR I-2801
- C-117/03 Traghetti del Mediterraneo [2006] ECR I-5177
- C-209/03 Bidar [2005] ECR I-2119
- C-380/03 Germany v Parliament and Council [2006] ECR I-11573
- C-387/03 Van Parys [2005] ECR I-5285
- C-173/03 Belgium v Commission [2005] ECR I-2801
- C-147/03 Commission v Austria [2005] ECR I-5969
- C-147/03 Commission v Austria [2005] ECR I-2801
- C-176/03 Commission v Council [2005] ECR I-7879
- C-177/03 Bidar [2005] ECR I-2119
- C-177/03 Bidar [2005] ECR I-2119
- C-176/03 Commission v Council [2005] ECR I-7879
- C-176/03 Commission v Council [2005] ECR I-7879
- C-176/03 Commission v Council [2005] ECR I-7879
- C-95/04 P British Airways v Commission [2007] ECR I-2331
- C-144/04 Mangold [2005] ECR I-9981
- C-145/04 Spain v UK [2006] ECR I-7917
- C-154/04 and C-155/04 Alliance for Natural Health [2005] ECR I-6451
- C-158/04 and C-159/04 Alfa Vita Vassilopoulos [2006] ECR I-8135
- C-234/04 Kapferer [2006] ECR I-2585
- C-258/04 Ioannidis [2005] ECR I-8275
- C-295/04-C-298/04 Manfredi [2006] ECR I-6619
- C-300/04 Sevinger [2006] ECR I-8055
- C-344/04 International Air Transport Association [2006] ECR I-403
- C-372/04 Watts [2006] ECR I-4325
- C-406/04 De Cuyper [2006] ECR I-6947
- C-410/04 ANAV [2006] ECR I-3303
- C-436/04 Van Estbroeck [2006] ECR I-2333
- C-467/04 Gasparini [2006] ECR I-9199
- C-479/04 Laserdisken [2006] ECR I-8089
- C-520/04 Turpeinen [2006] ECR I-10685
- C-28/05 Dokter [2006] ECR I-5431
- C-64/05 P Sweden v Commission [2007] ECR I-11389
- C-76/05 Schwarz [2007] I-6849

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xli
<table>
<thead>
<tr>
<th>Case Reference</th>
<th>Year</th>
<th>Case Name</th>
<th>European Case Reports (ECR)</th>
</tr>
</thead>
<tbody>
<tr>
<td>C-77/05 UK v Council [2007]</td>
<td>2007</td>
<td>11459</td>
<td>571</td>
</tr>
<tr>
<td>C-91/05 Commission v Council [2008]</td>
<td>2008</td>
<td>3651</td>
<td>34, 36, 284, 340–1, 378</td>
</tr>
<tr>
<td>C-119/05 Lucchini [2007]</td>
<td>2007</td>
<td>6199</td>
<td>31</td>
</tr>
<tr>
<td>C-135/05 Commission v Italy [2007]</td>
<td>2007</td>
<td>3475</td>
<td>41</td>
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<tr>
<td>C-137/05 UK v Council [2007]</td>
<td>2007</td>
<td>11593</td>
<td>571</td>
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<tr>
<td>C-142/05 Mickelsson [2009]</td>
<td>2009</td>
<td>0000</td>
<td>534–5</td>
</tr>
<tr>
<td>C-150/05 Van Straaten [2006]</td>
<td>2006</td>
<td>9327</td>
<td>577, 583</td>
</tr>
<tr>
<td>C-192/05 Tas-Hagen [2006]</td>
<td>2006</td>
<td>10451</td>
<td>454, 463</td>
</tr>
<tr>
<td>C-229/05 P PKK and KNK v Council [2007]</td>
<td>2007</td>
<td>439</td>
<td>337</td>
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<tr>
<td>C-266/05 P Sison v Council [2007]</td>
<td>2007</td>
<td>1233</td>
<td>459</td>
</tr>
<tr>
<td>C-303/05 Advocaten voor de Wereld (European Arrest Warrant) [2007]</td>
<td>2007</td>
<td>3633</td>
<td>26, 29, 36, 406, 465, 486, 577, 634</td>
</tr>
<tr>
<td>C-305/05 Ordre des barreaux francophones et germanophone [2007]</td>
<td>2007</td>
<td>5305</td>
<td>17, 45, 357, 486</td>
</tr>
<tr>
<td>C-325/05 Derin [2007]</td>
<td>2007</td>
<td>6495</td>
<td>446</td>
</tr>
<tr>
<td>C-341/05 Laval [2007]</td>
<td>2007</td>
<td>11767</td>
<td>437, 481, 637–8, 651</td>
</tr>
<tr>
<td>C-411/05 Palacios de la Villa [2007]</td>
<td>2007</td>
<td>8531</td>
<td>356</td>
</tr>
<tr>
<td>C-432/05 Unibet [2007]</td>
<td>2007</td>
<td>2271</td>
<td>359, 465, 634</td>
</tr>
<tr>
<td>C-438/05 International Transport Workers' Federation (Viking Line) [2007]</td>
<td>2007</td>
<td>10779</td>
<td>23, 277, 437, 486, 546, 600, 639, 649</td>
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<tr>
<td>C-11/06 and C-12/06 Morgan [2007]</td>
<td>2007</td>
<td>9161</td>
<td>447, 463</td>
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<tr>
<td>C-89/06 Carp [2007]</td>
<td>2007</td>
<td>4473</td>
<td>364</td>
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<td>C-117/06 Möllendorf [2007]</td>
<td>2007</td>
<td>8361</td>
<td>158</td>
</tr>
<tr>
<td>C-161/06 Skoma-Lux sro [2007]</td>
<td>2007</td>
<td>10841</td>
<td>383</td>
</tr>
<tr>
<td>C-212/06 Government of Communauté française [2008]</td>
<td>2008</td>
<td>1683</td>
<td>453</td>
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<tr>
<td>C-215/06 Commission v Ireland [2008]</td>
<td>2008</td>
<td>4911</td>
<td>41</td>
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<tr>
<td>C-231/06–233/06 Jonkman [2007]</td>
<td>2007</td>
<td>5149</td>
<td>41</td>
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<tr>
<td>C-268/06 Impact [2008]</td>
<td>2008</td>
<td>2483</td>
<td>286, 359</td>
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<td>C-275/06 Promusicae [2008]</td>
<td>2008</td>
<td>271</td>
<td>480, 493</td>
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<tr>
<td>C-301/06 Ireland v Parliament and Council [2009]</td>
<td>2009</td>
<td>0000</td>
<td>26, 277, 284, 293, 480</td>
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<td>C-308/06 Intertanko [2008]</td>
<td>2008</td>
<td>4057</td>
<td>23, 137–8, 140, 146, 149, 321</td>
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<tr>
<td>C-346/06 Rüffert [2008]</td>
<td>2008</td>
<td>1989</td>
<td>651</td>
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<tr>
<td>C-413/06 P Bertelsmann et al v Impala [2008]</td>
<td>2008</td>
<td>4951</td>
<td>681</td>
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<td>C-521/06 P Athinaïki Techniki [2008]</td>
<td>2008</td>
<td>5829</td>
<td>371</td>
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<td>C-524/06 Huber [2008]</td>
<td>2008</td>
<td>0000</td>
<td>277</td>
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<td>C-49/07 MOTOE [2008]</td>
<td>2008</td>
<td>4863</td>
<td>23</td>
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<td>C-152/07–C-154/07 Arcor [2008]</td>
<td>2008</td>
<td>0000</td>
<td>357</td>
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<td>C-162/07 Ampliscientifica [2008]</td>
<td>2008</td>
<td>4019</td>
<td>23</td>
</tr>
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<td>C-127/08 Metock [2008]</td>
<td>2008</td>
<td>6241</td>
<td>453</td>
</tr>
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</table>
### European Court of Justice (Opinions)

<table>
<thead>
<tr>
<th>Opinion</th>
<th>Year</th>
<th>Title</th>
<th>Relevant Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>1/75</td>
<td>1975</td>
<td>Local Costs Standards</td>
<td>289, 318, 327</td>
</tr>
<tr>
<td>1/76</td>
<td>1977</td>
<td>Laying Up-Fund</td>
<td>189, 318, 322</td>
</tr>
<tr>
<td>1/78</td>
<td>1979</td>
<td>Agreement on Natural Rubber</td>
<td>289, 318</td>
</tr>
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<td>1/90</td>
<td>1991</td>
<td>EEA I</td>
<td>2, 13, 34, 36, 39, 189, 278, 322, 408-9, 444, 573, 593, 720, 741, 765, 773-4, 779</td>
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<td>1/94</td>
<td>1994</td>
<td>WTO</td>
<td>35, 282, 286, 289, 319</td>
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<td>2/94</td>
<td>1996</td>
<td>ECHR</td>
<td>19, 28, 35, 148, 165, 192, 280, 286-7, 301, 322</td>
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<td>1/00</td>
<td>2002</td>
<td>Aviation Agreement</td>
<td>39</td>
</tr>
<tr>
<td>2/00</td>
<td>2001</td>
<td>Cartagena Protocol</td>
<td>283</td>
</tr>
<tr>
<td>1/03</td>
<td>2006</td>
<td>Lugano Convention</td>
<td>290-1, 318-19</td>
</tr>
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</table>

### Court of First Instance

<table>
<thead>
<tr>
<th>Case</th>
<th>Year</th>
<th>Title</th>
<th>Relevant Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>T-305/94 et al Limburgse Vinyl Maatschappij et al v Commission</td>
<td>1999</td>
<td>ECR II-931</td>
<td>155</td>
</tr>
<tr>
<td>T-369/94 and T-85/95 DIR et al v Commission</td>
<td>1998</td>
<td>ECR II-357</td>
<td>198</td>
</tr>
<tr>
<td>T-382/94 Confindustria et al v Council</td>
<td>1996</td>
<td>ECR II-519</td>
<td>384</td>
</tr>
<tr>
<td>T-228/97 Irish Sugar v Commission</td>
<td>1999</td>
<td>ECR II-2969</td>
<td>666</td>
</tr>
<tr>
<td>T-112/98 Mannesmannrohrenwerke v Commission</td>
<td>2001</td>
<td>ECR II-729</td>
<td>155</td>
</tr>
<tr>
<td>T-172/98 et al Salamander et al v Parliament and Council</td>
<td>2000</td>
<td>ECR II-2487</td>
<td>20, 335</td>
</tr>
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<td>T-191/98 R Senator Lines v Commission</td>
<td>1999</td>
<td>ECR II-2531</td>
<td>437</td>
</tr>
<tr>
<td>T-54/99 max.mobil v Commission</td>
<td>2002</td>
<td>ECR II-313</td>
<td>465, 486, 777</td>
</tr>
<tr>
<td>T-112/99 Métropole Télévision (M6) et al v Commission</td>
<td>2001</td>
<td>ECR II-2459</td>
<td>671</td>
</tr>
<tr>
<td>T-120/99 Kik v OHIM</td>
<td>2001</td>
<td>ECR II-2235</td>
<td>458</td>
</tr>
<tr>
<td>T-188/99 Euroallages v Commission</td>
<td>2001</td>
<td>ECR II-1757</td>
<td>365</td>
</tr>
<tr>
<td>T-342/99 Airtours v Commission</td>
<td>2002</td>
<td>ECR II-2585</td>
<td>672-3</td>
</tr>
<tr>
<td>T-168/01 GlaxoSmithKline v Commission</td>
<td>2006</td>
<td>ECR II-2969</td>
<td>682, 686, 690-3, 698</td>
</tr>
<tr>
<td>T-177/01 Jégo-Quéré v Commission</td>
<td>2002</td>
<td>ECR II-2365</td>
<td>366, 432</td>
</tr>
<tr>
<td>T-306/01 Yusuf et al v Council and Commission</td>
<td>2005</td>
<td>ECR II-3533</td>
<td>154, 158-9, 164, 582</td>
</tr>
<tr>
<td>T-315/01 Kadi et al v Council and Commission</td>
<td>2005</td>
<td>ECR II-3649</td>
<td>158, 582</td>
</tr>
<tr>
<td>T-5/02 Tetra Laval v Commission</td>
<td>2002</td>
<td>ECR II-4382</td>
<td>672</td>
</tr>
<tr>
<td>T-77/02 Schneider Electric v Commission</td>
<td>2002</td>
<td>ECR II-4201</td>
<td>672</td>
</tr>
<tr>
<td>T-228/02 Organisation des Modjahedines du peuple d’Iran v Council</td>
<td>2006</td>
<td>ECR II-4665</td>
<td>565-6, 581-2</td>
</tr>
</tbody>
</table>
Table of Cases

T-253/02 Ayadi v Council [2006] ECR II-2139 ........................................ 158–9, 583
T-327/03 Stichting Al-Aqsa v Council [2007] ECR II-79 ..................... 581
T-411/06 Sogelma v European Agency for Reconstruction [2008] ECR II-0000 .......................... 368

European Commission of Human Rights/European Court of Human Rights

Belgian Languages Case ECHR [1968] Series A, No 6 ....................... 510
Benham v UK ECHR 1996-III .................................................. 495
Boner v UK [1995] Series A No 300-B ......................................... 495
Bosphorus v Ireland (2006) 42 EHRR 1 .................................... 152, 437, 491
Casado Coca v Spain [1994] Series A No 285 ................................ 600
Coëme et al v Belgium ECHR 2000-VII .................................... 391
Dangeville v France ECHR 2002-III ........................................... 437
Emesa Sugar v Netherlands ...................................................... 437
Goodwin v UK ECHR 2002-VI .................................................. 437
Granger v UK [1990] Series A No 174 ........................................ 495
Guerra et al v Italy ECHR 1998-I ............................................. 466
Heinz v Austria et al [1994] DR 76-A, 123 ................................ 152
I v UK ECHR 2002-VI ......................................................... 437
Informationsverein Lentia v Austria [1994] Series A, No 276 ............... 505
Jacobowski v Germany [1994] Series A No 291 ............................ 600
Kress v France ECHR 2001-VI ............................................. 437
Larkos v Cyprus ECHR 1999-I .................................................. 511
López Ostra v Spain [1995] Series A No 303C ................................ 493
M & Co v Germany [1990] DR 64, 138 ........................................ 152
Mathieu-Mohin et Clerfayt v Belgien [1987] Series A No 113 .......... 120
Matthews v UK (1999) 28 EHRR 361 ..................................... 48, 120, 151, 437, 457, 466, 491
Mazurek v France ECHR 2000-II .......................................... 511
Nikula v Finland (2002) 38 EHRR 45 ....................................... 507
Palumbo v Italy, Judgment of 30 November 2000 ............................ 512
Piermont v France [1995] Series A No 314 ..................................... 466
Senator Lines v 15 EU Member States (2004) 39 EHRR SE3 ................ 152, 437
Sisojeva v Latvia (2006) 43 EHRR 695 ...................................... 451
Sunday Times v UK [1979] Series A, No 30 .................................. 503
Timke v Germany (1995) DR 82-A, 158 ..................................... 120

xliv
permanent court of international justice/international court of justice

Greece v United Kingdom (Mavrommatis Palestine Concessions), PCIJ Series [1924] A No 2 460
Liechtenstein v Guatemala [1955] ICJ Rep 4 460
Belgium v Spain (Barcelona Traction Light and Power) [1970] ICJ Rep 2 151, 460

National Cases

Austria

Verfassungsgerichtshof, 12 December 2000, KR 1-6, 8/00 124

Belgium

Decision 26/91, 16 October 1991 87, 416
Decision 12/94, 3 February 1994 416, 753
Decision 33/94, 26 April 1994 416
Decision 124/2005, 13 July 2005 406

Canada

Secession of Quebec, Reference re, [1998] 2 SCR 217 (Can) 15

Cyprus

Decision No 133(1)/04 of 7 November 2005 419

Czech Republic

Decision Pl ÚS 31/97 of 29 May 1997 92
Decision Pl ÚS 50/04 of 8 March 2006 (sugar quotas) 406, 418
Decision Pl ÚS 66/04 of 3 May 2006 (European arrest warrant) 418
Decision Pl ÚS 19/08 of 26 November 2008 (Treaty of Lisbon) 418, 438

Denmark

### Table of Cases

#### Estonia

Decision No 3-4-1-11-03 of 24 September 2003, Vilu and Estonian Voters Union. 418  
Decision No 3-4-1-12-03 of 29 September 2003, Kulbok. 418  
Decision No 3-3-1-33-06 of 5 October 2006, Hadleri Toidulisandite AS. 406, 418

#### France

CC 19 November 2004, Traité établissant une Constitution pour l’Europe. 425  
CC 27 June 2006, Loi relative au droit d’auteur et aux droits voisins dans la société de l’information. 405, 416–17, 425  
CC 2004-496 DC. 91, 753  
CC 2007-560 DC. 438  
CC 92-308 DC. 90, 96, 117–18, 124, 450  
CC 92-312 DC. 90, 96  
CE 22 December 1978, Ministre de L’Intérieur c Sieur Cohn-Bendit. 753  
CE 6 February 1998, Tête. 405  
CE 26 September 2002. 419  
CE 28 February 2003, Arcelor. 416  
Cass 27 May 1971, Le Ski. 87  
Cass 2 June 2000, Fraisse. 416  
Cass 16 January 2003, Madame X v CMSA . 402

#### Germany

Entscheidungen des Bundesverfassungsgerichts 3, 407 (Baurechtsgutachten). 282  
Entscheidungen des Bundesverfassungsgerichts 22, 134. 410  
Entscheidungen des Bundesverfassungsgerichts 22, 293 (EWG-Verordnungen). 86, 189, 410, 443, 765  
Entscheidungen des Bundesverfassungsgerichts 29, 198 (Abschöpfung). 410  
Entscheidungen des Bundesverfassungsgerichts 31, 145 (Lütcticke). 410  
Entscheidungen des Bundesverfassungsgerichts 34, 269. 15  
Entscheidungen des Bundesverfassungsgerichts 37, 271 (Solange I). 86, 150, 285, 403, 409, 411, 464, 496  
Entscheidungen des Bundesverfassungsgerichts 44, 125 (Öffentlichkeitsarbeit). 773  
Entscheidungen des Bundesverfassungsgerichts 50, 290 (Mitbestimmung). 595, 750  
Entscheidungen des Bundesverfassungsgerichts 52, 187 (Vielleicht). 403, 411  
Entscheidungen des Bundesverfassungsgerichts 58, 1 (Eurocontrol I). 159, 411  
Entscheidungen des Bundesverfassungsgerichts 59, 63 (Eurocontrol II). 411  
Entscheidungen des Bundesverfassungsgerichts 65, 283. 456  
Entscheidungen des Bundesverfassungsgerichts 66, 331. 30  
Entscheidungen des Bundesverfassungsgerichts 68, 1 (Atomwaffenstationierung). 314, 759
Entscheidungen des Bundesverfassungsgerichts 71, 354
Entscheidungen des Bundesverfassungsgerichts 73, 339 (Solange II) ........................................... 30
Entscheidungen des Bundesverfassungsgerichts 75, 223
(Kloppenburg) ........................................... 19, 355, 399, 412, 415, 756
Entscheidungen des Bundesverfassungsgerichts 82, 159 (Absatzfonds) .................................................. 407
Entscheidungen des Bundesverfassungsgerichts 83, 37
(Ausländerwahlrecht I) ........................................... 117, 450, 456, 745, 748
Entscheidungen des Bundesverfassungsgerichts 83, 60
(Ausländerwahlrecht II) ........................................... 450, 456, 748
Entscheidungen des Bundesverfassungsgerichts 84, 212 ................................................................. 635
Entscheidungen des Bundesverfassungsgerichts 85, 191 (Nacharbeitsverbot) ........................................... 119
Entscheidungen des Bundesverfassungsgerichts 89, 155
Entscheidungen des Bundesverfassungsgerichts 92, 91 (Feuerwehrabgabe) ........................................... 119
Entscheidungen des Bundesverfassungsgerichts 92, 203 (Fernsehrichtlinie) ........................................... 124, 414
Entscheidungen des Bundesverfassungsgerichts 92, 365 ................................................................. 635
Entscheidungen des Bundesverfassungsgerichts 94, 49 (Sichere Drittstaaten) ........................................... 122
Entscheidungen des Bundesverfassungsgerichts 97, 350 (Euro) .......................................................... 759
Entscheidungen des Bundesverfassungsgerichts 102, 147
(Bananenmarkordnung) ........................................... 86, 152, 411, 414, 513
Entscheidungen des Bundesverfassungsgerichts 104, 151 (NATO-Strategiekonzept) .......................... 412
Entscheidungen des Bundesverfassungsgerichts 104, 214 (NPD-Verbot) .................................................. 404
Entscheidungen des Bundesverfassungsgerichts 110, 141 (Kampfhunde) ........................................... 404
Entscheidungen des Bundesverfassungsgerichts 111, 307 (Görgülü) ........................................... 415, 754
Entscheidungen des Bundesverfassungsgerichts 113, 273
(Europäischer Haftbefehl) ........................................... 26, 336, 406, 415, 419, 470, 513–14, 745, 754
Bundesverfassungsgericht, Cases 2 BvR 839/05 and 2 BvE 2/05 (Constitutional Treaty) .................. 438
Bundesverfassungsgericht, Cases 2 BvE 2/08 et al (Treaty of Lisbon) .................................................. 438
Entscheidungen des Bundesverwaltungsgerichts 80, 233 ................................................................. 139
Entscheidungen des Bundesverwaltungsgerichts 87, 11 ................................................................. 139
Entscheidungen des Bundesverwaltungsgerichts 103, 301 ................................................................. 119
Entscheidungen des Bundesverwaltungsgerichts 114, 27 ................................................................. 123
Entscheidungen des Bundesfinanzhofs 133, 470 ................................................................. 355
Entscheidungen des Bundesgerichtshofs in Strafsachen 45, 321 ........................................... 159
Bundesarbeitsgericht, Decision of 21 April 1971, Case GS 1/68 ........................................... 649
Finanzgericht Rheinland-Pfalz [1995] Entscheidungen der Finanzgerichte 378 ........................................... 414

Greece

Council of State No 3457/98 ........................................... 416
Council of State No 194/2000 ........................................... 416
Supreme Court No 504/2005 ........................................... 419
Table of Cases

**Hungary**


**Ireland**

- Campus Oil v Minister for Industry and Energy [1983] IR 82 .......................... 417
- Secretary of State for the Home Department v Adan und Aitseguer, Judgment of 19 December 2000 .............................................................. 123

**Italy**

- Decision No 183/73 (Frontini), Foro italiano I (1974) 314 .............................. 86, 101, 415, 417, 420, 752
- Decision No 170/84 (Granital), Foro Italiano I (1984) 2062 .......................... 85–6, 752
- Decision No 232/89 (Fragd), Foro italiano I (1990) 1855 .............................. 415, 752
- Decision No 168/91 (Giampaoli), Foro italiano I (1992) 660 .......................... 404
- Decision No 117/94, Foro Italiano I (1995) 1077 ........................................... 86
- Decision No 509/95 [1996] Rivista italiana di diritto pubblico comunitario 764 .......... 86
- Decision No 536/95 (Messagero Servizi), Gazzetta Ufficiale n 1 I, 3 January 1996 ... 124, 404
- Decision No 319/96 (Spa Zerfin), Gazzetta Ufficiale n 34 I, 21 August 1996 .......... 404
- Decision No 4207/05 (Admenta et al v Federfarma) [2006] 2 CMLR 47 .................. 417
- Decision No 103/08 (Legge della Regione Sardegna 11 maggio 2006/29 maggio 2007) .... 404

**Latvia**

- Decisions 119-123/2003 .............................................................. 419

**Lithuania**


**Netherlands**


**Poland**

- Decision K 33/03 of 21 April 2004 ............................................................. 121
- Decision K 18/04 of 11 May 2005 ............................................................... 93, 99, 406, 418–19, 753
- Decision P 1/05 of 27 April 2005 ............................................................... 93, 418
## Table of Cases

### Portugal
- TC Decision 163/90, 23 May 1990, Moreira da Costa e Mulher. 405

### Slovakia
- Decision of 18 January 2006, Dostal et al. 419

### Slovenia
- Decision Rm-1/97, 7. 419

### Spain
- Tribunal Constitucional, Decision 28/1991, 14 February 1991 405
- Tribunal Constitucional, Decision 64/1991, 22 March 1991 405
- Tribunal Constitucional, Decision 111/1993, 25 March 1993 404
- Tribunal Constitucional, Decision 180/1993, 31 May 1993 404
- Tribunal Constitucional, Decision 372/1993, 13 December 1993 404
- Tribunal Constitucional, Declaration 108/1992, 1 July 1992 87–8, 416, 753
- Tribunal Supremo, recurso de casación nº 9156/1996 402
- Tribunal Supremo, recurso de casación nº 4517/1997 402

### United Kingdom
- Arsenal Football Club v Matthew Reed (2003) EWCA Civ 96; [2002] EWHC 2695 (Ch); 1 All ER (2003) 137 407
- Macarthy’s Ltd v Wendy Smith [1979] 3 CMLR 44, and (1979) 3 All ER, 325 89, 416
- Thoburn v Sunderland City Council et al [2002] 4 All ER 156 416

### United States
- Gitlow v People of the State of New York 268 US 652, 45 S Ct 625 (1925) 500
- Rambus Inc v FTC (DC Cir 2008) 676
THE CONSTITUTIONAL APPROACH TO EU LAW—
From Taming Intergovernmental Relationships to
Framing Political Processes

ARMIN VON BOGDANDY AND JÜRGEN BAST

I. The Idea of the Volume

For the time being, the political project of founding the European Union on a document entitled Constitution has failed. At best, a Reform Treaty will see the light of day\(^1\) that, according to the European Council, abandons the ‘constitutional concept’.\(^2\) The second edition of this volume retains its title nonetheless. It builds on a scholarly rather than a ‘black letter law’ conception of European constitutional law. The title signals the main questions asked in this book, as well as the discourse context in which it is situated. Approaching the founding Treaties and the unwritten general principles of Union law from the angle of constitutional scholarship is informed by the tradition of liberal-democratic constitutionalism. The constitutional approach to EU law reads this ‘primary law’ as a framework for politics and contestation; it addresses the sources of legitimacy and the founding principles of the polity; it aims at inducing disciplinary self-reflection and self-awareness; it wishes to mediate between civic and legal-professional deliberations; and, last but not least, it systematises the cases and materials in light of constitutional theory and of established concepts of constitutional law.

Sure enough, a constitutional approach to EU law needs justification. As a paradigm of legal scholarship, however, it does not require the blessing of politics; the European Council certainly is not competent to authoritatively decide whether the founding Treaties are of a ‘constitutional character’.\(^3\) Besides, what the European Council makes out as ‘the constitutional concept’ is hardly relevant from a legal perspective. According to the Presidency Conclusions, the concept ‘consisted in repealing all existing Treaties and replacing them by a single text called “Constitution”’.\(^4\) Following this definition, neither Germany, with its constitutional...

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\(^3\) Ibid, para 3: ‘The TEU and the Treaty on the Functioning of the Union will not have a constitutional character.’

\(^4\) Ibid, para 1; according to the German government, this would include the symbols and the denomination of the legal instruments: ‘Denkschrift der Bundesregierung zum Vertrag von Lissabon vom 13 Dezember
document called Grundgesetz (‘Basic Law’), nor Austria, with its numerous federal constitutional laws, would have a constitution properly so-called; yet no one imagines these States as constitutionless. In fact, no relevant political actor substantially challenges the jurisprudence of the European Court of Justice (ECJ) that was developed on the premise that the EC Treaty is the ‘constitutional charter’ of the Community.\(^5\)

Approaches in legal scholarship, such as the constitutional approach to EU law, ought to be assessed on the basis of scholarly arguments. A constitutionalist reconstruction of the law as it stands demands ‘responsiveness’ in the legal material and requires that sufficient elements in its object of investigation lend themselves to be treated in such a way, in order not to produce arbitrary or utopian results. We hold this to be the case in the EU legal order. After all, the Treaties mandate the exercise of public authority, establish a hierarchy of norms and legitimise legal acts, provide a citizenship and grant fundamental rights, and shape the relationships between legal orders, between public interest regulation and market economy, and between law and politics. Numerous congruities of EU primary law and national constitutions emerge in a functional comparison, particularly when viewed through the lens of comparative federalism. Only theoretical and thus disputed emphasis brings to light significant differences. Moreover, not only the functions but also the semantics of the Treaties (their ‘coding’) increasingly suggest a constitutional approach, since the Treaty of Amsterdam has availed itself, in Article 6 EU, of the key concepts of liberal-democratic constitutionalism: liberty, democracy, rule of law and protection of fundamental rights. Meanwhile, albeit with some delay, the semantics of the ECJ have joined in and recently made a great leap forward in using the terms ‘constitutional principle’ and ‘constitutional guarantee’.\(^6\) Whether all this is sufficient, whether a constitutional approach works without the imagined community of a single nation, without all the features of statehood being present and without a foundational act that meets the requirements of an emphatic theory of constitution-making is in itself a first-rate topic of European constitutional scholarship. Consequently, this book is problematising its own approach; the contributions of Ulrich Haltern, Paul Kirchhof and Christoph Möllers especially discuss diverging positions.

The constitutional approach is of course not exclusionary for producing meaningful concepts and interpretations on matters of European law. There is an inevitable, and by no means problematic, overlap area of constitutional, administrative, economic and international law approaches to EU law. While we welcome any fruitful competition in the field of legal scholarship, we still hold that there is a vital necessity for the EU to be measured by the yardsticks of liberal-democratic constitutionalism. At some point in the last decade, the EU was pushed forward into the public arena and has lost its constitutional innocence for good. Somewhere between Amsterdam, Laeken and Lisbon, its older, functionalist or intergovernmental sources of legitimacy lost much of their force, and the demands of democracy, rule of law and protection of fundamental rights took centre stage. There is probably no way back to square one of being an output-based ‘regulatory agency’, an enhanced ‘common market’ or an interstate ‘regional integration organisation’, whatever the semantic choices of the Treaty drafters will be. One crucial normative implication for our constitutional approach to EU law needs to be stressed: it is not designed to be apologetic, quite the opposite. It rather takes the


aspirational language of Article 6 EU seriously, and therewith the high standards of assessment accepted by the Union. In this light, the constitutional approach elucidates the achievements as well as the deficits of the present state of the Union.

II. The Structure of the Volume

The structure of this volume is rather complex, perhaps because the discipline of European constitutional law is only in its making. While the reader usually knows roughly what to expect from a textbook handling his or her national constitutional law, there is not yet such generalised expectation of what the fundamental topics, foundations and perspectives of European constitutional scholarship should be. This background explains Part I, dedicated to defining the field of European constitutional law. The first contribution, ‘Founding Principles’, explores what a constitutional doctrine of principles can contribute to the project of a European constitutional law scholarship. It unfolds a systematic presentation of those principles, discussing the potentials, pitfalls and prospects of a doctrinal construction in this field. This chapter identifies the democratic principle, as well as the relationship between principles conducive to unity and those protective of diversity, as being the most problematic. Stefan Oeter picks up on this in ‘Federalism and Democracy’. He discusses the areas of conflict and submits an interpretation of these two concepts, federalism and democracy, which are essential for a constitutional approach to EU law as well as for the establishment of a common discourse of public law, political theory and social sciences. In accordance with the tradition of state theory, Oeter looks historically at the German Empire, interdisciplinarily at political-science literature and comparatively at US federalism.

Treatises of national constitutional law often present their subject as a self-sufficient normative universe. Many speak in favour of conceiving EU constitutional law not as a universe but as part of a normative pluriverse. EU primary law is interconnected with the Member States’ constitutions in a number of ways. These relationships are crucial for an adequate understanding of primary law and of the Member States’ constitutions alike. Christoph Grabenwarter develops the relevant questions in ‘National Constitutional Law Relating to the European Union’ using the methods of comparative legal constructivism. Drawing the threads together into the concept of Verfassungsverbund (a ‘composite of constitutions’, ie multilevel constitutionalism), he employs German legal scholarship’s most important concept at present for construing this pluriverse. In understanding EU primary law as part of a normative pluriverse, international law also ought to be included. This is due less to the Union’s origins in international law than to the plentiful entanglements of the ‘domestic’ Union law with the international legal order. Robert Uerpmann-Wittzack analyses these relationships from the angle of positivist legal doctrine in his contribution ‘The Constitutional Role of International Law’. He exemplarily demonstrates the critical potential of doctrinal analysis vis-à-vis the case law of the ECJ which currently only acknowledges the European Convention of Human Rights as a ‘supplementary’ constitution based in international law.

Christoph Möllers’s ‘Pouvoir Constituant—Constitution—Constitutionalisation’ takes a distinct approach that is founded on broad interdisciplinary and comparative knowledge. He explores the richness of constitutionalist thinking to which Union law scholarship could connect and the problems that arise from such connection. Möllers structures the complex debate by typifying two separate traditions of the constitutional concept. Concluding the first

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10 The volume provided the occasion to present this tradition to Anglo-American readers: J Khushal Murkens, ‘The Future of Staatsrecht: Dominance, Demise or Demystification?’ (2007) 70 MLR 731.
part of the volume, Ulrich Haltern’s contribution, ‘On Finality’, chooses an entirely different paradigm. The prosperity of possible methods and research interests would be neglected if one were to identify legal scholarship exclusively with a doctrinal approach, in particular with regard to such an unfinished cause as European constitutional law. Haltern’s contribution serves as a case in point. It illustrates the fruitful irritations to be expected from US legal literature that is more prone to experimental thinking.

The book’s second part addresses institutional issues from a specifically constitutional perspective. In ‘The Political Institutions’ Philipp Dann develops a comparative and interdisciplinary conception of ‘executive federalism’. On this basis, he provides a coherent analysis of the law governing the main political organs of the Union. Armin von Bogdandy and Jürgen Bast present ‘The Federal Order of Competences’ as a key for understanding the relationship between the Union and its Member States. They draw on the experience that doctrines of competences have gained in federal states. One of the chief developments since the first edition has been the strengthening of the EU as an international actor. Daniel Thym’s contribution, ‘Foreign Affairs’, analyses the co-existence of the EU (in the broad sense, encompassing all of its ‘pillars’) and the Member States in terms of constitutional doctrine. In this way, he is able to depict the idiosyncratic character of the EU’s external powers.

It was a deficit of the first edition, from a constitutional law perspective, that legal protection against the exercise of Union powers was only dealt with incidentally. The second edition remedies this in having a closer look at legal remedies and procedures. Jürgen Bast’s contribution reconstructs the interrelationship between legal instruments and judicial protection and exposes the constitutional principles and structural choices that carry the relevant primary law. In Part II’s last contribution, Franz C Mayer analyses the ECJ’s interaction with the highest national courts under the programmatic heading ‘Multilevel Constitutional Jurisdiction’. Conflict and co-operation between the courts is a topic of European law that has given rise to doctrinally rich controversies like few others. Mayer pictures the interaction in light of the guiding concept of multilevel constitutionalism (Verfassungsverbund) and develops the notion of a composite judiciary adjudicating on constitutional issues.

This edition’s third part is dedicated to the legal position of the individual. Besides the task of providing a framework for politics, the relationship between public authority and persons subjected to it forms a classic focus of constitutional law. The individual rights dimension of primary law is composed of three, as yet barely conceptually connected, components: Union citizenship, fundamental (human) rights and fundamental (market) freedoms. Stefan Kadelbach, in his chapter ‘Union Citizenship’, develops both a positive law and a constitutional theory perspective on citizenship issues. He thereby insightfully combines two academic discourses that are seldom related. Jürgen Kühling’s contribution, ‘Fundamental Rights’, submits a system of EU fundamental rights jurisprudence by engaging inter alia with conceptions of German fundamental rights doctrine and with the case law of the European Court of Human Rights. Thorsten Kingreen’s ‘Fundamental Freedoms’ also presents a doctrinally guided reconstruction. It provides another example of the critical potential of such a method, here vis-à-vis established jurisprudence on the fundamental freedoms of the EC Treaty.

Part III closes with a piece by Jörg Monar entitled ‘The Area of Freedom, Security and Justice’. This contribution has been newly introduced following the increasing significance of policies that are dedicated to this Treaty goal—policies that are most sensitive in terms of fundamental rights. Placing this topic within the section on the legal position of individuals may at first surprise, given the fact that the governing primary law does not grant rights to individuals. Nevertheless, it belongs there because the relevant provisions involve classic themes

of the dialectics of individuals and public authorities: providing security and an effective judicial system. Jörg Monar develops the topic by way of interpreting programmatic documents of political actors, a fairly unusual method in German legal academia.

The book’s fourth part turns to the constitution of social sectors; it is plausible to conceive of the relevant provisions of primary law as part of the constitution of the social order. It corresponds with the origins of the Union as an organisation primarily directed at shaping the economy, in that its focus lies on providing a legal framework for the economic sector. Thus, this part of the volume deals with primary law’s contributions to the European composite constitution of the market economy, labour and competition. The three authors assembled here share the understanding that the EU level of the European economic constitution does not exhaust itself in establishing a functioning internal market; yet apart from this, their interpretations diverge. Armin Hatje highlights in his contribution ‘The Economic Constitution within the Internal Market’ the ‘systemic choice in favour of an open market economy with free competition’. This fundamental choice, he submits, laid down in the EC Treaty, is the kernel of the European economic constitution. While it does not generally prevent political interventions into the markets either at the EU or at the national level, it does establish limits and provide for justificatory burdens. Florian Rödl asks in ‘The Labour Constitution’ for the primary law that orders the industrial labour relations. He arrives at the critical result that the original labour constitution of the EEC Treaty has failed and that the (re)creation of a normatively desired equilibrium of capital and labour is only possible in a European composite of labour constitutions that is balanced by a conflict-of-laws schema. Lastly, Josef Drexl examines European competition law in its constitutional context and defends the ordoliberal understanding of ‘Competition Law as Part of the European Constitution’ against recent interventionist and economist reinterpretations and critiques.

The fifth part provides an assessment of the whole of European integration by personages who, as academics and judges in highest positions, have shaped the course of integration themselves. Their contending visions of European integration submit guiding conceptions for legal constructions—built on historical knowledge and insights of state theory, on the concrete analysis of legal norms and on practical experience. Ulrich Everling, participant in the negotiations of the EEC Treaty, later senior German civil servant and then, from 1980 to 1988, judge at the ECJ, presents ‘The European Union as a Federal Association of States and Citizens’. Paul Kirchhof, judge at the Federal Constitutional Court of Germany from 1987 to 1999, rapporteur in the proceedings concerning the Treaty of Maastricht and creator of the influential concept of Staatenverbund (a ‘composite of states’), unfolds this reading in the contribution ‘The European Union of States’. Manfred Zuleeg, German judge at the ECJ from 1988 to 1994, thus at the time of the case before the Federal Constitutional Court concerning the Treaty of Maastricht, presents his, in central elements converse, conception under the title ‘The Advantages of the European Constitution’.

III. Reaction to Critique

Some reviewers wondered whether the book could be properly categorised as a textbook. It is certainly correct that it is not an introductory work. It is not addressed to the novice who seeks an easily accessible grasp on the topic of European law. This does not, however, exhaust the category of ‘textbook’. This volume aims at the scarcely occupied segment in the field of publications that is different from undergraduate textbooks providing the most relevant cases and

12 Noteworthy is the analysis of the premises of these three contributions by Khushal Murkens, above n 10.
materials, as well as from comprehensive commentaries presenting the law in all its breadth and
detail. It is designed to support any curious reader with an interest in legal scholarship, be it
undergraduates who, with desire and determination, have chosen to place an emphasis on
European law,14 be it master or doctoral students, or be it lawyers in general who want to orient
themselves within the academic discourse on European constitutional law. Following this
primarily scholarly rather than practical design, the volume dispenses with concise doctrinal
answers that could be put to immediate use in application. Rather, it is concerned with
theoretical and doctrinal fundamentals, with reflections on the state of research, with the eluci-
dation of methodological approaches, with the clarification of diverse understandings and with
the identification of research desiderata.

It is part of this textbook’s programme to present legal scholarship as an open process of
reasoning.15 Following this programme, the volume brings together authors of diverse method-
ological approaches and different political convictions on European integration. This has been
criticised, though.16 Sure enough, the material is not presented ‘smoothly’, cut from a single
cloth. This might make the first access more difficult. However, the present compilation should
help illuminate the variety of the field, in which each scholar has to find his or her own path.17
All contributions share a common commitment. They come together in their aspiration to
uphold within the Union the achievements of a constitutional culture attained in the national
sphere—and, indeed, to develop this culture.

It has also challenged criticism that all authors are part of a German-language legal
community.18 This limitation can be explained by the fact that the project grew out of a group
of German-speaking academics who sought to express the latest state of the art from the
perspective of their community, and then decided to present it internationally. This English
edition serves precisely that purpose. Apparently, quite some interest exists abroad in German
research on Union law; however, access to this research is often blocked by language barriers. It
seems only sensible to respond to this interest. The German tradition of theoretically founded
legal doctrine, in particular if further developed in light of other ways of thinking, has, by all
appearances, a contribution to offer and does not have to shy away from competition with
other European law scholarships within the European Research Area.19 In fact, this volume has
been received in this way.20

Finally, it can only please the authors of the present volume that it induced two stimulating
articles reflecting on its theoretical basis and its place in the history of legal thinking.21 The
authors are especially grateful to Michelle Everson for her appraisal, despite deeming them

Sächsische Verwaltungsblätter 252.
15 Regarding this volume’s place in the broader research context, see J Dülffer, ‘Europa—aber wo liegt es?’
52 Philosophische Rundschau 191 (both on the German edition).
Winkler, above n 9.
17 Similarly, see M Nakos (2005) 17 European Review of Public Law 1384; Beaud, above n 11, 535; von
Alemann, above n 11.
18 Aden, above n 16, 344.
19 On other tendencies, see A Arnull, ‘The Americanization of EU Law Scholarship’ in A Arnull, P Eekhout
and T Tridimas (eds), Continuity and Change in EU Law (2008), 415.
20 Beaud, above n 11, 535; Church, above n 16; Khushal Murkens, above n 10; M Panebianco [2003]
Diritto comunitario e degli scambi internazionali 641 (with interesting remarks on German-language legal
scholarship); F Ronse, Bulletin Quotidien Europe No 9219/693, 27 June 2006; HJ van Harten and T Beukers
(2006) 54 SEW Tijdschrift voor Europees en economisch recht, 452; D Thym (2007) 44 CML Review 837,
839.
Khushal Murkens, above n 10.
masters of ‘dark doctrinal arts’ that they pursue with ‘the fervour of theological commit-
ment’.22 Her central point of critique is, it seems to us, that a reflection on the limits of
European law and, more specifically, of legal reasoning with reference to a European consti-
tution be undertaken. She finds the contributions’ principal preconception to lie in the
‘assumption that legal discourse across and between national and European legal orders
possesses a persuasive authority all of its own’; this assumption, however, has ‘potentially fatal
weaknesses’.23 Here, a pattern of critique of lawyers and judges comes to the fore according to
which doctrinal constructions provide a cloak for an elitist political project, dubious in terms of
legitimacy and even authoritarian by implication.24 This reminder has been particularly helpful
for further developing the contribution on founding principles. It should now illustrate in more
clarity the arguments that justify the volume’s approach and stress its openness for democratic
political processes.

Like Michelle Everson was with regard to the first edition, the authors of these lines are
puzzled as to why even such epochal events like the enlargement of the EU by 12 new states,
the felicitous, as well as the less felicitous, global stances of the Union after 9/11 and, more
recently, the drama about the failure of the Constitutional Treaty and its rebirth as a Reform
Treaty did not have a deeper impact on the contributions nor lead to a greater distance between
the first and second editions. Part of the answer may be that the primary law as it stands indeed
successfully turns out to be a stabilising framework for politics—precisely as one might expect
from constitutional law.

22 Everson, above n 21, 136.
Part I
Defining the Field of European Constitutional Law
I. Aims, Theses and Premises

This book is entitled ‘Principles of European Constitutional Law’ because the study of principles is a well-established way to deepen the understanding of a legal subject. Hence, there is no dearth of exquisite commentaries, monographs and handbooks, and almost every contribution in this volume discusses principles of Union law. Wherein then lies the added value of this initial effort to present a comprehensive doctrine of foundational principles of the Union?

* Christian Wohlfahrt provided valuable assistance in the completion of this contribution; among the critics, particular thanks go to Jürgen Bast, Jochen von Bernstorff, Iris Canor, Pedro Cruz Villalón, Philipp Dann and Michelle Everson. Translated by Jenny Grote.

1 See, within the extensive literature on the still prominent perspective of common or general principles, U Bernitz and J Nergelius (eds), General Principles of European Community Law (2000); X Groussot, General Principles of Community Law (2006); T Tridimas, The General Principles of EU Law (2006); R Gosalbo Bono, ‘The Development of General Principles of Law at National and Community Level’ in R Schulze and U Seif (eds), Richterrecht und Rechtsfortbildung in der Europäischen Rechtsgemeinschaft (2003), 99. From the perspective of constitutional principles, see B Beutler, in H von der Groeben and J Schwarz (eds), Kommentar zum EU-/EG-Vertrag (2003), Art 6 EU; C Calliess, in C Calliess and M Ruffert (eds), EUV/EGV (2007), Art 6 EU; M Hilf and F Schorkopf, ‘Art 6 EU’ as well as I Pernice and FC Mayer, ‘nach Art 6 EU’, both
chapter devoted solely to principles? First, it aims to contribute to a more reflective legal scholarship exploring the dimensions, foundations and functions of principles in European legal discourse. Principles form the epicentre of a legal scholarship striving for autonomy and searching for a disciplinary proprium behind the multifariousness of norms and judgments. Principles furthermore strengthen the role of courts vis-à-vis politics. Last, but by no means least, a doctrine of constitutional principles promotes the project of a European constitutional scholarship. As both approach and project are controversial, all this raises a number of theoretical and political questions (section II).

The third, more doctrinal chapter is devoted to general questions regarding European founding principles. It analyses the diffuse use of the term ‘principle’ in Union law. With reference to a political act, the codification of Article 6(1) EU by the Amsterdam Treaty, it then defines as founding principles those norms of primary law which, in view of the need to legitimise the exercise of public authority, determine the general legitimatory foundations of the Union (section III.1). Moreover, the role of national constitutional principles in the Union’s constitutional discourse is elucidated (section III.2). This chapter finally debates the viability of a comprehensive doctrine of principles for both Union law and Community law which regards the EU Treaty and the EC Treaty as the foundations of a single and autonomous legal order (section III.3).

This contribution does not limit itself to the realm of the general but also aims to advance the understanding of individual founding principles. In contrast to most presentations of European principles, this will be done by developing the principles in their interrelatedness. The guiding thesis is that the relationship between the Union and its Member States, i.e., the federal tension, provides one, if not the, key to understanding the specifics of the Union’s constitutional principles in comparison to those of the Member States. This is why, in deliberate deviation from the usual depictions of European primary law and federal constitutional law, the founding principles of the federal relationship will be dealt with first (section IV) before the classical constitutional principles, liberté, égalité and fraternité—that is, the rule of law with fundamental rights protection, democracy and solidarity—will be developed in their supranational specificity against this background (section V).

This contribution offers a doctrinal presentation of the founding principles, their identification and interpretation, on the basis of scholarly debates, other principles, relevant norms and judgments, their context and comparative analyses. Like any other legal doctrine, this undertaking is placed in a wider theoretical and ideological context. This context includes the assumption that the Union constitutes a new form of political and legal authority. Accordingly, its founding principles should be rooted in the tradition of European constitutionalism, but at the same time should do justice to the specifics of the Union and thus concretise the sui generis character of the Union. This contribution further rests on the contested assumption that ethical, political or economic conflicts can be framed as conflicts of principles and that this can generate insight and help solve problems.2 Nota bene: a legal doctrine of principles can certainly not provide a scientific, definite solution to such conflicts. If the European primary law is conceived of not as ‘law of integration’ or ‘single market law’ but as constitutional law, hence assuming a general openness of the unional system for competing principles and

2 On this programme, see I Kant, Kritik der reinen Vernunft (2nd edn 1787 = Edition B) 355ff, esp 358.
solutions, not even a general precedence of a certain principle can be posited. However, this
does not exclude proposals for solutions by legal scholars which, by virtue of their systematic
approach and their exoneration from practical burdens, play a specific role in the pertinent
legal discourses.

This text mostly refrains from making such proposals except for one: that conflicts should
be treated and decided as conflicts of principles within Union law. The founding principles of
the Union should be regarded as an essential element of a common language of conflict
resolution. This is a basic decision pro unione.4

II. Theoretical Issues Regarding the Union’s Founding Principles

1. Founding Principles and Constitutional Scholarship

This volume deals not with European law in general, but with European primary law, and it
investigates the viability of identifying it as European constitutional law. Applying the category
of constitutional law to European primary law certainly needs to be justified, not least because
of the failure of the Treaty establishing a Constitution for Europe.5 It should, however, be noted
that constitutional interpretation remains an academic postulate that should be judged by its
analytical, constructive and advisory merits. Thus the task of a doctrine of European founding
principles is to prove the usefulness of the constitutionalist approach. The thesis is that primary
law’s constitutional character6 manifests itself especially clearly in the founding principles. Their
academic development as constitutional principles generates insight since this perspective leads
to the relevant questions, knowledge and discourses. The conception of primary law as constitu-
tional law defines it as the framework for political struggle, thematises foundations, aims at
self-assurance, and mediates between societal and legal discourses.7

At the same time, this approach pursues a strategic academic objective. The development of
European constitutional law into a sub-discipline demands a specific focus,8 just as the develop-
ment of European law9 and then European Community law10 into sub-disciplines did before.
The potential contribution of a doctrine of principles can best be explained in comparison with
an approach focused strictly on the sources of law. For the latter, the decisive criterion for
identification is whether a provision belongs to a body of law that can only be changed under
the qualified requirements of Article 48 EU.11 Accordingly, traditional portrayals of European
primary law could be presented as constitutional doctrine.12 However, a mere change of labels

4 This distinguishes the Union from international organisations: JHH Weiler, The Constitution of Europe
Archiv des öffentlichen Rechts 39; A von Bogdandy, ‘General Principles of International Public Authority’
5 See C Möllers, below chapter 5; P Kirchhof, below chapter 20.
1453, 1458.
8 A separate journal has existed since 2005, the European Constitutional Law Review (EUConst). Compare
further the approach in international law: S Kadelbach and T Kleinlein, ‘International Law a Constitution for
Mankind? An Attempt at a Re-appraisal with the Analysis of Constitutional Principles’ (2007) 50 German
Yearbook of International Law 303.
9 H Mosler, ‘Der Vertrag über die Europäische Gemeinschaft für Kohle und Stahl’ (1951–2) 14 Zeitschrift
für ausländisches öffentliches Recht und Völkerrecht 1, 23ff.
10 HP Ipsen, Europäisches Gemeinschaftsrecht (1972) 4ff.
11 H Kelsen, Allgemeine Staatslehre (1925) 252.
neglects an important concern linked to the move to constitutional law scholarship: the focus
on those provisions which constitute and legitimise the exercise of public authority.\footnote{13}
The treatment of primary law as constitutional law should bring about a new quality of under-
standing and exposition and promote the overcoming of understandings like ‘law of inte-
gration’ or ‘single market law’,\footnote{14} for a doctrine of principles not only observes, it is part of
the process of constitutionalisation. This leads to the next point.

\section*{2. Three Functions of a Legal Doctrine of Principles}

Legal doctrines of principles are in general part of discourses internal to law, ie operations of the
legal system. Such scholarship differs from approaches analysing the legal material from a social
science perspective which, for instance, trace the factual constraints or motives affecting the law.
A principles-oriented scholarship does not claim to prove causalities.\footnote{15} It does not deal with
empirical causes, but with argumentative reasons; causes and reasons relate to different
cognitive interests and structures of argumentation.

There are correlations with legal philosophy, which nowadays often argues based on
principles.\footnote{16} The relationship between the principles discourse in legal philosophy and that in
legal doctrine is as blurred as it is complicated. The difference cannot lie in the principles as
such: they always include democracy, the rule of law, fundamental rights, etc. One difference
is that a philosophical discourse on principles can proceed deductively, whereas a legal
discourse on principles has to be linked to the positive legal material made up of legal provi-
sions and judicial decisions; it is hermeneutical and refers to the law in force. A procedural
difference lies in the fact that a juridical conception of principles will eventually have to
assert itself in judicial proceedings. Moreover, important as it is that the principles
constructed by legal scholarship reflect their possible philosophical bases, it is equally
essential that, in pluralistic societies, legal principles maintain some distance from philo-
sophical and ideological discourses in order to provide common ‘projection screens’ for
divergent constructs, thereby furthering social integration. Philosophical considerations are
inappropriate in court judgments.

\subsection*{a) Doctrinal Constructivism}

A first doctrinal thrust of constitutional scholarship aims at identifying the principles inherent in
the positive legal material, thus to organise the latter and to further the coherence of the consti-
tutional material on this basis.\footnote{17} Coherence is less than analytic truth secured by logical
deduction but more than a mere lack of contradiction.\footnote{18} The criterion of coherence demands a
modelling that is sometimes described, with somewhat essentialistic enthusiasm, as a ‘grand

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\begin{itemize}
  \item F Snyder, ‘The Unfinished Constitution of the European Union’ in JHH Weiler and M Wind (eds), \textit{European Constitutionalism Beyond the State} (2003), 55, 58.
  \item Broader the meaning of the sociological term whereby principles encompass empiric, causal and normative axioms: SD Krasner, ‘Structural Causes and Regime Consequences’ (1982) 36 \textit{International Organization} 185, 186.
  \item Dann, above n 7, 183ff.
  \item Habermas, above n 16, 211.
\end{itemize}
structural plan’. The European Court of Justice (ECJ) makes use of this approach in important decisions when it refers to the ‘spirit’ or the ‘nature’ of the Treaties. The Supreme Court of Canada has formulated this understanding in an exemplary fashion:

The constitution is more than a written text. It embraces the entire global system of rules and principles which govern the exercise of constitutional authority. A superficial reading of selected provisions of the written constitutional enactment, without more, may be misleading. It is necessary to make a more profound investigation of the underlying principles animating the whole of the Constitution . . . Those principles must inform our overall appreciation of the constitutional rights and obligations . . .

Certainly, the assumption of a ‘grand structural plan’ is as problematic from an epistemological and argumentative viewpoint as are statements on the ‘spirit’ or ‘nature’ of a legal order. Nevertheless, the truth is that an idea of the whole is indispensable, and this contribution aims at conveying such an idea via a synopsis of founding principles. The respective role of legal scholarship can be labelled ‘doctrinal constructivism’.

Given the scepticism towards doctrine in the Anglo-Saxon world, this approach shall be briefly sketched. Initially, i.e., in the late nineteenth and early twentieth centuries, the agenda of doctrinal constructivism aimed primarily at structuring the law using autonomous concepts, following the legal-conceptual (begriffsjuristisch) stream of Friedrich Savigny’s historical school of law. The positive legal material is being transcended, not by way of political, historical or philosophical reflection, but through structure-giving concepts such as ‘state’, ‘sovereignty’ or ‘individual rights in public law’, which are conceived of as specifically legal and thus autonomous, and as a consequence fall under the exclusive competence of legal scholarship. The highest scientific goal of the doctrinal construction is to reconstruct and represent both public and private law as complexes of systematically co-ordinated concepts. At the heart of these efforts lies the creation of an autonomous area of discourse and argumentation, a sort of middle level between natural law, which is primarily within the competence of philosophy and theology, and the concrete provisions of positive law, which are in the direct grasp of politics and the courts.

In the course of the formation of substantive constitutional law and of the post-positivistic development of the original programme, constitutional principles have increasingly assumed the role of these autonomous concepts.

For the programme of a holistic legal scholarship, i.e., a ‘system’ or an ‘overarching conception’, founding principles in European law are of particular importance, since a legal-conceptual approach has hardly developed beyond an organise exegesis of the ECJ, not

23 For more detail, see F Müller and R Christensen, Juristische Methodik: Bd II. Europarecht (2007) paras 349ff.
25 JH von Kirchmann, Die Wertlosigkeit der Jurisprudenz als Wissenschaft (1848, reprint 1990) 29, thus justifies the uselessness of jurisprudence as a science.
26 From the perspective of classic positivism, this is of course a story of decline, as concisely presented by N Luhmann, Das Recht der Gesellschaft (1993) 521ff. Further concretion is achieved through so-called ‘legal artefacts’, typical for instance subjective rights or property; for more detail, see U Mager, Einrichtungsgarantien (2003) in particular 21ff and 98ff. These concepts are quite independent from positive law; however, they can hardly be found in the law of the European Union. This demonstrates the operational weakness of the doctrine of European Union law, but see T Kingreen, below chapter 14.
At least due to the sometimes tumultuous development of primary law. Nevertheless, the founding principles did not play this role from the outset: in the beginning of the integration, the Treaties’ objectives were at the centre of efforts to develop an ‘overarching conception’. In the course of the multiplication of these objectives, however, this approach lost its persuasiveness, which is confirmed by the envisaged abolition of the specific goals of Articles 2ff EC by the Lisbon Treaty (Article 3 TEU-Lis). A principle-oriented approach seems a useful alternative.

The doctrinal constructivist endeavour appears to be particularly pressing with regard to European primary law. Its qualification as ‘constitutional chaos’ is probably its best-known description. Of course the Treaty of Lisbon achieves a certain degree of systematisation, but it does not render futile academic efforts. Moreover, this principle-oriented scholarship does not only deal with primary law. The process of constitutionalisation requires that the constitution ‘permeate’ all legal relationships. A respective constitutional arrangement of the secondary law material demands a doctrinal constructivism for which, as the national examples show, constitutional principles and in particular single fundamental rights are indispensable. Numerous secondary law instruments call specifically for this as they are to be interpreted in the light of founding principles, especially single fundamental rights, according to their recitals. Accordingly, the ECJ uses the conformity with primary law as a method of interpretation. The Charter of Fundamental Rights confirms this constitutionalisation, conveying a constitutional dimension to numerous interests.

All this requires a sustainable concept of doctrinal constructivism. A doctrinal construct can only propose one, but not the, system of positive law. In the past, a system was often crypto-idealistically believed to be inherent in the law and was sometimes dogmatically advanced as the single truth. This academic programme has been characterised as undemocratic or elitist; this criticism needs to be accommodated. In the light of this criticism, contemporary endeavours should be directed towards the more humble goal of proposing the means to arrange the legal material and develop the law. Hardly any legal scholar still maintains today that doctrinal constructs reflect a pre-stabilised logical unity of the primary law or the one philosophy of integration of the Treaties. A constitutional doctrine must furthermore be aware of the danger of over-determining the political process. An awareness for the limits of the academic claim to truth is especially necessary for constructions based on principles, due to the openness of the stock of principles in general, to the semantic openness of single principles and to the openness of which principle prevails in cases of conflict. Similarly reduced are the expectations as to what a system can concretely accomplish in the operation of the law. Moreover, a doctrine of principles as the result of doctrinal construction cannot be identical with legal practice. This is no insufficiency but rather proof of the critical content of a doctrinal construction. The project of critical legal scholarship can be pursued with doctrinal instruments.

29 GFW Hegel, Rechtsphilosophie (1821; edited by Moldenhauer and Michel from 1970) § 274.
32 Concerning discourses of application, see K Günther, Der Sinn für Angemessenheit (1988) 300.
b) The Role of Legal Doctrine for Legal Practice

In the above-quoted statement by the Supreme Court of Canada, principles not only generate insight through ordering but also supply arguments for a creative application of the law. This practical orientation is an additional feature of doctrines of principles, legal scholarship being a primarily practical (social) science according to the prevailing opinion. Principles have diverse functions in the application of the law.

Oftentimes, principles increase the number of arguments which can be employed to debate the legality of a certain act. In this function, they can be described as legal principles, which transcend structural principles. By enlarging the argumentative budget of the legal profession, principles strengthen its autonomy vis-à-vis the legislative political institutions. This happens mostly via a principle-oriented interpretation of a relevant norm, be it of primary or secondary law. By employing principles, the onus of demonstration is often placed on the person arguing against the principle. Sometimes, however, the ECJ oversimplifies things: by merely characterising a provision as a principle it occasionally attempts to justify its wide interpretation and the narrow interpretation of a contradictory norm. This is not convincing methodically; further arguments are necessary. At times, a principle even becomes a legality standard of its own. A doctrine of principles must examine the relevant patterns of argumentation and develop general aspects and new understandings. The wide range of application of principles and their validity in different legal orders, for instance, allows for the generalisation of innovative local strategies to concretise principles. Yet at the same time, legal scholarship should highlight the costs of such an autonomisation, for example in light of the principle of democracy.

Finally, it should be noted that a legal doctrine of principles is usually unable to fulfil one function: to delimit right and wrong in a concrete case. This already results from the general vagueness of principles, the conflict usually arising when different principles are applied to concrete facts is another reason. The solution to a conflict of principles cannot be determined either scientifically or legally, it can only be structured.

c) Maintenance and Development of a ‘Legal Infrastructure’

The constructive and the practical element converge in a function of doctrinal constructivism that can be labelled as ‘maintenance of the law as social infrastructure’. First of all, this refers to the creation and safeguarding of legal transparency, which is of particular importance in the Union’s fragmented legal order. Furthermore, the ‘infrastructure maintenance’ function of legal scholarship is not static but demands participation in the development of the law to keep it in
line with changing social relationships, interests and beliefs. In this respect, principles can fulfil the function of ‘gateways’ through which the legal order is attached to the broader public discourse. This attachment is of particular importance for the Union’s primary law given the ponderousness of the procedure of Article 48 EU. For this reason, too, doctrinal work should not be restricted to the analysis of the positive law but also aim at further developing the law.\(^{40}\)

Constitutional principles enable an internal critique of the positive law, the pronouncement of which is a core function of constitutional law scholarship and which aims at the development of the positive law, be it via the jurisprudential or the political process. They promote the transparency of legal argumentation, are gateways for new convictions and interests, and can be agents of universal reason against local rationalities. This criticism differs from general political criticism since it is phrased in legal terms, is closely connected to the previous operation of the law and can thus be absorbed by the law more easily. Title I of the EU Treaty in its current as well as in the Lisbon version calls for such a critique due to its manifesto character.

3. Perspectives of Legal and Integration Policy

Principles enable an autonomous legal discourse, strengthen the autonomy of courts vis-à-vis politics and allow for an internal development of the law which circumvents Article 48 EU. Is this acceptable in light of the principle of democracy? The answer to this question has to distinguish between jurisprudence and legal scholarship. For the latter, it needs to be kept in mind that doctrinal constructions are not a source of law but are only of a persuasive nature. Moreover, legal scholarship can invoke academic freedom.\(^{41}\) Thus far, Max Weber’s insight that only a conceptualised and thus rationalised legal order can adequately structure social and political processes in complex societies has not been refuted. From this follows a functional legitimisation of this academic approach.\(^{42}\) Nevertheless, legal scholarship should not be blind to the possible consequences of its constructions. Particular attention needs to be paid to the problématique of the development of the law through judicial practice, courts being the most important addressees of doctrinal constructivism.

Regarding the use of principles by courts, it needs to be noted that all contemporary law is positive law. Positivity implies the domain of politically responsible bodies;\(^{43}\) the law is made by the legislator or—in common law systems or other cases of judicial development of the law—is under his responsibility; the legislature can correct a legal situation resulting from judicial development of the law.\(^{44}\) The judicial development of a body of law which can only be modified by the legislator under qualified requirements is thus critical and a standard topic of constitutional scholarship.\(^{45}\) However, it is generally recognised that some judicial development of the law flows from and is justified by the assignment given to courts to adjudicate; it is

\(^{40}\) On the evolution of Art 230(4) EC in the light of the rule of law, see J Bast, below chapter 10.

\(^{41}\) Compared to the German Basic Law (Grundgesetz), its protection on the European level is not as far-reaching: J-C Galloix, in L Burgorgue-Larsen et al (eds), \textit{Traité établissant une Constitution pour l’Europe} (2005) vol II, Art II-73 para 12.


\(^{44}\) Concerning common law, see P Atiyah and R Summers, \textit{Form and Substance in Anglo-American Law} (1991) 141ff.

\(^{45}\) A Bickel, \textit{The Least Dangerous Branch} (1962); for a comparative view, see U Haltern, \textit{Verfassungsgerichtsbarkeit, Demokratie und Misstrauen} (1998); on the ECJ from an internal perspective, see K-D Borchardt, ‘Richterrecht durch den Gerichtshof der Europäischen Gemeinschaften’ in A Randelzhofer et al (eds), \textit{Gedächtnisschrift für Professor Dr Eberhard Grabitz} (1995), 29.
mostly its limits which are being debated. Accordingly, the ECJ outlines its competence to develop the law with respect to the treaty amendment procedure. Sections III and IV of this contribution will illustrate a distinctive logic as to the demarcation of the areas in which principles can be used to judicially develop the law and those where this is not the case.

Another argument for the legal conceptualisation of political and social conflicts as conflicts of principles is that this may lead to their channelling and perhaps even rationalisation. Moreover, principles can play a supporting role for democratic discourses. In addition, a judicial decision which employs the balancing of principles is more intelligible for most citizens than a ‘legal-technical’ reasoning phrased in hermetic language that obscures the valuations of the court. To devise legal controversies as conflicts of principles allows for a politicisation which should be welcomed in light of the principle of democracy, since it promotes the public discourse on judicial decisions.

Principles such as primacy and direct effect form the key to the constitutionalisation of Community law. If the discussion on founding and constitutional principles is nevertheless a rather recent phenomenon, this is to be explained by the history of integration. The path to integration has not been constitutional, but rather functional. The objectives were determined by the Treaties with sufficient clarity, allowing the European discourse to unfold in a pragmatic and administrative manner, unburdened by politic–ethical arguments. This orientation decisively influenced the jurisprudential construction. The federal conception failed to gain a larger following in legal scholarship; economic law approaches and administrative law approaches were much more successful—at least in Germany. The ECJ only slowly developed principles limiting the power of the Community. As late as 1986, Pierre Pescatore ascertained that although the principles of proportionality, good administration, legal certainty, the protection of fundamental rights or defence rights existed, they amounted to ‘peu de chose’, ‘où on peut mettre tout et son contraire’. This was to change profoundly. Due to the single market programme and the Maastricht Treaty, the debate about European founding and constitutional principles unfolded quickly. It resulted in Article 6 EU of the Amsterdam Treaty of 1997, which forms the most important positive basis of European founding principles.

Lastly, the role of a doctrine of principles in promoting a common understanding of the Union among its citizens and the formation of a European background consensus on the operation of the European institutions should be pointed out. Certainly, a doctrine of principles developed by legal scholarship cannot directly trigger the creation of an identity for broad parts of the population. Yet it can be understood as a part of a public discourse through which the European citizenry ascertains the foundations of its polity.

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46 On judicial development of the law by the ECJ, see Entscheidungen des Bundesverfassungsgerichts 75, 223, 243 (Kloppenburg).
47 However, for exactly those cases where the denial of a proposed judicial development of the law seemed to suit the court well, see Opinion 2/94, ECHR [1996] ECR I-1759, para 30 and Case C-50/00 P, above n 33, para 44; Case C-263/02 P, Commission v Jégo-Quéré [2004] ECR I-3425, para 36; for more detail, see Bast, below chapter 10.
50 For more detail, see S Oeter, below chapter 2.
51 On the different formations of discourses, see Habermas, above n 16, 159ff.
52 P Pescatore, Le droit de l’intégration (1972) 70ff; H Lecheler, Der Europäische Gerichtshof und die allgemeinen Rechtsgrundsätze (1971).
In this discourse on the politics of integration, principles can assume an ideological function. A depiction of the Union in the light of principles certainly has such a potential. The Treaty of Lisbon is problematic in this respect as it presents the founding principles of the EU as ‘values’ and thus as an expression of the ethical convictions of the Union citizens (Article 2 TEU-Lis). A legal doctrine of principles should be based on a better foundation than sociological assumptions regarding normative dispositions of the Union citizens and should indicate the difference between law and ethics, a dividing line essential in light of the freedom principle. Value discourses can easily acquire a paternalistic dimension.

III. General Issues of a European Doctrine of Principles

1. The Subject Matter

a) Principles in European Law

The authors of the Treaties like the term ‘principle’: it is employed remarkably frequently in most language versions. The English and French versions of the EU Treaty currently use it 22 times, those of the EC Treaty 48 times—and the Treaty of Lisbon 98 times. The Charter of Fundamental Rights employs the word principle 14 times in its English and French versions. The context in which this term is used ranges from the principle of democracy (Article 6 EU) to the principles of national social security systems (Article 137(4) EC); some principles are even to be laid down by the Council (Article 202 EC). In the German version, the word principle appears far less frequently, only three times in the EU Treaty and four times in the EC Treaty, mostly in connection with the subsidiarity principle. This atrophy of principles in the German version is due to the fact that, instead of the English principle or the French principe, the German word Grundsatz is being used; this also holds true for the German version of the Charter of Fundamental Rights.

The use of the word principle in the Treaty text has an attributive character. The treaty-maker thus assigns enhanced significance to the relevant element or even to whole provisions and provides orientation to the reader in a text which is difficult to penetrate. At the same time, a principle usually lays down general requirements, eg in Article 6(1) EU or 71(2) EC. The notion characterised as principle shall make statements on a whole, insofar as having a reflexive connotation. Furthermore, the treaty-maker often identifies as principles elements of a provision with a rather vague content, as even the principles for single topics such as those of Article 174(2) EC or 274 EC show.

In his influential theory, Alexy distinguishes between principles and rules and characterises the former as being optimisation commands which are subject to balancing. This may be the reason why the Legal Service of the Council identifies the primacy of Community law in the German version as a ‘fundamental pillar’ in order to render it immune to balancing, whereas

the English version uses the term ‘cornerstone principle’. However, the categorical differentia-
tion between rules and principles underlying this theory is not altogether convincing and will not be used in this contribution to characterise principles.

The qualification as principle per se does not trigger specific legal consequences. This can be demonstrated especially clearly by comparing Articles 23 and 52(5) of the EU Charter of Fundamental Rights. The equality imperative of Article 23 of the Charter is an enforceable principle of Community law. Article 52(5) of the Charter, on the other hand, explicitly distinguishes between enforceable rights and principles. The presumption of a missing overarching conception of the authors of the Treaty is confirmed by the rather fortuitous assignment of attributes such as guiding (Article 4(3) EC), existing (Article 47(2) EC), basic (Article 67(5) EC), uniform (Article 133(1) EC), fundamental (Article 137(4) EC), general (Article 288(2) EC) or essential (Article 2 of the Protocol on the Financial Consequences of the Expiry of the Treaty Establishing the European Coal and Steel Community and on the Research Fund for Coal and Steel). One has to analyse individually for every single use of the word principle what legal consequences are attached to the norm, especially with regard to legal remedies and judicial review.

The word principle denotes a term not only of positive EU law but also of jurisprudential analysis. As explained in section II.2, it is indispensable for the fulfilment of the tasks of legal scholarship. Nevertheless it is debatable what exactly a ‘principle’ is; behind the term stand competing concepts of law. This is rightly so since the definition of a jurisprudential term is not about truth but about expediency in view of the scientific objective. This brings us to the founding principles.

b) The Union’s Founding Principles and Their Constitutional Character

This contribution uses ‘founding principle’ as a term of legal scholarship in order to identify and interpret, in the tradition of constitutionalism, those norms of primary law having a normative founding function for the whole of the Union’s legal order; they determine the relevant legitimatory foundations in view of the need to justify the exercise of public authority. ‘Founding’ principles express an overarching normative frame of reference for all primary law, indeed for the whole of the Union’s legal order. This conception of founding principles does not capture all norms or elements of norms labelled ‘principle’ in the Treaties or by the ECJ, but only a few provisions which are also called founding principles or structuring principles in national constitutions.

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65 On the term principe fondateur, see Molinier, above n 1, 24; similarly Dworkin, above n 16, 22.

It is useful to understand the founding principles as constitutional principles and to deal with them Accordingly. The Union became a political Union in the 1990s. After long debates, in 1997 the authors of the Treaty founded the Union on ‘the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law’ and thus on the core programme of liberal-democratic constitutionalism. This implies a decision for constitutional semantics which is now to be elaborated by constitutional doctrine. The normative content of the indicative mode ‘is founded’ in Article 6(1) EU and corresponds to that of the indicative mode ‘is’ in Article 20(1) of the German Basic Law (Grundgesetz), which also lays down founding principles whose normativity is beyond question.

A comparison with Article F of the EU Treaty in its Maastricht version illustrates the significance of the political decision of 1997. Article F is still formulated entirely from a limiting perspective underlying Article 6(2) EU: the Article commits the Union to general principles of law which have no constitutive function but only a restrictive one. In 1997 the treaty-maker then laid down the normative core contents on which the EU is founded in Article 6(1) EU. In this respect, the constitutional content of Article 6(1) EU exceeds by far the constitutional dimension of the Maastricht Treaty. Now not only a restrictive, but also a constitutive European constitutionalism has found its recognition in positive law. The legal approach pursued here with its substantive notion of what a founding principle is spells out the political decision voiced in the Amsterdam Treaty that a European political Union is to be founded on the postulates of liberal-democratic constitutionalism.

Founding principles are thus the principles laid down in Article 6(1) EU as well as the other principles located in Title I EU regarding the allocation of competences, loyal co-operation and structural compatibility. This approach is confirmed by Title I TEU-Lis with regard to the founding principles of the federal relationship between the Union and its Member States. Other principles of primary law do not belong to these overarching founding principles but serve to concretise them and thus derive constitutional content from them.

The tenets laid down in Article 2 TEU-Lis, although denoted as ‘values’, are to be understood as legal norms and principles, as founding principles. Usually, principles are distinguished from values, the latter being fundamental ethical convictions whereas the former are legal norms. Since the ‘values’ of Article 2 TEU-Lis have been agreed upon in the procedure of Article 48 EU and produce legal consequences (eg Articles 3(1), 7, 49 TEU-Lis), they are legal norms, and since they are overarching and constitutive, they are founding principles. The use of the term ‘value’ in Article 2 TEU-Lis instead of ‘principle’, together with the obscure normative function of the second sentence of this article as well as the differences between the diverse formulations of the posited values, illustrates the remaining uncertainties concerning the identification of European founding principles.

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67 The ECJ too speaks of constitutional principles of the EC Treaty: Cases C-402/05 P and C-415/05 P; above n 33, para 285. Cf on this the reflections in the introduction.
68 See U Everling, below chapter 19; Oeter, below chapter 2.
70 Art 6(1) EU is slowly becoming operative; on the principle-orientated interpretation of primary law, see Cases C-402/05 P and C-415/05 P; above n 33, para 303.
71 Molinier, above n 1, 29; cf the principles discussed by Tridimas and Groussot (both above n 1).
72 On the distinction between power-shaping and order-founding constitutionalism, see Möllers, below chapter 5.
73 For more detail, see below, section IV.1.
74 On the difficulty related to the concept of ‘values’, see above section II.3.
75 Compare the third recital of the preamble to the EU Treaty and Art 6(1) EU with Art 2 TEU-Lis and the second recital to the preamble to the EU Charter for Fundamental Rights.
Due to its analytical nature, the qualification of a norm as a founding principle does not mean that other understandings would be excluded. There are formidable analyses of the same principles, eg as administrative principles. The constitutional and the administrative approach overlap with regard to supranational public law. One may ask why this study legally qualifies the founding principles as constitutional principles but does not designate them as such. First, this is in line with the judicature: until recently, the ECJ has used the term ‘constitutional principle’ only for constitutional norms of the Member States. In the Kadi decision, the term ‘constitutional principle’ figures prominently also with regard to Community law, underlining the innovative force of this judgment. More common so far, however, is the denomination as founding principle. But most of all, to employ the wide term of constitutional principle for the principles presented here as founding principles would challenge the constitutional character of other principles of primary law, something which is not the aim of this contribution.

In Union law, a distinction must be made between principles, in particular founding principles, and objectives. The Union ‘is founded’ on principles (Article 6(1) EU), and principles limit the actions of the Member States and the Union. Objectives, on the other hand, stipulate the intended effects in social reality. The conjunction of objectives and principles as, for example, in Article 3(1) TEU-Lis does not undermine this distinction. The separation of objectives of integration and constitutional principles is also suggested by the shortcomings of the functionalist approach to European integration.

c) Principles of Public International Law

International public law scholarship operates with the term ‘constitutional principle’, too, and the question arises whether general principles of public international law or principles of individual treaties, in particular the UN Charter, the Human Rights Covenants or the WTO Agreement, must be included in an analysis of the Union’s founding principles. Article 3(5) TEU-Lis can be understood in this sense, and already now international Treaties stand above the derived law according to Article 300(7) EC; this also applies to general principles of international law.

However, a closer analysis of the jurisprudence shows that, with the exception of the provisions of the European Convention on Human Rights (ECHR), norms of international law do not play a decisive role for the exercise of public authority by the Union; consequently, they will not be addressed in this contribution. This basic decision is already expressed in the Costa v ENEL judgment: while the van Gend judgment characterised the Community law as ‘a new legal order of international law’, ever since Costa the ECJ only speaks of a ‘new legal order of international law’.

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78 Cases C-402/05 P and C-415/05 P above n 33, para 285.
80 See above section II.3.
81 Kadelbach and Kleinlein, above n 8.
83 See below, section V.2 and 4. Note the refusal of direct effect concerning the UN Convention on the Law of the Sea in Case C-308/06 Intertanko [2008] ECR I-4057, paras 42ff; on this, see also R Uerpmann-Wittrak, below chapter 4.
The prevailing understanding of European constitutionalism does not conceive of it as a sub-category of an overarching international constitutionalism.

2. On the Role of Constitutional Principles of the Member States

According to the concept of autonomy of Union law, this study examines only the European Union’s founding principles. However, this focus must not neglect their legal context, consisting in particular of the Member States’ constitutions. The constitutional law of the Union can be understood as a partial constitution or as a complementary constitution that, together with the Member States’ constitutions, forms the European constitutional area. In terms of positive Union law, this interconnectedness and the legal relevance of the Member States’ constitutions results, for instance, from Articles 48(3) and 6(2) EU, or from Articles 4(2) and 6(3) TEU-Lis. Furthermore, principles of the Member States, eg in the form of Article 23(1) German Basic Law, support those of the Union. Some even maintain that the constitutional substance of the European constitutional area lies in the national integration clauses.

A key question for a European doctrine of principles (and indeed for the whole of European constitutional law) is to what extent and with what provisos the relevant national scholarship can be used in order to develop the supranational principles. Some deny the possibility of such recourse by claiming that the new form of governance requires ‘unprecedented thinking’. Yet this demand clashes with the practice, perhaps even with the very nature of legal thinking, which, at its heart, is comparative and dependent on the repertoire of established doctrines of viable institutions.

Nor is it necessary to renounce any such comparison since there is sufficient similarity between the supranational and the national legal orders. The Union’s and Member States’ constitutions confront the same central problem: the phenomenon of one-sided public power as the heart of every constitutional order. Public authorities of the Union as well as of the Member States can limit a citizen without his or her consent. This one-sidedness, which collides with the central tenet of modern Europe, individual freedom, is the central problem of contemporary constitutional law. The Union’s as well as the national constitutional law deals first and foremost with the constitution, organisation and limitation of this problematic one-sidedness. Most, if not all, constitutional principles are eventually concerned with this problem. In view of this identity of issues, there is a sufficient degree of similarity to justify transferring the insights from the one order to the other.

84 Recent examples are Cases C-402/05 P and C-415/05 P, above n 33, para 316.
87 For more detail, see especially C Grabenwarter, below chapter 3.
Nevertheless, a simple transfer of concepts and insights from the national context in many instances will not be adequate for the issues that arise in the EU context. The transfer of constitutional concepts of one single Member State is prevented by the principle enshrined in Article 6(3) EU (Article 4(2) TEU-Lis), namely the equality of the 27 national constitutions. However, the search for a common European denominator of national concepts can also only constitute a part of the solution. This is due, on the one hand, to the fact that the Member States' constitutions diverge considerably, and it is quite improbable that coherent answers could be found in response to a concrete question.  

Moreover, every analogy and transfer must reflect the fact that the Union is not a state, but rather a new form of political and legal order. The constitutional principles must reflect this. A doctrine of European principles must therefore free the legal concepts constituting, organising and limiting the exercise of public authority from their national fixation and extrapolate their contents relating to European constitutionalism with a view to the Union. The insight that the Union is not a state (and shall probably not become one) only prompts this extrapolation but does not prescribe any particular direction. The concretisation of the ‘sui generis’ nature of the Union depends on this development; this constitutes a special challenge for a doctrine of principles. Parts IV and V of this chapter should be read in this sense.

It is important for the understanding of founding principles to bear in mind that the constitutional law of the Union and of the Member States differ in that national constitutional law rests on a far greater degree of political unity than does Union constitutional law, both conceptually and practically. Certainly, there is political unity in the Union insofar as peace has legal status and there exists a common political organisation whose prescriptions are generally followed even in the case of majority decisions. The notion of political unity, however, comprehends further aspects that are rarely found at the European level. Thus, the exercise of power by the Union can hardly be interpreted as the will or self-governance of a democratic sovereign. Also, the referenda of the last few years have clearly illustrated the limits of European political unity. The great importance of consensual and contractual elements in the relations between various public authorities and the prominence of the Member States and their peoples must decisively shape the understanding and concretisation of the founding principles. The ‘sui generis’ nature of the founding principles is based on the fact that the Member States of the Union are mostly developed nation states who are aware of their identity and who, although advocating a European polity, do not want to mutate into subordinated regional authorities in a European federal state. This understanding is especially clear in the first normative enunciation of the EU Treaty in its Lisbon version (Article 1(1) TEU-Lis).

The Member States’ constitutional principles are relevant for a discourse on principles of the Union in two respects in particular: first, the national principles raise questions the answers to which must be found at the EU level; and secondly, the national doctrines of principles in their diversity offer a plethora of possible understandings that are potentially useful for the development and concretisation of the Union’s principles. Hence, the constitutional principles of the Member States fulfil an important discursive function. Nevertheless, the discourse should not be limited hereupon: the constitutional law of complex federations such as the United States and Canada also provides valuable stimuli.
3. Uniform Founding Principles in View of Heterogeneous Primary Law

The principles set forth in Title I EU are valid for the whole of Union law, ie the European Union Treaty and the Community Treaties. Although this will be unquestionable under Article 2 TEU-Lis, it is doubted under current law, in particular with reference to the so-called ‘pillar structure’ of the Treaties (EC Treaty, Title V and Title VI EU). In fact, Titles V and VI of the EU Treaty do not correspond in every respect to the so-called community method, including supranationality, direct effect and comprehensive European judicial review. The special rules are an expression of important compromises in the context of the treaty-making process that need to be taken seriously by legal scholarship. According to some scholars, however, the European Union does not even exercise public authority. They maintain that, ‘in reality’, the Member States and not the Union’s organs operate under Title V and VI EU. Accordingly, a categorical differentiation would have to be made between Community law and the law of the Union. Acts of the Council under Title V and VI EU, such as framework decisions, would not be acts of the EU, but international agreements between the Member States. An overarching doctrine of principles would thus be rather nugatory.

There are, however, good reasons for conceiving the Union as one body of public authority and the law of the EU Treaty and that of the Community Treaties as a single legal order, delimiting it from the legal orders of the Member States on the one hand and from international law on the other. First of all, the organisational fusion should be pointed out: since 1994, it has always been the Council of the European Union that is named as the legislative organ in the legal acts under Title V and VI EU, never the Member States. Moreover, this unity has been explicitly mandated for the founding principle of fundamental rights protection (Article 46(d) EU) and can furthermore be based on provisions such as Article 1 or Articles 48ff EU. Seen in this light, it is only consistent that the ECJ expands the scope of Community law principles to cover legal acts under Titles V and VI EU.

The assumption of legal unity of the Union law can also be justified through the principle of coherence, which itself is based on the principle of equality. It constitutes the vanishing point for academic system- and thus unity-building, and enables a critique inherent in the law of diverging logics of regulation and lines of jurisprudence. It finds its positive foundations in the equality principle (Article 20 of the Charter) and provisions such as Articles 3(1) EU and 225(2) and (3) EC.

Coherence is no principle with general primacy; there may be good reasons for divergence. Assuming the legal unity of the Union’s legal order does not amount to maintaining that the positive constitutional law, or even the jurisprudence relating to it, forms a harmonious whole. The assumption of a legal order of the Union which includes Community law as its

99 A Haratsch, C König and M Pechstein, Europarecht (2006) paras 79, 83; in this direction, see also Entscheidungen des Bundesverfassungsgerichts 113, 273, 301 (European Arrest Warrant).
100 M Pechstein, in R Streinz (ed), EU/EGV (2003), Art 6 EU, para 2ff.
101 Concerning the uniformity of standards, see Case C-303/05 Advocaten voor de Wereld (European Arrest Warrant) [2007] ECR I-3633, para 45.
104 For more detail, see F Chirico and P Larouche, ‘Conceptual Divergence, Functionalism, and the Economics of Convergence’ in Prechal and van Roermund (eds), above n 103, 463.
main part thus does not deny the fact that a number of legal instruments of Community law can only be applied with restrictions under Titles V and VI EU, if at all. The general assertion is that Community law principles can be applied if this is compatible with the specific rules of the EU Treaty. Although the Treaty of Lisbon offers considerable progress regarding systematisation and reduces this fragmentation, it does not overcome it, as the Protocol on the application of the Charter of Fundamental Rights to Poland and to the United Kingdom illustrates.

Even under the premise of a uniform validity of the founding principles, the question arises whether this corresponds to a uniform meaning in the various areas of Union law. For instance, the dual structure for democratic legitimation through the Council and Parliament only exists under the competences of the EC Treaty, and judicial review by the ECJ, paramount for the rule of law principle, is limited or even precluded in important domains.

This gives rise to doubts about the usefulness of an overarching doctrine of principles. It might even nurture the suspicion that a doctrine of principles is not the product of scholarly insight but, rather, a policy instrument for more integration and federalism. Yet these doubts and suspicions are unfounded. As the principles set forth in Article 6 EU (Article 2 TEU-Lis) apply to all areas of Union law, an overarching doctrine of principles built thereupon encompassing the entire primary law is a logical consequence. Article 6 EU essentially requires expansion into a general doctrine of principles. Article 6(1) EU declares that the Union is ‘founded’ on these principles; this contains an ambitious normative programme. The EU Treaty can therefore even be interpreted as a constitution stipulating criteria for the detection of deficits and guidelines to overcome them.

An overarching doctrine of principles is thus possible. This basic objection being defeated, it might nevertheless appear problematic, in view of the fragmentation within primary law, to determine which provisions may be understood as concretising abstract principles. Theoretically, both the co-decision procedure under Article 251 EC and the Council’s autonomous decision-making competence under the requirement of unanimity can be understood as realisations of the principle of democracy. This contribution, however, maintains that the supranational standard case, also called the Community method, can justifiably be used for the development of a doctrine of Union principles. The Treaty of Lisbon confirms this thesis with the introduction of an ‘ordinary legislative procedure’ in Article 289 of the Treaty on the Functioning of the European Union (TFEU).

An understanding in the tradition of European constitutionalism as advocated here will strive to expand the idea underlying the EU Treaty in its Lisbon version of a representative constitution with separation of powers and fundamental rights protection to all areas and protocols. It will not, however, strive to expand the competences of the Union at the expense of the Member States or to override specific rules. An overarching doctrine of principles must

105 For more detail, see Everling, below chapter 19.
108 A similar concern can be found in Art 23(1) German Basic Law, which secures the structural integrity.
111 In this direction, see Case C-133/06 Parliament v Council [2008] ECR I-3189, para 63, concerning the new differentiation between parliamentary (co-)legislation and bare law-making. K Lenaerts is pathbreaking: see, eg Sénat et Chambre des représentants de Belgique (eds), Les finalités de l’Union européenne (2001), 14, 15.
not downplay sectoral rules which follow different rationales. To do otherwise would infringe upon an important founding principle: Article 6(3) EU in conjunction with Article 48 EU clearly shows that the essential constitutional dynamics are to remain under the control of the respective national parliaments. An argumentation based on principles uncoupled from the concrete provisions of the Treaties would misunderstand essential elements of the Union’s constitutional law: the EU Constitution is a constitution of details; this corresponds to the heterogeneity of its political and social basis. The plethora of details expresses this diversity, but also the Member States’ mistrust and desire for control.

IV. On the Relationship between the Union and its Member States

1. The Creation of Unity under the Rule of Law Principle

a) Rule of Law and Supranational Law

Among the founding principles of Article 6(1) EU, the rule of law principle has the greatest operative relevance for the law of the Union. In accordance with the guiding thesis of this contribution, namely that the Union’s founding principles can best be explained from the perspective of the relationship between the Union and the Member States, the rule of law principle will be now developed in this vein. The corresponding presentation will exhibit both continuity and innovation vis-à-vis national constitutional thinking, and will shed new—constitutional—light on the *acquis communautaire*.

Unity is constitutive for diversity. Consequently, principles advancing unity were the first to develop in the process of integration. In a constitutionalist reconstruction, the rule of law appears to be the most important principle promoting unity. It was the first classical constitutional principle to be claimed for Community law. Joseph H Kaiser declared programmatically in 1964 that the creation of a European state based on the rule of law is the ‘task of our time’. Most legal systems subsume the pertinent elements under a term equal or similar to *Rechtsstaatlichkeit* or *l’état de droit*; almost all language versions of the EU Treaty similarly use terminology linked to the state. This terminology is misleading, due to the inclusion of the element of statehood. It seems more accurate to use the term ‘rule of law’ (*prééminence du droit* or *Herrschaft des Rechts*).

The rule of law is fundamental for the trajectory taken by integration. It constitutes a *differenta specifica* in view of international law. The rule of law principle allows for a constitutional interpretation of the ECJ’s jurisprudence that since the early 1960s has aimed at the juridification of the integration process and the autonomisation of European law from political and administrative actors. As a principle, it has a ‘life of its own’, and has supported...
far-reaching developments of the law which have transformed\textsuperscript{119} and constitutionalised\textsuperscript{120} Europe. Obviously, the competent European judges, as well as national judges, are of the opinion that they are mandated to juridify the integration even in the absence of clear legal parameters. Against this understanding of the rule of law principle may be raised the objection that the ECJ very rarely uses the term ‘rule of law’ in the sense of \textit{Rechtsstaat}; it has been employed only recently in just a few judgments.\textsuperscript{121} A search with EUR-Lex only yields 16 results for rule of law as \textit{Rechtsstaat}.\textsuperscript{122} The same holds true for community of law or \textit{Rechtsgemeinschaft}, the famous notion created by Walter Hallstein\textsuperscript{123} that interprets the Community in light of rule of law postulates, avoiding the controversial allusion to an element of statehood. Even this key concept of legal scholarship\textsuperscript{124} has only been used by the ECJ (Advocates General included) \textsuperscript{78} times.\textsuperscript{125}

However, the specific terminology of the ECJ as well as historical motivations are secondary for a scholarly construction. The decisive factor for doctrinal constructivism rather lies in the cognitive value of a conceptualisation of the legal material based on principles. It will be shown that the legal concepts establishing the rule of Community law find their adequate constitutional basis in the rule of law principle.

\textbf{b) The Effectiveness Principle}

The first condition for an actual rule of law is the effectiveness of law in particular with regard to public authorities. In order to achieve this, the ECJ has developed legal concepts in numerous decisions aimed at fostering the obedience of the Member States as the most critical addressees of Community law. To date, the ECJ has employed the argument of the effectiveness of Community law 10,543 times. The (useful, practical, full) effectiveness (\textit{effet utile}) can be interpreted as a principle created by the judiciary that, more than any other principle, structures the relationship between the Union and its Member States.\textsuperscript{126} It commits the Member States to realising the objectives of a provision of Community law and can generate the requisite legal consequences in cases of conflict.\textsuperscript{127} It comprises all judicially developed concepts conveying effectiveness to Community law in the Member States’ legal orders; these in turn constitute important norms and thus principles. The most relevant legal concepts are: the autonomy of Community law,\textsuperscript{128} direct effect (of Treaty provisions,\textsuperscript{129} decisions,\textsuperscript{130} directives,\textsuperscript{131}...
tives\textsuperscript{131} and other legal obligations\textsuperscript{132}), primacy,\textsuperscript{133} and effective and uniform application by Member States’ authorities,\textsuperscript{134} as well as the concept of State liability under Community law.\textsuperscript{135}

From a national constitutional perspective, this construction might surprise, as the rule of law principle is generally associated with the restriction rather than with the constitution of authority. However, the first element of a rule of law principle is the actual rule of law, ie the effectiveness of legal norms. A constitutional understanding of the Union’s primary law presupposes that the Union actually wields public authority, implying that EU law does not depend upon the addressee’s disposition to comply in every single case. At the same time, the principle exercises a legitimatory function: on the one hand, effectiveness is indispensable for the so-called output legitimacy of the Union; on the other hand, the uniform application of the law is indispensable for the achievement of legal equality.\textsuperscript{136}

The effectiveness of Community law is by no means self-evident, given its genesis in international law: in public international law there exist numerous treaties, the Charter of the United Nations being one of them, whose effectiveness vis-à-vis their institutions as well as their state parties is problematic.

Herein also lies a major difference between the Union as a bearer of public authority and a state: the missing means of coercion. The effectiveness of national legal norms is usually beyond question due to the common origin of a state’s authority to legislate and to enforce. The effectiveness aspect of the rule of law is mostly a marginal topic or simply presumed in developed liberal-democratic states.\textsuperscript{137} The Union, by contrast, is (only) a community of law and not also a community of coercion.\textsuperscript{138} Considering how many theories conceive the element of coercion constitutive for a norm to be law,\textsuperscript{139} this is the first challenge for the rule of law principle in Union law. Accordingly, the basic elements of the rule of law were the first aspects of European constitutional thought in the 1960s that coalesced into principles of primary law. The constitutionalisation narrative generally starts with exactly those decisions aiming at the strengthening of the effectiveness of the law, of its normativity and autonomy.\textsuperscript{140}

The federal importance of the effectiveness principle can only be grasped fully if one considers that this principle strengthens the legal subjects of the Member States and transforms them into subjects and actors of the supranational legal order, into market citizens.\textsuperscript{141} In a transnational community of law, the community’s systemic interest in the effectiveness of its law and the individual’s corresponding interest in the enforcement of a norm that benefits him or her are consonant: the legislator (EU) and the beneficiary (citizen) both need the nation-state’s domestic courts. The principles establishing the rule of European law indissolubly serve both interests. The assertion that European law ‘instrumentalis the individual’ for the

\textsuperscript{131} Case 8/81 Becker [1982] ECR 53, paras 29ff.
\textsuperscript{135} Cases C-6 and C-9/90, above n 21, para 33ff.
\textsuperscript{136} M Nettesheim, ‘Der Grundsatz der einheitlichen Wirksamkeit des Gemeinschaftsrechts’ in Randelzhofer et al (eds), above n 45, 447, 448ff.
\textsuperscript{137} Art 3(1) German Basic Law; Entscheidungen des Bundesverfassungsgerichts 66, 331, 335ff; Entscheidungen des Bundesverfassungsgerichts 71, 354, 362.
\textsuperscript{140} Stein, above n 49; Weiler, above n 118.
\textsuperscript{141} Ipsen, above n 10, 187.
advancement of European integration (with the implicit reproach of an infringement of human dignity) expresses a misunderstanding of this basis of Community law.

Perhaps the Union is even more dependent on the rule of law than an established nation-state. When Hallstein said that the Community is a creation of law, this must be understood against the dominant understanding of the nation-state, which attributes to the nation-state a ‘pre-legal substratum’. One can contest the pre-existence of the state before the constitution, as well as the explication of integration solely by the binding force of law. Yet the outstanding importance of a common law as a bond which embraces all Union citizens is, in view of the dearth of other integrating factors such as language or history, hardly contestable. Moreover, as already pointed out by de Tocqueville, the bigger and freer a polity is, the more it must rely on the law to achieve integration. The notion of a community of law aptly reflects the particular importance of the rule of law in creating a cohesive Union; the recent efforts to depict the Union as a community of values can at best complement, but not replace, this.

The difficulties encountered by a highly centralised institution (Brussels and Luxembourg) in securing the effectiveness of its law when this conflicts with national provisions or practices explains some problematic rigidities of European law which do not always do justice to contradicting principles. Conflicts between the principle of effectiveness and the principles of conferral, subsidiarity and legal certainty are particularly frequent. The treatment of these conflicts in line with the general doctrines on the collision of principles opens the way for more balanced solutions. Its somewhat erratic jurisprudence regarding the legal effect of acts contrary to Community law at least illustrates that the ECJ does also not categorically champion the principle of effectiveness.

This interpretation of effectiveness as an aspect of the rule of law principle may be disputed by those considering the respective jurisprudence as ultra vires or irresponsible; the Franscovich judgment, for instance, gave rise to such enunciations. It is the task of legal scholarship to scrutinise judicial developments as to their competences, consistencies and consequences, and some decisions should certainly be queried. However, in its general thrust, this line of jurisprudence has not been questioned either by the treaty-maker or by national courts or scholarship.

The rule of law principle of the Union as concretised by the principle of effectiveness illuminates the gestalt of the Union’s legal order by means of its specific relationship with the legal orders of the Member States. It is a legal order whose effectiveness equals that of the law of

145 For a critique, see R Dehousse and JHH Weiler, ‘The Legal Dimension’ in W Wallace (ed), The Dynamics of European Integration (1991), 242.
146 For more detail, see F Hanschmann, Der Begriff der Homogenität in der Verfassungslehre und Europarechtswissenschaft (2008) 149.
developed federal states, but whose instruments cannot be fully grasped from a traditional federal perspective. This is illustrated clearly by the primacy principle, since it raises the question of hierarchy, the most important instrument for advancing unity. First merely conceived as an expression of an autonomous legal order, its constitutional and federal dimensions were rapidly understood. The development of the concept of primacy traces the Union’s own progression into a supranational federation, rather than a federal state. The decision against supremacy (with the effect of voiding national law) and in favour of primacy of Community law (simple disapplication of the national law for the conflicting case) comprises a significant pluralist element. Moreover, primacy cannot be fully understood from the perspective of Union law alone, because most Member State high courts do not fully accept such primacy of Union law. The principle of primacy does not succeed in creating complete unity by establishing a strict hierarchy; rather, at the centre of the constitutional interplay one finds an ‘unregulated’ relationship due to the competing jurisdictional claims. A number of authors understand this openness not as flawed but as an expression of a constitutional structure adequate for the European legal area, as long as the openness is contained by principles of the legal orders involved, namely by obligations of respect and co-operation.

c) The Principle of Comprehensive Legal Protection

The principle of effectiveness depends on the possibility of judicial review. This corresponds to the traditional understanding of the rule of law principle. Its development since the nineteenth century has been accompanied by the establishment of judicial control over the exercise of public authority. Sieyès, Bähr, Austin, Orlando and Dicey all argue that law becomes reality only through the settling of conflicts by an unbiased third party. The possibility of judicial review of the exercise of public authority is constitutive for the rule of law.

On closer examination, it even becomes apparent that most of the legal concepts depicted in the previous sub-section award judicial competences for the purpose of allowing a court, mostly the ECJ, to control the conformity of the Member States’ behaviour with Community law. The mere possibility of judicial control is an important element for promoting the effectiveness of law. For a long time, the respective expansion of the preliminary ruling procedure of Article 234 EC was at the centre of this development. The co-operation of the ECJ and national courts founded on Article 234 EC is constitutive for the juridification and constitutionalisation of the European process of integration, since it links the legal opinion of the ECJ with the authority of national judgments and thus overcomes a structural weakness of supranational jurisdiction. It is complemented by the duty under Community law to allow for

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151 But with reference to the constitution already AG Lagrange in Case 6/64, above n 128, 605ff.
152 E Grabitz, Gemeinschaftsrecht bricht nationales Recht (1966) 100.
153 Stein, above n 49, 12.
155 For more detail, see FC Mayer, Kompetenzüberschreitung und Letztentscheidung (2000) 87ff; idem, below chapter 11.
156 S Kadelbach, ‘Vorrang und Verfassung’ in C Gaitanides et al (eds), Europa und seine Verfassung (2005), 219, 228ff. This will not change under the Treaty of Lisbon.
157 See Grabenwarter, below chapter 3; Mayer, below chapter 11.
159 For more detail, see L Heuschling, État de droit, Rechtsstaat, Rule of Law (2002) passim, in summary 662.
160 Mayer, below chapter 11; this control might also be achieved through the proceedings of Art 230 EC, Case C-64/05 P Sweden v Commission [2007] ECR I-11389, paras 93ff.
an effective remedy in a competent national court with regard to all acts by the Member States violating Community law.\footnote{161 Case 222/84 Johnston [1986] ECR 1651, paras 17ff, confirmed by Art 47 of the Charter of Fundamental Rights.}

Even though the preliminary ruling procedure of Article 234 EC has become the central instrument for judicial control of the Union, it can hardly be grasped in traditional (ie hierarchical) categories. It establish a co-operative procedure rather than a hierarchical judicial system but. The ECJ is reliant on the willingness of the national courts, which can hardly be enforced.\footnote{162 For an attempt, see Case C-224/01 Köbler [2003] ECR I-10239, paras 30ff. The obligation under EC law is externally supported, in particular through Art 101(1), 2nd sentence German Basic Law, cf Entscheidungen des Bundesverfassungsgerichts 73, 339, 366ff (Solange II); 75, 223, 233ff (Kloppenburg). This also illustrates the co-operative structure.} This explains many peculiarities of judicial legal protection in the European Union.\footnote{163 R Dehousse, The European Court of Justice (1998) 28ff; U Haltern, Europarecht (2007) paras 13ff.} In short, European legal unity is not to be perceived as centralistic, but as pluralistic and dialogical. Of course, the principle of legal protection does not solely consist of the control of the Member States’ action in the procedure established by Article 234 EC; it also calls for legal protection against measures by the Union.\footnote{164 See below, section V.3.} Nevertheless, the federal relationship is decisively shaped by the preliminary ruling procedure, with its specific mixture of co-operative and directing elements.

2. Principles of the Political Process

a) The Rule of Law and the Legality Principle

The development under the rule of law principle led to the creation of legal unity; it transformed, federalised and constitutionalised the relationship between Union and Member States. However, this development of the law has a clear focus: it facilitates observation and implementation by the Members States of the law generated by the Union in its political process. As bothersome as this may sometimes be for the Member States, it also guarantees them that national authorities will mostly comply with this common law.\footnote{165 Such a development is much less frequent in international law despite numerous innovations. Instructive in the comparison with international environmental law are R Michell, ‘Compliance Theory’ and J Klabbers, ‘Compliance Procedures’, both in D Bodansky et al (eds), International Environmental Law (2007), 893 and 995 resp.} Law-making in the Union is more than symbolic politics, it exerts actual influence.

This judicial constraint placed on Member States implies an increased significance of the principles of the political process.\footnote{166 Pioneering JHH Weiler, The European Community in Change: Exit, Voice and Loyalty (1987).} Accordingly, congenial principles of the political process developed, also in a rule of law dimension. The rule of law principle refers not only to the application of the law, but also to European law-making. This has been elaborated by the ECJ in view of competences and procedures, so that the respective principles further shape the federal relationship and the constitutional nature of primary law.

This aspect of the rule of law principle can be labelled the principle of constitutional legality of the Union’s actions.\footnote{167 See A von Bogdandy and J Bast, ‘The European Union’s Vertical Order of Competences’ (2002) 39 CML Rev 227; idem, below chapter 8.} It divides into negative and positive legality. According to the principle of negative legality (Treaty primacy), every action that can be attributed to the Union has to respect higher-ranking norms.\footnote{168 From a comparative law perspective, see A von Bogdandy, Gubernative Rechtsetzung (2000) 166.} Every secondary law act must be in conformity with all

\footnote{161 Case 222/84 Johnston [1986] ECR 1651, paras 17ff, confirmed by Art 47 of the Charter of Fundamental Rights.}

\footnote{162 For an attempt, see Case C-224/01 Köbler [2003] ECR I-10239, paras 30ff. The obligation under EC law is externally supported, in particular through Art 101(1), 2nd sentence German Basic Law, cf Entscheidungen des Bundesverfassungsgerichts 73, 339, 366ff (Solange II); 75, 223, 233ff (Kloppenburg). This also illustrates the co-operative structure.}

\footnote{163 R Dehousse, The European Court of Justice (1998) 28ff; U Haltern, Europarecht (2007) paras 13ff.}

\footnote{164 See below, section V.3.}

\footnote{165 Such a development is much less frequent in international law despite numerous innovations. Instructive in the comparison with international environmental law are R Michell, ‘Compliance Theory’ and J Klabbers, ‘Compliance Procedures’, both in D Bodansky et al (eds), International Environmental Law (2007), 893 and 995 resp.}

\footnote{166 Pioneering JHH Weiler, The European Community in Change: Exit, Voice and Loyalty (1987).}

\footnote{167 See A von Bogdandy and J Bast, ‘The European Union’s Vertical Order of Competences’ (2002) 39 CML Rev 227; idem, below chapter 8.}

\footnote{168 From a comparative law perspective, see A von Bogdandy, Gubernative Rechtsetzung (2000) 166.}
Treaty norms and equal-ranking general principles. This generates a strict internal hierarchy, the layered structure (Stufenbau) of the Union’s legal order: the secondary law created by the Union’s institutions forms a uniform layer below primary law. Article 5 EU (modified Article 13(2) TEU-Lis) expresses this yardstick character of the Treaties for all actions of the main organs of the Union in all fields (ie also Titles V and VI EU). The principle of negative legality knows no exceptions: the primacy of the Union’s constitution is absolute. The Union’s organs are bound by the Treaties that have been ratified by the Member States.

Certainly, the primacy of Union law is not under complete judicial control. This holds true in particular for actions under Titles V EU: the European foreign, security and defence policy is conceived as a governmental arcanum, without sufficient judicial and parliamentary control; the Treaty of Lisbon changes little in this respect. The European Council’s role is also problematic. Although it finds its basis in Article 4 EU and thus is an institution of the Union, its self-understanding is that of an institution operating outside the ambit of the Union, as demonstrated by its failure to proclaim the Charter of Fundamental Rights of the European Union. Similar to the king in the constitutional regimes of the nineteenth century, it is not answerable to any other institution and can ‘do no wrong’. This institution, which often decisively shapes legislative projects, places itself outside the constitutional order and beyond legal and political responsibility. The Treaty of Lisbon remains ambiguous in this respect. Although it lists the European Council as one of the Union’s institutions (Article 13(1) TEU-Lis), the responsibility mechanisms remain weak (Article 263(1) TFEU).

Nevertheless, the remarkable success of the constitutionalisation of the Treaties is illustrated by the fact that the validity of the legality principle with regard to the EC Treaty appears trivial and its exclusion particularly with regard to Title V EU Treaty problematic. As evident as the validity of this principle may seem today, the early community did not take it for granted. In international law, most international organisations do not conceive their founding treaty as being the yardstick for the law generated by them; this therefore does not amount to an international legal principle. The strict hierarchisation is due to the ECJ. From the premise of an autonomous legal order, it deduced the exclusive validity of the treaty amendment procedure (Article 48 EU) and thus prevented a paralegal development within the EU as well as any paralegal influence of the Member States; a similar constitutionalisation of international organisations is still in its infancy.

The legality principle protects the Member States, since the competence of constitutional development and amendment is reserved to the Member States acting jointly. This principle finds expression in Articles 48 and 49 EU, as well as in the principle of attributed (conferred) powers. It is presented with particular clarity in Articles 5 EU and 5(1) EC (Article 5(1)
TEU-Lis), and has developed into an independent principle of interpretation.\textsuperscript{178} The different passerelle clauses and the sophistication of the treaty amendment procedure under the Treaty of Lisbon change nothing in this respect.

The legality principle implies that the strict Treaty normativity cannot be temporarily suspended through informal agreements\textsuperscript{179} and that even a constant practice of the organs cannot override primary law.\textsuperscript{180} The law created by unanimous Council decisions also has to conform to primary law, protecting the national parliaments from the dynamics of their governments acting jointly at the supranational level. This holds true without restrictions, as asserted by the ECJ against Member States’ resistance, even when the Council bases its decisions on wide competence clauses such as Article 308 EC.\textsuperscript{181} If it is not the Council who acts but a state conference representing the entirety of the Member States (the ‘representatives of the governments of the Member States meeting within the Council’), the principle of primacy is applied, enforcing negative legality.\textsuperscript{182}

The consequence in constitutional theory is a remarkable dichotomisation of the status of the Member States. As actors creating and amending the Treaties, the Member States operate largely\textsuperscript{183} outside the Union’s legality, but they can only exert influence through the procedure of Article 48 EU; in essence, this implies a far-reaching autonomisation of the Union’s constitutional order. At the same time, the Member States compose the European Council and the Council as the constitutionalised authority of the Union and hence are in the centre of the public authority constitutionalised by the Treaties, while being strictly subjected to primary law. This simultaneous exclusion and inclusion of the ‘Masters of the Treaties’ (\textit{Herren der Verträge}) bears similarity with constitutional legality in the Member States: although the parliaments represent the sovereign, they are, with the UK being the main exception, strictly committed to the normativity of the constitutions and the law-making procedures stipulated therein.\textsuperscript{184}

b) Principles of the Order of Competences

The European Union is a bearer of public authority since it has the unilateral power to commit others. This power is constitutionalised at its source by the principle of positive legality, also known as the principle of conferral or principle of limited or attributed competences. Every act of secondary Union law must have a legal basis that can be traced back to the founding Treaties.\textsuperscript{185} The legal basis can either be derived directly from a Treaty provision or from a secondary law act that, in turn, must be retraceable to the Treaties.\textsuperscript{186} While negative legality is (only) about restricting a preconditioned public authority, the requirement of a competence norm comes in one step earlier at the source of its validity. The principles of negative and positive legality do not differ in their legal consequences of an infringement: in cases of illegality, the act can be declared void by the Court; only in cases of particularly serious and


\textsuperscript{179} Cases 90/63 and 91/63 \textit{Commission v Belgium and Luxembourg} [1964] ECR 625, 531; Case 43/75 \textit{Defrenne} [1976] ECR 455, para 56.


\textsuperscript{181} Case 38/69 \textit{Commission v Italy} [1970] ECR 47, paras 12ff.

\textsuperscript{182} Case 44/84 \textit{Hurd} [1986] ECR 29, para 39.

\textsuperscript{183} For more detail, see below, section IV.3(b).

\textsuperscript{184} N Luhmann, ‘\textit{Verfassung als evolutionäre Errungenschaft}’ [1990] \textit{Rechtshistorisches Journal} 176.

\textsuperscript{185} For more detail, see von Bogdandy and Bast, below chapter 8.

\textsuperscript{186} Whether national acts also need to be traced back to the constitution is controversial: see Möllers, above n 96, 256ff.
obvious irregularity does the doctrine of non-existence apply, ie the act may be treated as having no legal effect whatsoever without intervention by the Court.187

Increasingly, the order of competences has been formulated from the perspective of safeguarding the Member States’ interests. The Treaty of Lisbon continues with this tendency. In accordance with numerous national constitutions,188 it refers to the competences as being ‘conferred’ by the Member States (Article 1(1) TEU-Lis) and stipulates the principles of conferral, subsidiarity and proportionality (Article 5 TEU-Lis). The choice of the wording ‘confer’ marks a distinction from federal constitutions, since a federal state is usually considered to enjoy its own intrinsic constituent power. Nevertheless, ‘conferral’ is not to be understood as technical delegation, since this would commit European public authority to the Member States’ constitutions and signify the end of the autonomy of Union law. This cannot be intended according to the fifth indent of Article 2 EU, which sets the objective ‘to maintain in full the acquis communautaire’.

Doubts have been raised as to whether the Union’s institutions always respect these principles, and whether the ECJ enforces them adequately.189 Whether these doubts are justified does not need to be answered at this point;190 what is important is that the Union’s legal order features principles allowing them to legally conceptualise these doubts and—with the exception of Title V EU191—to pursue them before the ECJ. Moreover, the ECJ is not alone in this task, but stands under external control. Institutions of the Member States, in particular some national constitutional courts, also credibly enforce the observance of these principles.192 Herein the non-hierarchical, pluralist character of the Union’s legal order once again becomes apparent.

Since the Union’s competences are broad, national autonomy can be considerably limited even when the limitations on the Union’s competences are observed. The most important safeguard for the respect of Member State autonomy is organisational in nature: the role of the Member States in the Union’s institutions and processes. This role is safeguarded by the legality principle since measures can only be taken in accordance with the relevant competence norms and with the procedures stipulated therein, including the necessary quora.193 The federal tension determines not only the direct relationship between the Union and the Member States but also the Union’s internal structure, be it the institutions’ internal rules or the horizontal inter-institutional relationships. It explains the lack of overarching hierarchical structures or, to put it another way, the political system’s polycentric and horizontal character. This polycentricity is normatively underpinned by the principle of institutional balance: it serves to stabilise the lines of responsibility established by the Treaties194 as well as compliance with procedural rules,195 without, however, pushing the inter-institutional relationships toward any specific direction.196

188 For more detail, see Grabenwarter, below chapter 3; PM Huber, ‘Offene Staatlichkeit: Vergleich’ in von Bogdandy et al (eds), above n 24, § 26.
189 Problematic Opinion 1/91, above n 6, para 21.
190 The ECJ made a point esp in Case C-376/98, above n 112, para 83; less explicit Case C-380/03 Germany v Parliament and Council [2006] ECR I-11573, paras 36ff.
191 But cf the approaches in Case C-91/05, above n 172.
192 Groundbreaking is Entscheidungen des Bundesverfassungsgerichts 89, 155 (Maastricht), albeit for partly questionable reasons.
193 Case 69/86, above n 181, para 24.
196 An interpretation from the perspective of a federal bicameral system now in Case C-133/06, above n 111, paras 54ff.
This corresponds to the political science insight that the political process of the Union is an open process of negotiations\textsuperscript{197} and is illustrated by the polycentricity of the Council, the most important institution for the pursuit of national interests. The Council does not have at its disposal the central mechanism for building unity: a hierarchy; in many respects, it appears to be more a multifaceted and fragmented consensus-building process of 28 different political-administrative systems (27 national and the Commission's) than a single institution. The political process is characterised not by hierarchical decree, but rather by contract-like co-operation between different political-administrative systems that are largely independent of each other.\textsuperscript{198}

However, there are numerous examples in secondary law that demonstrate that the Council does not always convincingly fulfil this role. Thus, the Treaty of Maastricht introduced the principles of subsidiarity and proportionality in order to promote an exercise of competences which is more respectful of the Member States’ autonomy.\textsuperscript{199} With regard to subsidiarity in particular, opinions diverge widely.\textsuperscript{200} Certainly, this principle has thus far not achieved an important role in the ECJ’s jurisprudence.\textsuperscript{201} From a conceptual standpoint, it is remarkable that the principle was originally conceived in a substantive sense but is now dominated by a procedural understanding, insofar as institutions with a perceived special interest in subsidiarity are accorded procedural positions.\textsuperscript{202} This reinforces the general interlacing of competences between the Union and the Member States.

c) The Principle of the Free Pursuit of Interests

Under the rule of law principle, the political process in the Union has been legalised and constitutionalised: Member States and institutions of the Union are effectively bound, and the normativity of law is also promoted with regard to the political organs. This legalisation is, however, largely restricted to the framework of competences and procedures; the positions of the Member States remain for the most part undetermined. The Union’s constitution provides very little orientation as to the substantive content of the Union’s political process.

The Member States are free to pursue their ‘national’ interests in the institutions of the Union.\textsuperscript{203} The ECJ has not specified the Treaty objectives, in particular Articles 2 and 3 EC, in a manner that would determine policies. This restraint is by no means imperative, the Treaties having been concluded after all in order to realise these objectives and to overcome the national limitations placed on many areas of life and to Europeanise the national societies. Nor does the ECJ infer duties to enact specific rules from the Union’s fundamental rights. Furthermore, the ECJ did not develop Article 10 EC into a duty of the Member States to co-operate in the institutions of the Union in order to promote the community interest. The principle of loyal co-operation does not require the Member States to make compromises in the Council or to use the possibility of majority decisions if a minority opposes a legislative project.\textsuperscript{204} This is by no

\textsuperscript{197} I Tömmel, \textit{Das politische System der EU} (2003) 271ff.
\textsuperscript{199} Since the Treaty of Amsterdam, these principles are specified in the creatively phrased Protocol on the application of the principles of subsidiarity and proportionality.
\textsuperscript{202} For more detail, see Grabenwarter, below chapter 3; Dann, below chapter 7.
\textsuperscript{203} Case 57/72 Westzucker [1973] ECR 321, para 17.
\textsuperscript{204} Cf the comments in Case 13/83 Parliament v Council [1985] ECR 1513, 1576; see also B Schloh, ‘Institutioneller Aufbau der EG’ in M Dauses (ed), \textit{Handbuch des EU-Wirtschaftsrechts} (looseleaf, last update Apr 2008), s A II paras 205, 209ff.
means necessarily so; one can also argue the opposite. After all, the ministers are directly bound by the Union’s goals (Article 2 EU, Articles 2 and 3 EC) when they participate in the Council and when acting in their national settings by Article 10 EC. These norms require them to further the interests of all Union citizens. Moreover, the principle of primacy might apply in case of conflict between ‘national’ and ‘supranational’ interests. Nevertheless, it has never come to a legal rejection of ‘national positions’. This can be explained by the understanding of the Union’s political system presented above: the European common good is achieved through synthesis of the various standpoints that are usually brought into the European process by the national governments. The principle therefore only requires participation in the Union’s political process.

These considerations also militate against the assumption of a principle of integration in Union law: integration understood as a fusion of heretofore nationally organised areas of life into one of European dimensions. Some authors assert an abstract legal principle of ‘more Europe’ as ‘more unity’.

The first recital of the preamble to the EC Treaty, which speaks of ‘an ever closer union among the peoples of Europe’, indeed appears to recommend unity as a goal in itself. However, such a principle would be highly problematic. First, it lacks a sufficient basis in the provisions of the Treaties. Moreover, a central function of European constitutional law, namely the stabilisation of the relationship between the Union and Member States, would not be well served by such a principle. Rather, it should be considered whether, in line with the motto of the Union, a general principle of diversity could be formulated. Joseph Weiler’s principle of constitutional tolerance points in this direction.

3. Principles of the Composite (Verbund) of Union and Member States

a) The Composite (Verbund) as a New Perspective

An important new line in legal scholarship aims to conceptualise the whole of the Union and Member States. Of particular importance here are the notions ‘multi-level’ and ‘network’, both coined by political science. German legal scholarship, always particularly preoccupied with conceptual autonomy, proposes the term Verbund, probably best translated using the English nouns composite and compound.

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207 The Treaty of Lisbon maintains the objective of an ‘ever closer union among the peoples of Europe’ (cf first recital of the Preamble to the TFEU).


209 JHH Weiler, ‘Federalism without Constitutionalism’ in Nicolaidis and Howse (eds), above n 98, 54, 55ff.


The word *Verbund* initially figured in two competing grand interpretations—Paul Kirchhof’s (intergovernmental) composite of states (*Staatenverbund*) and Ingolf Pernice’s (more federal) composite of constitutions (*Verfassungsverbund*)—but has since been unhinged from this antagonism.212 Conceptualising the whole of the Union and Member States implies a reorientation of European legal scholarship. Europe’s community of law developed as an autonomous legal order.213 Its autonomy is not merely one principle among others, but rather a normative axiom, defended by the ECJ with utmost resolve: for its protection, the ECJ even rejected a treaty that aimed at a rearrangement of the European continent after the fall of the Berlin Wall.215 In fact, this concept of an autonomous legal order was fundamental to the supranational legal order’s establishment. This autonomy of the legal order corresponds to Monnet’s conception for the Community’s political-administrative system. The actual development both in the political-administrative and in the legal realm led, however, not to separation, but rather to a close-knit interlocking or networking of the Union and the Member States.216 The Treaty of Lisbon further promotes this, for example, by including the national parliaments in the Union’s legislative process (Article 12 TEU-Lis). Attempts to grapple with this intertwining have led to conceptions advocating the unity of the supranational and the national realm.217 Most conceptions, however, are more pluralistic.

The dependence of the Union’s constitution on the Member States’ constitutions is greater, in law and in fact, than that of a federal state on its constituent states.218 In terms of positive law, this results from, for instance, Article 6(2) and (3) EU or Article 48 EU, and conceptually from the principle of dual legitimacy, which implies that the Union’s legitimacy depends on the legitimacy organised by the national constitutions. The Treaty of Lisbon, for its part, stresses complementarity through such crucial provisions as Articles 1(1), 10(2) and 12. However, the Member States’ constitutions can also hardly be adequately grasped without recourse to the Union’s constitution any more, since they no longer constitutionalise all public power in their scope of application.219 The awareness of this mutual dependence leads to a concept of complementary constitutions. Even if this terminology is not accepted, it is incontestable that Union law fundamentally determines the Member States’ law in general and more specifically that the Union’s constitutional law fundamentally determines the Member States’ constitutions. Among these determinants, the principles of Article 6(1) EU are of particular importance for the federal relationship, since they are evocative of the requirements of homogeneity in federal constitutions.

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212 Cf Kirchhof, below chapter 20; Mayer, below chapter 11.


214 Case 26/62, above n 20, 12; Case 6/64, above n 128, 593; Case C-287/98 Linster [2000] ECR I-6719, para 43.


216 For more detail on this linkage, see Dann, below chapter 7.


219 For more detail, see Grabenwarter, below chapter 3; Mayer, below chapter 11.
b) A Principle of Structural Compatibility or a Principle of Homogeneity?

It was recognised at an early stage in the integration process that a certain structural compatibility among the Member States with respect to market economy, democracy and rule of law is essential for the operation of the Community. These conditions were formulated as normative requirements, though they only had a minimal character.\(^{220}\) In the wake of the realisation of a common constitutional space, the question arises whether to tighten such requirements under a legal principle of constitutional homogeneity that furthers constitutional unity.\(^{221}\) Numerous authors derive this in particular from Articles 6(1) and 7(1) EU.\(^{222}\)

Yet such a principle would face significant objections. To begin with, such a constitutional principle is currently hardly practicable, given the diversity among the national constitutions: the republics and monarchies, parliamentary and semi-presidential systems, strong and weak parliaments, competitive and consensual democracies, strong and weak political party systems, strong and weak social institutions, unitary and federal systems, strong, weak or absent constitutional courts, as well as significant divergences in the content and level of protection of fundamental rights.\(^{223}\) The Union’s eastward and southward expansion has increased this heterogeneity. Neither does the postulation of such a principle derive from Articles 6(1) and 7(1) EU. The norms’ wording implies a structural consonance only at a rather abstract level, not constitutional homogeneity. Systematically, such a principle of homogeneity could scarcely be justified in light of Article 6(3) EU, as national identity finds its expression precisely in the peculiar, individual constitutional arrangements,\(^{224}\) as confirmed in Article 4(2) TEU-Lis. This understanding is corroborated not least by the controversy over sanctions against Austria by the other 14 Member States in the year 2000 and the debate about the concretisation of Article 51 of the EU Charter of Fundamental Rights.\(^{225}\) Moreover, the difficulties of making the Charter of Fundamental Rights a binding legal document as well as the modifications in the course of the negotiations of the Treaty of Lisbon also militate against a principle of constitutional homogeneity: many European citizens are concerned that European constitutional law might develop into a force of undesired homogenisation, similarly to the basic rights under the German Basic Law or the US constitution.\(^{226}\)

It seems more promising, then, to concretise the principles of Article 6 EU differently for three different settings: the first, with the highest normative density, concerns the Union’s own design; the second, with significantly less normative density, concerns the general requirements placed on the Member States; and the minimally regulated third setting informs the Union’s foreign policy.\(^{227}\) It results from the cherished diversity in the European constitutional area that the second setting should not be conceived similarly to a principle of homogeneity in a federal state. This should be reflected in the terminology: thus, only a principle of structural compati-

\(^{220}\) HP Ipsen, ‘Über Verfassungs-Homogenität in der Europäischen Gemeinschaft’ in H Maurer (ed), Das akzeptierte Grundgesetz (1990), 159.

\(^{221}\) On this concept, see C Schmitz, Verfassungslehre (1928, 8th edn 1993) 65.

\(^{222}\) S Mangiameli, ‘La clausola di omogeneità’ in idem (ed), above n 1, 17; T Schmitz, Integration in der Supranationalen Union (2001) 301ff; F Schorkopf, in Grabitz and Hilf, above n 1, Art 7 EU, para 32; Communication from the Commission on Article 7 TEU, COM(2003) 606.


\(^{224}\) M Hilf, ‘Europäische Union und nationale Identität der Mitgliedstaaten’ in A Randelzhofer et al (eds), above n 45, 157, 166ff.

\(^{225}\) See J Kühling, below chapter 13; R Alonso García, ‘Las cláusulas horizontales de la carta de los derechos fundamentales’ in García de Enterría and Alonso García (eds), above n 207, 151, 158ff.


\(^{227}\) For more detail on this concept, see A von Bogdandy, ‘The European Union as a Human Rights Organization?’ (2000) 37 CML Rev 1307; from a doctrinal perspective this can be achieved through the margin of appreciation doctrine: see Kühling, below chapter 13.
bility should be derived from Articles 6(1) and 7(1) EU. In return, the Member States’ structural determinants for the European Union, such as Article 23 German Basic Law, are not to be interpreted in the sense of a principle of homogeneity either.

This principle of structural compatibility does not, however, exhaust the range of primary law norms comprehensively determining the Union and the Member States. With particular regard to the national exercise of public authority within the scope of Community law, jurisprudence, based on Article 10 EC, aims beyond structural compatibility at a coherence comparable to that of a federal state and which could be conceived as principle of homogeneity. Thus, the ECJ has of late applied procedural principles developed for the EU’s own administrative action to Member States’ administrative activities. Within the scope of application of Community law, the national administrations are bound by the Community’s fundamental rights, the principles of equivalence and effectiveness, and now also through the principles which have been developed for the EU’s own administration: a federal constellation through and through. Likewise, a principle of coherent legal protection against any form of public authority applies within the scope of application of Community law. Contrasted with these determinants, it becomes even clearer that the requirements of Articles 6(1) and 7(1) EU, which set parameters for the Member States’ legal orders as a whole, ie outside the scope of application of Community law, are of far lesser density. For reasons of terminological clarity alone they should therefore not be labelled a principle of homogeneity.

c) The Principle of Loyalty and the Federal Balance

Whereas national law brings with it the threat of a sanctioning power, one searches in vain for a European counterpart. Much of European law—namely all legal norms that represent, at their core, a communication between different public authorities—is not even symbolically sanctioned by possible coercion. This aspect shows that loyalty plays a central, indeed fundamental, role in European law.

Loyalty as a legal principle plays a seminal role in shaping the manifold relationships between public authorities in the European legal area. Despite the occasional plethora of detailed rules on the co-operation within the composite (Verbund), these relationships must be embedded in supplementary duties that secure the law’s effectiveness and may solve conflicts. The principle of loyalty, usually described by the Court as the principle of co-operation, generates such duties. The relevant judgments are based mainly on Article 10 EC, but the principle has been extended to all Union activities, as now explicitly stated in Article 4(3) TEU-Lis. It can both foster unity and protect diversity.

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228 Case C-28/05 Dokter [2006] ECR I-5431, paras 71ff.
229 Cf eg Cases C-46/93 and C-48/93 Brasserie du pêcheur [1996] ECR I-1029, para 42; for more detail, see C Nowak, ‘Recht auf effektiven Rechtsschutz’ in S Heselhaus and C Nowak (eds), Handbuch der Europäischen Grundrechte (2006), paras 51, 63; Bast, below chapter 10, section II.3, II.4(c).
230 A new dimension can be found in the requirements of Art 12 TEU-Lis.
231 For more detail, see Möllers, above n 96, 272ff.
The principle of loyalty also underlies many important doctrines, often with strongly unifying effects, for instance the requirements regarding judicial co-operation or the domestic implementation of Union law. In light of the protection of diversity, however, it needs to be stressed that the principle protects only the integrity of the results of European legislation against subsequent disobedience by individual Member States. In contrast, duties to formulate ‘Union-friendly policies’ are not derived from it.

The principle of loyalty also imposes duties on the Union’s institutions with regard to the Member States, as explicitly stated in Article 4(3) TEU-Lis. It includes the protection of diversity, although its precise extent still awaits further clarification. It is certain, though, that Article 6(3) EU, as an expression of the principle of loyalty, requires the Union to take the Member States’ constitutional principles and fundamental interests into account (Article 4(2) TEU-Lis). However, there cannot be a prohibition on Union action for every infringement of a domestic constitutional position. Otherwise, in view of the fact that, for example, Germany deals with innumerable questions constitutionally, independent Union politics would be impossible. Rather, the principle is only to be applied in the case of concrete and serious interference with the fundamental requirements of the national constitutional order.

The principle of loyalty thus appears to be another key to understanding the Union. As the European legal order ultimately rests on the voluntary obedience of its Member States, and therefore on their loyalty, the principle of loyalty has a key role in generating solutions to open questions and thus containing conflicts that may arise in a polycentric and diverse polity.

V. On the Relationship between the Individual and the Union

This section develops the founding principles of European constitutional law on the relationship between private legal subjects and the public authority of the European Union. Certainly, the principles discussed under IV also concern private legal subjects: the creation of unity under the rule of law principle is mainly achieved by turning individuals and corporations into subjects of the supranational legal order, ie into market citizens. But these principles do not concern the classical dialectics of public authority and liberty in the relationship between the Union and the citizens. The situation is similar as regards the principles of distribution of political power: although they have a bearing on the political rights of citizens under the national constitutions, they also escape classical dialectics. In the following, the European principles of these dialectics, ie the classical principles of liberty, equality and fraternity, are explored as constitutional principles of the Union.

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235 For more detail, see above section IV.1(b).
236 For more detail, see above section IV.2(c).
237 This provision simply codifies jurisprudence: Case 230/81, above n 233, paras 37ff; Case C-263/98 Belgium v Commission [2001] ECR I-6076, paras 94ff.
238 Entscheidungen des Bundesverfassungsgerichts 89, 155, 174 (Maastricht); C Schmid, Multi-Level Constitutionalism and Constitutional Conflicts (2001) 22ff.
239 This includes corporations; concerning their central role in the formation of EC law, see C Harding, ‘Who Goes to Court in Europe?’ (1992) 17 European Law Review 105.
240 Entscheidungen des Bundesverfassungsgerichts 89, 155, 182ff (Maastricht).
1. The Principle of Equal Liberty

Article 6(1) EU as well as the fourth consideration of the Preamble as amended by the Lisbon Treaty name liberty as the first of the principles upon which the Union is founded. This principle must transcend the various specific freedoms if it is to have an independent normative meaning, since the latter can be fully inferred from the words ‘respect for human rights and fundamental freedoms, and the rule of law’, which appear later in this provision. Freedom in its singular form can be found in the objective of an area of freedom, security and justice (Article 2, 4th indent EU). However, to interpret the notion of liberty of Article 6(1) EU in light of the reductionist concept of freedom as expressed in Article 2, 4th indent EU is hardly convincing.

More apposite and consistent with the tradition of European constitutionalism is an interpretation of this term in light of its arguably most important document. The Declaration of the Rights of Man and of the Citizen of 26 August 1789 centres in its Article 1 on equal liberty and commits in Article 2 every public authority to this principle. According to its Article 4, this liberty consists in ‘the freedom to do everything which injures no one else’. To date, these provisions have constituted the vanishing point of the most important philosophical doctrines of principles.

The general principle of liberty should be interpreted as signifying that everyone within the EU’s jurisdiction is a free legal subject and all persons meet each other as legal equals in this legal order. This understanding of a person is by no means imposed by nature, but is rather the most important artefact of European history, fundamental for the self-understanding of most individuals in the Western world. One may object that this liberty is the universal principle par excellence. This may well be. Yet one cannot deny that this principle has by no means found a footing in all legal orders. And the law of the European Union is the only transnational legal order that effectively realises this principle in concrete legal relations on a broad scale.

In light of this principle, fundamental yet often technically (mis)understood concepts of European law become closely connected to the European constitutional tradition. The first is the concept of direct effect, according to which the individual is not only the object but also the subject of Union law: it serves not only the rule of law principle, but also the principle of individual liberty.

The principle of individual liberty has been a core element of integration from its earliest stages. Walter Hallstein understood European integration, with its dismantling of borders, as a significant expansion of the individual’s space of autonomous action. Even though the early Community enacted practically no rules pertaining to private law, since its inception it has had an important private law dimension the weight of which results from the conception of private law as the veritable order of individual liberty. From this perspective, one can understand the fundamental importance of the market freedoms and competition law as well as of Article 4(1)

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241 For a constitutional doctrine on this principle, see E Grabitz, ‘Freiheit als Verfassungsprinzip’ (1977) 8 Rechtstheorie 1; for more detail, see idem, Freiheit und Verfassungsrecht (1976).
242 For more detail, see J Monar, below chapter 15.
243 Cf I Kant, Metaphysik der Sitten (edited by K Vorländer, 4th edn 1922) § C, 35; Rawls, above n 16, 81; Dworkin, above n 16, 300; Habermas, above n 16, 82ff, 125, 210, 414, 445ff.
244 Concerning the nexus between liberty and legal subjectivity, see Hegel, above n 29, § 4.
246 See above section IV.1.
EC. After all, the goal of a continental area of free individual activity cannot be realised by national law—such an area thus embodies a particular value of integration.248

This opportunity for private autonomy has a particular significance in a heterogeneous political community of nearly continental scope such as the Union. The larger and more diverse a political community is, the harder it is to understand politics and law as instruments of political self-determination. Areas of private autonomy thus become all the more imperative. Although the Union has transcended its single market finality, the economic aspects of individual liberty still retain greater relevance here than they do in the national context.

The principle of liberty is not confined to private autonomy,249 but requires in Western constitutional tradition the same liberty for all legal subjects. The principle of equal liberty allows for a constitutional interpretation of the ECJ’s jurisprudence regarding discrimination, insofar as it aims at equalising the legal status of the European legal order’s subjects;250 the principle thus informs the freedom of movement of workers, the general prohibition of discrimination, the rights deriving from Union citizenship and the rights derived from association agreements, in particular the one with Turkey.251 The transformatory potential of this jurisprudence is considerable, all the more so since equal liberty is a principle with a particularly strong centralising tendency.252 The sociopolitical objective surfacing in Article 2, 2nd sentence TEU-Lis reinforces this transformatory tendency.

Regarding the aptitude of a state to accede to and be part of the EU according to Articles 49 and 7(1) EU, this implies that its social and legal order must rest on a liberal understanding of the individual and that there can be no internal segmentations, ie in intransigent religious, ethnical or social groupings, that would prevent the individuals from interacting as equal legal subjects. This principle also supports interventions by the Union in private autonomy if the latter produces social inequality and dependence.

Based on the principle of liberty, a critical perspective on many politics of the Union can be developed. The Union does exhibit paternalistic tendencies towards its citizens, perhaps due to the hope of increasing its own legitimacy through well-meaning policies.253 Similarly critical under a principle of liberty are the Union’s ethical claims. One example is the European Charter for Researchers.254 The researchers shall be committed to ‘recognised ethical principles’, in particular if they want to obtain funding from the Union. This indiscriminate requirement is inimical to liberty. If public authority requests something from its subjects, it must use the legal form. This constitutes a core demand of constitutional liberty. In light of the principle of liberty, it is indispensable to separate legal and moral–ethical discourses.255 For this reason, the merging of values and principles in the Treaty of Lisbon (Article 2 TEU-Lis) cannot convince either.

The Treaty of Lisbon relegates liberty (now ‘freedom’) from first to second place; following the logic of the Charter of Fundamental Rights, it is displaced by the principle of respect for human dignity. This falls in line with the Universal Declaration of Human Rights, as well as

248 Entscheidungen des Bundesverfassungsgerichts 89, 155, 174 (Maastricht). This also explains the special relevance of the economic constitution: on this, see A Hatje, below chapter 16; critical of this is F Rödl, below chapter 17.
250 Accordingly, Art 2 TEU-Lis mentions equality as a value of its own.
253 For more detail, see A Somek, Individualism (2008) 245ff.
255 Denninger, above n 57, 149.
with German constitutional understanding under the Basic Law.\textsuperscript{256} It remains to be seen whether this will lead to a reorientation of the course taken by the Union, or whether Anglo-Saxon liberty might even be wrestling with ‘German’ human dignity.

2. The Principle of Protection of Fundamental Rights

Article 6(1) EU stipulates a principle of respect for human rights and fundamental freedoms. The fundamental freedoms of Article 6(1) EU do not refer to the market freedoms of the EC Treaty\textsuperscript{257} but to rights, which shall be labelled fundamental rights here in accordance with the terminology of the Charter of Fundamental Rights.\textsuperscript{258} Despite its prominent position, the principle of protection of fundamental rights has not acquired particular relevance in EU law so far. Certainly, fundamental rights do not constitute the most important point of reference for the Union’s legal order; their significance does not reach that of the basic rights under the German Basic Law. Several insights regarding the Union’s constitutional law can be drawn from this.

First, it can be noted that the treaty-maker has formulated the principle of Article 6(1) EU, as well as that of Article 6(2) EU, with remarkable reticence. Respect is only the first element of the trias ‘to respect, to protect, to fulfil’.\textsuperscript{259} Although the ECJ has sometimes derived rights to protection and participation from fundamental rights, the latter have not shaped its jurisprudence decisively, even if some recent decisions show a clearer fundamental rights-oriented profile.\textsuperscript{260} This corresponds to the trajectory taken by integration. Individual rights have been essential for the constitutionalisation of the Union,\textsuperscript{261} yet they were only rarely qualified as fundamental rights: integration has followed the functionalist, not the constitutionalist, path.

Initially, it had been considered that the principle of the separation of powers should provide protection from the Community,\textsuperscript{262} yet the separation of powers soon lost much of its meaning as the ECJ started to develop, beginning in the late 1960s, \textit{principes généraux} protecting the individual.\textsuperscript{263} Besides administrative principles, those general principles also comprise fundamental rights;\textsuperscript{264} this explains the formulation of Article 6(2) EU. In general, however, the fundamental rights dimension of the Union law has remained pale for a long time.

The shape of fundamental rights protection can be explained from the perspective of federal tension. First of all, it can hardly be understood without factoring in the pressure exerted on the ECJ by some national supreme courts.\textsuperscript{265} Also, the close reliance by the ECJ on the jurisprudence of the ECHR,\textsuperscript{266} ie its renunciation to formulate its own fundamental rights standards, can be explained from this perspective: according to this logic, the Union does not form a

\textsuperscript{256} For more detail, see S Rixen, ‘Würde des Menschen als Fundament der Grundrechte’ in Heselhaus and Nowak (eds), above n 230, 335ff.
\textsuperscript{257} T Kingreen, in Calliess and Ruffert (eds), above n 1, Art 6 EU, para 3.
\textsuperscript{258} For more detail, see Kühling, below chapter 13.
\textsuperscript{259} M Nowak, UN Covenant on Civil and Political Rights (2005) Introduction, para 3.
\textsuperscript{260} Case C-540/03, above n 30, para 35ff; Case C-305/05, above n 33, para 28ff.
\textsuperscript{261} See above section IV.1(b); the principle of direct effect leads to individual rights. For more detail, see S Beljin, ‘Dogmatik und Ermittlung der Unionsrechte’ (2007) 46 Der Staat 489.
\textsuperscript{263} For more detail, see Pescatore, above n 53.
\textsuperscript{264} However, administrative law principles are usually applied as a separate standard and not within the examination of fundamental rights, eg the principle of proportionality; cf Case C-453/03 ABNA (2005) ECR I-10423, paras 67ff.
\textsuperscript{265} For more detail, see Mayer, below chapter 11.
fundamental rights community of its own, hence does not challenge the courts of the Member States in this respect. One premise of the current European integration is that the Member States remain autonomous vis-à-vis the Union with regard to essential mechanisms of creating national unity, and hence with regard to the design of national fundamental rights protection. The fact that the ECJ’s considerations are often not very well differentiated or sensitive towards fundamental rights has at least the advantage of not profiling the ECJ as a specific organ of fundamental rights protection. Thus, no competition with national courts which distinguish themselves through this role is created.

There are, however, tendencies to strengthen the principle of fundamental rights protection. In a seminal work of 1999 commissioned by the European Parliament, Philip Alston and Joseph H Weiler called for the Union to develop into an international role model for a coherent, vigorous and future-oriented fundamental rights policy. Minority policies, migration policies and general non-discrimination policies should converge in this progressive fundamental rights policy, which is to be implemented not so much through the courts as through specialised bureaucracies and non-governmental organisations. This claim first played a rather marginal role in the discussions; this is certainly not the case any more following the creation of the Fundamental Rights Agency. Most important in this respect is the proclamation of the Charter of Fundamental Rights. Its second recital can be understood as positing that fundamental rights should constitute the centre of Union law and of outstanding political-symbolic significance. However, the difficulties of transforming it into a legally binding instrument show that positive EU law does not yet share this orientation.

A general trend in the current development of the principle of fundamental rights protection has not become apparent yet. On the one hand, a number of measures by the EU affecting fundamental rights have led to the topic being much more prominent now than it was in the 1990s. Accordingly, some decisions exhibit a considerably greater level of scrutiny. Moreover, there are indications that the ECJ intends to use fundamental rights to foster federal unity. Equally noticeable is a line of jurisprudence that reinterprets individual legal positions from a fundamental rights perspective, thus promoting a fundamental rights oriented constitutionalisation. On the legislative level, legal acts have been passed concerning specific aspects of fundamental rights protection in the Member States. On the other hand, there are obvious indicators that general unity-building based on a fundamental rights rationale will meet with considerable resistance by the Member States. The Charter of Fundamental Rights explicitly states that the Union’s fundamental rights first and foremost commit the Union as a whole; according to Article 51(1), the Member States are only addressed in the so-called imple-
gement constellation.\textsuperscript{276} During the negotiations of the Treaty of Lisbon, this has been clarified even further.\textsuperscript{277}

The specific federal tension thus explains numerous aspects of the Union’s principle of respect for fundamental rights. The current constitutionally protected diversity in the Union limits judicial attempts to create homogeneity based on principles or values. Furthermore, the particularities of the Union’s organisational set-up, eg the lack of a legislator with the power to amend the constitution, demand consideration when determining the scope and depth of principles.

3. The Rule of Law Principle

Important aspects of the rule of law principle have already been described. With a view to the relationship between the Union and the individual, a further dimension demands the protection of the individual from measures of the Union.\textsuperscript{278} This is generally recognised (Article 47 of the Charter), though this legal protection is not satisfactory in various regards. In dealing with these deficiencies, the overall constellation of legal protection through the Union’s and the Member States’ courts should be developed in light of the rule of law principle.\textsuperscript{279}

4. The Principle of Democracy

a) Development and Basic Features

For many decades, European legal scholarship focused not on the principle of democracy, but rather on the rule of law principle. With regard to the latter, there was consensus \textit{ab initio} that it should be applied directly to the acts of the supranational organs, ie that the Community needed its proper rule of law legitimacy. A mere indirect application, ie via the national officials participating in the European political process or implementing its result in the national sphere, was always considered insufficient. The postulate of democratic legitimacy proper to the Community developed in sharp contrast to this. For a long time, it had only been a political request of European federalists and not a legal principle. Until the 1990s, the view was held that the supranational authority did not legally require a democratic legitimacy of its own.\textsuperscript{280} Then a rapid development took place with two focal points: Union citizenship and the Union’s organisational set-up.\textsuperscript{281}

The development from political demand for an independent democratic legitimacy to legal principle has been arduous. Tellingly, even the 1976 Act concerning the election of the representatives of the Parliament by direct universal suffrage does not yet contain the term ‘democracy’.\textsuperscript{282} Beginning in the 1980s, the ECJ very cautiously started to use the concept of democracy as a legal principle.\textsuperscript{283} The Treaty of Maastricht then employed this term, although

\begin{itemize}
\item \textsuperscript{276} This is narrower than current jurisprudence; cf Case C-260/89 \textit{ERT} [1991] ECR I-02925, paras 41–5; Case C-479/04 \textit{Laserdiskens} [2006] ECR I-8089, para 61.
\item \textsuperscript{277} For more detail, see Mayer, above n 60, 1141.
\item \textsuperscript{278} Heuschling, above n 160.
\item \textsuperscript{279} For more detail, see Bast, below chapter 10, section II.4(a), II.4(c).
\item \textsuperscript{280} A Randelzhofer, ‘Zum behaupteten Demokratiedefizit der Europäischen Gemeinschaft’ in P Kirchhof and P Hommelhoff (eds), \textit{Der Staatenverbund der Europäischen Union} (1994), 39, 40.
\item \textsuperscript{281} For more detail, see Dann, below chapter 7; S Kadelbach, below chapter 12.
\item \textsuperscript{282} Act and decision concerning the election of the representatives of the Assembly by direct universal suffrage, [1976] OJ L278, 1.
\item \textsuperscript{283} The democratic principle serves predominantly to enable judicial review: Case 138/79 \textit{Roquette Frères v Council} [1980] ECR 3333, para 33; Case C-300/89 \textit{Commission v Council} [1991] ECR I-2867, para 20; Case
\end{itemize}
it mentions its relevance for the supranational level only in the 5th recital of the Preamble. With Article F EU Treaty in the Maastricht version, democracy found its way into a Treaty provision—yet not addressing the Union, but rather with a view to the Member States’ political systems. The leap was not made until the Treaty of Amsterdam, whose Article 6 EU then laid down that the principle of democracy also applies to the Union.

This internal constitutional development is buttressed by external provisions. Of particular importance are Article 3 of the first Protocol to the ECHR in its interpretation by the Strasbourg Court and—albeit less clearly—national provisions such as Article 23(1) German Basic Law. The Convention’s draft of the Constitutional Treaty tried to make another leap in distinguishing democracy as the highest value of the Union in the introductory quotation; it failed, and rightly so.

The word ‘democracy’ in Article 6 EU carries no definition. Nothing better depicts the uncertainties of how to understand the Union’s principle of democracy than Part I Title VI and Part II Title V of the Constitutional Treaty. Under the headings ‘The Democratic Life of the Union’ and ‘Citizens’ Rights’ respectively, a number of heterogeneous provisions were amassed. The difficulties also become evident in a remarkably cautious jurisprudence of the ECJ which largely abstains from developing a definition of the democratic subject. In contrast to most other terms of European law, the Court avoids an autonomous determination and leaves the field to the Member States. The Treaty of Lisbon takes a big step forward in this regard: the four articles of Title II TEU-Lis are by far more coherent; the complex interdisciplinary discussion on European democracy bears some fruit here.

A number of concepts that are prominent in national legal discourses on the concretisation of the democracy principle can be discarded for the purpose of defining the democracy principle as pertaining to the Union. This is particularly true for the theory that understands democracy as being the rule of ‘the people’ in the sense of a ‘Volk’, insofar as the term is to be understood in a substantive, holistic sense. Such an understanding implies empirical bases that scarcely pertain at the European level. Although it would be possible to proceed formally and conceive ‘das Volk’ as being the sum of all Union citizens in a Kantian sense, this is not convincing in light of Articles 1(2) and 6(3) EU and 189 EC. These norms suggest that the principle of democracy within the context of the Union must be concretised independently from the concept of ‘people’. The notion of Union citizenship might serve as an alternative.

Yet it would be a misunderstanding of the Union’s principle of democracy to place only the individual Union citizen in the centre. The Union does not negate the democratic organisation


285 On similar provisions in other constitutions, see Grabenwarter, below chapter 3.

286 Case C-145/04 Spain v UK [2006] ECR I-7917, para 71; Case C-300/04 Sevinger [2006] ECR I-8055, para 44.


of the citizens in and by the Member States (Article 17(1) EC). Thus, alongside the Union citizens, the Member States’ democratically organised peoples (Articles 1(2) and 6(3) EU, Article 189 EC) are acting in the Union’s decision-making process as organised associations. The Union’s principle of democracy should build on these two elements: the current Treaties speak on the one hand of the peoples of the Member States and on the other hand of the Union’s citizens insofar as the principle of democracy is at issue. The central elements that determine the Union’s principle of democracy at this basic level are thus named. The Union rests on a dual structure of legitimacy: the totality of the Union’s citizens and the peoples of the European Union as organised by their respective Member State constitutions. This conception can be seen clearly in Article 10(2) TEU-Lis.

At this point, the key question of European constitutional theory arises as to whether the two strands of legitimacy assume the existence of two structurally different subjects of legitimacy and are to be conceived in different theoretical traditions, or whether there is a single basis of legitimacy. The dual approach seems to argue for a conception of the political design as a compromise between an understanding of democracy centred on the individual and a holistic one based on the macro-subject of a people. Yet such a syncretic conception appears to be problematic on the theoretical level. It is theoretically more convincing to conceive only the individuals, which are national as well as Union citizens, as the sole subjects of legitimacy. However, this theoretical position can only be used very carefully for the development of the law.

But what is it all about? Some authors understand the European democracy as they do any democracy, as a way of political self-determination. In fact, the Union can be interpreted as an institution protecting the Europeans from American, Chinese or Russian domination. But this does not satisfy the notion of political self-determination in post-colonial times. The notion of self-determination, then, can first be understood in the sense of individual self-determination. To interpret the hardly understandable procedures of the Union in this sense, however, exceeds conventional imagination, or at least that of the author. Furthermore, such an understanding might encourage intolerance with the tendency to exclude renegades. The alternative is to interpret democracy as collective self-determination. This appears viable in a nation-state on the basis of a strong concept of nation. It is not, however, transposable to the European level since exactly such a collective, such a form of political unity, such a ‘We’ is missing. The consequence of this conception can therefore only be to perceive the Union as currently not capable of democracy. Although this conclusion can certainly be argued theoretically, it is useless for legal doctrine since it is unable to give a meaning to a term of positive law, the ‘democracy’ of Article 6(1) EU.

Political self-determination thus becomes implausible also for the understanding of democracy in the Member States. The citizens or peoples of the Member States cannot exercise self-determination, given their membership in the Union. Such conceptions of democracy accordingly only have a critical potential with respect to democracy in Europe, but cannot help to provide meaning to the ‘democracy’ of Article 6(1) EU. Respective philosophical concep-
tions are concerned with a ‘regulative idea’, the luminance of which is limited with respect to the analysis of positive law and which should not be confounded with a legal principle. A less grand concept of democracy needs to be sketched, focusing on interest representation and control.

b) The Principle of Democracy and the Institutional Structure

The principle of democracy finds its most important expression in representative institutions; Article 10(1) TEU-Lis builds on this. Almost 20 years of discussion have revealed that parliamentarianism is without alternative but has to be adapted to contemporary needs. In accordance with the basic premise of dual legitimacy, elections provide two lines of democratic legitimacy. These lines are institutionally represented by the European Parliament, which is based on elections by the totality of the Union’s citizens, and by the Council and the European Council, whose legitimacy is based on the Member States’ democratically organised peoples (see Article 10(2) TEU-Lis). In the current constitutional situation there is a clear dominance of the line of legitimacy from the national parliaments, as shown in particular by Article 48 EU, as well as the preponderance of the Council and the European Council in the Union’s procedures. Viewed in this light, one understands the Treaty of Lisbon positing requirements for national parliaments in Article 12 TEU-Lis.

One may doubt whether a principle of dual legitimacy as a concretisation of the principle of democracy can be formulated at all since the co-decision of the European Parliament (EP) has by no means been incorporated into all areas of competence, nor do all important decisions require its approval, nor are the other institutions answerable to it for all acts. In view of the current legal situation, the principle can be understood to mean that the democratic legitimacy of Union acts can be derived through the Council and the EP, and that this is the normal case regarding legislative actions. The legal principle does not, however, determine whether the situation represents the normal case, i.e. which institution in any concrete case must take a concrete decision; this depends on the respective competence. The demand to expand parliamentary powers remains in the political sphere.

If the legal impact of the principle of democracy is limited, its implications are enormous. A transnational parliament can confer democratic legitimacy even though it does not represent a people; moreover, a governmental institution is also able to do so. This contrasts sharply with national constitutional law. Even in federal constitutions the representative institutions of the sub-national governments are rarely acknowledged to have a role in conferring democratic legitimacy. The idea of a unitary people is too strong. By contrast, European executive federalism has its own democratic significance in light of the Union’s democracy principle. Often, the principle of democracy is further concretised by the parliament’s specific position in the overall constitutional structure. The respective research on the EP and arguably the EP itself are still in search of a guiding model.

294 Habermas, above n 16, 215ff.
296 See Case C-133/06, above n 111, para 63, explicitly regarding Art 289 TFEU.
297 This irrespective of the political claim that the European Parliament should at least co-decide in cases where the Council takes a majority decision.
298 The principle of democracy is thus no criterion for the demarcation of competences: Case C-300/89, above n 284, paras 20ff; however, AG Tesauro is misleading in ibid, 289ff.
300 For more detail, see Oeter, below chapter 2; Dann, below chapter 7.
c) Transparency, Participation, Deliberation and Flexibility

The principle of democracy confronts greater challenges in the Union than it does within the nation-state context. This might be the price for greater private freedom. Contrasted with the nation-state, the Union’s sheer size and constitutive diversity, the physical distance of the central institutions from most of the Union’s citizens and the complexity of those institutions are only some of the factors that place greater restrictions on the realisation of the principle of democracy by way of electing representative institutions. In light of this insight, further strategies for the realisation of the principle of democracy have received far greater attention than within the national context. Yet one important result of the discussion of the last 20 years is that these further strategies can only complement, not replace, parliamentanism. Of particular significance are transparency, participation of those affected, deliberation and flexibility; Article 11 TEU-Lis reflects this.

The first issue, transparency of governmental action—that is, its comprehensibility and the possibility of attributing accountability—has been only peripherally associated with the principle of democracy in the domestic context. European constitutional law places itself at the forefront of constitutional development when it requires that decisions be ‘taken as openly as possible’, ie transparently. The Amsterdam Treaty first declared this, placing it prominently, namely in Article 1(2) EU. The specifically democratic meaning of transparency in European law is confirmed by Article 11(1) and (2) TEU-Lis.

Transparency requires knowledge of the motives. From the beginning, Community law has enshrined a duty to provide reasons even for legislative acts (Article 253 EC), something that is hardly known in national legal orders. This duty was first conceived primarily from the perspective of the rule of law, yet its relevance for the principle of democracy has meanwhile come to enjoy general acknowledgement. Access to documents, laid down in primary law in Article 255 EC, is also of great importance to the realisation of transparency. It has become the subject of a considerable body of case law.

A further aspect is the openness of the Council’s voting record on legislative measures.

The second complex concerns forms of political participation beyond elections. Popular consultations appear as an obvious instrument, and referenda have occasionally been used to legitimise national decisions on European issues (such as accession to the Union or the ratification of amending Treaties). To extend such instruments to the European level has been proposed for some time. The restrictively designed citizens’ initiative of the Treaty of Lisbon (Article 11(4) TEU-Lis) falls short of this. It is presently difficult to evaluate its possible importance as a way of giving life to the democratic principle.

Whereas the Union has no experience with popular consultations, it has much experience in allowing special interests to intervene in the political process. Research indicates that such participation of interested and affected parties might be a further avenue to realising the democratic principle. Article 10(2) TEU-Lis is based on this understanding. However, the...

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302 Case C-64/05 P, above n 161, paras 54, 64.
307 B Kohler-Koch, ‘The Organization of Interests and Democracy’ in idem and Rittberger (eds), above n 288, 255.
principle of political equality must be respected and participation has to be designed so as to avoid political gridlock or the so-called agency capture by strong, organised groups.

Moreover, making the Union more flexible is of democratic relevance.\textsuperscript{308} It allows a democratic national majority to be respected without, however, permitting this national majority, which is a European minority, to frustrate the will of the European majority. However, there are difficult questions of competitive equality in the internal market as well as of guaranteeing democratic transparency in an ever more complex decision-making processes.\textsuperscript{309} Also, the possibility of leaving the Union, as foreseen in Article 50 TEU-Lis, serves the democratic principle, since it upholds the prospect of national self-determination in the event that the dominance of the Union should appear as illegitimate or considered.\textsuperscript{310}

d) Supranational Democracy: An Evaluation

The preceding considerations demonstrate that the principle of democracy is slowly taking form at the European level, building on established conceptions while at the same time making a number of innovative accentuations and far-reaching modifications in order to further a viable democracy at the European level. The most important conceptual modification with respect to established, national constitutional doctrine regards the concept of political unity of a nation, which most scholars consider foundational for the democratic constitutional state (even for the federal variant). The Union lacks such political unity; rather, it builds on discrete, nationally organised peoples.\textsuperscript{311} This understanding finds its constitutional expression in the guarantee of respect for the Member States’ peoples, the lack of will to found a state, as well as the central role of the Council and the European Council in the decision-making process, to name a few. The assumption of one European society, as posited in Article 2 TEU-Lis, changes nothing in this regard.

Thus, whereas in national constitutional law the principle of democracy—in the sense of the political equality of all citizens—greatly influences the organisational set-up,\textsuperscript{312} the Union’s organisation must place diversity at the same level. This is no complete novelty and can be squared with democracy theory.\textsuperscript{313} It is this characteristic which explains and probably justifies, for example, some of the limitations placed on the principle of political equality\textsuperscript{314} or the relative weakness of the EP. Perhaps these elements can even be seen as defining elements of a supranational understanding of democracy.\textsuperscript{315}

Another legal question is whether the principle of democracy invites judicial activism. Within the organisational set-up and the inter-institutional relationships, in particular between the Council and the Parliament, judicial activism is only possible within the narrowest limits. Indeed, the Council is an institution which realises the principle of democracy, and nothing in the Union’s constitutional law supports a preponderance of the European Parliament. Perhaps

\begin{itemize}
  \item 308 D Thym, ‘Supranationale Ungleichzeitigkeit im Recht der europäischen Integration’ [2006] Europarecht 637.
  \item 309 J Wouters, ‘Constitutional Limits of Differentiation’ in B de Witte et al (eds), The Many Faces of Differentiation in EU Law (2001), 301.
  \item 310 J-V Louis, ‘Le droit de retrait de l’Union européenne’ [2006] Cahiers de Droit Européen 293.
  \item 312 K Hesse, Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland (20th edn, 1999) paras 125, 130.
  \item 315 See P Magnette, ‘European Democracy between Two Ages’ in Barnard (ed), above n 126, 13; M Nettesheim, ‘Demokratisierung der Europäischen Union und Europäisierung der Demokratietheorie’ in Bauer et al (eds), above n 288, 143.
\end{itemize}
Article 10 TEU-Lis can be understood as an assumption in favour of dual legitimacy; this assumption might allow for more judicial activism. Even today this principle operates in this sense in the areas of transparency, participation by affected interests\textsuperscript{316} and intra-institutional law.\textsuperscript{317}

5. The Solidarity Principle

The last classical principle of European constitutionalism is solidarity. Under the principle of solidarity, public authority organises the cohesion of and mutual assistance between the citizens.\textsuperscript{318} Its constitutional basis is not Article 6 EU, but rather Articles 1(3) and 2 EU. There has been another noteworthy textual development. In the original formulation, Article 2 EEC Treaty called merely for a closer relationship between the Member States, only weakly reminiscent of the first Preamble, according to which the Treaty aimed at ‘an ever closer union among the peoples of Europe’. Later developments approached the Preamble’s lofty goal. The Treaty of Maastricht introduced the current text. The substitution of the term ‘relations’ with the term ‘solidarity’ can be understood as a conceptual transition from a Union based on international relations to the Union as a federal polity. The centrality of solidarity is underscored by the Charter of Fundamental Rights of the European Union, which devotes an entire Title (Title IV) to this principle. The development is also inspired by the idea of a European social model positively distinguishing Europe from the US; this forms the background for Article 3(3) TEU-Lis.

Nevertheless, solidarity does not rank among the founding principles of Article 6 EU and Article 2 TEU-Lis. An important tension surfaces here: the tension between those Member States that ‘give’ and those that ‘take’ in the inner-European redistribution. Article 2 TEU-Lis increases this tension by stipulating solidarity not as a value of the Union (which is capable of acting), but as a value of a diffuse European society. The objective of social equality, introduced by Article 3(3)(2) in order to draw the contours of a European social model, is conceived in the light of solidarity not among citizens but among the Member States. The same holds true for solidarity in the common foreign and security policy, Article 11(2) EU (Article 24 TEU-Lis). The limits of the European community of solidarity in comparison to that of a nation-state can moreover be discerned in the lack of a full defence community, the liability exclusions contained in Articles 100 and 103 EC (Articles 122 and 125 TFEU), as well as the relatively small volume of redistribution organised by and through the Union.\textsuperscript{319} It follows from all this that redistribution as arguably the most important aspect of the solidarity principle does not rank among the legitimatory foundations of the Union. The autonomy of the Member States regarding their social systems as prominent instruments of the creation of national unity remains largely untouched.

In a more limited sense, solidarity is a principle of Union law, and its design once again portrays the Union as being distinct from an international organisation on the one hand and a federal state on the other. Although solidarity among Member States has not been the basis for much judicial activism,\textsuperscript{320} it has served to reinforce important legal concepts: the community of

\textsuperscript{316} Case T-135/96, above n 284, paras 88ff.
law and the principle of loyal co-operation. More interesting from a constitutional law point of view is the fact that Union law also aims at interpersonal solidarity in the Member States. In particular, Union citizenship requires treatment equal to national citizens under national systems, it demands ‘a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States’. There are indications that the Union generally aims at promoting the development of the European nations into inclusive societies (note the plural) based on solidarity which are successful in the global competition. One is reminded of the single market programme of the 1980s, when the governments conducted a large-scale economic modernisation programme via the EC; today the inclusion of marginal groups in the context of societal modernisation is the focus of attention. This serves the Lisbon Strategy for the enhancement of European competitiveness—exclusion and discrimination are expensive and non-economical—as well as the development of a new European social model compatible with globalisation. Article 3(3) TEU-Lis needs to be read against this background.

VI. Concluding Remarks

The comparison of the Union’s founding principles with those of national constitutions reveals both continuity and innovation. Continuity increases if the national principle is loosened from the postulate of unity, ie if concepts such as people, state and sovereignty are not central but rather peripheral, if representation is not the visualisation of some unseen entity but rather an instrument for the aggregation of interests, if legal provisions enshrine not the higher truth of the volonté générale but rather negotiated results, and if law in general is not the expression of but rather a functional equivalent to common values. The more national constitutional law is seen as a constitutional law of social and political pluralism, the better the national and supranational founding principles dialogue.

The principle of democracy and the relationship between principles furthering unity and those protecting diversity have proven to be philosophically problematic and antinomic. In terms of philosophical principles, this can be interpreted as tension between equal liberty, guaranteed by the Union law, and diversity, organised through the Member States. Carl Schmitt was likely right on one point: substantial stability is largely impossible in a real—that is, heterogeneous—federation. However, it is even more likely that, in a rapidly changing, interdependent world, substantial stability is an outdated, illusory pipedream. Fortunately, what really matters is not substantial stability, but the realisation of the principles discussed in this contribution. Their realisation appears demanding, but ultimately promising.

323 Cf above n 276; critical Somek, above n 254, 245ff.
324 Kant, above n 2, 392, 444; therefore the contribution by S Oeter concerning federalism and democracy, below chapter 2.
325 Schmitt, above n 222, 370ff.
Federalism and Democracy

STEFAN OETER

I. Introduction: ‘Understanding the European Union as a Federal Polity’

References to concepts of federalism enjoy a certain popularity in the political and constitutional debate on the future architecture of the EU as a vision how to construct a democratic polity at the European level. The slogan ‘From a Commonwealth of Nations to a Federation’ has become a means of gaining profile as visionaries for some politicians. Similarly, but in a diametrically opposed fashion, such visions serve to antagonise politicians with a different orientation. Federalist concepts thus entrench ever more the already existing rift dividing the various factions in the constitutional–political debate on the future shape of a united Europe. ‘Understanding the European Union as a Federal Polity’, to borrow the title of an article by an American political scientist, proves to be a position far from enjoying potential consensus. This is striking if one takes into consideration that for the founding father generation of European federalists, enthused by the project of founding the ‘United States of Europe’, concepts of federalism from the beginning had served as guidelines for their visions of a ‘European Constitution’. These visions have always been contested, but in the early years of the European project the ‘federalists’ were quite a strong current in political terms.

1 See the speech by the German Federal Minister for Foreign Affairs Fischer at Humboldt University, Berlin, 12 May 2000, printed as: J Fischer, ‘Vom Staatenbund zur Föderation’ [2000] Integration 149, 154.
In the meantime, the ‘dirty F-word’ in the upper echelons of European politics has become a kind of taboo. What are the reasons for this? 'Why has federalism provoked such an obviously irrational response'—a question formulated some years ago by the British political scientist Michael Burgess, a leading authority on the debate—and why does it continue today to upset even well-informed observers of the evolving European Union (EU)?

Burgess identifies primarily—and I find this convincing—a distorted perception of federalist experiences. Federalism constitutes, according to a widespread understanding of the basic experiences of federal systems such as the US, Germany or Switzerland, a decisive part of the complex historical process of state formation and of national integration of heterogeneous polities. Federalism thus seems to be inseparably linked to the dialectical process of forming an own nation and an own state. Accordingly, the formation of a federally structured European Union would inevitably end up—this is implicitly assumed—in the formation of a European state, thus dissolving the traditional nation-states and national cultures into the melting pot of a newly formed ‘European Nation’.

In contrast to such an ‘oversimplified and chimerical’ misconception, one must make clear that the construction of a united Europe in federal categories does not constitute an enterprise of destroying the inherited nation-state, but is an enterprise intended to save these traditional polities. The inherited nation-states will only be able to survive in a world increasingly characterised by international entanglement of economies, societies and political entities if they manage to integrate into a bigger, overarching polity. Such a polity would enable public authorities to find suitable answers to the challenges of globalisation, whilst at the same time preserving in its federal division of functions the existence of traditional states and their (albeit limited) capacity to act.

If one has managed to overcome the first barrage of completely tabooing federalist conceptions, a new problem arises. Upon analysing the federalist discourse in more detail, one becomes aware that there is no definitive discourse on ‘federalism and the European Union’, but a multitude of discourses which are only loosely related to one another. The discourse on the future shape of a ‘federal Europe’—envisioned as a constitutional project—is inspired by a completely different set of guiding ideas, concepts and arguments than the more analytical discourse on the possibilities of theoretically modelling the existing institutional framework of the EU upon the categories of a federal or federative composite system. While one school of thought attempts to overcome the ‘half measures’ of the existing ‘union of states’ by integrating states through a federal constitution (in its genuine sense), leading to a ‘genuinely united’ European federal state, the other school of thought already perceives the existing multi-level system of the European Union as a structure of federal (composite) statehood—as a federal commonwealth that does not necessarily need a transformation into formal federal statehood.

Accordingly, as a first step I will attempt to give a brief summary of the various theoretical approaches and models using federalist concepts as a tool of conceptualising the European Union. Naturally, as a lawyer with a particular interest in political science, I will show a marked preference for the institutionalist discourse, inspired by concepts of political science and European Community law. This is a consequence of implicit cognitive interests. Also, due to my background, I have a personal preference for the description and theoretical reconstruction

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4 Ibid.
5 Ibid; see also T Fischer and N Schley, Europa föderal organisieren (1999) 38.
7 For an attempt to model such an overarching polity with the concept of a Bund (ie a ‘union’), see C Schönberger, ‘Die Europäische Union als Bund’ (2004) 129 Archiv des öffentlichen Rechts 81.
of the existing multi-level system of ‘composite’ European statehood and consequently a marked scepticism towards any ‘visionary’ call for a ‘constitutional revolution’.

The core of this contribution deals with the basic questions and guiding concepts of the analytical discourses on ‘federalism and European Union’, e.g., the controversy over whether and to what degree it is possible to model the (existing) European Union as a federal system of ‘composite’ statehood—a debate that is inextricably intertwined with the issue of how to construct the European Union as a democratic polity. This controversy is full of conceptual flaws since the debate is a complex myriad of divergent theoretical concepts and notions. Such concepts and notions will have to be evaluated and partly reconstructed in the course of a basic revision and synthesis of the discourse. This is particularly evident with the (delicate) debates on sovereignty and on democracy in the European Union. Any serious attempt to reconstruct the inherited notions (and the underlying theoretical concepts) inevitably exemplifies how much our theoretical and constitutional thinking on state and constitution is still dominated by the legacy of nineteenth-century ideas.\(^8\)

### II. The Different Federalism Discourses—An Outline

For the founding fathers of the European Community the problem of modelling European integration as just described did not exist to the same degree as it does now. They constructed a new form of ‘supranational’ integration which was developed out of the traditional forms of international organisation—a new arrangement which on completion was perceived to fit easily into the established categories of traditional political theory. Without unduly simplifying, one can state that the founding generation envisaged a step-by-step process of ‘thickening’ integration, a largely consent-based process which had a clear final vision: a ‘United States of Europe’, in the classical form of federal statehood.\(^9\) *The Unfinished Federal State*\(^10\)—a noteworthy book by Walter Hallstein, the first president of the Commission—programmatically called for the project to be brought to its logical end with regard to the common objective underlying the enterprise. The founding fathers of the Community therefore were practically all ‘federalists’. The European Economic Community was born out of the disappointment over the failure of the (much more ambitious) project of a European Defence Community, a project which carried, even more visibly than the follow-up project EEC, the mission of serving as a ‘first pillar’ of the aspired European federal state.\(^11\) The most important actors of European integration policy of these years—from Robert Schuman and Jean Monnet to Walter Hallstein, Konrad Adenauer and Alcide De Gasperi—were undoubtedly inspired by the same vision when they started the surrogate project of a European Economic Community in 1955.\(^12\) Their position was not without controversy. The famous German Federal Minister of Economics at the time, Ludwig Erhard, often complained about the ‘Europe-romanticists’ in the Foreign Office.\(^13\) The ‘federalist’ camp proved to have stronger support, however, and was ultimately victorious. The result was a treaty which contained an institutional structure that was conceived

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\(^9\) See Burgess, above n 3, 64–70.


\(^12\) Burgess, above n 3, 72–7.

to serve as a blueprint for a ‘federal’ system. Even more, in the first phase the Commission became a bulwark of declared ‘federalists’, with Walter Hallstein at its head and open advocates of a European federal state, like Hans von der Groeben and Jean Rey, as influential members.

However, this vision soon suffered setbacks, beginning with De Gaulle’s initiatives of a purely intergovernmental ‘Political Union’. The result was a confrontation between the French government on the one hand and the Commission and the majority of the Council on the other. The outcome was the (French) ‘empty chair policy’—an event that led to stagnation of any further attempts of integration in the late sixties, seventies and early eighties. The federalist teleology that had been shared by most activists of European integration seemed to have been proven illusory. Thus the competing paradigm to the initial federal vision, based upon the construction of the European Community as a (limited) project of ‘functional integration’ with a primarily economic rationale, got the upper hand. The federal paradigm never completely vanished, but became the profession of faith for a sectarian group of convinced idealists. Documents such as the 1975 report of the Commission on the reform of the Community inspired by Altiero Spinelli, which served as the basis for the Tindemans Report, as well as the introduction of direct elections for the European Parliament in 1979, showed ‘federalist’ ambitions going well beyond the dominant approach of pure functionalism. The resistance of national politics against such far-reaching objectives and the deliberate change to an approach of cautious incrementalism led, however, to a nearly complete disappearance of federalist programmes in politics. It is only the discussion on the necessity of a European Constitution of the 1990s that has revived federalist arguments.

The big disappointment of the late 1960s had transformed the federal paradigm from a powerful political eschatology to a much more modest, more status quo-oriented ‘cognitive pattern’. Walter Hallstein’s book, The Unfinished Federal State, is again perhaps a good point of reference. Based upon his disillusioning experience as President of the Commission, Hallstein advocated an understanding of the existing Community arrangement as the nucleus of a federal type of institutional arrangement oriented towards the vision of a federal system—towards the ‘United States of Europe’. The ambiguity of such a federal concept has already been voiced with utmost clarity by Hallstein: ‘The federal concept is... not only an objective. It is at the same time the most simple—and in this sense the most adequate—description of a (partial) reality, namely the European Community.’

Observers have characterised this perspective as a ‘Kantian constitutionalist strategy, directed towards a federative supra-state’, a strategy which intends to portray the integration

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14 Burgess, above n 3, 73, 76–9.
15 Concerning the ‘federalist’ ideas of his influential work, see W Hallstein, Der unvollendete Bundesstaat (1969) and idem, Europe in the Making (1972).
16 Burgess, above n 3, 78–82; Bitsch, above n 11, 135ff; see also, in great detail, PJ Bodenheimer, Political Union (1967).
17 See again Burgess, above n 3, 83–87; see also Dinan, above n 11, 157ff; Bitsch above n 11, 161ff; W Loth, ‘Hallstein und De Gaulle: Die verhängnisvolle Konfrontation’ in Loth et al (eds), above n 12, 171; HH Götz, ‘Die Krise 1965/66’ in ibid, 189.
18 Burgess, above n 3, 85–8, 101–4; Dinan, above n 11, 169ff.
19 Burgess, ibid, 108–12.
20 Ibid, 116–18; Bitsch, above n 11, 214ff.
to the reader as something effective as well as reasonable, with the aim of taking effect as some kind of ‘self-fulfilling prophecy’.

The dominant ‘functionalist’ paradigm of the decades after 1970, however, resulted in all conceptions of the EC as a ‘federal’ arrangement receding into the background. But is there in fact not more to Hallstein’s construction of the ‘actually existing’ Community than merely a grain of truth? Recent writings, in particular German-speaking, increasingly raise this question. Inspired by historical analogies to the construction of the German Empire of 1867/1871, the federal features of the Community’s construction are increasingly elaborated upon within the relevant literature. This approach can also be increasingly found in the Anglo-Saxon literature, albeit with a more comparative orientation. It is fuelled by the growing research on comparative federalism. This line of debate (re)introduces an important new dimension into European constitutional discourse and corrects not only traditional inter-governmentalist perceptions, but also the narrow sides of ‘supranational-functionalist’ thought. It also reassesses and deconstructs, in a critical sense, the assumptions and conceptual pre-judgements dominating the debate. The following sections will attempt a reconstruction of these ‘revisionist’ approaches.

III. The European Union as a Mixed System of a Federative Character

The de facto ‘Constitution’ of the European Community (and of the Union) contains features of a hybrid system. As a treaty community founded by a treaty of public international law, the Community displays strong traits of a confederal, ‘unional’ arrangement and of a ‘functional community’ with limited purposes. The constitutive fundamen of the Community (and the

24 As a fundamental work, see EB Haas, The Uniting of Europe (2nd edn, 1968); see also PC Schmitter, ‘Three Neofunctional Hypotheses about International Integration’ (1969) 23 International Organization 161.
28 See the particularly clear assessment of Burgess, above n 3, 41–2, who argues that ‘the EU represents something distinctly new in the world of both inter-state and intra-state relationship. It is not yet a union of individuals in a body politic but it is more than merely a union of states in a body politic. It is not a federation but it is also more than a confederation understood in the classical sense.’ See also Schönberger, above n 7, 102ff; Rosen-Stadtfeld, above n 25, 59ff.
Union) remains a series of classical inter-state treaties under public international law. From this perspective, the Community can easily be recognised as a type of international organisation, albeit one with particularly strong competences. The international organisation model clearly inspired the founders in the 1950s when they designed the details of the institutional arrangements of the Community, in particular the basic features of the organs. The Council of Ministers as the main decision-making institution of the Community and the Parliament—as a marginalised consultative organ—were clearly based upon the typical institutional structure of international organisations. The other classical organ of an international organisation, the secretariat, has admittedly found a very peculiar form within the European Commission. The Commission might still be perceived, however, as a special variant of a traditional bureau or secretariat facilitating inter-state co-operation. The ‘secretariat’ has only been adapted to the particular needs of a supranational community. Even the European Court of Justice, in its function of settling disputes regarding the interpretation of the founding Treaties, has parallels in more recent international organisations.

A larger group of political scientists tends to analyse and construct the institutional arrangement of the Community as a mere variant of an ‘international regime’—a construction which has become characteristic for the developing system of global governance during the last 50 years. Consequently, the European Community (and now the Union) could perhaps be described as the most elaborate and refined treaty regime of regional integration. The supranational character of the Community, however, does not really fit into this picture. The Commission, for example, clearly contains features of a supranational organ. Likewise, the Parliament has not remained a classical parliamentary assembly, but has become, first through the shift to direct elections and then through the gradual increase of parliamentary participation in law-making, a body with genuine powers of (co-)decision.


30 See Böhmer, above n 26, 53, 125ff.

31 Concerning the application of institutionalist approaches from the sphere of international relations to the analysis of European integration, see R Keohane and P Hoffman, ‘Institutional Change in Europe in the 1980s’ in R Keohane and P Hoffman (eds), The New European Community (1991) 25.


33 For the most important advocate of such an approach, see A Moravcsik, ‘Negotiating the Single European Act’ (1991) 45 International Organization 19; also idem, ‘Preferences and Power in the European Community’ (1993) 31 JCMS 473.


With elements of supranationality becoming stronger during the evolution of the Community system, the Community is developing increasingly more federal features. This is a remarkable contrast from the originally dominant confederal features of the system of European integration. Although it seems logical to understand—according to the classical theoretical categorisations of ‘confederations of states’ and ‘federal states’—‘confederal’ and ‘federal’ as mutually exclusive theoretical notions, the Community system undoubtedly demonstrates features of both categories in a mixture which is changing over time. The dichotomy of ‘confederation’ and ‘federal state’, in addition, has always been a theoretical artefact. The German Union of the early nineteenth century (the Deutscher Bund), for example, could be described at its origin as a basic model of a confederation (Staatenbund), but when examined in more detail it constituted much more than a mere confederation. Indeed, it possessed not only supranational, but also federal characteristics. In contrast, the North German Union (the Norddeutscher Bund) of 1867 and its successor, the German Empire in 1871, still possessed strong confederal features. However, there were other motives behind the reduction of both models into new theoretical categories. The leading authors of German constitutional law after 1871 were reluctant to take into consideration the hybrid character of both constitutional arrangements, as their agenda was to denounce the German Union in an attempt to reinterpret the Constitution and ultimately purify the ‘federal state’ of 1867/1871 from all its confederal rudiments.

The use of theoretical concepts such as confederation and federal state aims to establish a dominant normative leitmotiv in order to adequately conceptualise the European Union’s construction in a specific sense, hence excluding some competing concepts and ideas. It is thus not possible to engage in a meaningful debate over the ‘federal’ features of the European Community if one does not direct attention to the political implications and implicit discursive strategies linked to the use of the concepts just described. The discussion on parallels, analogies and direct potentials of explication that has sprung up in recent years is very much driven by such political implications and deliberate discursive strategies. While the debate in the German-speaking area concentrates in particular on similarities to and analogies and contrasts with the German Empire of 1871, the Anglo-Saxon literature refers to many more examples. These include the federal Constitution of the United States of America, the federal ‘dominion’ Constitutions of Canada and Australia, and the postcolonial federal Constitutions of India, Nigeria, Burma and Malaysia. Furthermore, recent political science literature, particularly in the field of nationalism, questions how a decidedly multinational community might be integrated at all levels of a state—coming to a clear conclusion that this is possible only in a federal form, if at all! Here Switzerland, Belgium and Canada serve as points of reference.

While the first idea which is strongly represented in German speaking literature aims primarily at a deconstruction of guiding ideas and basic concepts that are uncritically used in the debate on the ‘European Constitution’, the more comparative literature on European federalism, primarily of Anglo-Saxon background, tries to draw constructive consequences from the rich experience which might be found in an empirical analysis of the functioning of federal systems all over the world. The constructive orientation is even more openly displayed within the debate inspired by nationalism studies, a debate which covers the chances of federal integration of a multitude of national entities and/or peoples in a multinational arrangement of a federal nature. The debate struggles with the question of whether under conditions of national heterogeneity it is possible to avoid giving the federal structure strong ‘consociational’

\[36 \text{See also on that point Burgess, above n 3, 41ff, in particular, 42: ‘the established concept of federation may no longer be helpful and the federation–confederation antithesis may prove to be completely misleading. . . The future may not lie in an outmoded state sovereignty but in a new theory of association’.}

\[37 \text{See the exemplary contributions by DJ Elazar, JHH Weiler, JD Donahue, MA Pollack, GA Bermann, G Majone und K Nicolaidis, in Nicolaidis and Howse (eds), above n 27, 31, 54, 73, 191, 252 and 439, respectively.} \]
characteristics. In the end, this leads to the question of what might be the potential collective subject of such a conglomerate of nations—culminating in a work such as 'A Theory of the Necessity of a Federal “Staatsvolk”, and of Consociational Rescue'.

IV. The Benefit of Federal Analogies—Or the Central State as a ‘Leitmotiv’ of Political Theory

Let us begin with the deconstructivist potential that is inherent in any comparative look at federal parallels. One of the most interesting aspects of the debate on form and content of a European Constitution is the choice of theoretical assumptions. It should not come as a surprise that such a choice in states like France, characterised for centuries by experiences and traditions of rigid centralisation, demonstrates an instinctive fixation on centralist models and categories. In contrast, the orientation towards centralist models that characterises the German debate should be of greater surprise. The strong fixation of the German debate on the traditionalist concept of sovereignty is conspicuous in this regard, coupling this concept with classical ideas of people’s sovereignty and of parliamentary democracy. On the basis of such a construction, many authors conclude that it is not possible to successfully ‘parliamentarise’ an arrangement like the European Union, or that—it is argued—from the perspective of German constitutional law—such ‘parliamentarisation’ would mean an infringement of the constitutional guarantee of democracy. The peculiarity of the arrangement created during decades of gradual integration does not allow—for a complete parliamentary codetermination in political decision-making without destroying the balance of the overall system.

If viewed through the lenses of German constitutional history, such debate raises strange analogies to the constitutional discourse of the late nineteenth century over the nature and character of the federal state, a debate which suggests that there exist common problems and structures in such arrangements of a federal type. The search for the ultimate place of sovereignty almost became an obsession in the late nineteenth and early twentieth centuries, particularly the issue whether sovereignty had gone over to the Empire (Reich) with its foundation or whether it had remained in the hands of the individual monarchs jointly forming this entity. A second question closely linked to this point was the debate over whether a parliamentary system would be compatible with the federal character of the Constitution of the Empire (Reichsverfassung). The majority of German constitutional scholars took a rather negative stance in the second debate, dismissing any such compatibility.

The return of this archaic debate about the place of sovereignty is irritating if one takes into consideration its background. In pursuing the debate to its conclusion, in particular current ideas about the ‘special nature’ of a confederal system (perceived as incompatible with a consequent parliamentarisation), one cannot avoid the strange impression of experiencing a revival of the theories of the late nineteenth century. The recourse to seemingly outdated ‘historical’ debates over basic concepts, however, demonstrates that notions and categories perceived as secure and beyond argument contain more problems than the users of such concepts are ready to admit.

40 On the question of what the common structure of such federal systems might be, see A Weber, ‘Zur künftigen Verfassung der Europäischen Gemeinschaft’ [1993] Juristenzeitung 325; Everling, above n 25, 179.
41 See E Kaufmann, Bismarcks Erbe in der Reichsverfassung (1917) 6–9; 64–67; 96–101; see also O Mayer, ‘Republikanischer und monarchischer Bundesstaat’ (1903) 18 Archiv des öffentlichen Rechts 337, 366–68.
42 See also Murkens, above n 8, 743ff.
1. The Question of Sovereignty

The specific construction of the federal Constitution of 1867, which had been deliberately worked out in this form by Bismarck,43 had left open the question that seemed so central for constitutional lawyers of that time—the question of where real sovereignty was placed. The Constitution had created a fragile balance not only between monarchical sovereignty—of the individual princes, embodied in the organ of the Federal Council (Bundesrat)—and the people’s sovereignty—of the entire German people, embodied in the Imperial Diet (Reichstag)—but had also left open the question whether the Empire had become a fully sovereign state on its own by marginalising the member states to dependent entities or whether the individual States that had formed the Empire continued to exist as sovereign states. This ‘deliberate confusion’ was easy to understand because at the time when the states unified to form the Empire, the dominant thought of the old liberal constitutionalism worked with the assumption of a shared or joint sovereignty, distributed upon federation and member states.44 The sovereignty of the (composite) state was perceived as being simply divided between the different levels of state authority.

Under the influence of a new theoretical school that had gained prominence soon after 1871 and was working on the basis of the ‘juridical–formal’ method later called legal positivism, the question of sovereignty was immediately readdressed. Constitutional positivism forced an outcome on the issue of sovereignty. It was the widely shared belief in constitutional law doctrine that state sovereignty, in its nature and as a legal concept, is indivisible and can only be attributed to either the federal state or the member states.45 According to the respective methodological perspective (and political preference), one could either construe the federal (imperial) Constitution as a more confederal, ‘unional’ arrangement, or perceive the federal Constitution as the founding act of a new state marginalising the member states which had entered into such a union. Following the latter understanding, the Federation (Reich) had been transformed into a state which had become the exclusive bearer of sovereignty.46

The predominant view maintained that sovereignty must be construed as ‘the highest, supreme, only itself directing power’—a concept that includes ‘logically the characteristic of unrestrictedness and accordingly also the characteristic of indivisibility’.47 Reformulated in terms of the famous question of the Kompetenz-Kompetenz (competence-competence), it means that ‘in the authority of the state over its competence lies the highest condition of its self-sufficiency, the core point of its sovereignty’.48 Such a sovereignty, however, could, in the view of the majority of constitutional lawyers of the time, only belong to the Empire (Reich). The

46 As a summary of this controversy, see von Martitz, above n 44, 560ff.
47 Hence the critique of Laband, above n 45, 73; in the same direction, see also von Seydel, Kommentar zur Reichsverfassung, above n 45, 3.
48 Haenel, above n 45, 149.
German scholarship of constitutional law thus had become entangled ‘in the web of the concept of sovereignty . . . like a fly in the web of a spider’—a statement which still seems valid today.

2. ‘Divided Sovereignty’ and the Principle of People’s Sovereignty

The old liberal constitutionalism could imagine only the principle of people’s sovereignty as a suitable basis and guiding principle of a modern state. When constitutional theory based itself upon the assumption of people’s sovereignty, a construction of ‘shared sovereignty’ made a lot of sense. The people, as the ultimate owner of sovereignty, are not capable of acting independently. People’s sovereignty must always be organised by a constitution and must be channelled in an institutional arrangement in order to work. However, in a constitutional system based upon the separation of powers, such an organisation always rests upon a division of labour in the exercise of public authority. The state—organised on the basis of a formal constitution—by definition does not know a state organ which could be, as the bearer of an organ-specific sovereignty, supreme to the other organs, ie endowed with absolute authority. On the contrary: in such a constitutional system, the organisational bearer of sovereign rights can only be a multitude of organs which exercise the state’s public authority jointly—if one does not think in categories of the centralisation of powers inherent in classical doctrines of ‘sovereignty of parliament’. Absolute sovereignty of parliament, however, is the constitutional doctrine of a unitarian state, not of federal states.

A completely different image emerges if one takes as a starting point a divergent theoretical construction, like German constitutional theory of the late nineteenth century did. The undisputed axiom of the system of constitutional monarchy had always been the unlimitedness—and indivisibility—of sovereignty. Monarchical sovereignty—understood in the absolutist intellectual tradition of Bodin’s doctrine as suprema potestas of a monarch representing the state—logically tended to a construction of unitary and absolute power. State authority was always derived power—derived from the ‘supreme, absolute power’, the sovereignty of the monarch. Such uniform and centralised power, however, could only belong to one source of authority, even in a federal state. This had not been changed by the compromise formula found in the era of constitutionalism, the formula replacing the monarch as the genuine bearer of sovereignty with the state—a compromise solution which has had a lasting influence on German constitutional doctrine right up to this day. The state as a collective subject in those days had been raised to the position of a genuine owner of sovereignty. The German debate on the impending loss of national sovereignty following the Maastricht Treaty (and the draft Constitutional Treaty) only becomes understandable if one takes these intellectual legacies into account.

49 Preuß, above n 44, VI (my translation).
51 So—as an accusation—Mayer, above n 41, 337.
53 For more detail, see K Stern, Das Staatsrecht der Bundesrepublik Deutschland (1980) vol II, 527–41, in particular 532–6.
54 As a classical emanation of the doctrine of sovereignty of the parliament, see JC Bluntschi, Allgemeines Staatsrecht (6th edn, 1883) 134–8.
55 See, eg Laband, above n 45, 73.
56 Concerning the victory of this construction, see the historical study of W Pauly, Der Methodenwandel im deutschen Spätkonstitutionalismus (1993), in particular 23–9, 46, 66–7, 77–9.
consideration. Various conceptual peculiarities derive from this legacy, like the formula of the proper and ultimately responsible statehood of the Federal Republic (‘eigenen und letztverantwortlichen Staatlichkeit der Bundesrepublik’)

or the constitutional necessity of an indivisible responsibility (‘Verfassungsnotwendigkeit einer unteilbaren Verantwortlichkeit’) as well as the guiding idea of an ultimate responsibility of the German State (‘Leitbild einer Letztverantwortlichkeit’). The drama that has unfolded in the eyes of a powerful faction of German constitutional scholars by the transfer of certain additional competences to the European Union is understandable only if one starts from the inherited, unitarian concept of a uniform and indivisible sovereignty. If one were to take the old construction of shared sovereignty as a starting point, the arrangement of the European Union, founded by the Maastricht Treaty and further developed by the Amsterdam and Nice Treaties and now the Lisbon Treaty, would be reduced to a rather banal operation of rounding off the competences of the Community system.

3. People’s Sovereignty and the ‘Constitution’ of the European Union

The supranational arrangement of the European Union undoubtedly raises questions regarding the construction of composite statehood in federal patterns. These questions concern in particular the division and grading of ‘sovereigns’ and the change of the concept of sovereignty. It is disputed whether the European Union already possesses ‘state-like’ or ‘parastatal’ characteristics. However, in many aspects the existing ‘Constitution’ of the European Union—in the form of the Treaties of Maastricht, Amsterdam, Nice (and hopefully Lisbon)—demonstrates striking similarities to the constitutional arrangement of the German Empire of 1867/1871, which also rested on a series of compromises in the distribution of powers. In hindsight and with good reason, the German Reich has also been described as a ‘community of states’ or a ‘union of states’ (Staatenverbund), due to its confederal characteristics. This is true in particular for the form in which the member states participated in the central decision-making of the Reich. The arrangement designed by Bismarck in 1867 was far from being typical for federal states at that time. The most telling part of the construction was the Federal Council. The Council was designed as a surrogate of the missing executive of the Reich. It was intended (according to Bismarck’s original conception) to serve as a kind of joint governmental organ of the ‘allied monarchical governments’ of the princely member states. With that construction, Bismarck deliberately tried to preserve the independence of the individual States’ executives. The ‘allied governments’, as bearers of monarchical sovereignty, constituted the real sources of legitimacy in the bureaucratic model of an authoritarian state dominant at that time in Germany. By preserving the political predominance of the monarchical executives, Bismarck at the same time hoped to block—and this was a deliberate part of the construction—any victory of parliamentarism. One could say something similar concerning the construction of the European

60 See KE Heinz, ‘Das Bismarck-Reich als Staatsgemeinschaft’ (1994) 5 Staatswissenschaften und Staatspraxis 77; see also Böhmer, above n 26, 35ff.  
61 The differences between the federal constructions of the German Empire on the one hand and the classical federations like the US and Switzerland on the other were already recognised by several contemporaries, and with particular clarity by JC Bluntschli in his state theory, above n 44, 561–2; see also G Anschütz, Bismarck und die Reichsverfassung (1899) 13–17; H Triepel, Die Reichsaufsicht (1917) 71–5.  
62 On the Bismarckian thesis of a ‘League of Princes’ (Fürstenbund), see eg the declaration of Bismarck before the Federal Council on 5 April 1884, printed in Hirth’s Annalen (1886) 350–4; on the political function of the thesis, see Craig, above n 43, 50; Nipperdey, above n 43, 87–8; Huber, above n 45, 788–9.  
63 See, eg Nipperdey, above n 43, 92.
Community, which in its approach is also a very technocratic construction. By attributing to the national governments (through the predominance of the ‘intergovernmental’ Council) the decisive say in the decision-making of the Community, the whole construction tried to secure the hegemony of the executive. Seen from this perspective, it is amazing how the pragmatic arrangement of the Council today is sanctified as an emanation of democracy by some authors. The Council is often elevated to being the centre of the European democratic process. If this were to be taken seriously, it would mean that the project of European integration was in danger of becoming an instrument for safeguarding the autonomy of executives in political decision-making. Thus, the European project, still to some degree an idealistic concept, would become hijacked by the ‘intergovernmental’ predominance in its institutional arrangement. This would mean in turn that the Community construction could easily bypass democratic participation.

The role of the parliament poses particularly difficult questions. From the beginning, the role of the federal parliament (Reichstag), as an emanation of the principle of people’s sovereignty, was in stark contrast to the more bureaucratic authoritarian constitutional arrangement characterising the Reich in general—a contrast that was deliberately built into the federal Constitution of 1867. Bismarck had used the appeal to the people’s sovereignty of the German people as a kind of ‘joker’ in the struggle over hegemony. It was also a useful catalyst of further integration in the aspiration for legal unity. Today, the institutional arrangement of the European Community is also characterised by a compromise between persisting Member States’ ‘sovereignty’ (as classical state sovereignty) and direct representation at the European level (as an expression of the principle of people’s sovereignty). It is thus based on two pillars of democratic legitimation: a national one, by way of national parliaments and governments, and a Community-related one, grounded in the directly-elected European Parliament. In its original version as a ‘Parliamentary Assembly’, the European Parliament clearly did nothing more than incorporate the national parliaments in the decision-making procedures of the Communities, thus ‘representing’ the national peoples as the undisputed subjects of a (Member State-related) people’s sovereignty. The introduction of a scheme of direct elections, however, shifted in a very peculiar way the institutional role of the European Parliament. It is not possible any more to understand the members of the European Parliament as simple ‘representatives’ of individual nations or peoples constituting the Union, as an expression of a—separate—people’s sovereignty of each nation united with the other nations in the Union. They are not trustees of (a German or other national) state authority any more, legitimated through the national parliamentary systems, as much as the members of the German federal Parliament are not representatives of a specific ‘people’ of a Land any more, although they are elected in this Land. The Members of the European Parliament are ‘representatives’ of the

64 The Constitution of the Empire was—as Thomas Nipperdey has formulated it—‘truce and compromise’. The Constitution has ‘balanced federalist and parliamentary principles. It has indeed limited, if not blocked the potential power of the parliament and the position of the government by the decidedly federalist organ of the Federal Council, but it has also created and consolidated a dynamic parliament on the basis of general elections.’ See Nipperdey, above n 43, 79 (my translation).

65 This is now explicitly stated in Art 10(1) and (2) of the EU Treaty of Lisbon (TEU-Lis); see in this regard also M Ruffert, in C Calliess and M Ruffert (eds), Verfassung der Europäischen Union (2006) Art I-46 CT paras 2f.

66 See, eg Burgess, above n 3, 116–18.

67 Some scholars are still of the opinion that by definition only the traditional ‘state-nations’, which are capable of delivering a genuine democratic legitimation through their national parliaments, can be bearers of people’s sovereignty. See, eg PM Huber, ‘Die Rolle des Demokratieprinzips im europäischen Integrationsprozeß’ (1992) 3 Staatswissenschaften und Staatspraxis 349, 354; F Ossenbühl, ‘Maastricht und das Grundgesetz—eine verfassungsrechtliche Wende?’ [1993] Deutsches Verwaltungsblatt 629, 534; HP Ipsen, ‘Europäische Verfassung—nationale Verfassung’ [1987] Europarecht 195, 209ff; but see also, in a more differentiated manner, U Di Fabio, Der Verfassungstaat in der Weltgesellschaft (2001) 87ff, 100ff; J Bröhmer, ‘Das Europäische Parlament: Echtes Legislativorgan oder bloßes Hilfsorgan im legislativen Prozeß?’ [1999] Zeitschrift für europarechtliche Studien 197.
people of the European Union (‘people’ understood as the totality of all the citizens of the Union) with a view to a public authority extending to the whole Union.  

The identification of people and nation is a possible, though not necessarily the only, cogent interpretation of the concept of people’s sovereignty. In a generic perspective, the concept of people’s sovereignty has not been intrinsically based upon the concept of nation, but rested (at least at the beginning) upon the idea of free self-determination of a citizenry. The consensus of citizens was needed to legitimate state authority; but these were the citizens of a given political entity, not the members of a pre-existing national community. The individual citizens must not have constituted a people or nation prior to the act founding a political community, but may have altogether conceived themselves as a collective entity (and a *pouvoir constituant*) in the act of constitution-making.

There is probably only one plausible alternative left, if one does not want the European Parliament to fade into a *quantité négligeable*, like the advocates of national sovereignty prefer to argue. This option tells us that the European Parliament is an elected representative organ, a symbolic embodiment of a principle of representation (in the sense of people’s sovereignty) oriented towards the entirety of the European Union, even if such people’s sovereignty does not belong to a uniform ‘European people’ (*Staatsvolk*), but rather to a ‘people’ in the pre-national, authentic sense of the term (as *demos*), forming the totality of the citizenry living in a given polity. If it is possible at all to construct the concept in traditional categories, we could speak of the European peoples united in the Union as a composite polity of multinational character.

This element of representation, which has been inherent in each directly elected parliament to date, has only a relatively weak embodiment in the institutional structure of the Union and is largely overshadowed by the statal sovereignty of Member States that is embodied in the Council of Ministers. In principle, the Member States formally continue to be the ‘Masters of the Treaties’ (*Herren der Verträge*), since changing the Treaties (as the ‘Constitution’ of the Union) does not formally require consent of the European Parliament. But the stronger the European Parliament and the more important its participation in decision-making becomes, the

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68 See also W Kluth, in Caliess and Ruffert (eds), above n 65, Art I-20 CT paras 5ff; A Augustin, *Das Volk der Europäischen Union* (2000) 386ff; Kluth, above n 35, 30ff.


70 As an example of this tendency, see Ossenbühl, above n 67, 634–5, who claims that the European Parliament is ‘not a parliament in the traditional sense of popular representation’. Despite being named parliament, one should not ‘identify it with the constitutional position of national parliaments’ (my translation). According to him, it remains unclear from which source the European Union should ever obtain its democratic legitimation. See also PM Huber, above n 67, 356, who—in modifying the famous words of Montesquieu—describes the role of the European Parliament as ‘en quelque façon nulle’ and writes of a ‘democratic decorum’; see in addition the literature listed in G Lübke-Wolff, ‘Europäisches und nationales Verfassungsrecht’ (2001) 60 *Veröffentlichungen der Vereinigung Deutschen Staatsrechtslehrer* 246, 263 fn 44.


72 See Pernice, above n 39, 477–8; see also the more recent, detailed study of A Augustin, *Das Volk der Europäischen Union* (2000), in particular 63ff, 39ff; Peters, above n 57, 657–6, 700–8.

stronger the element of an all-European people’s sovereignty embodied in the parliament comes to the fore.\textsuperscript{74}

In view of the current state of integration, in particular the European Parliament’s degree of participation in political decision-making,\textsuperscript{75} one might ask whether the European Union does not constitute a state with ‘shared’ or ‘dual’ sovereignty.\textsuperscript{76} Pointing at the (missing) Kompetenz-Kompetenz of the Union, which usually serves as a counter-argument, does not really help here. Such competence to decide upon the distribution of competences remains, according to the common construction, with the Member States as ‘Masters of the Treaties’.\textsuperscript{77} But the theoretical assumption that there exists such a Kompetenz-Kompetenz presupposes the existence of an ultimate decisional prerogative which is far from self-evident in a federal or confederal system. The institute of an unlimited Kompetenz-Kompetenz transfers the model of the hierarchically organised unitarian state to any sort of federal structure, since it claims that public authority and sovereignty are always attributed to one central organ, originally the monarch, then the central parliament. However, this transfer of unitarian theoretical categories to a federal structure is misleading.

If the project of building a European polity is only conceivable in the form of a confederal ‘union of peoples’, the sovereignty of the Member States continues to exist, at least at its core. This is due to the states continuing to possess an autonomous, original (originäre) public authority (which we could also call sovereignty). Such sovereign power, however, is no longer unlimited, as the traditional doctrine of sovereignty demanded; rather, it is only a partial authority over its citizens. Other parts of its sovereign powers are irrevocably bound in the system of supranational integration. The corresponding level of supranational authority also possesses only a limited power—a fact that would not change even after a potential ‘constitutionalisation’ of the system through the formal introduction of a European Constitution.

V. The Role of the Principle of Democracy in a Federal Commonwealth

The question of sovereignty and the principle of democracy thus prove to be inseparably linked, like Siamese twins.\textsuperscript{78} In an arrangement of modern constitutionalism, the question of sovereignty is always linked to the construction of people’s sovereignty. At its core, however, the

\textsuperscript{74} See also A Maurer, ‘The Legislative Powers and Impact of the European Parliament’ (2003) 41 JCMS 227.
\textsuperscript{75} As to the role dedicated to the European Parliament under the failed Constitutional Treaty, see S Oeter, ‘Demokratie im europäischen Verfassungsverbund’ in M Zuleeg (ed), Die neue Verfassung der Europäischen Union (2006) 69; see also B Crum, ‘Tailoring Representative Democracy to the European Union’ (2005) 11 ELJ 452.
construction of people’s sovereignty is a question of moulding the principle of democracy.\(^{79}\)
How one solves the question of who should be the ultimate bearer of sovereignty in a system of federal integration will depend upon the chosen model of procuring democratic legitimacy. If one is thinking in unitarian categories, one will tend to construct a sovereignty of the federation, in contrast to a system of ‘shared’ sovereignty. However, if one accepts as subjects of people’s sovereignty only the individual peoples of the member states forming a confederation, sovereignty will be attributed exclusively to the member states.

The response to the question of democratic legitimation depends not only upon the theoretical understanding on which the implicit model of construction of the European integration rests, but also upon the assumed theory of democracy. If one perceives the Community under a traditionalist perspective, ie constructing the arrangement exclusively as a commonwealth of sovereign nation-states, the source of democratic legitimacy can only be the parliamentary system at the national level. But what, then, is the role of the European Parliament? It undoubtedly is no longer a simple form of consultative ‘parliamentary assembly’, but a directly elected parliamentary representation of the European citizens and accordingly a genuine organ of parliamentary representation that possesses direct democratic legitimacy. In taking into account such a changed role for the European Parliament, it is not possible any more to deny that the European Parliament has acquired aspects of a common European people’s sovereignty. Similarly to the federal parliament of the German Reich, the Reichstag, the foundations of a people’s sovereignty throughout the whole European polity remains constricted by the fact that the overall arrangement of the European Constitution does not establish a genuinely parliamentary system, but rather attempts to consolidate the predominance of the ‘allied governments’. It will depend mainly upon the concrete modelling of the position of the European Parliament as to how strong the core of an evolving ‘European people’s sovereignty’ will become. Rey Koslowski has written in this regard of a process of ‘unintentional constitutionalisation of power-sharing’, in contrast to the classical founding act of federal systems, ie the ‘intentional federalism by treaty’.\(^{80}\)

A change in the functional distribution of roles between the organs of the Community and a transformation of the system of political parties will therefore go hand in hand.\(^{81}\) The growing importance of the European Parliament will force the parties into deeper internal integration at the European level, a process which is necessary in order to enable the Parliament to do justice to its new function. Such an increased role for the Parliament will also raise the interest of the media in ‘European internal politics’, ie the decisions in rule-making, budgetary and administrative control attributed to the Parliament. Intensified reporting (heightened interest by the public) should lead to more public knowledge of parallel debates in the media of other Member States, which should result in the growing interdependency and interlocking of hitherto rather separated ‘national’ publics. The more the Parliament and the Commission deal with questions of European politics of public interest, in the sense of a ‘European common good’, the more the current national political perspectives will develop into all-encompassing ‘European’ discourses. In such European discourses, the same questions, if perceived with a view to the arguments of the others and with an orientation of common goals, would have a chance to become fused to a ‘European common good’ overarching the individual nations with its constructs of ‘national interest’.\(^{82}\) None of this will happen quickly, and it is likely to be a

\(^{79}\) Ibid, para 9.
\(^{80}\) Koslowski, above n 2, 39–40.
\(^{82}\) See also Rossen-Stadtfeld, above n 25, 76–7.
tortuous and protracted process. The ‘constitutionalisation’ of the European Union to a federal polity should accordingly be construed in this perspective as a slow, and in its essence dialectical, process. If the project of European integration is to be a success, it will not suffice to develop the institutional arrangements of a European democracy, but—parallel to the shift in balance of the institutional roles—the social and organisational preconditions of a functioning democracy at the European level will have to develop. It is exactly in this dual nature that the real challenge of a creeping process of gradual ‘federalisation’ lies, of an—to use the words of Koslowski—‘institutionalization of a federal legal framework through the routinization of practices’.

As a consequence, it becomes questionable whether it is justified to claim that the founding of genuine people’s sovereignty at the European level should happen as a ‘revolutionary’ act in the shape of formulating a formal Constitution. Moulding a Constitution in this case is perceived as requiring an act directly legitimised by the people, usually instituted through the election of a constituent assembly or at least the confirmation of a Constitution by referendum. In reality, however, the process of European constitution-making will have a gradual character. A European democracy resting on a common European people’s sovereignty will be established away from the public eye. The idea of a ‘revolutionary’ act of a singular nature, meant as the setting of a new ‘foundational rule’ (Grundnorm), thus proves to be highly problematic. In conclusion, one should imagine ‘constitution-making’ in the European Union in a totally different manner, more as a process of creeping accumulation of important fundamental decisions according to the British style of constitutional evolution, rather than as the formal exercise of revolutionary pouvoir constituant by a constituent assembly.

Nevertheless, the concept of a revolutionary shift of sovereignty serves as the main point of attack for the critics of further integration. An ongoing ‘parliamentarisation’ of the Union would, it is argued, inevitably erode national sovereignty and marginalise national parliaments. The European Community and Union accordingly qualify in the perspective of this line of thinking as a mere system of international law-based regional integration, as a commonwealth of a confederal nature, not suited to democratisation. According to this view, democracy requires the existence of a recognised people as bearer of people’s sovereignty. A ‘European people’, some argue, does not exist or cannot exist since the diversity and heterogeneity of its peoples is a constitutive characteristic of Europe. A ‘people’ as a subject of popular sovereignty, however, does not necessarily require a common language, culture and history, but does at least need to be a collective that is convinced it belongs together, is prepared to form a legal union and is ready to accept common decisions taken by organs responsible for the whole entity. Only on the basis of such commonalities might a political public agree to support an overarching people’s sovereignty and enjoy the ultimate control within a democracy. The preservation of particularities of the peoples and states united in the Union is thus seen as requiring renunciation of any further democratisation of the Union. It is in fact seen as the very reverse, as requiring stronger inclusion and participation of national parliaments.

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83 Koslowski, above n 2, 41.
86 On that point, see also R Bieber, ‘Verfassungsentwicklung und Verfassungsgebung in der Europäischen Gemeinschaft’ in Wildenmann (ed), above n 71, 393, 408–9.
87 See inter alia the references to the relevant literature given by Lübbe-Wolff, above n 70, 263 fn 44. On the difficulties of the notion ‘people’ in particular regarding the ‘treaty constitution’ of the European Union, see in detail Augustin, above n 68, 29–35, 196–204, 393–8; Peters, above n 57, 105–7, 651ff.
88 See, eg Fischer and Schley, above n 5, 34; on the practical problems of such an understanding, see in particular U Everling, ‘Überlegungen zur Struktur der Europäischen Union’ (1993) Deutsches Verwaltungsblatt 936, 945–47; Pernice, above n 39, 466–70.
At first glance this argument seems plausible. A ‘European people’, in the sense of a nation with pre-existing collective identity oriented towards creating its own homogeneous nation state, indeed does not exist. But is this statement really the end of the debate? Does this starting point really justify the conclusions derived from it? The response should not be given too hastily. The assumptions of the described line of argument should not be presumed as self-evident without further questioning.89 The current argument of a missing ‘European people’ as an insurmountable obstacle in democratising the European Community reveals a problematic understanding of the construction of modern statehood. It demonstrates that it is erroneous to identify without any further reflection people’s sovereignty and the traditional nation-state with one another.90 Most European nations are the result of a common statehood in history, from which they derived, and did not constitute pre-existing conditions of a national state founded upon the basis of such a prior nation.91 During the French revolution, France was declared to be a nation-state, although most of the inhabitants of France were far from considering themselves members of a uniform nation; it was only the centralised state enthused by the national idea that has formed France into a uniform nation92 in just over a century. The same could be said for most of the other nation-states of Western Europe.93 The popular identification of people’s sovereignty with the nation-state thus contains at its core an element of ethnic fundamentalism and demonstrates traits of mythological thinking.94 Historically, people’s sovereignty works without any problem where the unifying relationship of common ethnos does not exist—^one need only think of Switzerland or classical immigrant countries like the US and Canada.95

The current argument against democratising a federal system like the European Union contains a historical irony, as the German constitutional scholars in the late nineteenth and early twentieth centuries, particularly during World War I, had also objected to any democratisation with very similar arguments. These objections were raised in order to ‘defend’ Germany against any further parliamentarisation. The ‘genuine’ German model of statehood embodied in the ‘constitutional monarchy’ was perceived as being incompatible with a dependency of government on parliament. Moreover, the diversity of German stal and cultural traditions—preserved in the federal model—was seen as incompatible with parliamentarisation,


90 This is done with particular openness by U Di Fabio, ‘Der neue Art 23 des Grundgesetzes’ (1993) 32 Der Staat 191, 202, who refers for the construction of ‘democratic sovereignty’ to the ‘idea of the modern European nation state’ (my translation).

91 See in particular EJ Hobsbawm, Nationen und Nationalismus (German edn, 1991) 25–31; see also E Gellner, Nationalismus und Moderne (1991); EJ Hobsbawm and T Ranger (eds), The Invention of Tradition (1983).


93 Hobsbawm, above n 91, 97–105.


95 On the friction that exists between the concept of the modern ‘state-nation’ relying upon the principle of non-identification and the nation-state principle, see in particular J Delbrück, ‘Global Migration—Immigration—Multiethnicity’ (1994) 2 Global Legal Studies Journal 45; as an interesting attempt to apply certain findings of recent political theory to the problems of the social and cultural fundamentals of European integration, see also S Howse, ‘A Community of Europeans’ (1995) 33 JCMS 27; S Choudhry, ‘Citizenship and Federations’ in Nicolaidis and Howse (eds), above n 27, 377.

96 On that point, see Bryde, above n 94, 312.
because parliamentary sovereignty in the Reich would inevitably mean the final marginalisation of the individual states’ monarchies.97

Some authors argue in a rather similar fashion today. They claim that the construction of people’s sovereignty and democracy is inherent in the traditional unitarian nation-state of Western European origin. This is not objectionable insofar as people’s sovereignty and democracy are understood as being exclusively oriented towards the concept of the nation-state. ‘Democratisation’ of the Community in the sense of a classical parliamentary majority rule would result in the creation of a European ‘suprastate’ and would be doomed to destroying the balance of the Community system that is based upon continuing self-determination in the framework of the ‘national’ state and upon the preservation of heterogeneity and diversity of the European national cultures. The underlying tenet remains questionable—namely the assumption that a gradual progress of European integration is only possible through the organisational structures of the classical nation-state. The argument completely disregards the wealth of empirically gained insights concerning the construction of non-nation-state-based composite systems that have been unearthed by research on comparative federalism. The composite of different levels of statehood with a division of labour between the various levels, a structure typical for federal systems, does not abolish the polities united in its institutional framework, but preserves the (albeit functionally limited) decisional autonomy and self-determination of the relevant nation-state in the multi-level system of a federal nature. It thus consolidates and secures the political autonomy of its subjects. Only the tasks that must be pursued by a central authority are transferred to the newly created, overarching level of the federative commonwealth; the decentralised powers of the member states preserved in the federal composite remain intact, which also preserves regulatory competition of member states as a disciplining element of federative unions of states.

In contrast to such a cautious approach characteristic of federalism, the inherited model of unitarian statehood of the nation-state is often misunderstood as an a priori value in the model of the ‘eurosceptics’, instead of dealing with federalism as a question of the functional adequacy of a certain institutional order.98 This obsession with the ideal rather than the given structure, however, tends to avoid the decisive question: does the renunciation of any further consolidation of the role of the European Parliament and the compensatory strengthening of the national parliaments really solve the problems hidden behind the slogan of the ‘democratic deficit’?

VI. The Construction of Democratic Responsibility—Experiences of Federal Systems

The persistence of historical peculiarities and of a presumed ‘being different’ tends to obscure the decisive questions. The bureaucracies of the individual states, Max Weber argued in 1918, perceived the Reich primarily as an ‘insurance institution for safeguarding their own position’.99

What always stood and still stands behind the slogan of ‘protection of federalism’ in Germany, he argued, continues to be a kind of dynastic–bureaucratic insurance of privileges, which finds its expression in a guarantee of far-reaching freedom of control enjoyed by the bureaucracy—freedom of control in particular in the internal administration of individual states.100 By shifting politically delicate questions to the federal level, the bureaucracy at the state level had largely gotten rid of any control by state parliaments. The lack of a functioning

97 See, eg Kaufmann, above n 41, 98–9.
98 See Peters, above n 57, 93–9.
99 M Weber, Parlament und Regierung im neugeordneten Deutschland (1918) 146.
100 Ibid.
parliamentary control of the executive at the federal level resulted in a system of completely uncontrolled bureaucratic decision-making.

Uncontrolled power of the bureaucracy is a corollary of unclear attribution of political responsibility.\textsuperscript{101} Clear political responsibility will be avoided or obscured with the result that political decisions need not be justified publicly by its authors as part of a co-ordinated strategy but will develop more or less accidentally, partly in coexistence, partly in confrontation between bureaucratic sub-organisations.\textsuperscript{102} Against the misery of such a bureaucratic decision-making there is, according to Max Weber, only one remedy. Only genuine parliamentary control of government can secure a clear attribution of political responsibility and force the executive to subject its decisions to public scrutiny.\textsuperscript{103}

Admittedly, the general public today is disillusioned to a large degree with the virtues of parliamentarism. Yet an efficient alternative to the inevitable growth of bureaucratic organisations, not to mention an alternative mechanism of public scrutiny and clear attribution of political responsibility, remains absent. Such an observation definitely applies to a confederal arrangement like the European Union, the construction of which was originally based upon a primarily intergovernmental ‘commonwealth of nations’. The problems of confederal systems based on bureaucracy, which were stated so eloquently by Max Weber in 1918, are also visible to a frightening extent with respect to the project of European integration. The bureaucracies of the Member States in the system of the European Union manage rather successfully to bypass the control of their national parliaments by shifting problems of decision-making to the European level.\textsuperscript{104} At the European level the bureaucracies are not subject to a form of political accountability comparable to the system of parliamentary control at the national level.\textsuperscript{105} Political responsibility accordingly becomes more diffuse, until it vanishes entirely.\textsuperscript{106} What develops then is a system of ‘organised irresponsibility’, as Max Weber has demonstrated with regard to the example of the external policy apparatus of the German Reich. There is no lack of concrete examples in the Community system of such apparent dangers to any specialist of organisational sociology, as a superficial glance at the European policy arenas demonstrates, eg the Common Agricultural Policy or the EC’s trade policy. There is also no indication that inter-governmental co-operation according to the model of the second and third pillars of the EU, which some suggest as a means of preserving sovereignty, is devoid of such problems—one need think only of the experiences with the purely inter-governmentalist approach of police and criminal justice co-operation, an attempt to insulate a decisive field of politics against the mechanisms of (national) parliamentary control whilst not creating an adequate (surrogate) mechanism of public responsibility that could replace the national mechanisms.\textsuperscript{107}

This should not be misunderstood as meaning that the European Union must necessarily, in order to create clear channels of public responsibility, convert to a system of pure parlia-

\textsuperscript{101} Ibid, 13–18.
\textsuperscript{102} Ibid, 33–36.
\textsuperscript{103} Ibid, 39–43, 99–105.
\textsuperscript{104} There is a widespread agreement on this fact, even among euro-sceptics: see eg Ossenbühl, above n 67, 635–6, 640; U Fastenrath, ‘Die Struktur der erweiterten Europäischen Union’ [1994] Europarecht suppl 1, 101, 119; PM Huber, \textit{Recht der Europäischen Integration} (1996) 81.
\textsuperscript{105} With some justification, however, Steinberger, above n 69, 40–1, points to the fact that the governments in current parliamentary systems are not comparable to the monarchical executives of the nineteenth century because they constitute in practice a kind of governing committee of parliamentary majority; nevertheless, it remains doubtful whether parliamentary groups, even when a partner in government, have enough expertise as well as working capacity to really enable them to control the executive apparatus in its activities in the field of European law-making.
\textsuperscript{106} This is conceded even by those authors who are sceptical towards a further strengthening of the European Parliament: see eg Huber, above n 67, 356–7.
mentary majority rule, as was advocated for the German Reich by Max Weber. The heterogeneity of the nations and societies united in the European Union is arguably so large that it is not possible to rely exclusively on the mechanisms of majority rule. Majority decisions alone would not lead to decisions that are generally accepted as legitimate in a multinational confederation like the EU. Federal systems like the European Union, which must attempt to integrate an enormous amount of societal diversity, cannot avoid incorporating strong elements of a consociational system into their arrangement of political decision-making. More far-reaching conclusions, like the claim that an integrated Europe will, by definition, not be capable of developing a democratic system at the European level, are based upon a problematic distortion of perspective. One should bear in mind that decision-making on the basis of national arrangements of democracy is not a genuine alternative to ‘democratising’ the European Union, since significant policy fields were placed under the jurisdiction of the Community long ago, with the result that joint decisions are taken in any case by the institutions of the Community. The whole project is path-dependent, and the path taken with the transfer of important policies to the arena of the Community is no longer reversible. There are many problems that the Member States can no longer deal with in the ‘splendid isolation’ of the classical nation-state. The solution is not a return to traditional policy-making at the national level, but ought to be the creation of an international treaty regime enabling the institutionalised co-operation of states. However, the accountability of politicians in such regimes is often even worse than in the European Community. The political choice is thus rather limited. One can choose between the established form of purely bureaucratic decision-making in the framework of intergovernmental negotiation procedures, either institutionalised in the Community system or insulated in a separate treaty regime, or between a political decision-making systematically made subject to public scrutiny and to political responsibility on the basis of prior public debate and parliamentary decision. The question is no longer whether one wants to have a structure of integrated decision-making at an international level, because the list of state functions that cannot be exercised without international co-operation has grown so long that the matter has largely got out of hand. States would be overburdened if they attempted seriously to ‘re-nationalise’ all these policies and keep them under strict national control. This leaves us with the question of how we want to organise the institutional arrangements of common decision-making. How do we want to counteract the indisputable lack of homogeneity that blocks the simple solution of classical majority rule?

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Two findings seem to be beyond dispute at this point. The first is that the Council is indispensable as a decisive organ and must keep its function in the political process of the Community; moreover, it is also an instrument to secure participation of the Member States in law-making and executive governance of the European Union. The perennial problem of the Council’s decision-making—its intransparency resulting from the confidentiality of the meetings—might be solved by the Lisbon Treaty; but no solution has been found for the other fundamental problem, the fragmentation of the Council with its largely uncoordinated parallelism of more than a dozen specialised sectoral councils. The second finding is that political decisions must be taken in such a way that all relevant social groups have a chance to be heard in decision-making. There are good reasons for developing a model of consensual democracy with a collegial structure of government, as is the case, for instance, in Switzerland. A collegial directorate ensures the representation of all important social groups in government decision-making.

It is beyond doubt, in my opinion, that the European Union will have to strive for something similar, even when instituting a framework of general co-decision by the European Parliament. With the (failed) draft Constitution and now the Lisbon Treaty, the institutional structure is converging towards an arrangement where Council and Parliament act as equal legislators. Some asymmetry will remain because the European Parliament is a ‘working parliament’ centred upon functions of control, not a classical (Westminster-type) emanation of majority rule, where the parliament itself shapes policies. With its concentration on control functions, some of the main problems of the traditional structure persist: the European Parliament has very little public profile, due to its low personalisation of politics and the lack of a polarity between governing majority and opposition. In its role as an institutional counterpart to Council and Commission, the European Parliament can only bring its influence to bear when the major parties act together. The resulting image, however, is again that of a consociational arrangement.

The collegial organ that was claimed here as being vital for the functioning of the Union already exists. In the Commission, the Union possesses such an organ that, according to its institutional position and composition, strikingly resembles the Swiss Federal Council. It would be folly to transform such a collegial executive, the composition of which ensures that

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113 Classical forms of international negotiations between national bureaucracies are not a priori better equipped to cope with these problems than parliamentary procedures formed according to the models of ‘internal politics’, which shift the question of aggregation of interests from the classical ‘statal’ (bureaucratic) actors to the political parties, the elections and the parliamentary process. In this direction, however, see the sceptical reflections by FW Scharpf, ‘Europäisches Demokratiedefizit und deutscher Föderalismus’ (1992) 3 Staatswissenschaften und Staatspraxis 293, 297–301.

114 On that point, see the convincing reasons given by P Raworth, ‘A Timid Step Forward’ (1994) 19 European Law Review 16, 23–25; see in addition the reflections of Fastenrath, above n 104, 114–16.


118 See Dann, above n 25, 330ff, 363ff.

the different peoples, traditions and political preferences of the member nations are represented in the executive centre of the institutional system, into a parliamentary government based on the Westminster system. Unfortunately, there are tendencies towards doing just this, which seem to reflect the lack of comprehension and imagination in European politics. Luckily, the Lisbon Treaty does not decisively change the institutional balance in this regard.

If federal experiences with the institutional problem of how to incorporate linguistic and cultural diversity into a decision-making structure teach us anything, it is that a parliamentary government according to the Westminster model, entrusting the decision-making to a simple parliamentary majority or, even worse, to a presidential executive like the American model, would not be capable of producing convincing results under the conditions of the European Union. Efficiency within the procedure of decision-making is only one parameter when measuring the success of an institutional system; the other is the perceived legitimacy of the decisions taken. Only legitimacy ensures that decisions taken and rules enacted by the institutions are respected in society. The legitimacy of a simple arrangement of majority rule in the European framework, however, would be more than fragile. The classical models of parliamentary majority rule and of presidentialism presume a social condition that is lacking in the European Union: the consent (usually presumed to be self-evident) of the outvoted minority to recognise as legitimate the decisions taken against their will. If this basic condition does not exist, majority decisions mean for the losing minorities nothing other than brutal domination by external rulers—a finding that becomes even more evident if the division between the majority and the minority follows clear-cut national, ethnic or cultural cleavages. A political minority under these conditions is in danger of becoming entrapped in a structural minority position, denying it any chance of ever winning a majority. Federal arrangements of a multinational character accordingly need strong elements of consensus. Consensual (or consociational) patterns admittedly must avoid an unconditional veto of various ethnic groups or nations, while at the same time seeking as broad a consensus as possible including the views of all involved, otherwise the union is in danger of breaking apart exactly along the rifts upon which it was constructed.

The comparison with Switzerland must take several problems into consideration. As long as the centre of gravity of political decision-making lies with the Council, the Commission continues to be dependent upon boxing up national interests in package deals often with rather 


121 In this regard only, see J Peterson, ‘The College of Commissioners’ in J Peterson and M Shackleton (eds), The Institutions of the European Union (2002) 71, 72ff.


123 In this sense, see also Fischer and Schley, above n 5, 32.

124 See also R Dehousse, ‘Constitutional Reform in the European Community: Are there Alternatives to the Majoritarian Avenue?’ (1995) 18 West European Politics 118, 122ff; M Poiares Maduro, ‘Europe and the Constitution: What if This Is as Good as It Gets?’ in JHH Weiler and M Wind (eds), European
The Commission still does not have the privilege of resorting to the balancing exercise available to the executive in classical federal systems, due to the inherent tension between a parliament oriented towards integration and Member State bureaucracies taking shelter behind the principle of 'subsidiarity'. Policies that are defined and formed exclusively in the informal negotiation procedures of 'intergovernmental co-operation' will always contain an element of opaqueness and will bear the traits of package deals. Such policies tend to show more features of an aggregation of particular bureaucratic interests than the aspired overall transformation of particular interests in the formulation of an independent common good of the entire Community. Political decisions of a certain consistency will probably only be achieved by political accountability of the political leadership towards a central parliament as representative of the 'composite people'—this is Max Weber's genuine insight that led to his polemic being used against the Constitution of the late German Empire.

But we should be realistic. The consociational character of the Union's decision-making leads to political processes of an inevitably ponderous and slow character. The efficiency of decision-making within the federal construction suffers considerably. The big advantage of the creation of a separate level of federal statehood with its own competences and its own, institutionally independent, decision-making procedures, as well as its own chain of democratic legitimation, tends to become obsolete. The practical alternatives to such a consensual system, however, are far from preferable. It is not the clear arrangement of orderly democratic responsibility of a parliamentary democracy with majority rule that is the real alternative, but the problems associated with the quagmire of institutions and the labyrinthine decision-making of the usual international co-operation in treaty regimes that constitutes the competing option. True, the advantages of the federal construction vis-à-vis the procedures of intergovernmental co-operation tend to vanish in the consensual mode of consociationalism. Webs of informal agreements and consensus routines tend to dominate formal institutions, but only such mechanisms ensure—as important contributions have plausibly argued—the cohesion and undisturbed functioning of multinational federations. At the same time, the system maintains a high degree of flexibility in decision-making, which is much higher than in traditional forms of purely intergovernmental co-operation. The absolute veto power of any member, which is rendered significantly less forceful in the federal system. The federal system is still burdened with strong consensual elements. In a first phase of negotiations the search for a consensus remains the decisive orientation and the possibility of majority decision increases the readiness of potential veto candidates to make concessions and to reach a compromise; if they remain too stubborn and stick too uncompromisingly to their blocking position, they run the risk of having no influence at all on the contents of the final decision and of being simply outvoted. The decision-making system is not necessarily forced...
to show consideration for the voice of every single member in every case to the extent that such a voice is stubbornly particularistic and shows no respect for common purposes.

VII. Conclusions: The Federal ‘Union’ as a Promising Construction

In reviewing the arguments, one comes across a series of marked ambiguities. Without parliamentary responsibility it is impossible, even in the European Union, to ensure political transparency and a form of decision-making that is responsible towards the common good of the entire community. At the same time it is obvious that a future Constitution of the European Union will not be able to follow any ‘pure’ doctrine of a parliamentary system, but must search—with a view to its own functional requirements—for its own solutions, solutions that inevitably will contain strong elements of a consensual system. This is not necessarily a plea for the ‘grand design’ of a new European constitution; on the contrary, the revolutionary act of founding a constitution ‘from scratch’ will remain a mere illusion—a utopia with its inherent danger. If such a utopia came near realisation, it would entail an enormous risk of overstraining the given will to enter into statal unity.

The existing ‘composite arrangement’ of integration, which might be placed somewhere between the classic poles of ‘federal statehood’ and ‘confederation’, might be described as the decisive virtue of the existing European Constitution—a Constitution which is in constant change. From this perspective, the peculiar Constitution of the EU is much more than a deficient construction. The ‘composite constitution’, preserving in its core strong elements of a confederation, represents a decisive safeguard of ‘subsidiarity’ in political decision-making. It ensures the peaceful coexistence of the divergent peoples of Europe, without depriving them of the advantages of a deepened co-operation in federal forms. In contrast, constitutions according to the model of federal statehood always contain a strong dose of forced ‘creation of unity’. They constitute at least as strong a central authority oriented towards unitarisation as they safeguard a (rudimentary) allocation of competences in favour of the subdivisions of the federal state. The citizens of the European Union, however, do not want a process of unitarisation, in the sense of a forced ‘nation-building’.

The gentle evolution of the arrangement along the lines of path-dependency seems to be without real alternatives in political practice. That is not to say that there is no need to improve the details of the institutional set-up. The European Union will either accept the challenge of finding an adequate solution to the problem of attribution of clear political

130 Ibid, 40.
131 On the interdependency of transparency and accountability, see also ibid, 11.
134 As to the openness of notions of a federal ‘union’ (Bund) to such hybrid constructs, see Schönberger, above n 7, 86ff, 104ff, 109ff.
135 In this sense, see the argument of Elazar for continuing a confederal construction of the European Union, which he perceives—in a certain way almost ironically—as a reminder of the federalist-consociational heritage of ‘Ancient Europe’ and as a volte-face against statist patterns of continental European nation statehood; see DJ Elazar, ‘The United States and the European Union’ in Nicolaïdis and Howse (eds), above n 27, 31.
responsibility and find a system of transparent political decision-making at European level, or the project of European integration will be frustrated by the immense challenges that lie ahead.\textsuperscript{137}

What the best realisation of these objectives might look like is a question that has to be decided primarily from a political perspective.\textsuperscript{138} The European democracies will have to consider what they want: preservation of national autonomy as far as possible, which in a system of intergovernmental co-operation will necessarily be to the detriment of the efficiency of common action but also to the mechanisms of democratic control, or strengthening of the mechanisms of the formation of a common will and of the coupled democratic mechanisms of control of the exercise of public authority. The second alternative inevitably will come—at least to a certain degree—at the expense of the autonomy of national systems and bureaucracies.\textsuperscript{139}

But can the lack of clear political responsibility characteristic of bureaucratic confederal systems really be a valuable alternative? If dependency upon consensus is unavoidable, then we should prefer the openly political search for consensus of the federal system that is also accountable to the public and not the classical intergovernmental system with its veto powers, which leaves no option but to rely upon the lowest common denominator. The patterns of decision-making in the Community suffer less from a ‘democratic deficit’ in a proper sense, but more from a ‘transparency deficit’.\textsuperscript{140} Without elements of transparency there may never exist a proper mechanism of democratic control, which by definition needs a certain degree of accountability in public affairs. There is an ultimate need for public control and public debate that forces political actors to routinely justify their actions. The required scheme of clear attribution of political responsibility will be possible only to a limited extent if one takes into consideration the necessity of incorporating elements of consensual democracy into the system. But the collective of citizens will become—merely by the fact of being integrated in a common polity that takes shared decisions over its weal and woe—a ‘community of fate’ (\textit{Schicksalsgemeinschaft}), to use a popular term of German constitutional theory.\textsuperscript{141} Such a community needs to be able to influence the decisions of the political leadership to ensure that power does not become structurally independent (and thereby lacking responsibility towards the ‘people’).\textsuperscript{142}

This is a result that is not easy for constitutional lawyers and those adhering to theories exclusively centred upon the state in its traditional form to accept. Based on the paradigm of the sovereign state, we have difficulties, even nowadays, in imagining another polity outside that of the nation-state. Municipalities, counties, regions, etc can be understood, if perceived from the perspective of \textit{Kompetenz-Kompetenz}, only as dependent subdivisions of the state; international and supranational organisations can be conceived only as dependent ‘functional communities’ centred upon the state.

\textsuperscript{136} See also the pleading of Pinder for an ‘incrementalist’, gradual process of ‘federalization’ of the Community: J Pinder, ‘The New European Federalism’ in M Burgess and AG Gagnon (eds), \textit{Comparative Federalism and Federation} (1993) 46.
\textsuperscript{138} On the political dilemma of any further development of the European Union, see FW Scharpf, ‘Kann es in Europa eine stabile föderale Balance geben?’ in Wildenmann (ed), above n 71, 415, 418–20.
\textsuperscript{139} This should not be misunderstood as a call for a further expansion of the EU to a European federal state or for a further extension of the competences of the EU. The question of the adequate structures of political decision-making is independent from any aspired legal quality such as statehood or federal ‘composite polity’; see Graf Strauffenberg and Langenfeld, above n 112, 259; Oeter, above n 26, 248ff.
\textsuperscript{140} See Fischer and Schley, above n 5, 31; see also Peters, above n 57, 626–9, 694–8.
\textsuperscript{141} ‘People’ here understood in the sense of the notion modelled by E-W Böckenförde as ‘democratic notion of people: people as a political community of fate’: idem, above n 78, § 24, para 26.
\textsuperscript{142} See, from the perspective of Union citizenship, Choudhry, above n 95, 377; but see also D Lacorne, \textit{European Citizenship}, ibid, 427–38.
As long as legal doctrine perpetuates its distorted assumptions, it will remain practically impossible to comprehend in theoretical terms institutional arrangements like the European Community. If taken seriously, this should be understood as a challenge to reassessing the assumptions of constitutional theory and adapting them to real developments. ‘Understanding the European Union as a Federal Polity’ expresses the challenge of modelling the institutional structure of the EU—a formula that should not be misunderstood in the sense that the European Union should be forced into the Procrustean bed of classical federalist constructions. ‘Federal polity’ does not necessarily mean ‘federal state’, but may comprise other constructions of a ‘federal nature’. The call to abandon the inherited ideals of constitutional theory accordingly does not mean to proclaim the ‘end of the state’. The nation-states that founded the Union would also persist in an openly federal construction as states. They would remain the bearers of genuine statehood and the symbols of national identity, equipped with important competences and a wide spectrum of statal institutions and instruments; they would, however, lose their ‘exclusivity’ as the sole bearers of sovereignty. Even in the future, the Union, as the federal roof, will not be able to exercise more functions than the Community does now—with the exception of a Common Foreign and Security Policy and co-ordinating institutions of a common protection of internal security. The European Union, however, will no longer be just a mere variable, a simple construction of national ‘internal’ politics; it will need to develop something like an all-European ‘common good’ and to persuade the peoples of the Union to actively embrace it.

This enterprise should not be an elitist project, a ‘design engineering’ experiment of well-meaning technocrats, no matter how sincere their intentions may be. The enterprise must respect the conditions, opinions and elementary interests of the peoples of the Union and must constantly keep the citizens on board in order to gain their approval. At the same time, it must not be a populist image of national clientelism, lest its purpose be forgotten. Such a struggle for a common European interest cannot be organised in purely intergovernmental forms. It is no accident that, from the outset, the project of European integration has demonstrated features of a federal construction. A federalist theory of European integration needs to strengthen and expand these features gradually, without overstraining the still fragile will of the citizens of Europe to live in a European federation. It must not be the foundation of a ‘European Federal State’ modelled on a copy of American, German or other federal state constructions. The united Europe of the European Union will not be a federal state in the classical sense for quite some time, but will remain a treaty-based hybrid—a mixed system that will gradually develop more federal characteristics and at the same time keep some traits of an arrangement of international co-operation.

The dictates to preserve ‘confederal’ elements derived from regimes of international co-operation are particularly visible in the attribution of competences to Member States, to the Community and to the Union. In contrast to classical federations, the European Community’s powers to achieve certain fixed objectives were deliberately limited, with scant detail provided

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144 On this point, see also I Pernice, ‘Carl Schmitt, Rudolf Smend und die europäische Integration’ (1995) 120 Archiv des öffentlichen Rechts 100.
145 See Peters, above n 57, 174.
146 According to the lucid formulation by W Wallace, ‘Theory and Practice in European Integration’ in P Bulmer and A Scott (eds), Economic and Political Integration in Europe (1994) 272, the European Community is ‘a constitutional system which has some state attributes, but which most—or all—of its constituent governments do not wish to develop into a state, even while expecting it to deliver outcomes which are hard to envisage outside the framework of an entity which we would recognize as a (federal) state’. See also idem, ‘Less Than a Federation, More Than a Regime’ in H Wallace and W Wallace (eds), Policy-making in the European Community (2nd edn, 1983) 403–8.


149 Hertel, above n 148, 25.


151 The ambivalent character of such federal construction raises difficulties in theoretical categorisation, however—see Burgess, above n 3, 46ff; Sbragia, above n 147, 262–3; see also Schmitter, above n 147; Schönberger, above n 7, 109ff; G Majone, Dilemmas of European Integration (2005); EO Eriksen, ‘Reflexive Supranationalism in Europe’ in Eriksen et al (eds), above n 119, 1.

on the means by which it may carry out its tasks. As is routine in the sphere of international organisations, such an approach often requires recourse to the instrument of implied powers in order to deduce its concrete competences. This might be seen as problematic with regard to the legal certainty and positivity of the order of competences. Nevertheless, for an international legal regime, which requires a laborious procedure to change its founding document, a flexible working of the treaty is essential. Adherence to the attributed competences without the possibility of amendments to this ‘Constitution’ through a qualified majority would deprive the system of any potential to adapt in the future. No doubt federal constitutions seek to protect minorities against arbitrary decisions of the majority by incorporating specific obstacles that make it burdensome to achieve constitutional amendments. For good reasons, however, they deny the individual Member States comprehensive veto positions. In addition, one should not have too many illusions concerning the precision of traditional federal catalogues of competences. Replacing the existing system of specific empowerments in the Treaty with a detailed catalogue of Community competences would not bring about substantial improvements in legal certainty, to the extent that such a catalogue would be characterised (like the German Basic Law) by competential titles with few contours.

The character of the European Verfassungsverbund as a hybrid should be understood more as a virtue than as a weakness of the European Union. For aesthetic purists, such a hybrid system will always be problematic; for political practice, however, the ambivalent character of the federal construction has indisputable advantages, since such a construction allows for gradual progress towards further integration without compromising the place of genuine 'statehood'. In conclusion, more confidence in the dynamics of the existing Union, without aspiring to overturn the achievements of our predecessors, could guide us in reforming its obvious shortcomings. If one accepts that the European Union is already a 'federal' construction, a lot of arguments speak in favour of the position that it is best to build upon this construction in the hope that we will optimise the inherited institutional structures, instead of overturning the Union structure in a completely 'revolutionary' act that would transform it into a state artificially created by technocratic elites. It may be that the political elites are not capable of imagining a reformed Union without approximating it to the common model of the nation-state. This is no argument, however, for propagating a reformed Union according to the institutional model of traditional 'statehood'. Just the reverse: a 'social construction' of the European Union as a federally construed polity of a composite character will give us the calm that is needed in order to ensure that the 'united Europe' will not be undone by a controversial constitutional utopia. We should strive for a careful and gradual way of consolidating and reforming the existing institutional structures towards a federally constituted ‘Union’ of the European peoples with a government accountable to the people and a parliamentary
arrangement securing Europe’s own schemes of democratic responsibility and control. The experience with federal constructions tells us that, should the Community not manage to develop into an efficiently organised federal polity driven towards an overarching ‘common good’, the entire project of European integration will fail in the long run.\textsuperscript{152} The European Union will either conserve its federal characteristics and strengthen them in its institutional reforms or will suffer a fate comparable to that of the Holy Roman Empire of the German Nation, which was swept away by the Napoleonic project of a hegemonic reconstruction of a ‘Roman Empire’ covering all of Europe. Those who believe in the vision of a free association of the European peoples in a functioning ‘composite’ of states should rally for a strengthening of the federal traits of the European Community.

The recent constitutional debate over the necessary reforms of the European institutions is of a very peculiar kind in light of the thoughts and findings outlined here. Perhaps the vision of a ‘United States of Europe’ is not as utopian as is usually assumed. There is, however, one certainty—the ‘United States of Europe’ as a federal polity will (and should) be different to the United States of America (and other federal states). The rather strange ‘composite constitution’ of the Union—the ‘distinct constitutional arrangement’, as Joseph Weiler has called it—should be understood as a potential treasure in its future development. The deviation from traditional forms of statehood organised in federal forms is anything but accidental.\textsuperscript{153} Even the long-term objective of the Union expressed in the Preamble of the Treaty departs from a continued existence of the different peoples of Europe distinguished by language, culture and historical experience. As Joseph Weiler has stressed, to unite these peoples in an overall arrangement without depriving them of their diversity (and accordingly their ‘distinctness’) is a civilising project of the highest order. We should become aware of this particularity of the project of European integration, and the federalist perspective helps us to do this.

\textsuperscript{152} In this sense, see also Fischer and Schley, above n 5, 8.
\textsuperscript{153} See JHH Weiler, ‘Federalism without Constitutionalism’ in Nicolaidis and Howse (eds), above n 27.
National Constitutional Law Relating to the European Union

CHRISTOPH GRABENWARTER

I. Introduction

The development of national constitutional law that deals with the European Union is related in a specific way to the relationship between national constitutional law and Union law. This contribution considers changes in national constitutional law resulting from accession to the Communities or Union, the continuing confrontation with Union law and developments in Union law. This involves the contents of written and unwritten legal rules and their changes over the course of time as well as the way in which such changes take place. This contribution will investigate the extent to which individual Member States pursue specific strategies in order to cope with increasing European integration.

Constitutions and their development reflect the strategies of constitutional organs and therefore form the main subjects of investigation. This contribution will not use the term ‘constitution’ too narrowly, bearing in mind the aim of this analysis. Often, changes reveal themselves not in textual mutations of constitutional documents but rather in secondary constitutional law, implementing laws or realisations of constitutional law (constitution in the material sense).

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The interesting changes to be discussed in this chapter represent certain ‘adaptation processes’. Initially, adaptation appears to be a unilateral process implying that the national constitution is altered in compliance with Union law. However, this interpretation defines ‘adaptation’ too narrowly. At least in this context, adaptation rather consists of two components, ie a ‘conformity aspect’ and a ‘creative aspect’. The former describes the yielding to the pressure of adaptation emanating from Union law. The latter refers to the creative management of the adaptation situation as conditioned by law and politics. Adaptation relationships within the network of the current 27 Member States, however, are more complex: adaptations can also result from a unification with regard to the Member States’ constitutions, which is not caused but simply induced by Union law. The meaning of ‘adaptation’ in this sense may by no means be reduced to that of ‘unification’. Such unification can be both the aim and, where successful, the result of an adaptation process. Quite to the contrary, however, it can also lead to diversity and therefore any legal situation which continuously facilitates the juxtaposition and co-operation between two legal levels. This meaning of adaptation is conveyed by the English term of ‘(institutional) adaptation’, which is often used in political science,1 and which—just like the German term ‘Anpassung’,2 does not describe a unilateral process either.

This investigation consists of three stages. The first stage clarifies the starting point between national constitutional law and the most significant part of Union law, ie the question as to whether Community law takes primacy over national constitutional law. The second stage describes the typical contents of those parts of constitutional law which are particularly relevant for Union law. The third stage, finally, identifies similarities and differences in strategies and consequences for Union law.

II. The Relationship between Union Law and National Constitutional Law

Consideration of what is depicted here as ‘Union constitutional law of the Member States’ starts with the relationship between Union law, in particular Community law, and national constitutional law. It determines the form which adaptations of Union constitutional law take. The adaptation strategies of national constitutional law are influenced and sometimes even determined by the dogmatic management of the relationship. The relationship between national constitutional law and Community law assumes significance both for contractual amendments and the continuing development of domestic law in relation to Community law.

Today, it is generally accepted that European Community Law takes primacy over the national law of Member States.3 As early as 1964 the European Court of Justice (ECJ) made it clear that Community law takes primacy over national law at every level, ie including the constitutional law of Member States.4 Although in principle this starting point is nowadays accepted with regard to ordinary statutory law, views on the relationship between national constitutions and Community law are conditioned by the nature of the relationship and the extent to which it is determined by the dogmatic management of the relationship. The relationship between national constitutional law and Community law assumes significance both for contractual amendments and the continuing development of domestic law in relation to Community law.

1 Cf eg the terminology in T Börzel, States and Regions in the European Union: Institutional Adaptation in Germany and Spain (2001) 27ff.
3 T Oppermann, Europarecht (2005) § 7 paras 1ff.
4 Case 6/64 Costa v ENEL [1964] ECR 585, 594: Community law cannot be overridden ‘by domestic legal provisions, however framed’. See also Case 106/77 Simmenthal II [1978] ECR 629, where the ECJ states that in case of conflict domestic legal provisions do not get reversed by Community law but must not be applied. Referring expressly to fundamental rights: Case 11/70 Internationale Handelsgesellschaft [1970] ECR 1125;
constitutional law and Union law are controversial and inconsistent. In this respect, Member States differ considerably. States can be divided into three groups: those in which Community law enjoys full primacy, States in which Community law has limited primacy and those in which national constitutional law takes primacy over Community law.

1. Full Primacy of Community Law

The first group comprises states in which the primacy of Community law is largely undisputed and recognised by the courts even in relation to constitutional law. The Netherlands is the main example in this respect. Leading opinion assumes unqualified primacy because, according to the view of the adjudicating division of the Raad van State (Afdeling Bestuursrechtspraak), the primacy of Community law is derived not from the Dutch Constitution but directly from European law.5

In Austria, too, the opening up of the Austrian legal system for EU membership was made in awareness and recognition of the primacy of Community law (cf Article 2 of the Act of Accession), independently of the status of conflicting national law. The Austrian Constitutional Court appears to take the primacy of Community law for granted even in relation to constitutional law.6 However, in line with those states which place limits on primacy, ‘basic principles’ of constitutional law are not ‘subordinate’ to Community law.7

2. Limited Primacy of Community Law over Constitutional Law

In the second group of states, it is assumed for different reasons that Community law has a partial primacy, which is limited by constitutional law. In terms of numbers, this is by far the largest group.

First of all, the constitutional courts of Italy, Germany, Denmark and Belgium have highlighted limits to the primacy of Community law in relation to national law, especially constitutional law.

In 1984, the Italian Corte Costituzionale acknowledged the primacy of Community law in principle.8 However, the court expressly reserved to itself the right to check the observance of fundamental rights and personal freedoms (controlimiti doctrine).9 A December 1995 decision is critical of the ECJ’s argumentation is A Schmitt Glaser, Grundgesetz und Europarecht als Elemente Europäischen Verfassungsrechts (1996) 156ff.


interpreted to the effect that the Corte Costituzionale will only consider exercising this power of review if the ECJ previously rejects the protection given by fundamental rights within the framework of a reference for preliminary ruling.\footnote{Sen 509 December 1995 [1996] Rivista italiana di diritto pubblico comunitario 764; on this, see Adinolfi, above n 8, 1324ff.} Article 117 of the Italian Constitution, as amended in 2001, stipulates that legislative power belongs to the state and the regions in accordance with the constitution and within the limits set by European Union law and international obligations. According to legal scholarship, this provision is a confirmation and codification of the Corte Costituzionale's case law, by virtue of which the Constitution grants Community law primacy over constitutional law, solely restricted by the controlimiti doctrine.\footnote{Cf references in Panara, above n 8, paras 37ff.}

The German Bundesverfassungsgericht recognised the primacy of Community law over national law relatively early on.\footnote{Concerning this, cf Entscheidungen des Bundesverfassungsgerichts 22, 293, 296 (EEC regulations); 31, 145, 174. On the question of whether Community law takes primacy of validity or application over national law, the Federal Constitutional Court appears to prefer the latter in its more recent decisions, cf R Streinz, Europarecht (2008), para 229.} However, over time it formulated different restrictions on full primacy in relation to constitutional law. The effect of primacy was initially subject to the protection of structural principles. Thereby the right to review Community legislative acts was recognised\footnote{Entscheidungen des Bundesverfassungsgerichts 37, 217, 279 (Solange I); 58, 1, 40 (Eurocontrol); see also J Schwarze, ‘Deutscher Landesbericht’ in idem (ed), The Birth of a European Constitutional Order (2001) 109, 170ff.} at least by implication. However, the Federal Constitutional Court later qualified this to the effect that it did not wish to review Community measures vis-à-vis their compatibility with the German Constitution, the Grundgesetz (Basic Law), provided that the standard of fundamental rights achieved at Community level was generally guaranteed.\footnote{Entscheidungen des Bundesverfassungsgerichts 73, 339, 387 (Solange II).} In the Maastricht judgment passed in 1993, the court deliberately left open the question as to whether it had the power to review Community measures to ensure that they remained within the framework of Community law jurisdiction.\footnote{Entscheidungen des Bundesverfassungsgerichts 89, 155, 188 (Maastricht). Critical eg M Kumm, ‘Who is the Final Arbiter of Constitutionality in Europe?’ (1999) 36 CML Rev 351ff, and C Tomuschat, ‘Die Europäische Union unter der Aufsicht des Bundesverfassungsgerichts’ [1993] Europäische Grundrechts-Zeitschrift 489.} In its Banana-market decision of 2000, the Federal Constitutional Court distanced itself from, or at least did not enforce, the claim for review.\footnote{Entscheidungen des Bundesverfassungsgerichts 102, 147, 164 (Bananenmarkordnung); cf R Hofmann, ‘Zurück zu Solange II! Zum Bananenmarkordnungs-Beschluß des Bundesverfassungsgerichts’ in HJ Cremer et al (eds), Tradition und Weltoffenheit des Rechts (2002) 1207.} In the meantime, the constitutional legislator laid down limits to the power of integration contained in Article 23(1) Basic Law.\footnote{See below, III 2.}

In its judgment on Denmark’s Act Ratifying the Maastricht Treaty of April 1998, the Højesteret, the Supreme Court in Copenhagen, stated that Danish courts could still exercise their right to review whether an EC legal act observed limits on the transfer of sovereignty laid down by the Act of Accession.\footnote{Højesteret of 6 April 1998, pursuant to I 361/1997 [1999] Europäische Grundrechts-Zeitschrift 49; on this see the examination by R Hofmann, ‘Der Oberste Gerichtshof Dänemarks und die europäische
Belgium also belongs to this group. The earlier case law of the Cour de Cassation\(^\text{19}\) gave the impression that Community law took primacy over all measures of national law. However, the Cour d’Arbitrage (Court of Arbitration), established in 1980, clearly rejected this approach. In its judgment of 16 October 1991, the court held that the power to review international treaties also extended to the inherent constitutionality of treaty provisions (substantive constitutionality).\(^\text{20}\)

Spain can be included in the same group of states, even if the starting point would suggest something different. The Spanish Constitutional Court (Tribunal Constitucional) expressly reserved to itself the power to review the constitutionality of Community law.\(^\text{21}\) For this purpose, the Court referred to Article 95.1 of the Constitution in its fundamental Maastricht decision of 1 July 1992. This provision states that the conclusion of an international treaty which contains unconstitutional provisions requires the prior amendment of the constitution. The Court took the view that the application of Article 93, which grants the power to transfer sovereign rights, must not undermine the protective function of Article 95 and therefore could not result in implicit changes to the Constitution.\(^\text{22}\) This purely formal interpretation of Article 93 as a provision concerning organisation and proceedings was given a substantive dimension by the Court’s decision of 13 December 2004,\(^\text{23}\) which construed the Article as a hinge between the different legal systems in the sense of an opening clause.\(^\text{24}\) The substantive interpretation of Article 93 manifests itself in the first-time formulation of barriers to integration, among which the Constitutional Court ranks national sovereignty and the fundamental structure of the
as well as fundamental rights and constitutional core values. As to the matter of primacy, the Court avoids a collision between the Constitution and Community law by creating a conceptual distinction between primacy (primacía) and supremacy in the sense of a hierarchically higher rank (supremacía). Supremacy of the higher norm, which gives rise to the invalidity of subordinate norms in case of conflict, entails in general its primacy as well, unless the former provides for its own non-application. In the Court’s opinion this exactly is the case as regards Community law. By means of decoupling normative hierarchy and primacy, the Constitutional Court can deal with the Constitution as the hierarchically highest norm without depriving—at least in its actual effects—the Community law of its primacy. Nonetheless, such a theoretical operation aiming at the moderation of the potential primacy conflict is not able to surmount the material bounds of integration which the Court recognised in the very same decision. Therefore, a collision in respect of those bounds cannot be excluded.

In Sweden it is generally suggested that Community law has primacy over any national law, including constitutional law. However, the constitutional rule of Chapter 10, § 5, which was enacted for the purpose of accession, clearly reflects the Solange case law of the German Constitutional Court. Accordingly, the Swedish parliament can transfer decision-making rights to the European Communities provided the protection of liberty and law corresponds to the level of protection of human rights and fundamental freedoms guaranteed by their constitution and in the European Convention on Human Rights. Thus, the Solange case law of the Federal Constitutional Court is established in the Swedish constitution as positive law and forms the basis of Swedish membership.

In Ireland, it is also assumed that Community law takes primacy over the constitution, at least in principle. The Irish Constitution contains provisions both in Article 29(4) No 3 (Accession to the EC) and Article 29(4) No 4 (Maastricht Treaty), according to which no existing or future part of Community law may be deemed to contravene the Irish Basic Law.
As a result, Irish statutes which serve to implement indirectly applicable EC law cannot be declared invalid on the basis of Irish constitutional law. Any measure of Community law is also protected against judicial review of its compatibility with the Irish Constitution. There is, however, one significant exception: it is generally accepted that Community law relating to Ireland can be set aside where human rights protected by the constitutional statute might be infringed.\textsuperscript{34}

Finally, Great Britain can also be classified within this group even if it represents a special case. In contrast to Ireland, Great Britain initially accepted the primacy of EC law without making any amendment to the constitution. In any case, British constitutional law is largely uncodified and hardly receptive to a formal amending act.\textsuperscript{35} Accordingly, commentators were content to point out that British constitutional law hardly contained any provisions which could infringe EC law anyway.\textsuperscript{36}

Admittedly, the unwritten constitutional principle of sovereignty of parliament contains considerable potential to conflict with Community law.\textsuperscript{37} The question of primacy and whether it complied with this principle was repeatedly discussed during the first 20 years of British membership in the EC, but was never resolved. The resolution of the dispute was left to the courts, which had always found pragmatic solutions in compliance with Community law by avoiding dogmatic questions.\textsuperscript{38} Accordingly, since the decision \textit{Macarthy’s Ltd v Wendy Smith} of the English Court of Appeal, section 2(4) of the European Communities Act (ECA) was generally regarded as having established the principle that national law was to be interpreted broadly in order to avoid a direct collision between a measure of Community law and a national measure adopted subsequently.\textsuperscript{39} The decision of the House of Lords in the 1991 \textit{Factortame Ltd} cases proved to be an acid test where the resolution of a collision proved unavoidable: for the first time, the House of Lords decided not to apply a subsequent national rule owing to its incompatibility with Community law. This break with case law heralded the courts’ recognition that Community law took primacy over national law.\textsuperscript{40}

\textbf{National Constitutional Law Relating to the EU}

institutions thereof, or by bodies competent under the Treaties establishing the Communities, from having the force of law in the State.’ Cf Hogan, above n 32, 90ff; M Sychold, ‘Irischer Landesbericht’ in Cottier (ed), above n 8, 237, 264.

\textsuperscript{34} This is taken from the decision of the Supreme Court in the case \textit{Society for the Protection of Unborn Children (Ire) Ltd v Grogan} [1989] IR 753. This case concerned the question whether distributing information in Ireland on the possibilities of abortion in Great Britain was covered by the freedom in Community law to provide services; cf Case C-159/90 \textit{Society for the Protection of Unborn Children} [1991] ECR I-4685. Owing to the exceptional sensitivity of this subject in Ireland, the case is not classified as establishing a general rule; cf Hogan, above n 32, 101; Sychold, above n 33, 264ff.


\textsuperscript{36} See, eg Sychold, above n 33, 264.


\textsuperscript{39} \textit{Macarthy’s Ltd v Wendy Smith} [1979] 3 CMLR 44, and (1979) 3 ALR, 325. Concerning this basis of conform interpretation, see the speech of Lord Oliver in the case \textit{Litster v Forth Dry Dock and Engineering Co Ltd} [1989] 2 CMLR 194. For more details on the significance of the ECA, see P Birkinshaw, ‘British Report’ in Schwarze (ed), above n 21, 205, 235ff; Schwarze, in ide m (ed), above n 21, 463, 507ff; A Dashwood, ‘The British Way’ in Kellermann et al (eds), above n 6, 81, 84.

\textsuperscript{40} House of Lords, \textit{Factortame Ltd v Secretary of State} (1991) 1 AC, 603.

\textsuperscript{41} Cf Lord Bridge: ‘If the supremacy within the European Community of Community Law over the national law of member states was not always inherent in the EEC Treaty it was certainly well established in the jurisprudence of the European Court of Justice long before the UK joined the Community. Thus, whatever
question as to whether it would be lawful for the UK Parliament to expressly declare its intention to infringe Community law and whether such a decision would also bind the courts due to the sovereignty of parliament remains undecided. It is debatable whether such a ‘reservation of sovereignty’—ie the power to expressly adopt legislation in contravention of Community law—exists and, if so, to what extent.\footnote{32}

\section{3. Primacy of the Constitution}

The third group concerns those states which assume that national constitutional law takes primacy over Community law either predominantly or in principle. These states are France and Greece.

French constitutional law is characterised by a complex interaction between constitutional requirements, the practice of executive and legislative organs and the jurisprudence of the Conseil constitutionnel.\footnote{42} Nowadays it is accepted that Community law has the same status as international agreements, that is to say between constitution and law, on the basis of Articles 54 and 55 of the Constitution.\footnote{44} In accordance with Article 54, the Conseil constitutionnel has the power of preventative control over the constitutionality of primary Community law.\footnote{45} The limits to constitutional change created thereby suggest that the Constitution takes primacy over national law.\footnote{46} Article 55 grants Community law primacy over national legislation but subjects this primacy to certain conditions, thereby making it clear that only a moderate form or qualified monism exists in France. Therefore, according to Articles 54 and 55, Community law ranks below the Constitution but above national law,\footnote{47} though the Conseil constitutionnel limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary’ (ibid 658ff). However, the other Law Lords did not expressly support his view.

\footnote{42} Lord Denning supported this in his opinion in the Macarthy case, above n 39; cf also Craig, above n 37, 221; Dashwood, above n 39, 87; C Filzwieser, Ausgewählte rechtliche Aspekte der Mitgliedschaft des Vereinigten Königreichs bei den Europäischen Gemeinschaften (1999) 100ff; Rajani, above n 38, 195ff.


\footnote{44} Gundel, above n 43, 480. By contrast, no conclusion on the primacy relationship is drawn from paras 14 and 15 of the Preamble. These paras are merely referred to as a measure for the constitutionality of the integration treaties, ibid, 49, 55. For a slightly different understanding, see de Berranger, above n 43, 215ff, 247, who advocates activating para 15 of the Preamble as an ‘integration lever’ in favour of Community law.

\footnote{45} See the procedure of the Conseil constitutionnel prior to ratification of the Maastricht Treaty, Decision no 92-308 DC of 9 April 1992 [1993] Europäische Grundrechts-Zeitschrift 187 and then Decision no 92-312 DC of 2 September 1992 [1993] Europäische Grundrechts-Zeitschrift 193. This possibility of preventative control was introduced by the Constitution of the 5th Republic, Gundel, above n 43, 57.

\footnote{46} Ibid, 72.

\footnote{47} Ibid, 70. The basic structure of the classification of international treaties in the French legal system resembles the solution which applies in relation to the classification of international obligations of the Community in its internal legal order. In Community law, too, international treaties are considered an autonomous source of law. However, they do not take primacy over primary law, ie the ‘constitution’ of the Community. They are subordinate to primary law but superior to secondary legislation. In addition, there is a procedural parallel: preventative control of a treaty which still has to be concluded: cf Art 54 French Constitution and the opinion procedure according to Art 300(6) EC. However, a subsequent review of conformity with primary law is also possible in accordance with Art 230 EC: see Gundel, ibid, 57, 68, 70ff. Concerning the extent to which the constitution has primacy, cf the decisions of the Conseil constitutionnel on the constitutionality of European Community law see J Dutheil de la Rochère, ‘The French Conseil constitutionnel and the Constitutional Development of the European Union’ in M Kloepfer and I Pernice (eds), Entwicklungsperspektiven der europäischen Verfassung im Lichte des Vertrages von Amsterdam (1999) 43, 46ff; Flauss, above n 43, 31; C Walter, ‘Die drei Entscheidungen des französischen Verfassungsrates zum Vertrag von Maastricht über die Europäische Union’ [1993] Europäische Grundrechts-Zeitschrift 183ff.
restricted the requirement of Community law to comply with the Constitution. In its decision of 10 June 2004 it derived from Article 88-1 of the Constitution the obligation to implement EC Directives, to which solely an explicit contrary provision of the Constitution may be opposed. Apart from this reservation, the examination of whether fundamental rights and the allocation of competences were respected is the responsibility of the ECJ. By deeming the obligation of implementation a constitutional one, the examination of implementing acts is restricted to provisions explicitly contrary to the Constitution. Nevertheless, as the Conseil constitutionnel highlights in its decision of 19 November 2004, the French Constitution keeps the highest rank within the domestic legal order. One aspect of the aforementioned should be stressed: the crucial reason for the primacy of Community law is not its autonomy but a constitutional authorisation in the form of Article 88-1.

Community law does not take precedence over Greek constitutional law either, according to the leading opinion either. This was justified by the wording and genesis of Article 28(1) of the Constitution, which only grants Community law primacy over ordinary law. This suggests _e contrario_ that Community law does not enjoy any primacy over the constitution, otherwise the legislature of 1975, who were aware of Community law’s claim to primacy, would have formulated the provision differently. In July 1997, the State Council confirmed this approach in the ‘DI.KATSA’ decisions. Contrary to Article 149 EC and the Diploma Directive, the Court held that the prohibition of private universities anchored in the Constitution excluded the recognition of diplomas awarded by foreign universities.

4. The Situation in the Legal Systems of New Member States

For the sake of completeness, the situation in the 12 new Member States has to be considered, although the legal situation does not lead to a different conclusion for the analysis in general. First of all, European Union law was already engendering ‘pre-effects’ of the later realised membership in the legal systems of the former ‘accession candidates’. On the eve of their accession, the Constitutional Courts of the Czech Republic, Hungary and Poland already declared their position in principle vis-à-vis the relationship between Community law and national law.


49 Mayer, above n 48, 930; Walter, above n 48, 79ff. The terms ‘explicitly contrary provisions’ must not be interpreted too narrowly, Dutheil de la Rochère, above n 48, 867; the constitutional reservations comprehend, for example, the principle of laicism, equal access to public services and the inseparability of the Republic: see L Azoulai and F Ronkes Agerbeek (2005) 42 CML Rev 871, n 30.


51 Walter, above n 48, 82.

52 C Bernasconi and C Spirou, ‘Griechischer Landesbericht’ in Cottier (ed), above n 8, 155, 169. But see D Evrigenis, ‘Legal and Constitutional Implications of Greek Accession to the European Communities’ (1980) 17 CML Rev, 157, 167, who, taking account of Greece’s receptiveness towards Europe, expects Greek courts to affirm Community law’s primacy over constitutional law on the basis of Art 28(1) and (2).

53 Cf Mayer, above n 5, 220ff.

The Hungarian Constitutional Court was more reserved in declaring that the requirements of the bilateral European agreement did not belong to the ‘generally recognised rules of international law’ according to Article 7 of the Constitution. It further concluded that the requirements of Community law had a dynamic character as developed according to the application practice of Community organs. The Community formed a system of public power independent of and separate from the Hungarian Republic; Hungary did not exercise any influence over its legislation. Accordingly, the Hungarian Constitution would have to be amended before Community law took direct effect. In a decision taken after accession to the EU, the Constitutional Court considered an Act that had been set up for the implementation of some EC Regulations to be unconstitutional. While the decision prima facie criticised the Regulations’ content so that the Court appeared to grant the Constitution primacy over secondary Community law, a more accurate analysis of the decision reveals that the unconstitutionality rested not on the EC Regulations but on the concrete manner of their implementation by the Hungarian legislator. The integration clause of the Hungarian Constitution (Article 2/A) does not contain a rule with regard to the relationship between the Constitution and Community law. One can derive from Article 2/A that certain elements of the Constitution, particularly the fundamental rights and the principle of legal certainty, prevail over Community law: Article 2/A provides that the Republic of Hungary may exercise certain constitutional powers jointly with other Member States of the EU. This wording is considered a nemo plus iuris rule preventing the Republic of Hungary from conferring its competences to the EU unless the latter respects such constitutional guarantees with which primarily the Hungarian authorities have to comply. However, due to Article 6(4) of the Constitution, according to which the Republic of Hungary shall contribute to the European unity, Community law is not as strictly subject to the fundamental rights as domestic law, since the Article implicates that the standard of proportionality between the right’s restriction and its purpose differs depending on whether Community law or domestic law is concerned.

The Czech Constitutional Court was unable to declare that law determined by the European Community was unconstitutional despite there being a substantive conflict between the competition rules in the EC Treaty and national constitutional law. The Court justified this by arguing that the Treaty of Association, like the Treaty on European Union, rested on the same values and principles as the constitutional order of the Czech Republic. As a result, the Constitutional Court emphasised that it could not be unconstitutional to interpret national law in compliance with European competition law. This result does not differ any more from Community law taking primacy over constitutional law in accordance with the case in question. Nevertheless, there are no express regulations governing the primacy of European Union law over constitutional law in this respect either. Accordingly, the constitutional courts

55 Cf J Zemánek, ‘Mittel- und Osteuropa vor dem EU-Beitritt’ in Kloepfer and Pernice (eds), above n 47, 132, 137.
59 P Sonnevend, ‘Ungarn’ in von Bogdandy et al (eds), above n 8, para 33ff.
60 The government proposal to amend the Constitution laid down that Community law and other achievements of the EU pursuant to the founding Treaties do apply in the Republic of Hungary. However, these drafts did not get the required parliamentary majority vote of two-thirds for the opposition suspected the provision was intended to set up the primacy of Community law over the Constitution.
61 Sonnevend, above n 59, para 27.
of most new Member States will have to determine the primacy of Community law more or less on a case-to-case basis.\(^64\)

The Polish Constitutional Court held unambiguously that, in accordance with Article 91(2) of the Polish Constitution relating to international treaties in general, Community law has primacy over domestic law of sub-constitutional nature.\(^65\) On no account, however, may the application of Article 91(2) be extended by means of an analogical interpretation to constitutional law. The Constitution remains the supreme law of the Polish legal system and thus prevails in case of conflict.\(^66\) However, the conflict exists only if there is an inevitable divergence between Community law and the Constitution, which is to say that even an interpretation in favour of the former cannot eliminate the conflict. Such an interpretation is limited by the wording and the functional guarantees of the Constitution.\(^67\) The conflict may be resolved either by way of a constitutional alteration or by the withdrawal of Poland from the EU.\(^68\) Whilst the position of Community law between constitutional and sub-constitutional law corresponds to the case law in France and Greece, the clearness of the conclusions drawn by the Polish Constitutional Court is quite remarkable.

Unlike most constitutions, those of Lithuania and Slovakia comprehend provisions referring explicitly to the issue of primacy. The Constitutional Act on the Membership of the Republic of Lithuania in the European Union\(^69\) lays down that,

> where it concerns the founding Treaties of the European Union, the norms of the European Union shall be applied directly, while in the event of collision of legal norms, they shall have supremacy over the laws and other legal acts of the Republic of Lithuania.

This wording suggests that at least parts of the primary law shall prevail over domestic laws, whereas _e contrario_ the Constitution shall not be touched. Pursuant to Article 7(2) of the Slovak Constitution, ‘legally binding acts of the European Community and of the European Union shall have precedence over laws of the Slovak Republic’. This phrase covers secondary Community law but also fails to take a position as to the relationship of Community law and the Slovak Constitution.

### 5. Similarities and Differences in Justifications

From a comparative perspective one can define a number of similarities and differences that contribute to the explanation of the relationship between national constitutional law and the law of the Union.

\(^64\) Cf Mayer, above n 5, 358.


\(^66\) Decision of 11 May 2005, above n 65, n 4.2. Already in the context of the most recent constitutional amendment in 1997, the supremacy of the Constitution over primary and secondary Community law was under deliberation. Academic writing affirms such a supremacy while pointing out that, due to the ‘axiologic’ conformity of both legal orders, collisions with each other are unlikely; M Bainczyk and U Ernst, ‘Fragen der EU-Mitgliedschaft vor dem polnischen Verfassungsgerichtshof ’ [2006] Europarecht 249ff, with references.

\(^67\) Decision of 11 May 2005, above n 65, n 6.3ff.

\(^68\) Ibid, n 6.4; cf also Decision of 27 April 2005, P 1/05. In the latter decision, the Constitutional Court regards the provisions of the criminal procedure act, which implemented the framework decisions on the European arrest warrant, as violating Art 55 of the Constitution. It pointed out the requirement of a constitutional amendment which in fact was carried out subsequently. For further references, see P Łyteja, ‘Polen’ in von Bogdany et al (eds), above n 58, § 8, para 50ff.

\(^69\) Constitutional Act of 13 July 2004, no IX-2343.
As with the primacy of Community law over national law in general, the relationship between Community law and constitutional law depends on the relevant reference system to which primacy applies. From the viewpoint of Community law, the ECJ derives primacy from the autonomy of Community law, whereas from the viewpoint of national law primacy is justified by a specific power of constitutional law. In terms of legal theory, one can explain this distinction using two different basic rules without actually resolving the conflict for a judicial body (court or administrative authority) that has to deal with the conflict in practice. In this respect, authorities will have to search for strategies to avoid conflicts and facilitate co-operation, given the fact that there are different rules of primacy in European and national law.

Finally, the principle of Community law refers to the constitutions of Member States in order to determine its limits. National constitutional legislatures do not have unqualified discretion, having subjected themselves to restrictions during their accession and/or sometimes even subsequently. Balancing the interest in achieving a uniform effect of Community law and having intact, functioning and accepted constitutions of Member States sometimes leads to different results in Member States. In most of the countries investigated, the case law of the (constitutional) courts determines the relationship or exact demarcation between constitutional law and European Community law. Comparing and distinguishing three groups of constitutional orders shows four phenomena:

1. Different solutions determine the relationship in most Member States.
2. Although aspects which serve to highlight limitations to primacy are characterised by national peculiarities, they essentially amount to the same constitutional principles. The vast majority of Member States have an inviolable core of basic constitutional principles or emphasise the autonomy of fundamental rights.
3. Those states which formally grant unlimited primacy to one legal level also recognise limits to primacy.
4. The acceptance of Community law’s primacy over constitutional law is more difficult in those states that joined the Community early on, where constitutional organs (especially constitutional courts) have protected national identity more strongly, and also, to a certain extent, in those states that are more important to Europe, particularly due to their size.

70 Of fundamental importance in this respect are: Case 6/64, above n 4; Case 26/62, van Gend & Loos [1963] ECR 1; Case 11/70, above n 4; Case 106/77, above n 4; T Giegerich, Europäische Verfassung und deutsche Verfassung im transnationalen Konstitutionalisierungsprozeß (2003) 678ff.
71 On this, see Streinz, above n 12, paras 180ff, with further references.
75 Of the analysis conditional on the time of accession by FG Jacobs, ‘The Constitutional Impact of the Forthcoming Enlargement of the EU’ in Kellermann et al (eds), above n 6, 183ff.
76 Schwarze, above n 39, 502ff.
6. The Legal Situation According to the Lisbon Treaty

Unlike the failed Constitutional Treaty\textsuperscript{77}, the Reform Treaty of Lisbon does not mention the relationship of Union law and domestic law. In its Declaration (No 17) concerning primacy, however,

the Conference recalls that in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the said case law. The Conference has also decided to attach as an Annex to this Final Act the Opinion of the Council Legal Service on the primacy of EC law . . .\textsuperscript{78}

By referring unreservedly to the case law of the ECJ, it is conceivable that primacy of Community law over domestic constitutional law, as recognised by the Court in the case of \textit{Internationale Handelsgesellschaft},\textsuperscript{79} will be legally established also under the Lisbon Treaty.\textsuperscript{80}

III. Contents of National Constitutional Law Relating to the European Union

The adaptation of Member States’ constitutional law and the strategies pursued thereby depend first of all on the subject of the constitutional regulation to be adapted. The following analysis focuses on central concepts and principles of the constitutions, namely the question of sovereignty (1), structural safeguard clauses (2), the federal state (3), and questions concerning democracy (4) and fundamental rights (5). This section does not aim to reappraise and record all adaptation procedures individually, but rather to portray the way in which changes have taken place and to what extent.

Furthermore, this section aims to highlight and explain differences in the intensity of adaptation depending on constitutional content (state organisation law on the one hand and fundamental rights on the other) as well as differences revealed when comparing countries—as opposed to those genuinely caused by national law (eg the system of legal sources).

1. Sovereignty and Transfer of Sovereign Rights

In the vast majority of Member States it is assumed that accession to the EC or EU and ‘integration impetus’ engendered by amendments to the Treaty affected their national sovereignty and prevailing notions of sovereignty.\textsuperscript{81} The intensity of the related debates depends on the importance that the country concerned attaches to sovereignty. In France and the UK (the latter

\textsuperscript{77} Art I-6 CT: ‘The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States.’

\textsuperscript{78} See Opinion of the Council Legal Service of 22 June 2007, annexed to the Final Act of the Intergovernmental Conference of 13 December 2007 [2008] OJ C115, 335, 344: ‘It results from the case law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (Costa/ENEL, 15 July 1964, Case 6/64) there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case law of the Court of Justice.’

\textsuperscript{79} Case 11/70, above n 4.


\textsuperscript{81} See also J Kokott, ‘Die Staatsrechtslehre und die Veränderung ihres Gegenstandes’ (2004) 63 \textit{Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer} 11, 17ff.
case also involving the question of parliamentary sovereignty), the loss of sovereignty was regarded as a central problem of the necessary adaptation. For different reasons, it proved less of an issue in other countries—including Germany. 82

The initial years of European integration provoked only sporadic reactions by Member States. At any rate, express provision for the transfer of sovereign rights to international organisations had existed in the German Basic Law (Article 24) since 1949, in the Danish Constitution since 1953 (Article 20) 83 and in the Dutch Constitution since 1956 (Article 67(1), now Article 92). Other European constitutions subsequently adopted comparable clauses. 84

However, many states found that the usual provisions allowing them to enter into ‘normal’ international obligations exceeding those of international agreements no longer offered an adequate constitutional basis for transferring sovereign rights within the framework of increasing European integration. The inadequacy of such provisions became clear when states acceded to the Communities or Union, or even subsequently—for instance, when making an amendment to a treaty. Besides general powers, the constitutions of many Member States now contain specific provisions regulating the transfer of jurisdiction to the European Union.

In France, the first Maastricht decision of the Conseil constitutionnel, dating from 9 April 1992, led to the adoption of Title XV (Articles 88-1 to 88-4) of the Constitution. 85 It lays down constitutional limits to integration where ‘essential conditions of the exercise of national sovereignty’ 86 are affected by integration. The decision is crucial for understanding the motives and substance of the amendments to the Constitution. The Conseil constitutionnel held that it was necessary to amend constitutional law owing to negative effects on sovereignty in three respects, even though it regarded participation in the European Community as fundamentally compatible with the protection of national sovereignty, ie the right to vote in municipal elections, 87 currency union 88 and visa policy (Articles 61ff EC). 89 The Court’s decision led to new regulations being adopted in all three cases. 90 Article 88-1 expressly points out, in relation to Union membership, that the European Communities and European Union are ‘constituted by States that have freely chosen, by virtue of the treaties that established them, to exercise some of their powers in common’, although the continued existence of the States must be safeguarded, depending on the issue in question. 91 Article 88-2 (currency union, visa policy) contains a proviso of reciprocity as does Article 88-3. This latter article also ‘strengthens the national state’ in the parliamentary procedure in two respects. First, the national assembly transformed the constitutional right of EC foreigners to vote in municipal elections into a mere legislative power. According to the version at the senatorial reading, this power could only be exercised by the national assembly and senate acting in tandem. Secondly, besides parliamentary participation in the legislative process of the European Union (discussed below), in

82 For the reasons, see Schwarze, above n 39, 514.
83 See the Judgment of the Supreme Court in Copenhagen of 6 April 1998, above n 18.
85 Conseil constitutionnel, Decision no 92-308 DC of 9 April 1992, above n 45, 187.
86 See 14th Consideration.
87 Cf Considerations 21ff. The Municipal Elections Act (Art 8 EC) contravened Art 3 of the Constitution whereby the matter is discussed as a sovereignty problem. For more details on this problem see below, section III.5(a) and J Hecker, Europäische Integration als Verfassungsproblem in Frankreich (1998); Walter, above n 47, 183; Gundel, above n 43, 132.
88 Cf Considerations 36ff, esp, 43: see Gundel, above n 43, 133.
89 Cf Considerations 46ff, esp, 49: see Gundel, ibid, 133.
90 See again Conseil constitutionnel, Decision no 92-312 DC of 2 September 1992, above n 45.
91 Flauss, above n 43, 38; Hecker, above n 87, 248; Muñoz Machado, above n 2, 29; V Constantinesco, ‘Der Beitrag nationaler Verfassungen zur Entwicklung eines zweistufigen europäischen Verfassungssystems’ in U Battis et al (eds), Das Grundgesetz im Prozeß europäischer und globaler Verfassungsentwicklung (2000) 61, 70.
Article 2-2 a new constitutional provision was adopted declaring French as the language of the French Republic. All amendments—the language provision in particular—suggest an attempt to protect national identity and sovereignty. Sovereignty as the main criterion of constitutional review is emphasised in the decision of the Conseil constitutionnel of 19 November 2004, which dealt with the constitutionality of the European Constitutional Treaty. The Conseil constitutionnel considered the transfer of those competences which were inseparably linked to the Constitution unconstitutional. This is particularly the case insofar as civil and criminal law as well as questions of border control are concerned. Furthermore, the Court had reservations in respect to the change from a qualified majority to unanimity, even in cases where such a change requires a unanimous decision of the European Council or the Council of the European Union. However, the principle of sovereignty is no structural safeguard clause, but rather subject to a regular constitutional amendment by the sovereign legislator.

In Greece, the constitutional basis for EU membership is Article 28(2) of the Constitution. This provision displays the principle of open statehood. In addition, the provision constitutes an interpretative guide as a ‘fundamental choice’, i.e. a fundamental aim of state policy. Article 28(3) expresses the inherent limits to Article 28(2). It contains substantive requirements for limiting the exercise of sovereignty which results from accession to the EC. Article 28(2) and (3) were adopted in 1975 as part of a substantial amendment of the Constitution, and in view of the following (within a few days) application of Greece to join the European Communities. The provision was proposed following the pretext of similar provisions in the constitutions of existing or potential Member States which had already passed constitutional reviews before national courts. The loss of sovereignty, which membership in the European Community entailed, was considered a fair price for the immediate and future advantages promised by Greek participation in the process of European unification.

The Italian Constitution contains only a very short regulation: according to Article 11 of the Italian Constitution, it is constitutional for Member States to restrict their sovereignty by transferring their sovereign rights to the Community established by the founding Treaties. Article 117 of the Constitution, according to which the national legislation must not infringe either

92 For extensive information on this, see J Rideau, ‘France’ in J-C Masclot and D Maus (eds), Les constitutions nationales à l’épreuve de l’Europe (1993) 67, 110; a similar provision is mentioned within Art 11(3) of the Constitution of Portugal (‘the official language is Portuguese’) inserted by the Lei Constitucional 1/2001 de 12 de Dezembro.
93 Hecker, above n 87, 248; Alter, above n 43, 171.
95 Ibid, 27th Consideration. The Spanish scholarly literature follows this case law of the French Constitutional Council as regards the problem of conformity of the delegations of competences with the Constitution and in particular with the idea of sovereignty, M Medina Guerrero, ‘La distribución de competencias entre la Unión Europea y los Estados miembros’ in Cruz Villalón (ed), above n 23, 109, 134.
96 29th and 33rd Considerations.
97 Walter, above n 48, 83.
99 Antoniou, above n 98, 208.
100 Evrigenis, above n 52, 160. Antoniou does not regard membership of the EC as creating the problem of an irredeemable loss of sovereignty since the States have agreed not to exercise specific state powers but have not forfeited the substance of their state power. Rather, in accordance with Art 1(3) Greek Constitution, the substance of state power lies directly and inalienably with the people, whilst their exercise is distributed between different holders as stipulated by the constitution (Art 26 or in relation to international organisations Art 28(2) Greek Constitution): Antoniou, above n 98, 209.
102 Lotito, above n 9, 261.
upon the Constitution or upon any international obligations, is not regarded as an integration clause enabling the conferral of any further sovereign rights.\textsuperscript{103}

Austria ensured the constitutionality of accession to the EU by a separate Federal Constitutional Act of Accession which empowered the responsible organs to conclude the necessary international treaty. This constitutional Act therefore forms the basis for the transfer of sovereign rights to the EU. Although it had also been subject to a referendum owing to constitutional reasons, the question of sovereignty played only a subordinate role at most.\textsuperscript{104} Entrenching participation in the common foreign and security policy by means of an accompanying constitutional amendment was due not so much to sovereignty as to the constitutional principle of permanent neutrality, which resembles an international restriction on foreign policy and possibility of military action.\textsuperscript{105}

Finally, as an example of the penultimate generation of acceding countries, it is worth taking account of the discussion in Poland and Hungary that was held on the eve of their accession to the European Community. Owing to decades-long dependence on the Soviet Union, the scientific, or at least political, discussion about national sovereignty and its restrictions attracted particularly strong attention within the public of some of the new Member States.\textsuperscript{106} Sovereignty undoubtedly assumed great importance in the debate concerning Article 90 of the Polish Constitution of 1997, which grants the power to transfer sovereign rights to the European Union.\textsuperscript{107} It also raised further issues, particularly those of linking the accession procedure to a referendum and Polish notions of sovereignty. Pursuant to Article 90 of the Constitution of Poland, the consent for ratification of an international agreement, on the basis of which the Republic of Poland delegates to an international organisation or international institution the competence of organs of State authority in certain matters ('European clause'), may be granted by parliament in form of a statute—passed by a qualified majority vote of two-thirds in both houses of parliament—\textsuperscript{108} or by a nationwide referendum.\textsuperscript{109} The choice of one of these procedures has to be taken by the Sejm (the lower house of the Polish parliament) by an absolute majority vote, taken with at least half of the statutory number of Deputies (Article 90(4)). On 17 April 2003, one day after signing the Accession Treaty, the Sejm chose to call a referendum—the most important form of direct democracy and therefore a special form of expression of the state sovereignty—\textsuperscript{110} to grant consent for the ratification of this Treaty by the President of the Republic of Poland, pursuant to Article 90 of the Polish Constitution.\textsuperscript{111} The

\textsuperscript{103} Panara, above n 8, para 377ff, with further references.
\textsuperscript{104} Further details in H Schäffer, ‘Österreichischer Landesbericht’ in Schwarze (ed), above n 21, 339, 372ff.
\textsuperscript{105} T Öhlinger, ‘BVG Neutralität’ in K Korinek and M Holoubek (eds), Österreichisches Bundesverfassungsrecht (looseleaf, last update 2001) Art 23f, para 13; Art 23f Austrian Federal Constitutional Law, which in this respect was originally created to justify in constitutional terms the participation in embargo decisions of the EU Council, has been amended on ratification of the Treaty of Amsterdam in order to do justice to the ‘Petersberg tasks’: see W Hummer, ‘Österreichs dauernde Neutralität und die ‘Gemeinsame Außen- und Sicherheitspolitik’ (GASP) bzw ‘Gemeinsame Europäische Sicherheits- und Verteidigungspolitik’ (GESVP) in der Europäischen Union’ [2001] Schweizerische Zeitschrift für internationales und europäisches Recht 443, 465ff.
\textsuperscript{106} As to Poland, see Biernat, above n 65, paras 36ff.
\textsuperscript{108} It the so-called ‘legislative procedure’, pursuant to Art 90(2) of the Polish Constitution; \textit{cf} Wyrzykowski, above n 107, 271ff.
\textsuperscript{109} It the so-called ‘ratification procedure’, \textit{cf} Art 90(3) Polish Constitution; \textit{cf} Wyrzykowski, above n 107, 274ff. According to Art 125(1) of the Polish Constitution, such a referendum should only be held ‘in respect of matters of particular importance of the state’.
\textsuperscript{110} \textit{Cf} Wyrzykowski, above n 107, 278.
\textsuperscript{111} The referendum was held on 7 and 8 June 2003. Of the citizens having the right to vote, 58.85% took part in the referendum, and 77.45% of the valid votes were cast in favour of ratification of the Treaty. In accordance with the result of the referendum, the President ratified the Accession Treaty.
Nationwide 2003 Referendum Act\textsuperscript{112} provides in Article 75 that, if the result of the ratification of the referendum was not binding (less than half of the citizens having the right to vote participated therein), the Sejm could again adopt a resolution to hold another referendum or to initiate the parliamentary procedure to grant consent for ratification. Inter alia, the constitutionality of this provision, as well as the interpretation of Article 90 of the Constitution, led to political and legal controversies (the main fear of the opponents of the European clause of Article 90 was the loss of state sovereignty),\textsuperscript{113} and was reviewed by the Constitutional Tribunal of Poland on 27 May 2003. On the basis that the interpretation of binding statutes should take into account the constitutional principle of favourable predisposition towards the process of European integration,\textsuperscript{114} the Constitutional Tribunal decided that the Nationwide Referendum Act 2003 was not compatible with either Article 4 (the principle of sovereignty of the Nation) or Article 90 of the Constitution.\textsuperscript{115} In a decision of 11 May 2005, the Constitutional Court linked the issue of sovereignty to the question of the extent to which national competences may be conferred. The applicants submitted that the Accession Treaty was in breach of Article 8 of the Constitution, as under the latter the Constitution shall be the supreme law of the Republic. The Court took the view that the Constitution prevents the transfer of sovereign rights insofar as it would affect the functioning of a sovereign Poland.\textsuperscript{116} According to Article 90(1), the legislature accepts the application of another kind of legislation on the Polish territory.\textsuperscript{117} Hence, structural safeguard clauses were recognised by the Court for the first time in order to preserve Polish sovereignty.\textsuperscript{118}

The integration clause of the Hungarian Constitution fulfils two different functions, which were debated before accession. On the one hand, it ought to assure democratic legitimation as to the delegation of sovereign rights to the EU. In view of Decision 30/1998\textsuperscript{119} of the Constitutional Court concerning the Europe agreement, Hungarian legal scholarship held that legitimation was required but could not be established without a specific constitutional provision. On the other hand, the delegation ought to be restricted constitutionally.\textsuperscript{120} Article 2/A protects state sovereignty.

\textsuperscript{112} Although the Act does not only refer to referenda in respect of the ratification of international agreements described in Art 90 of the Constitution, the legal and political debate that accompanied the adoption of the Act was dominated by problems concerning the accession referendum. The reason for this lies in the fact that the Act was adopted in the final stage of the debate on Poland’s accession to the EU with the intention of enacting rules regarding the accession referendum and the referendum campaign preceding it.

\textsuperscript{113} Cf Wyrzykowski, above n 107, 268ff.

\textsuperscript{114} Cf the Preamble and Art 9 of the Constitution ("The Republic of Poland shall respect international law binding upon it"); Judgment of the Polish Constitutional Tribunal of 27 May 2003, K 11/03 (referendum on Poland’s accession to the European Union).

\textsuperscript{115} According to the Constitutional Tribunal the ‘representative democracy as a basic form of democracy in Poland’ is expressed by Art 90 of the Constitution and the referendum is only a facultative procedure to grant consent for ratification. The nation has to express its will, either directly or through its representatives (Art 4(2) of the Constitution), and if the nation does not express its will by more than half of the entitled citizens, the referendum is only of advisory significance. Such a result should be treated at the same time as the lack of acceptance by the nation-sovereign of the proposition to hold a referendum itself. Accordingly, the Sejm could make the choice again whether to hold a new referendum or to initiate the parliamentary procedure. See Judgment of the Polish Constitutional Court of 27 May 2003, K 11/03 (referendum on Poland’s accession to the European Union); cf Banaszkiewicz, above n 65, 188ff.

\textsuperscript{116} Decision of 11 May 2005, K 18/04, above n 65, 4.3, where the Court refers explicitly to the Maastricht decision of the German Bundesverfassungsgericht; Banaszkiewicz, above n 65, 313ff.

\textsuperscript{117} Decision of 11 May 2005, K 18/04, above n 65, n 8.1. It is worth mentioning that the Constitutional Court regards neither the EU nor the EC as a supranational organisation, since the accession treaty, and public international law in general, do not justify a distinction between internationality and supranationality of organisations: ibid, n 8.8. This assertion is arguably the result of the fact that the drafts of the Polish Constitution proposed the use of the notion ‘supranational organisation’ for the addressee of conferred sovereign rights in vain; Bainczyk and Ernst, above n 66, 252.

\textsuperscript{118} See below.


\textsuperscript{120} Sonnevend, above n 59, para 10.
eighty along an outer border by referring to Hungary as a Member State of the EU. Moreover, the clause enables the delegation of certain constitutional powers, while the ability to determine its own competences (Kompetenz-Kompetenz) remains within the national sphere, thereby stressing Hungarian sovereignty. Finally, under Article 2/A, competences may be conferred only to the extent necessary in connection with the rights and obligations conferred by the treaties on the foundation of the European Union and the European Communities. Accordingly, ultra vires acts of the EU are not covered by the Constitution.121

2. Structural Safeguard Clauses

In the constitutions of many Member States, provisions on, inter alia, the power of accession and the transfer of other sovereign powers are accompanied by 'structural safeguard clauses'. Such clauses are often connected to a power to enter into or confirm membership or to the accession of a state to the European Union. They also serve to demarcate the limits to integration or the development of Union law by withdrawing even a core area of constitutional law from the scope of European measures aimed at integration ('constitutional reserve clauses', or Verfassungsbestandsklauseln in German). In this respect, the primacy of Community law also encounters constitutional limits.

Article 23(1) of the German Basic Law clearly expresses the connection between the reception clause and the purpose of the structural guarantee.122 At the same time, it requires the Union to obey certain principles by participating in the development of the European Union. These constitute substantive limits to the power of integration. Article 23(1) lays down the principles, thereby subjecting the European Union to structural requirements which display parallels to the structural principles of the Basic Law. However, this does not require structural congruence; rather, the postulates must be structurally modified in order to comply with the peculiarities of the EU structure concerned.123 These structural safeguard clauses display clear parallels to the case law of the Federal Constitutional Court, at least with regard to the protection of fundamental rights.124 They provide normative reference points for future decisions of the Federal Constitutional Court in reinforcing the limits and establishing the consequences of their infringement.125

The extent to which the Federal Republic of Germany may participate in the integration process without abandoning its constitutional essentialia is determined by the constitutional reserve clause of Article 23(1) Basic Law by reference to Article 79(3) Basic Law. The administrative principles covered by this ‘permanent guarantee’ largely include the same principles which should bind the Union as a whole according to the Basic Law—albeit in modified form—ie constitutional principles under Article 20, in particular.126

121 Ibid, paras 24ff.
124 In particular Entscheidungen des Bundesverfassungsgerichts 74, 339, 378ff (Solange II).
125 Entscheidungen des Bundesverfassungsgerichts 89, 153, 179, 182ff (Maastricht).
126 Isensee, above n 72, 1257ff; GB Oschatz, ‘Verfassungsrechtliche Grenzen der Weiterentwicklung Europas’ in D Merten (ed), Die Stellung der Landesparlamente aus deutscher, österreichischer und spanischer Sicht (1997) 33, 36; Schwarze, above n 13, 134ff.
Sweden and Austria adopted aspects of German constitutional law when they acceded to the Union in 1995. Admittedly, the constitutional legislator did not display the same confidence towards Europe, which led to a rather different result. The Austrian constitutional legislator sometimes refers literally to the limits on integration which the Federal Constitutional Court had laid down in its *Maastricht* judgment. However, it does not do so in the text of the Federal Constitutional Act of Accession, but merely in the explanatory memorandum to the law. It is therefore generally suggested that limits comparable to those in Germany do not exist in Austria.\(^{127}\) Similarly, Ch 10 § 5 of the Swedish Constitution refers to an equivalent standard of protection of fundamental rights as a constitutional condition for the Law of the Union. Additionally, since the amendment of the Constitution in 2002, the transfer of a right of decision-making within the framework of the European Union co-operation has required that the principles of the form of government not be affected. Among these principles are some specific Swedish legal traditions that are vague in detail.\(^{128}\)

Article 28(3) of the Greek Constitution also contains a type of structural safeguard clause. Like Article 79(3) of the German Basic Law, it also contains substantive requirements and thereby limits the transfer of sovereignty by protecting the fundamental core of the principles contained in Article 110(1) of the Greek Constitution. Article 28(3) subjects limitations on sovereignty to the substantive requirements of, inter alia, the protection of human rights and foundations of the democratic system. In this respect, the structure of the EC should not adopt the specific form of the nation-state as an expression of democracy but instead the guarantee of the foundations and principles of democracy in general. Nor should it seek to protect fundamental rights as laid down by the Greek Constitution, but instead human rights per se.\(^{129}\)

Article 11 of the Italian Constitution only allows limitations of sovereignty insofar as they serve to establish a system ensuring peace and justice between states.\(^{130}\) In 1973, the Italian Constitutional Court confirmed the compatibility of the EC Treaties with this objective, stating that European integration pursues the aims of economic as well as social development to ensure a legal system of peace and freedom between nations.\(^{131}\)

A similar provision exists within Article 7(6) of the Portuguese Constitution, which provides that Portugal contributes to European integration with respect to both the principle of reciprocity and subsidiarity and with regard to the realisation of economic and social cohesion. But according to this provision, Community law can be reviewed on the basis of national constitutional law. As a result, this provision represents constitutional limits to integration.

Article 88(1) of the French Constitution contains a structural safeguard clause insofar as this provision, established in the wake of the *Maastricht* I decision, presupposes a Community structure which is based on independent Member States. However, substantive limits on the transfer of sovereign rights to the Union are still determined by the case law of the Conseil constitutionnel and embrace the ‘conditions essentielles d’exercice de la souveraineté nationale’ and the protection of fundamental rights.\(^{132}\) The idea of a permanent core within the French legal order, unalterable even by constitutional amendment, is still largely rejected.\(^{133}\)

The new Member States had already adapted their constitutional systems for membership to the European Union before the accession process itself took place.\(^{134}\) The Polish Constitution
played a leading role in this respect: Article 90 of the new Polish Constitution of 1997 grants the power to transfer sovereign rights and is described in Polish literature as the 'European clause'.  

Paragraph 1 provides that the Republic of Poland may, by virtue of international agreements, delegate to an international organisation or international institution the competence of organs of State authority 'in relation to certain matters'. In light of the discussion concerning the provision, it is clear that it is conceived for accession to the European Union, notwithstanding its limitation to 'certain matters'. It also appears as accepted that the provision resembles a structural safeguard clause. The Polish Constitutional Court decided on the limits under Article 90 to transfer competences to international organisations on 11 May 2005. According to the Court, the limits are not respected if the transfer undermines the existence or functioning of any State organ, or if the indispensable protection of fundamental rights is affected.

Like the European clause of the Polish Constitution, Article 2/A of the Hungarian Constitution states that the Republic of Hungary may exercise certain constitutional powers jointly with other Member States. A structural safeguard is not expressed by the restriction to certain powers but rather by reference to the Constitution. The reference means that the Republic may transfer its powers only according to the circumstances of which the state organs have to take account as well, amongst others the fundamental rights and the principle of legal certainty. The Hungarian legislator makes the delegation of sovereignty to the EU dependent on compliance with some fundamental values of the Hungarian Constitution, which the Constitutional Court still has to substantiate.

Constitutional development in Slovakia has not only followed this example but goes one step further. Extensive constitutional amendments were already adopted in February 2001, of which the most important related to EC accession. According to Article 7 of the Constitution, the Republic of Slovakia may 'by an international treaty or on the basis of such treaty, transfer part of its powers to an international organisation of which it is a member'. This provision therefore resembles Article 90 of the Polish Constitution because it establishes that Community law will take direct effect upon accession. In general terms, legal acts of this international organisation are directly applicable and take primacy over statute.

The Constitution of Slovenia addresses the issue of sovereignty in a general way. According to Article 3a, Slovenia may transfer the exercise of part of its sovereign rights to international organisations which are based on respect for human rights, fundamental freedoms, democracy and the principle of the rule of law.

3. Federal and Decentralised Entities

National legislators display different approaches, depending on whether they belong to federal or decentralised entities of Member States. The crucial factors in this respect appear to be the weight of national sub-divisions together with the federalist culture of a Member State.

Order of Slovenia' in Hanns Seidel Stiftung and Ústavny súd Slovensky republiky (eds), above n 54, 70, 75; concerning other states of central and eastern Europe cf the contributions in Kellermann et al (eds) above n 6, 267ff.

135 Cf Wyrzykowski, above n 107, 268ff; cf on this Biernat, above n 65, 254ff, with further references.
136 See above section III.1.
137 Wyrzykowski, above n 107, 280.
138 Contrary to the Constitution, for instance, are the delegation of all competences of an authority or the overall delegation of the competences within a certain sector, Decision of 11 May 2005, K 18/04, above n 65, n 4.1.
139 Sonnevend, above n 59, para 27.
140 Cf Hofmann, above n 134, 398, 405ff.
Processes of constitutional adaptation are determined by disputes concerning the protection of national jurisdiction, which is subject to change owing to growing integration. In retrospect, it becomes clear that the Maastricht Treaty once again marked a turning point in this respect which encouraged crucial constitutional developments at Member State level.

It is primarily federal entities, with the exception of communities and regions of Belgium, which seek compensation for the transfer of their jurisdiction ‘to Brussels’. German Länder in particular are seen as the losers in an increasingly unified Europe. This particularly affects state parliaments because the legislative powers of the German states are also transferred to the European Union, along with national sovereign powers. The loss of power within the jurisdiction of the Federation as a whole is partly compensated by participation in the European organs. In the case of the states, however, compensation in European law is initially limited to a right to participate within the Member States. In Germany, national compensation is awarded to state governments and not state parliaments, whereby European integration indirectly reinforces the development of federal statehood into executive federalism.

Regarding the participation rights of federal or decentralised entities in the European legislative process, three categories of constitutional adaptations can again be distinguished. Belgium belongs to the first category. The federal entities were empowered to represent Belgium in the Council of the European Union within the framework of their jurisdiction following the great constitutional reform of 1993. This gave rise to a highly complicated system of co-operation between the state and its federal entities. Article 1 of the Constitution declares that Belgium is a federal state made up of communities and regions. This results in a complicated network of six constituent states altogether, each of which has its own executive and legislative organs. These constituent states are granted wide rights to participate in the creation of both primary and secondary law. Two co-operative agreements between the federal state, communities and the regions establish procedures regarding the expression of will of the Belgian state. Accordingly, prior co-ordination of Belgian opinion takes place at a council meeting within the framework of the ‘Administrative Direction of European affairs’.

141 The European Union is therefore often told to be ‘blind’ with regard to the states. Cf only Streinz, above n 12, 61, para 152.

142 In Austria, this question is left to the state constitutions. The integration agreement of the states provides that the organ consists of the state heads and the presidents of the state councils. However, the right to vote is only to be exercised by the heads of state executive organs; cf H Schambeck, ‘Föderalismus und Parlamentarismus in Österreich’ in Merten (ed), above n 126, 13, 26ff.


144 The regions (decentralised expanded administrative entities) in Greece which were established at the end of the 1980s are not comparable to the German States: Papadimitriou, above n 101, 178.

145 Flemish Community, French Community, German-speaking Community, Flemish Region, Walloon Region, Brussels-Capital Region.


Executive representatives from all levels are invited to such co-ordination meetings, ie representatives of the Prime Minister, the respective Deputy Prime Minister, the Minister for European Affairs, chairpersons of community and regional governments, members of the same and the permanent representation at the European Communities, together with the attachés of the communities and regions. In addition, the agreement establishes a special measure on representation at the Council of Ministers. Annex I to the Treaty lists the areas of jurisdiction and sets out the individual powers of representation, although the latter can always be amended. Altogether, four categories of representation are provided: exclusive federal representation (category I), federal representation with assessors of the federated areas (category II), representation by the federated areas with federal assessors (category III) and, finally, exclusive representation by federated areas (category IV). According to the Annex, justice, energy, research and culture are therefore subject to categories I, II, III and IV respectively. Cases where the communities and regions have the power to represent Belgium are, in turn, characterised by a biannual rotation principle (Annex II of the Treaty).

A second category of constitutions is governed by the notion of co-operative federalism. Federal entities are indeed granted rights of representation but with the proviso that they remain subject to the interests of the nation-state. This category includes Germany and Austria with their respective Länder and, again as a special case, the UK following devolution.

As far as Germany is concerned, Article 23(2), (4), (5) and (6) of the Basic Law provides for the ‘participation’ of the Federal Council. Action by the Federation, in particular the Federal Government, is always provided for, in which case the Federal Council is involved. Even in the extreme case that the exclusive legislative powers of the states are affected in terms of subject, the power to enforce the rights of the Federal Republic as an EU Member State can be transferred to a representative of the German states. However, here too the rights are exercised ‘with the participation and concurrence’ of the Federal Government and subject to ‘the responsibility of the Federation for the nation as a whole’.

Federal state participation in Austrian constitutional law is quite similar, and its regulation has clearly been influenced by the German example. Article 23d Austrian Federal Constitutional Law establishes a duty of information incumbent on the Austrian Federal Republic (paragraph 1). The federal states have the right to express their views with differing binding effect (paragraph 2) and, concerning matters within the federal states’ legislative jurisdiction, the participation at Council meetings can be delegated to a federal state representative (paragraph 3). The most important departure from the German system is that the organ acting for the states is not the Federal Council, but an ‘Integration Conference of the Länder’.

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149 Pahl, above n 146, 184; Delmartino, above n 147, 147.
150 Roller, above n 146, 53ff; Delmartino, above n 147, 148.
151 Cf Roller, above n 146, 53.
152 The Länder Participation Act governs the details: see Müller-Terpitz, above n 143, 267, 294ff; Schmalenbach, above n 122, 104ff; C Calliess, ‘Innerstaatliche Mitwirkungsrechte der deutschen Bundesländer nach Art 23 GG und ihre Sicherung auf europäischer Ebene’ in Hrbek (ed), above n 147, 13, 14ff; König, above n 122, 352ff; Giegerich, above n 70, 1366ff.
154 The position of the Austrian Federal Council is considerably weaker than that of its German counterpart in political and legal terms: in political terms because it is constituted from politicians of the ‘second set’, who
(Integrationskonferenz der Länder), assembled from the heads of federal state governments and councils. At the same time, the Austrian states are also obliged to ensure that standards of Community law are implemented within their jurisdiction. Austria had already established the relevant mechanisms and procedures before accession as part of its membership of the European Economic Area in compliance with the requirements of European Union membership. The Federation undoubtedly paid a price for the required agreement of the Federal Council to the Accession Treaty by Article 23d Federal Constitutional Law. Nevertheless, this accounted for half the price at most. The other half, namely a full reform of the Federal State with jurisdictional shifts to the benefit of the states, has not yet been paid.

What is noticeable about the Austrian regulation is that the municipalities also gained access to participation: like the states, towns and municipalities also have the right to be informed and to express their views (Article 23d(1) Federal Constitutional Law).

The Italian legal system shows some similarities to the German and Austrian rules on the relation between federalism and European integration. The government has the duty to inform the regions, which may reply in some cases, but without any binding effect. On the other hand, binding agreements between the regions and the government may be reached in the framework of the so-called ‘State–Regions Conference’. Additionally, representatives of the regions participate in deliberations of the Council and working groups of the Council and the Commission, if they are charged with such matters as being part of the regional legislation according to the Italian Constitution. Unlike the situations in Germany and Austria, these procedures are governed not by the Constitution itself but by legal provisions ranking below constitutional law.

The devolution of Scotland and Wales in 1998 also raised the question of the participation rights of these decentralised entities within the UK. Admittedly, the peculiarity here is that the transfer of jurisdiction to the devolved parts of the country took place at a time when European integration had already been completed. Therefore, the issue did not concern the defence of existing jurisdiction with regard to constituent states; rather, it concerned the allocation or ‘decentralisation’ of centralised state jurisdiction. A legally non-binding agreement was made between the government of the UK on the one hand and the regional governments of Scotland (Scottish Ministers) and Wales (Cabinet of the National Assembly for Wales) on

are not government members but elected by state parliaments; in legal terms because the Austrian Federal Council has considerably less power in legislative procedure at the federal level.


157 The states considered withholding their consent, but in the event did not do so. The pressure upon them not to delay the entry into force of the Accession Treaty was too great.

158 The extra-political participation of the Swiss cantons is also mentioned in this respect. According to Art 55 of the Federal Constitution of 1999 (BV), the cantons are granted a right to participate in extra-political decisions ‘which concern their responsibilities or their significant interests’. The Federation is obliged to notify the cantons punctually and comprehensively and to hear their views. Finally, Art 55(3) BV establishes that: ‘The position of the Cantons shall have particular weight when their powers are concerned. In these cases, the Cantons shall participate in international negotiations as appropriate.’ Cf T Cottier and C Germann, ‘Die Partizipation bei der Aushandlung neuer völkerrechtlicher Bindungen’ in D Thürer et al (eds), Verfassungsrecht in der Schweiz (2001) § 5, particularly, para 27.

159 Panara, above n 8, para 50ff.


the other. This agreement comprises a memorandum of understanding and individual supplementary agreements. Accordingly, a Joint Ministerial Committee, consisting of representatives from the executives of the bodies involved, was established as a central co-ordination board. Nevertheless, co-ordination largely takes the form of co-operation between the relevant ministries for the case in question. As additional regulations, separate Concordats on Co-operation of European Union Policy Issues, together with further Concordats between the individual ministries for individual matters, were concluded for Scotland and Wales. These Concordats on Co-operation of European Union Policy Issues are expressly non-binding (‘intended to be binding in honour only’). They enact, inter alia, information duties and participation rights in the expression of the British opinion on different policies, together with the right to attend meetings of the Council of Ministers and other meetings. According to these Concordats, the Scottish and Welsh executives are completely and continuously involved within the framework of the development, negotiation and implementation of political opinions which affect the jurisdiction of the constituent bodies. In this respect, an effective and uniform negotiation strategy should be guaranteed, particularly in light of negotiations held under the pressure of time. Even if the leadership of negotiations remains the right of the central government, Scottish or Welsh representatives can represent the previously agreed British position in the Council under certain circumstances.

The Constitution of Spain (being a ‘complex nation-state’ rather than a federal state) adopts a third method by means of the autonomous communities (Comunidades Autónomas, CCAA). This method basically protects the character of the nation state and grants decentralised entities only limited participation rights.

Since the accession of Spain, there have been differences in opinion between the government and the CCAA concerning the latter’s participation in the European legislative process. All attempts at co-operation failed during the first years of membership. Initially, the autonomous Communities attempted to make contact with European institutions by informal means, primarily in order to avoid further centralisation at the national level. Once the Communities recognised that such means met with little success, a parliamentary initiative at the beginning of 1989 during the Spanish EC presidency persuaded the government to adopt agreements according to the area or theme concerned. The most obvious example of this phase was a conference on European affairs which took place towards the end of 1988. Only in 1994 was a model for co-operation created which was subsequently enacted. This model also bears strong similarities to the German model. Nevertheless, there are substantial differences. The organs involved in enforcing interests of the autonomous communities are the Conferencia para Asuntos Relacionados con las Comunidades Europeas (CARCE) together with the subject-related Conferencias sectoriales, composed of the respective ministers and delegates of the autonomous communities, which most closely resembles the German Ministers Conference. Like the Austrian Integration Conference, they do not have any influence on legislation at the nation level. Agreements reached in the framework of the Conferencias sectoriales are determinant (determinante) for the positioning of the central government.

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162 Memorandum of Understanding and supplementary agreements between the UK Government, Scottish Ministers and the Cabinet of the National Assembly for Wales, October 1999, Cm 4444. This also governs the participation rights of the Northern Ireland Executive Committee.


164 On this and the following, see Börzel, above n 1, 113ff.


166 On this and the following, see AM Carmona Contreras, ‘Las comunidades autónomas’ in Cruz Villalón (ed), above n 23, 175, 187ff.
without having any binding effect. Moreover, the representative of the central government, also being a member, has the right of veto. The proceedings of the Conferencias sectoriales depend on what kind of competence is concerned: if the European legislation concerns an exclusive competence of the central state, the CCAA may only exercise a right to information. If, however, European legislation concerns an exclusive competence of the CCAA, they have to evolve a common position in order to realise their participation, as otherwise the central government may act at its own discretion. In the third and usual case that the European legislation is related to divided or concurring competences, the CCAA has to reach an agreement not only among the autonomous communities but also with the central government. Given the lack of any binding effect, the effort to come to an agreement within the CCAA is still considerable. The CARCE is meant to serve as a discussion forum with respect to general and institutional issues regarding European integration, as well as an instrument of co-ordination. Furthermore, it is meant to ensure an appropriate participation of the CCAA in the national decision-making process. Agreements reached within the CARCE, for instance, lay down the granting of national subsidies or the modality of participation of the CCAA in infringement and other proceedings which affect the competence of the autonomous communities. Against this background, the CARCE has a superior position vis-à-vis the more specific Conferencias sectoriales in the framework of the co-operation as regards general issues of integration. Nevertheless, owing to the lack of decision-making power, the most important matters are dealt with in the course of the Conferencias sectoriales.

A comparison of Belgium, Germany, Austria, Great Britain and Spain shows very clearly that any differences in the extent of constitutional amendments and the degree of participation are determined mainly by the weight of the federal entities. In a state where the federal bodies exercise such a strong centrifugal force, like in Belgium, the corresponding entities could assume complete representation in some cases. In states, like Germany and Austria, where they are able to prevent the ratification of a treaty aiming at further developing Union law, they often succeed in ‘selling’ their consent for compensatory concessions. However, the relationship between these two states differs greatly, which is explained by the comparatively weaker position of the Austrian states and, in particular, the Federal Council.

If one looks for similarities in the adaptation procedure and its result, two interrelated modifications become apparent. The first one concerns a defining characteristic of federal statehood, ie that the federal bodies exercise their legislative powers within a certain system of jurisdiction. These powers are exercised insofar as European legislation now takes place in this area by the ‘extended’ procedure and, in particular, by involvement in the participation of the Federal Republic in the EU. Participation federalism is replacing jurisdictional federalism: the Federal Council’s rights to exclusive decision-making by consent or objection, or in general by federal states exercising their legislative powers, are being exchanged for participation rights.

This introduces the second modification, which concerns the separation of powers between the legislative and executive. Participation rights are created by the Federal Council itself or by leading representatives of the executive of federal entities directly. This is achieved either via representatives nominated by the Federal Council or via members of ‘State Conferences’ and,

168 Concerning Germany, see Börzel, above n 1, 68ff.
170 As regards the missing symmetry of the delegation of competences to the EU, cf A Ruiz Robledo, ‘Las instituciones constitucionales españolas’ in Cruz Villalón (ed), above n 23, 149, 152.
in particular, by co-operating with the Federal Republic. In Belgium, this depends on which ‘category’ representatives of federalised constituent areas fall under. The ‘losers’ are the state parliaments and the relevant legislative organs.\(^{171}\) In the end, what they are left with is that the state governments and their relevant organs are also responsible for European policy and that they are allowed to implement Directives into law.\(^{172}\) The participation procedure therefore serves to reinforce executive federalism.\(^{173}\)

Altogether, the participation rights of federal entities appear to provide some compensation for the loss of legislative autonomy. However, such compensation is by no means adequate.\(^{174}\) All the same, however, following erosive tendencies, particularly in the 1970s, the federal entities were reinforced by adaptation to national constitutions in the 1990s. This reinforcement is supported, in turn, by the European Union as a result of constitutional development in the wake of the Maastricht Treaty.

### 4. The Position of National Parliaments

According to the principles of democratic constitutions, adaptation can be noticed in three areas: the adoption of plebiscite elements; the participation of national parliaments in Community legislation; and changes relating to the right to vote in municipal elections induced by European legal development. At this point, only the second area will be subject to a comparative investigation. The right to vote in municipal elections will be discussed in connection with fundamental rights\(^{175}\) and plebiscite elements are referred to in the concluding chapter.\(^{176}\)

To a large extent, constitutional adaptations aim to protect the democratic legitimisation of the legislative process in the European Union. This aim is clearly expressed by the structural guarantee clauses of the Member States’ constitutions. Such an example is Article 23(1) of the German Basic Law, which not only obliges the Union to protect democratic principles (a ‘structural guarantee directed towards the Union’), but also imposes qualified obligation on the Basic Law to protect these principles in conjunction with Union law via reference to Article 79(3) Basic Law. The Federal Constitutional Court expresses the reciprocal effect between Union law and national constitutional law by its demand that national parliaments assume ‘tasks and powers of substantial importance’.\(^{177}\) In this respect, the rights of national parliaments to


\(^{172}\) Sometimes, the state constitutions provide for the involvement of state parliaments in resolutions for the Federal Council. For example, according to Art 34a of the State Constitution of Baden-Württemberg, the State Council has to be informed of and involved in all plans relating to the European Union which are of paramount political importance and substantially affect significant state interests or the legislative jurisdiction of the states directly. On this and further examples, see K Zwicker, Als Bundesstaat in die Europäische Union (2000) 225ff.

\(^{173}\) This tendency is also noticeable in Switzerland, where the cantons established the so-called Conference of Canton Governments (Konferenz der Kantonsregierungen, KDK) in October 1993 in order to represent the cantons’ interests in the formation of foreign policy in a co-ordinated way in relation to the federation: cf T Fleiner and N Töpperwien, ‘Chancen und Probleme für den schweizerischen Föderalismus nach einem Beitritt zur Europäischen Union’ in T Cottier and A Kopf (eds), Der Beitritt der Schweiz zur Europäischen Union (1998) 323, 334ff; K Nuspliger, ‘Vernetzung führt zum Erfolg’ in T Cottier and A Caplazi (eds), Die Kantone im Integrationsprozess (2000) 29.

\(^{174}\) see below secction III.3(a).

\(^{175}\) See below section IV.1.

\(^{176}\) Entscheidungen des Bundesverfasungsgerichts 89, 155, 186 (Maastricht).
participate in the legislative process can largely perform the function of compensation provided that democratic legitimisation is still deficient at the European level in comparison with that at the national level.\(^{178}\)

How do constitutional legislators in Member States react to the national parliaments’ loss of powers? The national parliaments of all Member States, save Cyprus,\(^{179}\) have some competences to participate in the European legislative process.\(^{180}\) Regulations have been adopted in this respect at the constitutional level in Germany, France, Greece, the Netherlands, Denmark, Sweden, Portugal, Austria and Finland. Besides, there are extra-constitutional participation rights, for example in Great Britain, Belgium, Ireland, Italy, Luxembourg and Spain as well as in Lithuania, Poland, Estonia and Latvia. The motive for corresponding constitutional amendments resembles that in relation to federalism. Here, too, the aim is to compensate for the loss of influence by granting the parliaments participation rights in the European legislative process.

The regulations of Member States certainly differ in detail.\(^{181}\) However, they are similar in principle. The instrument employed by the constitutions in order to protect the influence of parliaments essentially consists of two components: information rights and participation rights in the form of rights to express their opinion.\(^{182}\) Under certain circumstances, the Member State’s representative can be obliged to express the parliament’s opinion to the Council in a given case. Some parliaments are equipped with rather informal means of participation.\(^{183}\)

The legal systems of almost all Member States grant their parliaments information rights. Only Luxembourg does not provide for such a legal obligation.\(^{184}\) The information rights exist on the basis of the Constitutions, some other national laws, or parliamentary or ministerial resolutions.\(^{185}\) In Great Britain and Ireland the right exists on the basis of convention.\(^{186}\) In most cases, the government is obliged to inform the parliament about drafts and propositions of European legislation, sometimes to append some explanatory remarks\(^{187}\) or the govern-


\(^{179}\) The Cypriot Parliament has a specific Committee for European matters whose function, however, does not exceed the general parliamentary control of the government in cases relating to European affairs. At the moment there is a debate on the potential introduction of a specific participation of the parliament, particularly in terms of the conformity of European legal acts with the principle of subsidiarity, COSAC (below n 180, 24ff).


\(^{181}\) COSAC, above n 180, 3.

\(^{182}\) Eg Art 23(3) German Basic Law; Art 161 Portuguese Constitution; Art 23e Austrian Federal Constitutional Law.


\(^{185}\) Cf the Regulation no 236 of 3 June 2003 of the (Ministerial) Cabinet of Latvia on the temporary proceedings of the coordination of the national positions.

\(^{186}\) Cf Kamann, above n 184, 124ff, 136. In the UK ‘conventions of the Constitution’ are regarded as extra-legal rules of constitutional conduct which are binding but not directly enforceable by the courts or the Presiding Officers in Parliament.

\(^{187}\) This is the case in Ireland, the UK, Estonia, Hungary and Slovenia. The parliament of Lithuania may demand such additional informations. As regards the similar situation in Germany, cf N Görlitz, *Europäische
The contents of these remarks vary from information about the purpose of the legal act and the schedule of European legislation to an outline of implication on the national legal system, particularly whether European legislation would require national legislation for its implementation, as well as potential economic, social and financial concomitants.

The second component, ie the participation of the parliament in the decision-making process, is common to all constitutions. However, the instruments of participation are developed to varying degrees. They encompass the mere right of parliament to issue its opinion, the obligation of the government to take account of parliamentary opinion and the obligation of the government to comply with the parliamentary opinion. In any event, an effective parliamentary participation requires the parliament to scrutinise the respective documents within an appropriate time limit. In order to meet that need, the provisions of some Member States oblige the national ministers to wait for the parliamentary opinion before participating in the European legislation.

Differences in details notwithstanding, the procedure is characterised by a great degree of uniformity. The essential documents must be delivered regularly, as required by constitutional law; the governmental representative only gives his opinion once the national participation procedure has been concluded. Once the parliament has formed an opinion, it is usually not binding.

When comparing countries, the Danish, Swedish and Austrian parliaments as well as those of Slovakia, Estonia and Lithuania, which have the right to issue a binding opinion according to national law, display the strongest participation rights. The Danish parliament may submit its opinion to which the government is bound, particularly in respect to regulations and directives of great account. Likewise, the competent member of the Austrian government is bound by the opinion of the National Council during European negotiation and voting. Deviation is only admissible for imperative foreign and integration policy.

188 Eg in Denmark, Finland, Sweden, Estonia, Latvia, Lithuania, Poland, Slovakia, Hungary, Slovenia and the Czech Republic.
189 Cf § 152(1) of the Estonian Statute on parliamentary proceedings (Riigikogu); Art 3 of the Hungarian Act no LIII of 2004 on the cooperation of the parliament and the government in matters of the EU; Art 180 of the Statute of the Lithuanian Seimas; Art 6 of the Polish Act on the cooperation of the Ministry Council with the Sejm and the Senate in matters relating to the membership of Poland in the EU; Art 9 of the Slovenian Act on the cooperation of the National Assembly and the government in matters of the EU.
190 There is such a ‘reservation of parliamentary scrutiny’ in Italy: cf Panara, above n 8, paras 44ff; COSAC, above n 180, 10.
192 COSAC, above n 180, 29; on the procedure of mandating, cf Janukowski, above n 180, 107ff. Although there are no sanctions other than the ‘usual’ vote of no confidence in the event of violating a mandate of the Folketing or its European Committee, the mandate is of great political account. Because Denmark is traditionally ruled by minority governments, the risk of a vote of no confidence is higher than elsewhere—the more so as the Folketing may vote against any single minister. Cf J Dieringer, ‘Entparlamentarisierung oder Renaissance der Volksvertretungen?’ in K Beckmann et al (eds), Eine Verfassung für Europa (2005) 235, 248ff; Janukowski, above n 180, 110; Kamann, above n 184, 55; J Albaek Jensen, ‘Prior Parliamentary Consent to Danish EU Policies’ in E Smith (ed), National Parliaments as Cornerstones of European Integration (1996) 40.
reasons. Insofar as the legal act under preparation in the EU would lead to an amendment to existing constitutional law, a deviation is only admissible if the National Council does not controvert it within an appropriate time. While the mandates of the Swedish parliament lack any formally binding character, they are for the most part politically binding. The Slovakian parliament may scrutinise the negotiating position of the government; it must not vote for any positions other than those approved of by the parliament. Such a reservation of approval equals a binding mandate. The Estonian government is also bound by parliamentary opinion, a deviation from which requires at least a justification. Finally, the Lithuanian parliament may oblige the government to conduct its actions within the framework of the European institutions and, most notably, its official position in the Council depends on its previous co-ordination with the parliament. This so-called ‘parliamentary reservation’ holds true only insofar as the parliament refers to an EU project as ‘relevant’ or even ‘very relevant’.

In a number of Member States there are participation rights, which act as a safeguard insofar as governments must take account of the opinion of parliament and orientate themselves around it. The extent of the required consideration is complex and multifarious, as the German example shows. Article 23(3) of the German Basic Law states that the government shall take into account the position of the Bundestag during negotiation. According to section 5, paragraph 3 of the respective law (EUZBBG), the government must base its negotiating position on the opinion of the parliament. In other words, the government must be guided by the instructions of the Bundestag at the outset of its deliberations. Consequently, the position issued by the Bundestag in the form of a parliamentary resolution is not binding in nature. The government may deviate from the position due to integration policy reasons. In the event of deviation, pursuant to Article 43 (1) German Basic Law, the Bundestag may require the appearance of the competent member of the government and may demand an explanation for

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194 Art 23e(2) Austrian Federal Constitutional Law; according to the government bill, deviation is admissible if the protection of considerable Austrian interests within the EU requires it, see Regierungsvorlage 27 Beilagen Nummer 19. Gesetzgebungsperiode 10.  
195 A Khol, ‘Demokrateabbau durch EU-Regierungsgesetzgebung’ in Österreichische Parlamentarische Gesellschaft (ed), Festschrift 75 Jahre Bundesverfassung (1996) 271, 282; the National Council may be asked once again by consultation with the Committee pursuant to § 31e(6) of the Standing Rules of the National Council (Geschäftsordnung des Nationalrats).  
196 See Janukowski, above n 180, 114; Nergelius, above n 31, 293ff.  
197 Cf COSAC, above n 180, 65; concerning the corresponding provision of the Dutch parliamentary chambers, insofar as the European legislation on justice and home affairs is concerned, cf COSAC, above n 180, 59.  
198 See § 1524(3) of the Statute on parliamentary proceedings (Riigikogu).  
199 See Art 18018 of the Constitution of Lithuania.  
201 On this, note the Bundestag-Special Committee ‘Europäische Union (Vertrag von Maastricht)’; cf R Scholz, in T Maunz and G Dürig, Grundgesetz Kommentar (looseleaf, last update Dec 2007) Art 23, para 116.  
202 Kamann, above n 184, 79ff.
the deviation.\textsuperscript{203} The creation of binding effect, however, is only possible by means of a
'mandatory statute'.\textsuperscript{204}

Participation rights in Finland,\textsuperscript{205} Ireland, Malta,\textsuperscript{206} the Czech Republic, and to some extent
in Hungary, Poland and Slovenia are comparable to those of the German Bundestag. In some
cases, the government is not only obliged to take into account the opinion of parliament, but
also to respect certain additional obligations strengthening the binding character of the former.
For instance, the government of Hungary is obliged to regard the position of parliament as a
‘basis’ for the elaboration of the negotiating position. Insofar as the project would constitution-
ally require a qualified majority vote in the Hungarian parliament, however, the
government is only free to deviate in legitimate cases.\textsuperscript{207} The Polish and Slovenian governments
have to give reasons for their deviation from the position of parliament, which constitutes
either a basis in the negotiations (in the case of Poland)\textsuperscript{208} or has to be taken into account (in
the case of Slovenia).\textsuperscript{209} The obligation to give reasons for the deviation from the parlia-
mentary opinion effectively binds the government to the parliament, at least politically. The
expertises\textsuperscript{210} of the Finnish parliament have similar effects.\textsuperscript{211}

The situation in the UK is unique, since parliament need merely debate European policy.
Nevertheless, thanks to the ‘scrutiny reserve system’ as well as to the significance of such
debates as a parliamentary instrument to exert influence on the government, participation of
parliament in reality comes close to the participatory quality of parliament in systems where
opinions must be taken into account, as mentioned above.\textsuperscript{212}

At the opposite end of the spectrum are those parliaments whose participation rights do not
exceed the mere right to issue their opinion on European documents. This is the case in
Belgium, France, Greece, Italy, Luxembourg, the Netherlands, Portugal, Spain, Latvia and
Bulgaria.\textsuperscript{215}

In France, the parliament’s right to participate in its present form was only achieved in
proceedings before the Conseil constitutionnel. The court held that a constitutional
amendment was necessary in order to grant the parliament an (indirect) channel of influence
over the French government’s attitude in the Council.\textsuperscript{216} According to Article 88-4 of the

\begin{itemize}
  \item \textsuperscript{203} CD Classen, in H von Mangoldt et al, Grundgesetz-Kommentar (2000) vol II, Art 23, para 97.
  \item \textsuperscript{204} Scholz, above n 201, Art 23, para 118; Classen, above n 203, Art 23, para 105 refers to ‘fundamental
    binding nature’; cf also O Rojahn, in I von Münch and P Kunig (eds), Grundgesetz-Kommentar (2001) vol II,
    Art 23, para 71.
  \item \textsuperscript{205} See Art 96, 97 of the Finnish Constitution.
  \item \textsuperscript{206} For the proceedings of participation of the Maltese Parliament, cf the Annual Report 2004 of the
    Standing Committee on Foreign and European Affairs, Appendix 4 and 5, 40ff, available at
  \item \textsuperscript{207} See Art 4(4) and (5) of the Hungarian Act No LIII of 2004 on the cooperation of the Parliament and the
    Government in matters of the EU.
  \item \textsuperscript{208} See Art 10 of the Polish Act on the cooperation of the Ministry Council with the Sejm and the Senate in
    matters relating to the membership of Poland in the EU.
  \item \textsuperscript{209} See Art 3a of the Slovenian Constitution and Art 10 of the Act on the cooperation of the National
    Assembly and the government in matters of the EU.
  \item \textsuperscript{210} See Art 96 of the Finnish Constitution.
  \item \textsuperscript{211} COSAC, above n 180, 33; cf Janukowski, above n 180, 116ff, pointing out the fragmentation of the
    party system and the means of a vote of no confidence against any single minister entailing a strong factual
    account of the parliamentary opinion, such as in Denmark and Sweden.
  \item \textsuperscript{212} Cf Janukowski, above n 180, 133ff, 139; one of the factsheets with informations about the English
    Parliament contains a detailed description of the ‘scrutiny reserve system’ as well: see www.parliament.uk/
  \item \textsuperscript{213} Cf above n 197.
  \item \textsuperscript{214} See the Constitutional Act on the Membership of the Republic of Lithuania in the European Union of 13
    July 2004, no IX-2343, and Art 1853 of the Procedural Act of the Seimas.
  \item \textsuperscript{215} Cf COSAC, above n 180, 10ff.
  \item \textsuperscript{216} Eg Gundel, above n 43, 479.
\end{itemize}
Constitution, which did no more than implement the standards of the Maastricht I decision, the government submitted to the national assembly and the senate bills or proposals for legal acts of the EC and the European Union containing legal measures. The two chambers could (only) pass resolutions on such drafts and proposals, as well as other documents.\footnote{For more detail, see Kamann, above n 184, 102ff; P Weber-Panariello, \textit{Nationale Parlamente in der Europäischen Union} (1995) 162ff.}

The participation of the Greek parliament is also weakly developed. Initially, Article 3 of the Act Ratifying Accession only required the government to submit a report on the development of European affairs to the parliament before the end of its annual term.\footnote{Evrigenis, above n 52, 168; Bernasconi and Spirou, above n 52, 186.} In 1990 a Commission for European Affairs was established, consisting of 25 members. The Commission has consultative powers only. It follows current affairs in the Community and general European policy, and issues a report in which it can also make recommendations.\footnote{Bernasconi and Spirou, above n 52, 186ff; Papadimitriou, above n 101, 168; P Zervakis and N Yannis, ‘The Parliament of Greece’ in Maurer and Wessels (eds), above n 184, 147, 160.} However, the government does not provide prior information on a regular basis. Similarly, the government is not bound to follow the recommendations and parliament’s practical influence is extremely low.\footnote{Kamann, above n 184, 118.}

The Bulgarian Constitution merely provides that the Bulgarian Council of Ministers must inform the National Assembly in advance about any drafts and adoptions of EU instruments and give detailed account for its actions according to Article 105(4). This wording indicates that the Council of Ministers is free to act without being bound to any parliamentary opinions. At the constitutional level, there is in fact no provision granting the parliament an opportunity to give specific Union law opinions. Any such right would have to be derived from the general parliamentary control of the Council of Ministers at best.

At the procedural level two aspects relating to adaptations of the traditional legislative procedure in parliament can be discerned. Plans within the framework of the participation procedure are usually dealt with by separate committees, usually specialised in European affairs, whose small size, specialisation and expert knowledge facilitate an actually effective participation. The second aspect of adaptation is closely related: in order to comply with the legislative process at the European level, plans in parliament must be dealt with within short periods. Constitutions or the laws to be implemented sometimes stipulate precise periods\footnote{The Senate of the Czech Parliament has to vent its opinion within 35 days, COSAC, above n 180, 28; the French National Assembly and the Senate within a month, while in practice the government waits for the parliamentary opinion, COSAC, above n 180, 35ff; the Hungarian Parliament ‘within reasonable time, considering the European Union’s agenda for decision-making’, Art 4(1) of Act no LIII of 2004 on the cooperation of the Parliament and the Government in matters of the EU; the Italian Parliament within 20 days, Art 4 of the Italian Act no 11 on the participation of Italy in the European decision-making; the Lithuanian Parliament within 15 working days, Art 18015 of the Lithuanian Constitution; and the Slovak Parliament within two weeks, COSAC, above n 180, 65.} or are content with approximate stipulations, such as ‘at the earliest opportunity’,\footnote{\S 3 Implementing Act (AusfG) to Art 23(2) German Basic Law, also \S 5.} ‘immediately’ or ‘reasonable’.\footnote{Art 23d(1) of the Austrian Federal Constitutional Law.}

On paper, parliaments sometimes appear to have extensive powers; nevertheless, participation in the legislative process of the European Union does not adequately compensate the loss of legislative powers. In Germany, for example, provisions such as Article 23(1) Basic Law show that only the government really has the institutional and functional legitimisation to participate in supranational legislation. This represents a shift in the functional order contained in the German Grundgesetz. Parliament’s control over the government replaces autonomous
legislation. Additionally, the practice in states which recognise greater powers of parliament does not differ from that of other states as greatly as constitutional texts may suggest. Accordingly, there has never been any serious resistance or restriction of governmental discretion, not to mention genuine conflict, during the 14 years of Austria’s membership.

In Denmark, the mandates of the Market Committee of the Folketing are broadly interpreted following a case of conflict. Consequently, the governmental representative is left with a certain freedom of negotiation, which serves to avoid conflict. Even in cases where the parliaments do exercise their participation rights, its effectiveness depends on the required quorum, that is to say, on the respective matter requiring either a qualified majority or unanimity in the Council. The realisation that infringements of the bond in national constitutional law do not affect the validity of a legal act at Union level may also contribute to the fact that parliaments have little practical influence.

The Lisbon Reform Treaty would incorporate a number of elements of national constitutional law defined above in a general way that matches the provisions of national constitutional law. On several occasions, the Treaty expressly refers to the national parliaments, in particular in Article 12 TEU-Lis, requiring them to make an active contribution to the ‘good functioning’ of the Union. The most important amendment is that the national parliaments are now part of the control mechanism monitoring the compliance with the principle of subsidiarity (an ‘early warning system’). They can directly scrutinise the legislative process of the EU. The first reference is found in Article 5 TEU-Lis, which is substantiated by Protocol (No 1) on the role of the national parliaments in the European Union as well as by Protocol (No 2) on the application of the principles of subsidiarity and proportionality. Finally, Article 69 Treaty on the Functioning of the European Union (TFEU) affirms—in relation to the area of freedom, security and justice—that the national parliaments ensure compliance of proposals and legislative initiatives with the principle of subsidiarity in accordance with the arrangements laid down by the protocol on the application of the principles of subsidiarity and proportionality. Protocol (No 2) on subsidiarity and proportionality provides in Article 4 that the Commission shall forward its draft legislative acts and its amended drafts to national parliaments at the same time as the Union legislator. Upon adoption, legislative resolutions of the European Parliament and positions of the Council shall be forwarded by them to the national parliaments as well. Within 8 weeks, the national parliament or the chambers of a national...
parliament may submit a reasoned opinion stating why it considers the draft in question non-compliant with the principle of subsidiarity (Article 6). With regard to regional parliaments with legislative powers, the Protocol provides for the possibility of consulting them without any legal obligation (‘it will be for each national parliament . . . to consult, where appropriate’). This must be understood in such a way that European law is open for a legal obligation under national (constitutional) law.

The procedure to be followed in case of a reasoned opinion includes the obligation to take account of the reason (Article 7(1) of the Protocol), the number of votes allocated to the various parliaments and chambers (paragraph 2) and the Commission’s obligation to review the draft in the case of a ‘qualified opinion’, ie generally when it represents at least one-third of all the votes of parliaments. The Commission may decide to maintain, amend or withdraw the draft. Whatever the Commission decides, it must give reasons for its decisions. The regular legislative procedure only begins once the decision to maintain the proposal is made by the Commission. Where reasoned opinions represent at least a simple majority of the votes, the proposal must be reviewed. Again, the Commission may decide to maintain, amend or withdraw the proposal. If it chooses to maintain the proposal, the Commission must, in a reasoned opinion, justify why it considers the proposal compliant with the principle of subsidiarity. This reasoned opinion, as well as the reasoned opinion of the national parliaments, will have to be submitted to the Union legislator for consideration according to the following procedure: before concluding the first reading, the legislator (the European Parliament and the Council) must consider whether the legislative proposal is compatible with the principle of subsidiarity, taking particular account of the reasons expressed and shared by the majority of national parliaments as well as the reasoned opinion of the Commission. If, by a majority of 55% of the members of the Council or a majority of the votes cast in the European Parliament, the legislator is of the opinion that the proposal is not compatible with the principle of subsidiarity, the legislative proposal shall not be given further consideration.

Finally, in order to ensure some effectiveness of the principle of subsidiarity, Protocol (No 2) provides for a right to bring actions on grounds of an alleged infringement of this principle. However, actions may only be brought by the Member States or ‘upon notification in accordance with their legal order on behalf of their national parliament or a chamber of it’ (Article 8 of the Protocol). This wording means that it is the government of a Member State which brings the action, whereas it is the national parliament which is entitled to decide whether the action is brought at all and on what submission the action is based. The way in which the parliament institutes the proceedings is an issue of national State organisation, which is decided by the national legislator according to the constitution.

Protocol (No 1) on the role of national parliaments refers in its Preamble to the control of national parliaments over their respective governments and their activities in the European

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234 Pursuant to Art 8 of Protocol (No 1), its provisions shall apply to the component chambers, where the national parliamentary system is not unicameral. Pursuant to Art 7(1) of Protocol (No 2), each national parliament shall have two votes, shared out on the basis of the national parliamentary system. In the case of a bicameral system, each of the two chambers shall have one vote. Cf in particular as to the German Bundesrat, Streinz et al, above n 229, 53.


236 Mager, above n 231, 479; Schröder, above n 231, 12.

237 Mayer, above n 80, refers to this procedure as an instrument of blockade and symbolic legislation.

238 Pursuant to Art 8 of Protocol (No 2), the action has to be brought in accordance with the rules laid down in Art 263 TFEU.

239 One may reflect on whether the action concerns only the principle of subsidiarity or the competences per se and the principle of proportionality, too; on this, see Hölscheidt, above n 229, 449; Schwarze, above n 39, 522ff.

240 Hölscheidt, ibid, 449.
Union, and expresses the will to increase the involvement of national parliaments in the activities of the Union. For this purpose, the Protocol contains a number of obligations on the side of European institutions to inform national parliaments (Part I). Moreover, Part II provides for inter-parliamentary co-operation between the European Parliament and national parliaments. These examples reveal the increasingly strong mutual interrelation between national institutions and European institutions and, as a consequence, between national constitutional law and European law in the field of organisational law.

5. Fundamental Rights

That fundamental rights were and are directly affected by Community law is shown most clearly by the case law of the German Federal Constitutional Court on individual powers of revision relating to the protection of fundamental rights. The accession of France to the ECHR, the joint declaration of the Council, Commission and Parliament of 1977, the accumulating case law on the fundamental rights of the ECJ with increasing references to the European Convention on Human Rights (ECHR), amendments of primary Community law relating to fundamental rights and finally the proclamations of the Charter of Fundamental Rights represent the most important milestones in this respect. This development also affects national constitutions. In contrast to the areas hitherto described, changes in this area—with the exception of the right to vote in municipal elections—are expressed less by the wording of the constitutional texts than by changes to the case law of the constitutional and supreme courts.

Concerning the effects of legal mechanisms emanating from Union law, five different types of changes can be distinguished:

a) Expanding the scope of national guarantees of fundamental rights demanded by Community law.

b) Increasing the protection of fundamental rights within the scope of Community law.

c) Reinforcing and changing the effect of the ECHR within the national area.

d) Community law indirectly affecting the scope of national guarantees of fundamental rights.

e) Matching national fundamental rights with increased standards at European level.

a) Expanding the Scope of National Guarantees of Fundamental Rights Demanded by Community Law: The Example of the Right to Vote in Municipal Elections

Classifying the right to vote in elections at the municipal level as a fundamental right might not be immediately obvious. However, this classification is justified by the fact that this right is governed by the same principles which apply in Germany to the right to vote at federal and state levels and the corresponding classification in the constitutions of other Member States. The Charter of Fundamental Rights also classifies the right to vote in municipal elections contained in Article 38 under Citizens’ Rights in its 5th Chapter.

The guarantee of voting rights for EU foreigners at the municipal level and its detailed form in Directive 80/94, first anchored in Article 8b(1) EC Treaty and subsequently in Article 19(1) EC, required a series of amendments in a number of states because, for democratic reasons, foreigners were not permitted to participate in elections. During the run-up to amendments at the Union level, the constitutional courts dealt with this question in order to clarify the amendments required, not least with regard to the issue of sovereignty and the state. By way of example, developments in Germany, France and Spain show the different amendment strategies.

\[241\] Cf, eg Art 14 Finnish Constitution; Art 15(4) Portuguese Constitution.
In Germany, the Federal Constitutional Court clarified the requirements of constitutional adaptations on different grounds but at a time when the Directive on the right to vote in municipal elections was already looming. In 1990 two judgments of the Federal Constitutional Court declared that the right to vote granted to foreigners by statute in Schleswig-Holstein and Hamburg at municipal levels was unconstitutional.\textsuperscript{242} The Court interpreted Article 20(2) Basic Law to the effect that the ‘people’ legitimising state authority is the people of the Federal Republic of Germany. The state could not be conceived without the entirety of the people who were the holders and subjects of state power.\textsuperscript{243} These rights and duties of German citizenship are bestowed by nationality.\textsuperscript{244} According to the Federal Constitutional Court’s interpretation, the Constitution granted the right to vote on federal and state levels merely to German nationals, and that a right to vote for foreigners was accordingly unconstitutional.\textsuperscript{245} At the municipal level, the Court decided that municipal self-government was also the (indirect) exercise of state authority and that therefore the required democratic legitimisation, provided by Article 28(1) Basic Law, could similarly only be conveyed by German nationals.\textsuperscript{246} At the same time, the Court stated in an obiter dictum that the introduction of a right to vote in municipal elections for EU foreigners discussed at the time could be the subject of a valid amendment to the constitution according to Article 79(3) Basic Law.\textsuperscript{247} Owing to the clear statement of the Constitutional Court’s judgment on the right to vote in municipal elections for foreigners, Article 28(1) was amended to implement the Maastricht Treaty.\textsuperscript{248} According to sentence 3 of the newly formulated article, nationals of a Member State of the European Union are also entitled to vote and to stand for election in district and municipal elections in compliance with Community law. Thereby, the Basic Law opens up to a provision of Community law and a more detailed regulation of the right to vote in municipal elections for EU citizens (Article 28(1), sentence 3 Basic Law as an ‘opening clause’).\textsuperscript{249}

In France, the constitutional situation before the introduction of the right to vote in municipal elections was similar for EU citizens. The Constitutional Council held in the Maastricht I decision that Article 3(4) of the French Constitution granted only French citizens the right to vote and stand for election.\textsuperscript{250} With reference to Articles 3(1) and (2), 24 and 72 of the Constitution, the Conseil constitutionnel held that it was unconstitutional for EU citizens to participate in municipal elections because the election of senators by the municipal councils would indirectly result in non-French Union citizens participating in elections of the state senate.\textsuperscript{251} This suggests that the Conseil constitutionnel judges regional and state elections differently.\textsuperscript{252} The introduction of the right to vote in municipal elections for EU citizens, following the conclusion of the Maastricht Treaty, meant that the constitution had to be changed in France as well.\textsuperscript{253} This amendment is notable largely because Article 88-3 of the Constitution authorises only the legislator, subject to reciprocity, to grant EU foreigners

\begin{itemize}
\item \textsuperscript{242} Entscheidungen des Bundesverfassungsgerichts 83, 37, 50ff (foreigners electoral law); cf, eg K Sieveking, ‘Die Umsetzung der Richtlinie des Rates zum Kommunalwahlrecht der Unionsbürger in den deutschen Ländern’ [1993] Die öffentliche Verwaltung 449.
\item \textsuperscript{243} Entscheidungen des Bundesverfassungsgerichts 83, 37, 50 (foreigners electoral law).
\item \textsuperscript{244} Ibid, 51.
\item \textsuperscript{245} Ibid, 51ff and summary no 3.
\item \textsuperscript{246} Ibid, 53ff.
\item \textsuperscript{247} Ibid, 59; cf also Schwarz, above n 13, 149.
\item \textsuperscript{248} Amending Act of 27 October 1994, [1994] Bundesgesetzblatt I, 3146.
\item \textsuperscript{249} R Scholz, in Maunz and Dürig (eds), above n 201, Art 28, para 41b.
\item \textsuperscript{250} Conseil constitutionnel, Decision no 92-308 DC of 9 April 1992, above n 45, 187, 190.
\item \textsuperscript{251} Ibid.
\item \textsuperscript{252} Walter, above n 47, 186.
\item \textsuperscript{253} Conseil constitutionnel, Decision no 92-308 DC of 9 April 1992, above n 45, 187, 192; cf also Constantinesco, above n 91, 68.
\end{itemize}
resident in France the right to vote in municipal elections. In its Maastricht II decision, the Conseil constitutionnel quickly put limits on this seemingly created leeway for legislative discretion by warning the legislator to adhere to the Directive’s standards when adopting the transposing Act.

In Spain, implementation took place with fewer conflicts and ultimately went considerably further in terms of constitutional law. At the time of the implementation of European standards, the adaptation procedure had already been half carried out anyway, because the active right to vote for foreigners subject to the requirement of reciprocity already existed. Besides, the Constitutional Court held that, according to constitutional law, the right of EU citizens to vote in municipal elections did not contravene Article 23.1 of the Spanish Constitution, which guaranteed citizens the right to political participation. This guarantee is, in principle, limited to Spanish nationals, but can also be extended to foreigners on the basis of the general clause of Article 13.1 of the Constitution. Therefore, however, Article 13.2 of the Constitution had to be changed, since it only granted foreigners the right to vote in elections. The new article now also grants foreigners the right to stand for election and that—like the existing regulation—without restriction to Union citizens. As to whether foreigners’ participation in municipal elections infringes Article 1.2, according to which the Spanish people are the sole holders of sovereignty, the Constitutional Court held that the municipalities do not exercise powers which are connected to the exercise of Spanish sovereignty.

b) Increasing the Protection of Fundamental Rights within the Scope of Community Law: The Example of Equal Treatment of Men and Women

Community law recognises several different principles of equal treatment, in both primary and secondary law. The equal treatment of men and women in relation to education, appointments, working conditions and payment is guaranteed by Article 141 EC and the Equal Treatment Directive. Article 12 EC prohibits discrimination on grounds of nationality in relation to cross-border cases, the details being more precisely structured in the fundamental freedoms of the internal market. Further prohibitions against discrimination can be found in connection with the fundamental freedoms of the internal market. Prohibitions against discrimination and principles of equal treatment located at different levels have influenced national constitutional law in different ways and complement each other.

Community law exercises considerable influence over national (constitutional) law, particularly in relation to the equal treatment of men and women. Without the facts of any case needing to possess a cross-border dimension, women and men must be equally treated in relation to education, appointments, working conditions and payment in accordance with Article 141 EC and the Equal Treatment Directive—anywhere from training as a tax-advisor to recruitment by the army. This is often connected to a change in, or at least a supplement to, the national reserve of fundamental rights. This influence is particularly apparent in Germany and Ireland.

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254 Regardless, at the constitutional level foreigners are excluded from the offices of mayor and councillor, from nomination by electors to the senate and from senate elections themselves.
255 Conseil constitutionnel, Decision no 92-308 DC of 9 April 1992, above n 45, 187.
Using Germany as an example, the effects on the scope of protection according to Article 3(2) Basic Law can be clearly shown by two examples. First, Article 141 EC and the Equal Treatment Directive apply to all participants of working life and therefore are binding not only for the state—in contrast to Article 3(2) Basic Law. Only in its decision to prohibit night work did the Federal Constitutional Court transfer this protective policy to the interpretation of Article 3(2) by the notion of protective duty. Secondly, the ECJ’s consideration of factual discrimination influenced the case law of the Federal Constitutional Court on Article 3(2) Basic Law. Although, initially, only rules relating to gender were believed to infringe Article 3(2) Basic Law, the Federal Constitutional Court now interprets the article to the effect that it demands the creation of de facto equality of the sexes. In a further decision following the amendment of Article 3 in 1994, the Federal Constitutional Court also regarded positive discrimination as constitutional in order to create de facto equality, whilst the ECJ continues to interpret the principle of equal treatment in the sense of strict equality.

In relation to German constitutional law, the equal treatment regime of Community law has entailed further consequences. Until 2000, women were barred from military service in the Bundeswehr according to Article 12a(4) Basic Law. According to the prevailing opinion in legal scholarship and the case law of the Federal Administrative Court (Bundesverwaltungsgericht), they were only allowed to be employed in the Bundeswehr as medics or military musicians. In a decision which caused great excitement in Germany, the ECJ held that this practice was incompatible with the Equal Treatment Directive 76/207/EEC. According to the ECJ, the Directive also applied to the areas of internal and external security; gender did not constitute an essential prerequisite therefore for the employment relationship and the complete exclusion of women from armed service was neither reasonable nor necessary in order to guarantee public security. German legal scholarship further debated whether Article 12a(4) Basic Law prevented women from performing military service on a voluntary basis. Accordingly, the constitutional legislator then made a minor amendment to the wording of the relevant sentence in Article 12a(4) to make clear that women do have voluntary access to the Bundeswehr, even though such service is military in nature.


262 Entscheidungen des Bundesverfassungsgerichts 85, 191, 207 (prohibition of nightwork); 52, 369, 375ff (day off for housewives); 92, 91, 109 (fire-service contribution).

263 Entscheidungen des Bundesverfassungsgerichts 85, 191, 207 (prohibition of nightwork); Entscheidungen des Bundesverfassungsgerichts 89, 276, 283 (Art 611a of the German civil code); cf Classen, above n 261, 72; idem, ‘Wie viele Wege führen zur Gleichberechtigung von Männern und Frauen?’ [1996] Juristenzeitung 921, 922.

264 Entscheidungen des Bundesverfassungsgerichts 92, 91, 109 (fire-service contribution).


266 In preference to many, see R Scholz, in Maunz and Dürig, above n 201, Art 12a paras 196ff; F Kirchhof, ‘Bundeswehr’ in J Isensee and P Kirchhof (eds), Handbuch des Staatsrechts der Bundesrepublik Deutschland (2000) vol III, § 78, para 42.

267 Eg Entscheidungen des Bundesverwaltungsgerichts 103, 301.


269 According to the new legal situation, women may not ‘under any circumstances be obliged to perform armed service’.

119
c) Reinforcing and Changing the Effect of the European Convention on Human Rights in the National Area

Union law also influences the constitutions of Member States in relation to fundamental rights, insofar as this area gives rise to an increase in the influence of the ECHR or changes in the content of fundamental rights’ guarantees of the ECHR.

The reinforcement of the protection of fundamental rights at the national level induced by Union law can be illustrated by many examples: for instance, the enactment of the Human Rights Act in Great Britain, which transformed the ECHR into national law, while in Sweden the incorporation of the ECHR into national law was directly connected with EU accession, which took place at the same time.²⁷⁰ The ratification of Protocol No 6 to the ECHR by Belgium, Great Britain and Greece is the direct consequence of the first Declaration of the governmental conference on the ratification of the Amsterdam Treaty on the abolition of the death penalty.²⁷¹

Where the ECHR takes precedence over national law or influences the interpretation of fundamental rights,²⁷² Union law increasingly serves to modify the substance of fundamental rights. Examples are the ‘reception terms’, such as ‘aliens’ in Article 16 ECHR, and ‘legislative institution’ in the guarantees of the right to vote contained in Article 3 of Protocol No 1 to the ECHR. Article 16 of the Convention allows the political activity of aliens to be restricted in relation to Articles 10, 11 and 14 ECHR. However, legal developments in Union law led to the term ‘aliens’ in Article 16 of the Convention being restricted to nationals of third-party states. Consequently, EU foreigners are placed on an equal footing to citizens when exercising rights according to Articles 10, 11 and 14 of the Convention, at least for canvassing purposes before elections to the European Parliament. The term ‘legislature’ in Article 3 of Protocol No 1 to the ECHR, which was originally only intended as a guarantee for national parliaments, refers to national constitutional law. Therefore, the interpretation must take the constitutional structures of the state concerned into account.²⁷³ On this basis, the ECHR has confirmed the applicability of Article 3 Protocol No 1 to elections to the European Parliament.²⁷⁴ The ECHR held that the European Parliament did not fall outside the scope of Article 3 Protocol No 1 just because it was a supranational rather than a purely national organ. By referring to the relevant provisions prior to and following the entry into force of the Maastricht Treaty, the ECHR concluded that the European Parliament was sufficiently bound into the general democratic supervision of activities of the European Communities to represent part of the legislative body for the Member States of the Community.

d) Community Law Indirect Affecting the Scope of National Guarantees of Fundamental Rights

Effects on the scope of national guarantees of fundamental rights stem finally from the interplay between the fundamental freedoms of the EC Treaty on the one hand and national fundamental

²⁷¹ When the Treaty of Amsterdam was signed, the governmental conference accepted Declaration No 1 on the abolition of the death penalty which pointed out, with reference to Art 6(2) EU, that the 6th Protocol had been signed and ratified by a large majority of Member States.
²⁷⁴ ECtHR, App No 24833/94 Matthews v United Kingdom ECHR 1999-I, 251, paras 39 and 54.
rights on the other. The latter concern those rights which apply to nationals and EU foreigners equally as well as those limited to national citizens.

In the first case, the improved position of foreigners ('reverse discrimination') required by EC law could conflict with the general principle of equality. The legal position of EU foreigners as a comparable group has been withdrawn from the regulatory power of national legislators and is governed by supranational law. National constitutional law sees itself confronted with the problem that Community law is not part of national law but part of the legal system applicable in the Member State.

Assuming that Article 3(1) German Basic Law applies to cases of reverse discrimination, then it also extends to Community law as a full principle of equality within the legal system of the Federal Republic. Even if the unequal treatment of nationals and EC foreigners is ultimately founded on Community law, the national legislator has several different options to fulfil its international obligations. Both national and Community law leave open the possibility of also relieving nationals from an oppressive regulation. Therefore, national legislators remain responsible for the distinction between nationals and foreigners, and this constitutes a disadvantage in the rights according to Article 3(1) Basic Law. However, discrimination can be justified if there is sufficient objective justification and the disadvantage for nationals is kept within limits.

The Austrian Constitutional Court did not have any doubt that the national principle of equality applied to cases of reverse discrimination from the outset. It assumes that Austrian laws are bound both by Community law on the one hand and by national constitutional law—namely, the national principle of equality—on the other. National law must therefore be in conformity with the principle of equality; the fact that Community law has been implemented does not constitute sufficient justification.

Only a few days before Poland’s accession to the European Union, the Polish Constitutional Tribunal held that the scope of freedom the legislator enjoys in enacting regulations concerning restrictions on economic freedom, its delimitation and the interpretation of the notion of ‘important public interest’ as contained in Article 22 of the Constitution must be assessed in keeping with Poland’s participation in the European Common Market. This has special consequences for the constitutional assessment of reverse discrimination in particular for enacting restrictions on economic freedom which apply only to nationals, as their application to foreign entities from the EU is prohibited by Community Law. Even though discrimination against national entities is irrelevant in the light of Community law, it is the constitutional duty of national authorities to protect against such discrimination.

The second group of indirect adaptations concerns the protection of EU foreigners’ fundamental rights, which are found in the scope of fundamental freedoms but do not come as protection of corresponding fundamental rights of national law. In this respect, Community

277 M Herdegen, Europarecht (2001), para 100; Streinz, above n 12, para 685.
278 A Epiney, in C Calliess and M Ruffert (eds), EUV/EGV (2002) Art 12 EC paras 33ff; Herdegen, above n 277, para 100; C Starck, in von Mangoldt et al (eds), above n 203, Art 3(1), para 213.
279 Eg Verfassungssammlung 15106/1998.
280 Verfassungssammlung 15683/1999.
281 Judgment of the Polish Constitutional Tribunal of 21 April 2004, K 33/03 (biocomponents in gasoline and diesel).
law may require EU foreigners to be placed in a position which is no worse than that of EU nationals. Cases of application are, for example, the fundamental rights limited to state nationals such as the right of occupational freedom in accordance with Article 12 German Basic Law or freedom of association pursuant to Article 8 Basic Law as well as the principle of equality under Austrian constitutional law.

Here, the question arises as to the way in which a guarantee of fundamental rights applicable to nationals can be granted to EU foreigners. This may be necessary in order to take account of a principle of Community law, for instance a freedom of the internal market or to avoid discrimination, particularly in legal protection.\textsuperscript{282} The most convincing\textsuperscript{283} way of solving this problem is to extend the protection of state citizens’ fundamental rights to EU foreigners.\textsuperscript{284}

In Greek constitutional law, one example of the indirect influence of Article 191 EC (ex-Article 138 EEC Treaty) on Article 29 of the Greek Constitution is the provision which grants Greek citizens the right to found and become members of political parties. Whilst the constitutional legislator originally only intended to include national parties, it is now argued—on the basis of the integration clause of Article 28(2) and (3) of the Constitution—that Union as well as Greek citizens can be active in political parties.\textsuperscript{285}

Evaluating the proportionality of a professional restriction measure (consisting in a provision discriminatory against nationals), it might be necessary to take into account the discriminatory effect for the national citizen with regard to co-competitors from other EC Member States. Furthermore, the criteria of suitability and necessity might also have to be re-evaluated in the light of domestic discrimination.\textsuperscript{286}

A similar, if converse, problem became evident with regard to Article 22 of the Bulgarian Constitution. According to this Article, foreigners were in principle prohibited from acquiring ownership of land. This provision needed to be amended in order to avoid a potential violation of at least some fundamental (market) freedoms.

e) Matching National Fundamental Rights with Increased Standards at European Level

Using the fundamental right to asylum as an example, it becomes clear how increasing co-operation at the European level influences definitions of fundamental rights. It is no coincidence that the reference to safe third-party states in Article 16a(2) German Basic Law and the provision of international agreements in Article 16a(5) Basic Law emphasises EC Member States. Rather, it includes the Convention Implementing the Schengen Agreement\textsuperscript{287} and, with regard to paragraph (5), the Dublin Convention determining the state responsible for examining applications for asylum lodged in one of the Member States.\textsuperscript{288}

\textsuperscript{282} In relation to the fundamental rights guaranteed by the German Basic Law, see A Siehr, Die Deutschen Grundrechte des Grundgesetzes (2001) 329ff.
\textsuperscript{283} Cf preferably the objections of H Dreier, in idem (ed), above n 276, Preamble to Art 1, para 17; E Klein, ‘Gedanken zur Europäisierung des deutschen Verfassungsrechts’ in Burmeister (ed), above n 72, 1301, 1309ff; Jarass and Pieroth, above n 178, Art 19, para 10.
\textsuperscript{284} In relation to Art 12 German Basic Law, see R Breuer, in J Isensee and P Kirchhof (eds), Handbuch des Staatsrechts der Bundesrepublik Deutschland (1989) vol IV, § 147, para 21; see further references in PM Huber, ‘Europäisches und nationales Verfassungsrecht’ (2001) 60 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 194, 201.
\textsuperscript{285} Papadimitriou, above n 101, 173.
\textsuperscript{286} Example in König, above n 276, 603ff.
\textsuperscript{287} So, too, Entscheidungen des Bundesverwaltungsgerichts 94, 49, 86 (safe third-party states).
\textsuperscript{288} Cf B Huber, ‘Das Dubliner Übereinkommen’ [1998] Neue Zeitschrift für Verwaltungsrecht 150ff; G Lübke-Wolf, in Dreier (ed), above n 276, Art 16a, para 102; U Davy, in E Denninger et al (eds), Kommentar zum Grundgesetz für die Bundesrepublik Deutschland (looseleaf, last update Aug 2001) Art 16a, para 58.
The constitutional amendment contained in Article 53-1 of the French Constitution on the participation of France in the Schengen system is to be similarly evaluated, even though it does not directly concern a provision relating to fundamental rights. The legislator amending the constitution responded to the decision of the Conseil constitutionnel on 13 August 1993, holding that only a ‘lagging’ participation granting admission, ie renewed review of applications for asylum already rejected in other Member States, complied with the constitutional guarantee of asylum.\footnote{Cf Gundel, above n 43, 63ff.}

That co-operation in the field of asylum rights still suffers from harmonisation deficiencies is shown by the House of Lords’ decision in the case Secretary of State for the Home Department v Adan und Aitseguer.\footnote{Judgment of 19 December 2000—R 9441 [2002] Neue Zeitschrift für Verwaltungsrecht suppl I, 17ff.} In this case, Algerian and Somalian nationals were protected from deportation to Germany or France on the grounds that these states did not qualify as safe third-party states. This is because they interpreted Article 1A of the Geneva Refugee Convention in a way which did not take into account persecution by non-state groups. As far as Germany is concerned, an approximation of judicial practice appears to be taking place following the decision of the Federal Constitution Court of 10 August 2000\footnote{Europäische Grundrechte-Zeitschrift 388.} or the judgment of the Federal Administrative Court of 20 February 2001.\footnote{Entscheidungen des Bundesverwaltungsgerichts 114, 27.}

IV. Conclusions: The Relationship between National Constitutional Law and Union Law

1. Bodies Acting under the Constitutional Order

The extent to which the constitutional legislators are active depends on the constitutional tradition in question. While a series of states, such as Germany, France and Ireland, as well as the more recent Member States, have predominantly made their own—partly detailed—regulations on the transfer of sovereign powers,\footnote{See ch 10, § 5 Swedish Constitution; Art 93 Finnish Constitution; Arts 23a–23f Austrian Federal Constitutional Law, as well as the Federal Constitutional Accession Act.} other constitutional orders are more reserved\footnote{Mainly the Benelux States, but also Spain and Italy.} and do not contain a general ‘European Article’. Instead, they apply general regulations for transfers of sovereign rights. However, this does not provide any indication as to how ‘pro-European’ the constitution actually is. Rather, shifts in sovereignty can be limited by a regulation specifically dealing with Europe.

If, against this background, one considers the relationship between the constitutional legislator and constitutional courts, then it becomes obvious that the balance of power depends on the subject-matter. In many states, the constitutional legislators still hold the reigns of constitutional legislation as far as the law governing state organisation is concerned. In several states, constitutional changes have taken place which have adopted certain detailed regulations in the constitutional text concerning the participation of parliaments and, in the case of federally organised states, the federal states or comparable entities as well. With regard to the separation of powers, a comparable situation would exist if the constitution only contained one basic rule and the ordinary legislator issued implementing regulations.

Certainly, constitutional courts also help to establish the rules’ starting points and basic conditions, albeit to differing degrees. Accordingly, the Federal Constitutional Court has
expressly linked parliamentary participation to the requirements of Article 23 of the German Basic Law concerning the democratic structure of the Union’s legislative process.\textsuperscript{295} The French Conseil constitutionnel even transformed a regulation corresponding to the later Article 88-4 of the French Constitution into a constitutional requirement for ratification of the Maastricht Treaty.\textsuperscript{296} By comparison, regulations in other states have sometimes become constitutional law owing to the constitutional legislator’s interest in protecting its own powers and sometimes to the influence of other countries.

This suggests that there are two different views concerning the role of constitutional jurisdiction and legislation which are connected to the system of constitutional jurisdiction. In the French system, constitutional jurisdiction usually establishes the requirements of constitutionality prior to ratification and other acts of transfer. However, in the system of ex-post control, as practised by the Federal Constitutional Court in compliance with the concept of the German Grundgesetz, the constitutional legislator plays the major role. Nevertheless, in this area, too, borders become blurred, especially between French and German constitutional control. Whereas the Federal Constitutional Court reviewed the compatibility of the Maastricht Treaty with the standards of the Grundgesetz prior to its ratification by the Federal Republic of Germany, the French Conseil constitutionnel increasingly assumes the role of an ex post facto review court by subjecting past legislation or Acts of ratification to review when amending statutes or treaties.\textsuperscript{297}

In general, constitutional courts play a greater role in developing the content of fundamental rights than in the law governing state organisation. The reasons are less European than domestic. In most constitutions, the constitutional courts have repeatedly interpreted the texts on fundamental rights, old and unaltered for many years, which are formulated in relatively general and vague terms, typical of the nature of human rights. Throughout Europe, constitutional courts increasingly intrude into the legislator’s scope of discretion, a trend which is significantly influenced by the European courts themselves and likely to continue in areas of friction with Union law.

In interpreting the law, constitutional courts get into conflict with the ECJ. As far as the courts of Member States are concerned, such conflicts are resolved by the preliminary reference procedure found in Article 234 EC. What has today become the rule for ‘ordinary courts’—regardless of national differences in the willingness to make a reference—still encounters considerable reservations in constitutional courts. Indeed, most constitutional courts feel themselves obliged to adopt an interpretation in compliance with European law but either they do not regard themselves as a court pursuant to Article 234 EC\textsuperscript{299} at all or they avoid making a reference concluding that they are neither justified nor obliged to make a reference—eg because the legal question is sufficiently clear—or to hold that non-reference by a lower court amounts to an infringement of constitutional law. In this respect, the Austrian Constitutional Court is different because in 1999 it was the first constitutional court to make a reference according to the procedure under Article 234 EC;\textsuperscript{300} this practice has since continued in other cases.\textsuperscript{301}

\textsuperscript{295} Entscheidungen des Bundesverfassungsgerichts 89, 155, 184ff (Maastricht).
\textsuperscript{296} Conseil constitutionnel, Decision no 92-308 DC of 9 April 1992, above n 43, 190.
\textsuperscript{297} Cf references in Hecker, above n 87, 110ff.
\textsuperscript{299} Entscheidungen des Bundesverfassungsgerichts 92, 203 at esp 236ff (EEC television directive); Italian Corte Costituzionale, Decision no 536 of 29 December 1995; on this, see Panara, above n 8, para 32ff. U Everling, ‘Vorlagerecht und Vorlagepflicht nationaler Gerichte nach Art 177 EWG’ in G Reichelt (ed), Vorabentscheidungsverfahren vor dem EuGH (1998) 11, 14.
\textsuperscript{300} Constitutional Court Decision, 12 December 2000, KR 1-6, 8/00 [2001] Europäische Grundrechte-Zeitschrift 83.
If one considers the practice of constitutional organs in amending or interpreting constitutional law, one often gains the impression that arguments relating to the protection of democratic standards to ensure the rule of law or state sovereignty are motivated, at least in part, by the need to protect their own respective powers. This can be seen most clearly in the participation of the parliaments or federal entities, primarily the German and Austrian Länder and the Federal Council.

Concerning amendments to treaties, the ‘constitutional organ’ of the people still plays a role where referendums decide the development of Union law just as much as the development of the national constitution. Referendums are held not only for constitutional reasons; they are also held for the political symbolism of legitimising fundamental decisions (acts of accession and amendments to treaties). As a way of effecting important amendments to treaties, referendums represent democratic legitimisation, but their effect on other Member States can also make the ratification procedure unpredictable. Ultimately, they have consequences not only for the substance of amendments but also for the ratification procedure. Structural imbalances are thereby caused in the Member States which are by no means unusual in federal systems: A few votes in a referendum can decide whether a treaty is entered into or, in less spectacular cases, whether a treaty takes effect with or without adjustments.

2. Interdependencies between the Constitutional Orders of Member States

Many adjustments to the constitutions of Member States appear to be directly influenced only by Union law. In fact, adjustment here makes a detour, being guided either by the constitutional law of other Member States or influences emanating from international treaties, which bind all Member States but which do not form part of Union law.

The first area concerns the reciprocal effects between the constitutional orders of Member States. Since accession took place at different times, the constitutional order had to satisfy completely different adjustment requirements in each case. In the founding Member States, certain questions arose when Community law had not yet reached its current state of development. This is shown most clearly in respect of the primacy of Community law and competition in protecting fundamental rights. A decision such as Solange I will no longer be possible in the next group of accession countries provided that the written law of the European Union contains a catalogue of fundamental rights at the time of their accession.

The House of Lords has also shown itself to be willing to make a reference: cf C Fülzweiser, *Ausgewählte rechtliche Aspekte der Mitgliedschaft des Vereinigten Königreichs bei den Europäischen Gemeinschaften* (1999) 127ff.


Eg Ireland and Denmark, as well as Poland from the group of new Member States.

Eg France and Sweden; cf Bernitz, above n 29, 435ff.

An example is Denmark’s ratification of the Maastricht Treaty. Since the bill did not get the required majority of 5/6 in Parliament but the government stuck to the bill, according to § 20(2), sentence 2 of the Constitution, a referendum became necessary. Only in a second referendum on an amended bill did a majority vote in favour of ratification. For details, see H Zahle, ‘Europäische Integration und nationales Verfassungsrecht in Dänemark’ in U Bättis et al (eds), *Europäische Integration und nationales Verfassungsrecht* (1995) 47, 49ff.

On the other hand, the constitutional legislator, courts and jurisprudence developed in one state responds to tensions between the national and European legal systems, which could be and, promoted by legal comparison, actually are received in other states. In light of comparable political systems and constitutional cultures, new accession states are often attracted to ideas in one state which have already proved their worth over decades of membership at least as a basis for their own solutions. This can be observed from the accessions of 1995, 2004 and 2007.  

Besides a later accession date also proved to be ‘psychologically soothing’ for the national organs. Constitutional courts and other constitutional organs, which, for example, developed the scope and limits of the primacy of Community law over decades of dialogue with the organs of the European Union, generally have greater difficulty in recognising a more extensive acquis than a constitutional court of a new Member State, the latter, in this respect, being presented with a fait accompli insofar as it had no opportunity to contribute to its creation. A comparison between the German and the Austrian Constitutional Courts may be revealing in this respect.

However, shifts necessary due to differing durations of exposure to Community law can occur in the relationship between the constitutional legislator and constitutional jurisdiction as well. Accordingly, the courts in one Member State may develop, slowly and gradually, without a written basis in constitutional law, principles that other states later implement by written constitutional law.  

Where interdependencies in Article 6(2) EU are not already stipulated as mandatory, they are nevertheless considerably encouraged. General legal principles are (at least as far as the fundamental claim is concerned) ascertained by taking the constitutions of all Member States into account rather than just those of individual countries, which is not the case regarding the reciprocal relationships already described.

The situation does not significantly differ in relation to international treaties that bind all Member States but that do not form part of Union law. As the most important example, the ECHR mainly influences the constitutional orders of Member States, and not only in terms of membership of the European ECHR but also conveyed, modified and even reinforced by the law of the European Union.

3. Typology According to Substantive Orientation: Adaptations that are Receptive and Defensive towards Integration

In substantive terms, adaptations of national constitutional law can be classified into two groups: those that are ‘receptive to integration’ and those that are ‘defensive’. The classification is not always straightforward and the wording alone occasionally leads to incorrect results. Often, the only source of information is the genesis of a rule of European constitutional law.

Article 7(5) of the Portuguese Constitution, which contains a clear commitment to European integration, specifically that Portugal should ‘support the European integration process and the projects of the European States regarding peace, economic progress and justice amongst the peoples’. A similar impression is conveyed by the duty in Article 23(1) German Basic Law, namely to participate in the development of the European Union ‘in order to realise a united Europe’, as well as by the duty in Article 6 (4) of the Hungarian Constitution to ‘take an

308 For Poland, cf Wyrzykowski, above n 107, 267. For Hungary see, eg A Harmathy, ‘Constitutional Questions of the Preparation of Hungary to Accession to the European Union’ in Kellermann et al (eds), above n 6, 315, 316ff.

309 Cf the demise of Art 10 § 5 of the Swedish Constitution, which was influenced by the Maastricht Judgment of the Federal Constitutional Court.

310 For details, see above section III.5(c).

311 See further references in I Pernice, in H Dreier (ed), above n 276, Art 23, para 8.

126
active part in establishing a European unity in order to achieve freedom, well-being and security for the peoples of Europe’.\(^{312}\) The interpretative clause of Article 28 of the Greek Constitution determines that this Article ‘constitutes the foundation for the participation of the country in the European integration process’. The Bulgarian Constitution abstains from solemn terms, merely establishing the duty in Article 4 (3) to ‘participate in the building and the development of the European Union’.

Nonetheless, these tasks of integration are only one side of the coin. If one can unhesitatingly classify these as pro-integration adaptations, then the structural guarantee clauses accompanying them must belong to the defensive adaptations. This is shown more clearly in the case of Germany, but also features in the Portuguese Constitution, albeit that here, as in other constitutions, the principle of subsidiarity is referred to just as much as to the principle of reciprocity.\(^{313}\)

The defensive strategy of the French legislator is especially clear in relation to amendments prior to the ratification of the Maastricht Treaty. Certainly, Article 88-1 of the French Constitution contains a formulation comparable to the introductory passage of Article 23(1) German Basic Law concerning participation in the EC and the EU, but there is no reference to a united Europe. Instead of this, the EC and the EU are described as interstate organisations, ‘constituted by states that have freely chosen, by virtue of the treaties that established them, to exercise some of their powers in common’.\(^{314}\) The Member States as ‘rulers of the Treaties’ obtain this powerful confirmation by the approval of national legislators.

Austria’s way of adapting constitutional law to the Foreign and Defence Policy is offensive only at first sight. According to Article 23f(1) Federal Constitutional Law, Austria participates in the common foreign and security policy of the European Union. In reality, this provision hides all those complex—hardly rational—sensitivities that exist in relation to the ‘permanent neutrality’ of Austria, which many still consider as an indispensable condition for the existence of an independent state. This is because it also serves as a constitutional signal to remove any doubts in the Union and other Member States as to the ability of Austria to participate in the European Community. Within Austria, however, the provision has the effect of reducing the constitutional obligation of neutrality.\(^{315}\) The defensive character of adaptation becomes clear mainly in the qualified procedural provisions of Article 23f(1) last sentence and in the requirement of Article 23f(3) Federal Constitutional Law, namely that the Federal Chancellor and the Foreign Minister reach agreement.

### 4. Development towards a Reciprocal Linking of Constitutions

The involvement of Member States in the European integration process has become a significant component of constitutional development for all national constitutions.\(^{316}\) European law, which was once developed from the principles and traditions of Member States, now forces national constitutions to adapt in the course of European integration. Owing to the increasing influence of European law, national constitutions have started to approximate each other in central

\(^{312}\) See further references in Halmai, above n 58, para 87ff.

\(^{313}\) Art 7(6) Portuguese Constitution; Art 23(1), sentence 1 German Basic Law; Art 28(3) Greek Constitution; Art 11 Italian Constitution; Art 20 Danish Constitution.

\(^{314}\) Emphasis added.


areas, even if the strategies employed are different insofar as they are strongly characterised by national peculiarities. Amendments to the EU Treaty and advances in integration also give rise to substantive constitutional amendments at national level which are not always expressed in text.

However, such standards are no artificial products of European law but substantively sustained by the Member States’ constitutions. Therefore, its interpretative development again takes place under the influence of national constitutions and particularly in relation to their structural guarantee clauses. These make constitutions receptive to the process of supranational constitutional legislation and determine the procedure and organs by which the process of supranational constitutional legislation is formulated in accordance with democratic principles.

First of all, this involves the mutual reference to and consideration of the requirements of procedure and decision-making concerning the participation of national legislators and federal entities in the legislative process of the European Union. These are expressed both in national constitutions, eg in Article 23(2) Basic Law, and in Union law, eg in Article 203 EC and section I of the Protocol annexed by the Treaty of Amsterdam on the role of national parliaments. The two Protocols to the Lisbon Treaty, Protocol (No 1) on the national parliaments and Protocol (No 2) on subsidiarity and proportionality, are the most substantial legal documents in this respect so far.

However, the principles that establish a dialectic relationship between the national and European constitutional development are more important. Union law and the Member States’ constitutions are linked with each other on the basis of the law of the Union. Consequently, the constitutional autonomy of Member States is limited. The homogeneity clause of Article 6(1) EU and the respective provisions of the Lisbon Treaty (in particular Article 2 TEU-Lis) contain the most essential criteria for a common standard of democracy, fundamental rights and the constitutional state which Member States’ constitutions must satisfy under the threat of sanctions contained in Article 7 EU. This forms a ‘structural link’ with the constitutions of Member States which, according to national constitutional law, cannot be dissolved unilaterally.

This mutual relation may be described as a system of reciprocal constitutional stabilisation, which in German legal scholarship has been described as the ‘existential condition of the European Verfassungsverbund’. The concept of a Verfassungsverbund (literally, a ‘constitutional composite’ or ‘association of constitutions’) has been developed to emphasise the legal unity of supranational and national levels. It is meant to emphasise the particular make-up of this system in which there are multiple institutional, personal, functional, procedural and

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317 Cf also Schwarze, above n 39, 463.
320 Cf eg Müller-Terpitz, above n 143, 47, with further references.
321 Frowein, above n 318, 83; cf also Schwarze, above n 39, 464ff.
322 Huber, above n 284, 209.
324 For Germany: Art 23(1) Basic Law; for Austria: the Federal Constitutional Act on Accession, which involved a complete amendment to the Federal Constitution and which could only be repealed in the (more difficult) procedure of complete amendment in connection with a departure from the Union.
326 I Pernice, ‘Bestandssicherung der Verfassungen’ in Bieber and Widmer (eds), above n 231, 225, 261ff (my translation); see also idem, ‘Europäisches und Nationales Verfassungsrecht’ (2001) 60 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 148, 186; FC Mayer, below chapter 11.

128
substantive law references at both levels and the citizens, in their different capacities as national, state and Union citizens, are both the subject of legitimisation and the addressees of the respective rules issued at the different levels.\textsuperscript{327} However, this concept has been subject to substantial criticism, which leaves a question mark over the accuracy and value of concepts like the \textit{Verfassungsverbund} or the similar ‘multi-level constitutionalism’.\textsuperscript{328} The concept of \textit{Verfassungsverbund} is in part not a normative category but an expression that describes the legal and factual interrelationships between constitutions as a consequence of provisions in different legal orders that refer to the other one without creating a system of dependence like in federal states.

For the moment this mutual connection, still \textit{sui generis} in nature and difficult to define adequately, forms the basis both for further developments of national constitutional law relating to the European Union and for Union law referring to national constitutional law. The Lisbon Treaty would enhance those links.

\textsuperscript{327} Cf I Pernice, in Dreier (ed), above n 276, Art 23 paras 20ff; idem, above n 326, 163ff.
\textsuperscript{328} Jestaedt, above n 73, 666ff.
States and international organisations are integrated in the comprehensive order of international law. This is also true for the European Community and the European Union. The international community is not constituted in the same way as a state or the EU, yet constitutional elements can be found in international law, such as the Charter of the United Nations or, at the regional level, the European Convention on Human Rights (ECHR). The attitude of a state or a state-like community towards international constitutional elements gives an idea of its position in the world. The spectrum of options varies from unconditional exposure of the state’s own constitutional order to complete isolation. This chapter deals with the role of international law for the constitutional order of the EU.

The norms of international law vary in their capability to shape a community’s constitutional order. Article 38(1) of the Statue of the International Court of Justice (ICJ) names three types of sources of international law. First is international customary law, e.g. the prohibition of use of force, which to a great extent is of such fundamental character that it actually has consti-
tutional quality in a material sense. The same is true for general principles of law in the sense of Article 38(1)(c) ICJ Statute. However, these principles are drawn from national law. Union law itself is familiar with the general principles of law which, as a primary source of law, evolve out of the Member States’ legal orders. Although the Union’s legal concept of general principles of law does not completely align with that of international law, one can assume that general principles of international law are already part of primary Union law. Hence, no reincorporation is necessary.

Article 38(1)(a) ICJ Statute refers to a wide range of international treaties. Some of them cover very specific areas. Fishery treaties between the EC and North African states on the EC’s catch quota in the other parties’ exclusive economic zones are an example of this. Such a treaty shares the general precedence of international treaties over EC secondary law as laid down in Article 300(7) EC or, in future, Article 216(2) of the Treaty on the Functioning of the European Union (TFEU). However, in its content the treaty is a tool of the common fishery policy according to Articles 32ff EC (Articles 38ff TFEU). Hence, it is not a constitutional treaty but a treaty within the constitution.

On the other hand, international law is familiar with agreements that organise important fields of law. Such multilateral agreements are likely to influence the constitutional order of a community. They may be called ‘international supplementary constitutions’, which is the most adequate translation for the German term völkerrechtliche Nebenverfassungen developed by Tomuschat and Petersmann.

Christian Tomuschat coined this phrase with regard to German constitutional law in 1977 when presenting a paper to the Association of German Constitutional Law Professors. In this paper he described international instruments for human rights protection as the principal example of supplementary constitutions for the Federal Republic of Germany. In a later article he applied this concept exclusively to codifications of human rights. Ernst-Ulrich Petersmann took up the concept in 1989 in order to describe the function of the General Agreement on Tariffs and Trade (GATT).

Such treaty systems can fulfil various functions. Sometimes national constitutional law contains gaps that are filled by referring to international law. This is especially the case in the area of human rights. Thus, the European Convention on the Protection of Human Rights has taken on a gap-filling role in several European countries. For example, the Convention compensates in different ways for deficiencies in the national protection of basic rights in Austria, in the UK and also in France. In Germany, however, this role was barely required due to an existing broad and justiciable catalogue of fundamental rights as laid down in the

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4 See below section II.2(a)(aa).
9 See R Blackburn, ‘United Kingdom’ in Blackburn and Polakiewicz (eds), ibid, 935.
German Constitution. Consequently, in Germany the ECHR provides inspiration for the development of internal law rather than a gap-filling function.\footnote{R Uerpmann, ‘Völker- und Europarecht im innerstaatlichen Recht’ in C Grewe and C Gusy (eds), Französisches Staatsdenken (2002) 196, 202ff.}


Whether or not a community incorporates multilateral treaty systems as international supplementary constitutions into its domestic constitutional system conveys a certain idea of its position in the world. Tomuschat’s topic in 1977 was ‘The Constitutional State within the Network of International Relations’.\footnote{Above n 5 (my translation).} He was able to base his argument on Klaus Vogel, who in 1964 described the question of an individual state’s classification within the international community as a question of constitutional law.\footnote{Vogel, above n 12, 30.} This chapter deals with the question of how the EC functions within the network of international relations. A state that wants to emphasise its independence and autonomy will have a reserved attitude towards international law and might not be willing to integrate international supplementary constitutions into its own constitution. The situation is different for a community that considers itself to be part of the international community. In this case, it is to be expected that the community’s constitution will be characterised quite strongly by elements of international law.

The ECHR primarily comes into consideration when deliberating about international supplementary constitutions of the European Community. Its guarantees represent a common European standard of basic rights.\footnote{HC Krüger and J Polakiewicz, ‘Proposals for a Coherent Human Rights Protection System in Europe’ (2001) 22 \textit{Human Rights Law Journal} 1, 3, 8ff.} Meinhard Hilf describes it as the ‘agreed heart of a common European constitutional order’.\footnote{M Hilf, ‘Europäische Union und Europäische Menschenrechtskonvention’ in U Beyerlin et al (eds), \textit{Recht zwischen Umbruch und Bewahrung} (1995) 1193, 1194: ‘konsentierten Kern einer gesamteuropäischen Verfassungsordnung’ (my translation).} Even though the EC has not acceded to the ECHR, the Convention is unquestionably of significance to Community law as a point of reference for human rights questions. Originally, Community law completely lacked a human rights catalogue. The ECHR was an important aid in compensating this deficiency.\footnote{See J Kühlung, below chapter 13; D Shelton, ‘The Boundaries of Human Rights Jurisdiction in Europe’ (2003) 13 \textit{Duke Journal of Comparative International Law} 95, 111ff; below section III.1(c).} Hence, the Convention has fulfilled the gap-filling function of an international supplementary constitution.
The treaty system of the WTO shall be examined as a second example of an international supplementary constitution. Its constitutional quality is far less certain, but this is not relevant at this point. This chapter does not intend an abstract determination of the constitutional quality of multilateral treaty systems; rather, it deals with the extent to which the EU and EC have integrated multilateral treaty systems into their own legal system so that they become part of European constitutional law. From this point of view, the law of the WTO is particularly interesting because it has struggled to establish its position in Community law in recent years.

The third aspect of review is the Charter of the United Nations. Like the ECHR, the UN Charter has not been acceded by the EC and EU. Sanctions imposed by the UN Security Council are implemented into Union law through a complex two-tier mechanism. First, the Council, acting within the Common Foreign and Security Policy (CFSP), adopts a joint action or a common position according to Articles 11ff EU. This is followed by a regulation or other implementing act pursuant to Articles 60(1) and 301 EC (see Articles 75 and 215 TFEU). This system of multi-stage transformation makes Community law appear to be well shielded against UN law. However, recent case law of the Court of First Instance (CFI) regarding UN sanctions against suspects of terrorism listed by name suggests that Security Council resolutions can interfere deeply with the Community legal order and especially with the Community system of legal protection.

Association agreements pursuant to Article 310 EC (Article 217 TFEU) remain beyond the scope of this chapter as it is their aim to bring non-Member States closer to the EU. Their primary intention is the extension of Community law’s regulatory content to non-Member States. This is also the case for the agreement on the European Economic Area, which associates the European Free Trade Association countries (except for Switzerland). This chapter, on the contrary, is about the import of external foreign regulatory content into the law of the Community.

The following aims to determine if and how Union law has absorbed international customary law into its constitutional order on the one hand, and the ECHR, the law of the WTO and the UN Charter as international supplementary constitutions on the other. For this purpose it is necessary to investigate the mechanisms Community law provides for the incorporation of international law. Those who consider the internal order to be part of a larger worldwide order will also be willing to give international norms direct effect within their internal order. Such approaches shall be examined first (section II). However, Union law also has mechanisms to enforce international law without giving direct effect to it by transforming it into Union law (section III). An evaluation trying to explain the differences in the incorporation of international law and an outlook on the Reform Treaty of Lisbon shall conclude this chapter (section IV).

As far as methods are concerned, the analysis has to be based on the relevant treaty or other legislative texts wherever they exist. In a second step, concepts of legal doctrine that have been offered in order to resolve open problems have to be systematised. The case law of the European Court of Justice (ECJ) must be examined in regard to its doctrinal consistency. If necessary, deficient legal concepts shall be reconstructed in a more coherent way, while remaining contradictions need to be explained.

First of all a terminological clarification: the relationship between the EC and the EU cannot and need not be determined in this chapter. The EC acts within the framework of the WTO. Likewise, it is the EC that is of primary importance in relation to the ECHR. Hence, EC and Community law will be the primary focus of the discussion below. However, the reference to human rights in Article 6(2) EU shows that the EU is equally affected. In

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21 According to the ECJ, the non-Member State ‘must, at least to a certain extent, take part in the Community system’ (Case 12/86 Demirel [1987] ECR 3719, para 9); see also A Weber, in H von der Groeben and J Schwarze (eds), Kommentar zum EU-/EG-Vetrag (2003) Art 310 EC, para 1.
addition, common positions within the EU’s second pillar have to be considered as far as the implementation of UN sanctions is concerned. The Lisbon Treaty is to abolish the distinction between EC and EU law. Therefore, the perspective is shifting more and more from Community law towards the entirety of Union law. Consequently, the way terms are used will not be completely uniform.

II. Giving International Constitutional Law Direct Effect within EC Law

A national legal order opens up the most when international law is given direct effect through a general automatic implementation. Community law in fact seems to act on that concept in the field of international customary law. This automatic implementation shall be examined first (1). The established mechanism to make an international treaty binding is accession, and will be examined next (2). However, this mechanism was not used in relation to the ECHR, the UN Charter or GATT 1947. Here the mechanism of legal succession as well as concepts of indirect obligation must be considered (3).

1. Automatic Implementation of International Custom

The relationship between international law and internal law has been traditionally described in terms of monism and dualism. A monist conception has often been attributed to Community law in its relation to international law. This automatic conception would mean that international law automatically takes precedence over all norms of internal law, including constitutional law. No one is in favour of such a generalised primacy of international law over EC law. The incorporation of international law into the Community legal order is rather a question to be answered by Community law itself. Denis Alland noted from the perspective of French constitutional law—which is allocated to the monist tradition—that all constitutional concepts of integrating international law are in essence dualist ones. What varies from one constitutional order to the other is the degree of monist influence. These observations are also true for EC law.

Following a monist approach, it seems obvious to assume that the Community legal order automatically absorbs international law. This may be referred to as a general implementation of international law. Such an approach is indeed discussed for international customary law. Tomuschat argues that basic rules of international law, in particular international customary law, are part of the Community legal order ipso iure. Thus, he refers to Article 25 of the German Basic Law, which states that general rules of international law shall take precedence.
over Acts of Parliament.\textsuperscript{26} He consequently ranks international law between primary and secondary EC law.\textsuperscript{27} In fact, ECJ case law refers consistently to international customary law.\textsuperscript{28} In several cases, international custom was used in order to delimit Community competences with regard to non-Member States. In the \textit{Cellulose} case the claimants invoked a breach of international law by being subjected to EC competition law, as they were registered in a non-Member State. However, the ECJ focused on the effects of the claimants’ price cartel on the common market and considered an EC competence to be granted under the territorial principle, which is part of international customary law.\textsuperscript{29} Therefore, it was not necessary to determine the formal position of international custom within Community law.

Indications concerning the position of international customary law first appeared in the \textit{Poulsen} judgment of 1992. It had to be decided whether an EC fishery regulation was applicable to a ship of Danish ownership registered in Panama. The ECJ held that EC competences were to be exercised in accordance with international law; hence, the EC regulation had to be interpreted in the light of the respective rules of the international law of the sea.\textsuperscript{30} The ECJ stressed the EC’s obligations under international law and derived from that a rule of interpreting EC law in compliance with, or at least in favour of, international law. However, the \textit{Poulsen} judgment also does not clarify the formal status of international customary law within the EC legal order.

In a slightly different constellation, the ECJ applied international customary law in the \textit{Weber} case. The ECJ had to decide whether the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters was applicable to operations on the continental shelf. The Convention referred to the contracting state’s territory, but did not suggest how to determine that territory. Therefore, the ECJ held that ‘reference must be made to the principles of public international law’.\textsuperscript{31} Public international law thus took a gap-filling role.\textsuperscript{32} Even if international law was not considered as an element of the EC legal order, it would seem natural to apply criteria of international law, lacking other indications, wherever a European legal norm refers to a concept of international law, like a country’s territory.

The ECJ’s most explicit statement concerning the internal status of international customary law is found in the \textit{Racke} judgment, on which Tomuschat\textsuperscript{33} bases his proposition on direct effect. In view of the decay of Yugoslavia, the Council suspended a co-operation agreement between the Community and Yugoslavia through a directive in 1991 and pled frustration of purpose. In 1998, the ECJ ruled that the EC had to respect international customary law when suspending an agreement with a non-EU country; the rules of \textit{clausula rebus sic stantibus} were binding upon EC institutions and part of the Community legal order.\textsuperscript{34} The wording suggests that the ECJ is clearly favouring a concept of internal effect of international customary law with primacy over secondary EC legislation. However, the particular circumstances of the case

\begin{itemize}
  \item \textsuperscript{27} Tomuschat, ibid, para 43.
  \item \textsuperscript{28} Thoroughly analysed by J Wouters and D Van Eckhoutte, ‘Giving Effect to Customary International Law through European Community Law’ in Prinsen and Schrauwen (eds), above n 23, 181.
  \item \textsuperscript{29} Cases 89/85 et al \textit{Ahlström Osakeyhtiö et al v Commission (Cellulose)} [1988] ECR 5193, paras 18–19.
  \item \textsuperscript{31} Case C-37/00 \textit{Weber} [2002] ECR I-2013, para 31.
  \item \textsuperscript{32} Wouters and Van Eckhoutte, above n 28, 194–6.
  \item \textsuperscript{33} Tomuschat, above n 26.
  \item \textsuperscript{34} Case C-162/96 \textit{Racke} [1998] ECR I-3655, paras 45–6.
\end{itemize}
must be kept in mind as the claimant relied on a co-operation agreement that, according to Article 300(7) EC, is part of the legal order, ranking between primary and secondary law. Consequently, the suspension of the co-operation agreement would amount to a violation of Community law unless the suspension was justified under international law. Hence, the ECJ had to apply the international law of treaties in order to determine if the EC directive violated the co-operation agreement or if the latter was lawfully suspended. It is therefore doubtful whether a general rule about the internal status of international law arises from this case. Meanwhile the ECJ has shown its readiness to review Community acts under customary international law in Intertanko. However, the Court did not find an appropriate customary rule that could have been applied in this case.

In 1997, the CFI chose a quite different way of incorporation in the Opel Austria case, where the Court had to judge an import duty imposed by the Council. According to the EEC agreement, which entered into force a few weeks later, such an import duty was illicit. Opel Austria therefore invoked a rule of international customary law codified in Article 18 of the Vienna Convention on the Law of Treaties. Under Article 18 of this Convention, those who have signed an international treaty are obliged to refrain from any action contrary to the object and purpose of the treaty even before the treaty enters into force. While the CFI held that this international rule was mandatory for the EC, it did not apply the rule of international law; rather, the CFI relied on the principle of good faith as a parallel general principle of Community law. Hence, as regards content, the CFI applied the standard given by international law. The source of law and therefore the basis for the Court’s decision was not international law but EC primary law in terms of a general principle of law. Consequently, the CFI applied the mechanism of indirect incorporation developed by the ECJ for the ECHR.

Hence, the status of international law within the EC is anything but clear. Unlike some national constitutions, the EC Treaty does not settle the question. At first sight, the ECJ’s Racke and Intertanko judgements seem to clearly favour an automatic incorporation of international law. However, there are decisions showing a different approach, the most visible of which is the CFI’s decision in Opel Austria. This method of indirect incorporation will be dealt with later.

2. Accession to International Supplementary Constitutions

a) WTO

The normal way to make an international treaty binding is via accession. The EC follows this way regarding the WTO. The EC is one of the founding members for whom the agreements establishing the WTO came into force on 1 January 1995. Subsequently, the parties to the agreements are obliged under international law to follow the contractual rules. How the contracting parties cope with this by international law is left up to them. In particular, there are no rules of general international law to determine whether and how the parties have to incorporate a treaty into their internal law. It is part of the freedom of contract under international law.

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35 See below section II.2(a)(a).
36 See also Wouters and Van Eckhoutte, above n 28, 202–4.
37 Case C-308/06 Intertanko [2008] ECR I-4057, para 51.
39 See below section III.1(c).
40 See below section III.1(c).
41 See the notification of the WTO General Secretary pursuant to Art XIV(3) WTO Agreement, WTO-Doc WT/Let/1/Rev 2; available at www.wto.org.
law that the contracting parties can decide whether a direct effect within internal law is required or excluded.\footnote{Cottier, above n 14, 121; PE Holzer, \textit{Die Ermittlung der innerstaatlichen Anwendbarkeit völkerrechtlicher Vertragsbestimmungen} (1998) 35ff.} In the case of the WTO, this did not happen.\footnote{GM Berrisch and H-G Kamann, ‘WTO-Recht im Gemeinschaftsrecht’ [2000] Europäisches Wirtschafts- und Steuerrecht 89, 92ff; W Meng, ‘Gedanken zur Frage unmittelbarer Anwendung von WTO-Recht in der EG’ in U Beyerlin et al (eds), above n 19, 1063, 1085; this is also confirmed by ECJ Case C-149/96 Portugal v Council [1999] ECR I-8395, paras 34ff, 41.} The decision thus remains with the individual parties.\footnote{A von Bogdandy and T Makatsch, ‘Collision, Coexistence, or Cooperation?’ in G de Búrca and J Scott (eds), \textit{The EU and the WTO} (2001) 131, 143.} Article 1(1)(3) TRIPS clarifies this.\footnote{See also Case C-89/99 Schieving-Nijstad [2001] ECR I-5851, paras 33ff.} For the EC, Article 300(7) EC states that the WTO agreements are binding on the institutions of the Community and on the Member States. The meaning of this, however, is debatable.

\textit{aa) Article 300(7) EC as a Starting Point}

Taking the literal meaning of Article 300(7) EC wording as a starting point, the legal nature of the binding effect is unclear. An international treaty concluded under Article 300(2) EC is automatically binding upon the EC. Community law has no influence on this external effect. Therefore, Article 300(7) EC can only place an obligation on individual Community institutions that goes beyond the external obligations of the Community as such.

Article 300(7) EC contains an unlimited obligation of the institutions, which are consequently also bound when acting as legislator.\footnote{C Timmermans, ‘The EU and Public International Law’ (1999) \textit{European Foreign Affairs Rev} 181, 189.} The internal effect of international treaties within the Community follows from this. As a result of the fact that international treaties derive their binding effect from primary law, they rank below primary law within the Community legal order. On the other hand, the fact that Article 300(7) EC binds the Community legislator shows that it allocates international treaties above secondary law.\footnote{A Epiney, ‘Zur Stellung des Völkerrechts in der EU’ [1999] \textit{Europäische Zeitschrift für Wirtschaftsrecht} 5, 7.} Within the Community legal order, therefore, the treaties fit in between primary and secondary law.

The internal primacy of international treaties over secondary law is not self-evident. In Germany, for example, Article 59(2)(1) of the Basic Law allocates international treaties merely on an equal footing with ordinary federal laws.\footnote{O Rojahn, in I von Münch and P Kunig (eds), \textit{Grundgesetz-Kommentar} (2001) Art 59, para 37.} If a constitution places international law above ordinary law, it takes the legislator’s freedom away to pass laws that are inconsistent with international law.\footnote{C Tomuschat, in von der Groeben and Schwarze (eds), above n 21, Art 300 EC, para 74.} This is turning more and more into the European standard. Article 55 of the French Constitution, Article 94 of the Dutch Constitution and Article 91(2) of the Polish Constitution are examples of this. Article 300(7) EC also opts for this solution, which is particularly friendly to international law.

This is, in principle, broadly acknowledged. Academics are not the only ones to derive the primacy of international treaties over secondary Community law from Article 300(7) EC.\footnote{See H Krück, in J Schwarze (ed), \textit{EU-Kommentar} (2000) Art 281 EC, para 60; slightly doubting Tomuschat, above n 50, para 84.} The ECJ basically also acknowledges this primacy by its willingness to review secondary law according to international standards,\footnote{Case C-308/06, above n 37, para 42–3; see also Case C-377/98 Netherlands v Parliament and Council [2001] ECR I-7079, paras 53ff; Case C-344/04 International Air Transport Association [2006] ECR I-403, para 39.} yet it hesitates to do so in the sphere of WTO law. The legitimacy of this reserved attitude towards WTO law is still to be tested.
The statement that international treaties are binding within the EC legal order and rank between primary and secondary law does not clarify under which circumstances the treaties can regulate the legal relationship of individuals within the Community. This is determined by the theory of direct effect.

**bb) The Theory of Direct Effect**

Although international law does not regulate its own internal effect, a general concept about its direct internal effect has been developed and is common to many countries.\(^53\) Following the leading decisions of the ECJ in *Haegemann*\(^54\) and *Kupferberg*,\(^55\) the academics of European Law predominantly assume that these concepts are equally valid within the framework of Article 300(7) EC.\(^56\) The concept of direct effect is also described as the theory of self-executing treaties.\(^57\) One particular manifestation of this theory can be found in the theory of direct effect of Community law within its Member States. However, the law of the Community shows a special development distinct from general international law.\(^58\) It is closer in many ways to internal law rather than international law.\(^59\) In examining the internal effect of international law, the general theory of self-executing treaties has to be looked at first.

Figure 4.1 shows an overview of the requirements for a direct effect. Accordingly, a norm is self-executing if it is sufficiently precise and unconditional for the internal application. In this context, the ECJ examines whether the purpose of the agreement ‘contains a clear, precise and unconditional obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure’.\(^60\) The German Federal Administrative Court emphasises the comparability with an internal legal act.\(^61\) If the international norm requires implementation through state legislation before it can be applied, it is not a self-executing norm.\(^62\) In this situation the international norm leaves a normative gap which the national courts cannot fill. Hence, the separation of competences between the political bodies of the first and second power on the one hand and the judiciary on the other stands in the background of the theory of direct effect.\(^63\) Norms are only self-executing to the extent that courts can interpret and


\(^{54}\) Case 181/73 *Haegemann* [1974] *ECR* 449, paras 2/6.

\(^{55}\) Case 104/81, above n 42, paras 9–27.

\(^{56}\) P Hilpold, *Die EU im GATT/WTO-System* (2000) 171; Meng, above n 44, 1067ff, esp 1070 and 1072; Cottier, above n 14, 104; for the same result, see A Peters, ‘The Position of International Law within the European Community Legal Order’ (1997) 40 *German Yearbook of International Law* 9, 42–5, who, however, would prefer to avoid the concept of ‘self-executing’ and emphasises in particular the intentions of the contracting parties; a conflicting point of view is apparently taken by J Sack, ‘Noch einmal: GATT/WTO und europäisches Rechtsschutzsystem’ [1997] *Europäische Zeitschrift für Wirtschaftsrecht* 688.

\(^{57}\) On the identity of the concepts, see Buchs, above n 53, 26ff.

\(^{58}\) Hilpold, above n 56, 168–70; Peters, above n 56, 55ff.


\(^{60}\) Cases C-300/98 and C-392/98 *Dior* [2000] *ECR* I-11307, para 42, with reference to Case 12/86, above n 21, para 14; Case 162/96, above n 34, para 31.

\(^{61}\) The Constitution of the Republic of Poland/The Constitutional Tribunal Act (2001)).

\(^{62}\) These aspects are emphasised by Cottier, above n 14, 115ff.
apply them without taking on political functions. The way that an international treaty is formulated can also express the requirement of normative implementation. This is especially the case when an international norm explicitly addresses the states and directs them to act in a certain way. Consequently, the answer as to whether a norm has direct effect can turn out quite differently for different provisions belonging to the same treaty.

In *Intertanko*, the ECJ seems to make direct effect dependent on whether a norm confers an individual right. This additional condition is not compatible with the established criteria for granting international treaty norms direct effect. It is true that the right of action will often depend on the assertion of an individual right, though it is not necessary that this right arises from the international treaty. For example, if an administrative act that is contrary to international law conflicts with a constitutional human rights norm, then this constitutional norm confers the required right of action.

If these principles are applied in relation to the law of the WTO, provisions that are directly effective can be found easily. There is hardly any doubt, for example, that Article 50 TRIPS, which contains rules on provisional legal protection through the courts, has direct effect. The norm directly addresses the courts and needs no further normative implementation. Each court can remedy possible doubts about the content of WTO law by means of legal interpretation. Other regulations, such as the ban on non-tariff trade barriers according to Article XI GATT and the exceptions that are laid down in Article XX GATT, are much less precise. Armin von Bogdandy draws attention to the legal uncertainty that could arise for market participants in the application of such complex rules. Nonetheless, these rules give the individual states no scope for implementation. This is shown by the WTO Dispute Settlement Understanding (DSU). Any state can initiate a procedure with the assertion that another state has violated its GATT obligations. In this case, a panel and, if necessary, the appellate body decide whether GATT has actually been violated. The panel and appellate body are not political institutions but rather apply a procedure similar to court proceedings to decide the matter. If the panel and appellate body are in a position to make a decision of judicial nature, the same must be true for state courts. Piet Eeckhout points out that it could be too much for national courts to apply WTO law directly. However, the courts are usually required to apply complex law. In Europe, the ECJ is the court that is most occupied with the application of WTO law. Even more than other courts, the ECJ should be in a position to adapt to working with the legal system of the WTO in an adequate way. In fact, the ECJ does not hesitate to interpret norms of WTO law.

64 Case 308/06, see above n 37, paras 59–64.
65 Buchs, above n 53, 40 and 88ff; Vásquez, above n 53, 719ff; Würger, above n 53, 109ff.
67 The German Federal Government in its memorandum concerning the ratification of the WTO agreements also assumes that at least some sections of TRIPS have direct effect (Printed matter of the Federal Parliament [Bundestags-Drucksache] 12/7655, 345); with specific regard to the direct effect of the TRIPS agreement see R Duggal, ‘Die unmittelbare Anwendbarkeit der Konventionen des internationalen Urheberrechts am Beispiel des TRIPS-Übereinkommens’ [2002] *Praxis des internationalen Privat- und Verfahrensrechts* 101, 104–7.
69 Eeckhout, above n 59, 50.
cc) Delimiting Different Jurisdictions

It is often difficult to predict how judicial bodies will finally interpret and apply WTO law. If national courts were to apply WTO law directly, then it is very likely that divergences between decisions of the different national courts,71 or between national decisions and later decisions within the WTO Dispute Settlement Procedure,72 will arise. However, this problem is not limited merely to WTO law.73 National constitutional law is often uncertain to a degree in that constitutional court decisions are frequently unpredictable. It is quite common for decisions of the constitutional courts to deviate from earlier decisions of the lower courts. Other international treaties also allow a wide scope of interpretation. This is especially the case for the ECHR. The risk that judgments of the European Court of Human Rights might differ from earlier national decisions on the ECHR has been well known for a long time. Nevertheless, more and more countries have decided to integrate the ECHR into their internal law as a yardstick for judicial review.74

Markus Krajewski considers it to be an essential difference between the ECHR and the WTO that WTO law does not contain any mechanism to regulate diverging Dispute Settlement Body (DSB) and national court decisions. As a result of this deficiency, he claims that it ought to be concluded that the contracting states wanted to exclude the direct effect of WTO law. According to his view, the ECHR regulates the relationship between different jurisdictions with the so-called local remedies rule as laid down in Article 35(1) ECHR.75 This argument is not completely convincing. Article 35(1) ECHR does not avoid diverging decisions. Rather, the rule guarantees that the European Court of Human Rights can basically only judge cases in which national courts have definitely excluded an infringement of law. Thus, if the Court of Human Rights then detects an infringement, this results in a conflict with the national decisions. Under these circumstances, it cannot be concluded from the absence of an equal regulation under WTO law that the parties of the WTO wanted to exclude the direct effect of WTO law in the interest of avoiding conflicts. This absence, rather, supports the conclusion that the law of the WTO has not decided the question of its internal effect.76

dd) The Principle of Reciprocity

In Portugal v Council, the ECJ introduced another argument for the rejection of direct effect—the principle of reciprocity—and has relied on that ever since.77 Indeed, the important trade partners of the EC equally do not grant an internal effect to WTO law.78

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This argument is not convincing within the context of international law. If another country violates WTO law, the EC can initiate dispute settlement proceedings and, should the situation arise, suspend its own obligations in a precisely regulated procedure according to Article 22 DSU. Such a suspension of international law can also be carried out internally without the doctrine of direct effect being an obstacle to this. If a rule is suspended in international law, the parallel internal effect is equally suspended. However, outside of the special procedures of the DSU, the EC cannot make its own legal compliance with international law depend on other states’ faithfulness to international law.

The internal effect of WTO law is not determined by international law anyway. Hence, internal law is crucial, and here reciprocity can be raised perfectly as a requirement for direct effect, as Article 55 of the French Constitution states. Nevertheless, the French example shows that a precondition of reciprocity is problematic. French courts have increasingly restricted the scope of this precondition. In particular, if the international treaty itself provides for a dispute settlement and implementation mechanism, then the principle of reciprocity as an instrument of pressure can be refrained from. If this were to be followed, the WTO dispute settlement mechanism would exclude the principle of reciprocity even under French law. Anyhow, Community law lacks a rule that would correspond to Article 55 of the French Constitution. Article 300(7) EC does not recognise a provision of reciprocity. Least of all, Article 300(7) EC offers any indication that reciprocity is required only for a specific type of agreement, as the ECJ tried to interpret. The lack of consistency of this reasoning can be seen in the fact that the ECJ does not apply it to association agreements, although Article 310 EC explicitly demands reciprocal rights and obligations for this type of agreement.

ee) The Scope for Negotiation

It seems that the ECJ recognised the weakness of the principle of reciprocity in Omega Air, where it essentially relied on the argument that scope for negotiation should remain with the WTO members. This argument can be seen in the light of international law as well as in the light of community law.

In respect to international law, this argument can already be found in Portugal v Council, where it is stated that WTO law itself contains a broad scope for negotiation. In particular, Article 22(2) DSU provides that if a Member State cannot eliminate a violation that has been detected by the DSB within a reasonable period of time, the state shall negotiate and subsequently agree upon compensation with the other state. In the Biret v Council judgments of

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79 Meng, above n 44, 1076ff.
81 Above n 44.
82 See also von Danwitz, above n 78, 726; further see Buchs, above n 53, 101–4, where she draws a parallel to American case law.
84 Alland, ibid, 1665.
85 von Danwitz, above n 78, 726.
86 Berrisch and Kamann, above n 44, 93.
88 Cases C-27/00 and C-122/00 Omega Air [2003] ECR I-2569, paras 89–90.
89 Case C-149/96, above n 44, para 36; cautious agreement from Hilf and Schorkopf, above n 77, 85ff, 90; similarly Schmid, above n 71, 195.
90 Case C-149/96, above n 44, para 39; Hilpold, above n 56, 272–77, also argues this.
2003\(^\text{91}\) the ECJ had to judge the direct effect of binding decisions of the DSB. The Court referred to Article 21(3) DSU, which provides a reasonable period of time for the Member State to comply with a DSB decision if it is impossible to do so immediately. At least, according to the ECJ in \textit{Biret}, there can be no direct effect prior to the end of such a period of time, as otherwise the possibility of negotiation would be obsolete.\(^\text{92}\) This argument indicates that the ECJ might possibly come to a different verdict once the deadline for transposition has expired.\(^\text{93}\) Such expectations were disappointed in the \textit{Léon Van Parys} judgment of 2005. In this case the ECJ held that the expiry of the deadline for transposition did not imply that the EC had exploited all the options open for negotiation. Hence, a judicial review by the ECJ could still weaken the position of the EC towards other countries.\(^\text{94}\)

In an attempt to capture the principle of the scope for negotiation with the theory of direct effect, only the criterion of a lack of unconditionality is adequate. As mentioned earlier, a norm may only have direct internal effect if it is unconditional.\(^\text{95}\) Thus, if the EC were free to decide whether it should follow rules of the WTO or instead pay compensation, then indeed the rules of the WTO would actually lack unconditional application.\(^\text{96}\) Such an understanding of WTO law is, however, hardly tenable.\(^\text{97}\) Article XVI(4) of the WTO Agreement clarifies the obligation to follow WTO law and Article 22(1)(2) DSU confirms that a member has to harmonise its law with the obligations that arise from the WTO agreements.\(^\text{98}\) This has been pointed out several times.\(^\text{99}\) In consequence, the ECJ’s argument seems to be untenable.

As mentioned earlier, one can understand the principle of the scope of negotiation not as referring to international law but rather as a scope that should be maintained for Community reasons independently from the Community’s international obligations. On these lines, the ECJ states that it cannot reduce the legislative and executive bodies’ scope of negotiation, which is equally attributed to the Community’s trade partners.\(^\text{100}\) This comes close to the reasoning of those academics who object that direct effect would deprive the Community of a means of political pressure in negotiations with other states.\(^\text{101}\) According to Helen Keller’s analysis, such reasoning is based on a political–diplomatic understanding of international law. Although the legal character of international norms is not completely denied, compliance with international law ultimately becomes a question of political choice.\(^\text{102}\) The loss of this form of political pressure is nevertheless inherent in the theory of direct effect. If a constitution opts for direct effect, it is in favour of a broad effect of international law without making its own faithfulness to international law dependent on the behaviour of other states. This decision is particularly friendly towards international law, and numerous national constitutional orders and also Article 300(7) EC have made this decision. The case law of the ECJ indicates that this friendliness


\(^{92}\) Case C-93/02 P, above n 91, para 62.


\(^{94}\) Case C-377/02, above n 77, paras 51–52.

\(^{95}\) See above section II.2(a)(bb).


\(^{98}\) Berrisch and Kamann, above n 44, 92; Eckhout, above n 59, 54ff; Mauderer, above n 66, 133, 160–2; Petersmann, above n 66, 653; Schroder and Schonard, above n 80, 659–62.

\(^{99}\) Berrisch and Kamann, above n 44, 92; Eckhout, above n 59, 54–5; Mauderer, above n 66 133, 160–2; Petersmann, above n 66, 653; Schroder and Schonard, above n 80, 659–62.

\(^{100}\) Case C-149/96, above n 44, para 46; Case C-377/02, above n 77, para 53.

\(^{101}\) \textit{S Peers, ‘Fundamental Right or Political Whim?’} in \textit{De Búrca and Scott (eds), above n 45, 111, 122ff; Sack, above n 96, 651.}

\(^{102}\) \textit{H Keller, Rezeption des Völkerrechts} (2003) 700; Snyder, above n 70, 331, refers to a political questions doctrine.
towards international law is not politically intended.\textsuperscript{103} Interestingly, Article 300(7) EC is not once referred to by the ECJ.\textsuperscript{104}

From the silence regarding Article 300(7) EC, it may be possible to infer that the ECJ does not base its arguments around substantial law but rather uses procedural arguments. The wording of the ECJ in stating that the WTO agreements ‘are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions’ may also speak in favour of this.\textsuperscript{105} If this statement is understood procedurally, the ECJ does not question that the Community institutions are substantively bound by WTO law; rather, the ECJ shifts the problem from a substantial to a procedural level. The scope of review of the ECJ is in principle just as broad as the substantial obligations laid down in Community law. Dealing with public international law in \textit{International Fruit Company}\textsuperscript{106} and in \textit{Racke},\textsuperscript{107} the ECJ emphasises that its jurisdiction considers all possible reasons for invalidity. Furthermore, neither Article 230(2) EC nor Article 234(1)(b) EC (Articles 263, 267 TFEU) permits any distinction between the type of international treaty at issue regarding the scope of judicial review.

\textbf{ff) Unilateral Council Action}

Some authors discuss whether the Council has excluded the internal effect of the WTO agreements by its decision of approval.\textsuperscript{108} According to the eleventh and last recital in the preamble of the decision, ‘by its nature, the Agreement establishing the World Trade Organisation, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State courts’.

It is recognised that the contracting parties have the authority to limit or exclude the internal effect of an agreement by means of a provision that is enacted at the international level.\textsuperscript{109} This exception to the principle that the internal effect of a treaty is a question of internal law corresponds to the freedom of contract under international law. The decision of the Council of the EU is, however, a purely internal act, which has no effect in the sphere of international law.\textsuperscript{110} On the level of international law, the EC accepted the WTO agreements on 30 December 1994 and, according to the notification issued by the Director-General of the WTO,\textsuperscript{111} it did so without reservation or other additional declarations.\textsuperscript{112}

Hence, the question arises whether the Council of the EU can remove the internal effect from a treaty just by an act at the EC law level.\textsuperscript{113} This is a question of primary EC law. Article 300(2) EC grants the Council the authority to decide on the international obligations of the

\textsuperscript{103} For analysis of the political dimension, see Mauderer, above n 66, 170ff; the economical and political context is examined by Hilpold, above n 56, 212–52.
\textsuperscript{104} This is also emphasised by Berrisch and Kamann, above n 44, 91, as well as by C Schmid, ‘Ein enttäuschender Rückzug, Anmerkungen zum ‘Bananenbeschluss’ des BVerfG’ [2001] \textit{Neue Zeitschrift für Verwaltungsrecht} 249, 256.
\textsuperscript{105} Case C-149/96, above n 44, para 47; Case C-93/02 P, above n 91, para 52.
\textsuperscript{107} Case 162/96, above n 34, paras 26ff.
\textsuperscript{109} Nollkaemper, above n 53, 171; Tomuschat, above n 50, para 79.
\textsuperscript{110} According to its Art 1(3), Council Decision 94/800/EC, above n 108, only contains the Community law authorisation to grant the subsequent declaration of accession under international law; see also von Danwitz, above n 78, 725.
\textsuperscript{111} Confirmatory of this: Tomuschat, above n 50, para 81.
Community. The Council can adopt a treaty, reject it or limit its scope by a reservation under public international law. However, once the Council has accepted the international obligation, Article 300(7) EC provides for its internal effect.\footnote{At this level the Council has no liberty. In fact, international law leaves the determination of the internal effect up to the respective contracting party—\textit{in this case, the EC. In Community law, however, the question is regulated at the primary law level in Article 300(7) EC and is subsequently binding for the Council.}} In this respect, Community law adheres to the theory of automatic implementation as it does equally with international customary law.\footnote{Norms binding upon the EC under international law automatically take effect within the internal order. Werner Meng points out the difference to German law.} In Germany the order of internal application of a ratified treaty (\textit{Rechtsanwendungsbefehl}) is not contained in the constitution itself but rather in the act of assent passed by the German federal legislator according to Article 59(2)(1) of the Basic Law. Due to this, the German legislator is theoretically capable of excluding the internal effect. In Community law, on the other hand, primary law itself gives the order of internal application. The EC Treaty is friendlier towards international law in this respect than the German Basic Law is.\footnote{Under these circumstances, the above-mentioned consideration in the preamble of the Council decision qualifies only as a mere expression of opinion. Thus, when the ECJ cites the recital of the preamble in \textit{Portugal v Council} as confirmation of its argumentation, it provides a political justification of its decision according to Thomas von Danwitz.}

\underline{gg) Internal Effect without Direct Effect}

Considering the persistence of the ECJ in denying the direct effect of WTO law, it is of special importance to look at the internal effect that the international treaty which the EC acceded to can have without actually having direct effect. Some German authors deal with these effects under the concept of internal validity (\textit{interne Geltung}). According to them, a treaty is automatically valid internally as soon as it has been incorporated into the domestic legal order. Thus, this internal validity does not depend on a treaty’s self-executing nature and is possible within Community law even if it produces no direct effect.\footnote{Nonetheless, the concept of internal validity seems to be too narrow to cover all cases of internal effect. For instance, the construction of domestic law that is consistent with international law is feasible even if an international regulation has no internal effect. The mere interest in avoiding responsibility under international law can be a sufficient motive for an interpretation of internal law in accordance with international law.} French academics locate the various forms of internal

\footnote{For this result, see also von Bogdandy, above n 68, 24.}
\footnote{For this result, see also von Danwitz, above n 78, 724; similarly Mauderer, above n 66, 136ff.}
\footnote{See, eg Schroeder and Selmayr, above n 114, 345ff.}
\footnote{Uerpmann, above n 11, 200.}

effect under the general term of *invocabilité*. Thomas von Danwitz translates this concept as ‘suability’ (*Einklagbarkeit*). However, this leads to an understanding restricted to procedural law, which would be overly narrow. Because of this, the expression ‘internal effect’ is the most neutral.

Some authors consider the previously mentioned theory of interpretation in accordance to international law (*völkerrechtsfreundliche Auslegung*) to be the way out of ECJ’s deadlocked case law. The ECJ initially approached this method of interpretation cautiously in the cases *Werner* and *Leifer*, and then confirmed it in *Hermès*. This method has the potential to become a highly effective tool for avoiding conflicts between international and European law and of integrating international standards into the European legal order. Its success depends, however, on whether the norms of Community law open up a corresponding scope for interpretation. Hence, the Community legislator remains master of WTO law’s internal effect.

In addition, even rules that have no direct effect could function as yardsticks for internal law. This approach is known from the relationship between Community law and national law. An EC directive that is not directly effective as a result of its content is still able to render contradictory internal law inapplicable. According to Schroeder and Selmayr, WTO law should be able to annul a contradictory EC regulation by means of its internal validity without having a direct effect. This concept is coherent. Legality and direct effect are logically independent from one another, as Jan Klabbers observed. In *Intertanko*, however, the ECJ confirmed that it will not review Community acts only under international treaty norms unless they have direct effect. In *Fediol* and *Nakajima*, the ECJ accepted WTO law only in exceptional cases as a yardstick for Community law: Community law either implements a particular obligation that was entered into within the framework of the WTO or explicitly refers to specific provisions of WTO law. Armin von Bogdandy points out that the internal effect depends on a revocable act of the EU institutions to avoid self-commitment. Hence, WTO law that is binding on the EC shall only have an internal effect as long as this is wanted by the Community institutions.

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126 von Danwitz, above n 78, 722.
127 Berrisch and Kamann, above n 44, 95; von Bogdandy and Makatsch, above n 45, 147; Cottier, above n 14, 109–11; Hilf and Schorkopf, above n 77, 88; GA Zonnekeyn, ‘The Status for WTO Law in the EC Legal Order’ (2000) 34 *Journal of World Trade* 111, 124ff. See also Betlem and Nollkaemper, above n 42, 574–75.
130 Case C-53/96, above n 70, para 28; further confirmed in Cases C-300/98 and 392/98, above n 60, para 47; Case C-76/00 *P Petrostub and Republica v Council* [2003] ECR I-79, para 57.
131 Snyder, above n 70, 363.
132 Cottier, above n 14, 122, states that the ‘prerogative of democratic legislation’ is preserved.
133 Epiney, above n 48, 11; see also Thym, below chapter 9, section III.2.
135 Schroeder and Selmayr, above n 114, 345.
137 Case C-308/06, above n 37, paras 64–5, concerning the UN Convention on the Law of the Sea.
139 Case C-70/89 *Fediol v Commission* [1989] ECR 1781, paras 19ff; along the lines above, see also Case C-377/98, above n 52, para 55. The Nakajima and Fediol case law is confirmed in Case C-149/96, above n 44, para 49; Case C-377/02, above n 77, para 40.
140 Von Bogdandy, above n 68, 26.
The ECJ between Monism and Dualism

Article 300(7) EC, which integrates international treaties into the European legal order and gives them a rank above secondary law, is understood as an expression of a monistic interpretation.\footnote{141}{Above n 23.} When dealing with WTO law, the ECJ does not follow this line;\footnote{142}{PJ Kuijper and M Bronckers, ‘WTO Law in the European Court of Justice’ (2005) 42 CML Rev 1313, 1315.} instead, the Fediot and Nakajima case law turns out to be strongly inspired by dualism. It denies WTO law automatic effect within the European legal order. The internal effect of WTO law depends on a specific Community act, which may be freely revoked or changed by the Community institutions.\footnote{143}{Above n 140.} This is inconsistent with the traditional understanding of Article 300(7) EC.

This disturbing lack of doctrinal coherence can be solved differently. The ECJ could give up its Portugal v Council and harmonise its WTO case law with the general doctrine of direct effect. However, after the Léon Van Parys judgment\footnote{144}{Above n 94.} this seems most unlikely. Another option would be to revise the established interpretation of Article 300(7) EC. Its wording is sufficiently open to permit a different understanding.\footnote{145}{See Klabbers, above n 136, 270ff.} Such a revision cannot be limited to WTO law but must take into account public international law as a whole.\footnote{146}{See also Thym, below chapter 9.} However, this does not exclude the possibility of distinguishing different types of international treaties. A new doctrine of direct effect could be limited to certain types of treaties. Von Bogdandy suggested certain criteria to do so.\footnote{147}{Von Bogdandy, above n 68, passim; for a discussion of these criteria, see R Uerpmann, ‘International Law as an Element of European Constitutional Law’, Jean Monnet Working Paper 9 (2003) 15–18, available at www.jeannonetprogram.org; see also the criteria proposed by Snyder, above n 70, 333–4.} The relationship of law and politics and the question of democratic legitimacy are of particular importance in this context.\footnote{148}{See von Bogdandy, above n 68, 33; idem, above n 15, 614ff; T Cottier and M Oesch, ‘Die unmittelbare Anwendbarkeit von GATT/WTO-Recht in der Schweiz’ (2004) 14 Schweizerische Zeitschrift für internationals und europäisches Recht 121, 144ff; JH Jackson, ‘Status of Treaties in Domestic Legal Systems’ (1992) 86 AJIL 310, 330ff; Krajewski, above n 15, 223–5; N Krisch, ‘The Pluralism of Global Administrative Law’ (2006) 17 EJIL 247, 262–3.} Such a new understanding cannot be developed here.

What must be retained from this chapter is the shift from monism to dualism. Where the Community legal order was thought to stand in a monist tradition, the ECJ chooses a dualist approach with regard to WTO law.\footnote{149}{The Opinion of AG Maduro in Case C-402/05 P Kadi v Council and Commission [2008] ECR I-0000, paras 21–24, is particularly clear on this point.} Hence, the autonomy of the EU legal order is more important than its integration into an overarching international legal order.

b) ECHR

As the EC has not yet acceded to the ECHR, it might seem unnecessary to examine the mechanism of accession with regard to the ECHR. Nevertheless, the ECHR is indisputably a central reference text for the protection of fundamental rights in Europe and also in the European Union. At the same time, the European Court of Human Rights, as the guardian of the ECHR, has taken on the position of the highest and ultimate guarantor of human rights in the states of the Council of Europe. The European Union is the only important European public authority that stands outside this system. This could make an accession pressing.\footnote{150}{See Krüger and Polakiewicz, above n 18, 3ff; for an emphatic view on this, see also J Polakiewicz, ‘The Relationship between the European Convention on Human Rights and the EU Charter of Fundamental Rights’ (2010) 15 EJIL 67, 147–58.} Hence, an
analysis of the reasons against the accession promises further information about the attitude of the EC towards international law.

The first obstacle arises from international law. The ECHR is only open to members of the Council of Europe, and only states can join the Council of Europe. In order to make the accession of the EC possible, the ECHR must therefore be amended. Now Protocol No 14 to the Convention is at hand, although Russia still has to ratify it. As soon as the protocol enters into force, a new second paragraph will be added to Article 59 ECHR allowing the EU to accede.

From the point of view of Community law, it is doubtful whether the EC Treaty confers the competence to accede. It is well known that the ECJ has denied this. According to the opinion of the ECJ, Article 308 EC is not sufficient to found such a competence because an accession would have ‘fundamental institutional implications for the Community and for the Member States’ and, therefore, ‘would be of constitutional significance’. This has been interpreted in the light that the ECJ fears subjection to the European Court of Human Rights. Krüger and Polakiewicz argue that Community law does not exclude the establishment of an external judicial power as the first report of the ECJ on the European Economic Area and the ECJ report concerning accession to the WTO showed. As different as the evaluations could possibly be, they do agree on the starting point that the relationship of both European jurisdictions to each other constitutes the main problem. Basically, the ECJ’s independence as the highest protector of Community law is at stake.

The Member States could react to this without any problem by embedding the necessary competence explicitly into the Treaty at a revision conference. The negative attitude of the majority towards such an amendment may have had two reasons. The ECHR was created as a system to control state power. A community that accedes to this system will become increasingly similar to a state. The position as guarantor of civil rights and freedoms, from which a state derives part of its legitimacy, would then equally count for the EC. Consequently, the significance of the Member States would decrease. According to Sebastian Winkler, it is specifically because of this effect that some of the Member States disapproved the accession to the

151 Art 59(1) ECHR; see also Winkler, Der Beitritt der Europäischen Gemeinschaften zur Europäischen Menschenrechtskonvention (2000) 46–50; but see now Art 17 Additional Protocol No 14 amending Art 59 ECHR (not yet in force).
152 Art 4 of the Charter of the Council of Europe.
154 Art 17 of Protocol No 14.
156 Ibid, para 35.
158 Krüger and Polakiewicz, above n 18, 10; on the permissibility of an external jurisdiction see also Winkler, above n 151, 77–84.
160 See also Thym, below chapter 9, section III.2.
162 For the different agendas of the Member States, see Winkler, above n 151, 115ff.
163 Ibid, 118ff.
The second reason points in the opposite direction. A participant who can be challenged before an international court loses some of his high-handedness. In the case of the European Court of Human Rights, the intervention is especially serious because this court does not merely judge relations between states but judges primarily internal issues. For states, which, as original subjects of international law, are sovereign, it has been clarified that their subjection to international jurisdiction is compatible with their sovereignty. Ideas of absolute sovereignty are outdated. The EC, as a non-state subject of international law, has never been granted any sovereignty anyway. Nevertheless, it does not seem impossible that the long-lasting opposition to an ECHR accession is based on the fear that subjection to the jurisdiction of the European Court of Human Rights could impair the Community’s independence. This idea will be further considered below.

3. Legal Succession by Virtue of Functional Succession and Other Forms of Indirect Obligation

a) GATT 1947

A further mechanism that could make international law binding upon the EC is the concept of legal succession. By taking over certain functions from its Member States the EC might have stepped into their obligations under international law. This possibility has especially been discussed in connection with GATT 1947. Schroeder and Selmayr call it a ‘functional succession’ (Funktionsnachfolge), which establishes obligations of the EC under international law. Tomuschat describes this legal phenomenon as ‘functional legal succession’ (funktionelle Rechtsnachfolge).

Public international law contains rules on the succession of states. Such a succession has not taken place, however, with regard to the EC. The rules of state succession are applicable when territorial sovereignty over an area is passed from one state to another. In the case of the EC, this is not what has happened. The EC is not a state. In particular, it has not replaced its Member States as territorial sovereignties but has just taken over some of their functions. One could ask if such a functional succession leads to the transfer of obligations of international law; however, such functional succession has thus far been recognised neither by international treaties nor by customary international law as a reason for a legal succession. Also, the role that the EC played in GATT 1947 hardly can be considered as a precedent. The EC was integrated into GATT 1947 as a Member State under international law. However, this was with the mutual consent of the participants. Consequently, the position of the EC within GATT 1947 can be explained through the concept of implied accession.
Since the foundation of the WTO, which the EC formally joined in 1994, the question of legal succession to GATT 1947 has not been of major importance. The mechanism of legal succession by virtue of functional succession, however, remains interesting as a legal option for other cases. A succession of the EC in the duties that arise from the Geneva Convention on Refugees of 1951 and the accompanying Protocol of 1967 may be considered with regard to the harmonisation of asylum law. Under international law, the Geneva Convention binds only the EU Member States as such, not the EC. Nevertheless, the question of succession has only a limited meaning here because Article 63(1) EC (Article 78(1) TFEU) makes the Geneva Convention on Refugees binding under Community law.\footnote{A possible legal succession of the EC to the obligations that arise out of the ECHR seems to be more interesting.} 

b) ECHR

Mechanisms that can be assigned more or less to the concept of functional succession have also been discussed regarding the ECHR. They are based on the idea that it would not be acceptable if the Member States deprived individuals of the human rights guarantees enshrined in the ECHR by transferring important state functions to the EC.

aa) Legal Succession in a Narrower Sense

Legal succession in a narrower sense applies to the ECHR in the same way as to the GATT 1947.\footnote{Legal succession in a narrower sense applies to the ECHR in the same way as to the GATT 1947. According to Hilf, it is quite clear that the Member States can only transfer national jurisdiction by simultaneously passing on the related legal obligations. Consequently, this means that the national jurisdiction that the Member States transferred to the EC carries along with it the obligation to comply with human rights (Hypothek). It is difficult to explain this by doctrinal concepts. First of all, the idea referred to contradicts the general view that the EC exercises original jurisdiction and not a bundle of Member State jurisdictions; however, this is not a barrier to legal succession. In cases of dismemberment, fusion or secession, the rules on state succession also apply to a new original jurisdiction, which is thus bound by the obligations of the predecessor state. More importantly, the temporal sequence of the ECHR is not as clear as that of GATT 1947. Although the ECHR is older than the EC, it only came into force in France in 1974, which is a long time after the EC Treaty. Consequently, no legal succession could have occurred at any rate until 1974. The French accession to the ECHR could not have triggered legal succession either because the transfer of sovereign rights to the EC had already taken place. This speaks against a functional transition in 1974. It is just as difficult to explain how the EC can be bound to the ECHR’s additional protocols as they came into force after the EC founding Treaties. To do so, one would have to seriously develop the well-known concepts of state succession. Moreover, Rodriguez Iglesias argues against legal succession by stating that the EC cannot be treated like contracting parties without their consent. 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Moreover, Rodriguez Iglesias argues against legal succession by stating that the EC cannot be treated like contracting parties without their consent.\footnote{Moreover, Rodriguez Iglesias argues against legal succession by stating that the EC cannot be treated like contracting parties without their consent. Indeed, international law in this sense is not applicable.} Indeed, international law in
principle exempts treaties that establish membership in an international organisation from the succession of states. It is in accordance with this that the supporters of the concept of legal succession restrict succession to the substantial guarantees of the ECHR. Subjection to the control mechanism that includes the possibility of individual complaint to the Court of Human Rights is reserved for the EC’s accession to the ECHR.

**bb) Direct Responsibility of EC Member States**

The direct responsibility of EC Member States is another idea that has been discussed increasingly in the last few years. This theory states that it should not be possible for the contracting states of the ECHR to evade their responsibility for human rights protection through establishing an international organisation as a form of interstate co-operation. The Member States of the EC therefore take on full responsibility under the ECHR for the conduct of the EC institutions. This mechanism does not imply a legal succession in the strict sense—the Member States do not pass any of their duties on to the EC. Rather, the conduct of the Community institutions is attributed to the Member States. This approach is based on the general rules of state responsibility as they are laid down in the draft articles adopted by the International Law Commission in 2001. According to Draft Article 5, the conduct of entities which are not organs of the state but are empowered by law to exercise elements of the governmental authority shall be considered as acts of that state under international law if the entities are acting in that capacity. Following this logic, the conduct of those EC institutions which are not bodies of the EU Member States but which are empowered by the law of these states to exercise public authority can be considered as conduct of the Member States. Article 1(1) of the EU Treaty of Lisbon (TEU-Lis) strengthens this argument by stressing that competences are conferred upon the EU by its Member States.

Although this mechanism may appear radical, the underlying theoretical concept is simple. The EC is no longer considered as an independent subject of international law from the perspective of the ECHR. As soon as the EC is no longer seen as a responsible entity, the conduct of the Community institutions is attributed to the Member States, which founded and supported the EC. The EC’s ‘veil of legal personality’ is lifted.

As long as the EC itself has not acceded to the ECHR, the conduct of its institutions can be ascribed to the Member States.

The European Court of Human Rights did not dare to make that step. In the Matthews judgment of 1999 it explained that the transfer of competences to an international organisation, such as the EC, does not exempt the Member States from their responsibility under the ECHR. At the same time, however, the Court emphasised that legally relevant acts of the Community institutions cannot form the subject matter of an action before the Court of Human Rights. In the end, the decision did not depend on this question because the respon-

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182 Bleckmann, above n 177, 81; also Hilf, above n 19, 1197ff, speaks merely of the material binding effect; for a different view, see Pescatore, above n 175, 453.
183 C Grabenwarter, ‘Europäisches und nationales Verfassungsrecht’ (2001) 60 Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer 290, 329–31; the considerations of Ress, above n 157, 920ff and 932, follow the same trend.
184 UN Doc A/RES/56/83, 2ff.
185 Winkler, above n 151, 170.
186 A similar concept was applied by the ICJ in the context of diplomatic protection; Barcelona Traction [1970] ICJ Rep 3, para 56.
187 The Constitutional Role of International Law

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sibility of the UK arose from its approval of a decision of the Member States meeting within the
Council and of the Treaty of Maastricht.\footnote{Robert Uerpmann-Wittzack}{188}

One might consider it impractical to make individual or even all\footnote{Robert Uerpmann-Wittzack}{189} EU Member States
responsible for the conduct of the EC, which they can scarcely control. However, such consid-
erations of practicability can hardly determine the legal extent of human rights protection.
Besides, the problems can be solved. For instance, it might be possible for the EC Member
States to allow themselves to be represented by a delegate of the EC in cases where acts of the
EC are challenged. If the Human Rights Court were to follow the path of ascribing EC acts to
the Member States, this would increase the pressure to clarify the legal situation through
formal accession of the EC to the ECHR.\footnote{Robert Uerpmann-Wittzack}{190} In the meantime, the European Court of Human
Rights has opted in favour of a more moderate approach.

\textit{cc) The Member States’ Responsibility to Guarantee the Observance of Human Rights by the
European Community}

The third approach has already been pointed out by the European Commission of Human
Rights in \textit{M & Co v Germany}.\footnote{Robert Uerpmann-Wittzack}{191} According to the Commission’s decision, the ECHR accepts
that, in striving for co-operation and integration, the Member States create supranational
organisations. At the same time, the ECHR States will only do justice to their own responsibility
for human rights if they guarantee that the supranational organisation maintains a human rights
standard that corresponds to the ECHR. This approach is similar to the so-called \textit{Solange} case
law of the German Federal Constitutional Court concerning the relationship between EC law
and German constitutional law.\footnote{Robert Uerpmann-Wittzack}{192} According to this decision, it is incumbent on the German
Federal Constitutional Court not only to guarantee the protection of fundamental rights against
the German State but also to generally guarantee a broad protection of fundamental rights in
Germany.\footnote{Robert Uerpmann-Wittzack}{193} Thus, EC law would also be measured against the German Basic Law. This will not
be practised as long as the EC guarantees a protection of fundamental rights that is structurally
comparable to that of the Basic Law.\footnote{Robert Uerpmann-Wittzack}{194} The European Commission of Human Rights argues
similarly regarding to the applicability of the ECHR.

In \textit{Bosphorus}, the European Court of Human Rights has confirmed this approach.\footnote{Robert Uerpmann-Wittzack}{195} According to \textit{Bosphorus}, the ECHR does not require the exact same level of human rights
protection under EU law. However, protection must be ‘equivalent’, ie ‘comparable’ with regard both to substantial rights and to legal remedies.\footnote{Robert Uerpmann-Wittzack}{196} If such an equivalent protection of
fundamental rights has been determined abstractly, then there is a presumption that sufficient
protection has been granted in the individual case. However, this presumption can be rebutted
if the protection of fundamental rights is apparently insufficient in the particular case.\footnote{Robert Uerpmann-Wittzack}{197}
Germany, the Federal Constitutional Court, in pursuing its so-called Solange case law, is satisfied with an abstract control to determine a standard of protection that is equal in substance whereas the particular case will not be examined. In contrast, the European Court of Human Rights is willing to take action in a single case when it comes to severe failure of the minimum protection standard. This difference follows an inherent logic. If Union acts are reviewed by the constitutional court of a smaller entity, such as Germany, the unity of Union law is at stake. That is in favour of restricting review by national authorities to an absolute minimum. The jurisdiction of the European Court of Human Rights covers ratione loci the whole territory of the Union and even beyond. Judicial review by the Strasbourg Court does indeed infringe upon the autonomy of the ECJ but does not question its territorial unity.

However, this does not deal with legal succession by virtue of functional succession in a strict sense. The states alone remain obligated. They are required to ensure that the EC guarantees the protection of fundamental rights. The legal sources and texts on which this protection is based remain open. The essential point is to achieve effective protection of fundamental rights within the EC legal order. For several years now the ECJ has shown a tendency to optimise legal protection against EU acts. As the judgments in Gestoras Pro Amnistía and Segi of 2007 reveal, the ECJ is reacting to the gentle but certain pressure from Bosphorus. In both cases, the ECJ extended its jurisdiction over the third pillar common positions as far as they create legal effect towards individuals, although Article 35 EU only grants judicial review of framework decisions and other decisions. The ECJ closes a gap in legal protection which otherwise the Strasbourg Court, following Bosphorus, would have had to engage in. Hence, the ECJ accepts the challenge from Strasbourg.

**III. Transforming International Constitutional Law into Union Law**

If a community decides to continuously control the influence of international law, it makes sense to give international law effect through domestic norms instead of granting it direct effect. International law is then transformed into domestic law. This transformation can be processed within primary or secondary law.

1. **Incorporation by Primary Law**

A first way of incorporation through primary law is legal succession governed solely by Union law, as it is proposed for the ECHR (see a); yet primary law incorporation is also possible through explicit reference. The most important example is Article 6(2) EU (see b). Finally, the incorporation of elements of international constitutional law through general principles of law at the level of primary law is very efficient (see c).

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198 Entscheidungen des Bundesverfassungsgerichts 73, 339, 378 (Solange II).
a) Legal Succession under Union Law

International law may not yet be developed enough to accept the idea of functional succession and to derive from it a genuine legal succession of the EC to the international ECHR obligations of the Member States. However, a legal succession under Community law may still be considered. This mechanism would equally lead to a commitment of the EC institutions to the ECHR. However, the obligation would no longer be one of international law but rather of Community law. Rudolf Bernhardt argues along these lines when he speaks of the phenomenon that the EC is substantially bound to treaty regulations without being a contracting party itself. He explains this with the principle that Community law must be interpreted and applied in accordance with the international commitments of the Member States.  

The starting point for such considerations in primary law is Article 307 EC (Article 351 TFEU). Article 307(1) EC expresses the self-evident truth that accession to the EC does not affect the obligations under the ECHR that most Member States had previously undertaken. As seen above, these obligations can be understood in such a way that the Member States are responsible to ensure that the EC’s conduct is in line with the ECHR. Potential incompatibilities between the ECHR and the EC Treaty should be solved according to Article 307(2) EC. The ordinary normative consequence of Article 307(2) EC is to obligate Member States to modify conflicting pre-Community treaties or, if this is not possible, to denounce them. An amendment or even a cancellation of the ECHR in favour of the EC Treaty is not at issue. In 1997 Toth suggested that all EU Member States should withdraw from the ECHR. According to his proposal, the ECJ could take over the task of protecting human rights within the EU. However, this concept runs counter to the idea of the ECHR system, which was to subject any exercise of public authority within Europe to an external control. There is a consensus that national constitutional courts cannot replace the external control exercised by the Court of Human Rights. The same is true for the ECJ. One author even described the idea of terminating ECHR membership as ‘absurd’. The only solution, therefore, is to commit the EC institutions to follow the ECHR in Community law so that Member States are not held responsible under international law. Similar considerations have been indicated by the CFI in Yusuf in relation to the UN Charter.

The concept of legal succession under Community law permits the obligations of the Member States to bind the EC institutions regarding Community law. It can do so without needing to further develop the international rules on legal succession and without having to rely on the participation of non-Member States, as would be the case with the EC’s accession

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203 Bernhardt, above n 173, 214.
204 See above section II.3(b)(bb) and (cc).
205 To the same effect, see Bleckmann, above n 177, 87.
208 Winkler, above n 151, 146ff; all these lines, see also AVMW Busch, Die Bedeutung der Europäischen Menschenrechtskonvention für den Grundrechtschutz in der Europäischen Union (2003) 174ff; C Grabenwarter, ‘Entwicklungen zu einer Europäischen Verfassung’ in G Hohloch (ed), Wege zum Europäischen Recht (2002) 87, 97ff.
209 To the same effect, see Grabenwarter, above n 182, 331, who wants to interpret Art 6(2) EU in this sense. Winkler, above n 151, 147ff, goes even further: according to him, Art 307(2) EC requires the accession of the EC to the ECHR because this would be the only way to establish a right of complaint against the EC under Arts 33 and 34 ECHR. However, this does not follow because the ECHR does not require a subjection of the EC to the jurisdiction of the ECHR. As explained above in section II.3(b), it is already doubtful whether the ECHR applies to EC acts. Even if this is approved of, the competence of the ECHR is safeguarded by putting the responsibility for EC acts on the Member States.
210 See below section III.2; but see Cases C-402/05 P and C-415/05 P Kadi et al v Council and Commission [2008] ECR I-0000, paras 301–4.
to the ECHR. At the same time, the Community’s autonomy would remain unaffected because
the EC is not obligated under international law. However, Article 307 does not provide for
individual means of incorporation. It serves to substantiate why EU acts must be in accordance
with international treaties. In order to achieve compliance with international law, other mecha-
nisms of Union, law like Article 6(2) EU, are reverted to.

b) Explicit Incorporation in Primary Law—Particularly Article 6(2) EU

When examining Article 6(2) EU, it should first of all be noted that the mechanism is purely of
European law. It incorporates international law through reference on the level of a primary law.
EU law gives a text of international law the role of a yardstick without establishing an interna-
tional obligation. The reference is autonomous. Article 6(2) EU facilitates the reception of
international law standards without creating external obligations or subjecting the Community
or the Union to the jurisdiction of a body that stands outside the Union. Consequently, Article
6(2) EU preserves the independence of the EU and its institutions.

Beyond this point, the scope of Article 6(2) EU is unclear. Some would like to see Article
6(2) EU as making the ECHR binding at least within the Community. In this context, Hilf talks
about ‘a substantial obligation’ in this context.211 He emphasises that Article 6(2) EU does not
refer generally to international human rights norms but, rather, specifically to the ECHR. He
also stresses that the article mentions first the ECHR as an independent guarantee and only
afterwards the constitutional traditions of the Member States.212 Others, however, emphasise
once more the independence of Community law. Thus, the CFI has stated that the ECHR is
‘not itself part of Community law’; the ECJ and CFI merely allow themselves ‘to draw inspira-
tion from the guidelines’ that the ECHR provides.213 This has led authors to the conclusion
that the ECHR is not a source of law for the EC but just a subsidiary source for the determi-
nation of EC law.214

Eckhard Pache appreciates the ruling of the CFI by stating that it avoids the danger of an
external domination of EC human rights protection through the European Court of Human
Rights.215 As an observation, this may be true;216 however, it raises the question as to why
control by that Court should be considered a dangerous domination. It is not surprising that
Alber and Widmaier argue in the opposite direction and suggest a provision in primary law
which would make it compulsory for the ECJ to react to the case law of the Human Rights
Court.217 If all EU Member States have voluntarily subjected themselves to the control by the
Court of Human Rights, the same should not be too alarming for the EC either.

The Charter of Fundamental Rights of the European Union shows once more the ambiv-
alent attitude of the Community and the Union towards the ECHR as an international
supplementary constitution. The decision to just formulate a specific EU text on fundamental
rights instead of incorporating an international human rights text formally into Community
law corresponds with other efforts to safeguard and emphasise the independence of
Community law. Regarding the content, the references in the Charter of Fundamental Rights to

211 Hilf, above n 19, 1206ff: ‘materielle Bindung’; this concept is taken up by Busch, above n 208, 24.
212 Hilf, above n 19, 1205ff.
214 J Kühling, below chapter 13, section II.1; T Kingreen, in C Calliess and M Ruffert (eds),
EUV/EGV (2007) Art 6 EU, para 33; see also D Ehlers, ‘General Principles’ in D Ehlers (ed), European Fundamental
351.
216 See also Cases T-305/94 et al Limburgse Vinyl Maatschappij et al v Commission [1999] ECR II-931, para
420, where the CFI emphasises the independence from the case law of the European Court of Human Rights.
217 Alber and Widmaier, above n 161, 507ff.
the ECHR go further than Article 6(2) EU. Article 52(3)(1) of the Charter synchronises the guarantees of the Charter with parallel guarantees of the ECHR.\(^{218}\) Moreover, Article 53 of the Charter declares the ECHR to be the European minimum standard in connection with other guarantees of fundamental and human rights.\(^{219}\) However, this incorporation of the ECHR into Community law will remain merely an agenda as long as the Charter of Fundamental Rights lacks a legally binding nature.

An essentially stronger incorporation at primary law level can be found in Article 63(1)(1) EC (Article 78(1) TFEU). The Treaty of Amsterdam added this rather concealed provision. It allocates the task of harmonising the law on asylum to the European legislator. At the same time, it declares the Geneva Convention on Refugees of 1951, its Protocol of 1967 and other relevant treaties binding to the legislator. Here a multilateral treaty system is integrated at the primary law level into Community law. Whilst Article 6(2) EU merely requires a more or less close orientation towards the ECHR, Article 63(1)(1) EC demands behaviour ‘in accordance with’ international law. The Geneva Convention thus becomes a direct standard of judicial control. It is not just a subsidiary source; rather, it becomes a source of law by virtue of reference to it in primary Community law. This has a practical meaning, however, only in the context of harmonisation of asylum law by Community legislation.\(^{220}\)

c) General Principles of Law

A final approach to incorporate international law into primary EU law is the use of general principles of law. The ECJ had already started to use the ECHR as an expression of general principles of law long before Article 6(2) EU came into place. According to some authors, Article 6(2) EU simply confirmed this jurisprudence.\(^{221}\) The gaps in the written legal order of the Community are the starting point for this concept. As European integration reached a certain level, an irrefutable need arose to guarantee fundamental rights protection against acts of the Community institutions.\(^{222}\) Fundamental rights had to be derived from other sources because there was a lack of these rights in written Community law. The use of general principles of law seemed practical. The ECHR, which guarantees a common European standard of fundamental rights, was obviously qualified as a reference text.

The ECJ nonetheless avoided making the ECHR directly binding.\(^{223}\) The point of reference is not the Convention; rather, it is the unwritten legal principles that derive from common constitutional tradition. German academics have described this method as comparing and evaluating systems of law (\textit{wertende Rechtsvergleichung}).\(^{224}\) According to earlier leading decisions of the ECJ, international agreements on human rights can provide ‘guidelines’ for the unwritten principles of constitutional law.\(^{225}\) Later, the ECJ emphasised the ‘particular signifi-


\(^{222}\) See also Kühling, below chapter 13, section II.1.


The Constitutional Role of International Law

cance’ of the ECHR. Despite the attributed dominant role of the ECHR, the development of Community law remains independent. Jürgen Schwarze talks of a reservoir from which the ECJ nourishes its decisions.

The mechanism of incorporation through general principles of law thus qualifies itself not only due to great flexibility but also by the fact that it leaves the independence of the Community untouched. Obligations in international law are not established. The extent to which the standards of international law are gradually adopted in the Community depends on the EC institutions alone, and primarily on the ECJ’s jurisprudence. That result, which is gained from this international law outside-perspective, is on the same lines as what Jürgen Kühling concludes from an EU fundamental rights perspective.

In Opel Austria the CFI chose the same mechanism in order to incorporate international customary law. A rule of international customary law was used as the starting point there, and the CFI stressed how the Community was bound by international law. Nevertheless, the CFI did not apply the rule of international law but relied on a parallel general principle of Community law. International law standards are thus transformed into Community law while the ECJ and CFI keep control of the internal effect of those standards.

2. Incorporation by Secondary Law—The Implementation of UN Sanctions

Incorporation of international law through autonomous reference is not only reserved for primary law; international law can be transformed into Union law through a secondary law reference as well. EC regulations implementing WTO law into Community law are examples of this. In Nakajima, the ECJ assumed for this special case that an EC regulation the was intended to transform international obligations could be examined in respect to its conformity with WTO law. Other examples of this incorporation method are legal acts by EU institutions giving internal effect to UN sanctions.

The fight against international terrorism has led to a heated discussion about the internal effect of sanctions imposed by the UN Security Council. On 15 October 1999, pursuant to Resolution 1267 (1999), the Security Council ordered that the funds of all persons attributed to the Afghan Taliban be frozen. A Sanctions Committee was established to implement the resolution. In Resolution 1333 (2000), the sanctions were extended to Osama bin Laden and his supporters. The Sanctions Committee, a subsidiary body of the Security Council, registered all individuals whose funds were to be frozen on a list. The Council of the EU adopted a common position in order to transform these sanctions. On 6 March 2001, Council Regulation (EC) No 467/2001 followed thereon, pursuant to Articles 60 and 301 EC.

Annex I of this Regulation lists the persons whose funds should be frozen and who had been registered by the Sanction Committee. The list has since been amended several times. Different persons complained to the CFI about being included on the list and invoked a violation of their fundamental rights. The CFI had to decide in particular if UN Security Council resolutions pursuant to Chapter VII UN Charter could shield EC regulations from judicial review in the light of fundamental rights.

227 Above n 224.
228 Below chapter 13.
229 Case T-115/94, above n 38; see above section II.1.
230 See also Wouters and Van Eeckhoutte, above n 28, 211.
231 Case C-69/89, above n 138.
In Yusuf the CFI derived, from Article 103 UN Charter on the one hand and Article 307 EC as well as Article 297 EC on the other, that the Member States’ obligation to comply with UN sanctions takes precedence over primary and secondary Community law.\(^{233}\) In addition, the CFI uses the concept of legal succession established in relation to GATT 1947\(^{234}\) to construct a binding effect of the UN Charter for the EC.\(^{235}\) While the EC was under an international obligation to respect GATT 1947, however, the binding effect of UN sanctions established by the CFI derives rather from Community law.\(^{236}\) Hence, this position is more similar to the mechanism of legal succession under Community law as sketched out for the ECHR.\(^{237}\)

The CFI has also emphasised the challenged regulation’s intention, which is the implementation of UN sanctions.\(^{238}\) This shows a parallel to the Nakajima case law of the ECJ.\(^{239}\) In both cases legal acts of Community law are reviewed, both aiming to give international obligations an internal effect. Thus, the transformation of international obligations by means of secondary law is at stake in both cases. Nakajima allowed an exceptional review of the transforming regulation in respect to its conformity with WTO law. The CFI in Yusuf instead held that, because the regulation transformed a UN sanction, there would be no review of the regulation concerning its compliance with EU fundamental rights.\(^{240}\) Rather, the CFI confined itself to review if the underlying UN resolution infringed mandatory norms of international law and was therefore void.\(^{241}\) According to the CFI, this minimum standard was not violated.\(^{242}\) Although there is a gap in judicial protection, as the inclusion on the list cannot be challenged before any international court, the CFI did not find a violation of \textit{ius cogens}.

According to the CFI, the individual interest concerning judicial protection is outweighed by the interest in ensuring universal peace.\(^{244}\)

In the following Ayadi judgment, the CFI tried to reduce the gap in judicial protection starting from a different angle. The Court explicated that EU fundamental rights oblige Member States to take action within the Sanctions Committee with a view to changing the list in favour of their nationals or individuals residing on their territory.\(^{245}\)

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\(^{234}\) See above section II.3(a).

\(^{235}\) Case T-306/01, above n 233, paras 245ff.

\(^{236}\) Ibid, para 257.

\(^{237}\) See above section III.1(a).

\(^{238}\) Case T-306/01, above n 233, paras 264; see also Case C-117/06 Möllendorf [2007] ECR I-8361, para 54; Cases C-402/05 P and C-415/05 P, above n 210, para 297.

\(^{239}\) See Case C-69/89, above n 138.

\(^{240}\) Case T-306/01, above n 233, paras 265ff.

\(^{241}\) Ibid, paras 277ff.


\(^{243}\) Case T-306/01, above n 233, paras 340–1.

\(^{244}\) Ibid, para 344.

\(^{245}\) Case T-253/02, above n 233, paras 144ff; consenting C Tomuschat, ‘Die Europäische Union und ihre völkerrechtliche Bindung’ [2007] Europäische Grundrechtzeitschrift 1, 11–12.
against a record on the Sanctions Committee’s list is substituted by a right to diplomatic protection. Looking at how UN sanctions affected Community law, it has to be stressed that direct effect is not at stake. The sanctions have an internal effect due to incorporation by secondary law. According to the CFI, the relevant Security Council resolutions had the effect to shield the transforming EC regulation from review in respect of EU fundamental rights. While the well-established WTO case law generally protects secondary law against review under the yardstick of WTO law, in Yusuf and Ayadi the CFI used international law as a shield against review under EU fundamental rights The latter decisions have now been set aside by the ECJ. 246

IV. Assessment and Perspectives

1. Reasons for Different Ways of Implementation

a) Ensuring Sovereignty

At the beginning of this chapter, the question was raised how European constitutional law relates to international constitutional elements. The results of the above analysis allow two interpretations that do not exclude one another. One explanation addresses the rule of law within the Community, the other concerns the position of the Community in the world. The restrictive attitude that the ECJ takes towards WTO law is often explained by the Court not wanting to restrict the scope of the Council’s and Commission’s action. 247 This again is based on the understanding of separation of powers, which exempts the exercise of foreign-political powers from judicial control. 248 Josef Drexl describes this as a tension between judicial control on the one hand and freedom to breach of contract on the other. 249 He favours judicial control due to policy-oriented reasons. 250 Legal contemplation of European constitutional law leads to the same result. In national law the idea that foreign policy is exempt from judicial control has been increasingly abandoned. 251 In France the significance of international law in its judicial application has considerably increased in recent years. 252 German courts have repeatedly emphasised that it is one of the tasks of national courts to avoid situations that could lead to international responsibility of the state. 253 Legal control of foreign-policy power is also laid down in the EC Treaty in Article 300(7) and in the rules on judicial control in Articles 220ff. The Community institutions do not, as yet, appear to have reached this stage of legal development.

The restrictive attitude taken towards international law also concerns the EC’s position in the world. Naturally, the EC is a member of the international community, and is one of the

246 Cases C-402/05 P and C-415/05 P, above n 210, paras 280ff; see also below section IV.1(c).
247 Critical of this are Berrisch and Kamann, above n 44, 94; von Danwitz, above n 78, 728ff; Petersmann, above n 66, 327; along these lines, although less critical, is Hilf and Schorkopf, above n 77, 89; see also above n 100.
248 To this effect, see both the analysis of Peters, above n 56, 59ff, and Thym, below chapter 9.
250 Ibid, 839ff, 845ff.
252 Grewe, above n 10, 165ff.
253 Entscheidungen des Bundesverwaltungsgerichts 58, 1, 34, and ibid 59, 63, 89 (Eurocontrol); Entscheidungen des Bundesgerichtshofs in Strafsachen 45, 321, 339.
important actors in the context of the WTO. The ECHR guarantees a common European standard of fundamental rights. It is obvious that the EC and the EU cannot, in principle, withdraw from this standard. Nevertheless, the EC consistently pursues a policy of maintaining as much independence as possible from the international community and international law obligations. The EC has mechanisms at hand to efficiently incorporate the human rights standards of the ECHR into Community law when required. First there was the concept of the general principles of law, which is now supplemented by the autonomous reference in Article 6(2) EU. So far, however, the EC has avoided international obligations that could have restricted its freedom of action. An accession to the ECHR has not yet taken place, and the idea of a legal succession under international law has been proposed by only a few authors. The situation is similar regarding the WTO. Although the EC has formally acceded to this system in international law, the consequence of granting WTO law an extensive internal effect via Article 300(7) EC has not been followed. Berrisch and Kamann state that the ECJ decided in favour of the protection of the Community’s sovereignty within the WTO. A committee report of the European Parliament from 1997 is on the exact same line. It demands that the Community should provide for a ‘sovereignty shield’ in the course of Treaty amendments.

Thus, one is faced with the image of a European Community that seeks to preserve a conception of sovereignty which modern European states outgrew a long time ago. Many states are willing to give international law an internal effect that noticeably restricts the freedom of action of the state institutions. The constitutional courts of European states have long since lost their roles as the sole supreme protectors of fundamental rights; the Court of Human Rights stands next to and above them. It seems odd that the European Community, which has never been regarded as a sovereign state, has a lot more problems in subjecting itself to international obligations. Perhaps an explanatory approach lies exactly here. Nation-states such as Germany or France do not seriously jeopardise their identity if they subject themselves to international obligations and withdraw from their claim for autonomous legislation and the application of law. The situation is different with the EC. The EC is a relatively young construction that in essence is considered to be a Community of law. If Community law loses its autonomy, this could endanger the Community’s identity. Consequently, in Kadi the ECJ used the concept of a Community based on the rule of law in order to explain the autonomy of Community law with regard to sanctions adopted by the Security Council.

The Community’s aspiration for autonomy, therefore, seems to be an attempt to achieve and strengthen an identity of its own. The identity deficit of the EU and the EC is well known. The EU Treaty considers this in the context of the CFSP. In the tenth recital of its Preamble, the EU Treaty describes the CFSP as a tool to reinforce European identity and independence. It is remarkable that identity and independence are explicitly linked to each other here. Article 2(1)
EU takes up the subject of the Preamble in its second sub-paragraph by declaring the assertion of identity on an international level as an objective of the European Union. Article 2(1) EU considers the Union as a political actor on the international stage. This effort is intended to strengthen the European identity. A second strategy is based on emphasising independence: marking differences and autonomy can also establish identity. The ECJ proceeded in this second way far back in 1964 in *Costa v ENEL*. In that case, the Court separated Community law as an autonomous legal order from the legal orders of the Member States. The ambivalent attitude of the Community towards international constitutional elements reflects the same strategy. The Community institutions endeavour to make the legal order of the Community independent from international law. This aspiration for autonomy seems to a certain extent outdated, since the nation states are increasingly prepared to withdraw prevailing ideas of sovereignty and to open their national constitutional orders to international influences. The policy of the Community, which runs contrary to this, is explicable in that the Community has not yet found its permanent place in the international community.

According to this analysis, the constitutional order that is examined in this volume appears to be an order in statu nascendi. It cannot do without international constitutional elements. However, as long as the European constitutional order has not established itself, the Community will endeavour to water down the significance of international constitutional elements and place its own claims to autonomy in the foreground.

b) European Integration through Human Rights

*aa) Increasing Reference to the ECHR and the Strasbourg Court*

In the field of fundamental rights, certainly a different tendency has developed in the last years. The ECJ’s position towards the formal status of the ECHR within Community law has not changed. The phrases of international human rights treaties being mere ‘guidelines’ to detect general principles of law and the attribution of the ECHR’s ‘special significance’ can still be found, yet the ECJ seems to be willing to give full effect to the Convention’s guarantees within Community law. Moreover, the ECJ now relies on the case law of the Human Rights Court in the same way as it relies on its own case law. This is even more striking given that the ECJ usually only cites its own and now the Strasbourg case law. The increasing willingness of the ECJ to accept the ECHR and the European Court of Human Rights can be proved by figures. Figure 4.2 shows a clear development in this regard.

One needs to keep in mind that the total case law of the ECJ has also increased. While in 1998 there had been 254 decisions, in 2006 the decision rate had increased to 351. This again puts the increase in references to the ECHR into perspective. However, if the decisions including ECHR references are seen in relation to all ECJ decisions of a year, there is still a significant increase, as Figure 4.2 shows.

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261 See also Thym, below chapter 9.
262 Case C-112/00 *Schmelberger* [2003] ECR I-5659, para 71; Case C-71/02 *Herbert Karner Industrie-Auktionen* [2004] ECR I-3025, para 48; see also the text accompanying nn 225–6.
263 See also Kühling, below chapter 13.
265 Figures according to ECJ, Annual Report (2006) 97, available at www.curia.europa.eu. The following diagram also relies on these figures.
The restricted attitude of the Luxembourg judges towards the Strasbourg Court belongs in the past.266 The moment for the accession to the ECHR seems to have come.

bb) Intensified Review of the Member States’ Action

Considering the case law of the recent years, it can be stated that the ECJ has especially intensified the review of actions performed by the Member States. The fact that the ECJ subdues actions by Member States to European fundamental rights is not new. Since 1989 in Wachauf, the ECJ has reviewed the execution of EC law by the Member States in regard to its accordance with EC fundamental rights, at least wherever there is no discretion for the national authorities.267 Article 51(1)(f) of the Charter of Fundamental Rights absorbs this case law. Slightly more complicated but also mainly accepted are the principles established in the ERT case law. The ECJ held there that Member States have to observe EC fundamental rights as an additional limitation to their interferences with fundamental freedoms.268 At the same time, the Court indicated that Member States have to comply with the EC fundamental rights not only when limiting fundamental freedoms, but whenever they act within the scope of Community law.269

Meanwhile, the ECJ has extended the ERT case law in a problematic way. The Carpenter judgment of 2002 attracted the greatest attention.270 The UK government intended to expel Ms Carpenter, a third-country national who was married to a British citizen, Mr Carpenter. Secondary law contains the right of residence for family members but does not stipulate a right of residence in the Union citizen’s state of origin.271 Therefore, the ECJ referred to primary law and relied on Mr Carpenter’s freedom to provide services. As Ms Carpenter would take care of the children at home, she made it easier for Mr Carpenter to visit customers in other Member States in the course of his freedom to provide services. If the UK expelled Ms Carpenter, it would interfere with Mr Carpenter’s freedom to provide services. Consequently, the door was open to apply Article 8 ECHR as a limitation to interferences in the freedom to provide services. Thus, the expulsion was unlawful because it was contrary to the right to respect of family life.272 The link between the expulsion and the freedom to provide services is very indirect. Considering how the ECJ limited the scope of application of the free movement of goods rules in Keck and Mithouard,273 an interference with the freedom to provide services in this case can hardly be supported.274 In Carpenter, the ECJ acted less as a guardian of Community law than as a guardian of the ECHR.

Equally problematic is the judgment in Herbert Karner Industrie-Auktionen of 2004.276 An Austrian company acquired another company’s bankruptcy assets and planned to auction them.

267 Case 5/88, Wachauf [1989] ECR 2609, para 19; Kühling, below chapter 13, deals with this agency situation.
269 Case C-260/89, above n 268, para 42.
270 Case C-60/00 Carpenter [2002] ECR I-6279; see also the subsequent Case C-109/01 Akrich [2003] ECR I-9607.
271 Case C-60/00, above n 270, paras 34–6.
272 Ibid, para 39.
275 Case C-71/02, above n 262.
It promoted the sale as an auction of bankruptcy assets. This was prohibited as misleading advertising, as it suggested an auction held by the liquidator. Indeed, Community law regulates misleading advertising, but allows further regulations by Member States and therefore was not contrary to the prohibition. Article 28 EC was also not applicable as the prohibition constituted a mere selling arrangement in the sense of the Keck case law. Thus EC fundamental rights could not be applied as a limitation to interferences. However, the ECJ applied the yardstick of Article 10 ECHR to the advertising prohibition. The Court substantiated that step with an abstract reference to the relevance of fundamental rights ‘whose observance the Court ensures’, where national legislation falls within the field of application of Community law. After finding no infringement of fundamental rights, the ECJ eventually held that Article 28 EC was not contrary to such an advertising prohibition. This conclusion indicates that the Court did not want to examine Article 10 ECHR independently, but rather within the free movement of goods, although this fundamental freedom was not applicable. The examination of fundamental rights is barely linked to Community law. Like in Carpenter, the ECJ appears rather as a guardian of the ECHR.

cc) Attempting an Explanation

The question needs to be asked why the ECJ does not leave the role of the ECHR’s guardian to the Strasbourg Court, which was created precisely for that purpose. With Carpenter and Karner the ECJ moved away from the origin of EC fundamental rights protection, which was to restrict Community powers in a comparable way to Member State powers. Comparing Carpenter and Karner with the WTO case law of the ECJ, the different attitude towards the EC legislative is striking. With regard to the WTO, the ECJ emphasises the scope of action of the political bodies which must not be restricted. In Carpenter, the right of residence was already regulated by secondary law. According to these regulations, there was no right of residence under Community law. This decision of the ECJ was corrected by the ECJ using Article 8 EMRK. It was similar in Karner. The fact that the EC legislator had only established minimum criteria for misleading advertisement did not restrain the ECJ from reviewing the Member States’ stronger protection with the yardstick of Article 10 ECHR.

The intensified fundamental rights case law of the recent years can possibly be seen as an attempt to establish the Union as a fundamental rights organisation and the ECJ as a fundamental rights court. Along these lines, in Kadi the Court emphasises the constitutional significance of human rights for a Community based on the rule of law. The ECJ then would be looking for an additional legitimating basis, which is based on the protection of individual rights. The ECHR and its development through the Strasbourg Court can no longer be seen as a threat for the autonomy of the EC legal order, but is rather a fundament of this order.

c) A Special Problem: UN Sanctions

The implementation of UN sanctions is a special case. First of all, there are deficits at the UN level. As long as UN sanctions did not directly address individuals there was little need for a legal protection of fundamental rights on the UN level. This is different regarding so-called

278 Ibid, para 49.
279 Ibid, para 53.
280 See also Rengeling and Szczekalla, above n 224, paras 288, 320.
281 Case C-60/00, above 270; Case C-71/02, above n 262.
282 For a critical view of such a concept, see A von Bogdandy, ‘The European Union as a Human Rights Organization?’ (2000) 37 CML Rev 1307; according to Kirchhof, below chapter 20, section IV.6, this would imply a shift towards a Community of values.
283 Cases C-402/05 P and C-415/05 P, above n 210, paras 285, 304, 316.
smart sanctions. If the Security Council, or a committee established by the Security Council, lists specific individuals and puts incisive sanctions on them, an efficient protection of individual rights is required under today’s fundamental rights standards. If the binding effect of UN sanctions is not to be challenged, then this legal protection has to be developed within the framework of the UN. Such a mechanism does not exist. Hence, the question arises whether smaller territorial entities, like UN Member States or the EC, can provide the necessary legal protection. The ECJ is situated in a position similar to that of the German Federal Constitutional Court with its Solange case law and the Strasbourg Court in Bosphorus. The Federal Constitutional Court and the Human Rights Court reacted in their case law to the potential deficits in EU fundamental rights protection. It will be clear if the EU courts react in a similar way to the striking deficits of legal protection within the UN.

If the EU understands itself as being a fundamental rights community, it cannot accept the near-complete lack of legal protection against individualised UN sanctions. The German Federal Constitutional Court and the Strasbourg Court refrained from exercising a fundamental rights review provided that the ECJ and the CFI maintain a substantially equivalent level of fundamental rights protection. Instead, the CFI in Yusuf held a lower ius cogens level to be sufficient. According to the Solange- and Bosphorus standards, UN sanctions aimed at specific individuals would fail because of a complete lack of legal protection.

Regarding human rights, this solution appears to be unsatisfactory in the extreme. If the Security Council plans to continually sanction individuals, it has to provide them with sufficient judicial protection. In order to prevent individual states and their national courts from challenging the lawfulness and effectiveness of UN resolutions, judicial protection of individual rights should be introduced at the UN level. Chapter VII of the UN Charter offers the necessary legal basis for establishing a court exercising such review. If the Security Council is not willing to take that step, other authorities have to exert adequate pressure. This includes the usage of subsidiary review powers in the sense of Solange and Bosphorus. The German Federal Constitutional Court has never gone so far that the Union would have suffered serious damage. Regarding this aspect, subsidiary legal protection against UN sanctions is risky. If European courts were to suspend sanctions because of a lack of legal protection, this could promote further—especially US—doubts regarding the benefits of the UN system. It is understandable that EU courts give warning signals, but refrain from a straight shot. Accordingly, the Strasbourg Court implied in Behrami that it could cut back its review severely if actions deriving from Security Council sanctions were affected. By contrast, the ECJ emphasised the concept of a community founded on human rights when it set aside the Kadi and Yusuf judgments of the CFI. The Court thereby rejected the idea that the UN Charter would be a supplementary constitution for the EC.

284 See also von Arnauld, above n 233, 207ff.
285 See above section II.3(b)(cc).
287 See also von Arnauld, above n 233, 209–10.
289 See above n 283.
2. The Lisbon Treaty

The Reform Treaty of Lisbon confirms a tendency that has appeared in the last few years: upgrading the ECHR while maintaining reservation towards other elements of international constitutionalism.

The former reservation against the ECHR, reflected in the present Article 6(2) EU, is going to be resolved at the level of primary law. When it enters into force, the Lisbon Treaty will amend Article 6(2) EU. The new Article 6(2) TEU-Lis, based on Article I-9 of the Constitutional Treaty, introduces two additional sources of human rights law. Article 6(2) TEU-Lis refers to the Charter of Fundamental Rights, which now becomes part of primary law as separate codification of fundamental rights. Thus, future EU constitutional law will contain its own written catalogue of human rights, which will be legally binding. At the same time, Article 6(2) TEU-Lis is a reaction to ECJ Opinion 2/94 as it provides an explicit competence to accede the ECHR. The provision not only opens the door for accession, but also urges the EU institutions to undertake the necessary steps.

However, Article 218 TFEU complicates the accession to the ECHR in procedural aspects. After the entry into force of Protocol No 14 to the ECHR, Article 59(2) ECHR would allow the EU to accede to the ECHR by unilateral declaration. This way is closed by Article 218(6) and (8) TFEU, stipulating the need for an agreement to accede to the ECHR. Protocol No 5 to the Lisbon Treaty further elaborates this requirement, determining the contents that have to be settled in the agreement. Under Union law, accession is therefore only possible on the basis of a protocol that is to be negotiated between the EU and all ECHR Member States. The second sentence of Article 218(8)(2) TFEU further stipulates that the decision of the EC Council concerning the conclusion of the accession protocol will not enter into force until it has been approved by the Member States in accordance with their respective constitutional requirements. The EU Member States therefore will have to take action twice: on the one hand, they have to ratify the accession protocol as a party to the ECHR; on the other hand, they also must ratify the Council decision prior to the Union’s definite conclusion of the accession protocol. Such double participation sounds unnecessarily complicated, but two explanations can be found for that. First, there could be a fear of individual Member States that an ECHR accession of the EU might result in ECHR rights affecting the national legal order in a way that is alien to the national legal tradition. The provision thus would be motivated by the same reasons as Protocol No 7 to the Lisbon Treaty is, in which the scope of application of the Fundamental Rights Charter is limited for Poland and the UK. Secondly, the procedure of ratification determines the rank of the ECHR within Union law. Article 216(2) TFEU, which follows Article 300(7) EC, incorporates international treaties into the Union legal order and assigns them a rank between primary and secondary law. If the Member States instead have to ratify the Council decision on the conclusion of the accession protocol, the Council decision becomes an act of primary law. It therefore could incorporate the ECHR with the rank of primary law.

Under the Lisbon Treaty the ECHR will be relevant in two different ways: accession under Article 6(2) TEU-Lis will make the ECHR internationally binding upon the EU, and it will subject the EU institutions to external legal control by the Strasbourg Court. In addition,
the ECHR is also incorporated through the EU Charter of Fundamental Rights. Under Article 6(1)(1) TEU-Lis the adjusted Charter forms a part of primary law. According to Article 52(3)(1) of the Charter, all its rights which correspond to rights guaranteed by the ECHR shall have the same meaning and scope as those of the ECHR. The explanations, which were prepared by the Præsidium of the Charter Convention and later updated by the Præsidium of the European Convention on the Future of Europe, contain a list of corresponding rights. According to the fifth recital of the revised Preamble of the Charter, these explanations shall serve as official means for interpretation. They show that the guarantees of the ECHR and its Protocols are almost entirely mirrored in the Charter. Article 52(3) of the Charter is of particular importance when Charter guarantees are infringed. According to this provision, any limitation of Charter rights must fulfil not only the general criteria laid down in Article 52(1) of the Charter, but also the specific criteria laid down in the ECHR. When it comes, for instance, to an interference with the right to private life, Article 7 of the Charter has to be seen in the light of Article 8 ECHR. The interference is only justified if it complies with both Article 52(1) of the Charter and Article 8(2) ECHR, the latter having been incorporated into EU constitutional law by means of Article 52(3) of the Charter. Even though at first glance it could seem differently, the Charter of Fundamental Rights does not create an autonomous fundamental rights codification. In order to determine the true scope of the Charter, the guarantees of both the Charter and the ECHR have to be read together.

Article 6 TEU-Lis therefore incorporates the ECHR twice, once through Article 6(2) with the view to an accession and then independently thereof through Article 6(1) as an integral part of the Fundamental Rights Charter. Both ways result in giving the ECHR the rank of primary law. The ECHR is therefore a supplementary constitution in the true sense of the word. The ECHR-friendly case law of the last few years seems to anticipate this development. Additionally, Article 6(3) TEU-Lis picks up Article 6(2) EU and therefore prevents a relapse behind the status quo in fundamental rights.

However, the Lisbon Treaty’s positive attitude towards external influences is restricted to European human rights law. There is no significant change with regard to WTO law. Article 300(7) EC, which should be the starting point of any debate on direct effect, is simply reproduced in Article 216(2) TFEU, albeit with linguistic changes. The opportunity to resolve open questions has not been taken. While external action and foreign policy are given considerable attention, the Lisbon Treaty focuses most particularly on the external influence of the EU. According to Article 3(5)(1) TEU-Lis, the Union shall uphold and promote its values and interests in the world. The norm expresses the intention to export the Community’s standards, whereas the possibility of importing international standards into its own order is not given any consideration. Article 3(5)(2) TEU-Lis mentions the EU contribution to free and fair trade, but it must be presumed that the standards of what is free and fair are, once again, to be defined by the EU. This same sentence deals with the EU contribution to the strict observance and development of international law. The wording suggests that present international law is not accepted unconditionally and shall be developed according to EU standards. Article 21(1)(1)

297 See also Art 52(7) of the Charter as adopted on 12 December 2007, [2007] OJ C303, 1.
299 See above section IV.1(b)(aa).
300 See above section III.1(b).
301 See above section II.2(a)(aa).
302 C Herrmann, ‘Die Außenhandelsdimension des Binnenmarktes im Verfassungsentwurf’ [2004] Europarecht suppl 3, 175, 203, with regard to the corresponding Art III-225(2) CT.
TEU-Lis confirms the intention to promote EU standards outside Europe in the context of the Union's foreign policy. European integration is described as a worldwide model.\textsuperscript{303} In these provisions the Lisbon Treaty paints an image of a Union which is self-sufficient and which does not expect to be significantly influenced from the outside, e.g., by the WTO or other institutions. Aside from the ECHR, the EU does not seem inclined to accept any supplements to its constitution originating from the international sphere.

\textsuperscript{303} See ibid, 188–9, with regard to the CT.
The ambiguity of the term ‘constitution’ is notorious.¹ ‘Constitution’ can describe a norm, but also a political condition, an object, the document itself or even a function. Mostly a few, but seldom all, of these meanings are addressed simultaneously when the term is used. This difficulty creates vagueness. This vagueness increases when different constitutional traditions meet and there is neither consensus whether there is already a constitution nor agreement if there should be one at all. This is the case in Europe. It causes a blend of legal and political questions that currently lends political significance to every theoretical statement.

These complications cannot be avoided by simply limiting the concept to one possible meaning. Such a terminological reduction threatens to improperly level a discussion that is revolving around the European ability to have a constitution and the content of this notion. For this reason, it may also turn out to be unproductive to conceptually close the connection between the concept and the state of European integration, ie just to determine that the

European Union\(^2\) had or needed a constitution or did not have or need one. Rather, the term ‘constitution’ offers opportunities for analysis on different levels.

Besides its political connotations, three levels of meaning are connected with the term ‘constitution’: a theoretical level that reflects the term with regard to history and legitimacy; a normative level that applies the term as an element of the legal system; and a descriptive level that uses constitution as a term to analyse institutions. Only a reflection of the conceptual level applied can lend consistency to the discussion about the constitution of European integration. At the same time, it is important to see that the distinction between these levels does not imply their separation: theoretical terms may become legal concepts. Legal implications can be applied to the European Treaties if they are labelled as a ‘constitution’, as was done in the project of a Constitutional Treaty.

The following considerations will attempt to expose different traditional meanings of the concept of ‘constitution’ and examine their applicability to European integration. They take their starting point from two premises. First, a meaningful contemporary use of the constitutional concept cannot ensue without referral to its historical meanings.\(^3\) This is particularly important in a juridical context, which is always asymmetrically oriented towards the past.\(^4\) Secondly, the function of constitutions will be understood as the reciprocal connection of politics and law, i.e. the connection of law-making to a political process, on the one hand, and of the legalisation of political processes on the other hand.\(^5\)

A juridical assessment of the term ‘constitution’ must, on the one hand, study the usage of the term and, on the other hand, check for conclusiveness. For this, the historic-systematic development of the concept will first be considered (II). A critical investigation of the discussion about constitutionalisation of Europe will follow this (III), which can finally lead to the construction of three levels of meaning of the concept of constitution—meaning with regard to theory, to legal doctrine and to descriptive institutional analysis (IV). All this may help to finally give an assessment of the failure of the Constitutional Treaty and its resurrection as a Reform Treaty, the Treaty of Lisbon (V).

\section*{II. Theoretical Prerequisites: Two Types of Constitutions}

If the term ‘constitution’ is used to describe all kinds of normative structures from the \textit{Magna Carta} to the UN Charter, then this broad use remains too unspecific to lend any analytical value to the discussion about the European constitution. In order to develop a more precise usage of the category, without restraining oneself to a certain definition too soon, two constitutional traditions have to be distinguished in the following. The chosen distinction is not new.\(^6\) It owes


\(^3\) The necessity for a historical account of constitutional arguments is impressively underlined in J Derrida, \textit{L'université sans condition} (2001) 66ff.


its conceptual background to the seminal but, in the legal literature, too rarely used work of Hannah Arendt about history and theory of the revolution, but—different from Arendt—it is orientated towards the correlation between law and politics. The first Franco-American tradition created a specific democratic stock of traditions that are still crucial for Europe—as was shown in 1989. Its theme is the democratic politicisation of law-making through the founding of an entirely new system of government (1)—an older form of constitutionalism that, conversely, places the juridification of an already existing governmental system in its centre (2). This tradition can be found—with many differences between the individual cases—for instance in the German and the British constitutional traditions. As will be shown, both constitutional traditions are necessary for a European constitutional theory (3).

1. Founding of a New Order: Constitution as Politicisation of Law

What are the common characteristics of the constitutional idea that arose at the end of the eighteenth century from the American and French Revolutions? Two basic features can be systematically extracted.

a) Foundation of a New Political Order

The new constitutions founded an entirely new order. They did not just limit already existing powers. This point—often, and probably not accidentally, overlooked in the German discussion—is crucial for the theory of the liberal constitutional state: in the organisation of revolutionary constitutions every form of the exercise of public power requires an immanent form of justification defined by the constitution. The constitution determines the form and the content of the sovereign power and, in doing so, terminates the previous political order. It founds a discontinuity, a rupture that finds its institutional correspondence in France in the Revolution and in the US in the Revolutionary War of Independence. With this, constitution becomes an exclusive concept: certain forms of order are now no longer labelled as faulty or wrong constitutions; rather, their claim to be constitutions at all is denied.

The concept of the democratic pouvoir constituant can be affiliated with the foundation of a new order, though it hardly plays a role in the American tradition. The idea of a pouvoir constituant designates the subject of the founding act to be the people, and it guarantees that the process of constitution-making can be transformed into a perpetual process—in France,
through the institution of the parliamentary democratic law that is responsible for the scope of subjective rights. This perpetuation is guaranteed by procedures, not by specific purposes of sovereign power. Because the basis of sovereignty is self-determination, sovereignty becomes an end in itself.

The tradition’s egalitarian concern for the individual (democratic equality) also follows from its founding character. Only this concern enables, at least in theory, a radical break from the authoritarian status quo. Because the constitution must ignore and abolish already existing political power structures, it must make individual freedom its systematic reference point. The addressees of the constitution are those who are individually subjected to the new authority without any interference of other intermediate corporations. This does not necessarily result in less governmental power towards society than before. Both the French Revolution and the founding of the US may have more likely led to an increase in public power, and the time before and after the Revolution in France may be portrayed as an administrative continuum. However, the constitution organises, establishes and justifies these interventions through the invention of citizenship, through the right to vote and through civil rights. The constitution finds a new form of sovereignty that is limited from the start by the rights of the individual. It does not organise an already existing sovereignty.

b) Normativity, Supremacy and Written Form of the Constitution

The normative claim of this constitutional tradition is implied in its founding character. The constitutional revolution eliminates the recognition of the status quo as a legitimate consideration. As a result, tradition loses its justifying value. It is replaced by ‘new traditions’ that are specific to the constitution. At the same time, this disengagement from the past is a disengagement from the previously existing political practice and, therefore, an intensification of the difference between political practice and the normative demands of the constitution: the pre-constitutional inventory of privileges must be forgotten. In doing so, the constitution opens up a horizon for the future that, along with the perpetuation of the democratic pouvoir constituant, also works towards the perpetuation of changes.

Beginning in the US, this emphatic normativity developed into the legal concept of the constitution as the supreme law. The establishment of supremacy is successful under certain institutional premises. Besides having interpretable constitutional contents, it also requires institutions of review that are specific to the constitution—constitutional courts. The example of

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14 R Carré de Malberg, *La loi, expression de la volonté générale* (1931); Vorländer, above n 6, 55–6; the revolutionary idea of separated powers is analysed in M Gauchet, *La Révolution des Pouvoirs* (1995) 55ff.
15 The democratic clou of the idea of public power as an aim in itself has been widely misunderstood. But see H Kelsen, *Allgemeine Staatslehre* (1925) 39–40.
17 Its most severe expression was the prohibition of any form of association or corporation between state and individual in the revolutionary Loi Le Chapelier.
18 This has famously been elaborated for the case of France by A de Tocqueville, *L’ancien régime et la révolution* (1851); see the analysis of F Furet, *Penser la Révolution française* (1978) 209ff.
19 Preuß, above n 9, 20–1.
22 Preuß, above n 9, 24ff; Ost, above n 4, 175ff.
23 Looking to the US, the seminal contribution is by N Luhmann, ‘Verfassung als evolutionäre Errungenschaft’ (1990) 9 *Rechtshistorisches Journal* 176.
France shows, on the other hand, that a revolutionary constitutional tradition can also develop over a long period of time without this sort of pronounced constitutional supremacy.

Not only the political-utopian content but also the legal supremacy of the constitution is favoured through its written form. The written documentation of the constitutional content has a formalising effect. The objectification of the constitution in one text makes the constitution an autonomous piece of sense and the reference to its content open again and again to new interpretation. This creates its specific political normativity. Similar to a piece of art, its objective character enables it to portray potential oppositions to ‘social reality’. The objectification of the constitution in a text calls forth its symbolisation. The function of the written form is not necessarily the fixing of certain content, because the textual understanding obviously changes quite considerably over time and this change is by no means undesirable. However, the documentation of the constitution enables its political-utopian demand to become independent of political or legal practice. As Franklin D Roosevelt brilliantly put it, the constitution is ‘a layman’s document, not a lawyer’s contract’. Yet the written form also has meaning for the supremacy of the constitution: if constitutional changes are tied to changes in the constitutional text, then this increases the constitutional distance from specific present political problems and emphasises its demand for supremacy.

c) Result

The revolutionary constitutional tradition demands a comprehensive democratic politicisation of law-making. The discontinuity that is at least feigned through the revolutionary foundation of constitutional law justifies the necessity to focus the law production on a single democratic reference point, in which all citizens must be able to participate as free and equal individuals. The central meaning of the democratic law (loi, Gesetz) for the democratic state results from this. The availability of democratic proceedings alone justifies the legal system and can even—as strides for in the figure of the pouvoir constituant of the people—legitimise its abolition in favour of another political system.

2. Shaping of the Powers: Constitution as Juridification of Politics

The profile of the revolutionary concept becomes clearer when contrasted with another constitutional tradition that strives not towards founding a new political order but towards the legalisation or juridification of the already existing one. With regard to the European constitution, England and Germany can be named as examples of this tradition—though with substantial differences in detail.

27 In *McCulloch v Maryland* 17 US 4 (Wheat) 316, 407 (1819) this is exactly the problem John Marshall refers to in writing the famous phrase: ‘In considering this question, then, we must never forget that it is a constitution we are expounding.’
29 Worth mentioning are the different parliamentary and, respectively, anti-parliamentary traditions. For the notorious German misunderstanding of parliamentarianism, see E Fraenkel, ‘Historische Vorbelastungen des deutschen Parlamentarismus’ in idem, *Deutschland und die westlichen Demokratien* (1991) 23. Also worth mentioning is the different concept of statehood.
a) Limiting Powers by Legalisation of Government

Since its beginnings, German constitutionalism has aimed not at the erection of a new democratic order but, rather, at the limitation of the already existing governmental system, which was conceptually identified with the person of the king and later with the legal personality of the state. The constitutions ‘do not constitute a new polity; rather, they represent a system of limitations to the sovereign power’. A structurally similar constitutional understanding arose in England in a completely different historical context. The gradual juridification of the legitimate power apparatus also functioned as the ‘constitution’. The original constitutional situation in the US was the existence of a representative body, a parliament, without an administration. It was just the opposite in Germany and England: a representative body with gradually increasing importance was allocated to the already existing monarchy. The king’s ‘original’ power was to be put in its place through the constitution. This starting point has always been the common denominator in two important traditions: the German Rechtsstaat and the British rule of law. Therefore, it is no coincidence that both constitutional traditions—unlike those in France and the US—have not developed a democratic theory within their constitutional system. In Germany the constitution as a power-limiting institution lacked a principle of justification, a legitimising process. Until 1918 the legitimacy of government remained merely a background topic for German public jurisprudence, which did not accidentally call itself Staatsrecht instead of constitutional law. In England, on the other hand, the established legitimacy of the traditional theory of sovereignty was successfully united with a modernisation of the institutions. British parliamentarianism was the result. The question of legitimacy was practically solved as a matter of parliamentary election and deliberation.

The historic fear of unrestrained tyranny is closely connected to this idea of limitation of power. However, for a modern variation of power-limiting constitutional theory it is important to see that limitation of power does not weaken public institutions, but just legalises them. This shaping of political power through juridification must in no way lead to a decrease in its influence—rather to an increase—just as the modern constitutional state may have infinitely...
more precise control over its citizens than an absolutist ruler.\textsuperscript{43} The juridification of the power apparatus may improve organisational rationality,\textsuperscript{44} increasing executive powers. For this reason, the constitutional tradition developed here will here be called a power-shaping—not a power-limiting—tradition.

\textbf{b) Restricted Normativity of the Constitution}

Lacking a revolutionary rupture, the normative demand of the power-shaping constitutional tradition remained limited. Starting even before the Weimar discussion, the attempt has been regularly made in Germany to integrate social reality into the concept of constitution. Influential concepts like \textit{Verfassungswirklichkeit} (constitutional reality)\textsuperscript{45}, \textit{Verfassungswandel} (constitutional change)\textsuperscript{46}, \textit{materielle Verfassung} (substantial constitution)\textsuperscript{47} or constitution as \textit{politische Grundentscheidung} (fundamental political choice)\textsuperscript{48} bear witness to this tradition to date.\textsuperscript{49} Reflected in this are the lack of experience of a revolutionary change in government as well as the doubts concerning the ability of legal forms to grasp social reality as a 'whole'. The constitution is not the text; it is the total condition of society. At the same time, the fact that the concept of constitution reaches out to the entire society makes it more and more similar to another notorious concept, that of the 'state'. State and constitution developed into integral, but interchangeable categories.\textsuperscript{50} At this juncture the allegedly compelling correlation between state and constitution that has become of such central importance in the discussion of the European constitution arises in German constitutional theory.\textsuperscript{51}

In England the idea of constitutionalism also remained limited, but in quite another way.\textsuperscript{52} The development is less visible in the doctrine of parliamentary sovereignty\textsuperscript{53} and in the modest juridification of constitutional supremacy. We can also find these phenomena in France.\textsuperscript{54} More significant are the absence of a constitutional document\textsuperscript{55} and the corresponding identification of the constitution with a certain inventory of tradition\textsuperscript{56} that has to be continuously developed. Constitution is an evolutionary process of political practice. Therefore, in both traditions the constitution does not raise a normative demand for absoluteness with respect to the existing political system. As a result, the concept experiences an evolutionary rather than a revolutionary design over time. It is the idea of continuous constitutionalisation, not of a supreme constitution.

\textsuperscript{43} For a historical comparison, see BS Silberman, \textit{The Cages of Reason} (1993).
\textsuperscript{45} F Lasalle, \textit{Über Verfassungswesen} (1862).
\textsuperscript{46} D-L Hsü, \textit{Die Verfassungswandlung} (1932); B-O Bryde, \textit{Verfassungsentwicklung} (1982).
\textsuperscript{47} R Smend, \textit{Verfassung und Verfassungsrecht} (1928).
\textsuperscript{48} Schmitt, above n 1, 23ff.
\textsuperscript{49} For an important critique using the Anglo-Saxon tradition as a counterpart, see W Hennis, \textit{Verfassung und Verfassungswirklichkeit} (1968) 24ff.
\textsuperscript{51} See below section III.1.
\textsuperscript{52} Vorländer, above n 6, 34–5.
\textsuperscript{53} Canonised by Dicey, above n 35, 37ff; and ECS Wade, ‘Introduction’ in ibid, XXXIVff; for the present state: E Barendt, \textit{An Introduction to Constitutional Law} (1998) 86ff.
\textsuperscript{54} Above n 14.
\textsuperscript{55} Dicey, above n 35, 4ff; Loewenstein, above n 35, 43ff; AW Bradley and KD Ewing, \textit{Constitutional and Administrative Law} (1997) 7ff.
c) In Particular: Constitutional Treaties

Constitutional treaties also belong to the power-shaping constitutional tradition. Constitu-
tional treaties are not social contracts. Unlike the latter, the former do not represent a theoretical construction for justifying public power. Constitutional treaties deal, rather, with a certain form of constitutional norms that have emerged from a treaty, not from a representative constitutional assembly. Constitutional treaties belong to the power-shaping tradition because the parties who make the treaty are sovereigns who do not completely dispose of their sovereign power at the time the treaty is concluded, but rather legally bind their power, or transfer it to a higher level, like the states during the founding of the Norddeutscher Bund as the first modern German state.

Occasionally, the establishment of the first German nation-state is used as a model in the European constitutional discussion. The reason for this is that the European Treaties were also established by sovereigns whose existence was not rescinded, but was and is specifically recognised by these Treaties (Article 5(2) EC, Article 6(1), 2nd sentence EU).

The central problem of a constitutional treaty is represented in the question to what extent the subject that emerges through the treaty can become legally independent of the parties to the treaty. To put it another way: is the constitutional treaty really a constitution or only a treaty? Therefore, it is not a coincidence that in Germany the autonomy of European law was first established with a theoretical design that originates from the theory of the German Kaiserreich: Ipsen’s ‘Gesamtaktstheorie’. The problem of this doctrine can also be represented as one of the problems of the power-shaping constitutional theory in general. According to its own premise, this tradition cannot claim a complete discontinuity, a real new establishment that can be traced back to a democratic act. However, the autonomy of a new legal system is less plausible if the old legal systems continue to exist and are specifically recognised by the new system. Ipsen’s ‘Gesamtaktstheorie’ proves to be—just like more recent theories that postulate the existence of a European ‘Grundnorm’—a doctrine of pouvoir constituant without the people.

d) Result

Accordingly, the power-shaping constitutional tradition does not require a concept of democracy—again, here it is different to the order-founding tradition. Rather, its central theme is limiting a pre-democratic sovereignty through legal form. Revealingly, a special function is assigned to the courts not only in the German but also in the English tradition. As judicial review in Germany compensated for the lack of democratisation, so did (and still does) judicial review in England, where the sovereign is obligated to certain standards of justice. In the latter case, quasi-constitutional standards originate in particular from the

58 Böckenförde, above n 9, 36ff.
59 Rousseau, above n 37, II/36.
62 Structural parallels between the foundation of the German Reich and the European integration are a much rehearsed theme in the German discussion: see A Böhmer, Die Europäische Union im Lichte der Reichsverfassung von 1871 (1999) 39ff; S Oeter, above chapter 2; P Dann, below chapter 7.
63 HP Ipsen, Europäisches Gemeinschaftsrecht (1972) 61; for a convincing critique of this German doctrine, see HF Köck, Der Gesamtakt in der deutschen Integrationslehre (1978) 50ff.
Common Law tradition\textsuperscript{66} and represent a specific form of constitutionalisation without constitutional text that is not based on a distinction between normativity and the routines of the political practice. In sum, constitution describes, in both traditions, the result of a process of juridification, not a process of politicisation.

3. The Traditions Correlated: Constitution as Coupling of Politics and Law

The ideal-typical confrontation of the two constitutional traditions allows a more exact description of their mutual relationship and of their applicability to the European integration. Order-founding and power-shaping constitutional traditions do not principally contradict one another. Moreover, both traditions can be seen in the Member State constitutional systems of the present. However, the aspect of democratic creation and the legal formality of the political process can unfold in antagonistic directions.\textsuperscript{67} Such contradictions have been known to constitutional theory for a long time, and have occupied much academic discussion, which continues to the present day—for instance, in the question of democratic legitimacy of constitutional courts\textsuperscript{68} or the question of the statutory interpretation of civil rights. Within the academic literature the attempt is frequently made to resolve this antagonism in favour of one of the two traditions.\textsuperscript{69} The current academic debate on constitutionalisation seems to privilege juridification over politicisation.\textsuperscript{70}

The supposition behind such approaches—that democratisation and juridification necessarily clash at one another’s expense—underlies the thesis of a zero-sum game between politics and legal form. In contrast, one may point out that Western legal systems have long been familiar with the antagonism of two forms of law: one driven by politics and one that arose autonomously. This dualism, which gives courts the scope to create law and legislatures the general power to correct the courts, is even necessary for the adequate functioning of the legal and political systems.\textsuperscript{71} By the term ‘constitution’, therefore, we understand an institutional setting that simultaneously guarantees the legitimacy of the legal order through democratic procedures and the organisation of democratic will-formation through legally formal procedures.

On a theoretical level this necessary correlation between the two constitutional traditions can be described by quite a variety of theories and terminology (eg as the structural coupling of politics and law,\textsuperscript{72} as the deliberative circle of law and democracy\textsuperscript{73} or simply as the juridification of democratic-parliamentary law-making\textsuperscript{74}), so that both points of view can be understood as having equal rights. Finally, this also allows for the hypothesis that legal form


\textsuperscript{69} See C Schmitt’s attempt to construe a contradiction between rule of law and democracy, and between law and politics: above n 1, 125ff.

\textsuperscript{70} See below sections IV.3 and V.


\textsuperscript{72} Luhmann, above n 23, 193ff, 204ff.


\textsuperscript{74} Kelsen, above n 15, 234.
and democratic law-making can reciprocally strengthen each other.\textsuperscript{75} In contrast, abatements in the juridification of the political process lead to both practical malfunctions and normative deficits in legitimacy. For example, political considerations in court reasoning question the legitimacy of the political system that exerts influence on the court and the legitimacy of the legal system that submits itself to such an influence. On the other hand, too extensive a constitutional adjudication can lead to an over-juridification of political processes that overuse constitutional texts. This diminishes the normative power of the constitution and, at the same time, calls into question the ability of the political system to function properly.

In order to apply both constitutional traditions to European integration, the question is not, therefore, which of the two is the ‘better’ tradition; more accurately, at the European level one observes both new forms of political law-making processes with specific claims to a legitimacy of their own and intensive forms of legalisation of the original intergovernmental political process. The European Parliament is an example of the first phenomenon, and procedural standards, developed by the European Court of Justice (ECJ), are an example of the second trend.

If the coupling of politics and law through constitutions is not a zero-sum game, as shown, then there are many reasons to believe that the European institutions lack not only structures of democratic law-making, but also suitable forms of juridification. In this way, the Council’s arcane legislative techniques are neither legalised nor democratic.\textsuperscript{76} If we are dealing so far with a double deficit in the democratic foundation of the order and in its legal form, then the distinction between an order-founding and a power-shaping constitutional concept can present a form of analysis of the European state of constitutionalism that cuts across the question of whether Europe has or should have a constitution. This also allows for a more exact reconstruction of the normative cost–benefit balance of the notion of a European constitution. In this, certain phenomena can be traced back to one constitutional tradition and some to the other. At the same time, these traditions should also provide a critical yardstick against which European integration can be measured.

\section*{III. Basic Positions in the Constitutional Discussion—A Critical Inventory}

The basic positions in the current academic discussion about the European constitution are not totally compatible with the conceptual and historical requirements previously mentioned: they revolve around assigning the constitutional concept to the nation-state (1), around reducing the constitutional concept to constitutional elements or constitutional functions (2) and around the question of the autonomy of European law (3). However, it remains dubious how helpful these questions are (4).

\subsection*{1. Assignment of the Constitution to the Nation-State}

Large portions of the discussion about the European constitution focus on the relationship between constitution and state. This strand of the debate discusses whether the idea of constitution must be limited to the state\textsuperscript{77} or whether it may also be applied to Europe.\textsuperscript{78}

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\textsuperscript{75} This insight can be described on different theoretical bases; see Möllers, above n 67, s 1.3.
\textsuperscript{76} See below section IV.2(a).

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If one first looks at the historical classification, then very little speaks for placing the concepts of state and constitution in a necessary correlation. This is true, for example, for the German tradition. German constitutional history is familiar with constitutionalism without a nation-state and without pouvoir constituant, and is therefore pre-nationally familiar with the supposedly new model of the post-national constitution.79 Despite this historical experience, the discussion about the relationship between state and constitution proceeds in a remarkably non-historical fashion on both sides of the front, especially since the nation-state is not a typical model in German history. In the words of a prophetic observer from the early 1930s, German history demands a form of government in the sense of the pre-national imperial idea or of the post-national United States of Europe.80 British constitutional history also hardly possesses a strong concept of the state, at least if what is meant by this is the institutional concept of the state oriented towards administration.81 England is a ‘stateless society’ that remains distant from administration-centred legal thinking.82 In European constitutional history any identification of nation-state and constitution is unconvincing.83 Consequently systematic arguments for state-oriented constitutionalism often refer to the French nation-state, namely the ‘universal’ category of pouvoir constituant. The term ‘constitution’ is only used where a democratic pouvoir constituant brought about the formation of a new order in a revolutionary act of democratic self-determination.84 This view quickly leads, however, to the question of the sociological requirements of European state formation, which cannot be solved with jurisprudential tools. The reference to the necessity of a homogenous state citizenry does not lead any further here.85 The argument involves sociological questions of the state of European integration and the public sphere.86 The proof of a necessary correlation between state and constitution does not even succeed on a theoretical level. The argument insinuates a notion of democratic homogeneity that is not part of the democratic tradition of the French Revolution.87 The concept of nation as a self-determining subject is confounded with statehood.88 The invocation of statehood remains without democratic elaboration. Consequently, the argument would eventually have to deny the constitutional character of many other constitutions—possibly even that of the second German Empire. The necessary correlation of state and constitution does not follow from the


82 KW Dyson, The Western State Tradition (1980).

83 Pernice, above n 6, 156ff.

84 Beaud, above n 77, 359ff.

85 Grimm, above n 77, 870ff; M Kaufmann, Europäische Integration und Demokratieprinzip (1997) 38, 48ff; see also P Kirchhof, below chapter 20.

86 Schmitt, above n 1, 228ff.


88 Brunkhorst, above n 6, 91ff; Preuß, above n 5, 24.

89 Möllers, above n 50, 422–3; for the distinction between state and nation, see F Mancini, ‘Europe: the Case for Statehood’ (1998) 4 ELJ 29.
fact that a certain tradition of the constitutional concept was manifested in the French nation-state.

Despite these objections, the question remains at what level law and politics can be recoupled beyond the nation-state, and which constitutional concepts will be adequate for the approaching politicisation of the European level.\(^{90}\)

### 2. Constitutional Elements—Constitutional Functions

However, no positive claim can be deduced from the rejection of a statist idea of constitutionalism: even if constitutions do not necessarily limit themselves to the nation-state, the proposition that it makes sense to apply the category to European integration has still to be proved. In order to answer this question in a positive sense, the academic literature has emphasised constitutional functions and elements of EU law. However, both can only justify a very modest concept of constitution.

The reference to certain constitutional functions fulfilled by EU law, especially by the Treaties, often serves as a complementary element of reasoning in favour of the Union’s constitutional character.\(^{91}\) In this context, functions like legitimacy, power-fragmentation or organisation are cited. However, the deduction of such functions is planned with relatively little systematic or historical effort. Usually, no attempt is made to systematise the various functions into a concept. The meaning of ‘function’ is simply assumed.

Conceptually, at least, it does not seem necessary to conclude from the fact that one institution fulfils the function of another that both should be described by the same term. On the contrary, the functional concept refers specifically to structurally similar services of different institutions; otherwise, ‘function’ could be replaced by ‘identity’. In other words, not every legal structure that fulfils constitutional functions is therefore a constitution. One must ask whether assigning a multiplicity of functions without a compelling internal system actually provides a particular descriptive value.\(^{92}\) This is best clarified using the example of the correlation between two constitutional functions mentioned in the discussion: constitutive legitimising functions.

An influential voice in the debate tries to tie the ‘constitutive’ and ‘legitimising’ functions of the European Treaties together. The Treaties constitute the European Union and they grant individual rights. The exercise of these rights determines the state of legitimacy of the Union.\(^{93}\) However, under these conditions it becomes necessary to explain why the European Treaties presuppose the existence of its Member States\(^{94}\) and do not directly address its citizens in a constitution-creating situation. The observation that the democratic Member States are also, in the end, committed to the individual freedoms of the citizens\(^{95}\) cannot refute this objection: this statement defines democracy without government\(^{96}\) and therefore denies the difference

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\(^{90}\) For a critique of the actual state of European integration, see J Habermas, ‘Braucht Europa eine Verfassung?’ in idem, *Die Einbeziehung des Anderen* (1996) 185.


\(^{92}\) The ambivalence of the notion has been recognised for a long time: RK Merton, ‘Manifest and Latent Functions’ in idem (ed), *Social Theory and Social Structure* (1968) 73, 79ff.

\(^{93}\) Pernice, above n 6, 159, 167–8.

\(^{94}\) See above, II.2(d).

\(^{95}\) Pernice, above n 6, 164.

\(^{96}\) For the connection between democracy and public power, see O Lepsius, ‘Die erkenntnistheoretische Notwendigkeit des Parlamentarismus’ in M Bertschi et al (eds), *Demokratie und Freiheit* (1999) 123.
between individual freedom and public authority. Democracy’s paradoxical achievement\(^{97}\) lies, however, in the fact that it does not make government disappear, but organises it in a particular form. The European citizens’ democratic self-determination cannot simply be identified with decisions of the Member States. Here functional concepts conceal terminological contradictions and the plural legitimacy of the EU. To express this in terms of the concept outlined above: democratic foundation and legalisation, and their basically antagonistic institutional tendencies, are not differentiated in this line of argument, but are improperly identified with one another. The complex triangular relationship between European authorities, government by the Member States and citizens’ rights in Europe disappears in functional terminology.

At first glance, it seems more helpful to allocate the limitation and organisation of pre-existing governmental power to Union law as a ‘classic’ constitutional function.\(^{98}\) Because the European Union is consciously tied to the power of the Member States, this function seems more appropriate for European law. However, such a determination secretly reduces the idea of a constitution to a power-shaping understanding and withholds, for one, the democratic constitutional tradition\(^{99}\) and also the fact that ‘power shaping’, in this sense, can lead to an increase in the exercise of power.\(^{100}\) The European exercise of political power is marginalised via this functions process. Even less helpful is the organisational function: the Treaties do indeed define the organisation of the European Union,\(^{101}\) but quite evidently organisational rules are not enough to elevate a norm to the level of a constitution.

The line of argument examined here shows basic flaws. It cannot, for instance, identify the losses that the concept of constitutionalism has suffered in regard to the revolutionary constitutional tradition. Constitution is, according to the functional understanding, the power correlation between Union and Member States,\(^{102}\) is a constitutional system or is a multi-level system\(^{103}\) that one can recognise by looking at the political reality. With this, the normative—and, indeed, the utopian—content of constitutionalism is completely lost.\(^{104}\) Via the functional concept, constitutionalism becomes a synonym for the status quo of integration. The European constitution is the collective state of the European institutions, nothing more. At the same time, it remains unclear exactly what is to be described under a functional constitutional concept: the political system of the Community, with or without Member States, or just the norms of the Treaties.

Equally serious are the descriptive casualties. A functional interpretation of the constitutional concept only then offers an individual explanatory value if the function in question is exactly specified.\(^{105}\) This is lacking when different, partly exchangeable, partly dispensable functions are taken from the national legal system and transposed to the European level. The attempt to consistently specify constitutional functions within the context of the relationship between politics and law\(^{106}\) retreats in favour of a more associative connection of functions.

The same can be said of the reference to constitutional elements of European law. The notion of constitutional elements can refer to Article 16 of the revolutionary Declaration,\(^{107}\) which declared civil rights and separation of powers as conditions necessary for a constitution. But these elements, as defined by the French revolutionaries, are understood cumulatively. A

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\(^{98}\) Pernice (above n 6, 158) talks of limitation as the ‘classical’ concept.

\(^{99}\) See above section II.1.

\(^{100}\) See above section II.3.

\(^{101}\) M Hilf, *Die Organisationsstruktur der Europäischen Gemeinschaften* (1982).

\(^{102}\) Pernice, above n 6, 165ff.


\(^{104}\) It is remarkable that the pre-democratic theorist Jellinek regularly serves in this context as a source for defining the term ‘constitution’: G Jellinek, *Allgemeine Staatslehre* (3rd edn, 1912) 505.

\(^{105}\) Above n 92.

\(^{106}\) See above section II.3.

\(^{107}\) Above n 11.
constitution that contains only organisational rules is, according to this understanding, not a constitution—a constitution that contains the specified elements can be one, but does not have to be. In any case, civil rights must be legally effective and kept up to date by a democratic legislator.108

Article 16 had a radical-democratic momentum.109 This is diminished by the fact that the reference to organisational rules or fundamental freedoms in the European Treaties ought to justify their constitutional character.110 Such an argument does not do justice to the tradition it refers to. It also ignores the difference between fundamental (market) freedoms and human rights.111

Reducing constitutionalism deprives the constitutional concept not only of its legitimising contents but also of its theoretical descriptive value and covers up a deficient end result.112 Although the applicability of the term ‘constitution’ within European law has, in the meantime, received extensive recognition, the reference to constitutional functions or elements may not be sufficient to justify it.

3. Heteronomy, Autonomy or Fragmentation of EU Law

The discussion about the European constitution continues on another different conceptual level, calling for the autonomy of European law. Does it enjoy autonomy113 or is it only valid through the intervention of national law?114 In Germany this question is more controversial in respect of the use of the term ‘constitution’ than it is in the EU, but the question of autonomy cannot be answered ‘correctly’ here; instead, its pertinence must be questioned. Two aspects provoke doubts: the Treaties are the undisputed basis of European law, but the legal consequences of this observation are debatable (1); and is it at all productive to include the complex relationship between national law and Union law in a binary scheme of autonomy or dependence (2)?

(1) The construction of an individual autonomous fundament for European law, perhaps as a Grundnorm, is often used in order to justify the ultimate authority of the ECJ.115 One must, however, question whether such a construction will be successful. The Kelsenian Grundnorm is not a norm but an extra-judicial fact,116 like the act of constitution-making. It is hardly convincing to assume a Grundnorm simply by pointing to the adjudication of the ECJ. And even if one did this, it would not be possible to construct a logical correlation between a certain ECJ standard of review for an ‘ultimate’ decision and the autonomy or constitutional character of European law. Even a strictly international concept of European law does not exactly speak for a sovereign reservation of national law or national courts.117

108 Above n 14.
109 Grimm, above n 77, 868.
110 See below section IV.2.
111 See J Kühlung, below chapter 13; and T Kingreen, below chapter 14.
114 Entscheidungen des Bundesverfassungsgerichts 73, 339, 375 (Solange II); ibid 89, 155, 183–4, 190 (Maastricht); but see also ibid 45, 142, 169 (Rückwirkende Verordnungen); C-D Ehlermann, ‘Die Europäische Gemeinschaft und das Recht’ in B Börner et al (eds), Einigkeit und Recht und Freiheit (1984) 81, 83; Kaufmann, above n 85, 428 fn 69.
115 For other legal orders of the old Member States, see FC Mayer, Kompetenzüberschreitung und Letztentscheidung (2000) 87ff.
116 Dreier, above n 30; Möllers, above n 50, 398.
The correlation between Union law and national legal systems—or more generally between different legal systems—can, in the second place, hardly be squeezed into any dichotomy between autonomy and heteronomy. In other words, the autonomy of a legal system is always relative.

In substance, the body of European law has undoubtedly become a methodically and systematically autonomous structure—much more autonomous than, say, the legal systems of the German Länder or the Spanish comunidades autónomas are from their national laws. However, this autonomy cannot be equated to a detachment from the contractual basis.

Formally the decisive criterion for the degree of autonomy—also covered by the term ‘competence-competence’—lies in the relationship between treaty-making and treaty amendment. The picture here appears unclear. On the one hand, the Member States remain, according to Article 48 EU as it stands, the only deciding factors for the amendment of the Treaties—in other words, the treaty amendment procedure has not become independent. On the other hand, the first tendencies towards a more independent procedure have emerged regarding the obligation to hear the European Parliament, above all in the accession procedure according to Article 49 EU, where its consent is actually needed. This remains different from federal national constitutions in that a single Member State can prevent a treaty amendment. It is possible to recognise the survival of Member State sovereignty in this, insofar as actually understands sovereignty not as the nation-states’ unrestrained ability to act, but normatively as the ability to obligate themselves. This remaining element of state sovereignty does not have to remain in existence but, until further notice, it does have to be mentioned.

The newly created right to leave the Union in Article 50 of the EU Treaty of Lisbon (TEU-Lis) has an ambivalent meaning. At first glance, this provision expresses the greatest possible respect for the sovereignty of the Members States, but looking deeper, the fact that European constitutional law grants this option changes this impression. Two effects of the provision can be mentioned that rather diminish the influence of single Members States: first, the provision may give the opportunity to draw a distinction between legal and illegal forms of secession; and secondly, the alternative to leave the Union may weaken an individual Member State position in a negotiation process. The provisions about ‘simplified’ treaty ratification in Article 48(6) and (7) TEU-Lis seem to underline the suspicion that the Lisbon Treaty may be the first step in a development towards treaty amendment by qualified majority.

Finally, the diagnosis of constitutional fragmentation is an important element of the European constitutional discourse. Put simply, the point goes as follows: whereas classical.

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118 Be it within federal states in public international law or in private law making procedures.
119 The same question arises if one wonders what the community administration might be—whether the Member States are implementing EU law or the Commission and its subdivision, or whether both are rather co-operating: E Schmidt-Aßmann, ‘Verwaltungskooperation und Verwaltungskooperationsrecht in der Europäischen Gemeinschaft’ [1996] Europarecht 270, 275ff.
121 Perhaps the highest degree of autonomy within a federal system can be found in the US Supreme Court’s actual understanding of dual federalism. For an interesting comparative account including the US, the EU and Germany, see D Halberstam, ‘Comparative Federalism and the Issue of Commandeering’ in K Nicolaïdis and R Howse (eds), The Federal Vision (2001) 213.
122 On the history of this German concept, see P Lerche, ‘Kompetenz-Kompetenz’ und das Maastricht-Urteil des Bundesverfassungsgerichts’ in Ule (ed), above n 113, 409, 409ff.
123 Pernice, above n 6, 171–2.
124 This concept can only be applied within a plurality of states: S Langer, Grundlagen einer internationalen Wirtschaftsverfassung (1995) 23.
125 An idea of power that historically never has been realised: SD Krasner, Sovereignty (1999) 3ff.
126 See U Di Fabio, Der Verfassungstaat in der Weltgesellschaft (2001) 92; Möllers, above n 50, 400.
127 I have to thank J Bast for this point.
128 To have another option can be a disadvantage. This point was discovered by TC Schelling, The Strategy of Conflict (1960).
state-based constitutions are (or were) able to create a political unity whose structure could be deduced from a single text, the European constitutional state of affairs represents a fragmentation that is typical for contemporary constitutionalism\(^{129}\) and especially for the state of public international law.\(^{130}\) Therefore, we need a new concept of constitutional fragmentation. Despite the fact that the contemporary structure of the European organisation and the European treaties is indeed characterised well by the notion of fragmentation, some doubts about this concept seem appropriate. First of all, the discussion overestimates the political unity of political nation-states. It seems always to look at centralised states like France instead of being oriented at federal structures like Switzerland or the USA, in which the question of sovereignty within the federation has always been left open.\(^{131}\) In order to develop a reasonable standard for the assessment of constitutional unity or plurality it could be helpful to compare the development of the European integration with the development of early other federal orders, eg with regard to the meaning of federal citizenship.\(^{132}\) Secondly, in comparison to other structures of public international law, the EU still functions as a de-fragmentation agency. Whatever can be said about the complexity of European law, the procedures are obviously bundling a huge variety of policies within a relatively homogenous procedural and organisational framework.

4. Limited Relevance of the Discussion Fronts

The discussion that has been presented so far stays, for the most part, within a binary conceptual framework. Also, the question whether or not Europe has a constitution always deals with whether it should have a constitution and, in the end, how the status of integration is politically assessed. These discussions may, moreover, owe their limited productivity to their conceptual polarisation strategy, which cannot exhaust the concept of constitution. The discussion often falls back upon a misstated version of the constitutional traditions developed above: limiting constitutionalism to the nation-state proved to be an etatist reduction of the revolutionary constitutional tradition. Reducing constitutionalism to functions or elements has proven to completely disregard the different constitutional traditions.

However, even if one cannot ask European integration to duplicate legendary democratic revolutions as in France, much still speaks for not excluding the idea of constitutionalism from the European integration and not identifying it with the integration process. Rather, the traditions have to be carefully adapted to the peculiarities of the integration process in a way that retains a normative value.

IV. Three Concepts of the Constitution in Europe

If the central theme of constitutional theory is the institutionalised relationship between politics and law, or more exactly the legalisation of politics and the democratisation of law-making,\(^{133}\) then this correlation must be developed on three conceptual levels. (1) On a theoretical level the notion of the *pouvoir constituant* for Europe will be reconsidered. This is the component of the tradition that most uncompromisingly stands for the democratic politicisation of law-making.

\(^{133}\) See above section II.3.
(2) At the level of positive law, the use of a formal concept of constitution, i.e., a written supreme norm, will be applied and examined regarding the European Treaties. (3) Finally, on a descriptive level, the concept of the constitutionalisation of European law has to be distinguished from the idea of a constitution itself and made fruitful for some phenomena of the integration. Referring to the categorisation developed in part II, the first level can be understood as an update of the revolutionary tradition, and the third point as making use of a power-shaping concept. Formal constitutionalism, the second point, stands between these two traditions.

1. **Pouvoir Constituant**—the Criterion for Equal Freedom

If it were possible to apply the revolutionary constitutional tradition to the European Union, the question about the existence of a European **pouvoir constituant** would have to be raised. However, is this admissible without distortions? In the academic discussion the category of **pouvoir constituant** is often formalistically equated with the question regarding the autonomy of European law. If European law is heteronomous, then the Member States constitute the **pouvoir constituant**; if it is autonomous, the citizens do. However, this approach misjudges the radical-democratic content of the doctrine of the **pouvoir constituant**.

The concept of **pouvoir constituant** refers to the democratic form of the emergence of a democratic system; it therefore contains two closely linked democratic elements. However, the paradoxical structure of the doctrine of **pouvoir constituant** makes it susceptible to misuse. On the one hand, its effect is only recognisable *ex post*, when a constitution has come into being. On the other hand, it cannot be regulated through law. The **pouvoir constituant** is quintessentially not controllable through law; it is the theoretical utopia of democratic self-determination. After all, the actual practice of constitution-making almost never satisfies the democratic principles contained in the constitution through which the practice is decided. We will come back to this point when we look at the Convention and its ‘method’.

Sieyès labels as **pouvoir constituant** the act of a nation of free and equal citizens, uncommitted and willing to bind themselves through the creation of a constitution. In whatever way this is constituted, at least certain minimum requirements may also be derived from this concept for the European level: the existence of a political mechanism for participation, in which the European citizens as a whole (not as parts of national or regional constituencies) have an equal and free right to participate. In this, the central requirement for democratic equality results from the republican idea of justification that is oriented towards the individual and in which political self-determination must always be a medium for the individual

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134 See above section III.3.
136 C Dorau, Die Verfassungsfrage der Europäischen Union (2001) 66ff; Pernice, above n 6, 171.
138 Beaud, above n 77, 321ff; Böckenförde, above n 13, 91.
140 A Negri, Il potere costituente (1992); a critical analysis of this approach is given in G Agamben, Homo Sacer (2002) 50ff.
142 See below section V.
143 Sieyès, above n 12; Sewell Jr, above n 21, 45ff; Brunkhorst, above n 6, 102ff; A Zweig, Die Lehre vom Pouvoir Constituant (1909) 116ff.
144 Augustin, above n 139, 401–2.
perception of freedom. Democratic processes for securing individual freedom must, according to this, grant all individuals whose freedom may be addressed a strictly equal chance to participate.\textsuperscript{145}

If these requirements are accepted, it seems somewhat problematic to allocate the European \textit{pouvoir constituant}, in its current phase, to European citizens. Only this kind of allocation would permit one to speak of a \textit{pouvoir} of the people in the demanding democratic sense that goes beyond the technicalities of treaty-making or amendment. Therefore, in a democratically demanding sense, the European Union does not have any \textit{pouvoir constituant}.\textsuperscript{146} A European-wide plebiscite about the constitution would radically change this. However, such a plebiscite would require European national societies that are ready to succumb to a majority of ‘foreigners’ in a national sense and to accept them as co-Europeans. This does not seem to be the state of integration. Among the diverse political processes that take place at the European level, there is not one that corresponds to these strict criteria.

The Member States’ representation, according to the principle of sovereign equality, must be distinguished from the citizens’ representation, according to the principle of strict individual equality.\textsuperscript{147} Not only does the original act forming the Treaties of Rome—the actual act of a \textit{pouvoir constituant sans peuple}—conform to the first principle of representation, but so does the treaty amendment in Union law found in Article 48 EU. The states’ representation disrupts democratic equality.\textsuperscript{148} In the debate about international relations this problem has long been recognised under the heading of foreign policy’s lack of democratic coherence.\textsuperscript{149}

But the argument does not end there. The legitimacy of constitutional law does not end with laying down the constitution,\textsuperscript{150} but is perpetuated in the law-making procedures set up by the constitution.\textsuperscript{151} Therefore, it seems possible to assess the legitimacy of the European law-making mechanisms without reference to the fact that the Union’s is more or less accepted with a positive ‘plébiscite des tous les jours’.\textsuperscript{152} Lack of revolt does not justify an existing political order.

The idea of a \textit{pouvoir constituant} refers to the legal institutionalisation of a political process according to the principles of democratic equality. Political process means procedures that generate possible alternative decisions and that are at least regularly controversial (ie they allow themselves to be broken down into a dichotomous scheme—eg right wing/left wing or government/opposition). Furthermore, as Hannah Arendt has stressed, politics is dependent on the possibility of action, ie political processes must be able to create something new, to cause a disruption, to detach themselves from context and history.\textsuperscript{153} However, the possibility of fresh action\textsuperscript{154} needs an institutional frame, mechanisms in which actors can be changed—such as elections. Therefore, the distinction between government and opposition is crucial for any legitimate political process. With this idea, the concept of a \textit{pouvoir constituant} presents itself

\textsuperscript{145} EJ Sieyès, \textit{Essai sur les privilèges} (1788); E-W Böckenförde, ‘Demokratie als Verfassungsprinzip’ in idem, above n 9, 289, 327ff; Maus, above n 16.
\textsuperscript{146} See HP Ipsen, Fusionsverfassung Europäische Gemeinschaften (1969) 35, 51; Gerkrath, above n 78, 127; less rigid Häberle, above n 87, 232ff.
\textsuperscript{147} Kaufmann, above n 85, 344–5.
\textsuperscript{148} Above n 16 and above n 139.
\textsuperscript{150} Augustin, above n 139, 319ff; Böckenförde, above n 13, 105–6; Peters, above n 57, 379ff (with differing normative implications).
\textsuperscript{151} See above section II.1(a).
\textsuperscript{152} Pernice, above n 6, 161 referring to E Renan, \textit{Qu’est-ce qu’une nation?} (1882); for criticism, see Augustin, above n 139, 349ff.
\textsuperscript{153} H Arendt, \textit{Responsibility and Judgment} (2003).
as radically input-oriented and cannot be satisfied by introducing deliberative structures that do not lead to the ability to act.

Understood this way, the doctrine of a *pouvoir constituant* takes quite a clear position between intergovernmental, supranational and federal theory in the discussion about the legitimacy and finality of Europe. It is not in favour of the nation-state and thus in favour of a primarily intergovernmental Union structure; to the contrary, it is in favour of an extensive federalisation of integration.

If one scrutinises the institutional system against this background, the results remain negative. The supranational contribution of the ECJ cannot be integrated into such a model; indeed, it should not be, since it stands for juridification. Also, the deliberative environment of the committee system cannot be allowed to belong to this due to the democratic inequality of those involved in it. Finally, political discretion, which the Commission possesses in relation to initiative and implementation competences, also does not fit into this reconstruction. A different paradigm could only be valid for the Commission insofar as it is accountable to the European Parliament. This is discussed under the heading ‘parliamentarianisation’. However, the fragmented electoral law of the European Parliament hardly satisfies the standards of democratic equality.

The doctrine of *pouvoir constituant* does not assume the existence of a somehow pre-legally characterised people. The democratic subject is a normative concept in the revolutionary tradition. It emerges in a normative sense as soon as the legal system addresses it. Conversely, the genuinely normative construction of *pouvoir constituant* permits the establishment of a parliament, elected according to the criteria of democratic equality, to be understood as the prerequisite for a democratic citizenry. Further substantial requirements are foreign to the radical-democratic concept of demos. Thus, institutions that satisfy the minimal requirements for the doctrine of *pouvoir constituant* could only arise in the establishment of a parliament, instituted according to standards of equality, or in the introduction of a Union-wide plebiscite.

If the doctrine of *pouvoir constituant* of the people stands for the democratic politicisation of legislation, then its institutional realisation in Europe faces two problems—first, the lack of democratic institutionalisation as described above; and secondly, the open question as to

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157 See above section II.1(a).

158 A critique of any federal legitimacy of the EU is given in Kaufmann, above n 85, 260ff.

159 For a critique, see JHH Weiler, ‘Epilogue: “Comitology” as Revolution’ in C Joerges and E Vos (eds), *EU Committees* (1999) 339, 347ff; also below n 261.

160 Regarding the technocratic legitimisation of the Commission and its limits, see G Majone, *Dilemmas of European Integration* (2005).


162 A precise analysis is given in Kaufmann, above n 85, 251ff; C Gusty, ‘Demokratiedefizite postnationaler Gemeinschaften’ (1998) 45 *Zeitschrift für Politik* 267, 269.


164 Brunkhorst, above n 9, 256ff; in particular about Europe: Brunkhorst, above n 6, 227ff. This may imply a complete abandonment of the notion of the people: Augustin, above n 139, 377ff.

165 Beaud, above n 77, 477ff.

166 See above section II.1(a).
what extent a political process that makes integration its main object can be institutionalised at the European level.\footnote{Optimism and good reasons for it can be found in P Steinberg, ‘Agencies, Co-regulation and Comitology— and What about Politics?’ in C Joerges et al (eds), Mountain or Molehill? (2002) 139, 141ff.}

If one generally understands a political process as an open-ended form of decision-making that leads to binding law and is in turn organised through binding law, then independent political processes are, indeed, located at the Union level. However, they are hardly such as to satisfy the democratic demands developed above.

Essential aspects of the integration process were deliberately withdrawn from any political realm and given over to the responsibility of the ECJ as the most effective supranational actor.\footnote{An institutional comparison in J Tallberg, ‘The Anatomy of Autonomy’ (2000) 38 Journal of Common Market Studies 843.} Despite the often-extended parallel between European integration and legal integration in the US,\footnote{Analyses in M Cappelletti et al (eds), Integration through Law (1985–8), 3 vols; T Sandalow and E Stein (eds), Courts and Free Markets (1982), 2 vols.} there is a decisive difference in terms of the establishment of democratic procedures. In the US the constitutional conflict between the national and state levels had already changed, early on, into a political conflict at the national level.\footnote{Elkins and McKertrick, above n 33, 258ff.} The crucial distinction between government and opposition\footnote{About the early US, see R Hofstadter, The Idea of a Party System (1970).} and the differentiation of the two levels. The process for creating constitutional law represented the conflict between the national and state levels through the tendency of one party, in the two-party system, to side with the Federal Government and the other to side with the State Governments. The European level lacks this interconnection of democratic conflict and integration, at least for the moment. This can be seen in the Parliament’s institutional behaviour, which is only just starting to develop a political conflict of its own with regard to the question of how much more integration is necessary.\footnote{A Héritier, ‘The White Paper on European Governance’ in Joerges et al (eds), above n 167, 73.} But only a political confrontation over integration itself within the European Parliament can create democratic legitimacy for integration, in a demanding sense. It has to be kept in mind that democratic institutions must combine an institutional and procedural consensus with material dissent.\footnote{M Neves, Zwischen Themis und Leviathan (2001).} Such a dissent at the European level might push the development and the factual relevance of (almost) egalitarian political institutions like the European Parliament. Maybe the conflict over the EU’s relationship with the US during the war on Iraq will be seen as a first indication of such a conflict—as was the relationship with England in the early history of the US. The failure of the candidacy for the European Commission of Rocco Buttiglione, inflicted by the European Parliament, followed the political scheme of right wing and left wing, not the logic of national affiliations. These forms of politicisation will be the first building blocks for an egalitarian political process at the European level.

Accordingly, what does this perspective on the doctrine of \textit{pouvoir constituant} mean for European constitutional discussion? It reminds us, first of all, that the demanding radical-democratic heritage of the late eighteenth century must not be limited to the institution of the nation-state. Also, it provides substantial criteria for a further development of the Union that wants to keep abreast of its own democratic rhetoric. The figure of \textit{pouvoir constituant} serves as a theoretical thorn in the side of the development of European integration with concrete institutional implications.
2. Constitution: The European Treaties as a Formal Constitution for the Union

It seems plausible to understand the European Treaties as a formal constitution of Europe. The Treaties constitute autonomous forms of law-making at the European level, and they are supreme above all other layers of Union law. The Treaties are ‘law-making norms’, and with this they couple the relation of politics and law at the level of the Union.

There are two reasons for taking a closer theoretical look at this formal constitutional structure. First, the structure brings up the element of the written form of the constitution that is often underestimated especially in the discussion about European law. Secondly, dealing with formal aspects is also e contrario advisable because the search for a substantial constitution for Europe hardly leads to a systematic concept. Indeed, there are apparently necessary connections between the idea of the constitution and all imaginable legal principles. If one emphasises the individual mobilisation of courts, then a connection with the concept of the rule of law lies close at hand. If one focuses on the organisational structures, then one can turn to the federal organisation, the subsidiarity principle or forms of differentiated integration. Functional considerations, finally, suggest declaring the open internal market or the fundamental market freedoms to be the constitutional core of integration. However, important as all these principles are for the consistent and complete description of the European legal system, it is far from clear that there is an urgent or necessary connection of any one principle to the idea of constitution or a connection to all of them. This corresponds to the widespread use in European legal literature of talk about a European constitution, without any theoretical elaboration of the term.

Limiting the analysis to its formal aspects leads to a more modest and selective result. Moreover, this seems to correspond to the ECJ, which referred to the Treaties as to a ‘constitutional charter’. The investigation of the formal constitutional characteristics also represents an opportunity to completely restructure the programmatically overloaded European constitutional debate.

However, before a systematic investigation of the formal constitutional characteristics of the Treaties can begin, we need to clarify terminological limits to the formulation of the ECJ. The words that appear in the French original of the judgments are ‘charte constitutionnelle de base...’

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174 On the concept of a formal constitution, see Kelsen, above n 15, 251–2.
175 Kelsen, above n 15, 98, 234.
176 See A von Bogdandy, above chapter 1, section II.1; Gerkrath, above n 78, 325ff.
177 See above section II.2(a).
182 M Maduro, We the Court (1998) 7; see A Hatje, below chapter 16.
qu’est le traité’. This not only reveals ambiguities in the translation\textsuperscript{185} but also gives a historical indication of the legally compromising character of the European Treaties, for in French constitutional history this term refers to the Charte Constitutionnelle of 4 June 1814, which is emphatically not a ‘constitution’ that the people gave themselves, but a basic law given by the king. The term indicates a democratic deficit and introduces the idea of royal constitutionalism into European history, holding back the democratic achievements of the Revolution for the time being.\textsuperscript{186}

Formal constitutionalism—different from the doctrine of pouvoir constituant already dealt with, and different from the concept of constitutionalisation yet to be dealt with—cannot clearly be assigned to one of the two constitutional traditions developed above. Written form and constitutional supremacy indeed first took on their central meaning when the revolutionary constitutional concept appeared.\textsuperscript{187} However, they can also be integrated into an evolutionary constitutional understanding, though it is no necessary part of it.\textsuperscript{188}

a) The Treaties in Written Form

The written aspect of a constitution has two functions.\textsuperscript{189} On a political level the constitutional text is a program against which the reader can repeatedly measure and criticise social reality. The constitution—and this is a heritage of the revolutionary constitutional tradition that can still be clearly observed in the US—develops an important symbolic function for a society, a normativity for the polity that it regulates.\textsuperscript{190} The text of the constitution is read again and again and reinterpreted, demanding and requiring new efforts of a society to improve itself. The general dissemination of a readable constitutional text promotes this claim. Furthermore, the requirement for documentation strengthens the de-coupling of constitutional guarantees from specific political matters. Ad hoc amendments to the constitution are avoided, and it provides a guarantee that the entire constitutional status quo is preserved and that no unwritten sub-constitutions can emerge.\textsuperscript{191} These important functions of a constitutional text must at least be put into perspective with regard to the European Treaties. The written form of the Treaties is precarious for a variety of reasons that can be traced back to the continuously functioning intergovernmental origins of European law.

First, the division of the founding charters into different treaties at the community’s founding moment has restricted their formal constitutional character. This problem has been deepened through the division of European Treaties since the Maastricht Treaty. The system of protocols and declarations intensifies this problem. According to Article 311 EC, the Protocols become part of the Treaty. Even though they are part of the juridification of the treaty amendment process,\textsuperscript{192} they are suspect, especially in cases in which their content violates core rules of Union law, like the ban on discrimination or the retention of the acquis communautaire\textsuperscript{193} in the Barber Protocol or the Protocol on the Application of the Charter of

\textsuperscript{185} ‘Charte’ can be translated as constitutional document or as constitution. The adjective ‘constitutionnelle’ seems to weaken rather than underline its constitutional character.

\textsuperscript{186} F Furet, La Révolution, tome II 1814–1880 (1988) 24ff.

\textsuperscript{187} See above section II.1(b).

\textsuperscript{188} As exemplified by the English constitutional tradition.

\textsuperscript{189} See above section II.1(b).

\textsuperscript{190} Ibid.

\textsuperscript{191} U Hufeld, Die Verfassungsdurchbrechung (1997) 208ff.

\textsuperscript{192} On the applicability of 48 EU on protocols, see W Meng, in H von der Groeben and J Schwarze (eds), Kommentar zum EU-/EG-Vertrag (2003) Art 48 EU para 38.

Fundamental Rights to Poland and to the UK. The protocol system is the European equivalent of the practice found in some Member States of allowing constitutional amendments that do not change the constitutional text. Less serious, but nevertheless belonging in this context, is the myriad of Member States’ declarations annexed to the Final Act amending the Treaties. They are, however, restricted in their legal effect to being, at best, interpretation aids. Also belonging in this context are the powers of Article 308 EC as well as the existence of special rules for the simplified treaty amendments in Articles 22(2), 190(4) and 269(2) EC and Article 42 EU.

The complexity of the entire treaty system corresponds to the confusing structure of the individual treaties, above all the EC Treaty. This is also the result of intergovernmental negotiation processes and diminishes the positive effects of a written constitution. In their current form, because of problems of style, the treaties cannot be used as the political catechism of a democratic polity.

Finally, the written form experiences its most extensive modification through specific forms of differentiated intergovernmental integration (eg through the ‘enhanced cooperation’ according to Article 43 EU and, though to a lesser extent, according to Article 11 EC, and through the ‘open method of co-ordination’). The latter procedure is particularly questionable because it leaves absolutely no formalised written traces in Union law: it is neither planned for in the Treaties nor does it lead to an edict of Union legal acts. The integration proceeds separately from the Treaties’ texts and remains invisible to their readers.

From a theoretical viewpoint these mechanisms are similar in that they constitute a political valve on the Union’s intergovernmental side with a quasi-constituent effect. This valve takes an institutional form as the European Council, Article 4 EU. Such a valve function, however, disturbs the balanced coupling of political process and legal form that is expected from constitutions. It is deficient even from an internationalist point of view because the national parliaments remain partially excluded. As a result, a look at the official side of the Treaties yields problematic answers regarding their material ability to function as a constitution. Beyond this, the structuring of the Treaties reduces the political symbolism of the constitutional charter until it is unrecognisable.

A legal solution to these structural problems could lie in the generalisation of the rule in Article 48 EU, which—like the ECJ argumentation using the constitutional concept—could be ascribed a unifying effect for the entire Union law system. However, the inclusion of all forms of intergovernmental sub-constitutional law in the amendment procedure of Article 48


195 For Austria in Art 44 Federal Constitutional Law: A special case is, of course, the UK.


197 Lenaerts and Van Nuffel, above n 183, 262–3.


200 See Dann, below chapter 7.


202 See above section II.1(b).

203 See below section IV.1.(b)(aa).
EU cannot be legally justified. At least, an amendment to the Treaties is not possible outside of the amendment procedure. Again one may recognise the analytical deficiencies of an approach that wants to completely detach European law from its intergovernmental roots. The Reform Treaty of Lisbon, which will consist of two treaties that basically rehearse the distinction between the EU and EC, will not change this. The quest for more general constitution-like procedural rules in the Treaty on the Functioning of the EU is undermined by the considerable amount of special policy rules in its Part III. The system of annexes and protocols remains.

b) Supremacy of the Treaties

Supremacy is part of a formal constitution. Regarding the Treaties, two levels of hierarchy are recognisable: (i) a possible hierarchy within the law of the Treaty; and (ii) the supremacy of Treaty law with respect to other Member State laws and Union law. At this point, the ‘metaphor’ of the European Treaties as a constitution takes a concrete legal meaning.

aa) Constitution as a Legal Argument—the ECJ and Hierarchies within the Treaties

The possible internal hierarchy (or the immanent amendment limits) of the Treaties leads to one of the classic problems of European law, ie to the issue of the consensual revocability of the Treaties. However, the conflict between treaty-rules of public international law and a supranational ban on leaving the Union proves to be merely illusory. The discussion mirrors the ambiguities of the concept of sovereignty, oscillating between a normative right and a factual capability. The following observation may be sufficient. If a state is actually able to leave the EU and the costs of withdrawal are worthwhile, then an opposing legal obligation will not play a practical role. If this ability does not exist, the question of law is irrelevant. The problem of the internal hierarchy of certain treaty contents may be of major significance in the future, in particular as a functional compensation for the inflationary, non-constitutional-like contents of the Treaties. The ECJ once used the notion of the constitution at this point in its first Opinion on the European Economic Area (EEA) to interpret the current Article 310 EC. In this controversial decision the court seals the EC legal system off from another legal order by using the term ‘constitution’. According to the Court, the prerequisite for homogenising the Union

204 A restrictive interpretation is proposed by Koenig and Pechstein, above n 201, 133ff, referring to the General Principles of public international law.
206 See above section III.3.
207 Kelsen, above n 15, 252–3.
213 For a critique, see Möllers above n 50, 399–400.
legal system follows from the constitutional qualities of the Treaties. The high degree of ambivalence of this line of argument may be well exemplified by the Opinion of AG Maduro in the Kadi case.\footnote{AG Maduro in Case C-402/05 P, Kadi v Council and Commission [2008] ECR I-0000, no 31ff. For an overview, see I Ley, ‘Legal Protection against the UN-Security Council between European and International Law’ (2007) 8 German Law Journal 279.} Here, the reference to constitutionalism leads to EU human rights as the correct measure for the UN sanctions. But the same argument could also be made in favour of judicial control of European acts by the Member States with reference to national human rights. This is the rationale of the German Maastricht decision. The hierarchical effect of the claim to constitutionalism cuts for anyone who makes use of it.

Although the decision in Les Verts\footnote{Case 294/83, above n 184.} is rarely discussed under the heading of internal hierarchy,\footnote{But see PP Craig, ‘Constitutions, Constitutionalism, and the European Union’ (2001) 7 ELJ 125, 133–34.} it is similar in its invocation of ‘constitutional’ qualities of the EC. The Court deduces a comprehensive demand for legal protection from the constitutional qualities of the Treaty.\footnote{See J Bast, below chapter 10, section II.2(b).} In an astonishing parallel argument to Justice Marshall’s in McCulloch v Maryland,\footnote{Above n 27.} the invocation of constitutional qualities serves to widen the content of the norm text and the jurisdiction of the court. In general, the use of ‘Constitution’ means to close EC law to the outside and to complete it inwardly. This occurs at the expense of the systematic coherence of the reasoning.\footnote{Similar circular reasoning in the founding period of Community law is analysed in B de Witte, ‘Direct Effect, Supremacy and the Nature of the Legal Order’ in P Craig and G de Búrca (eds), The Evolution of EU Law (1999) 177, 208.} However, such circular arguments may often mark the beginning of constitutional adjudication,\footnote{PW Kahn, The Reign of Law (1997) 134ff.} and its practical power to establish a legal system should at least not depend on its argumentative conclusiveness. Despite this, the use of the term offers a solution to a problem unforeseen by the text that is convincing in the result, an interpretation that is more praeter than contra legem.

\textit{bb) Supremacy of Treaty Law}

The supremacy of the Treaties over all levels of Member State law, including constitutional law, is often understood as an important constitutional element of the European legal order.\footnote{Hartley, above n 183, 233ff; Ipsen, above n 63, 266–7, 277ff.} In public international law, international courts generally apply and enforce international law obligations without regard to state law.\footnote{Art 46(1) Vienna Convention on the Law of Treaties; Weiler and Haltern, above n 117.} The enforcement of European law in respect to the Member States is, in this sense, not unusual. However, this enforcement becomes particularly visible because of the quantity of European law, on the one hand, and because of its direct applicability on the other.\footnote{Similar Weiler, above n 211, 20–1.}

In federal structures the constitutional supremacy of the higher level constantly proves to be a precarious phenomenon because decisions concerning the relationship between the levels are also regularly assigned to a court of the higher level. It is therefore not easy to compare the effects of constitutional supremacy within one level and between different levels. Despite these difficulties, it is necessary to undertake this comparison within an investigation of the supremacy of European Treaty law.

If the Treaties serve to juridify European law-making structures in a similar way to national constitutions, then they must prevail over secondary law. In this way the ECJ review of European law seems to be less intensive than that of Member State acts. It is also oriented, at
least in the result, towards political majorities in the Council.225 A similar observation can be made for the delegation of legislative competences from the Council to the Commission, on the one hand, and to the Member States on the other.226 There is undoubtedly a reason for these distinctions. If the core of the basic freedoms is anti-discrimination, then Member State acts are more likely to infringe upon them than European acts. A similar situation can be observed in the function of delegated rules as securing a homogeneous system of implementation,227 especially since written limits of delegation are unknown to the EC. Seen this way, a large part of the Treaty law focuses specifically on the Member States and legitimately differentiates between national and Union law. However, this justification of different supremacy structures has its limits. If one also understands fundamental freedoms as a ban on limitations,228 and if Community law’s implementation structure is increasingly designed homogeneously, then different standards of review may lose plausibility. But despite the growing level of integration, the judicial enforcement of European primary law with regard to the European level remains the exception. This can be seen clearly in the fact that a lack of competence at the European level has hardly ever been accepted by the ECJ.229

Modifications of Treaty supremacy can also be observed in other ways: Union law lacks a canon of legal forms that can formally portray the difference between various norm hierarchies.230 This affects not only the sub-treaty law, which does not have separate forms for basic and implementing rules,231 but also the Treaties, the contents of which are materially overloaded and which contain a multiplicity of secondary rules in this matter.

Both are harmful to the supremacy of Treaty law. The functioning of Treaty supremacy is not based on the isolated demand for supremacy of a complex of norms above all others; rather, it must be appropriately designed for application. Specifically, the question whether primary or secondary law is the actual standard of review, ie whether the supremacy of the Treaties is applied or not, is hardly discernible in the jurisprudence of the ECJ.

This will hardly be changed by the Reform Treaty of Lisbon, which uses the terms ‘legislative acts’ and ‘legislative procedure’ but does not draw a consequent distinction between ‘laws’ of secondary law and delegated, tertiary ‘rules’. The Reform Treaty at least makes it easier to distinguish both forms, proposing a substantial criterion for the limits of delegated rule-making (Article 290(1) AEUV provides for non-delegation of the ‘essential elements’ of a legislative act). The effects of these changes are uncertain, but real changes are most likely at the level of the standard of review by the European Courts. This may lead to a more finely tuned constitutional supremacy of the Treaties.

c) The Treaties as a Formal Constitution: Supranational Over-juridification and Intergovernmental Politicisation

Even if there are good reasons for understanding the European Treaties as the formal constitution of the European Union, this categorisation also allows the development of a critical account of their deficits. The Treaties’ quality as constitutional documents is limited by their division, by their overloaded contents, by the annex system and by continuously working intergovernmental super-legislative processes. Also, under closer scrutiny, the Treaties’ supremacy

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228 For similar, see Kingreen, below chapter 14.
229 Beyond the decisions concerning the external powers of the EU, see Case C-376/98 Germany v Parliament and Council [2000] ECR I-8419; see also A von Bogdandy and B Bast, below chapter 8.
230 Bast, below chapter 10, section IV.2.
proves to be limited, in that the ECJ does not apply the same standards of review towards the Member State and European levels. In both cases the Treaties only partially fulfil the task of coupling political process and legal form: in terms of written form, they prove to be intergovernmentally politicised; in terms of Treaty supremacy, they prove to be supranationally over-juridified. To put it another way, the Treaties insufficiently bundle the rules according to which the supreme law should originate. They bind the simple legislative processes through an excess of substantial law that has been decided upon intergovernmentally. The Treaties are under-formalised and over-materialised. The connection of both constitutional traditions, the democratisation of law-making and the juridification of the political process, has yet to prove itself in formal constitutional qualities. It is only partially successful in terms of the European Treaty system.

3. Constitutionalisation

The concept of constitutionalisation, which is ubiquitously used in the literature on European law, cannot be completely separated from the term ‘constitution’, though it should be clearly distinguished from it.232 To understand this distinction, one may return to the constitutional traditions categorised above. The concept of constitutionalisation can be assigned to the second, power-shaping tradition: it receives its emphasis less from the democratisation of law-making than from the incremental juridification of the political exercise of power. Regarding the British constitutional tradition, which is shaped by the common law, constitutionalisation results in a control of the executive branch by the courts, which develop general standards of procedural justice. This enables spontaneous forms of juridification without a legislative process. It is important to note that the distinction between public law and private law plays a minimal role in this constitutional tradition,233 if it plays a role at all.

In the context of supranational and international law, the concept of constitutionalisation describes the developing autonomy of international regimes from intergovernmental action.234 Constitutionalisation can therefore be understood as a phenomenon of the gradual formation of a new legal level. It may be described as the unorganised intensification of a legal regime whose increasing quantity of norms finally enables the emergence of normative structures—of legal principles—that can be generalised and that are also, at least factually, difficult to amend due to their generality.235 In this way, a spontaneous internal hierarchy of norms arises that increases and accelerates through the multiplication of adjudicative authorities.236

Such a broad understanding of constitutionalisation also enables the inclusion of private law phenomena. In particular, the development of the common law demonstrates a constitutionalisation phenomenon in its amalgamation of private law and ‘constitutionally legal protections’.237 The central role of subjective rights is a decisive factor for the advanced constitutionalisation of the European Union. This also results from the direct applicability of

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232 For similar, see Craig, above n 217, 126–7.
235 This important observation can be found in Heintzen, above n 214, 36.
236 Weiler, above n 211, 9
Community law,\textsuperscript{238} which provides for an intensive juridification.\textsuperscript{239} The two constitutional traditions introduced above can be found again: the order-founding tradition assumes a political basis for the establishment of the entire legal system in a revolutionary discontinuity, in political action in an Arendtian sense, emphasising the legislature. The concept of constitutionalisation corresponds to the power-shaping tradition, to a gradual and self-referential\textsuperscript{240} process of juridification. This process is pushed particularly by the courts, but also by an administrative practice that is structuring itself and that is also structured by academic legal doctrine. Such processes of evolving constitutionalisation are of major importance for European law.

\textbf{a) Common European Constitutional Law—Establishing Principles}

The discussion about the formation of a Common European Constitutional Law\textsuperscript{241} can serve as an example of a constitutionalisation process in Europe. Against the background of homogenisation requirements, which run in both directions from the European level to the Member States and vice versa (Article 6(1) EU\textsuperscript{242}, Article 23(1) German Basic Law\textsuperscript{243}), common structures of constitutional law could be developed horizontally among the Member States or vertically between them and the Union. Certainly, one must express doubt as to the use of the notion of a common law,\textsuperscript{244} especially for organisational rules.\textsuperscript{245} While comparable structures arise in the relationships between governmental bodies and citizens in the Member States and the Union, this applies less to the organisational norms. In concrete terms, while the legal protection of legitimate expectations\textsuperscript{246} or the proportionality principle\textsuperscript{247} could lead to common solutions,\textsuperscript{248} this does not apply in the same way to either the issue of democratic legitimacy or to separation of powers, or rather the ‘institutional balance’. Indeed, comparisons can also be made here, but potential solutions are so strongly influenced by the prevailing regulatory context that a common European legal doctrine may hardly result. Additionally, the organisational structures of the Member States are only selectively affected by Union law. The development of a common canon of argumentation will most likely be limited to civil rights; however, something different would most likely apply to the unwritten rules of loyalty to the Union and between the Member States that is anchored in Article 10 EC as well as in national constitutions.\textsuperscript{249} Rules that can be generalised for the conduct of courts\textsuperscript{250} and other public authorities may also arise from this concept.\textsuperscript{251}

\textsuperscript{238} Hartley, above n 183, 187ff; Weiler, above n 211, 19–20.
\textsuperscript{240} In the sense of a law of the law, not a law of politics, see Hofmann, above n 71, 40–1.
\textsuperscript{242} Schorkopf, above n 208, 69ff.
\textsuperscript{243} For other Member States, see Schorkopf, above n 208, 45ff; see C Grabenwarter, above chapter 3.
\textsuperscript{244} Härberle above n 241, 268.
\textsuperscript{245} The attempt to define a common concept of separation of powers regarding the EU, the US and Germany is made in C Möllers, Gewaltengliederung (2005).
\textsuperscript{247} E Ellis (ed), The Principle of Proportionality in the Laws of Europe (1999).
\textsuperscript{248} A Schmitt Glaeser, Grundgesetz und Europarecht als Elemente europäischen Verfassungsrechts (1996) 191ff.
\textsuperscript{250} See FC Mayer, below chapter 11, section II.2(e).
\textsuperscript{251} M Blanquet, L'article 5 du traité CEE (1994).
b) Charter of Fundamental Rights

The integration of the Charter of Fundamental Rights\textsuperscript{252} into the Lisbon Treaty also belongs within the context of constitutionalisation and thus the power-shaping constitutional tradition. The Charter places European actions under further legal control, with no complementary democratic processes being available. With that, it institutionally transfers the further extension of the legal system to the courts, and has clearly been part of the continuity of European development since its beginnings. This raises the question of whether a further level of civil rights would restrict the political discretion too much—creating a problem that is specifically known in German constitutional law.\textsuperscript{253}

On the other hand, introducing the Charter also fulfils a symbolic function that is tied to the revolutionary constitutional tradition in that it documents the European civil rights protection. However, the exceptions for Poland and the UK in the relevant Protocol illustrate the remaining power of intergovernmental politics even within this core project of European constitutionalisation.\textsuperscript{254} From a theoretical point of view, rights have to be equal rights.\textsuperscript{255} A European charter of rights excluding some Europeans from equal access to enforcement mechanisms provides not rights, but privileges.

c) Administrative Constitutionalisation and Governance

If constitutionalisation is understood as a spontaneous form of juridification that leads to a legal order without legislative intervention, then the administration also becomes an actor. Even though it is difficult to identify an independent ‘European Administration’ between European and Member State organs,\textsuperscript{256} systematic structures are nevertheless recognisable. The development of a European administrative law can then be understood as a phenomenon of constitutionalisation.\textsuperscript{257} At the first level, such structures result from principles of administration in an inductive comparison of Member State administrative legal systems.\textsuperscript{258} However, systematic structures also emerge from the actions of Union organs.\textsuperscript{259}

There have been diverse discussions about the codification of a European administrative procedure,\textsuperscript{260} about the legitimacy of comitology,\textsuperscript{261} about international administrative action\textsuperscript{262} and about a European general administrative law.\textsuperscript{263} The Commission’s White Paper on Governance, which quite specifically argues on the basis of the existing Treaties and avoids the political process of legislation, is closely connected to this.\textsuperscript{264} These discussions care less about legislative programmes than about the reconstruction of administrative practices in order

\begin{itemize}
\item[\textsuperscript{252}] EO Eriksen et al (eds), \textit{The Chartering of Europe} (2003).
\item[\textsuperscript{253}] GF Schuppert and C Bumke, \textit{Die Konstitutionalisierung der Rechtsordnung} (2000).
\item[\textsuperscript{254}] Protocol (No 30) on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom.
\item[\textsuperscript{255}] Coming from a Kantian conception: C Menke and A Pollmann, \textit{Philosophie der Menschenrechte} (2007).
\item[\textsuperscript{257}] See J Schwarze (ed), \textit{Administrative Law under European Influence} (1996).
\item[\textsuperscript{258}] E Schmidt-Aßmann, \textit{Das allgemeine Verwaltungsrecht als Ordnungsidee} (2004) 385.
\item[\textsuperscript{260}] C Harlow, ‘Codification of the EC Administrative Procedures?’ (1996) 2 \textit{ELJ} 3.
\item[\textsuperscript{261}] C Joerges and J Neyer, ‘From Intergovernmental Bargaining to Deliberative Political Process’ (1997) 3 \textit{ELJ} 273, 293ff.
\item[\textsuperscript{262}] Weiler, above n 211, 96ff, 283ff.
\item[\textsuperscript{264}] COM(2001) 428; see the critiques in Joerges et al (eds), above n 167.
\end{itemize}
to satisfy certain standards of procedural justice. The following academic discussion on the conception of ‘governance’ remained highly technocratic. The concept is oriented towards the improvement of output, which has to be defined in a quantifiable and comparable manner.

The concept of constitutionalisation that is applied here, the construction of administrative legitimacy, is largely independent from a free and equal democratic process. Indeed, not all concepts correspond to a merely ‘expertocratic’ model of legitimacy. However, the political environment of the named administrative structures is definitely not coupled with a general equal chance of participation for all citizens. It is not accidental that this facet of the constitutionalisation discussion, although maintaining its claims to novelty, remains quite clearly within an English conceptual and theoretical tradition, and its critique of a French concept of law-bound hierarchical administration. Like the evolution of the common law, constitutionalisation is understood as a spontaneous social process that is not limited to private actors but also applies to public authorities.

The two constitutional traditions that were reconstructed above can therefore be portrayed as two possible concepts of a European administration. On the one hand, there is a pluralistic concept, on the other hand, the idea of a hierarchical unitarian administration. The academic discussion moves more along the lines of the first model; the adjudication of the ECJ may adhere more to the second model. The dilemma in this is that the guardian of a European administrative unity is not a politically accountable government, but a Commission that is still operating with a technocratic self-understanding.

d) The Legitimacy of Evolutionary Constitutionalisation

Juridification without democratic politics: the forms of constitutionalisation introduced here are, without doubt, well suited to increasing the legitimacy of European law. In common, they foster rationality, systemic approaches and transparency of law through the development of principles as well as through the institutionalisation of deliberative procedures. Such developments are necessary in a legal system that is, institutionally and in terms of legitimacy, split like that of the EU. The plurality of the European legal system hampers a hierarchical understanding, as is indicated by the constitutional ideal of a democratic pouvoir constituant.

The concept of constitutionalisation originates from a tradition that shows its great sensitivity through the evolutionary development of legal principles on the basis of case-by-case problem solving. However, for precisely this reason it is doubtful in what way this concept is suited to lay claim to legitimacy among legal developments at large. It is quite possible that the chosen path of constitutionalisation is only considered legitimate because it was indeed chosen. Spontaneous constitutionalisation processes without attributable political decisions construct integration as an almost naturally grown ‘evolution’, ie a development that can neither be


266 As favoured by Majone, above n 160.

267 Explicit criticism is in C Harlow, ‘European Administrative Law’ in Craig and Búrca (eds), above n 220, 261, 264ff.


270 For the criticism of the hidden common law context of certain theories of European constitutionalism, see C Möllers, ‘Transnational Governance without a Public Law?’ in C Joerges et al (eds), above n 237, 329.


272 This is made very clear by the Commission’s White Book on Governance: FW Scharpf, ‘European Governance’ in Joerges et al (eds), above n 167.

273 Hence the title of Craig and de Búrca (eds), The Evolution of EU Law, above n 220.
fundamentally changed nor democratically answered for. Herein lies the danger of a concept of constitution that is limited to constitutionalisation.

V. European Constitutional Law—A Legal Field and its Academia

The difficulties in defining what European constitutional law could be are, at second glance, less Europe-specific than one may presume. For example, German public law jurisprudence has never succeeded in giving a consistent meaning to the expressly maintained difference between constitutional law and Staatsrecht. Moreover, it is not always possible in federal structures to clearly assign a certain body of law to a certain level of law production. This is also true for the European Union.

What is really being addressed when European constitutional law is being discussed? Even if this question cannot be unambiguously answered for national structures, determining this branch of law at the European level raises additional problems. This is a result of the intense association of primary and secondary law in the ECJ standards of review, and in the blend of Union law and national law that is particularly typical for directives. Consequently, the degree to which European constitutional law can be determined is completely dependent upon very concrete institutional correlations. The fact that selective demarcations regarding national law as well as secondary law are not always possible should, however, not prevent a discussion around ‘European Constitutional Law’. Thus far it makes sense to talk about constitutional law at a time when a supranational regulatory context exists that is able to establish law-making structures that go beyond selective dispute resolution. If this is the case, legal hierarchies emerge. A specific field of juridical questions is then connected to the term ‘European constitutional law’. These questions can be reasoned from the three-part concept that has been developed in this chapter.

To begin with, what belongs to this is—true to the revolutionary constitutional tradition and the doctrine of pouvoir constituant affiliated with it—the reconstruction of Union law’s democratic legitimacy. This question cannot be left either to political philosophers or to empirical social scientists. It represents a genuine juridical problem to the extent that the concept of legitimacy joins democratic theory with the codification and interpretation of positive law. The question as to where political processes are located at the European level, and whose rights of participation are in play, is a focus of a European constitutional law. This means that European constitutional law cannot limit itself to positive law but must also use theoretical tools.

Furthermore, any collisions between the primary Treaty law and other Union and national legal rules continue to belong to a European constitutional law—true to a formal constitutional concept. The questions regarding the dogmatic and institutional resolution of conflicts between Union and Member State law, and regarding the standard-setting function of primary law

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275 Möllers, above n 50, 173.
277 Weiler, above n 211, 12.
279 Häberle, above n 87, 123ff.
280 Accepting the general distinction between constitution and constitutional law, but focusing on a further state-centred concept, is P Badura, ‘Verfassung und Verfassungsrecht in Europa’ (2006) 131 Archiv des öffentlichen Rechts 423.
with respect to secondary law, are the focus here. A wealth of specific problems can be tacked on to this, eg the delegation structure within the Community law and the implications various understandings of Union fundamental freedoms and civil rights have for the competences of the European level.

Finally, the development of legal principles for Community law that result from judicial and administrative practice belongs to a European constitutional law—true to the power-shaping constitutional tradition, and the understanding of constitution as an evolutionary constitutionalisation process that belongs to this. The chaotic complexity of secondary law demands—not only for practical and systematic reasons, but also for legitimacy reasons—structures that stand out from mere single regulations and can be recognised as principles.

Considering the definition of a European constitutional law, three different aspects must be considered regarding the duties of the academic jurisprudence in the European constitutional discussion. First of all, the types of constitutions reconstructed here, revolutionary and power-shaping constitutional understandings, assign various tasks to academic jurisprudence. While evolutionary constitutionalisation processes allow jurisprudence to become an important legal source through establishment of principles and systems, the influence of the discipline is repressed not only through revolutionary incidents but also through the activity of the democratic legislator—jurisprudence’s restrained ‘positivist’ self-image is the methodical correlate here. This correlation explains the importance of juridical law-making and of arguments inspired in a philosophical manner, which is growing again specifically in international and supranational regulatory contexts.  

This affinity is just another formulation for a democratic deficit because legal expertise—like every other expertise—lacks a mandate for legitimate law-making. Against this background, jurisprudence must be careful not to privilege certain constitutional concepts just because they could strengthen its own institutional role. Specifically, this means that the recommendation for the problem of coupling politics and law at the level of the European Union cannot simply be ‘law’. Many aspects speak much more for the fact that the Union has hit the ‘limits of informal constitutional development’, which presents itself, above all, as a phenomenon of juridification without corresponding political processes.

Besides the danger of privileging certain forms of constitutionalisation, jurisprudence also faces the danger of a lack of temporal distance to the European constitutional project. This results from interventions in primary law that are comparatively frequent and intense. It is particularly important for the legal sciences, which necessarily work with a retrospective view, to uncover the basic and longer-term trends among current developments.

Finally, the theoretical discussion is suffering quite evidently from a lack of distance: the constitutional concept still serves as a kind of shibboleth that is supposed to express a fundamental position on the European constitution. Yet the amalgamation of constitutional politics and constitutional theory is nothing new. A glance at the history of legal scholarship shows that even objective contributions take sides in a political sense. However, this taking of sides, if it is to have an intrinsic theoretical value, must not limit itself to making the constitutional concept a taboo, but it should not stretch the concept to complete status quo...
submissiveness either. Inevitably, every use of the concept at the European level feeds on the pathos transferred to it by the history of nation-states. Thus, the question in what way this pathos is deserved requires theoretical critique.

VI. Epilogue: From Constitution to Reform

The nominal constitutional process ended with the decision of the French and Dutch people contra the Constitutional Treaty. A Reform Treaty, the Lisbon Treaty, with an almost identical content, is now under consideration, but has been blocked politically by another referendum of the Irish people. With regard to these events, three points may be relevant for a constitutional theory of European integration: (1) the deliberative process in the European Convention and the Intergovernmental Conference; (2) the search for ‘constitutional moments’ in the European process of constitutionalisation; and (3) the value of constitutional nominalism.

1. Constitutional Deliberation: Convention and Intergovernmentalism

The development of the European Convention was a reaction to the practical failure of the Intergovernmental Conference in Nice. Nice seemed to prove the deficiencies of intergovernmental decision-making procedures, long since analysed by political scientists. A ‘real’ constitution, therefore, should not be the result of an intergovernmental pork barrel compromise but of a genuine deliberative procedure: Habermasian virtues instead of intergovernmental vices. The European Convention should remind us of Paris and Philadelphia, not of Amsterdam and Nice. One important consequence of this insight was the integration of a great number of European and national MPs in the Convention; indeed, it seems to be the case that the discussion in the Convention was, at least in some of the working groups, more constructive and problem-oriented than in the Intergovernmental Conference. And, as we know from historical research, none of the legendary constitutional conventions lived up to the democratic qualities they were defining for the constitution to be written. There is no reason to be too critical of the discussion culture within the Convention.

Yet the process remains peculiar: an intergovernmental body empowers a deliberative body to write a legal text that can be modified and has to be decided upon by the intergovernmental body. This irritating structure underlines the unsolved political dilemmas of European integration. On the one hand, there is no legitimate power that can make constitutional decisions beyond the Member States. All academic speculation about deliberation as a substitute (and not only a supplement) for national political processes remained mere talk. But on the other hand, there is a deep and well-founded mistrust in the way in which these national processes co-operate at the European level. The Convention shows that Europe has no trust in the only decision-making procedures that Europe can accept as legitimate.

The Convention method therefore reveals a certain irony. The deliberations within the Convention do not add any democratic legitimacy to the constitutional process. The Convention remained distant from the political consciousness of the overwhelming majority of

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288 See U Haltern, below chapter 6.
290 Available at http://european-convention.eu.int.
292 Above n 135.
European citizens—and it failed to a certain degree in its contact with the national people. Yet
the Convention produced a result that, though deserving of criticism, was much better than any
purely intergovernmental result would have been. The ‘deliberative’ Convention worked not as
a legitimate but as a functional problem-solving body.

2. Constitutional Moments: The Political Remaining Outside

The incremental character of the process of European integration is notorious. Hannah Arendt’s
credo that politics needs disruption and acts of creation seems to be rather far from the
European polity and its political organs: obviously far from the Council, which knows no form
of disruption whatsoever but works in steady political continuity, but also from Parliament and
the Commission, whose work seems to be only mildly affected by change to its membership or
elections. Yet European politics still dreams of such an Arendtian disruption, of its own constitu-
tional moments. The Constitutional Treaty seemed to be the result of this dream, giving the
primary law a new name, but without changing the contents of European law more radically
than, for example, the Treaty of Maastricht. The Constitutional Treaty tried to bring a nominal
innovation without a substantial constitutional moment, but just this nomination failed in the
negative moments in France and the Netherlands.

But this is not the whole story: it is one of the mysteries of European integration that the
lack of constitutional moments is accompanied by the fact that the character of the European
polity has dramatically changed in the space of 20 years. One just has to compare its status
before the Single European Act with its status after the various enlargements and the European
Convention. Major changes without a major change? A rapid institutional evolution without
constitutional moments? Or are there still constitutional moments that can be attached to this
development? Does the evolution have its revolutionary elements?

One of the first constitutional moments of the new European Union is the year 1989, and
the way this event worked for Europe may be typical for the future. In Eastern Europe the end
of the cold war was perceived as a national act, as the rebirth of democratic nation states, but it
also had its own political meaning for European integration. This uncertain connection
between national political events and their European meaning seems to be the way in which
‘the political’ in Europe will work in the future, as has been the case in many political disrup-
tions at the national level, such as the elections in Austria in 1999 and in Spain in 2004. It was
the terror attack in Madrid that influenced the outcome of the Spanish parliamentary elections.
It was the change of the Spanish government that isolated the governmental resistance against
the Constitutional Treaty. The referenda in the Netherlands and France (both in 2005) ended
this project. The first referendum in Ireland delayed the Lisbon Treaty. In all these cases the
political momentum pro or contra integration was the result of a national political process—or,
to be more precise, the result of a Europeanised national political process. Considering the
referenda in France and the Netherlands to be about national politics is based on the false
assumption that European and national politics can be cleanly dissected from each other.
Rather, their political processes become mutually contaminated as a consequence of multi-level
institutionalism.

Similar observations can be made at the global level. The war in Iraq created a genuine
political conflict within the European Council, a conflict that did not adhere to the right/left

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293 The term has religious overtones but may be unavoidable for an analysis of the social practices of politics

202
distinction. As analysed above, it may be such a conflict, rather than any form of consensus, that will enable a genuine European democratic process to be made. However, this illustrates again how dangerous the making of a real supranational democratic process can be. The making of the US resulted in a democratic conflict between two parties that finally led to a civil war.

At the moment, procedures within the European institutional framework are not ready to produce such a political momentum of their own. One has just to compare the relevance of the above events with the political relevance of the elections to the European Parliament to see that. The political process within the institutions only gains genuine political relevance by means of national or international political conflicts.

3. Constitutional Honesty: The Limits of Constitutional Nominalism

Was the Constitutional Treaty a constitution? Or is it true that ‘[t]he Original Sin was to confuse the Institutional with the Constitutional and to peddle the idea that Europe was in need of a Constitution’? After the Second World War, the German émigré Karl Loewenstein developed the notion of a ‘semantic constitution’ to give a name to political systems in which the text of the constitution is only a mask behind which a completely different political system is hidden. The European Union is by no means a totalitarian system, but the fact that it tried to give itself a constitution also means that it submitted its political order to a very demanding tradition. At least as regards the democratic-revolutionary tradition that served as the ideological blueprint of the political events in 1989, one will have to accept that the Constitutional Treaty was not a constitution.

The Constitutional Treaty connected abundant constitutional symbols with a traditional treaty form, a technique that looked very much like a deception of the citizens, or at least like a semantic constitution in Loewenstein’s sense. While its first part defined general constitutional concepts, one had to look up the Byzantine small print in part three to understand the whole—this was not a constitution-like design. The text broke the constitutional promise as soon as it was given. In most of its content the Lisbon Treaty follows the failed Constitutional Treaty, but without making use of constitutional semantics. How can we evaluate this development?

The revival of the Constitutional Treaty in substance may well be understood as political treason, namely with regard to the democratic majorities in France and the Netherlands, who will have no further opportunity to vote against an almost identical treaty, but the question remains whether the peoples of France and the Netherlands voted against the substance of the Treaty or rather against its nomination as a constitutional treaty. In any case, it seems impossible to dismiss the results of the referenda just as consequences of internal affairs. The readiness of many European lawyers to ignore the referenda tells us much about the authoritarian views of parts of our discipline. From a democratic point of view, the referenda need to have political consequences; however, the decisive consequence may be seen in the re-nomination of the treaty project. The failure of the constitutional nomination is not a failure

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295 See section IV.1.
298 But see the interesting comparison between the EU and authoritarian Austria of the 1930s in A Somek, ‘Authoritarian Constitutionalism’ in C Joerges and NS Ghaleigh (eds), Darker Legacies of Law in Europe (2003) 361, 381ff.
299 See above section II.1.
of institutional progress but of its normative evaluation, of the Europeans’ expectations towards themselves.

Europe paid a heavy price for this double deception. Had it been presented for what it really was rather than misrepresented as a Constitution (based on the earlier deception that one needed a constitution) the peoples of Europe in their wisdom would have welcomed it for what it really was: a Reform Treaty adapting the European Union to enlargement.\(^{300}\)

Therefore, the question is not if the state of integration is ‘really’ ready for the concept of a constitution. This question misses the very normativity of the idea. The question is if Europe is willing to define its own political identity by means of our well-known traditional concept. From this perspective, the Lisbon Treaty is not treason but an unpretentious prolongation of the European project. If the state of European integration will some day seem to a European democratic majority worth the idea of a political constitution, then this wish will be self-fulfilling.

\(^{300}\) Weiler, above n 296, 652.
I. Entangled Discourses on Finality

The Schuman declaration left the question of Europe’s ends unanswered; a space where ‘war . . . becomes not merely unthinkable, but materially impossible’ was utopia, a *focus imaginarius* worth pursuing but impossible to reach. The famous ‘ever closer union among the peoples of Europe’ from the Preamble of the Treaty establishing the European Community was lofty in its aspirations, even though it later became the foundation of a whole strand of supranational thought.\(^1\) To be sure, it was widely felt that ‘ever closer union’ was needed to avert war and create prosperity, but could that be all? There seemed to be a cold modernist void, a spiritual absence at the heart of the European integration project.\(^2\) The Treaty on European Union tried to fill this void with values, hopes, rights and cultural artefacts. With the difficult ratification process, however, and a growing lack of popularity it provided little guidance as to the Union’s finality. The same holds true for the Constitutional Treaty and its demise. If we do not know who we, as Europeans, are, and if we cannot even be sure of the gestalt of the Union, how will it

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be possible to say anything of import about its finality? If we do not know what it is, we cannot know what it is for.

However, the process of European introspective turns out to be challenging. Even basic categories such as space (territory) and time (history) remain notoriously elusive. Geographically, Europe has no clear boundaries in the south or in the east. Its eastern borders are neither organic nor natural, but are contingent upon political agreements. When Peter I of Russia opened up Russia people migrated from the Don to the Volga, whereas the cold war shifted them back into the opposite direction. Europe’s southern borders are just as hard to pin down, and President Sarkozy’s Union for the Mediterranean is a recent reminder of their obscurity. The Mediterranean Sea was more of a link than a border, with ‘Mediterranean’ meaning mid-landish and denoting the countries bordering the Mediterranean Sea both on the north and the south. Europe, Asia and Africa were bound together as a unit, and it was only the recent decolonisation that turned the Mediterranean Sea into a marker of division.

Like space, time and the past are social constructions. Of course, history is often used to form emblematic identities and political ideologies, and the past takes on the form of a chronological progression with linear narrations linking the past and the present. Such narrations are usually the result of a filtering process designed to legitimate the current state of affairs. The way we understand the past is less dependent on facts and events than on selective interpretations attributed to them. We construct the past not in the past, but in the context of the present; whatever meaning we obtain from such constructions is more eloquent with respect to the present than to the past. Little wonder, then, that we are basically clueless as to where to start when we think about European history.

Moreover, the narratives we use to find out about ‘us’ as Europeans overlap, cut across and contradict each other, and reflexively refer to each other. We are facing a network of meanings that is hard to decipher. Europe is a forest of ideas, symbols and myths; it is a mirror that reflects the image of a multitude of concepts and meanings, rather than a prism that concentrates the minds and hearts of people around a single theme.

Political identity, under these conditions, is difficult to develop. What we mean by politics entails a commitment to both history and territory. This is precisely what marks the difference between politics and morality. Only the latter can appear timeless and universal.

In this light, and in the face of the staggering deficit in the Union’s social legitimacy, it is little surprise that we are facing a host of entangled discourses on European political identity and the finality of European integration. They draw on different empirical and analytical resources and point into different normative directions.

On the one hand, there is a narration of progress that sees deepening and enlargement—from enhanced co-operation via political community to constitutional treaty and European Federation by way of a deliberate political act of re-founding Europe—as a necessity and the fulfilment of a historical vision. While the trajectory is always the same, the vectors leading there range from politics (peace), economy (prosperity through the Common Market), history (learning from history) and ethics (solidarity among European citizens) to law (‘ever closer Union’), and leave little room for alternatives (transnational problems requiring transnational solutions). This discourse expands seamlessly towards the ‘European dream’ (Rifkin) of a global community under law in which cultural, economic and political differences are overcome in a process of global constitutionalisation, in which people will define themselves as Weltbürger and in which national institutions will work on preparing and negotiating the globe-spanning contrat social.

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3 Sallust called it Mare Internum, and other names include Mesogeios, Greek for inland.
4 P van Ham, European Integration and the Postmodern Condition (2001) 58.
5 J Fischer, From Confederation to Federation (2000).
On the other hand, there is a eurosceptic discourse that emphasises the local, narrows the (moral, economic, political or legal) virtues of integration and introduces dichotomies: common market gains are tempered by painful processes of adaption and ‘victims’ of globalisation, a community of solidarity is to be weighed against unreasonable demands of virtuosity, a community under law is pitted against communities defined by anything but law, such as culture, language, interests, religion, etc. A shared European identity finds itself in opposition to collective, mostly national, memories, and all the metaphors differ: instead of charging ahead, Europe should take a breather; instead of reform, consolidation; instead of action, deliberation; instead of decision, discussion. This discourse places a premium on the organic, natural, grown, immobile and earthy, and discounts the created, projected, mobile and liquid. Its impression is often that of being conservative and critical of contemporary culture, emphasising substance rather than function, values rather than purposes, fate rather than design, and the difference between surface/depth or thin/thick rather than networks.

Both discourses feed on experience and praxis. The progress narration is informed by structures best described by theories of transnational governance, and includes elements such as global trends of state transformation, governance networks, multiple actors in law-making, heterarchy, polycentricity, interlegality and the re-formation of boundaries between national and international, formal and informal, public and private, centre and periphery, or inside and outside. The eurosceptic discourse is informed by the widening gulf between the Union and its citizens, and the ensuing alienation many Europeans feel. The tensions introduced by this discourse lead directly to the ambivalence of what the Union has to offer: Union citizenship and free movement of persons and services are both promising and terrifying. To move means to arrive somewhere as well as to leave something behind; to win new insights into the Other means to lose firm beliefs and particularisms; old, and cherished, identities are under siege. The Union has turned, from a response to post-war angst, to a replicator of post-modern angst. In this light, it is hardly astonishing to find a discursive hotchpotch in European Union documents. One of the best examples is surely the Draft Constitutional Treaty as it was handed to the President of the European Council on 18 July 2003. It strives for an Aufbruch as well as a Schlusstrich. Its Preamble aspires to put an end to the self-deprecating doubts about the idea of Europe. Many people have ceased to believe in such ideas as the civilising power of European modernity because they remember that the idea of Europe embodies prejudices that lie deep in the history of Europe. Delanty writes that ‘the idea of Europe cannot be disengaged from the atrocities committed in its name’, reminding us of Benjamin’s famous dictum that ‘there is no document of civilization which is not at the same time a document of barbarism’.

European history does not lead from culture to civilisation. The Preamble, however, does away with this insight. In the Convention’s Draft, it even claims that ‘Europe is a continent that has brought forth civilisation’ and that ‘its inhabitants, arriving in successive waves from earliest times, have gradually developed the values underlying humanism: equality of persons, freedom, respect for reason’. The Preamble promises the dawning of Europe’s future: Europe is now ‘united in its diversity’ and thus a ‘special area of human hope’, a space where the peoples ‘transcend their ancient divisions’ and ‘forge a common destiny’. Europe intends to ‘continue along the path of civilisation, progress and prosperity’, and to ‘strive for peace, justice and solidarity throughout the world’. The future delineated by the Preamble is a horizon of good possibilities and intentions. At the same time, the Preamble asserts continuity. The historical trajectory leading to the Draft Constitution is a great arc that reaches from antiquity to the twenty-first century. Portraying European integration as a project that spans time and generations is perhaps the Preamble’s most ostentatious claim. In the Convention’s Draft, we have the Thucydides quote, successive waves of arrivals of inhabitants, earliest times and gradual development of values, all

7 Weiler, above n 1, 330–1.
in less than five lines. Europe draws inspiration from its varied ‘inheritance’ and believes in values still present in its ‘heritage’. Thus, the arc that is to circumscribe European identity, gestalt and finality is an arc with invisible ends, something that, like a parabolic curve, tends towards infinity. The past reaches back to foggy ‘earliest times’, the future is utopia: a ‘great venture’ and a special area of human hope even for the ‘weakest and most deprived’ committed to virtually everything good, like peace, prosperity, culture, knowledge, social progress, equality, justice, solidarity, learning, transparent democracy and respect for law and reason.

Europe wants to ‘continue’ as well as ‘remain’, to ‘forge’ a future as well as to accept a ‘destiny’; it is already ‘reunited’ and at the same time strives for being ‘united ever more closely’. What are we to make of this? What of the stringing together of good aspirations, hopes and values, without any hint at priorities? And what, finally, of the breathtakingly shameless Thucydides quote? There is no satisfactory answer to the question that vexes Europe today: who are we, and where are we going? The Draft promises, in its garrulity, a revelation, but reveals too much (all those values) and leaves out too much (all those messy ambiguities) to be more than idle chatter. With the parabolic arc of Europe’s projected trajectory tending toward infinity, it is impossible to see the ends; how can we talk of finality if there is no \textit{fin}? 

The rift following the Constitutional Treaty’s demise could hardly have been more ostentatious. Europe, in June 2007, wanted three things: enhanced efficiency, democratic legitimacy and coherence of its external action. This is the sobering language in the first paragraph of the IGC 2007 mandate.\footnote{Doc 11218/07, available at http://register.consilium.europa.eu/pdf/en/07/st11/st11218.en07.pdf (accessed on 9 February 2009).} The presidency, in its conclusions, uses language very different from the Constitutional Treaty, too. No more mention of Europe as a ‘special area of human hope’, rather a ‘resolve that only by working together can we represent our interests and goals in the world of tomorrow’. As examples of recent positive results, we find

the Roaming Regulation which reduces the cost of modern communication in Europe, the creation of the European payment area which makes travelling and living together easier in the EU and the constant improvement of consumer rights which guarantee citizens the same high standards across the entire European Union.\footnote{European Council, 21/22 June 2007, Doc 1177/01/07 REV1, available at http://register.consilium.europa.eu/pdf/en/07/st11/st11177-re01.en07.pdf (accessed on 9 February 2009).} The Union, it seems, turns from its global sense of mission and its teleological understanding of history to travel, trade, consumption and its own interests. If one wanted a cheap punchline, one might conclude that Union citizens get not a polity that brings forth civilisation, but cheap cell phone charges.

Of course, this does not exhaust the Union’s finality. Suffice it to mention the Union’s values as listed in Article 2 of the EU Treaty of Lisbon (TEU-Lis) (respect for human dignity, freedom, democracy, equality, the rule of law, respect for human rights, pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men), its fundamental principles of Article 6 TEU-Lis and the sanctioning mechanism of Article 7 TEU-Lis. Moreover, Article 4 TEU-Lis presumes that legal and administrative power lies in the first place with the Member States; they stand at the centre of the Union, and the Union has to respect their core functions and national identities.

Still, this is an important shift in tone. None of these values or principles talks up the Union as a new political community. Rather, they avoid the constitutional hubris of the Constitutional Treaty.\footnote{D Chalmers and G Monti, \textit{European Union Law Updating Supplement} (2008) 11–15.} As the IGC 2007 mandate laconically has it, ‘the constitutional concept, which
consisted in repealing all existing Treaties and replacing them by a single text called “Constitution”, is abandoned’.

While no discussion of the Union’s finality can disregard this important shift, we will have to bear in mind that none of the texts mentioned have legal force. In order to find answers we must also look beyond the Constitutional Treaty and the Treaty of Lisbon—but where? As jurists, we are tempted, if not doomed, to look to the law as it stands. That makes little sense, at first glance, when investigating ‘finality’. Finality seems to have to do with political action, is future-oriented and is part of a promise of novelty. Law, in contrast, is inevitably turned to the past. Law’s rule is an exercise in the maintenance of political meanings already achieved. It links the future to the past in that the future of the political order should be the same as its past.12 Can the past, and law as its maintenance project, tell us anything serious about the promises of future European horizons?

I submit that they can. Law has been the major leitmotiv of European integration. Above all, law deserves attention from a cultural perspective, which is able to yield insights into the possibilities and promises of a Union to come. Law is not just a body of rules; it is a social practice, a way of being in the world. A social practice is not merely a set of prescribed actions, but rather a way of understanding self and others, and thus a way to make actions meaningful. To live under the rule of law is to maintain a set of beliefs about the self and community, time and space, authority and representation. Law’s rule is a system of beliefs—a structure of meaning within which we experience public order as the rule of law.13 If there is any merit to this suggestion, law is a marker that points not only to a community’s past and memory, but to its future and hopes as well. A polity imagines itself in part through law. More often than not, such a legal imagination also yields a political imagination.

The Union’s political imagination today is very different from nation-state imaginations. If citizens are mostly indifferent towards the Union, that is because EU law is not ‘theirs’. EU law fails in its attempt to create and maintain a collective identity. It carries forward not rooted meaning, but a precarious form of post-politics (see section II).

However, things may be changing. Europe has begun an urgent search for its own political imagination.14 The Constitutional Treaty is but the visible sign of this search; its demise and the shift in tone in the Treaty of Lisbon are but visible signs of its contested nature. Europe is about to decide whether, for the Union, the political signifies the market, humanity or a self-narrative that reaches back to the symbolic arsenal of cultural mythology so well known from nation-state political rhetoric. We see this everywhere, not simply in the overused cultural artefacts of flag, anthem, Europe day, motto and Jean Monnet prizes, but also in documents such as the EU Charter of Fundamental Rights, the Constitutional Treaty and, above all, the jurisprudence of the European Court of Justice (ECJ) in the fields of human rights and Union citizenship. These artefacts and documents have proved unsuccessful in forging a political imagination. I will use consumer aesthetics to explain this failure in section III. There is much potential, however, especially in the Court’s jurisprudence. It is, above all, the Court’s changing human rights and citizenship discourse that is indicative of a major shift in law’s role in the quest for European identity. I will explain the recent change of heart and its consequences in section IV.

The political has entered the European stage and will not easily go away. Today, we find ourselves in a legal, psychological, and discursive universe different from the one 15 years ago.

13 This cultural approach to symbolic meaning goes back to Ernst Cassirer, Clifford Geertz, Charles Taylor and Michel Foucault and has been developed most forcefully by PW Kahn, *Reign*, above n 12; idem, *The Cultural Study of Law* (1999); idem, *Law and Love* (2000); idem, *Putting Liberalism in Its Place* (2005); idem, *Out of Eden* (2007); idem, *Sacred Violence* (2008).
European discourse is no longer attracted to the question of what we should do (for instance, with a view to the democratic deficit); it is now fascinated by the question of who we are. Europe’s discursive nodal points are defined by contested notions of identity. Therefore, we will have to inquire into what meaning we read into Union law, and how this act of reading and understanding interacts with our beliefs about ourselves and our ends (see section V). No functional analysis can grasp this dimension of the law.

II. Post-politics and Law: The State of the Union

1. A Cultural Study of Law

The starting point for a cultural-legal investigation of European constitutionalism is a conception of law other than that offered by our dominant legal discourses. As Paul Kahn points out, the rule of law is a shorthand expression for the imaginative construction of a complete social-political order. It is a way of perceiving events and actors, and a framework of understanding that makes it possible to perceive legal meaning in every event. It provides a temporal and geographical shape to events, a normative ground for claims of authority, and an understanding of the self and others as subjects with rights and responsibilities. It has its own imaginative universe, and it is the imagination that constructs the past and the future of the polity, just as it constructs, at the same time, the political identity of the citizen. In the political imagination of citizens of Germany, for instance, the rule of law echoes with the memory of World War II and Auschwitz; American citizens’ political imagination of the rule of law echoes with the memory of revolution and civil war, with a continuity between the citizens and the Founders, etc. In other words, the rule of law is a structure of beliefs about the meaning of the polity. Its value lies not in objective facts but in the deployment of power to sustain these beliefs. What we must investigate, then, is the structure of meaning within our experience of public order as the rule of law occurs.

National law usually has a richly textured cushion of cultural resources that it can rely on. It is a symbolic form that establishes a world of pre-existing rules to which individuals appeal in order to make sense of their lives. It serves as a community’s memory in that it preserves existing meanings. Many of those meanings derive from a different symbolic form—political action—competing with law. Political action’s world creates, rather than preserves, meaning, and locates meaning in individuals performing unique acts. Political action takes revolution, not constitutional preservation, as its paradigmatic political act. The conflict between law and political action is a conflict between past and future, tradition and possibility, loyalty and responsibility. Most obviously, the tension arises at law’s origin. Political action and law co-opt each other at the point of law’s myth of origin, revolution. Revolutions create meaning; law preserves that meaning. The need for permanence requires the establishment of a historical memory, a text—not just any text, but a text that bears the meaning of law’s source. The first text of the revolution is the bodies of the revolutionaries: revolutionary ideas become the foundation of a new political order only when individuals are willing to engage in acts of sacrifice and invest their bodies in that new set of ideas. Sacrifice is the inscription on the body of ideal meaning. The body lends the authenticity of its sacrifice to the legal text that is the product of revolution—the product of the spent body, in other words, is the legal text. The sacrificed body establishes the legal text as ‘ours’. This is the deep structure underneath law’s
smooth, liberal surface design. It is myth and memory (not rationality), sacrifice (not contract), will (not reason and interest). A legitimate nation-state’s legal system exerts a tremendous normative pull not because of the threat of punishment or some basic consensus; rather, the legal regime expresses, in traditional terms, the ‘sovereign will’ of the community. To disconnect law from the idea of sovereignty fails to see the crucial connection of the rule of law to self-rule. In a democratic regime, sovereignty and law are tightly linked. The sovereign people govern through the rule of law; and by following the law, citizens participate in popular sovereignty and achieve self-government.17

The maintenance project of the law is a project of instantiation: the individual becomes a citizen and, ultimately, the sovereign. Law, then, is not simply about the promise of order; it is about identity. As such, it is incredibly erotic, political and dangerous.

The meaning of law in the European Union is very different from the meaning I have just laid out. Union law lacks the erotic component so distinctive of nation-state politics. It epitomises the project of a rational rule of law. I will give a few examples, and will attempt to show that the differences in the conception of the rule of law have decisive consequences for the Union’s finality and future gestalt.

2. The Union’s Birth from Reason

The Union was not born from belief, visionary revolution, shared sacrifices, emotions, or love, but rather from the spirit of reason and enlightenment. How could it be otherwise?18 Europe was a macabre unity, coming together in infinite destruction, with prisoner-of-war camps and millions dead, as an expanse of rubble. Auschwitz was the absolute zero, and the hatred was great enough to spawn serious suggestions to ‘strew Germany with salt’. To build Europe upon emotional appeals to feelings of sharedness and community would necessarily have had to fail. Still, there were two imminent problems to solve: first, what to do with Germany; and second, how to rebuild Europe.19 The Schuman plan was the well-planned and deliberate response to these questions. One cannot be deceived by its pathos: note that it speaks of ‘de facto solidarity’ only. The lack of grand vision and the tangible pragmatism of the Declaration have been noted too often to be repeated here. What is important, though, is the fact that European integration was conceived as a contract and as a project guided by enlightened rationality. We see this in many details. Take the original gestalt—the Union. There is no doubt that the Union, irrespective of its subsequent constitutionalisation, was constructed through classic international law treaties. International law, with few exceptions, is basically law through consent between states. Governments represent states, and international law is the product of governmental actors striving for coordination of their mutual interests. International law, in other words, is the act of reading the body. Interpretation is the reverse process: it realises the ideal content of the artefact. This is an old religious theme, of course, that has found its way prominently into literature, popular fiction and movies.

17 See Kahn, Liberalism, above n 13.
18 To be sure, there is the Schuman Declaration’s pathos; there is also Churchill’s Zurich speech on 19 September 1946, calling for a ‘United States of Europe’: W Churchill, His Complete Speeches, 1897–1963, 1943–1949 (ed RR James, 1974), reprinted in BF Nelsen and AC-G Stubb (eds), The European Union (1998) 7. However, Churchill was out of office at the time. What is more, it seems the Zurich speech was just another example of that typically British aphorism, ‘Don’t do what I do, do what I tell you to do’: JHH Weiler and SC Fries, A Human Rights Policy for the European Community and Union’ in P Alston (ed), The EU and Human Rights (1999) 147. It was Churchill himself who, a few years earlier, had maintained that ‘We are with Europe, but not of it’, quoted in: D Heater, The Idea of European Unity (1992) 148.
apotheosis of the social contract: it is predicated on the analogy between the sovereign state and
the unified self. Purvis points out that liberalism in international law, as elsewhere, can be under-
stood as a philosophy that combines an atomistic psychological assumption with a radical
epistemology about morality. The liberal psychological understanding is sovereign-centred, with
world order representing nothing more than a social contract between sovereigns. The
epistemological assumption is the principle of subjective value, leading to the claim that
decisions about morality can only be made by the international order’s atomic components, its
sovereigns.20 There is no need to explain at length the lack of sacrifice and of the erotic in intern-
ational law. We can, again and again, study the unerotic consequences of liberalism and
universalty by looking to nation-states’ unwillingness to invest bodies, money or meaning into
NATO or UN projects.

3. Europe as Style, Expertise and Project

Europe’s cultural artefacts and symbols have also received their share of this ethos. The world of
Brussels’ office towers was designed to embody the technical coolness and modernisation of the
old continent. It was a world of Xeroxed working documents and greyish-greenish office
furniture, of simultaneous translators in soundproof cabins featuring multi-channel cables, of
licence plates in blue, white and red, and of new European schools teaching transnational
history and more than three foreign languages. This sat well with the Zeitgeist of skyscrapers,
autobahns and nuclear power plants: where such controlled technique was to rule, national
idiosyncrasies and peculiarities became mere folklore and thus superfluous. Europe was in the
hands of technocrats.21

The international element of the Union (eg the European Council and the Council of
Ministers) is closely associated with contractarianism and liberalism. Both are political theories
which are speechless in the face of sacrifice. A similar charge may be levelled at the
Commission, whose mode of governance is hostile to the idea of sacrifice, too. The
Commission pools expert knowledge and seems like governance through management and
technocracy epitomised. There is a diffusion of accountability through the rise of comitology.
Expert management, however, may produce an efficient and perhaps even satisfactory distrib-
ution of society’s resources, but it cannot produce the historical and communal understanding
of self-identity that characterises the rule of law as an experience of political order. To the
expert, it does not matter how the present state of affairs came about. Loyalty may appear
irrational. Management, as a form of science, knows no borders. Law is silenced by claims of
expert knowledge that purport to provide their own grounds of authority. Scientific expertise
always speaks for itself. Like every scientific voice, management exists in the present. It tests
the past and future against present interests, whereas law tests the present against the past.
Management is in history but is not itself historical.22 Without history, however, there can be
no identity.

Another facet of Europe as a project of modernity becomes visible in the oft-used metaphor
of Europe as a project. This is one of the central motifs of modernity.23

Journal 81, 93–4.
22 See Kahn, Reign, above n 12, 182.
23 Incidentally, the notions of ‘project’ and ‘project-maker’ are in themselves highly modern notions and
deserve more attention. For a cultural genealogy, see M Krajewski (ed), Projekttemacher (2004).
In modernity, Man’s finitude becomes reconciled with the infinite and eternal, in terms of progression... as an interim apotheosis, one which rejects the preceding being but which also contains that being and prefigures all the object is yet to become.  

European academic literature will not tire of emphasising the nature of integration as a ‘project’ and the procedural nature of Union law. The Treaty of Rome, we read, did not lay down a static legal order that was complete from the outset. Rather, European integration is said to be a legislative process characterising the Union as a legal system evolving over time. The Court, too, cashes in on the myth of progression by privileging the teleological method of interpretation. Progression, it seems, becomes an essential element in the mythical structure of the Community legal order. The Union cannot compete with the law of nation-states as a source of order or transcendent being in terms of what it is; it can only attempt to do so in terms of what it is not, and in terms of what it will be.

The Union legal order, as a purely rational legal order, is unable to use the same imaginative and cultural resources as the nation-state. Unlike national legal orders, the Union legal order is precisely what it professes to be: a legal order originating from contract and exhausting itself in reason and interest. The Union has no subtext of will, and hence battles with the fatal difficulty to explain to us, its citizens, why its legal order is uniquely ‘ours’.

4. Europe as Imagined Community

The Union, of course, has not turned a blind eye to this dilemma. The Commission, above all, has commissioned countless studies, initiated working groups and written up White Papers in order to test social acceptance of the Union, define problem areas and work out solutions. In addition, long before 1993, the Commission embarked upon various initiatives in the fields of media and information policy to promote integration in the sphere of culture by enhancing what it saw as ‘the European identity’. These initiatives have not been very successful—I will return to this in a moment—which is why scholars tend to underestimate the Commission’s prowess. The Union’s demiurges know their political theory. They have read Hobsbawm and have learned that history is central to the imagining of community, for how people experience the past is intrinsic to their perception of the present. History, they know, is also fundamental to their conception of themselves as subjects and members of a collectivity. Following Hobsbawm and Ranger, they have focused on the ‘invention of European traditions’ and on practices which seek to inculcate certain values and norms of behaviour by implying continuity with the past. The past, like social memory, is a construction, actively invented and reinvented. The Commission might also have learned from Benedict Anderson’s highly influential ‘Imagined Communities’. Anderson defines nations as ‘imagined political communities’ because its members will never know, meet or even hear of most of their fellow members, yet in the minds of each lives the image of their communion. Indeed, his theoretical point of departure is mass sacrifice for the nation and, ultimately, death. Death brings the threat of oblivion. In a secular age we increasingly look to posterity to keep our memory alive, and the collective memory and solidarity of the nation help us to overcome the threat of oblivion. Nations are characterised by symbols of commemoration, notably the Tombs of Unknown Soldiers, which suggests that
nationalism, like religion, takes death and suffering seriously (in a way that Marxism and liberalism do not). It does so by ‘transforming fatality into continuity’, by linking the dead to the yet unborn. The nation, according to Anderson, is particularly suited to this ‘secular transformation of fatality into continuity, contingency into meaning’, since nations ‘always loom out of an immemorial past, and, still more important, glide into a limitless future. It is the magic of nationalism to turn chance into destiny.’28 This is just what the Commission had in mind: transforming contingency into meaning. However—unfortunately, if you want—the Commission had no fatalities at its disposal to turn into continuity. Perhaps here is the reason why its initiatives to enhance European consciousness and Europeanise the cultural sector all too often appear unconvincing.29

5. Europe’s Iconography

The Union has recognised the overwhelming importance of symbols. Being not a ‘natural’ but an ‘imagined’ community, it needs to be constructed through complicated ideological, political and cultural mechanisms and procedures. Such construction and reconstruction takes place discursively. The reconstruction of community as European Union touches upon the self-understanding and practices of its members, their bodies and their construction of the ‘Other’. Discursive constructions build on communication in order to develop, and generalise, an image of the self.

29 One early example of the Commission’s attempt to define a cultural foundation for European unification is the signing of the ‘Declaration on the European Identity’ in 1973: Commission of the European Communities, Declaration on the European Identity’, Bulletin EC 12-1973, 118; see the wonderfully evocative account by C Shore, Building Europe (2000). This approach to Europe is still very much in fashion, as the Decision of 14 February 2000 establishing the Culture 2000 programme demonstrates: Decision 508/2000/EC of the European Parliament and of the Council, [2000] OJ L63, 1. Consider, for instance, the following passages: ‘If citizens give their full support to, and participate fully in, European integration, greater emphasis should be placed on their common cultural values and roots as a key element of their identity and their membership of a society founded on freedom, democracy, tolerance and solidarity’ (5th recital); ‘To bring to life the cultural area common to the European people, it is essential to encourage creative activities, promote cultural heritage with a European dimension, encourage mutual awareness of the culture and history of the peoples of Europe and support cultural exchanges with a view to improving the dissemination of knowledge and stimulating cooperation and creative activities’ (8th recital). Activities and implementing measures include, among many others, ‘the European Capital of Culture and the European Cultural Month’, ‘organising innovative cultural events which have a strong appeal and are accessible to citizens in general, particularly in the field of cultural heritage’, and ‘European prizes in the various cultural spheres: literature, translation, architecture, etc’ (Annex 1, Activities and Implementing Measures for the Culture 2000 Programme). Another prominent example is the White Paper on ‘European Governance’ and the attendant working group reports (European Commission, ‘European Governance: A White Paper’, COM(2001) 428). Working Group 1a dealt with ‘Broadening and Enriching the Public Debate on European Matters’. It found its purpose ‘in the sobering and well-documented reality that, despite all of the efforts made by Europe’s institutions over the last decade, very few convincing answers have yet been found to the cry: ‘how can we take Europe closer to its citizens’?’. ‘Report of Working Group on Broadening and Enriching the Public Debate (Group 1a), White Paper on European Governance, Work Area No 1, Broadening and Enriching the Public Debate on European Matters (2001) 8 available at http://ec.europa.eu/governance/areas/group1/report_en.pdf (accessed on 9 February 2009). While the Union’s competences and responsibilities closely resemble those of most nation-states, its institutions do not have a relation ship with the general public ‘that remotely compares with that of national institutions’ (ibid, 9). Public support, therefore, is far from overwhelming. Knowledge of European affairs is low; prevailing attitudes to the Union are characterised by either indifference or a lack of knowledge, or a combination of both (ibid, 11). The working group maps the way forward by pointing out that decision-makers need the support of an informed European public and the creation of a ‘collective intelligence’ on European issues. Hence the heading ‘Enlightenment could lead to more popular support’ (ibid, 14). In practical terms, the Group suggests partnership networks of journalists, teachers, professors, associations, etc, to foster dialogue ‘close to the ground’ and ‘establish links between EU institutions and civil society’. One of the most important proposals is that ‘The EU must be taught’ (ibid, 16).
They make use not only of narratives, but also of images, media and cultural artefacts of all kinds. ‘Imagined communities’ have to do with ‘imago’, too. Objects become images of meaning.\(^\text{30}\)

It is here that EU iconography comes to the fore. The Adonnino Committee recommended various ‘symbolic measures’ for enhancing the Community’s profile. Foremost among these was the creation of a new EC emblem and flag. That flag was taken from the logo of the Council of Europe. It boasts twelve golden stars, which form a circle against a blue background, and is professed to be a symbol of everything that is said to make Europeans European: from the occidental via the religious to the esoteric. The number of stars is fixed, twelve being (as the Council of Europe has it) a symbol of perfection and plenitude, associated equally with the apostles, the sons of Jacob, the tables of the Roman legislator, the labours of Hercules, the hours of the day, the months of the year and the signs of the zodiac. Twelve is also a representation of the Virgin Mary’s halo of stars in the Revelation (from which, according to some interpretations, the new Messiah will be born). Thus, it seemed the symbol par excellence of European identity and European unification, a rallying point for all citizens of the EU.

There are countless other symbolic vehicles for communicating the ‘European idea’. Take, above all, the European anthem, which is the overplayed ‘Ode to Joy’ from Beethoven’s Ninth Symphony.\(^\text{31}\) Take the Jean Monnet Awards, the European Woman of the Year Awards, the variety of the European Year of the Cinema, Culture or the Environment, or the officially designated Europe Day. Take the European Literature Prizes, the standardised European passport, the European license plates, the stamps bearing portraits of EC pioneers or the European City of Culture initiatives. The political aim behind these initiatives was ambitious, trying nothing less than to reconfigure the symbolic ordering of time, space, information, education and the media to reflect the ‘European dimension’. In the end, all this pathos has failed.\(^\text{32}\) What, after all, is pathos? Formulas of pathos are designed to formally inject new tension into a frozen, rigid world and make it move again.\(^\text{33}\) The distinctly European problem of pathos is not life’s eventful turbulence, but rather the paralysis of all expression in a hieratic world of gestures. Pathos is thus a final escape from problems of meaning—and that is the context to discuss the European pathos not just of anthems and flags, but of the failed Constitutional Treaty and the Charter of Fundamental Rights as well.

To speak of pathos is to speak of the aesthetic. It is impossible, through purely functional description and analysis, to capture the gestalt of the Union. Description and analysis today will have to move on to, or at least include, the level of the aesthetic. The much despised and oft-scolded world of consumerism has taken this to heart long ago. Legal analysis has not. Recent studies of consumerism show what I mean. They attempt to recover the suppressed aesthetic data of our lives and to make the vast archive of subliminal images accessible to conscious analysis. They describe consumerism on the level on which the consumer actually experiences it: on the visceral level of the senses, the bodies,

from the point of view of the hand reaching for the soup can on the store shelf, the ears listening to the boom box broadcasting the sounds of a cool, refreshing soft drink splashing into a frosted glass, and the eyes fixed on the screen of the multiplex as the *Titanic* sinks.\(^\text{34}\)

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\(^{30}\) See the excellent collection of essays in U Bielefeld and G Engel (eds), *Bilder der Nation* (1998).

\(^{31}\) Available as either a high-quality recording or, perhaps for the busy, a compressed recording at http://europa.eu/abc/symbols/anthem/index_en.htm (accessed on 9 February 2009).


The Union, too, should be the subject of aesthetic discourse. It is a bit surprising that it is not because, for decades now, the Commission has been talking about ‘A Citizens’ Europe’. The citizen perspective should be important, then, and it would be helpful to examine the Union on the visceral level on which the Union citizen actually experiences it. Much less surprising than the lack of aesthetic discourse would be the analytical result, which is, mostly, nothing less than disastrous. The Commission continually bemoans the fact that Europeans feel alienated from the Union, that they have disappointed expectations, that there is a widening gulf between the Union and the people it serves—and wonders why.\textsuperscript{35} The answer is right there, on its own website. Whoever looks up the flag, the anthem and the prizes will have an intuitive understanding of the citizens’ indifference towards ‘their’ Union.

6. A Cultural-legal Study of the Union’s Problem

The European Union’s problem of meaning is precisely this: that its citizens are more or less indifferent towards it. The Union produces texts which nobody reads and nobody knows. Nobody is interested. That has fatal consequences. Texts, legal texts above all, are a polity’s memory, if you want the hard disk storing authentic witness. In nation-states, some legal texts—constitutions—embody ideal historical meaning that links the present to the past, to some point of origin, like a revolution and the consecutive writing of the constitution. They construct an imaginative fabric that allows a state to inscribe its own identity into the identity of its citizens. They form a metaphysical and political deep structure that is largely ignored by theory but still has an important place in political practice.\textsuperscript{36} Such texts constitute states as ‘imagined communities’ and continue them over time. They can claim loyalty as their source of moral support because they are ‘ours’. Union texts are not ‘ours’; they are just texts, empty shells with no roots. Rather than an embodied set of meanings, they are seen as a set of ideas without the power to make a claim upon the citizen. They do not bear the deep social meaning. There is no myth of origin; there are no bodies willing to be invested into ideas, no traces, no sacrifices. There is nothing that could convey authenticity on EU texts. Ultimate meaning disappears behind the semantics of rationality. Because of the lack of sacrificial meaning, Europe, in contrast to all its rhetoric, is not a new beginning really, since what is missing is the founding, creative power. The political future will look like the political past: belief in novelty, which is behind sacrifice, is non-existent. In the Union, then, there is nothing to remember and hence nothing to maintain. Union texts do not constitute a collective self; rather, they constitute a Common Market. Markets cannot tell us who we are. They operate through desires, which are mere placeholders. As market placeholders, ‘we have no character, only desires. The desiring body is not read, it is satisfied. It leaves no trace; its very existence is a matter of indifference to others.’\textsuperscript{37} Money, the universal means of exchange on the market, is the perfect example. There is nothing with less memory than money. An old saying says you should not conduct money business with friends or foes. The perfect business partner is thus someone completely indifferent, gaged neither in favour nor against us.\textsuperscript{38} The category of price, it seems, makes history and individuality disappear. Remarkably, it is precisely at the point of this total indifference

\textsuperscript{35} For a recent example of the Commission’s stunned disbelief and disappointment see European Commission, above n 29, 5.

\textsuperscript{36} See C Geertz, Local Knowledge (1983) 146: ‘The “political theology” (to revert to Kantorowicz’s term) of the twentieth century has not been written . . . But it exists . . . and until it is understood at least as well as that of the Tudors, the Majapahits, or the Alawites, a great deal of the public life of our times is going to remain obscure. The extraordinary has not gone out of modern politics, however much the banal may have entered.’

\textsuperscript{37} See Kahn, Reign, above n 12, 86.

\textsuperscript{38} See G Simmel, Philosophie des Geldes (1989) 290–1.
where the European rationality of the market and the European social contract—concluded by unencumbered selves behind the veil of ignorance—converge.

With no history, no identity and no individuality you cannot produce and maintain social and political meaning. We do not reach ourselves through markets and reason alone. We cannot reason about, or trade in, the symbolic dimension of meaning. Whereas money and reason create borderless fluidity, political and social meaning needs to be rooted. The Union’s legal texts are lacking in the way they look to the past, and they are unable to stabilise anything deeper than the ever-changing fluid surface of trade, travel and consumption. That is the reason why the EU appears so breathless in the eye of the beholder. As there is no memory to store meaning, meaning needs to be generated through political action, again and again. Meaning, in the Union, exists only within transitory and forgetful moments. It is ahistorical and respects neither borders nor authenticity. Without reservoirs of meaning, there can be no room or time to have a breather, read the legal texts and realise their ideal content. There can be no stable meaning; there can be only frantic, restless and ceaseless production of ever-new meaning. Europe, in this sense, is truly revolutionary, because political action may never come to an end. In the conflict between loyalty and responsibility, the latter prevails. Responsibility, however, is the mode not of law, but of political action. Citizens therefore see Europe as politicians negotiating and renegotiating. Politicians speak the discourse of responsibility; the future is a horizon of possibilities. Europe is the never-ending project. History is being rewritten and re-rewritten. It is in the nature of revolutions to break with the past—and here is the reason why all references to occidental culture, Christendom and Latin (or French) as the once lingua franca seem so unpersuasive. Revelation, which shares a temporal structure with revolution, constructs meaning not from history, but from truth, which manifests itself in and through action. That is why we were hardly able to read through the Treaty of Nice before, with its ink not yet dried, we heard talk of the post-Nice process and plans for the next intergovernmental conference.

III. The Middle Ground: Politics Gone Awry

The Union, in its attempt to be close to its citizens, has initiated counter-measures. Most of them can best be understood, I believe, from the perspective of consumer aesthetics. There is no substance to them; they are just an effort in aesthetics. What lies behind them is a principle of consumerism. They denote the middle ground between post-politics and politics; they are politics gone awry.

1. Europe and Consumer Aesthetics

One of the most important functions of the aesthetics of consumerism, writes Harris, is to provide us with an emotional cushion, a form of camouflage, a credible disguise for a culture that refuses to admit the truth about itself. We do not like to see ourselves as consumers, or our culture as that of consumerism. We continue to pretend that our values are those of an intimate world full of mom-and-pop businesses, rather than an overpopulated megalopolis dominated by multinational cartels. The aesthetics of consumerism helps us keep that faith by hiding consumerism from consumers. They combat our estrangement from a world packaged in plastic by restoring the ‘aura’ of the handmade to our commodities. They also shore up our sense of selfhood and individuality, which have been deeply compromised by the conditions of urban

39 See Kahn, Reign, above n 12, 76–84.
society. The aesthetics of consumerism have incorporated our distrust into their marketing techniques. They have built into consumerism symbolic forms of resistance to it: ineffectual strategies of rebellion that make consumers believe they are loners or oddballs, immune to advertising strategies rather than at the mercy of Madison Avenue.\textsuperscript{40} The perfect disguise for conformity has become rebelliousness. You buy shoes, for example, which remind you of running shoes, and feel like a rebel battling the conformist obligation to wear conservative shoes with dark laces to work. You are being in control, capable of action and rebellion, rather than being controlled: you ‘dare to be different’. In fact, all you actually do is wear fashionable shoes, just like everybody else. It is possible to identify a number of broad principles that govern the appearance of popular culture, among them cuteness, zaniness, coolness and idyllic quaintness. Quaintness responds to the discontent of a culture trapped in an eternal present. It disfigures things to eradicate the stigma of their newness, their disturbingly characterless perfection that smacks of the alienating anonymity of assembly lines. Quaintness also compensates for the absence of real personal history. We hide our sense of uprootedness by creating a sepia-tinted simulacrum of history and ‘instant’ traditions. Even, and especially, those who are cut off from history, like we often are, feel the need to establish something like continuity with the past. The result is quaintness riding roughshod over authenticity. It often mourns the loss of cohesion in family life and of the intimate circle brought together around the fireplace by darkness and cold weather. Quaintness is the industry’s tool to help reduce our deep-seated distrust of advertising and our fear of shoddy goods. It rectifies problems that consumerism itself creates, and allows us to express our discontent with consumer culture and society.

Quaintness is also what the Union is after. As vehicles, the Union has chosen a number of romantic idyllic items; one of them was the Constitutional Treaty; another is the Charter of Fundamental Rights.

2. The EU Charter of Fundamental Rights as Consumer Aesthetics

The Charter serves the same purposes as quaintness in consumer aesthetics. Both the appearance of popular culture in the form of quaintness and the Charter are meant to offer us symbolic ways of expressing discontent, and to neutralise our feelings of inferiority, caused by our status as objects, not subjects, of globalisation and international trade.

The Charter has little other use than that associated with consumer aesthetics. The ECJ has developed, for almost four decades, a rich and differentiated human rights case law. Since 1969, at least, the Court has been ready to invalidate Community legislation that violates EC fundamental rights. Does the newly proclaimed Charter offer better protection of fundamental rights? The Charter itself says no. In its Chapter VII, it admits that neither the scope of the rights it guarantees is broader, nor the level of protection is higher, than the case law status quo.

Clarity is another common justification for the Charter. However, like all human rights documents, the Charter is drafted in magisterial, sometimes cloudy, language. While there is much to say in favour of such constitutional traditions, clarity is not one of its features.\textsuperscript{41}

Finally, it is not a symbol of shared European identity. While it was solemnly proclaimed, it has no binding legal force. Some regard this as a symbol not of shared identity, but of European impotence and of refusal to take rights seriously.\textsuperscript{42} Even if it is bound to become law as part of the Treaty of Lisbon, doubts remain about its integrative force. Europe already has a pronounced culture of rights, with a tightly knit web of fundamental rights protecting its

\textsuperscript{40} See Harris, above n 34, xxi–xxiii.


\textsuperscript{42} Ibid.

218
citizens: bills of rights in Länder and federal constitutions, the EJC rights jurisprudence, the European Convention on Human Rights (ECHR) and its human rights court in Strasbourg, and the two 1969 UN Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights. The Union would also accede to the ECHR (Article 6(2) TEU-Lis). Waving yet another catalogue of rights in a culture of rights saturation will not take the citizen any closer to the Union.\footnote{I am by no means alone in this judgment. See, eg Weiler, above n 1, 334–5.}

Why is it, then, that so much money, and so many resources, are lavished on the Charter if there is so little to say for it, either legally or symbolically? Part of the answer is: it is aesthetic. The Union wants the Charter to destigmatise itself and to neutralise our distrust. The vehicle is quaintness. The Charter compensates for the lack of real European history. Notwithstanding all rhetoric the Union is a young entity with no model or predecessor. Europe has not one story, but a multitude of stories, which are contradictory, competing and violent, and which need to be reconciled with each other. Europeans think of ‘their’ Union as faceless Brussels bureaucrats, smooth, modern, insipid and characterless. The Union suffers from its unrooted newness. Its insatiable surge forward cuts it off from the past. That provokes its citizens’ distrust, and they refuse it their loyalty. The Union is seen as the epitome of bureaucratisation and centralisation. It rationalises life (through international division of labour) and depersonalises the market (through internationalisation). It emphasises competition and cross-border trade of goods through the Common Market, thus appearing as commodification of values personified. In addition, there is the peculiarly modern angst because truths and certainties crumble, identities become fragmented and transitory, feelings of displacement and uprootedness grow, and all that is solid melts into air. The Union ideally attends to such anxieties.\footnote{See ibid, 260–1.}

The Charter of Fundamental Rights is the Union’s designers’ programme to steer in the opposite direction. The Charter’s solemn declaration evokes the spirit of the Virginia Bill of Rights of 1776 and of the Déclaration des droits de l’homme et du citoyen of 1789. In part, this is deliberately done in order to create the impression that the Union’s roots reach back to the origins of modern democracies. Perhaps, what is hoped for is not merely a solution to the problem of lacking history and character, but to that of democratic legitimacy as well. By proclaiming a catalogue of rights, the Union adorns itself with the embellishments of the fountains of democracy—among them, the principle of popular sovereignty.\footnote{This connection has also been detected by P Craig, ‘Constitutions, Constitutionalism, and the European Union’ (2001) 7 ELJ 125.}

At the same time, in reaching back to 1776 and 1789, the Union creates a patina for itself. A patina is a physical property of material culture that consists in the small signs of age that accumulate on the surface of objects. The surface of objects, originally in pristine condition, takes on a surface of its own, being dented, chipped, oxidised and worn away. This physical property is treated as symbolic property: it encodes a status message and is exploited to social purpose. That purpose is the legitimation, authentication and verification of status claims.\footnote{On the function of patina in material culture, see G McCracken, Culture and Consumption (1988) 31–43; Architektenkammer Hessen and R Toyka (eds), Patina (1996).} Just as newly acquired wealth, in a world of traditional hierarchy, was under pressure to provide visual evidence of the authenticity of its status claim, the Union is trying to secure and verify its status in a world of nation-states. The Union is the nouveau riche in Europe and needs to prove that its wealth is not fraudulent. The gatekeeper that controls status mobility is patina. The Charter, of course, is meant to be the chipping and oxidisation on the EU’s pristine surface.
The Charter also conjures up an atmosphere of solidarity, brotherly love and trans-generational community (the political theory equivalent of the intimate circle gathering around a fireplace). 47 Here is a world resurrected before our eyes that has never known the critique of rights developed by legal realism, Critical Legal Studies, communitarianism, feminism and postmodernism. The Charter appears as a means to develop a moral and ethical foundation for the Union. It draws on the twin sources of the Ideal and the Other. On the one hand, it refers us to the informing ideal of an ethos of collective societal responsibility for the welfare of the individual and of the community as a whole. On the other hand, the Charter refers to the Other, that which is excluded but nevertheless there, such as stories of injustice and fear, or the barbaric orient. However, both references are (aesthetically, at least) unconvincing. They remain wooden and simplistic in a saturated liberal society. One accepts them the same way one accepts a shoe manufacturer’s claim that its shoes are not shoes but the result of a dream. 48

The creation of the Charter also speaks for my thesis that it is designed to create an atmosphere of quaintness. The European Council, meeting in Tampere in October 1999, decided to establish an ad hoc body. On its first meeting, that body called itself ‘Convention’—a name that smacks of Philadelphia and Paris. 49 Atmospherically, this is not insignificant. It fits well with the name of the website that documented the drafting process of the Charter: http://db.consilium.eu.int. ‘Consilium’ is Latin, the former European lingua franca, and conjures up the image of a Roman council of wise old men, white-bearded and clad in togas. That image is linked to progress and modernity surging forward. ‘Consilium’ is amended by ‘eu.int’—a cipher of globalisation (‘int’) à la Europe (‘eu’) —and it appears on the internet, the most progressive medium of communication with virtually unlimited possibilities. Such connection of old and new, of tradition and modernity, of local roots and global aspirations, also shows in the Convention’s email address: fundamental.rights@consilium.eu.int. The old lingua franca appears in the same breath, the same address even, as the new lingua franca, the world language English.

Finally, the choice of the Convention’s President fits into the picture well, too. Roman Herzog is a former professor of constitutional law and Justice and President of Germany’s Federal Constitutional Court—thus standing for cool rationality, academic smartness and legal expertise beyond doubt. He is also the former President of the Federal Republic of Germany—standing for political vision and statesman-like stature. Most importantly, though, he was born in a small town in Bavaria (Landshut), was married and has two sons. Despite his steep career, Herzog conveys the impression of somehow being native and rooted in the soil, sometimes even of that specifically Bavarian snugness.

All these phenomena serve an aesthetic purpose. That purpose is to soothe our deep-seated distrust of the smooth European machinery and its faceless bureaucracy. A ‘Convention’ is neither a machine nor a bureaucracy. Its members have a distinctive personal image. They listen to ‘us’ (represented by pressure groups) and take into account our reservations and suggestions.

47 The Preamble, for instance, provides that ‘[e]njoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations’. The Charter’s individual chapters have the following headings: I—Dignity; II—Freedoms; III—Equality; IV—Solidarity; V—Citizens’ Rights; VI—Justice.

48 That is what the print on a shoebox by Camper, a Spanish-based company that is all the rage in Germany, says; see U Haltern, ‘Europe Goes Camper’, Constitutionalism Web-Papers No 3 (2001) available at www.qub.ac.uk/pais/Research/PaperSeries/ConWEBPapers, and its German version in [2002] Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft 261.

49 The German version is even more telling than the English one. The body is called ‘Konvent’—according to Duden Fremdwörterbuch (6th edn 1997) a Konvent being 1. a) a community, esp of nuns, bound by vows to a religious life under a superior; b) a gathering of protestant priests for further education; 2. a) a weekly gathering of the [active] members of a fraternity; b) collectivity of lecturers at a university; 3. (no pl, hist) the convention during the French Revolution.
Herr Herzog even talks like someone from Landshut: how can he not be one of us? The stroke of genius that shows in the idea of a Convention is that, in spite of all the idyllic cosiness, the Union’s twin attributes—rationality and expertise—are not weakened. On the contrary, they grow stronger because the drafting of the Charter rests with a body of experts that bears the name of a gathering of university lecturers, of a community of monks or nuns, or of a political body during the French Revolution—in Latin still. It must seem to the Union’s architects that such a body will be able to scatter peoples’ doubts without giving up the tried and true Union standard of administrative expertise. Under such conditions, anything becomes possible—to have transnational governance and a Heimat, even to talk Latin and Bavarian at the same time. Things that seemed incompatible become compatible. There is nothing that cannot be achieved. Is it any wonder that the Convention method was used to draft the Constitutional Treaty? It must have seemed like the golden bullet that can blast a hole in the Gordian knot which blocks communication between the Union and the citizens that it wants to be close to.

3. The Problem with Consumer Aesthetics

There is much logical consistency in the Union’s deliberate use of the aesthetics of consumerism. Today’s citizens have turned, to a large degree, into consumers. Our personal salvation experiences are often founded upon consumption. ‘It is the consumer attitude which makes my life into my individual affair; and it is the consumer activity which makes me into the individual,’ writes Bauman, and Urry maintains that ‘citizenship is more a matter of consumption than of political rights and duties.’ Saatchi & Saatchi Europe is a reality, and not a bad one at that. There is no reason, then, why Europe should not print the Charter’s text on the wrapping of its product ‘European Union’ in order to sell it.

The problem is that the Union actually believes that the Charter really is a step towards shared European identity. That is as if a shoe manufacturer, convinced by its own adverts, actually believed its shoes were not shoes but the result of a dream. It simply is wrong to suppose that under the Charter’s influence the people living in Europe will turn into European subjects, coming together in solidarity as a European Community. We have already seen where such belief leads: to the comical attempt to make use of nation-state artefacts. Indeed, those artefacts, in the nation-state, are able to transport political and social meaning. However, the Union’s texts, like the Charter, are not. It is true that subjectivity, in the times of globalisation, has come under increasing pressure. When locality gets devalued and geographical space is cancelled out, people begin to feel like objects of transnational interests. Fundamental rights, however—the nth catalogue, at that—are no cure. The cure, as Bauman says, is playing the mobility game. Scope and speed of movement make all the difference between being in control and being controlled, between shaping the conditions of interaction and being shaped by them. It seems that to participate in the competition that races along before our eyes is to reconstitute subjectivity. Perhaps the perils of the market are met effectively only by the weapons of the market. Next to that, fundamental rights pale into near-insignificance and seem like anachronistic window-dressing, at least if injected into the rationality of money and the market.

But let us be honest. In times when society itself seems like a fancy-dress party, with identities designed, tried on, worn for the evening and then traded in for the next, we actually
like anachronistic window-dressing. That is why we are delighted about the Charter. ‘If there is kitsch in our daily lives,’ writes Daniel Harris, the theorist of consumerism, ‘it is because there is kitsch in our minds.’

IV. Post Post-politics: The Court Steps In

What looks unconvincing coming from political actors such as the Commission, the Council or Member State governments may look different when uttered by the ECJ. The Court has recently taken a leaf out of the Commission’s book by entering into what we might term ‘political rhetoric’. Its vehicle was, to little surprise, its citizenship and rights jurisprudence. After all, human rights mark the boundary between ‘us’ and ‘them’. Rights are distributed as a token of membership; little wonder, then, that it is here where law and identity connect. The language of rights introduces a range of values into the Community’s legal and policy-making processes. These values differ sharply and ostentatiously from the Community’s legacy of economic focus. Rights talk, in this reading, denotes a certain moral content to Community law and policies, and thus offers a means of developing a moral and ethical foundation for the Community. Rights are commonly conceived of as an integrating force and relied on as a logic for creating group identity that transcends national barriers. It is here that the rhetoric of rights and the rhetoric of citizenship interlock.

Initially, the Court promoted identity forging through human rights and citizenship with extreme caution only. The Konstantinidis case of 1993 is a good example (1). Later, however, the Court switched gears and used Union citizenship to table its revamped notion of what Union law and European identity are about (2). I believe this road to be problematic (V).

1. Cautious Beginnings: Konstantinidis

The case begins simply, but ultimately implicates no less than the warring visions of the identity of Europe. It starts with a Greek national living in Germany, Χρήστος Κωνσταντινίδης, transliterated in his passport as Christos Konstantinidis, who became engaged in a Kafkaesque dispute with the German authorities over nothing less than his right to his name. In 1990 Mr Konstantinidis applied to the German Registry Office to correct a misspelling of his name in the marriage register. Upon examining his application, however, the German authorities determined that his name had, from the first, been improperly transliterated under German law. The spelling, they found, did not comply with the system of transliteration established by the International Organization for Standardization (ISO), the use of which is mandated by a 1973 treaty to which both Germany and Greece are parties. They ordered that pursuant to the ISO he must henceforth be known as Hristos Konstantinidis.

The poor man was horrified. The new spelling disguised his ethnic origin (Hristos, as the Advocate General observed to the ECJ, does not look or sound like a Greek name and has a vaguely Slavonic flavour) and offended his religious sentiments by destroying the Christian
character of the name.\textsuperscript{58} Mr Konstantinidis was also a self-employed masseur and hydrotherapist, and envisioned the inconvenience and loss of business from having to change the name by which he was known to his clientele.

The newly christened Hristos sought protection from the German courts, which referred the matter to the ECJ for a preliminary ruling under the Article 234 EC procedure.

In his Opinion of 9 December 1992, Advocate General Jacobs gave voice to the common-sense intuition that Mr Konstantinidis must be protected by human rights. He suggested that Mr Konstantinidis should be able to invoke European Community human rights against Germany. Wherever a Community national goes to earn his living in the European Community, he argued, ‘he will be treated in accordance with a common code of fundamental values’. Then Advocate General (AG) Jacobs said: ‘In other words, he is entitled to say “civis europaeus sum”’ (I am a European citizen) ‘and to invoke that status in order to oppose any violation of his fundamental rights’. The ECJ was not so sure. It chose to stay out of the human rights/citizenship business. While the Luxembourg judges saw fit to afford some protection to Mr Konstantinidis, they did not buy into, or even refer to, AG Jacob’s sweeping concept. Rather, they decided the case exclusively on the basis of Article 52 EEC Treaty (embodying the economic freedom of establishment, now Article 43 EC) and the principle of non-discrimination on the basis of nationality. The German authorities, concluded the Court, were not entitled to insist on spelling the applicant’s name in such a way as to misrepresent its pronunciation since such ‘distortion exposes him to the risk that potential clients confuse him with other persons’.

\textbf{a) Advocate General Jacobs}

While the doctrinal implications of the case are simple,\textsuperscript{59} on a deeper level, as the Advocate General acknowledges himself (paragraph 46), the case is about the depth and foundations of European integration. It is the concept of citizenship that, in its understanding as a membership right, connects the polity and the rights-bearer. ‘Civis europaeus sum’, Jacobs has the European consumer say, and attempts to trade in the traditional, and much-despised, market citizen (or \textit{homo economicus}, or \textit{Marktbürger}\textsuperscript{60}) for citizenship cast in terms of human rights, and in modernist, almost cosmopolitan terms at that. His mindset is best illustrated by an example he gives. Right before he suggests that any individual should be able to claim ‘civis europaeus sum’ and rely on the ‘common code of fundamental values’, he hypothesises about the ECJ’s right to intervene if a Member State instituted a draconian penal code under which theft was punishable by amputation of the right hand. The reader’s immediate reaction will be, ‘We’re Europeans,

\textsuperscript{58} At the hearing, according to AG Jacobs, Mr Konstantinidis pointed out that ‘he owes his name to his date of birth (25 December), Christos being the Greek name for the founder of the Christian—not ‘Hristian’—religion’: AG Jacobs in Case C-168/91, above n 57, no 40.

\textsuperscript{59} It was generally accepted that, with the exception of two small, narrowly circumscribed exceptions, the Court lacked competence to review Members States’ actions for fundamental rights violations. That was the task of Member States’ courts; the Luxembourg Court would review only Community actions. This orthodox view was expressed in Case 43/75 Defrenne [1978] ECR 1365, by AG Capotorti. The two exceptions are as follows. First, Member States’ actions implementing Community measures will be reviewed according to human rights (‘agency’ situation). The hallmark case is Case 3/88 Wachau [1989] ECR 2609. Secondly, Member States’ measures adopted in derogation from the prohibition on restricting the free movement of the four factors of production will also be scrutinised according to human rights. The hallmark case here is Case C-260/89 ERT [1991] ECR I-2925. In view of this, the novelty and breadth of AG Jacobs’s position becomes fully apparent. He suggests that whenever an EC national goes to another Member State in reliance on the rights of free movement in the Treaty, any failure to respect a fundamental human right of that national, whether or not it is connected with his or her work, should constitute an infringement of EC law. Clearly, AG Jacobs’s view would significantly expand human rights review through the ECJ.

\textsuperscript{60} See M Everson, ‘The Legacy of the Market Citizen’ in Shaw and More (eds), above n 55, 73; HP Ipsen, \textit{Europäisches Gemeinschaftsrecht} (1972) 102.
this can’t be legal, there must be human rights protecting us’. Identifying a form of oppression which horrifies us and which we have reason to expect would horrify anyone from our cultural or social background is a great strategy to argue for a universal claim. AG Jacobs makes a strong appeal to what he, and surely we, his Western readers, associate with the humanity of the individual. Viewed in this way, AG Jacobs is a cosmopolitan. He identifies a core of what makes us human—in his penal code, hypothetical bodily integrity; in his argument in the case itself, identity conferred through a name—and entrusts a national court with upholding it across all boundaries.

Ironically, in a cultural reading, these arguments are put to work for a very situated, bounded, geographically and historically sharply defined communal self. Consider, first, that the draconian penal code hypothetical conjures up the stereotyped epitome of Europe’s Other: backward countries under Sharia, in far-away corners of the world, rejecting not only the enlightened wall between the Church and the State but also the essentialist notion that common human rights standards can be arrived at and ought to be upheld everywhere in the world. Invoking the Other, and provoking the foreseeable response, reifies a distinctly Western liberal democratic identity. Inventing Europe in the mirror of the Orient by inventing the Orient has a long tradition in Europe. Hence, surprisingly, at the heart of the human rights argument lies the almost racist image of the bedevilled Orient.

Remember, secondly, that AG Jacobs uses Latin (‘civis europaeus sum’) to voice his citizenship concept. Latin was the European lingua franca, the language of diplomacy and polite society, far into the sixteenth century, until French replaced it. Latin, as a bygone common language, still conjures up a common Europeanness, much more so than French does. It is considered the root of European civilisation.

Consider, thirdly, that it was the Apostle Paul who repeatedly said to the Romans, ‘Civis Romanus sum’, to keep the Roman soldiers from physically abusing him and his followers. AG Jacobs, in using the parallel phrase, appeals to the deep strata of Latin Christendom, which, as a cultural framework, has become interchangeable with the idea of Europe. Christianity, moreover, is not only the undercurrent of contemporary European culture; it also carries with it a siege mentality. Islamic invasions along with the barbarian and Persian gave a European identity to Christendom as the bulwark against the non-Christian world.

Note that it also provided Western monarchies with a powerful myth of legitimation. The Advocate General, in surprisingly few words, summonses up the rich texture that is part of the idea of Europe.

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61 Even though we are aware that it may be a common practice as part of a cultural tradition in other societies, it is nevertheless abhorred—and rightly so. One may accept the relativist’s anthropological point that sensibilities, moral ideas and ideas of respect for persons and minimally decent treatment vary from society to society. This particular practice, however, so excites our sympathies for those who suffer from it, and so offends our sensibilities, that the example invites us to condemn the practice notwithstanding its establishment in a culture: J Waldron, ‘How to Argue for a Universal Claim’ (1999) 30 Columbia Human Rights Law Review 305.

62 If law is to embody this universalist claim, its apparent origin must be in (one universal, not context-specific) reason, not will. With law being the expression of (universal) reason, the inevitable momentum will be towards empire, away from multiple states: see Kahn, Cultural Study, above n 13, 58. And the empire, logically, must be ruled by one emperor, who holds all the strings, who will perhaps delegate but never divide his authority, and who can, jealously yet legitimately, claim exclusive loyalty. It is here that the unified European constitutionalism has its deeper roots.

63 For details see Delanty, above n 8, 84–99. The classic text is, of course, EW Said, Orientalism (1978).

64 The irony is highlighted by the fact that, if at all, the argument is made precisely the other way round. Hervey, for instance, suggests that the market construction of rights within the EU raises what she terms the ‘racist implications of Community law’: TK Hervey, ‘Migrant Workers and Their Families in the European Union’ in Shaw and More (eds), above n 55, 91, 95–6.

65 Of the narrative, inter alia, in Acts 16, 37; 22, 25–9.

66 See Delanty, above n 8, 26.
Thus, there are two layers in the Advocate General’s argument. On the one hand, he claims that names are cultural universals, and that to tamper with them is to deprive individuals of their identity. In a way, he protests against Germany’s distorting Christos’s first name, which signifies his uniqueness and individuality as a human being. This is a violation sufficiently egregious to evoke our universalist, abhorred response, which is why Christos Konstantinidis needs the Court’s protection under the blanket of human rights. On the other hand, he argues that Germany has violated the rights of ‘one of us’, a European citizen who can claim membership in the same polity as the rest of us. Here, AG Jacobs protests against Germany’s distorting of Mr Konstantinidis’s last name, which provides the bearer with family and extended kinship ties. It identifies Konstantinidis as a Greek national, and hence as part of the Community family. The violation should be made good not because it is so egregious, but because this is no way to treat a member of your extended family.

These two layers do not necessarily contradict each other. In fact, they work well together in that they provide the notion of citizenship, as used by the Advocate General, with a core of organic essentialism. This core—in the first version of the argument, Aristotelian; in the second, European-centred—undermines competing claims to identity and loyalty. If the organic-cultural core of what defines membership in a community is as AG Jacobs claims it is, how can there be a different one when it comes to a different polity? Is it possible that there even is a different polity that can lay a claim to loyalty?

The problem with this vision is its displacement of nationality, and thus the finality of just another superstate. The distribution of human rights in the European Union becomes the thick wall separating Us from Them, those who belong from those who do not, and Europe from the Other. This flies in the face of Article 17(1) EC, which reads: ‘Citizenship of the Union shall complement and not replace national citizenship.’ Moreover, it is out of touch with reality. Citizens do not identify with the Union; rather, they feel alienated, and do not trust Brussels. The reason may be that the nation, through its myths, provides a social home, a shared history and a common destination. It is the emotional, romantic side of belonging. Weiler calls it the Eros, while the national is Civilisation. If this is true, the Advocate General’s effort to wave yet another catalogue of rights before the public will be meaningless in the attempt to create an effective attachment of the European citizens to their new polity, and bring them to accept the redrawn political boundaries. It would also fail to reflect the complicated multilayered structure of European integration, citizenship or individual identity. It is impossible to funnel polycentricity, legal and cultural pluralism, and plurality into the old vessels of unity and exclusivity.

b) The Court

Far from taking up AG Jacobs’s proposals, the Court in its brief decision does not even mention human rights. Still, the Court has a theory on citizenship and identity. That theory emerges from the Court’s elaborate silence and its use of economic law to protect Mr Konstantinidis.

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68 See OPTEM, above n 32.
69 See Weiler, above n 1, 324–57. See Anderson, above n 28: while the nation is the place of culture, and culture is the domain of feeling, there is no culture in nationalism, only an elegant, decorous absence of feeling.
71 While it may seem strange, at first glance, to distil a theory from silence, it is not so far fetched for those who are familiar with the Court’s jurisprudential culture. The Court and the Advocate General often seem to engage in a peculiar instance of division of labour. The Advocate General eloquently summarises arguments
The context of the Court’s theory is that of economic existence. Markets require a fluidity of capital, human and fixed. Market actors, both on the production and the consumption end, must be open to the reshaping of their own conception of the self over time. Identities, in other words, can be adopted and discarded like a change of costume. Bauman has likened modern life to a pilgrimage into the desert where one is in constant danger of losing one’s identity. That exactly is what happens to Konstantinidis: he loses his name, unquestionably the main bearer of identity. He learns, through painful experience, that mobility means to subject oneself to forces that will change identity in unknown ways, and that he is not the sole master of his identity.

The Court, then, essentially negates what the Advocate General believes. AG Jacobs is a modernist: identity is in the hands of the individual, and the goal is not to impinge upon it. He believes in a manageable world and rationality. History, to the Advocate General, is progress. The task is an impossible one: humanity as such, order, harmony, and certainty. While the horizon can never be reached, it is precisely the *foci imaginarii* that make the path feasible and even inescapable. If humanity is essentialist, human rights protect at least an essentialist core. The more human rights the better, and the more encompassing their scope the better, too. It is a matter of logic, therefore, to apply human rights judicial review against the Member States. It protects Konstantinidis in his being human (or at least, in his being one of us). His humanity is, inter alia, his autonomy, and as an autonomous sovereign agent he has the capacity to choose to travel beyond the boundaries of his known world. Protecting that autonomy means absorbing the risk involved in this endeavour. Choice and morality are private; risk is public. Konstantinidis’s freedom must be unharmed—and it is the job of the government to protect it. The tools of protection are, of course, human rights, as the ultimate weapon at the disposal of the enlightened agent.

The Court is sceptical. It appears comfortable with the notion of citizenship as consumer identity. Commentators are uniformly and customarily critical of such suggestions. Weiler, for example, speaks of ‘bread-and-circus democracy’ and a ‘Saatchi & Saatchi Europe’. However, there is strong evidence that today ‘we can learn more about the operations and values of social communication from Saatchi & Saatchi than from [Justices on the US Supreme Court] Holmes and Brandeis’. Rather than mourning a world we have lost, and condemning consumer culture as a social pathology that is both hedonistic and parasitic, we should accept that individuals use consumption—understood as rituals and codes which form a flow of information—to say something about themselves, their families and their loyalties. The kinds of statements they make reflect only the kind of universe surrounding them. The meanings and rituals of consumption mark out the categories and classifications which constitute social order. We might want to imagine the postmodern consumer as ironic and knowing, reflexive and aware of the games being played. The consumer has considerable cultural capital.

The Court, it seems, understands this. It has refused to pretend that Europe is composed of individuals carrying their immutable identities around with them, and has recognised instead...
the risk that identities will be changed, perhaps erased, by forces beyond individual control. Identities are not pre-social, monolithic or unchanging; they are multilayered, complex and impacted in unpredictable ways by disordered cultural spaces. The Court recognises that Konstantinidis, like all of us, is not just a self-defined independent agent. Power is exercised not primarily by him, but by the changing social environment around him. The Court displays a postmodern sensibility by limiting that power as is appropriate to Konstantinidis’s endeavour as an economic pilgrim.

c) Conclusion and Critique

In a way, the Court takes up AG Jacobs’s suggestion of linking the Konstantinidis case to the notion of citizenship. European citizenship, however, will not be defined through essentialist human rights, or exclusive demands on loyalty. According to the Court, a theory of European citizenship has to take into account the practice of citizenship in Europe. That practice does not support liberal, communitarian or republican theories of citizenship. Beyond its glossy surface of liberal human rights, or communitarian Europeanness, the European experience of citizenship is exactly as Article 17 EC has it: it is framed by the ‘limitations and conditions laid down in this Treaty and by the measures adopted to give it effect’, that is, by economic ratio. There is a gap, then, between the projected nature of the European polity on the one hand, which has appropriated cherished symbols of statehood and which lays claim to its citizens’ political loyalty, and the nature of the European citizens’ experience of citizenship on the other hand, which is dominated by rituals of trade, travel and consumption. The Advocate General models his vision of citizenship according to the nature of the polity, and embraces the notion that citizenship in Europe is still a project. Applying human rights against Member State actions would accomplish the project of rights-based citizenship, and at the same time the project of an ever-more federal Europe. The Court, in contrast, models its vision of citizenship after the practice, and experience, of citizenship. It refuses to bridge the gap between Europe’s reach and citizenship’s practice by projecting onto the individual attributes that have long dissolved, and hopes that have proved illusory.

European identity, as understood by the Court in 1993, proves to be fleeting, unstable and insecure, and hinges on participation in the market. It is just as complex and multilayered as the law that supports it. The upside is that the Union, in sustaining nothing more than weak and thin post-political identity, is able to perform its role as Civilisation. The downside is that postmodern superficiality squashes hopes for a vibrant political life and European Eros.

2. The Way Forward?—Evolving Union Citizenship

Obviously, this state of affairs sits squarely with the increasingly shrill discourse of shared values and a European identity rooted in commonness, feelings of belonging and a shared fate. The mounting pressure is nowhere more evident than in the Court’s own documents, namely its Advocate Generals’ opinions. In Konstantinidis, AG Jacobs seems to have started something of a tradition. A little later, AG Léger in Boukhalfa75, AG La Pergola in Martínez Sala76 and AG

75 See AG Léger in Case C-214/94 Boukhalfa [1996] ECR I-2253, no 63: ‘Admittedly the concept embraces aspects which have already largely been established in the development of Community law and in this respect it represents a consolidation of existing Community law. However, it is for the Court to ensure that its full scope is attained. If all the conclusions inherent in that concept are drawn, every citizen of the Union must, whatever his nationality, enjoy exactly the same rights and be subject to the same obligations. Taken to its ultimate conclusion, the concept should lead to citizens of the Union being treated absolutely equally, irrespective of their nationality. Such equal treatment should be manifested in the same way as among nationals of one and the same State.’
Jacobs again in *Bickel & Franz*\(^{77}\) made sweeping statements. The most extensive and fervent treatment of Union citizenship comes from AG Cosmas in *Wijsenbeek*. He first turned against the notion that Article 18 EC might not in itself have regulatory scope:

First, it underestimates the constitutive task of the Community’s constitutional legislature, presenting it as being devoid of substance. Secondly, it disregards the Community’s evolutive dynamics at a time when those dynamics are obvious at all stages in the evolution of the written rules and case-law on the free movement of persons. Lastly, my objection is based primarily on the very wording and spirit of the article in question . . .\(^{78}\)

Up to the Maastricht Treaty,

the text of the Treaties establishing the Communities gave the impression that persons were not considered to possess rights, in other words as autonomous holders of rights and obligations, except indirectly; it is only by repercussion that they benefit from the favourable consequences of the direct application of a rule of Community law and, more generally, of the implementation of the economic objectives of the Community legal order. The central objective of the Community rule lay in principle in the development of the Community itself and in the promotion of its fundamental aspirations . . .\(^{79}\)

This, however, has changed, according to AG Cosmas, with the insertion of Article 18 EC:

The article in question is inspired by the same *anthropocentric* philosophy as the other provisions of the body of rules of which it forms part. One class of persons, the citizens of the Union, become holders of a specific right—in the present case the right to move and reside freely within the territory of the Member States—irrespective of whether the enjoyment of this right is accompanied by the promotion of other Community aspirations or objectives.

This is where one of the most essential differences between Article 8a [now 18] and Article 48 [now 39]ff is to be found. The latter articles have established a *functional* possibility for nationals of the Member States, which they are granted so that they exercise it with a view to the creation of a common market, the objective of which can only be to permit persons to pursue their economic activities in optimum conditions. Article 8a [now 18], by contrast, establishes for nationals of the Member States (now designated citizens of the Union) a possibility of a *substantive* nature, namely a right, in the true meaning of the word, which exists with a view to the autonomous pursuit of a goal, to the benefit of the holder of that right and not to the benefit of the Community and the attainment of its objectives.\(^{80}\)

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\(^{76}\) See AG La Pergola in Case C-85/96, *Martínez Sala* [1998] ECR I-2691, no 18: ‘Article 8a extracted the kernel from the other freedoms of movement—the freedom which we now find characterised as the right, not only to move, but also to *reside* in every Member State: a primary right, in the sense that it appears as the first of the rights ascribed to citizenship of the Union. That is how freedom of residence is conceived and systematised in the Treaty. It is not simply a derived right, but a right *inseparable* from citizenship of the Union in the same way as the other rights expressly crafted as necessary corollaries of such status (see Article 8b, c and d)—a new right, common to all citizens of the Member States without distinction. Citizenship of the Union comes through the fiat of the primary norm, being conferred directly on the individual, who is henceforth formally recognised as a subject of law who acquires and loses it together with citizenship of the national state to which he belongs and in no other way. Let us say that it is the *fundamental* legal status guaranteed to the citizen of every Member State by the legal order of the Community and now of the Union’ (emphasis in the original).

\(^{77}\) See AG Jacobs in Case C-274/96, *Bickel & Franz* [1998] ECR I-7637, no 23–24: ‘The notion of citizenship of the Union implies a commonality of rights and obligations uniting Union citizens by a common bond transcending Member State nationality. The introduction of that notion was largely inspired by the concern to bring the Union closer to its citizens and to give expression to its character as more than a purely economic union. That concern is reflected in the removal of the word “economic” from the Community’s name (also effected by the Treaty on European Union) and by the progressive introduction into the EC Treaty of a wide range of activities and policies transcending the field of the economy . . . Freedom from discrimination on grounds of nationality is the most fundamental right conferred by the Treaty and must be seen as a basic ingredient of Union citizenship.’

\(^{78}\) See AG Cosmas in Case C-378/97 *Wijsenbeek* [1999] ECR I-6238, no 80.

\(^{79}\) Ibid, para 82.

\(^{80}\) Ibid, paras 83 and 84.
What follows must be a fundamental change:

In other words, Article 8a does not simply enshrine in constitutional terms the acquis communautaire as it existed when it was inserted into the Treaty and complement it by broadening the category of persons entitled to freedom of movement to include other classes of person not pursuing economic activities. Article 8a [now 18] also enshrines a right of a different kind, a true right of movement, stemming from the status as a citizen of the Union, which is not subsidiary in relation to European unification, whether economic or not.\(^\text{81}\)

Citizenship, therefore, is not structured through the parameters of the common market (paragraph 86). As can be seen from ‘the body of European constitutional literature’, citizenship is linked not so much to Articles 39ff EC, but to ‘the fundamental right to personal freedom, which is at the apex of individual rights’ (paragraph 89).

The Court did not follow its emphatic Advocate Generals. Rather, it developed Union citizenship in small, incremental, but ultimately very powerful steps. While it remained hesitant in Bickel & Franz and Wijzenbeek, it regrouped in a series of cases that led to a consistent and potent citizenship jurisprudence.\(^\text{82}\) The first of this series was Martínez Sala.\(^\text{83}\) Article 17(2) EC ‘attaches’ to the citizen the rights and duties existing under the EC Treaty, especially the non-discrimination principle in Article 12. Ms Martínez Sala could claim equality of treatment, in this case access to a German child-raising benefit for her newborn child, even if she was solely dependent on welfare and could bring herself within the personal scope of Community law by no other means than that she was a Union citizen lawfully residing in another Member State. The only material condition was that the benefit she claimed must fall within the scope of EU law.\(^\text{84}\) Some have concluded that this is something close to a universal right of access to all kinds of welfare benefits to all those who are Union citizens and are lawfully resident in a Member State.\(^\text{85}\)

The next step was Grzelczyk.\(^\text{86}\) The Court’s reasoning resembled that of Martínez Sala but was more far-reaching. The ECJ used citizenship to determine the sphere of \textit{ratione personae} for the application of Article 12 EC; it is because Mr Grzelczyk is a Union citizen lawfully residing in Belgium that he can avail himself of Article 12 EC, in all situations that come within the scope \textit{ratione materiae} of Community law. The very scope \textit{ratione materiae} is defined in part by the right to move and reside freely in another Member State.\(^\text{87}\) Also, the Court held that

Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.\(^\text{88}\)

This line of reasoning was finally confirmed in d’Hoop.\(^\text{89}\) If Konstantinidis came to the Court today rather than in 1993, the ECJ’s decision would look very different from what it did eleven years ago. In fact, a similar case involving the changing of names did come to the Court, and it did decide on the basis of the citizenship provisions. The case Garcia Avello\(^\text{90}\) concerns the surname borne by children born in Belgium to a married couple resident there. The father is a

\(^{81}\) Ibid, para 85 (emphasis in the original).


\(^{83}\) See Case C-85/96, above n 76.

\(^{84}\) Ibid, para 63.

\(^{85}\) See SC Fries and J Shaw, ‘Citizenship of the Union’ (1998) 4 European Public Law 533.


\(^{87}\) Ibid, paras 32 and 34.

\(^{88}\) Ibid, para 31.


Spanish national, the mother is Belgian and the children have dual nationality. On registration of their births in Belgium, the children were given the double surname borne by their father—Garcia Avello—composed, in accordance with Spanish law and custom, of the first element of his own father’s surname and the first element of his mother’s surname. The parents subsequently applied to the Belgian authorities to have the children’s surname changed to Garcia Weber so that it reflected the Spanish pattern and comprised the first element of their father’s surname, followed by their mother’s (maiden) surname. That application was refused as contrary to Belgian practice. To little surprise, the Court decided in favour of the parents. Importantly, it continued its citizenship jurisprudence and heavily relied on Martinez Sala, Grzelczyk and d’Hoop.

This jurisprudence, in conclusion, is interesting in more than one respect. First, the Court decided to use, for the first time in the field of Union citizenship, rather emphatic language. Union citizenship rises to be the ‘fundamental status’ of Member State nationals. If it is ‘fundamental’, nationality consequently loses its hitherto fundamental character. Secondly, the Court does not follow its Advocate Generals’ doctrinal submissions. It does not sketch Union citizenship as a ‘fundamental right to personal freedom’, which, according to AG Cosmas in Wijzenbeek, is at the ‘apex of individual rights’. Citizenship, according to the Court, is not foremost about freedom, but about equality. The ECJ links the citizenship clause with Article 12 EC and its principle of non-discrimination on the grounds of nationality. Belongingness mediated through nationality thus becomes less relevant; citizenship of the Union becomes fundamental. Behind this doctrinal construction stands the notion of transnational equality of European citizens. Citizenship is defined through the idea that Europeans across borders are equal—or, at least, are not unequal because of their respective nationalities. What is implied is that European citizens are part of a whole. While AG Cosmas’s right to personal freedom is about solitary individuals, their individual will and their individual ends, the principle of non-discrimination hinges on some form of commonality that makes them part of a larger organism. The gestalt of citizenship is not simply one of liberal individualism and rights so prominent in the Advocate Generals’ opinions, but is enriched through a collective dimension. Of course, this dimension is ‘imagined’, to borrow Anderson’s wonderful phrase. The Court, in other words, starts to construct an imagined community. This is the truly revolutionary moment in the Court’s citizenship jurisprudence. The difference between the Advocate Generals’ conception of citizenship and that of the Court is not merely academic; rather, it marks the difference between rights-based individualism and collective imagination of Gemeinschaft. From the first speaks a logic of enlightenment and its aspiration to place the individual, freedom and autonomy at the centre of communities—this is what AG Cosmas means when he speaks of ‘anthropocentric philosophy’. The Court, on the other hand, displays a good deal of sensitivity towards collective identity as part of individuals’ lives.

It may be that the Court has embarked on a journey towards political rhetoric. Political rhetoric invokes physical participation in a transtemporal community that is the physical corpus of the polity. Our century-long experience identifies that community as the state. Political rhetoric is about the realisation of the idea of the state in the individual citizen’s body. While political rhetoric is usually wary of law, just as law more often than not excludes political rhetoric, there are instances when these two come together. Prominent examples are the topos of sovereignty and the mythical point of origin of a community. In such instances, constitutional discourse becomes an important source of political rhetoric. Constitutional courts show us the high political rhetoric of the nation. Courts speak in the name of the sovereign people and tell us who we are, and who we are not. The ECJ’s recent jurisprudence

91 See Kahn, Liberalism, above n 13, 244.
on citizenship may mean it is ready to take on its role to elaborate the character of the political subject who is the citizen, and to identify the relevant community as the Union.92

### V. Politics and Post-politics

#### 1. The Murmuring Nation

The turn towards identity in European law is fraught with ambiguity. This comes as no surprise, taking into account the historical conditions of the discursive interlocking of citizenship and human rights: the disintegration of European natural law, the rise of social contract theories and the development of states in the modern sense. The success of the nation-state within the last two centuries is conditioned by ambivalent semantics. On the one hand, state and nation mark the rise of modern, post-traditionally organised polities that have rid themselves of all organic bonds. All pre-modern commitments, such as family and religion, have weakened and discharged the citizen into a mobile environment. The modern nation-state is constituted through citizens as abstract individuals, not through members of preformed groups. On the other hand, modernity has produced its own antithesis. In an environment of an abstract public domain and a gestaltless levelling of social bonds, individuals look for traces of true commonality in secluded spaces.93 The pre-modern character of Volk and nation is not pre-modern at all, but the effect precisely of modernity. The language of common roots, shared history or cultural unity is the by-product of the modern aseptic language of the nation-state. Today, more than ever, it is intertwined with the rhetoric of the initiated, the unspeakable and the secret, which makes the political appear ambivalent and ambiguous. At the same time, it is the very condition of modernity, comparable to vampires, which are portrayed as remains from the past, while their existence is in reality constituted by modernity itself.94 The state speaks the language of citizenship, rights and universality, but it means some unspeakable remnants, from which it is possible to sniff out the unique, the authentic and the unmistakable commonality. It is this interlocking of efficient bureaucracy and cloudy identity that makes the nation demonic.

The arcane underside of the political drifts to the surface as soon as a polity turns to identity discourse. This is true whether or not it is a transnational polity. Little wonder, then, that

92 It is no coincidence that the Court assumes a new role and turns to political rhetoric and identity. The discursive environment accompanying the citizenship jurisprudence since 1998 has exerted much pressure on Community law to reflect identity in its structures, programmes and meanings. There has been increasing politicisation and a distinct turn away from the primacy of legal and economic integration. The question of the political, the search for Europe's political imagination and the debate about its identity, foundations and ends have entered the stream of European discourse with such vigour that debates about democratic structures, transparency, effective administration etc have been, if not replaced, at least contextualised. What does Europe mean to its citizens if the turnout at elections for the European Parliament is extremely low? What is the Community about if the logic of economic growth seems exhausted after Seattle? Is there a democratic identity in sight if, in the centre of Europe, a party is represented in the Austrian government that in the eyes of many is intolerant and xenophobic and that sends ministers to the Council? What does our common money mean to us after the dispiriting Duisenberg/Trichet compromise and the drop of the euro below the par of exchange with the dollar in January 2000? Who are we as Europeans if the CFSP is disgraced by the violent conflict in Kosovo? All these questions pressed for an immediate answer; all involved European identity. We have seen part of that answer in the debates on the future of Europe and the quest for a Constitution for Europe. Mostly, however, this has been symbolic politics. The more important, if less showy, part of the answer is the Court's new role and, above all, law's changing meaning.


Europe today struggles with old demons. Jurists should be aware, too, that law is not immune from such ghosts from the past. Just as the nation murmurs beneath the surface of transnational integration, the mythical and the mystical whisper beneath the aseptic surface of the law. As Europe turns to identity, research must turn to Europe’s law’s deep structure.

2. Europe’s Legal Imagination of the Political

The debate on EU constitutional legitimacy has moved from formal validity (the legitimacy of the Court’s constitutionalising legal discourse) via deontological concerns (the democratic deficit) to foundational myths (issues of European identity and demos). Europe is redefining its political imagination. Most legal research, as instructive as it is, has little, or the wrong things, to contribute to this search. Trawling the bowels of the regulatory state will not yield a European imagination of the political. Perhaps, we are witnessing the move away from Civilization towards Eros.

The political, of course, is a contested domain. Its imagination is contingent upon the reality that surrounds it. Living in a world of economic transactions, consumption and markets—a world, that is, in which (in the words of the Schuman Declaration) ‘war becomes unthinkable’—the political is largely replaced by the market. Identity is as fluid as money flows, citizenship becomes more a matter of consumption than of political rights and duties, and Shore writes, ‘The citizen-hero of the new Europe thus appears to be the Euro-consumer.’

That, however, may quickly change. Political meanings are as contingent as any others: they can slip away with a slight change of perspective and can just as easily slip back into place. As soon as the political enters the domain of ultimate values and meanings, it becomes incommensurable with the values of the market. We need no reminder of this after 9/11. At the centre of such imagination stands the nation-state. It is the sole source, and the only end, of its own existence; it loves only itself. It exists as a meaning borne by citizens willing to invest their bodies in its continued existence as an order of law. Its power rests on the willingness of individuals to take up, as their own self-identity, the identity of the state. Maintenance of the state, then, becomes a meaning worth fighting and dying for. That is the nature of sacrifice: to take on, in one’s own body, the meaning that informs and sustains a larger community. The modern nation-state has been extremely successful in mobilising its population to make sacrifices in order to help sustain the state’s continued historical existence.

We stand dismayed and helpless before the tenacity of the nation-state’s political imagination. Living in Europe, we like to think we have outgrown the autonomy of the political and have entered the age of post-politics. We describe politics as a site of competition between interest groups. Ultimate
political meanings have given way to a multiplicity of particular interests. Many of those interests are just the same as those advanced through the market. Politics, therefore, appears as an alternative means of accomplishing market-ends. We have long lost sight of the notion of sacrificial politics at home. ‘Who,’ asked Benedict Anderson in 1983, ‘will willingly die for Comecon or the EEC?’

In part, this is a matter of perspective. It was none other than Carl Schmitt, in 1932, who realised that nowhere in liberal accounts of the state does anyone die; there is only protection from the state, no dying or killing for the state. Liberalism—a theory of contractual origins of law, whether or not behind a veil of ignorance—fails to see law’s move from contract to sacrifice and the collective nature of sovereignty. Yet this is not just another version of the story of the blind men and the elephant. There are signs that the political and the market are in fact increasingly being conflated, with ‘citizens’ and ‘consumers’ becoming essentially one and the same thing.

Can we really deny a blurring and flattening of modernist (not to mention pre-modernist) distinctions? Is it not true that, to a large extent, values have first materialised, then dematerialised and now exist purely as signs circulating within a political economy of signs? The plane of signs and culture can no longer be anchored in ‘finalities’ in the external world (eg consumption is no longer anchored in the finality of need, nor knowledge in truth, technocracy in progress or history in a meta-narrative of causation and teleology). It often seems there is little credible beneath or beyond the flat landscape of endless signification. Perhaps, in Europe, the outlines of a liberal order—a post-political order stripped of its attachment to a popular sovereign—are emerging, something that Kahn calls the ‘European model’.

I fear that while Europe is increasingly postmodern in relation to its Member States, it becomes just as increasingly modern with respect to its own identity. A slight change of perspective may yank us back onto a terrain where we distinguish between friends and enemies, believe in ultimate values, crave for meaning that we derive from standing for some larger community which will outlive ourselves, and are ready to invest our bodies into the continued existence of the polity we live in. Do we want such a political imagination for Europe? If so, how do we get there? If not, can we prevent it? These are questions that concern the meaning of the political just as they concern the meaning of law. Law is memory, and we are witnessing the Court feeding it with its new notion of collective identity. Jurists cannot leave this field to political science or politics.

3. Finality: Eros? Civilisation?

It will get more and more difficult to say what we actually mean when we speak of ‘European law’. What was thought of as a single body of rules has developed into a rich and inter-related patchwork of legal regimes, orders and spaces. The emergence of cross-referenced legal fields makes it pretty much impossible to maintain a single, coherent way of thinking about Community law. Research will doubtless break up into diverse disciplines: material and institutional, grand theory and micro theory, and subject areas. Much of EU legal studies have
already moved into this direction.\footnote{See, eg P Craig and G de Búrca (eds), \textit{The Evolution of EU Law} (1999).} Integrating political and legal analysis\footnote{See D Wincott, ‘Political Theory, Law, and European Union’ in Shaw and More (eds), above n 55, 293.} will not hold all those diverse strands together under one roof. That, however, is a sign not of law’s demise, but of its maturity. It is law that in the future may help forge a European identity and remodel a post-political finality into genuinely political ends. With Union law’s changing meaning, Europe may change its direction.

To be sure, rethinking the meaning of law in European integration in no way means a diminishing role of the ECJ. We should not expect lessening influence, or even a decreasing docket, in Luxembourg; quite the contrary. Once the Union and its Court enter the stage of the political, we may expect the constitutional discourse of the ECJ to become our most important source of political rhetoric. In a political community with symbolic narratives of self-creation, the Court’s legitimacy will be located not merely in the ‘science of law’ but in politics. Political identity will focus on a legal text, which may or may not be the Treaty of Lisbon. The political, which will define our self-understanding, will merge into our understanding of ourselves as a community under the rule of law. The myth will be that through the law, uttered by the Court, we participate in a sovereign act of self-government.

There is a profound temptation in awakening Europe’s political imagination, yet a polity imagines itself as a transtemporal community only from the perspective of the will. There is no will in the abstract and no universal will, only the narrative of self-creation of a particular community. Thus, Europe is at a decisive crossroads. Aspiring to a world of deep politics, it may easily overcome the social legitimacy deficit; at the same time, it enters the field of belonging, imagined authenticity, possibly of friends and enemies and blood and soil. The law would indeed be not about what we should do, but about who we are. On the other hand, Europe aspires just as much to a world of post-politics, where we imagine ourselves as fluid, multiple and fragmented. Here, the political looks like the economical, the state does not love only itself but looks like the market. This is the world of networks, a world stripped of flesh and bodies.

The failure of the Constitutional Treaty and the turn from constitutional hubris toward a Union of interests, travel, trade and consumption may signify a step towards the second model. To be sure, the European model, if it is to be the second model, is not the model of the rest of the world, nor even the American model. It is my suspicion that the political will not simply go away, not even in Europe. Yugoslavia has taught us about the fragility of post-politics; political rhetoric from Luxembourg will do little to rekindle our belief in the dawning of the age of post-politics. Law in the Union may soon take on a meaning different from what it is today, and while this would lead to a vibrant political life, it is not difficult to spot the problems. In this light, maybe there is something to say for striving for Civilisation rather than Eros.
Part II

Institutional Issues
I. Introduction and Purpose

To analyze the institutions of the European Union is to do research on a moving object. Central parts of what is now the core of the Union’s institutional system did not exist at the beginning of the process of European integration. The European Council or the European Parliament, for example, are today main actors in the institutional setting, but the former was not even mentioned in the Treaties of Rome, and the latter’s role changed dramatically. Looking at this profound change, one might assume that the institutional system is still in flux, not yet matured—and thus difficult to interpret in a coherent way.

Yet, another view is possible. The institutional development of the Union can also be seen as variations on a fixed tune, a development inspired by the same melody, although in different keys and tempi. This will be the approach of this chapter. It will try to analyze the institutions as being shaped by a generally unchanged tune or, as might be the more appropriate term in this context: structure. This structure, so the underlying thesis here, works its way into the shape of the institutions and their inter-institutional dynamic, and at the same time poses inherent and thus recurrent problems. This structure is that of executive federalism.

The aims and purpose of this chapter are threefold. First, it will reflect upon past research that has been carried out in Germany on the topic of the European institutions. It will thereby try to describe how our current understanding of European institutions has been shaped.

Building on this foundation, the second aim will be pursued. The chapter tries to analyze the current institutional setting within a coherent conceptual framework, which is the structure of
executive federalism. Its basic features will be described first, then the next part of the chapter, which describes the individual institutions beginning with the Council, will analyse the other institutions, as they perform their tasks ‘under the spell’ of the institutional dynamic arising from the structure of executive federalism: the European Parliament, the Commission and finally the European Council. The chapter will then move away from single institutions to focus on the major question of principle concerning the institutions: legitimacy. It will present different aspects of this issue and conclude by proposing a new label to describe the distinctly European situation: the label of a ‘semi-parliamentary democracy’.

The third general aim of the chapter is to reflect on the possible future development of the institutional system under the Lisbon Treaty. The Treaty’s effect on the institutions will therefore be considered throughout. However, by way of conclusion, its general effect on the institutional system will be briefly summarised.

Before we assess past research, some definitions and clarifications are necessary. First, what do we mean by ‘institution’? Here, ‘institutions’ are the main organs of the Union, as set up by the founding Treaties and mentioned in Article 7 EC and Article 5 EU.¹ This chapter will not address all such institutions; rather, it will focus on those organs that are part of the regular political process of policy- and law-making. The Court of Auditors and the European Court of Justice (ECJ) therefore fall outside the scope of this chapter.² Certainly, one can argue that the ECJ is a political organ. It serves as a constitutional court and its case law has set fundamental guideposts for the political process. Nevertheless, the ECJ is not part of the regular process of policy- and law-making. The rules for appointing its members, its principal task and, last but not least, its understanding of its own role distinguish it sufficiently from institutions which evolve from party competition and elections, and which proactively shape policy.³

One final note. This chapter will try to develop a systematic and coherent perspective on the institutional system in the structure of executive federalism. To this end, it will stress those aspects which make the system work and will focus less on its evident failures. To some, this perspective will come across as apologetic; some might suspect Dr Panglos at work.⁴ Perhaps that is true. It could also be the author’s German mindset, which always strives to build systems and to detect reason in accidental realities. But, perhaps, it could be that there actually is some sense behind this setting. Let’s see.

II. Past Research and Recurrent Questions

This volume on the principles of European constitutional law aims not only to describe the current law of the European Union,⁵ but also to reflect upon the ways in which the understanding of this law has been formed. Examining past German⁶ legal scholarship on institutions, however, requires a careful look. A first search for books on Community institutions seems to

¹ The terms ‘organ’ and ‘institution’ are used synonymously in this text.
² The European Central Bank and the European Council will become ‘institutions’ of the EU pursuant to the Lisbon Treaty (Art 13 TEU-Lis). Given the just-stated focus of this contribution, it will only deal with the European Council.
³ As to the ECJ, see generally J Bast, below chapter 10; FC Mayer, below chapter 11, both with references to further literature.
⁶ This section on past research is restricted to a review of German literature not least because I simply lack sufficient knowledge of the discussions in other countries. It would, however, be interesting to learn whether the observations made in this section correspond to approaches and themes in other countries.
produce ambivalent results. Even though the Council, the most powerful of the new institutions, began receiving monographic treatment as early as in the early 1960s, a German monograph, analysing only the Commission as arguably the most original component in the new institutional setting, was published for the first time only in 1980.

But this first look is deceptive. Typically for the German approach, and perhaps for any legal approach to institutions, scholars do not address them directly but instead through debates on legal principles. The separation of powers doctrine and the democratic principle in particular have been starting points for legal examinations of the supranational institutional system. This became relevant first with respect to Council and Commission.

1. Addressing Council and Commission through Principles and Procedures

By the 1950s, the debate on European institutions was characterised by the view of institutions seen through the lens of legal principles. In those days, heated debate arose with respect to the European Defence Community. The point in question was whether the new organisation had to observe the separation of powers principle. The debate was sparked by the argument that the German Constitution, which generally allowed the transferral of powers to international organisations, requires that the newly erected organisation must observe a 'structural congruence' with German constitutional law.

This debate was probably, at its core, concerned more with German constitutional law (and lawyers) than with the EEC. Nevertheless, it initiated the first intense discussion of the institutional setting of the EEC, thus bringing the new organisation to the centre of attention in German legal scholarship. In 1964, the preservation of the rule of law in international organisations even became a topic of the annual meeting of public law scholars, always a certain indicator that a topic had made centre stage. However, the discussion had cooled off by that time. The opinion prevailed that the new Communities presented a new form of governmental and legal structure, in which the idea of separation of powers while applicable had found a new form.

Early research on the institutions also went beyond this debate and provided groundwork, without, however, inspiring legal scholars to more conceptual aspirations. The analysis of the Council by Sigismund Buerstedde, to take the best example, gives a knowledgeable account of the foundation, organisation and mechanisms of this institution.


7 KH Friauf, Die Staatenvertretung in supranationalen Gemeinschaften (1960); S Buerstedde, Der Ministerrat im konstitutionellen System der Europäischen Gemeinschaften (1964).
9 H Kraus, ‘Das Erfordernis struktureller Kongruenz zwischen der Verfassung der Europäischen Verteidigungsgemeinschaft und dem Grundgesetz’ in Veröffentlichungen des Instituts für Staatslehre und Politik (ed), Der Kampf um den Wehrbeitrag (1953) vol II, 545; as to this debate, see Friauf, above n 7, 79–86.
10 Hans Peter Ipsen later scathingly remarked that the whole debate was yet another sign of the introverted nature of German legal scholarship: idem, ‘Diskussionsbeitrag’ (1964) 23 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 130.
11 See, eg J Seeler, Die europäische Einigung und das Problem der Gewaltenteilung (1957); H Petzold, Die Gewaltenteilung in den Europäischen Gemeinschaften (1966) with further references.
12 Tagung der Vereinigung der Deutschen Staatsrechtslehrer.
13 JH Kaiser and P Badura, ‘Bewahrung und Veränderung demokratischer und rechtssstaatlicher Verfassungsstrukturen in den internationalen Gemeinschaften’ (1964) 23 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 1 and 34, respectively.
14 Buerstedde, above n 7.
After receiving heightened attention in the first decade, research on Council and Commission slipped from the centre of attention—to which it would not return until the 1990s. The field became one of experts and practitioners. Another transformation took place. By the early 1970s there was general agreement that the EEC’s institutional system was dysfunctional and needed reform. The question of how to change the institutions became a dominant topic. The work of Christoph Sasse is representative for this time.\(^\text{15}\) He saw two main problems: a lack of leadership and a lack of legitimacy. The Commission was regarded as the victim of a miscalculation according to which it was assumed that technocratic expertise alone would convince national publics and suffice as a basis for leadership. The Council, on the other hand, was marked as the villain. The dominance of national self-interest in its deliberations and the disrespect for the role of the Commission were seen as causes of the bleak situation.

In a different class was Hans Peter Ipsen’s handbook on European law.\(^\text{16}\) Presenting a whole theory of European integration and its law, it also came close to offering a conceptual framework for the institutions. However, from today’s perspective, the Ipsen book seems more like a dinosaur than the Owl of Minerva. For all its considerable length, it was unable to illuminate the changes that had occurred in the institutional system since the mid-1960s. Although Ipsen acknowledges the central role of the Council as an organ that embodies ‘potency and risk’ at the same time, he has no answer to the problems of the Commission.\(^\text{17}\)

Perhaps wary of conceptual approaches during times of perceived stagnation, legal literature in the late 1970s and 1980s turned to topics that were located more at the core of legal analysis. The proliferation of organisations under the EEC Treaty raised questions about how this growing organisational structure could be understood and legally ordered.\(^\text{18}\) Meinhard Hilf’s major study of the organisational structure of the Communities provides a formidable overview of the immense differentiation of the institutional system below the level of Treaty organs.\(^\text{19}\)

At the same time, the creation of new inter-institutional procedures was discussed intensely. The focus of this discussion was the concerted action between the European Council, Commission and Parliament, which was agreed upon in 1975.\(^\text{20}\) This is the beginning of an intense examination of law-making procedures within German legal scholarship.\(^\text{21}\) However, it is also part of the attention, which the pet object of German institutional scholarship, the European Parliament, has received.


\(^{16}\) HP Ipsen, \textit{Europäisches Gemeinschaftsrecht} (1972).

\(^{17}\) For another general yet less influential approach, see L-J Constantinesco, \textit{Recht der Europäischen Gemeinschaften} (1977).


\(^{19}\) M Hilf, \textit{Die Organisationsstruktur der Europäischen Gemeinschaften} (1982); as to other questions of this development, see R Priebe, \textit{Entscheidungsbefugnisse vertragsfremder Einrichtungen im Europäischen Gemeinschaftsrecht} (1979).


2. European Parliament: The Pet Object

Research on the European Parliament (EP) has always played a special role in German research on European institutions. Self-sustained interest produced a constant flow of literature, yet early research was also driven by a question of principle. The above-mentioned debate on a requirement of congruence between German and European constitutional law also raised the question of the democratic principle. This question was fenced off quicker than with respect to the separation of powers doctrine. The limited scope of autonomous Community powers, the influence of national parliaments and different forms of popular involvement, especially through the Economic and Social Committee, were regarded as safeguards of democracy. Hence, the EP was not (yet) considered the proper place to expect democratic reassurance.

Nevertheless, interest in the EP spread, producing several detailed studies. Scholars faced a dilemma, though. The current legal position of the EP obviously deviated from the picture of ‘normal’ (i.e. national) parliaments, so that observers were torn between the description of the current and the prescription of an envisioned future legal state. Although the literature was characterised by sympathy for the experiment of a supranational parliament, most authors did not simply echo the highflying political rhetoric, which pictured the EP as the future parliament of a European Federation—and thus as a copy of national parliaments. Instead, sober warnings against unrealistic expectations and a schematic transferral of national systems onto the European level were manifold. Manfred Zuleeg warned against the mechanic reproduction of a parliamentary system, which even at the national level was already confronted with severe problems. As early as 1971 Roman Herzog pointed to the discrepancies between formal and social legitimacy, a trap in which the EP could be caught if its formal powers were enhanced without it enjoying the support of European civil society.

The focus of research changed with the announcement of direct elections to the EP. This step not only initiated the development of an election law, it also provoked new analysis of the general nature of the Parliament. Eberhard Grabitz’s research on this question set new standards here. Together with other scholars, he started to re-think the EP beyond traditional paths. Trying to locate the EP in the dynamic system of governance that had emerged in the Communities, they developed an analytical framework that would reflect this unique environment.

22 See again the reports given on the 1964 meeting of the public law scholars: Kaiser, above n 13, 31 and summary nos 3, 6 and 9; Badura, above n 13, summary nos 20–2; see also U Oetting, Bundestag und Bundesrat im Willensbildungsprozeß der Europäischen Gemeinschaften (1973).
27 See E Grabitz and T Läufer, Das Europäische Parlament (1980); E Grabitz et al, Direktwahl und Demokratisierung (1988); but see also P-C Müller-Graff, Die Direktwahl des Europäischen Parlaments (1979).
3. Changing Tides: Research on Institutions since the 1990s

The past 20 years have seen breathtaking political and institutional change in the EU and profoundly changed the field of institutional research. Only a few general remarks need be made.

First, the new dynamic meant a shift in stage. For the first time since the early 1960s, questions about European institutions again became a regular topic for general German public law scholars.29 Thus, the circle of authors changed. EC law specialist and practitioners, who used to dominate the field, were now complemented by non-specialised public law scholars. This also contributed to an immense increase in the number of studies undertaken.30

Secondly, the motor of the new debate was, again, a question of principle. Unlike in the 1960s, when questions about the rule of law motivated scholars, the democratic principle aroused German scholars in the 1990s.31 The debate also kicked off a new wave of studies on the institutions themselves. Within this literature, the EP once again attracted the most attention. Although sometimes short of a convincing general concept of the Parliament as a whole,32 the studies today provide a detailed picture of the EP’s legal set-up.33 In addition, other institutions and bodies have attracted new attention.34

Finally, another change set in. Surprisingly, German legal scholarship on European institutions had, for years, neglected a comparative perspective. In particular, there had been no reflection on European institutions in contrast to institutions of evolving federations. This is particularly astonishing in the German context, since German constitutional and institutional history itself provides a major example of such an evolving entity.35 However, research since the 1990s has brought about a growing awareness of the value of comparative approaches.36

29 As an indication for this renewed interests in questions of European integration, two of the annual meetings of public law scholars in the early 1990s were dedicated to such questions: see H Steinberger, E Klein and D Thürer, ‘Der Verfassungsstaat als Glied einer europäischen Gemeinschaft’ (1991) 50 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 9, 56 and 97, respectively; M Hilf, ‘Europäische Union: Gefahr oder Chance für den Föderalismus in Deutschland, Österreich und der Schweiz?’ (1994) 53 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 8; M Zuleeg and H-W Rengeling, ‘Deutsches und Europäisches Verwaltungsrecht’, ibid, 134 and 202, respectively.
36 Dann, above n 31, 8 and 43ff; H Kristoferitsch, Vom Staatenbund zum Bundesstaat? (2007).
III. Conceptual Framework: The Structure of Executive Federalism

The institutions of a political system do not stand separately and in isolation. Their interplay is as much a defining characteristic as are their powers and interior organisation. Furthermore, institutions are also embedded in a broader constitutional order, which must also be considered.

Looking at the institutions of the EU from this perspective, the multi-layered or federal nature of the Union is the first landmark to be seen. Indeed, the federal structure can play a pivotal role in explaining the institutional setting of the EU, particularly when taking into account the distinct form of this federal order. The EU is shaped by a structure, which can be called an executive federalism. What characterises this federal scheme to make it of importance for the institutions? Abstractly speaking, it is the dynamic interplay between a vertical structure of interwoven competences and the horizontal set-up of separated but co-operating institutions.

On a more concrete level, executive federalism can be described as having three basic characteristics. First, it is rooted in a vertical structure of interwoven competences. That means that laws are made in the EU at the federal (supranational) level but those laws are enforced at the level of the Member States. Simply put: Union laws are implemented by Member States. The duty to implement is derived from Article 10 EC, which places on Member States the duty to ‘take all appropriate measures . . . to ensure fulfilment of the obligations arising out of this [EC] Treaty’, entailing a principle of sincere co-operation. In effect, it means that the EU has almost no original competences to enforce EU law itself, even though it is (heavily) involved in supervising and guiding the decentralised implementation of its law. It should be noted, though, that (from a strictly legal perspective) the EC Treaty does not necessarily prescribe this specific ‘division of labour’. Another system of sharing enforcement competences could be equally lawful under the EC Treaty, eg to establish a more centralised mode of enforcement by way of secondary law. However, over time the political and legal development has confirmed the system of interwoven competences, so that today it is in practical terms a virtually unchangeable part of the constitutional order. It is as telling as it is consequential that the Constitutional Convention did not discuss, and the Lisbon Treaty will not alter, this system of competences.

Initially, this first characteristic of executive federalism might seem like a subtle and rather dry aspect of the constitutional set-up. Nevertheless, it entails far-reaching consequences for the institutional system. Most of all, the system of interwoven competences requires extensive co-operation: co-operation in the process of negotiating and adopting law, co-operation in the procedures of implementing law, even co-operation in the process of reviewing the law.

Moreover, equally important, the system determines who has to co-operate. It requires not

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37 Using the phrase ‘federal’ does not imply a state-like construct. Instead, federalism is regarded here as a general principle of organising multi-layered structures of governance, be they in a national, supranational or international sphere: see D Elazar, Exploring Federalism (1987) 34; A von Bogdandy, ‘The European Union as a Supranational Federation’ (2000) 6 Columbia Journal of European Law 27, 51–2; see also S Öster in this volume.


39 Exceptions are, understandably, in the field of internal organisation (Art 274 EC, Art 317 TFEU) but also in the field of competition law (Arts 81ff EC, Arts 101ff TFEU). However, most powers of the Commission or European agencies to take part in the enforcement of Union law are based on legislative acts rather than Treaty provisions, see P Craig, EU Administrative Law (2006) 155.


41 On this issue, see A von Bogdandy and J Bast, below chapter 8.

only vertical co-operation between actors from both levels, but also the involvement of executive actors, especially at the Member State level. Since EU law is implemented by national administrations, it makes perfect sense to give these administrations a voice in the process of making these laws.43

This last point leads to the second of the three characteristics of executive federalism mentioned above, namely the existence of an institution that organises and harbours the necessary co-operation as just described. This function is fulfilled by the Council, which can thus be regarded as the institutional complement of the system of competences. Finally, there is the third feature: a decision-making mode of consensus which facilitates co-operation in the Council and beyond.

Before we turn to the more detailed analysis of the institutions, beginning with the Council, a few remarks are necessary to put the concept of executive federalism in context and explain its status and purpose in the current analysis.44 The notion of executive federalism can be contrasted with that of other multi-layer systems, most clearly the model of ‘dual federalism’, where each level autonomously organises the making and implementation of its laws, ie parallel at the federal and state level (eg in the US).45 The contrast with this model underlines how different and distinct the multi-layered structure is in executive federalism in which the co-operation between the levels in all branches of government is a central feature. It should be pointed out that the European form of an executive federalism is by no means unique. Comparable federals systems can be found in Germany and to some extent in Switzerland and Austria.46 The multi-level structure of the EU can therefore be regarded as an expression of a typical continental European form of multi-level organisation.

At the same time, it is important to note that executive federalism is used here as a descriptive and analytical tool, not as a teleological concept propagating a certain finality of the Union. It does not encapsulate a federalist vision of the Union’s development (and neither an intergovernmental or technocratic, for that matter); rather, by taking into account the structure of what is termed here the executive federalism of the EU, this contribution highlights certain elements (like competences or inter-institutional dynamics) and extrapolates their interplay and consequences. In doing so, it integrates a number of issues that are generally considered to be characteristic of the Union as such, eg the vast and persisting heterogeneity of the Member States and their interests in the Union or the immense importance of bureaucratic co-operation (or even fusion47). Ultimately, looking at the political institutions with the awareness of the structure of executive federalism aims to understand the individual institutions in a wider context. On this basis, we can now turn to the analysis of separate institutions.48
IV. The Institutional Framework

1. Council

a) Form Follows Function: Members, Organisation and Competences

In the structure of executive federalism, the Council of the European Union is the institutional counterpart to the specific division of competences. Its composition, organisation and powers offer what the interwoven competences require: that is a meeting point for actors from the national and supranational levels, a meeting point for politicians and bureaucrats, and a place to negotiate and legislate. As such, it is the central institution of this political system.

The Council’s special role derives first from its composition. The Council ‘shall consist of a representative of each Member State at ministerial level’. Thus, its members are not directly elected but sent in their function as ministers of national governments. As such, they are generally appointed or nominated by their prime minister. This forms a sharp contrast to most other federal chambers (eg the US Senate), the members of which are directly elected.

Specific to the nature of the Council is also its mandate and its members’ understanding of their specific role. Whereas US senators are elected politicians, free to take any position they want, Council members, in contrast, are representatives of their home government; they are authorised to ‘commit the government of the Member State’. Thus, they have to follow the mandate agreed upon in their cabinet and must negotiate within these margins.

Yet the Council is much more than the round of national ministers—they form only the top of a complex system, best described as a pyramid of groups, in which national actors convene. This pyramid has three principal tiers: the Council as meeting place of the ministers, the Committee of Permanent Representatives (COREPER) and the Working Groups. Their composition and functions are best explained by way of example: the negotiations on a new bill. This example will demonstrate the procedural logic evolving from the interwoven competences, the logic of executive co-operation:

CFSP (on specialties in this field, see D Thym in this volume) or similar aspects in the AFJS (on the respective specialties here, J Monar, below chapter 15, s III.4. Secondly, the following analysis describes primarily the institutions, and only to a lesser extent the decision-making procedures that are played out between these institutions. To focus on the latter would require another article, or perhaps even a book. See, eg P Craig and C Harlow (eds), *Lawmaking in the European Union* (1998); A Dashwood, ‘The Constitution of the European Union after Nice: Law Making Procedures’ (2001) 26 European Law Review 215.

49 The former ‘Council of the European Communities’ decided after the ratification of the Maastricht Treaty to call itself the ‘Council of the European Union’, a term applicable to all its activities (Decision 93/591 of 8 November 1993, OJ L281, 18). In accordance with the language of the Treaties, the term ‘Council’ will be used as a shorthand.


51 Art 203 EC (Art 16(2) TEU-Lis).


53 Art 203 EC (Art 16(2) TEU-Lis).


55 This French acronym is commonly used to refer to this committee. It stands for *Comité des représentants permanents*. 245
It is the sole right of the Commission to initiate legislation, yet the first and most important reality test for any legislative proposal comes when it is discussed in a Council Working Group, composed of national civil servants from each Member State, who are responsible for the specific matter. They check how the proposal fits into the administrative and legal systems of their respective state. This can often take a long time, but it also addresses most of the often very technical complications arising from the fact that a bill has to be implemented in 27 different legal systems. A proposal then goes to the COREPER, which consists of the national ambassadors to the EU (thus career diplomats who stay for long terms in Brussels). Whereas Working Groups are put together flexibly and ad hoc to discuss one specific proposal, the COREPER is a permanent body.

The COREPER, sometimes regarded as the most powerful part of the EU, serves as a clearing-house: it checks every proposal, and negotiates those issues which remain unresolved in the Working Groups. Since it is not split into specialised groups for every proposal, it gathers a broad overview and accumulates immense expertise. Its broad exposure allows its members to strike more deals and settle more political issues than the Working Groups. Only highly political and non-negotiable topics are passed on by COREPER and negotiated by the national ministers.

One more important characteristic of the Council has to be added: it has no plenary. The ministers convene in accordance with their field of responsibility, as ministers of finance, as ministers of the environment, etc. As a consequence, there is no place for general discussion, only for sectoral negotiation. It is an extremely complex system, with barely any hierarchy or hegemony to streamline processes—and is therefore hardly a very efficient institution. Attempts to change this situation, mainly by strengthening the General Affairs Council (of foreign ministers), have not borne any fruit.

This organisational structure will remain generally untouched by the Lisbon Treaty. Changes that had been envisioned by the Convention’s Draft, eg the introduction of an elevated ‘Legis-

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56 Art 17(2) TEU-Lis.
57 In fact, these proposals are often already prepared in close co-operation with national experts and bureaucrats: see W Wessels, ‘Dynamics of Administrative Interaction’ in W Wallace (ed), The Dynamics of European Integration (1990) 229.
58 There are roughly 160 groups: see Westlake and Galloway, above n 50, 217.
59 Art 16(7) TEU-Lis; on the COREPER: J Lewis, ‘National Interests: Coreper’ in Peterson and Shackleton, above n 50, 277; Mentler, above n 34.
60 This is a simplification: the COREPER convenes in two formations: COREPER II is composed of the permanent representatives themselves and responsible for foreign, financial and horizontal matters; COREPER I is composed of deputies from the permanent representations and deals with most of the more technical legislation (Lewis, above n 59, 282–6). There are also other Committees, like the Political and Security Committee or the Economic and Finance Committee, which act beside the COREPER (Lewis, above n 59, 286; Westlake and Galloway, above n 50, 201, 208).
61 For the best account of the negotiating methods within the Council, see Spence, above n 54, 256ff.
62 Neither COREPER nor the working groups have the competence to formally decide a matter, yet about 80% of the matters are already materially decided before the ministers convene. These so-called A-points are decided without any further negotiation in the Council: see Art 3(6) of the Council’s Rules of Procedure (Decision 2006/683, OJ L285, 47). Hayes-Renshaw, above n 50, 53; but Lewis, above n 59, 287.
63 In the 1990s, 22 Council formations existed. This number was reduced to 16 in 2000. The current nine Council formations, introduced in 2002, are listed in Annex I to the Council’s Rules of Procedure (above n 62).
lative and General Affairs Council’, were not taken up. A hierarchy of Council formations to streamline procedures will only be weakly instituted. However, a new system of team presidencies will likely be introduced by a decision of the European Council, based on the Lisbon Treaty. The presidency will then be held by groups of three Member States for 18 months. This will certainly lead to more continuity in the Council’s work and also (hopefully) to more transparency, which can only be welcomed.

Although composition and internal organisation are of salient importance, it is its powers which render the Council the central institution in the institutional setting of the EU. And it is this aspect which also renders it a highly characteristic feature of executive federalism in the EU: the Council’s powers are spread from legislative to executive areas, thus defying a traditional separation-of-powers scheme, but serving the structure of interwoven competences.

With regard to law-making, the Council plays a dominant role, although it is not (as often falsely suggested) the sole centre of it. Despite the important influence of both the Commission and the European Parliament, the Council is not only the institution that has decision-taking powers in almost all procedures but is in all but one procedure the institution that has the final word. The Council also plays a major role with regard to the executive function, as it is involved in the task of executive rule-making.

In sum, it can be seen that composition and powers are closely connected to the structure of interwoven competences. The Council participates in law-making (and facilitates executive tasks), since it is the national authorities which ultimately implement and administer these policies. The early and influential involvement of national actors seems necessary to make these mechanisms work—and is thus entrenched in the interwoven structure of competences, hence the EU’s executive federalism. Yet it is only the third element that renders this structure workable: the specific decision-taking method.

b) Mode of Decision-taking: Majority-voting and the Resilience of Consensus

It has occasionally been highlighted as specific to the supranational nature of the EU that the Council, as one of its major decision-making bodies, can take binding decisions not by unanimity, but by majority rule, distinguishing the EU from most comparable organs in international organisations. Yet this is not the whole truth. Another line of the traditional narrative explains that, despite the often-applicable majority rule, the Council mostly strives to act by consensus. In this consensus mode, solutions are sought through ongoing negotiations, openness to compromise and the incorporation of as many parties as possible. This method is based on mutual trust and the expectation of gaining more by giving in to a certain extent

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66 Cp Art I-23(1) CT-Conv to Art 24(1) CT, and Art I-23(4) CT-Conv to Art 24(7) CT: see W Wessels, ‘Die institutionelle Architektur der EU nach der europäischen Verfassung’ [2004] integration 161, 165.
67 Art 16(2) TEU-Lis.
68 Art 236(a) TFEU, Declaration No 9 annexed to the Final Act of the Treaty of Lisbon.
69 The Commission is a major law-maker; it is responsible for roughly half of all the laws that are enacted directly by the Commission, hence more than by the Council: see A von Bogdandy, F Arndt and J Bast, ‘Legal Instruments in European Union Law and Their Reform’ (2004) 23 Yearbook of European Law 91, 126ff.
70 As to the role of the EP, see below section IV.2.
71 Arts 250ff EC (Arts 293ff TFEU); for an innovative empirical perspective, see R Thomson and M Hosli, ‘Who Has the Power in the EU?’ (2006) 44 JCMS 415.
73 Ipsen, above n 16, ch 2 para 44.
74 As to the different forms of majority votes in the Council, see Westlake and Galloway, above n 50, 233.
75 Hayes-Renshaw and Wallace, above n 50, 304; on the methods employed, see Spence, above n 54, 364; on voting patterns, see M Mattila and JE Lane, ‘Why Unanimity?’ (2001) 2 European Union Politics 31.
During one round of negotiations, with the expectation of being repaid in a later round. This method is considered to be based in no minor part on the secrecy and confidentiality of these negotiations. In a sense, so the narrative concludes, the Council adheres to two rules: behind the formal majority rule there is an informal consensus method, or, as Joseph Weiler famously put it, it is decision-making 'under the shadow of the vote'.

While this used to be a convincing analysis and one that also blends well with the structure of executive federalism (underlining as it does the importance of co-operation and consensus), one might wonder whether it is still valid. Did the enlargement of the Union, the heated debates on and reforms of majority voting in recent Treaty revisions and the drive to more transparency in Council decision-making leave this mode really unaffected? Or do we have to reconsider certain parts of it? Let us take a closer look.

EU's enlargement to now 27 Member States vastly increased the Council's size and heterogeneity. It certainly was (and is) a serious challenge to the consensus mode, and it is hence no surprise that studies on decision-taking in the Council since 2004 suggest that enlargement did have an impact. Data show that the amount of legislation passed has decreased and that those bills which are passed often concern more marginal issues and have become longer. At the same time, however, the culture of consensus seems to have remained intact. In particular, the level of contestation has not increased significantly. One technique to accommodate the increased heterogeneity of interests seems to be formal statements of disagreement which are included in the minutes of the Council. These flag differences but are not recorded as no-votes. Hence, even though decision-making certainly has become more difficult, the system of consensus in the shadow of the vote seems to have survived.

However, enlargement is not the only development to have challenged this distinct decision-making mode. It also triggered a far-reaching reform of voting rules in the Council. In fact, the Council’s voting rules were probably the most contested area of recent Treaty reforms that, according to the Lisbon Treaty, will lead to a considerable increase in the possibilities for majority votes. But will this make consensus-building obsolete? It seems unlikely. The current voting rules, based on the Nice Treaty, prescribe a complex system of triple majorities and weighed votes of the Member States. In clear contrast, the Lisbon Treaty will abolish the weighed votes and introduce a much more transparent system of a double-majority, consisting of 55% (and at least 15) of the Member States, representing 65% of the population of the Union. This new mechanism will be the regular voting rule and the most common form of decision-taking in the Council.

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79 Hagemann and De Clerck-Sachse, above n 78, 3.
80 With respect to the Constitutional Treaty, which in this respect was not changed by the Lisbon Treaty, see A Peters, ‘European Democracy after the 2003 Convention’ (2004) 41 CML Rev 55.
82 Art 16(4) TEU-Lis.
83 Art 16(3) TEU-Lis.
However, different considerations put these new rules in perspective and suggest that the heated discussions in the intergovernmental conferences hardly match the reality of decision-making on the ground. First, the Lisbon rules will only come into effect in 2014 and will be conditioned until 2017 by the possibility to invoke the old Nice rules for blocking minorities. Second, even the Lisbon majority rules require large, highly sophisticated super-majorities, which could also be qualified as a form of consensus. Finally, relative power in the Council does not seem to depend only on voting weight; rather, qualitative analyses suggest that even though weight is important, it is so only to a limited extent. Negotiating skills, substance and situational circumstances also matter.

If consensual decision-making thus seems as necessary as ever, is it still possible? The confidentiality of Council negotiations has been considered to be an integral part of why the consensual Council system works. However, these rules have been a major target of critique, as it is deemed normatively untenable that the central law-making organ remains largely closed to the citizens. In reaction, changes in the Council’s Rules of Procedure (RoP) in 2006 have opened up the Council debates to an unprecedented degree. Also, according to the Lisbon Treaty, the Council will ‘meet in public when it deliberates and votes on a draft legislative act’. Serious doubts remain, however, as to whether these changes effectively alter the dynamics in the Council. Such an effect seems unlikely especially if one takes into consideration that these changes only affect the uppermost level of the Council system and only a limited number of agenda points. As stated above, the vast majority of decisions are, and most likely will continue to be, reached elsewhere and confidentially, as so-called A-points.

On the basis of these considerations, one can assume that decision-making in the Council will remain a mostly consensual affair, spurred by the option to take a majority vote. Looking at the Council through the lens of executive federalism, its consensual and mostly non-majoritarian system seems to make perfect sense. Three main reasons suggest that the interplay of executive federalism and consensual decision-making in the Council is an unchangeable fact of the EU:

1. There is, first, the federal heterogeneity of the EU, which seems to simply require an inclusive, consensus-based decision-making method. The theory of consensus democracy shows that some culturally, religiously, linguistically or otherwise divided societies have developed an original mode of decision-making that enables them to find a peaceful way of dealing with conflicts. This method is based on permanent inclusion of all relevant social forces, ie on political compromise in decision-making and on proportionate accommodation of all relevant parties in responsible offices of government. Thus, it forms a contrast to competition and temporary exclusion, which shape systems organised by majority rule.

2. If the consensus method in the Council is required by the diversity of interests, it is facilitated by the sociocultural similarity of the Council’s members. As described above, negotiations in

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84 Art 16(5) TEU-Lis and Protocol (no 36) on the transitional provisions relating to the institutions and bodies of the Union. The Lisbon Treaty will not alter the substantive compromise on voting rules agreed upon in the Constitutional Treaty, but will solve the re-surfaced debate on such rules by providing a compromise along the timeline.

85 Hayes-Renshaw et al, above n 77, 179–85; Thomson and Hosli, above n 71.


87 See Art 8 Council’s RoP.

88 Art 16(8) TEU-Lis; on the Lisbon Treaty’s concept of legislative acts, see Bast, below chapter 10.

89 See above n 62.


92 It might be added that this method may prevail even after these cleavages are gone. The best example is the case of Germany: see H Abromeit, Der verkappte Einheitsstaat (1992); Elazar, above n 37, 66.
the Council are mostly a deliberation of national and supranational civil servants. Despite linguistic, political or other differences, these civil servants very often share a common education (law, political science) and a common professional background (national administrations), and grow closer by virtue of their ongoing contact. This common habit creates a certain club spirit (esprit de corps), as it is called, that facilitates compromise and consensus.  

3. Finally, the issue of implementation helps to explain why the consensus method is entrenched in the structure of executive federalism. One can assume that a solution is more acceptable if the different parties agree on it. In the EU, the implementation of norms rests with the Member States, their legislatures and their bureaucracies. Thus, Union regulations and directives will have a greater chance of being properly implemented by the national legislatures and bureaucracies if they were previously decided upon in consensus with the own government.  

With regard to these observations, the consensus method can be regarded as a complementary element of executive federalism. As long as the overall structure remains in place, the consensual character of Council decision-making seems destined to stay in place as well. This point can be taken even further. Not only is the consensus method prominent in Council decision-making, but the EU in general can be characterised as a consensus democracy. The method in the Council has a spill-over effect on decision-making procedures in other organs as well as between the organs. Perhaps the most striking example of this spill-over effect can be observed in the European Parliament.

2. European Parliament

In an almost revolutionary development, the EP has developed from a mere consultant assembly into an equal counterpart to the Council and the Commission. At the same time, the EP has been something like a pet object at least of German institutional scholarship. Yet despite ample material and analytical attention, a coherent interpretation of role and structure of the EP has not emerged.

Two means of analyses will be used here to approach the parliament: first, the EP will be described in the context of its institutional environment, within the conceptual framework of executive federalism; secondly, this chapter will try to grasp the EP’s specific character by using a comparative matrix of two types of legislatures or parliaments. These two types, debating parliament and working parliament, can be described in the following manner.

97 See above section II.2.
A debating parliament is centred on its plenum, which serves as the forum of the nation and central stage of public political discourse. It is typical for parliamentary systems, where the majority party in parliament forms the government, leading to a ‘fusion’ of majority party and government. The political opposition uses the plenary session to attack governmental measures as well as to expound its own proposals. The British House of Commons is the pre-eminent example.

A working parliament receives its character and power from being somewhat separate from the government and from operating as a counterweight. Rather than the fusion of majority party and government, it is the institutional combat between legislature and executive which characterises this parliament. An incompatibility rule, which forbids members of the executive from sitting in the legislature, prevents public debates between government and opposition in the plenary. Instead, strong and specialised committees function as the main focus of activity in working parliaments. The US Congress is the classic example of this type.

Against this comparative background, the underlying goal of this chapter is to understand the EP as a working parliament. Separated personally from the Commission and not intertwined with it politically, the EP holds comparatively strong (and often underestimated) legislative and oversight powers, establishing itself as the centre of democratic control in the EU, structurally resembling the US Congress. To demonstrate this, the EP will be analysed in its elective, controlling and law-making functions.

a) Co-Elector: Appointment Power and Negative Competence

The Parliament’s influence on the appointment of the Commission and especially its President has increased considerably in the past years. Originally completely sidelined, the EP today has the power to approve the Commission’s President as well as confirm the College of Commissioners. The Lisbon Treaty will even state that the European Parliament ‘shall elect the President of the Commission’, and prescribe that the European Council, before proposing a candidate for the Commission presidency, must take into account the elections to the European Parliament, thus underlining the link between election and composition of the Commission. The EP also has a right of censure.

Considering this growing influence, a parliamentarisation of the EU has certainly taken place. But is it convincing to interpret this growing influence as the steady move towards a parliamentary system, ie a system in which the majority faction in parliament determines the head of the government and forms a close political link with the government (like in the UK or Germany)? Or is it conclusive to argue that at least a special brand of parliamentary system...
with some specific supranational features will emerge? Even though executive federalism and parliamentary systems are not as such incompatible (as the German political system shows), such development in the EU seems unlikely. In fact, in the European institutional setting, which was not originally set up as a parliamentary system, elements of executive federalism seem to impede the emergence of such system. Three arguments underline this thesis:

1. The position of the Council structurally blocks the emergence of a full parliamentary system firstly because of its important role in appointing the Commission and secondly, because of the Council’s own role as part of a dual executive. The Council as a whole is generally beyond the reach of the EP. This position and influence of the Council might not only be interpreted as a necessary aspect of the intergovernmental side of the EU system—it also fits naturally into the structure of executive federalism, where the Council is a central partner of the Commission in law-making as well as executive functions.

2. A second argument derives from the way in which the EP conducts the approval procedure of a new Commission. It would be the ‘natural’ behaviour in a debating parliament for the majority party (or coalition) to elect the government without further discussion. In the EP, instead, there is no majority which perceives itself as a loyal parliamentarian base of the Commission. Especially in candidate hearings which the EP conducts before it approves of a new Commission, the EP presents itself more as a critical counterweight than as a loyal supporter of the Commission.

3. A final argument against a parliamentarisation concerns the personal fusion between EP and Commission, ie the normal rule for a parliamentary system and its debating parliament that parliamentarians (MEPs in our case) are at the same time members of the government (the Commission in our case). Empirically, there is no such fusion between EP and Commission in the EU. Moreover, a fusion would not be legally possible. An incompatibility rule between a mandate in the EP and a seat in the Commission formally prohibits the appointment of MEPs to the Commission. De lege ferenda this could be changed. In addition, the rule’s historical roots in the technocratic origins of the Commission are weak today. However, the incompatibility rule fits perfectly well into the structure of executive federalism. Here, the divide runs not between the political parliament and the technocratic Commission, but between the legislature and the executive branch.


109 See Art 214 EC (Art 17(7) TEU-Lis).

110 Lenaerts, above n 40, 17–18.

111 The national parliaments are, of course, responsible for the parliamentary accountability of the Council. However, each parliament elects and controls only one government, not the Council as such. Also, most national parliaments do not fulfil this role practically because European affairs play only a minor role in national politics: see P Dann, ‘The Semi-parliamentary Democracy of the EU’, Jean Monnet Working Paper 5 (2002), available at www.jeannonnetprogram.org; on the national parliaments, see also below section V1.


116 Art 6(1) 2nd indent, of the Act concerning the election of the representatives of the Assembly by direct universal suffrage ([1976] OJ L278, 5). This provision is based on Art 213(2) EC, which forbids that ‘members of the Commission engage in other paid activities’ and is interpreted as an incompatibility rule: see Dann, above n 111, 27.
Finally, the changes envisioned by the Lisbon Treaty will hardly change the basic dynamic of the election procedure. Despite several proposals and strong support from the more federalist side, these changes will not change the EP’s role significantly as they do not abridge the Council’s primacy in selecting a candidate.117 This dynamic might only change if European parties would start nominating their candidates before the election to the EP. This, however, seems unlikely from today’s perspective.

In sum, a development into a parliamentary system in the strict sense seems unlikely. Nevertheless, the elective powers of the EP today or tomorrow are neither unimportant nor meaningless. Quite the contrary, they tell a lot about the specific role of the parliament in the EU. Although it cannot autonomously elect a Commission, it can always prevent one. It functions as a controlling force, holding a negative elective competence. This power makes perfect sense in the specific institutional and political setting of the EU. First of all, possessing this negative competence might ensure at least a basic standard of democratic accountability. More importantly from the perspective of the overall system, an increased influence on the election of the Commission would also require a stable coalition in the EP to carry this Commission. This is not only very difficult to achieve (and maintain!) but would endanger the federal diversity of the party system in the EP. And, thirdly, the fact that neither the EP nor its majority is bound to the Commission by party loyalty has positive effects on its independence when it comes to questions of control and law-making. Thus, the current position of the EP might not only correspond to its function, it also seems to fit normatively into the broader political system and executive federalism of the EU.

However, this interpretation of the EP’s elective powers should not obscure a deep flaw in the elective system of executive federalism—the question of accountability. It is a central principle of democratic government that the people shall have a say in who governs. Democratic government is self-government. But looking at the EU, this principle is grossly violated. Here, the executive, located in the Commission and to some extent in the Council, is not elected by the EP but appointed by the EP and Council together. The Council itself is composed of national governments, thus elected separately by the respective national parliaments and their elections. Hence, every vote is several times counterbalanced and dispersed by other votes in other elections. It is barely possible to get rid of the governing class, since there is a de facto permanent all-party government.118

If parliamentarisation is hindered by the structure of executive federalism, would direct election, namely of the President of the Commission, remedy the problem? This could be argued, since it would enhance the transparency of the system and strengthen a clear line of responsibility.119 Yet the problem of accountability in the EU runs deeper. It is rooted in the federal structure, which necessarily demands co-operation between the federal levels and different governments. The problem of accountability and the federal structure of the EU are deeply intertwined.120 Even a directly elected President of the Commission would have to bargain and make compromises with the national governments in the Council. Executive federalism entails this somewhat murky and non-transparent situation. What seems like an obvious violation of democratic principles on the one hand turns out to be the life insurance of the federal system on the other.121

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117 See Kokott and Rüth, above n 65, 1332–3.
120 See also Oeter, above chapter 2.
121 For this problem in another system of executive federalism, the German, see E-W Böckenförde, ‘Sozialer Bundesstaat und parlamentarische Demokratie’ in J Jekewitz (ed), Politik als gelebte Verfassung (1980) 188.

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b) Oversight Function: Control via Organisation

The structure of executive federalism also has important consequences for the oversight function. The two types of parliaments sketched out in the beginning differ remarkably in this respect too: a debating parliament scrutinises the government primarily in public debate in the plenum; a working parliament does so by means of detailed control of government proposals, exercised by specialised committees.\footnote{122}

How does the EP fare with respect to these types? Seen from a formal standpoint, the EP could easily qualify as a debating parliament. It has several formal powers to interrogate and scrutinise the Commission in plenum.\footnote{123} A look at the actual use of these powers, however, alters the picture. Although interrogation powers are undoubtedly popular,\footnote{124} their usage has shrunk, especially since the EP has gained legislative powers.\footnote{125} Thus these powers do not constitute the most vital part of EP procedures.

Instead, the working parliament approach grasps the EP much better. This approach is primarily based on organisational preconditions, namely an effective committee structure,\footnote{126} as exemplified by the US Congress.\footnote{127} Indeed, the EP’s committees are of paramount importance.\footnote{128} Two aspects highlight their central position.

First, their role in acquiring and analysing information and in formulating political positions is central to the policy-formulation in the EP. Committees have the right to interrogate the Commission\footnote{129} and to hold hearings with special experts.\footnote{130} Through these instruments, committees have acquired specific expertise in their fields.\footnote{131} On this basis, they file reports to be discussed in the plenum, predetermining most of the outcomes.\footnote{132}

Secondly, their internal structure plays a pivotal role. They are small, specialised and targeted in their scope at the division of subject matters in the Commission. Of salient importance is their leadership structure. This consists of a chairperson and a rapporteur.\footnote{133} The latter is responsible for presenting a matter to the committee, drafting the report for the committee and arguing it in the plenum and with other institutions. A highly influential figure, the

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\item\footnote{122} K Bradshaw and D Pring, Parliament and Congress (1972) 355; Löwenberg and Patterson, above n 52.
\item\footnote{123} See Art 197(3) EC (Art 226 TFEU), rr 108–10 and 176 of the European Parliament’s Rules of Procedure (EP’s RoP), 16th edn, July 2004, [2005] OJ L44, 1; Corbett et al, above n 98, 283; Beckedorf, above n 33, 126. The EP also has extended powers to scrutinise the Council, which finds an explanation only in the special role that the Council plays in executive federalism, see Dann, above n 31, 360ff; J Lodge, ‘The European Parliament’ in SS Andersen and KA Eliassen (eds), The EU: How Democratic Is It? (1996) 198.
\item\footnote{124} In the fifth legislature (1999–2004) the Commission had to answer no fewer than 19,855 parliamentary questions (Corbett et al, above n 98, 285). For regular updates on these numbers, see the annual reports of the Commission; for an insightful early analysis, see L Cohen, ‘The Development of the Question time in the EP’ (1979) 16 CML Rev 46.
\item\footnote{125} A Maurer, What Next for the European Parliament? (1999) 54.
\item\footnote{126} From a comparative perspective, see K Strom, ‘Parliamentary Committees in European Democracies’ in L Longley and R Davidson (eds), The New Role of Parliamentary Committees (1998) 21.
\item\footnote{127} See C Deering and S Smith, Committees in Congress (1997); M Shapiro, ‘The Politics of Information’ in Craig and Harlow (eds), above n 48, 187.
\item\footnote{129} EP’s RoP, rr 109 and 187.
\item\footnote{130} Ibid, r 183(2).
\item\footnote{132} Another important facet of the EP’s scrutiny system are the Committees of Inquiry (Art 193 EC, Art 226 TFEU) that can be set up for special purposes and for a limited time: see Beckedorf, above n 33, passim; M Shackleton, ‘The European Parliament’s New Committees of Inquiry’ (1998) 36 JCMS 115.
\item\footnote{133} Mamadouh and Raunio, above n 128, 341–8; Bowler and Farrel, above n 128, 242–3.
\end{itemize}
rappoporteur is chosen in a complicated and hotly contested procedure.134 Besides, the rapporteur creates clear responsibilities, giving the committee a distinct voice to communicate to the inside (between different committees and party groups) as well as to the outside (to other institutions). It renders committees especially suited to negotiate with other institutions.135

The EP also resembles a working parliament with respect to its staff. One sign of a working parliament is that it acquires its expertise and level of scrutiny not least because of the support from an extensive staff. Compared to the US Congress, of course, the EP’s staff looks petty, but compared to all the national parliaments in Europe, it is very well equipped with respect to its scientific staff.136

c) Co-Legislator: Law-making by Co-operation and Consensus-building

Finally, the EP law-making function resembles that of working parliaments.137 As such, it has a more powerful position as legislature than most national parliaments, acting in a parliamentary system.138 Three aspects characterise its specific role: the need for inter-institutional co-operation, the need for compromise building within the EP and its role of a policy-shaping, not policy-making, actor.139

(1) Law-making in the EU is characterised by an overriding need for co-operation between the involved organs. This follows (partly) from the strictly bicameral approach of co-decision procedure (Article 251 EC)140 which the Lisbon Treaty will extend to even more areas of competence so that it is rightfully called the ‘ordinary legislative’ procedure (Article 294 of the Treaty on the Functioning of the European Union (TFEU)).141 Through two readings in EP and Council, and possibly a conciliation committee, a bill has to be agreed upon by both organs, EP and Council.142 In this often long bargaining process, the Commission acts as initiator and broker. The triangular game is facilitated by a range of informal meetings between the institutions, which have come to be known (and institutionalised) as ‘trialogue’.143 In fact, enlargement seems to have only increased the importance of such early and intensive consulta-

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134 Neuhold, above n 128, 7; Corbett et al, above n 98, 139–41.
135 Another important aspect explaining their role is that EP committees convene principally in public (see EP’s RoP, r 96(3)) and function as ‘windows of the parliament’: see Neuhold, above n 128, 8–9; Corbett et al, above n 98, 314–15, 334.
136 See Shapiro, above n 127, 199–207; Corbett et al, above n 98, 191–201; for a comparative perspective, see Löwenberg and Patterson, above n 52, 159–64; altogether there are 4100 staff workers, 1200 of them translators. And there are even more sources: the EP has adopted a network concept to use external research institutions for European matters (the so-called STOA, Scientific and Technical Options Assessment: see Corbett et al, above n 98, 287). Moreover, there is the legal service of the EP, which provides valuable support in judicial proceedings and other legal matters.
137 As to the differing approaches of parliaments to law-making, see Dann, above n 98, 566; Bradshaw and Pring, above n 122, 293.
139 There is not enough space here to spell out details of the lawmaking procedures; for a brief overview, see Lenaerts and van Nuffel, above n 38, para 14-011; for an empirical assessment, see Maurer, above n 113, 131ff.
140 Peters, above n 95, 45 and 49.
141 See, inter alia, Arts 43, 79 and 82 TFEU.
142 As to the conciliation committees, see extensively F Rutschmann, Der europäische Vermittlungsausschuß (2002); see also Corbett et al, above n 98, 223–5.
tions,\textsuperscript{144} with often problematic consequences for the transparency of proceedings and the ability of the general public to monitor and understand what is going on.

The need for ongoing co-operation has a second reason: although the Commission has the sole power to initiate legislation,\textsuperscript{145} it has no steady parliamentary base to carry its bills through the deciding organs.\textsuperscript{146} This reflects the Commission’s role as a politically (and nationally) balanced institution. However, even if it had a steady parliamentary majority, structurally it cannot have one in the Council, which is not prearranged along party lines. Hence, the Council forms a roadblock of executive federalism against a smooth government-led legislative process, rendering it a highly consensual, co-operation-based process.\textsuperscript{147}

(2) The second aspect is the fact that the EP in itself is a compromise-prone or even consensual system.\textsuperscript{148} Its committees serve as small, specialised fora for negotiations between the different party groups as well as with the other institutions.\textsuperscript{149} The general leadership structure of the EP also provides it with a system appropriate for a consensual setting.\textsuperscript{150}

The EP is also a dominantly compromise-seeking actor because its party structure is especially diverse.\textsuperscript{151} To reach an agreement here already requires the art of compromise. Moreover, majority rules in the EP set high standards for reaching agreement.\textsuperscript{152} Both aspects force the EP to develop negotiating and compromise techniques for its interior arrangements, allowing it to thrive in the broader inter-institutional process as well. This diverse and rather consensual character of the EP implies that a parliamentary and majoritarian logic cannot really take root and thus does not conflict with the federal and consensual structure of the institutional process in the EU.\textsuperscript{153} From this perspective, the ‘political deficit’ of the EP, as Renaud Dehousse has called it,\textsuperscript{154} turns out to be the ‘efficient secret’ of decision-taking in the institutional setting of the EU.

(3) A third point has to be made to characterise the EP’s comparatively powerful role in law-making. Since the EP has no power to initiate legislation, its influence is principally of an amending or blocking nature.\textsuperscript{155} The EP’s general role is therefore less that of a policy-making legislature, than a policy-shaping legislature. This does not (dis)-qualify it as a weak or incomplete parliament. In ‘normal’ parliamentary systems today, it is nearly exclusively the government that introduces bills. In contrast, the EP has developed an active agenda-setting behaviour; due to its political independence from the Commission and due to its organisational features (namely the committees), the EP is better able to rigorously scrutinise and amend bills

\begin{footnotes}
\item[144] Settembri, above n 78, 32.
\item[145] See Arts 250(1) 251(2) 252a EC (Art 17(2) TEU-Lis); see also C von Buttlar, \textit{Das Initiativrecht der Kommission} (2003).
\item[147] S Boyron, ‘The Co-decision Procedure’ in Craig and Harlow (eds), above n 48, 147.
\item[148] See also Farrel and Héritier, above n 143, 7; Kreppel, above n 96, 174–5, 215.
\item[149] The Commission is a regular participant of EP committee sessions, presenting and defending its proposals. Also, the Council (represented by the minister of the incumbent Presidency) is more and more often to be seen in these meetings to pave the way for later agreements, a situation codified in EP’s RoP, \textit{r} 137 and 183(2); see Neuhold, above n 128, 10; Collins et al, above n 131, 6.
\item[150] Judge and Earnshaw, above n 96, 173–6.
\item[151] Hix and Lord, above n 146, 77, 156 (table 6.7); Kreppel, above n 96, 215ff.
\item[152] Arts 198, 251(2)(b) and (c) EC (Art 294(7)(a) and (b) TFEU).
\item[153] As to different experiences in the German executive federalism, see Lehmbuch, above n 46.
\item[154] Dehousse, above n 90, 125; on the problem of opposition politics in the EP and its implication for the nature of constitutionalism in the EU, see also C Möllers, above chapter 5.
\item[155] As to its right to request that the Commission submits a proposal, Art 192 EC (Art 225 TFEU), and its rare use, see von Buttlar, above n 145, 190ff, 254; Corbett et al, above n 98, 238–9; M Westlake, ‘The Commission and the Parliament’ in G Edwards and D Spence (eds), \textit{The European Commission} (1997) 244–5.
\end{footnotes}
and thus shape legislation than parliaments in parliamentary systems, which have to loyally follow their government.\footnote{A von Bogdandy, above chapter 1, section V.4(b); see also K von Beyme, \textit{Die parlamentarische Demokratie} (1999) 282ff.}

In sum, the EP, as the parliament in the structure of executive federalism, can best be understood as a working parliament—guided by strong committees, neither politically nor personally connected with the Commission, and exercising influence on law-making procedures through its political independence and veto power. Its relation to the Commission, however, is flawed by a lack of elective accountability, which surely has consequences for the question of gubernative leadership.

### 3. European Commission

#### a) The Problem of Leadership

Perceived through the lens of executive federalism, leadership poses an inherent problem. The principal equality of Member States and the absence of ideological coherence in the Council impede hierarchical leadership. Even though certain tandems or triangles of countries may serve as motor, there is no steady base for formal or informal hierarchy. In addition, the need for consensus veils responsibility. As most decisions are taken in agreement with all parties involved and negotiated confidentially, it is often hard to discern which party is responsible for any particular policy—a basic hallmark of leadership. Finally, the demand for co-operation prevents quick action. In the Union of 27, the agreement on policy initiatives and bills takes an enormous amount of time.\footnote{This view shall not foreclose other explanations for the problem, eg the institutional rivalry between Commission and Council: N Nugent, \textit{The European Commission} (2001) 202–4.}

However, the institutional system of the EU offers two organs that have potential leadership functions: the European Commission and the European Council. How does the Commission, to start with the truly supranational organ, perform this function and how does it cope with the restraints of executive federalism?

Again, two lines of thought will be used to find answers. First, the role and functions of the Commission are examined in the frame of executive federalism. Secondly, we will once again use a comparative approach to get a clearer view on what type of institution the Commission is.\footnote{This chapter will only examine the political top of the Commission, ie the College and its President, but not the bureaucratic base, ie the services; for further information on them Nugent, above n 157, 134ff.}

To that end, two types of governments shall be outlined: the majoritarian and the consensual type of government.\footnote{Various concepts have been employed to grasp the Commission’s nature, see D Rometsch, \textit{Die Rolle und Funktionsweise der Kommission in der Ära Delors} (1999) 55; Nugent, above n 157, 8–9; L Cram, ‘The European Commission as Multi-organisation’ (1994) 1 JEPP 195; JH Matlary, ‘The Role of the Commission’ in N Nugent (ed), \textit{At the Heart of the Union} (2000) 270.}

The majoritarian government is composed along lines of political affiliation. Based on the majority in parliament, which elects and supports the government, the ministers are selected from one party or a coalition of parties; ideological coherence is the essential characteristic of a majoritarian government. The internal organisation of the cabinet government is structured by a clear hierarchy, with a prime minister at the top. He assures ultimate responsibility to parliament. Examples of this type can be found in the British government or the German Bundesregierung.\footnote{For a description of this form see M Schröder, ‘Bildung, Bestand und parlamentarische Verantwortlichkeit der Bundesregierung’ in J Issenbee and P Kirchhof (eds), \textit{Handbuch des Staatsrechts} (1998) vol II, § 51; von Beyme, above n 156, 415ff. The fact that German governments are regularly coalition governments does not meant that they not ideologically coherent.} The hallmark of the consensual government, as the second type may be called, is its proportionate composition, representing all relevant regional, cultural and political
groups. It is not built on a parliamentary majority but based on the principle of fair representation of all parties and regions. Members of the government are equals and take collective responsibility. The federal government is elected by an assembly, composed of both houses of parliament, thus ensuring the federal balance of the election. This form of government is to be found in the Swiss Bundesrat (Federal Council).

b) Organisational Structure: The Outlook of a Consensual Government

The composition of the Commission shows strong similarities to a consensual government. In the college of 27 members, every Member State is currently represented by one commissioner.\(^\text{161}\) Also, in terms of political composition, a form of proportionate representation (and not ideological coherence) prevails.\(^\text{162}\) The sacrosanct status of these rules of proportionate composition can be estimated by following the discussions within the Convention on the Constitutional Treaty—and by assessing the result. Even though there was broad agreement that a college of 27 is hardly able to govern coherently, efficiently and with mutual trust, a reduction of Commissioners was postponed until the year 2014. Then, as prescribed by Article 17(5) of the EU Treaty of Lisbon (TEU-Lis), the number of Commissioners will be reduced to correspond to two-thirds of the number of Member States. However, even after this change, the Lisbon Treaty will provide a backdoor for the European Council to unanimously alter that number (Article 17(5) TEU-Lis), a backdoor through which one step has already been taken.\(^\text{164}\) In any event, the equal representation (then based on a system of strictly equal rotation) cannot be impaired.

With respect to its internal hierarchy, we can observe a development from a consensual to a more majoritarian type. The Commission has a collegiate nature, with the Commission President traditionally being only marginally more important than other members.\(^\text{165}\) Currently, the college takes decisions collectively.\(^\text{166}\) However, past Treaty revisions have strengthened the role of the President. The Commission works now ‘under the political guidance of its President’, who can decide on its internal organisation and allocate responsibilities.\(^\text{167}\) More importantly, perhaps, the President can influence the choice of ‘his’ Commissioners\(^\text{168}\) and can dismiss a member of the Commission.\(^\text{169}\)

As to the mode of appointment, a close resemblance to the consensual type of government can be observed. The Commission is appointed in an intricate procedure that intertwines the role of the Council with the EP. Whereas the former has the power to nominate the President and then make a list of Commissioners, the latter has to confirm the choice of the President and then the college as a whole.\(^\text{170}\) Thus, it is not the parliament that can autonomously elect

\(^{\text{162}}\) Art 213(1) EC, Art 4 of the Protocol on the Enlargement (2001) as amended by Art 45(2)(d) of the Act concerning the conditions of accession of 2003 (OJ L236, 1); see also Art 17(4) TEU-Lis.
\(^{\text{163}}\) It is a telling detail that the bigger states, which until the accession of the 10 in 2004 used to send two commissioners, chose two from different political camps, eg Neil Kinnock and Chris Patten: see Nugent, above n 157, 89; more explicit is the legal situation in Switzerland: see Art 175(4) Bundesverfassung (Swiss Constitution).
\(^{\text{164}}\) In order to pacify the Irish voters, who had rejected the Lisbon Treaty in a referendum in June 2008, the European Council in December 2008 decided that ‘the Commission shall continue to include one national of each Member State’ (European Council, Presidency Conclusions, Council Doc 17271/08, para 2).
\(^{\text{165}}\) Nugent, above n 157, 68–71.
\(^{\text{166}}\) See Case 5/85 AKZO Chemie v Commission [1986] ECR 2585, para 30; see also Lenaerts and van Nuffel, above n 38, para 10-068.
\(^{\text{168}}\) Art 214(2) EC (Art 17(7)(2) TEU-Lis).
\(^{\text{169}}\) Art 217(4) EC; the current condition of obtaining the approval of the College will be dropped and the President’s role again strengthened according to the Lisbon Treaty: see Art 17(6) TEU-Lis.
\(^{\text{170}}\) Art 214(2) EC (Art 17(7) TEU-Lis): see Maurer, above n 113, 17ff; S Hix, ‘Executive Selection in the EU’ in Neunreither and Wiener (eds), above n 167, 98.
the government, as in the majoritarian model, but a tandem of a unitary actor and a federal one.\footnote{171}

The stability of the term of office is another indicator of the nature of the Commission as a consensual government. The Commission comes close to this. The Council, as one part of the bicameral elector, has no power to dismiss the Commission. The EP, on the other hand, has the power to retire the Commission by a motion of censure,\footnote{172} as such a typical instrument of parliamentary regimes. Its use is seriously hampered, though, by the requirement of a two-thirds majority of votes cast.\footnote{173} Especially in a parliament that is characterised by a very heterogeneous mix of parties, such a majora is almost impossible to organise.

c) Functions: Agenda-setter, Mediator and Guardian

Although the consensual aspects in the structure of the Commission have been demonstrated, the fingerprints of executive federalism have been less obvious so far. This changes, once we look at the functions of the Commission.

Every political system needs an institution that provides orientation and leadership. Within the EU, the institutional dynamic of co-operation and consensual agreement creates such a need. However, this need is confronted with a specific relation between the Commission and the law-making organs, which is characterised by two aspects. First, the Commission has no political base in the EP. In contrast to governments in parliamentary systems, it has no steady partner to carry through its political concepts. Secondly, even if it had such a parliamentary basis, this would not reach into the second house of the federal bicameral legislator, ie the Council. Hence, any institution of leadership in executive federalism must be able to reach out to both EP and Council. With that in mind, the tasks and powers of the Commission prove perhaps more convincing because they fit more effectively into the institutional system of executive federalism. Three functions of the Commission should be highlighted.\footnote{174}

\textit{aa) Agenda Setting}

First of all, the Commission serves as an agenda setter.\footnote{175} To that end, it employs several means of communication.\footnote{176} Just as important is its exclusive right of initiative in law-making procedures.\footnote{177} The Commission can decide whether, when and on what legal basis the Union should act. Even though the Council and the EP can request the Commission to submit proposals, the Commission is not obliged to do so.\footnote{178}

\textit{bb) Mediating Interests}

Secondly, the Commission serves as a broker and mediator between parties and institutions. Since leadership is hampered in executive federalism by a lack of hierarchy, the need for a
neutral third party rises.\textsuperscript{179} The Commission is well equipped to serve this purpose.\textsuperscript{180} By law, Commission and Commissioners must be independent and must perform their duties only in the general interest of the Community.\textsuperscript{181} The Commission mostly succeeded in being seen as an independent broker for sound solutions in the common interest.\textsuperscript{182}

Its ability as a neutral third party is also promoted by the Commission’s procedural rights, as it takes part in all legislative procedures and has access to all institutions.\textsuperscript{183} Flowing from its right of initiative, it has the power to amend a draft at any point or to simply withdraw it.\textsuperscript{184} Thus, the Commission has utmost flexibility and often has superior information as to how an agreement between the actors involved could be achieved.

In this function as broker, the interplay between the functional demand of the executive federalism and the Commission’s structure as a consensual government appears most striking. The specific structure of the Commission seems exactly shaped to fit into and promote the institutional dynamic of this multi-layered political system.

\textit{cc) Federal Guardian}

A third function of the Commission is not only to serve as a voice of the federal interest in the realm of political decision-making, but also to ensure compliance through means of legal control. To this end, the first indent of Article 211 EC obliges it to monitor the compliance of the Member States or other institutions with Union law.\textsuperscript{185} To this end, it is competent to institute infringement proceedings, or to bring actions for annulment or for failure to act in the Court of Justice. This task and powers fits well into the system of executive federalism, in which the Member States implement Union law. It seems evident that a federal organ has to supervise the implementation. It is a question not only of efficiency, but also of fairness between the Member States that a neutral institution ensures that all Member States comply.

\textit{d) Conclusion and an Unresolved Problem of Leadership}

In sum, the structure and powers of the Commission can be explained coherently within the conceptual framework of executive federalism. As Walter Hallstein put it, the Commission is ‘at once a motor, a watchdog and a kind of honest broker’.\textsuperscript{186} It is interesting to observe how the organisational structure of the Commission and its tasks interplay and complement each other. Namely, the proportionate composition of the Commission seems essential in order to serve as the mediating or prosecuting third party, which is an essential task in the consensual system of executive federalism.\textsuperscript{187}

However, one question that has not been directly answered yet is that of leadership. Considering the specific problems of leadership arising from the structure of executive federalism described above, it seems that there are two answers—a more benevolent one and a more sceptical one. In a more benevolent light, one could argue that a consensual system like the European Union needs a specific form of leadership. Leadership within this federal system

\begin{itemize}
    \item \textsuperscript{179} See FW Scharpf et al, Politikverflechtung (1976) 42ff.
    \item \textsuperscript{180} It should be emphasised that the neutrality of the Commission is interpreted here not as technocratic legacy or as a political task, but as a federal function.
    \item \textsuperscript{181} Art 213(1) and (2) EC (cp Art 245 TFEU); as to the incompatibility rule between Commission and EP, see above section IV.2(a).
    \item \textsuperscript{182} Nugent, above n 157, 210–11.
    \item \textsuperscript{183} Hayes-Renshaw and Wallace, above n 50, 192–4.
    \item \textsuperscript{184} Art 250 EC; but see Art 251(4) and (5) EC (cp Art 293(1) TFEU).
    \item \textsuperscript{185} See Art 17(1), 2nd and 3rd sentences TEU-Lis; Usher, above n 174, 165–8; still informative is Schmitt von Sydow, above n 8, 21ff.
    \item \textsuperscript{186} W Hallstein, United Europe (1962) 21.
    \item \textsuperscript{187} As to a comparison between the Swiss Bundesrat and the Commission, see also Oeter, above chapter 2, section VI.3.
\end{itemize}
cannot follow hierarchical (or majoritarian) models of command and top-down procedures. Instead, leadership here has to take on a more dialogical style, based more on the powers to initiate discussions, to set the agenda and to shape procedures. This type of leadership is not simply a soft version of power or yet another ‘European disease’; the powers of the President of the United States are seen as lying mainly along these lines, too.\textsuperscript{188}

The more sceptical observer would point out, though, that leadership by the Commission is weak, caused by a tension between the task of political leadership and the task of mediation. The Commission is torn between politicisation and federal accommodation, and in effect unable to lead in a strong sense. It seems, so the sceptic could argue, that an institution can either serve as a political leader with political goals, or as a neutral third party, but both together produce an unsatisfying intermediate result. The history of the Commission can demonstrate this. Whenever it took a strong lead in some policy field, it had to disguise its (political) intentions behind a facade of expertise and wrap it in rhetoric of the common interest. According to this view, the Commission is structurally an ineffectual leader.

Whatever view one might prefer, one sure consequence of the Commission’s role as neutral broker often is a political deficit. When political goals are pursued by technical deliberations, the open competition of opinion is over. This consequence follows from the structure of executive federalism and is yet another demonstration of a fundamental dilemma inherent to it. A system as heterogeneous and as consensually driven as the EU becomes less effective the more political and open a discussion is. Or, as it has been put before: a certain political deficit ensures the working of the institutions of executive federalism.\textsuperscript{189} In that situation, an alternative could lie in tandem leadership with another institution, the European Council.

\section*{4. European Council}

The European Council was not part of the original institutional set up of the European Communities. Instead, it grew out of a series of summits of the heads of governments in the 1960s, and was officially established as a regular meeting in 1974.\textsuperscript{190} This development is of special importance to the understanding of what is today seen as the central stage for major policy decisions in the EU, and explains many of the functional deficiencies of the federal institutional structure. Last but not least, the European Council can be regarded as the ultimate confirmation of the structure and institutional logic of executive federalism in the EU.

\subsection*{a) Composition and Form: The Ideal of the ‘Fireside Chat’}

A threefold impulse led to the creation of the European Council.\textsuperscript{191} Domestic pressure on the organisation of the welfare state, combined with rising international economic instability and a leadership gap within the European Communities, signalled an enhanced need for direct contact and co-operation between the heads of governments. However, the chance to create a truly helpful place for co-operation was crucially dependent on the institutional setting of the envisioned meetings.\textsuperscript{192} At the heart of the European Council therefore lies its form. The

\textsuperscript{188} Against popular belief on this side of the Atlantic, the US President has rather limited constitutional resources of power, so that his office as bully pulpit and other means of persuasion are of central importance, as famously described by R Neustadt, \textit{Presidential Power} (1960).

\textsuperscript{189} See above section IV.2(c).

\textsuperscript{190} Communiqué of the Heads of States or of Governments meeting in Paris on 9–10 December 1974, Bulletin EC 12-1974, point 1104(3); it convened officially for the first time as ‘European Council’ in Dublin in March 1975. For the development, see Westlake and Galloway, above n 50, 171; W Wessels, \textit{Der Europäische Rat} (1980); J Werts, \textit{The European Council} (1992).

\textsuperscript{191} S Bulmer and W Wessels, \textit{The European Council} (1987) 16.

\textsuperscript{192} As to the models discussed, see Bulmer and Wessels, above n 191, 36; Werts, above n 190, 70ff.
European Council was meant to be something like a ‘fireside chat’, a forum as informal and private, but at the same time as high-ranking, as possible. Today, the European Council has outgrown this original format, but its central organisational features still mirror this idea.

The European Council convenes only the most important actors, ie the heads of state or government as well as the President of the Commission, if necessary assisted by their foreign ministers and another member of the Commission. Secondly, and equally important, the European Council adheres to special working methods, especially informality. A ban on written records of the meetings is strictly observed. Very few actors are even allowed to enter the meeting room. Central to the working methods of the European Council is also its strict use of consensus decision-taking.

However, the informal and almost private character of the meetings has found its limits as importance, agenda and (not least) the number of participants of European Councils have grown immensely. Considerable organisational problems are the consequence. One central structural change is therefore planned by the Lisbon Treaty: in order to ensure the continuity and coherence of the European Council, the Treaty introduces the post of a President of the European Council, to be elected for a (renewable) two-and-a-half-year term. Whether the President will fulfil the hopes set in the office remains to be seen. The position does not seem to be very strong, since it is not clear yet what (administrative and political) resources he can really draw on. Much will depend on the ambitions and abilities of the first office-holder and the other members of the European Council.

The original ‘fireside-chat’ idea led to another consequence—with special meaning for the legal observer. The European Council for a long time was kept beyond the law. Only 12 years after its creation, the European Council was first mentioned in primary law. For another two decades, it has been only vaguely described in Article 4 EU, but not mentioned in Article 7 EC, which establishes the institutional framework of the Communities. Thus, the European Council is not an institution of the Community, and Community institutions are not legally bound by its decisions. Here, the Lisbon Treaty proposes significant change, as it will incorporate the European Council into the regular institutional and legal framework of the Union.

As we look at the organisational structure, it is revealing to put on the glasses of executive federalism for a moment. It is not difficult to recognise certain aspects that fit into the federal system. The need for extended co-operation, which led to the creation of the European Council, can be located in the lack of political leadership so characteristic of the federal system. Also, the consensual form of decision-taking between executives plays well into the general

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193 This idea was based on the experiences that Giscard d’Estaing and Helmut Schmidt had made in the so-called library group: Westlake and Galloway, above n 50, 171, 175; see also Bulmer and Wessels, above n 191, 80.
194 Art 4(2) EU (Art 15(2) and (3) TEU-Lis).
195 See the Decision of the European Council meeting in London, Bulletin EC 6-1977, point 2.3.1, which lays down the organisation and form of meetings; see also P de Schoutheete, ‘The European Council’ in Peterson and Shackleton (eds), above n 53, 21, 30.
196 See the vivid description by de Schoutheete, ibid, 25.
197 Bulmer and Wessels, above n 191, 55; Art 15(4) TEU-Lis will explicitly state this form of decision-taking.
198 de Schoutheete, above n 195, 41–4.
200 Art 15(5) TEU-Lis.
202 Art 2 Single European Act.
203 Lenaerts and van Nuffel, above n 38, para 2-018; to the legal force of its acts, see below section IV(4)(b)(bb).
204 Arts 13, 15 TEU-Lis; especially with regard to the question of whether its actions can be brought before the ECJ for infringement of the Treaties, see Bast, below chapter 10, section V.2.
character of the system of executive federalism as consensual democracy. In a sense, the European Council can be seen as the re-birth of an original, confederate Council idea: a meeting point of executives, where negotiations take place in strict confidentiality and decisions are reached by consensus. Hence, the European Council is not so much shaped by the Council; instead, it actually replicates it.\footnote{As to the relation between Council and European Council, see Hayes-Renshaw and Wallace, above n 50, 165ff; Werts, above n 190, 105ff; Bulmer and Wessels, above n 191, 104; but see P Sherington, The Council of Ministers (2000) 40.}

\section*{b) Functions}

The functions and powers of the European Council had originally not been fixed. Even today, they are of rather elusive legal form. Article 4(2) EU (Article 15(1) TEU-Lis) confers on the European Council the task of providing ‘the Union with the necessary impetus for its development’ and with the task of defining ‘the general political guidelines’.\footnote{See also its specific powers as laid down in Arts 99(2) 128 EC (Arts 121(2) 148(1) TFEU), and in Arts 13(1) and (2) 17(1) EU (Arts 26, 42(2) TEU-Lis).} Comprehension of its institutional role will therefore only follow from a closer look at its concrete functions. Three of these are of special importance.\footnote{For an overview, see de Schoutheete, above n 195, 33–40.}

\subsection*{aa) Steering Committee}

The central reason for creating the European Council was the need for closer co-operation and concerted leadership. Thus, providing direction and enabling major decisions is the main function of the European Council. It has developed into the central stage for launching and directing major steps in the integration project.\footnote{Eg the initiatives which led to the European Monetary System (1978–9), the beginning of the enlargement process with Eastern European countries (1993) or the Lisbon process (2000); an account of the actions taken by the European Council is provided by Bulmer and Wessels, above n 191, 85; Werts, above n 190, 177ff.} The European Council is thereby not confined to any special policy fields, but has taken action in every area, greatly enlarging the scope of Union activities.\footnote{The Solemn Declaration on European Union of 19 June 1983 even states this as task of the EC: see point 2.1.2. of the Declaration, Bulletin EC 6-1983; see also Bulmer and Wessels, above n 191, 92.}

\subsection*{bb) Final Arbiter and Co-ordinator}

The European Council has not been confined solely to defining general policy directions. To an ever-greater extent, it has taken on decision-making powers and become a final arbiter of European affairs. Contrary to its original intention,\footnote{See Art 15(1), 2nd sentence TEU-Lis.} the European Council has become involved in deciding major policy deals or leftovers from sectoral councils.\footnote{A precise account of these developments is given in MT Johnston, European Council (1994) 75.} Moreover, the European Council has increasingly asserted the position of a final arbiter for problems for which the sectoral councils were unable to find solutions.\footnote{This practice of shifting difficult problems up to the European Council (and thereby ensuring unanimity) has been even institutionalised in the area of the CFSP: see Arts 23(2) EU and Art 31(2) TEU-Lis.} This role as final arbiter falls naturally to it since the method of making such broad package deals is only available to the heads of governments sitting in the European Council.\footnote{S Bulmer, ‘The European Council and The Council of the European Union’ (1996) 26 Publius 32.}

Besides, the European Council has also become increasingly involved in co-ordinating the policies of the Council (of ministers). This rather unintended function was mainly caused by a
failure on the side of the General Affairs Council (composed of Foreign Ministers), which is supposed to play a central co-ordinating role.\textsuperscript{214}

The legal implications of these developments are problematic. As has been mentioned, the European Council itself is not an organ of the Community. Thus, it can take legally binding decisions in this realm only if it acting as a regular council (thus excluding the Commission President).\textsuperscript{215} In this case, however, it would also have to proceed in accordance with the requirements of the EC Treaty, ie to vote based on a Commission proposal and in co-decision with the EP. The European Council has so far not made use of this track. Instead, the Council formally enacts what follows from the conclusions of the European Council summits.\textsuperscript{216}

The development of the European Council as arbiter is not surprising. The growing complexity of the system created by an expanded range of covered policy areas leads to an enhanced demand of co-ordination and requires a certain degree of consistency between the sectoral policies. Whether the European Council fills this gap convincingly is another question.\textsuperscript{217}

The European Council has more successfully answered the need for a final decision-taker. This need is inherent to the consensual nature of executive federalism, which is prone to blockades, but the ‘European Council has been able—not consistently but as the culmination of a cycle of package-dealing meetings—to provide an escape from the Council’s earlier institutional “gridlock”’.\textsuperscript{218}

\textit{cc) Treaty Negotiator and Constitutional Motor}

The European Council has also developed an increasing impact on the constitutional development of the Union, becoming to some observers the ‘key forum for determining treaty reforms’.\textsuperscript{219} This comes as a surprise. When the European Council was created, it was feared that the new institution would lead to a strengthening of intergovernmental politics in the Communities, thus blocking supranational development.\textsuperscript{220} Quite to the contrary, the European Council has turned out to be a major motor for EU integration. It is necessary, however, to distinguish (not least legally) between the European Council, where the way for some important Treaty reforms might be paved politically (eg the Declaration of Laeken\textsuperscript{221} or the mandate for the revision of the Constitutional Treaty of Berlin\textsuperscript{222}), and the Intergovernmental Conference, where the actual decisions are taken. In any event, the growing importance of the European Council as a constitutional actor is confirmed in the Lisbon Treaty by the incorporation of special powers of constitutional amendment granted to the European Council (the so-called simplified revision procedures according to Article 48(6) and (7) TEU-Lis).\textsuperscript{223}

In a comparative perspective, the European Council finds no equivalent as an organ of constitutional change. However, there is an ironic twist to this situation, since the EEC, which was meant to be a system ‘in the making’, from the outset lacked an institution or mechanism to actually ‘make it’. In the European Council, originally feared as a blockade to integration, it

\textsuperscript{214} See Bulmer and Wessels, above n 191, 103.
\textsuperscript{215} Lenaerts and van Nuffel, above n 38, para 2-018. This is different in the area of CSFP: see Art 13 TEU.
\textsuperscript{216} Ibid.
\textsuperscript{217} Bulmer and Wessels, above n 191, 94.
\textsuperscript{218} Bulmer, above n 213, 31.
\textsuperscript{219} H Wallace, ‘The Institutional Setting’ in Wallace and Wallace (eds), above n 43, 20.
\textsuperscript{220} Bulmer, above n 213, 31.
\textsuperscript{221} European Council, Laeken Declaration on the Future of the European Union, 14/15 December 2001, SN 300/1/01 REV 1.
\textsuperscript{223} See also Arts 17(5) and 31(3) TEU-Lis.
seems to have invented a congenial institution that provides what an overloaded Council and restricted Commission cannot deliver.224

c) Conclusions

According to none other than Jean Monnet, 'the creation of the European Council is the most important decision for Europe since the Treaty of Rome'.225 At the end of this chapter we may briefly ask: why? To what extent did the creation of the European Council shift the institutional balance? How does the new institution fit into the structure and institutional system of executive federalism? And finally, which answer does it give to the question of leadership?

aa) An Institution from the Playbook of Executive Federalism

It has been suggested that the creation of the European Council was not designed along the lines of the ‘founding fathers’, ie the drafters of the EEC Treaty of Rome.226 That is, the expected reform would have been one within the existing institutional framework and probably more along the lines of technocratic reform. This may be true. However, one can argue that the creation of the European Council surely was consistent with the founding fathers’ principles, at least if their vision was one of executive federalism. Indeed, the creation of the European Council seems to have been composed according to the executive federalism’s playbook. Instead of strengthening the Commission, empowering the parliament or creating a European President, the solution has been to strengthen the executive branch. And not just that: the solution has been one of consensual executive co-operation. The European Council plays along the already well-known tune of co-operation and consensus, and thus decisively substantiates the logic and structure of executive federalism in the EU.

However, the European Council is not only a confirmation of this basic structure, but also a response to its deficits: adding a powerful organ that can provide leadership, serving as a motor of development and (at least partly) remedying the danger of gridlock in the Council. Most interestingly, the creation of the European Council cannot be understood as being anti-federal, or anti-supranational. The European Council has played a decisive role in advancing this supranational system. If proof be needed, the draft Constitution of the EP of 1984, often criticised as dreamy federalism, acknowledges the role of the European Council in its Article 32.

But how does the European Council relate to other institutions? The relation to the Council has been described above.227 With respect to the EP, the answer is ambivalent. At its inception, consent to the creation of the European Council was ‘bought’ from the smaller states with the promise (of the bigger states) to direct elections to the EP.228 Thus, the European Council stands at the cradle of the EP as the most directly legitimised institution of the EU. Moreover, the European Council as an actor in constitutional politics has been immensely helpful in pushing towards stronger powers for the EP. The direct relations between EP and European Council are, however, insignificant. Although Article 4(3) EU prominently mentions the duty of the European Council to report to the EP, the practical effect of that duty is minor.229

224 A practitioner’s insight in the need for the European Council is supplied by C Tugendhat, Making Sense of Europe (1986) 166.
225 Quote taken from ibid, 167.
226 Bulmer, above n 213, 30.
227 See above section IV.4(a).
228 Westlake and Galloway, above n 50, 171, 175; Werts, above n 190, 153.
229 On the practice of reporting, see Werts, above n 190, 158; see also Bulmer and Wessels, above n 191, 114.

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bb) European Council and European Commission as Twofold Government

Original fears that the European Council would decisively diminish the role of the Commission have not come true. Instead, today the European Council and the Commission can be regarded as two sides of a twofold government, complementing each other in providing different, yet crucial forms of leadership.

The European Council ensures guiding political leadership and major decision-making. This was a role originally envisioned for the Commission, but only the European Council combines the power of its participants to command their domestic governments with the legitimacy to stand accountable for the direction taken.

However, this dominant centre not only casts a shadow, it also offers the Commission a stage for launching ideas, since the Commission has learned to handle the European Council and to use it to its own ends. First, the Commission profits greatly from the direct channel of information that it gets by being part of the European Council. Also, the Commission fills an important role in providing the European Council with reports, memoranda and basic information, described as the ‘technical authority’ in the European Council. But in some aspects, the role of the Commission goes beyond that. More than once, the Commission was able to launch broad policy initiatives by using the European Council. The Commission’s role within the European Council has thus, with reference to this capacity, convincingly been called ‘promotional brokerage’.

d) A Threefold Government? The Lisbon Treaty and the New High Representative for Foreign Affairs and Security Policy

The Lisbon Treaty will complement as well as complicate this twofold structure by introducing a third governmental actor: a High Representative for Foreign Affairs and Security Policy. To be precise, such a post has been in existence since the Treaty of Amsterdam, but to date it has been part of the dual role of the Secretary General of the Council (Article 207(2) EC, Article 26 EU). With the Lisbon Treaty, the High Representative will gain more institutional independence, since it will be cut free from its role in the Council secretariat and will be assisted by a new European External Action Service, comprising staff from different European institutions (the General Secretariat of the Council and Commission) as well as Member States. Quite uniquely, the High Representative will operate in different organs: appointed by the European Council with the agreement of the Commission’s President, the High Representative will be a Vice-President of the Commission, will chair the Council when it convenes as the Foreign Affairs Council and will take part in the meetings of the European Council.

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232 Wessels and Rometsch, above n 231, 233; Bulmer, above n 213, 34.
233 Werts, above n 190, 143.
234 ‘This especially depends on the personal standing of the Commission’s President: see Werts, above n 190, 144.
235 Wessels and Rometsch, above n 231, 233.
236 Art 18 TEU-Lis: see D Thym, ‘Reforming Europe’s Foreign and Security Policy’ (2004) 10 ELJ 5, 18–22. This is the one aspect where the failure of the Constitutional Treaty will directly impact the institutional system, since the original title of a Foreign Minister fell prey to the anti-constitutional cleansing. Substantive changes were not made though: see FC Mayer, ‘Die Rückkehr der Europäischen Verfassung?’ (2007) 67 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 1141, 1175, 1179.
237 Art 27(3) TEU-Lis.
This post and its new institutional set-up is a response to the growing engagement of the Union in external matters and the so far confusing multitude of voices speaking for it. The new Representative ‘shall conduct the Union’s common foreign and security policy’ and thus provide the Union with a unified voice (Article 18(2) TEU-Lis).

However, the new office entails considerable risks. Its doubled institutional position will go well beyond the understanding of most observers. This poses a serious threat to the transparency of the institutional system. Together with the newly created President of the European Council and the Commission’s President, there will be three ‘faces’ representing the Union in international politics. Moreover, the division of competences between these three actors and their full system of instruments is not yet clear; institutional rivalries between the three are therefore likely.  

**V. Legitimacy of the Institutional System**

A description and conceptualisation of the institutional system of the EU would be incomplete if it ignored the question of legitimacy. At the same time, approaches and opinions with regard to this topic are myriad. A complete overview is thus beyond the scope of this chapter.  

Instead, this part will focus on one concept of legitimacy in the EU, the concept of parliamentary democracy. While the current Treaties barely acknowledge even the principle of democracy as such (it is mentioned only in Article 6(1) TEU), the Lisbon Treaty will change the picture, as it states that ‘the functioning of the Union shall be founded on representative democracy’ (Article 10(1) TEU-Lis). It will embrace the concept of a dual parliamentary basis of European public authority. Our analysis will now turn first to the national parliaments, then to the European Parliament. On the basis of this discussion, a concluding paragraph will suggest a label for the European institutional setting and its form of legitimacy: ‘semi-parliamentary democracy’.

**1. The Dilemma of the National Parliaments**

National parliaments are supposed to infuse democratic legitimacy to European governance by controlling the national governments’ representatives in the Council. They are also considered the sovereign actors in constitutional matters, ratifying Treaty reforms and the
accession of new members—at least in theory. In practice, their supposed influence is dramatically undercut. Although this fact is well known, the reasons for it are obscure. The institutional logic of executive federalism might help to provide a coherent explanation for this state of affairs, and ultimately discloses an underlying dilemma. Three major problems arise.

(1) Most fundamentally, the federal structure renders Member State parliaments mediated actors in European affairs. It is not national parliaments but national governments that are involved in the regular procedures of supranational law-making. Seen through the lens of executive federalism, this makes perfect sense, as has been explained above. In consequence, national parliaments have to watch the complex European law-making procedures from the sidelines. This deprives them of inside information and creates a timetable not geared towards the working rhythm of national parliaments and often prevents accumulation of in-depth expertise, all of which makes control cumbersome to ineffective.

(2) The inter-institutional decision-making process in the EU is often based on confidential negotiations. This poses another major problem for control through the national parliaments. However, this confidentiality is a necessary ingredient of the institutional setting in executive federalism, as discussed and demonstrated above with regard to several of the EU institutions. Thus, the urge of parliaments to publicly discuss and control collides with the confidentiality of EU negotiations.

(3) Finally, executive federalism works largely by consensus, adding another two problems. First, the consensus method is based on fairly unbound actors. In order to reach agreements, every party has to be free to compromise and cannot be bound to a rigid mandate from their constituency. Parliaments, on the other hand, will aim at giving mandates or setting stringent conditions in order to maximise influence on the representative’s behaviour in negotiations. Thus, parliamentary mandates collide with governmental freedom to negotiate.

Secondly, and more fundamentally, consensus is based on compromise. Yet compromises are not black and white. They do not offer clear-cut options, but rather offer a complex combination. The logic of parliamentary politics, on the other hand, is based on a majoritarian and mainly binary mode. Parliaments display the contrast of government and opposition, of contrasting policy options, and of winner and loser in concrete votes. National parliaments, which want to control what their governments do in Brussels, have to deal with a lot of consensual grey.

In sum, national parliaments face a dilemma between their own right to control and the efficiency of Union procedures. The more they try to control their governments by means of supervision, the more they run the risk of blocking procedures.

Will this situation change once the reforms envisioned by the Lisbon Treaty come into force? The role of national parliaments was a central topic of past constitutional debates and
their better integration into the institutional structure of the EU (in order to enhance EU legitimacy) was a stated goal of Treaty reforms. In fact, changes with respect to the national parliaments are numerous: the Lisbon Treaty will, first of all, highlight the role and functions of Member State parliaments in a new and central provision (Article 12 TEU-Lis), and hence considerably improve their visibility. The new Treaty will also introduce a new ‘early warning’ mechanism. With this mechanism, national parliaments can raise their concerns ex ante with respect to any legislative proposal from the Commission if they see an infringement on the Union’s behalf to the principle of subsidiarity. If at least a third of the Member State parliaments signal concerns about the proposal, the Commission is obliged to review (but not to change) its proposal. Member State parliaments can involve the ECJ on the grounds of an infringement of the principle of subsidiarity. While this mechanism was already provided for in the Constitutional Treaty, the Lisbon Treaty strives to enhance their role even further, and will add another stage to the procedure. It provides that, if at least a simple majority of national parliaments raise concerns, the legislature (not just the Commission) has to take up the issue and, if necessary, can stop consideration of the proposal.

Will these changes remedy the national parliaments’ dilemma? The new provisions are convincing to the extent that they give national parliaments higher visibility and a voice, which is of a certain symbolic value. The early warning mechanism also gives them a fair chance to halt processes at the European level. However, it is unlikely that these reforms will have a deeper impact and actually succeed in providing more parliamentary scrutiny and legitimacy. The envisioned mechanism can only be used successfully if national parliaments invest the massive resources necessary to examine early and competently, which legislative proposal might violate the principle of subsidiarity and endanger their competences. Herein lies the dilemma. National parliaments will still be mediated actors in the ongoing legislative procedure. Hence, they have to invest resources on matters which are not ‘theirs’. For a normal member of a national parliament, European matters will remain ‘alien territory’ and difficult to oversee. Therefore, I expect that the new system will mainly be of symbolic importance.

2. The EP and its Representational Limits

As national parliaments have legally and practically only a very limited influence on the decision-making in the EU, the focus turns to the EP. As we have seen above, the EP has developed the organisational means and the competences to be taken seriously. It surely offers the option for parliamentary legitimacy in the EU, despite not being—or, I would argue, precisely because it is not—likely to develop into a parliamentary system.

However, parliamentary legitimacy from the EP still has a weak spot: its representational function. A first central aspect of this function is that a parliament is meant to serve as a

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255 Two further protocols spell out their functions in detail: Protocol (no 1) on the role of national parliaments and Protocol (no 2) on the application of the principles of subsidiarity and proportionality.
256 Art 7 of Protocol (no 2).
257 Art 7(2) of Protocol (no 2).
258 Art 8 of the Protocol (no 2).
259 Art 7(3) of the Protocol (no 2).
260 For a similar conclusion, see Tans et al (eds), above n 258; arguing for a form of scrutiny that is based more on public deliberation than formal mandates is K Auel, ‘Democratic Accountability and National Parliaments’ (2007) 13 ELJ 487.
261 See above section IV(b)–(d).
262 There are formal and more communicative aspects to this function; for the first, see F Arndt, ‘Distribution of Seats at the European Parliament’ in A Bodnar et al (eds), The Emerging Constitutional Law.
public forum or sounding board for the society it represents. This aspect has traditionally been regarded as a specific problem of the EP because it lacks a common language and a common civil society. However, different types of parliaments show that the public forum function can be performed very differently. Whereas, for countries with a debating parliament, to return to the two ideal types of parliaments discussed above, the plenary debates are effectively the central stage of political discussion, in countries with a working parliament the approach is very different: since the battle between government and opposition in parliament is prevented at the outset by the incompatibility rule, which forbids ministers from sitting in parliament, it is thus not the plenary session but rather the parliamentary committees that serve as public sounding boards.

Picturing the EP as a working parliament helps to clarify its representational function. It entails that the EP ‘naturally’ does not have such a vivid plenary culture as debating parliaments. This might be a flaw, but it is less a European deficiency than one common to all working parliaments. Looking at the committee culture in the EP easily underscores this point. It is the committees that attract most of the public recognition, by working openly, pooling expertise and involving the interested public via hearings.

However, these arguments should not obscure the flaws of the EP. Conceptualising it as working parliament might explain some aspects, but it does not render it a perfect organ of representation. Worse, the situation of the EP appears more problematic because certain makeshift structures, which in national political systems help to remedy the weaknesses of such parliaments, are missing here. If plenary sessions as sounding boards are mute and committees reach out only to a specialised public, then there are normally specific agents of representation. There are mainly two models: either political parties serve as ‘representative agencies’, offering a clear and coherent programme that is infused into the parliamentarian discussion and evaluated by the voters, or there are individual parliamentarians, who are seen by their constituency as responsible delegates. Especially where parties are rather loose and decentralised, providing little orientation for the voter, single parliamentarians are considered delegates of a specific constituency.

The problem with these two models in Europe is that both fail. First, there are only very loose European parties, which lack coherent European programmes. European election
campaigns have therefore been dominated by national topics.\textsuperscript{273} Moreover, empirical data show that MEPs are only barely representative of their electorate since they are much more ‘pro-European’ than their constituencies.\textsuperscript{274}

The model of single parliamentarians also fails for another simple reason: the size of the constituency. Most Member States have electoral systems which provide for only one national constituency in EP elections (France, for example). This rules out any local basis for the parliamentarians.\textsuperscript{275} In addition, even if there are regional constituencies for European elections (eg the five constituencies in Italy), they are still very large. In effect, MEPs are hardly known in their constituencies. Thus, the model of parliamentarians being deeply entrenched in one region and thereby getting feedback and facing accountability is hampered by the EU structure.\textsuperscript{276}

In sum, none of the models to provide representation works properly in the European context. In fact, we face a puzzling situation. Institutionally, the EP has to be regarded as a strong parliament. Sociologically, however, it barely exists in the European political mindset. Only (yet surely) time will change this.\textsuperscript{277}

3. Concluding Proposal: A Semi-parliamentary Democracy

Looking back, it is obvious why legitimacy poses such a serious problem to the institutional system of the EU. In particular, questions of effective representation through parliamentary actors and of transparent lines of accountability are unresolved. It is evident that the structure of executive federalism has clear implications for the concept of legitimacy.

To put it less neutrally, the structure of executive federalism and its institutional dynamics are part of the problem. As we just saw, the mediated role of national parliaments and thus their exclusion from effective control is part of the federal set-up. Non-transparent responsibilities stemming from consensual agreements are typical for the federal system, and also render accountability a problem.

At the same time, this system is also part of the solution. The tendency towards consensus ensures a great deal of legitimacy. Also, the role of the EP is strong, because of the specific institutional division between it and the executive branch.

Hence, however one looks at it, the institutional system and its composite form of legitimacy represents a very distinct model. To highlight this unusual form, I propose to give it a special label—semi-parliamentary democracy—for the following reasons.

The relation between the executive and the parliamentary branch, determined primarily by the existence of appointment power (or the lack thereof), is normally used to label political systems.\textsuperscript{278} Applying this yardstick to the EU, we see neither a directly elected president nor an executive elected by parliament. Thus, the EU seems to be an undefined tertium. Looking closer, we find its principal characteristic: the negative appointment power of the EP. This power is not enough to justify the label ‘parliamentary system’. However, the negative power, a

\textsuperscript{275} Corbett et al, above n 98, 18–19; C Haag and R Bieber, in H von der Groeben and J Schwarze (eds), Kommentar zum EU-/EG-Vertrag (2004) post Art 190 EC, para 23.
\textsuperscript{277} Sartori, above n 52, 84, 101, 131; Lijphart, above n 95, 116.
sort of veto power in the appointment process and an emergency break in the running term, gives the parliament a decisive say—and the system a characteristic feature.

With respect to the Council as part of the executive branch, it is even clearer that the EU is ‘only’ semi-parliamentary, because the Council as such cannot be dismissed by the Parliament.\textsuperscript{279}

The EU is semi-parliamentary also with respect to the influence of executive actors (in the form of the Council) on the law-making function. Traditionally, a parliamentary system would be one in which parliament is the supreme law-making authority. This is hardly the case here, where the EP is at best only a semi-legislator.

All the above arguments speak for the ‘semi’, if even that. However, there is a more ‘parliamentary’ aspect to the structure: the position and powers of the EP. The whole institutional and governmental system of the EU cannot be adequately described without addressing the EP’s influence on the creation of the executive branch, its control of that branch and, most of all, its participation in the law-making process. The whole system gets a very specific twist through the participation of the EP. The label ‘semi-parliamentary democracy’ might help to describe it.

\textbf{VI. Summary and Prospects}

The reform of the institutional system was at the core of the Constitutional Treaty and its rhetorically cleansed surrogate, the Lisbon Treaty.\textsuperscript{280} Even though the changes envisioned by this Treaty have been analysed throughout this chapter, we may now in summary ask how it will impact the system. The institutional system of the EU, as we have discovered in the course of this chapter, is shaped by the structure of executive federalism. This multi-layer feature of the EU, rooted in interwoven competences and the Council as the institutional counterpart to the structure of competences, creates an institutional dynamic of co-operation and consensus-seeking that works its way into the shape of the institutions and their inter-institutional dynamic, while at the same time posing recurrent because inherent problems.

Considering the underlying thesis of this chapter, it may not be surprising that, in my opinion, the Lisbon Treaty proposes mainly a continuation of existing institutional patterns. It is not a radical break, but leaves the basic structure and institutional dynamic of executive federalism untouched. But even without a radical break, will the numerous changes in the institutional system and the textual clarifications ameliorate the many ambivalent peculiarities of the system? This is unlikely. Instead, the continuation of existing patterns could have a rather puzzling effect. It could well be that the Lisbon Treaty both enhances the advantages of the current system and prolongs its suffering. How would this come about? The key to this puzzle lies in the dilemmatic nature of executive federalism. Its structure entails an aporia, which we have encountered time and again in the previous pages. This aporia is rooted in the interwoven structure of competences which create an institutional dynamic of co-operation and consensus. This dynamic has a double-effect: it infuses legitimacy by inclusion and at the same time drains

\footnote{279 It is this aspect on which Paul Magnette rests his qualification of the EU as semi-parliamentary democracy: idem, ‘Appointing and Censuring’, above n 108, 302.}

\footnote{280 For an analysis of the changes between the Constitutional and the Lisbon Treaty with respect to the institutional system (which are rather marginal in substance, yet significant in rhetoric), see Mayer, above n 236; on the Lisbon Treaty in general, see Doughan, above n 201; J Terhechte, ‘Der Vertrag von Lissabon’ [2008] Europarecht 143; for further articles on the Constitutional Treaty, see Kokott and Rühl, above n 65; Peters, above n 80; Wessels, above n 66; see also K Lenaerts and D Gerard, ‘The Structure of the Union According to the Constitution for Europe’ (2004) 29 EL Rev 289; for a thoughtful analysis of legitimacy of the Union after the failure of the Constitutional Treaty, see Magnette, ‘European Democracy’, above n 108, 13.}
The Lisbon Treaty will not alter this fundamental character of the EU’s institutional system. It will neither dramatically simplify nor clarify this structure, but will (most likely) increase its federal complexities and ambiguities. This is perhaps not surprising. The strength of this system has always been its co-operative and inclusive character, its weakness the often obfuscating aspects. The structure of executive federalism, the origin of many of these aspects, will thus likely continue to accompany and shape the Union’s institutional system.
I. Introduction

The very heart of the European Union is that it exercises public authority. This authority stems from its competences as established by and defined in the founding Treaties. While the nature and foundations of public authority exercised by ‘normal’ treaty-based international institutions are still subject to conceptual clarification, the true public law nature of the EU/EC, ie its legal capacity to determine others and to unilaterally shape their legal or factual situation, was never in dispute. These ‘others’ being private persons and states alike, the Union competences co-exist, compete and interfere with the competences of its Member States. What is thus needed is a relatively stable set of rules for determining the existence and co-ordinating the exercise of the respective powers—a constitutional order of competences. Hence the term ‘vertical competences’, borrowing from a metaphor of ‘upper’ and ‘lower’ levels of a composite polity and roughly corresponding to the German term Verbandskompetenzen (literally ‘an association’s competences’). Note that we have here and there replaced the term ‘vertical’, used in previous versions of this article, with the more convenient but also more loaded term ‘federal’, though we are aware of the misperceptions which the concept of federalism in EU affairs still might entail. While the EU is not a state in terms of the bureaucratic, fiscal and ideological resources usually associated with statehood, there is hardly a chapter of law where its conceptual basis and its functioning are as close to that of a federal state, as in the area of competences. After all, familiar things should be called by familiar names in order to foster comparison, understanding and—albeit with caution—transplantation of concepts.

* The authors would like to thank Grant Van Eaton for proof-reading the revised version of this text. Comments are welcome at sekreavb@mpil.de.


2 In detail, see S Oeter, above chapter 2.
Until the end of the 1990s, there had been astonishingly little research on the system of the Communities’ competences. Legal literature on competence issues had almost exclusively focused on Article 235 EEC Treaty (now Article 308 EC). In recent years, however, Union competences have been the subject of a lively debate. According to the Nice Declaration of 2001 on the future of the Union, the post-Nice process should inter alia address the question of ‘how to establish and monitor a more precise delimitation of powers between the European Union and the Member States, reflecting the principle of subsidiarity’. This call for reform was a strategy for dealing with the Union’s endemic crisis of legitimacy, which was attributed to the Union citizens’ perception of the EU being too amorphous and too large, hence the claim of a more transparent order of competences. It also addressed concerns of some sub-national yet powerful players, in particular the German Länder: enhanced protection against unnecessary interference with their own legislative and enforcement powers. Moreover, there was a widespread view that the Union’s competences steadily erode those of the Member States, eventually even endangering their statehood.

Since then, a wealth of literature has been published, much of it triggered by the work of the European Convention and the relevant parts of the Constitutional Treaty (CT). The Convention had placed at the head of its Draft the general rules on Union competences—rules which to some extent go beyond the mere codification of already established legal doctrines.
The CT’s provisions have made it without any substantial amendment into the Lisbon Treaty. However, it is noteworthy that only the ‘fundamental principles’ stated in Article I-11 CT are included in the new EU Treaty (Article 5 TEU-Lis), whereas the remainder of the provisions form the new title on ‘Categories and Areas of Union Competence’ of the Treaty on the Functioning of the EU (Articles 2–6 TFEU).

This contribution will first outline the fundamental features of the current federal order of competences (II). On that basis, it will present some aspects of the Lisbon Treaty’s rearrangement of the order of competences (III). Beforehand, two remarks should be made as to scope of the analyses. First, this contribution does not address the competence of the European Court of Justice (ECJ) to develop the law, even though this is unquestionably a significant aspect of the EU’s power vis-à-vis the Member States. A restraint on judge-made law requires other instruments than a modification of the order of competences.10 Addressing ‘activist’ judgments as a competence problem may even tend to confuse the issues.11 Indeed, difficult questions are raised when the ECJ subjects a matter to the disciplines of the fundamental (market) freedoms irrespective of the fact that the EU would not be fully competent to legislate on the matter.12 Obviously, though, any additional limitation or a more precise definition of the potential scope of legislative activity would not remedy such a situation—on the contrary.

Secondly, this contribution understands the Union as an organisation that includes the Communities, so that Community law is a qualified part of Union law.13 This allows insights, developed on the basis of the EC Treaties, to be applied to the EU Treaty.14 We understand this is also the ECJ’s approach since Pupino.15 The following exposition is based on the EC Treaty, so a certain degree of ambiguity with respect to the EU Treaty is inevitable, in particular with respect to Title V EU (the Common Foreign and Security Policy (CFSP) ‘pillar’). However, there is a presumption that those competence theories developed on the basis of the EC Treaty

12 See, eg Case 147/03 Commission v Austria [2005] ECR I-5969, paras 32–5 (access to university education); Case C-438/05 ITF [2007] ECR I-10779, paras 39–41 (industrial action); Case C-524/06 Huber [2008] ECR I-0000, para 73 (preventive fight against crime).
14 It is widely recognised that the latter’s institutions are strictly bound by those competences under Titles V and VI EU Treaty, see P Manin, L’Union européenne (2005) paras 120ff; but see M Pechstein and C Koenig, Die Europäische Union (2000) para 193.
15 Case C-105/03 Pupino [2005] ECR I-5285.
with a view to preserving the Member States’ powers must apply all the more to the competences under the EU Treaty, given their impact on national politics. The solution offered by the Lisbon Treaty, which would establish substantive unity according to the rules of the ‘Community method’, builds precisely on this premise.

II. The Current Order of Competences

1. Terminological and Theoretical Foundations

A terminological question needs to be mentioned first. There is a certain degree of linguistic uncertainty in the Treaties, in particular with respect to the terms ‘power’ and ‘competence’. For example, the term ‘powers’ is used in both Articles 5(1) and 7(1)(2) EC; in the German version it reads ‘Befugnis’. The Lisbon Treaty would replace the former but not the latter with the term ‘competences’, in German ‘Zuständigkeiten’ (Articles 5(1) and 13(2) TEU-Lis). The German version of Article 300(1) EC uses the term ‘Zuständigkeit’, whereas in the English version the term ‘powers’ is used. Yet in Article 230(2) EC the terms used are ‘Kompetenz’ and ‘competence’, respectively. In the provisional draft of the Treaty of Nice, circulated on 12 December 2000, we find the phrase ‘delimitation of competencies’, the term being an alternative plural form of competence, yet one that is hardly ever used in Euro-jargon. The usage in other languages varies in still different ways. Neither the terms ‘competence’ and ‘power’ in the Treaties nor the related terms ‘empowering provision’, ‘authorisation’ and ‘legal basis’ appear to have distinct legal meanings respectively. All of these terms will therefore be used synonymously.

a) The Competence Requirement as an Evolutionary Achievement

The demand for a catalogue of European competences, a new ordering of competences or additional rules for the exercise of competences all build on a founding principle of European constitutional law: the principle of constitutional legality. This principle has two aspects: negative and positive legality. According to the principle of negative legality, every act that can be attributed to the Union must be consistent with higher-ranking law. Every act of secondary law must conform to the totality of the existing Treaty provisions as well as to those general principles of law to be found at the same level. This establishes a strict hierarchy of norms within Union law: all secondary law adopted by the Union’s institutions is on one single level under primary law. Article 5 EU formulates the Treaties’ ‘yardstick character’ as applying

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16 Doc SN 5333/00 (emphasis added).
17 B Garner (ed), Black’s Law Dictionary (1999) contains five definitions for the term ‘power’. Definitions one and three are of relevance here: ‘the ability to act or not to act’ and ‘the legal right or authorization to act or not to act; the ability conferred on a person by the law to alter, by an act of will, the rights, duties, liabilities, or other legal authorization’. Under the term ‘competence’ one finds as relevant definitions ‘the basic minimal ability to do something’ and ‘the capacity of an official body to do something’.
18 See also de Bürc and de Witte, above n 6, 202, who arrive at the same conclusion.
19 For details, see von Bogdandy, above chapter 1; see also H Eberhard, ‘Das Legalitätprinzip im Spannungsfeld von Gemeinschaftsrecht und nationalem Recht’ (2008) 63 Zeitschrift für öffentliches Recht 49, 58ff.
comprehensively to the Union’s five main institutions and to all the Union’s spheres of activity (ie including Titles V and VI EU Treaty); for Community law this follows with particular clarity from Article 230(2) EC.

The tremendous success of the constitutionalisation of the Treaties is revealed by the fact that the principle of negative legality appears somewhat trivial.23 Yet obvious as the validity of this legal concept may appear today, it was anything but evident for the early Community.24 That the founding treaty of an international organisation can effectively function as the standard for the law produced by that organisation is a rather new phenomenon.25 According to the doctrine and practice of public international law, there is almost no chance of success for a plea of illegality against decisions taken by an international organisation, provided that it can rely on the consent of its contracting parties represented in the plenary organ.26 Lawyers will probably call it ‘subsequent practice’, a ‘tacit renewal’, a ‘customary power’ or even a ‘spontaneous agreement’ having the same legal value as the founding treaty, rather than an ultra vires decision.27 Eventual amendments to its founding document routinely mark the formal endpoint of an incremental process of introducing new tasks and policies into a particular organisation, ie de jure acknowledgement of previous de facto changes.

This is where we have come from.28 The rather ‘inflexible’ hierarchisation of sources in the EU is thanks to the ECJ’s case law. The Court consistently held that the procedures for amending the Treaties are exclusively those provided for by the Treaties. The Treaties’ strict normativity does not permit any of its provisions to be temporarily suspended by informal consensus,29 nor can a persistent practice by the institutions derogate primary law or set a binding precedent.30 Even acts adopted unanimously by the Council are without distinction subject to primary law: in Community law, consensus is not a valid argument in favour of legality.31 The ECJ’s strict view equally applies when the Council based its act on a broadly

23 According to some authors, even today there is only a ‘slight hierarchy’ (geringe Hierarchisierung) between primary and secondary law; see, eg C Schönberger, ‘Normenkontrollen im EG-Föderalismus’ [2003] Europarecht 600, 501. Revealingly, Schönberger’s benchmark is derived from federal polities rather than from international organisations.


279
defined authorisation like Article 308 EC. This provision can therefore no longer be considered to be a competence to amend or ‘supplement’ the Treaty. When, however, it was not the Council but rather an intergovernmental conference that acted (the ‘Representatives of the Governments of the Member States, meeting within the Council’), then the principle of the primacy of Community law over any Member State law is applicable, which, in the end, has the same effect with regard to the principle of negative legality.

Only on the basis of this constitutional normativity does the principle of positive legality flourish. This principle implies that an empowering provision is a necessary proviso. Any act at the level of secondary Union law must rest on a legal basis that can be traced back to the Treaties. The legal basis can either be contained in the Treaties themselves or in an act of secondary law, which in turn is based on the Treaties. Whereas negative legality is (only) concerned with restraining an existing public power, the requirement of an empowering provision is situated one step before and asks about the act’s coming into being, its legal foundation. Thus—and this is an important point in the debate on constitutional reform—a modification of the order of competences can limit the EU’s power virtually at its source. The legal consequences of an infringement on the negative or the positive aspect of constitutional legality are identical: the usual legal consequence of an act’s illegality is that it is annulled when challenged before an EU Court, and in cases of especially serious and obvious defects the act may even be declared non-existent.

b) On the Scope of the Principle of Attributed Powers

The principle of positive legality, viz that the Union may only exercise as much power as conferred on it by the Treaties, has been universally recognised and is known as the principle of attributed powers or principle of conferral. As a shorthand, one can also speak of a competence requirement.

This requirement is occasionally questioned when the measure at issue does not infringe on the rights of the citizens or does not place legal obligations on Member States, yet the ECJ had already declared at an early stage of the Community that even an act benefiting any given party requires a legal basis.

In particular, the expenditure of funds as an important resource of influence is by no means legally neutral, so the Union does not possess a general competence to...

33 Such was still the claim in HP Ipsen, Europäisches Gemeinschaftsrecht (1972) ch 22, para 15; see similarly, eg JH Kaiser, ‘Grenzen der EG-Zuständigkeiten’ [1980] Europarecht 97, 115; Steindorff, above n 5, 114; also Herdegen, Europarecht (2008) § 9, para 59. Today the dominant scholarly view holds that Art 308 EC is subject to the competence order’s constraints: see, eg Streinz, above n 41, Art 308 EC paras 1 and 4; M Nettesheim, in E Grabitz and M Hill (eds), Das Recht der Europäischen Union (looseleaf, last update Sep 2008) Art 249 EC, para 60.
35 The question whether state actions must also always have a basis in national constitutions is very controversial: see C Möllers, Staat als Argument (2000) 256ff.
36 Case C-137/92 P Commission v BASF [1994] ECR I-2555, paras 48ff; for a different view, however, see Nettesheim, above n 24, 430 (assuming that a lack of competence in any case leads to non-existence of a contested act).
37 Sometimes the term ‘enumerated powers’ is used. The term is misleading, since it implies some form of a catalogue, which is missing in the Treaties.
grant aids. Against the Commission’s problematic practice, the ECJ correctly emphasised that the expenditure of EU money is subject to the cumulative requirements of a budgetary authorisation and an empowering legislative act.\(^{40}\)

It has not yet been completely clarified whether those acts of institutions that by their very form produce no binding legal effects are subject to the competence requirement.\(^{41}\) Institutional practice has developed non-binding instruments other than those foreseen in the Treaties,\(^{42}\) such as Council resolutions and Commission communications. The need for legitimacy of any act by a public body suggests that the competence requirement also applies to such acts. Accordingly, the ECJ in some instances annulled Commission communications that appeared to impose obligations on the Member States. The Court held that, in the absence of a legal basis conferring a power to actually impose such obligations, the communication was to be annulled on grounds of lack of competence\(^{(!)}\).\(^{43}\) The same rationale should apply to Council resolutions. The inclusion of recommendatory powers as part of the non-regulative type of powers defined in Article 6 TFEU (see section III.3.a below) supports the view that in Union law the competence requirement is to be understood broadly and is not limited to legal acts in a narrow sense. Hence, all types of actions taken by institutions or bodies of the Union, irrespective of their legal nature or form, need a sound legal basis, which explicitly or implicitly confers on them the relevant power to act.

The principle of conferral thus pertains also to formalised non-binding acts. Legal instruments such as resolutions or conclusions constitute official announcements that, at an early stage in the law-making process, fix the interim results of deliberations on the level of the respective institution and are therefore not ‘neutral’ in terms of competence. However, there are good reasons to assume an unwritten competence to adopt such measures, as implied by the institutions’ power of internal organisation (\textit{pouvoir d’organisation interne}).\(^{44}\) The assumption of such implied power is promoted by the obvious need to foster consensus-building in bodies as heterogeneous as the Council. A similar case can be made in favour of the Commission’s power to adopt non-binding communications, being a functional corollary of the power of initiative explicitly attributed to it in the Treaties. As the test for assuming such implied powers does not sound overly ambitious, it should be noted that to dispense with a competence requirement altogether would lead to a different situation: at the very least, the exercise of tacit powers to make non-binding statements must not overstep the scope of Union law \textit{ratione materiae}.

A particular case in point is the European Parliament (EP). As far back as 1983, ie long before the EP evolved into the co-legislature of the Union, the Court of Justice postulated a power ‘to discuss any question concerning the Communities [and] to adopt resolutions on such questions’ to be ‘inherent in the Parliament’.\(^{45}\) The Court seems to assume a power to deliberate on issues well beyond the scope of the written powers of the Union (at the time, the Communities), as long as the issues debated actually concern the Union. In such a case, the Parliament may even ‘invite the Governments to act’, the ECJ held. Here the particular nature

\(^{39}\) Case 111/63 \textit{Lemmerz-Werke v High Authority} [1965] ECR 677, 591.


\(^{42}\) As to the scope of the power of internal organisation, see, eg Case C-58/94 \textit{Netherlands v Council} [1996] ECR I-2169, para 37.

of parliamentary assemblies as a forum for public debate comes into play. In the case of the European Parliament, this institutional function justifies a broad reading of its power to express its opinion even on matters where no other Union institution is competent to act.\textsuperscript{46} Today, one may hardly imagine a political topic that is strictly excluded from being discussed and voted on by its members. Such powers ‘inherent in the Parliament’ do not, however, give it any additional say in the process of legislation, where the contributions of the Parliament must respect scope of the legal basis defining its participation.

Deriving a competence from institutions’ ‘inherent’ functions leads to the question how the principle of attributed powers relates to ‘creative’ interpretation. Of particular importance are the doctrine of implied powers\textsuperscript{47} and the deduction of powers from the tasks set out in the Treaties, even in the absence of an explicit empowering provision. The very existence of Articles 5(1) and 308 EC commands that these two methods be construed narrowly.\textsuperscript{48} Besides the less problematic powers of internal organisation, which by their very nature must rest with the Union, an implied powers doctrine of Union law can only have the status of a rule of interpretation for explicit empowering provisions. The proviso is, broadly speaking, that an undisputedly existing power cannot effectively be exercised without spanning a matter that is not (or not explicitly) mentioned in the text of the provision conferring that power.\textsuperscript{49} Hence, implied powers mostly take the form of a tacit annex to explicit powers. This is different from the usual understanding of international institutional law, which construes the doctrine of implied powers as a counter-concept to the doctrine of attributed powers rather than as an integral part of it.\textsuperscript{50} The implied powers recognised in the EU to a greater degree resemble a federal doctrine of Kompetenz kraft Sachzusammenhang, a concept known from German constitutional law, which could be translated into ‘competence on the grounds of factual connection’.\textsuperscript{51} The most important examples of implied powers concern the Union’s external relations, where it is settled case law that the Council may enjoy a power to conclude international agreements implicitly following from an internal power to legislate.\textsuperscript{52} A more recent, hotly debated incident is the implied power to determine the sanctions to be adopted by the Member States, including criminal sanctions, in order to enforce a policy defined by the Union legislature.\textsuperscript{53} A similar annex power is the competence to establish agencies or other bodies involved in the process of European composite administration.\textsuperscript{54} While arguing in favour of such tacitly conferred competences to foster the effectiveness of Union policies is not as such problematic, the ECJ did not always meet the test of providing sufficient reasons as to why there is such functional need in a given case.\textsuperscript{55}

\textsuperscript{46} Eg the power to issue reports assessing Member States’ respect for fundamental rights; for a collection, see at www.europarl.europa.eu/comparl/libe/elsj/zoom_in/03_en.htm# (accessed on 1 March 2009).


\textsuperscript{48} See Dashwood, above n 4, 124ff.


\textsuperscript{50} See Klabbers, above n 1, ch 4.

\textsuperscript{51} See Entscheidungen des Bundesverfassungsgerichts 3, 407, 433 (Baurechtsgutachten).


The derivation of competences from general goals, on the other hand, does not respect the principle of conferral.\textsuperscript{56} After some uncertainty in the 1980s,\textsuperscript{57} this is now generally accepted.\textsuperscript{58} This has the unfortunate, albeit unavoidable, consequence that the scope of the Union’s objectives in Article 2 EC and Article 2 EU is framed in much broader terms than its actual scope of competences comprises.

c) Empowering Provisions and Substantive Standards of Legality

Both aspects of the principle of constitutional legality are constitutive for the Treaties’ constitutional character. The division between empowering provisions and provisions that serve as standards delimiting the exercise of power runs along the same dividing line as between positive and negative legality. Yet this theoretically clear distinction is not easily applicable to the Treaties: most legal bases not only specify an abstract title to act, as is the case in some national constitutions (eg Articles 73ff of the German Basic Law, or Articles 148 and 149 of the Spanish Constitution), but also contain substantive standards for the exercise of that power. The object of the latter is to inform, direct, channel and limit European power. Consequently, in some cases it is also a question of drafting technique whether a particular normative element is considered to be on the side of the creation of the competence or part of the standard for the power’s exercise. This difficulty should not, however, be a reason to abandon the conceptual distinction between empowering provisions and provisions establishing substantive standards by conceiving the latter, eg fundamental rights, as ‘negative competence provisions’\textsuperscript{59}.

The conceptual distinction between if there is a competence to act and how the competence may be legally exercised remains valuable, if for no other reason than because such a distinction is assumed in Article 230(2) EC. Thus the concept of a competence should not be bundled together with all the conditions on the legal exercise of the power, but rather should be limited to the abstract conferral of power. Competence norms, as they are defined here, are abstract titles conferring the power to act. Their exercise is directed and delimited by legal norms that specifically provide formal, procedural and substantive requirements for the proper exercise of the particular competence, as well as by the general scheme relating to the lawful exercise of power, such as fundamental rights. Accordingly, the choice of the appropriate legal basis by the acting institution has ‘constitutional significance’ since it (partly) defines the applicable standards for testing the legality of the act.\textsuperscript{60} Failing to meet these standards, however, does not necessarily imply that the institution has exceeded the powers conferred on it. This conceptual proposal is consistent with the differentiation in Articles 51 and 52 of the EU Charter of Fundamental Rights, which repeatedly confirm the distinction between the substantive standards of legality established in the Charter and the competences conferred upon the Union elsewhere.\textsuperscript{61}

\textsuperscript{55} ‘Editorial Comments’, above n 11, 1577.
\textsuperscript{56} Manfred Zuleeg insisted on this early on: idem, ‘Der Verfassungsgrundsatz der Demokratie und die Europäischen Gemeinschaften’ (1978) 17 Der Staat 27.
\textsuperscript{58} But see C Bumke, ‘Rechtsetzung in der Europäischen Gemeinschaft (§ 19)’ in GF Schuppert et al (eds), Europawissenschaft (2005) 643, 648, proposing a distinction between general Treaty objectives, which cannot serve as a legal basis, and specific tasks conferred on an institution, which may imply a tacit power to act.
\textsuperscript{59} Yet this is FC Mayer’s approach: see idem, ‘Die drei Dimensionen’, above n 9, 584.
\textsuperscript{61} For details, see J Kühling, below chapter 13.
d) Horizontal and Vertical Competences

Another important distinction, albeit often disregarded, is that between the competences of the Union as such (vertical competences, Verbandskompetenzen) and the distribution of competences among its institutions (horizontal competences, Organkompetenzen). Broadly speaking, the vertical competences concern the federal balance, i.e., the issue of mutually protecting the Member States and the Union against irregular interferences, whereas the horizontal competences regard the inter-institutional balance, i.e., issues such as the legitimacy and effectiveness of the Union’s decision-making system.

This visibility of the distinction is blurred, however, because the Union’s vertical competences can (almost always) only be deduced from the competences attributed to its institutions. The Treaties’ empowering provisions are usually drafted in a standard wording that does not authorise the Union or the Community as such, but rather names the institution(s) that are so empowered (‘The Council shall adopt . . .’). The rationale behind this drafting technique is that the Union has no single institution that is vested with the residual power to exercise a ‘non-specified’ vertical competence (see Article 7(2) EC, 2nd sentence). If only for this reason, each legal basis must indicate the empowered institution and the procedure to be followed, either by way of reference to a standard procedure or by setting forth the details. Whenever it simply reads ‘The Union shall . . .’, without stating the competent institution(s), the provision is most likely merely setting out an objective, rather than conferring a competence.

Despite this difficulty, the categorical distinction between vertical and horizontal competences has significant potential to clarify the constitutional debate since the vertical and horizontal (re-)distributions of competences involve different constitutional issues and conflict potentialities. For example, when a Treaty legal basis providing for unanimous decisions of the Council has been amended to henceforth allow the Council to act by qualified majority, this amendment does not change the vertical order of competences, although it significantly reduces a single government’s capacity to block future European legislation. The conflict of whether the correct legal basis for a cross-pillar issue is in the EC or the EU Treaty does not involve an issue of federal competence, either.

The opposite view tends to confuse the Member States with the Council and be overly optimistic in regard to the latter’s role as a guardian of the federal order of competences. The distinction may become particularly relevant under Article 48(6) TEU-Lis, which provides for a simplified Treaty amendment procedure subject to the

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62 The French theory uses the concept of compétence for the Verbandskompetenz and the concept of pouvoir for the institutions’ competences: see in detail V Constantinesco, Compétences et pouvoirs dans les Communautés européennes (1974).

63 A rich case law exists on the distribution of horizontal competences regarding the choice of legal basis, summarised in, eg Case C-281/01 Commission v Council [2002] ECR I-12049, paras 33–35; Case C-155/07 Parliament v Council [2008] ECR I-0000, paras 34–37; for an overview of the jurisprudence, see Trüe (2002) above n 9, 511ff. It has usually not been disputed in these cases that the Union possesses the federal competence to adopt the challenged acts.

64 Manin, above n 14, para 157.

65 The dominance of the institutions in the order of competences is also reflected in the ‘final product’. The institution responsible for adopting an act leaves its fingerprints all over it: the act’s title, preamble and signature all testify to the responsible institution. The legal authorship is attributed to the institution responsible for the act’s final wording; with co-decision acts, this responsibility is shared between the European Parliament and the Council.

66 This is the case, indeed, with Art 6(4) EU: see D Simon in V Constantinesco, R Kovar and D Simon (eds), Traité sur l’Union Européenne (1995) Art F EU Treaty, paras 17–18; see the clarification in Art 3(6) TEU-Lis.

67 This is clearly stated in Case C-301/06, above n 13, para 56; see also Case C-91/05 Commission v Council [2008] ECR I-3651, paras 61 and 73; and Case C-403/05 Parliament v Commission [2007] ECR I-9045.

68 See its past practice under Art 235 EEC Treaty, which always required unanimity in the Council.
requirement that the amendment ‘does not increase the competences conferred on the Union’. By contrast, decisions of the European Council authorising the Council to act by qualified majority in further areas are a matter of Article 48(7) TEU-Lis, ie a different amendment procedure.69

e) Union and Member State Competences

The Union’s competences cannot be regarded separately from those of the Member States. This is due in the first place to the fact that the Union tends not towards the American model of separation between the federal and state powers (‘dual federalism’), but rather towards the Swiss or German Verflechtungsmodell (‘co-operative federalism’).70 The latter is based on interconnections, interdependence and co-operation between the various entities of the federation,71 a fact that, in the EU, is usually affirmatively interpreted as a balance of powers.72 However, even within the German model of allocating powers there is a strong ‘dualist’ notion that at a given point in time there is only one level of government competent to legislate in a particular area. This notion was actually reinforced in the constitutional amendments of 2006 reconstructing the federal order of competences in Germany. Generally speaking, the co-operative character of the European federalism is still more pronounced since Member States and the Union are mostly required to closely co-operate in the exercise of their legislative powers, as well.73 This implies that there are narrow limits to disentangling the powers of the various constitutional ‘levels’ in order to establish clearer lines of responsibility.

A proper understanding of the Union’s competences requires one to consider its impact on the Member States’ competences. It should be recalled that the conferral of a competence upon the Union does not—according to what has in the meantime become the overwhelmingly majority opinion—lead to a loss of ‘ownership’ of the competence by the Member State; this potentially ‘imperialistic’ reading is no longer advocated.74 Nevertheless, the Member States may be permanently prohibited from exercising significant parts of their powers or may only exercise them within the confines of Union law.75 Furthermore, the individual Member State has forfeited its right to determine its own competences (Kompetenz-Kompetenz) insofar as it is not permitted to extend its powers unilaterally to the detriment of the Union. The Member States, acting jointly as the Contracting Parties, may amend the Treaties and ‘transfer’ powers back to the Member States, but they are bound by the procedures provided for in Article 48 EU. In return for these restraints, the principle of attributed powers safeguards the individual Member State’s competences in all areas that have not been positively conferred upon the Union.

69 From the perspective of national constitutional law, a different view is possible: see the position of the Conseil constitutionnel as regards the souveraineté of the French Republic; see C Grabenwarter, above chapter 3.
70 On the rise and fall of dual federalism in European constitutional law, see Schütze, ‘Dual Federalism’, above n 3, 25–8.
71 On the concept of executive federalism, which builds on that observation, see P Dann, above chapter 7.
72 See Pernice, above n 9, 871; P Kirchhof, ‘Gewaltenbalance zwischen staatlichen und europäischen Organen’ [1998] Juristen-Zeitung 965, 969–70; see also idem, below chapter 20.
73 This is discussed in detail below section II.2.
74 E Grabitz, Gemeinschaftsrecht bricht nationales Recht (1966) 41ff. The opposite view that the Union is just a ‘trustee’ of the Member States’ competences has largely been abandoned. Rather, the Union enjoys autonomous competences that came into being with the Treaties: see Entscheidungen des Bundesverfassungsgerichts 37, 271, 280 (Solange I).
75 The problematic concept of a state as possessing ‘omni-jurisdiction’ (Totalzuständigkeit), that is, jurisdiction in all matters, will not be discussed separately here.
The compliance with the requirements of the order of competences is subject to judicial review. There is a certain degree of mistrust in the Member States as to whether the ECJ adequately fulfils this task. This mistrust is historically justified insofar as the Court did not oppose the Council’s excessive recourse to Article 235 EEC Treaty in the 1970s and 1980s. The Court has, however, become increasingly self-confident with regard to the Council. In its first Tobacco Advertising decision the ECJ confirmed that it is able to assert itself as the highest constitutional court adjudicating on competences in a composite constitutional order.

What has not yet been clarified is to what extent the vertical distribution of competences is bipolar in nature, that is, whether, in addition to the competences positively conferred upon the Union, there are also negative competence provisions that favour the Member States. Article 5(1) EC can in fact be interpreted as a general clause tacitly deferring to Member State competences, similar to Article 30 German Basic Law. The Lisbon Treaty would make the implied assumption, of all non-attributed powers to rest with the Member States, more explicit (redundantly, in Articles 4(1) and 5(2) TEU-Lis). According to some scholars, other Treaty provisions are interpreted as conferring special negative competences. Provisions such as Articles 149(1), 150(1) and 152(5) EC, which state that the Member States are responsible for the ‘content of teaching and the organisation of educational systems’, ‘content and organisation of vocational training’ and the ‘organisation and delivery of health services and medical care’ respectively, are considered to be true negative vertical competences. In fact, these provisions may be understood as ‘angst clauses’: the framers of the Treaty wanted to make sure that a particular distribution of powers would be maintained after the adoption of a new competence. This does not, however, prohibit the Union from adopting acts based on other Treaty provisions, to the extent that such measures are covered by the scope of an existent legal basis. It is essentially foreign to Union law to accept sectoral immunity or even create such areas that are hermetically sealed off from being influenced through measures based on recognised competences. It thus seems more convincing to understand them (only) as negative requirements belonging to a specific legal basis. For most of the relevant provisions this understanding is the one that best corresponds to their wording. It has also found approval by the Court of Justice. Consequently, they do not function as cross-cutting provisions limiting Union competence as such. This interpretation has the advantage of avoiding unforeseeable legal consequences that a reconstruction of a bipolar order of competences based in the Treaties might entail, eventually undermining the constitutional autonomy of the Member States.

76 Art 35(6) EU confirms this for Title VI EU as well; legal review of measures under Art 7 EU is limited to procedural errors: Art 46(e) EU. The exceptions hereto are measures under Title V, which is a significant weakness of the current constitutional order.


78 The ECJ had already asserted its authority in opposition to the Commission: cf Cases 281/85 et al, above n 57.

79 Case C-376/98 Germany v Parliament and Council [2000] ECR I-8419; see, prior to this, Opinion 1/94, above n 52, para 9; Opinion 2/94, above n 32, paras 10ff. See also the discussion below in section II.2(b).

80 See Mayer, ‘Die drei Dimensionen’, above n 9, 584.

81 Surveyed in ibid, 588ff, and Pernice, above n 9, 874; see also the conception de lege ferenda in T Fischer and N Schley, Organizing a Federal Structure for Europe (2000) 17–18.

82 For a comparable situation under Arts 117, 118 EEC Treaty as regards social policy before the adoption of the Social Protocol, see Cases 281/85 et al, above n 57, para 14; for the current social law, see Case C-372/04 Watts [2006] ECR I-4325, paras 92 and 147.


84 See Case C-76/05 Schwarz [2007] I-6849, para 70 (on Arts 149(1) and 150(1) EC); Case C-268/06 Impact [2008] ECR I-2483, paras 121–5 (on Art 137(5) EC).

85 Hence the preference for the concept of complementary ‘partial constitutions’ rather than a comprehensive ‘all-embracing constitution’; see von Bogdandy, above chapter 1. As to Art 4(2) TEU-Lis, see below section III.1(d).
The same understanding is also appropriate for the harmonisation prohibitions contained, for example, in Articles 149(4), 150(4) and 151(5) EC. According to our view, they refer exclusively to measures based on those competences, not to other legal bases. In other words, these Articles must be construed as being silent on the federal competences. Admittedly, the Treaty formulation is open to interpretation. The wording can, however, be explained by the evolutionary expansion of the Union’s vertical competences through successive Treaty amendments. These amendments occurred under the strict maintenance of the *acquis*, as Article 32 SEA and Article 47 EU demonstrate. This means that the Union competences so far have only been expanded, never contracted. Of course, a reassessment of the Union’s competences is not excluded, but it requires amending the Treaties and explicit wording. In the absence of such an amendment, it must be assumed that the *acquis de compétence* remains untouched, ie that the introduction of new competences does not affect the existing ones. There is, however, an important exception. Because of its subsidiarity to every explicit or implicit competence, the scope of application of Article 308 EC has been systematically reduced since the enactment of the Single European Act in order to provide a specific legal basis for previous legislative practice developed under the residual competence clause.

**f) Rules Regarding the Exercise of Powers**

Since the Treaty of Maastricht, the task of Article 5 EC (than still Article 3b EC Treaty) has been to stabilise the exercise of federal competences. This task was concretised by the Treaty of Amsterdam’s Protocol on subsidiarity and proportionality. The goal is to counter a supposed automaticity, which allegedly expands the Union’s competences at the expense of the Member States’. An ocean of ink has been spilled on the subject of subsidiarity. Even though this provision has so far not played a central role in case law, it has to a certain extent marked the legislative culture; it is arguably an at least partly successful innovation protecting the Member States’ competences. As a rule for the exercise of competences it is based on an already existing Union competence, so it only indirectly touches on the question of drawing the boundaries separating the Union’s competences from those of the Member States.

**2. Types of Federal Competences**

In what follows, an attempt is made to put order into the jungle of positive competences by categorising them according to various types of interaction with Member States’ competences.

The classification presented here, of course, is not the only one possible. One differentiation often made is between competences based on aims (zielebezogene Kompetenzen, also termed functional competences) and those based on fields (sachbezogene Kompetenzen). The differentiation is terminologically unfortunate since competences qualified as being based on fields

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87 Opinion 2/94, above n 32, para 29.
89 For a fundamental work, see C Calliess, *Subsidiaritäts- und Solidaritätsprinzip in der Europäischen Union* (1999); but see G Davies, ‘Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time’ (2006) 43 CML Rev 63.
(sachbezogen) usually also exhibit functional aspects, a phenomenon which also flows from the crucial role of Article 2 EU and Article 2 EC. It therefore seems more precise to distinguish between: (i) functional competences with a cross-sectoral character (esp. Articles 88, 94, 95, 308 EC); (ii) functional competences in a particular field (which are most of the competences, eg Articles 37, 175 EC); and (iii) other competences with respect to a particular field without functional elements, in particular in the institutional area (eg Articles 195(4), 255 EC). The cross-sectoral functional competences are considered to be the most critical type (see below, subsection b).

Another classification of the vertical competences can be made following the separation of powers doctrine. The regular power of the Union is that of legislation in the functional understanding, ie the adoption of abstract and general legal norms. However, the list of Union competences does not lend itself to a clear-cut breakdown according to a substantive distinction between ‘true’ legislation and ‘mere’ executive rule-making. With respect to the executive function, it seemed clear that the Union’s competences do not include coercive powers over the citizens, although this line may soon be crossed in the CFSP or in regard to external border protection, at least vis-à-vis third country nationals. Otherwise, the Union’s power to apply and enforce the law (ie implementation of rules in individual cases) is not categorically excluded from its competences; it depends entirely on the analysis of the respective empowering provisions. The Union may lay down detailed standards and procedures for the national administrative application by means of secondary law; it is not limited to the enactment of general rules. However, the Union’s institutions or bodies need a proper legal basis in order to implement Union law directly, provided for either in the Treaties or in an act of secondary law; the Commission in particular does not enjoy a general competence to implement Union law. In certain cases this is compensated for by the Commission’s delegated authority to issue decisions addressed to the Member States. These decisions often largely determine the latter’s administrative action directed at the citizen. Further instruments of guidance of national authorities have been developed through obligations to consult the Commission and through budgetary mechanisms. The most important limitation in this respect comes from general principles such as proportionality or good administration, including the right to be heard. This

96 Regarding the attempt, see JB Lisberg, ‘The EU Constitutional Treaty and Its Distinction between Legislative and Non-Legislative Acts—Oranges into Apples?’, Jean Monnet Working Papers No 1 (2006), available at www.jeanmonnetprogram.org; for a critique, see Bast, below chapter 10, section V.1(b).
98 As the current state of the law, see J Monar, below chapter 15.
99 See Jarass, above n 4, 182–3. It is significant that this is always treated as a question of institutional balance within the context of horizontal competences: cf K Lenaerts and P van Nuffel, Constitutional Law of the European Union (2005) para 13-008; see also D Simon, Le système juridique communautaire (1997) 74.
100 Moreover, Member State authorities must observe the general principles of Union law, including fundamental rights, when acting within the scope of Union law even if this impacts a sector for which the Union does not possess a corresponding legislative competence: see S Kadelbach, Allgemeines Verwaltungsrecht unter europäischem Einfluß (1999) 296ff; GC Rodrigue Iglesias, ‘Zu den Grenzen der verfahrensrechtlichen Autonomie der Mitgliedstaaten bei der Anwendung des Gemeinschaftsrechts’ [1997] Europäische Grundrechte-Zeitschrift 289.
102 On the various tools, see M Eeckhoff, Die Verbundaufsicht (2006).
solution is convincing: it is hardly possible to normatively distinguish the legislative and executive functions at the abstract Verbandskompetenz level with sufficient precision.103

In the remainder of this section, the Union’s competences will be classified according to the way that they affect the Member State’s powers. European constitutional law distinguishes between exclusive and non-exclusive competences. Within the latter, one can distinguish between concurrent and parallel powers. Within the parallel powers, one can conceive non-regulatory powers as a particular subgroup.

a) Exclusive Powers

The concept of exclusive competences was introduced by the ECJ and has since been explicitly recognised in the Maastricht Treaty in Article 3b(2) EC Treaty (now Article 5(2) EC). An exclusive competence of the Union means that the mere existence of such legal basis prohibits the Member States from acting in a given area.104 From the point in time that such a competence is valid in the Treaties, and as long as this particular provision remains in force, the Member States are banned from enacting any legislation in that field, save for an express authorisation by the competent Union institution. Mere application and enforcement of Union acts does not fall under this prohibition, as confirmed by Article 2(1) TEU-Lis.

The Treaties explicitly confer exclusive competences only in the monetary policy field (see Article 106(1) EC). The qualification of other competences as exclusive has long since been controversial, particularly after the introduction of Article 3b(2) EC Treaty.105 Based on the ECJ’s jurisprudence, the common commercial policy under Article 133 EC is recognised as being an exclusive competence,106 but the boundaries to other fields in which the Member States enjoy concurrent powers are often difficult to draw.107 Given the important repercussions on national competences, classifying a competence as exclusive should only be done when: (i) the actions by the Member States would severely prejudice later Union action; (ii) a common legal framework is necessary in any case; and (iii) the decision-making system of the Union is able to cope with its sole responsibility.

Accordingly, even in the common commercial policy an exclusive competence would only exist in the core areas, such as the exclusive power to fix customs tariff duties (Article 26 EC).108 This cautious reading seems to be confirmed by Article 133(5)–(7) EC, as amended by the Nice Treaty. Alongside these exclusive powers in policy areas mostly characterised by a strong connection to international relations and thus an imminent danger to curtail Union policies by creating international law obligations vis-à-vis third countries, the Union also enjoys a variety of exclusive competences regarding the organisation of its institutional system. Here

103 From the current Protocol on subsidiarity one can deduce the principle that the application of the law of the Union should rest with the Member States. That implies that the Union has competence to do otherwise.
105 Cf the Commission’s long list on this, published in Agence Europe No 1804/05 on 30 October 1992. On the question whether visa policy is an exclusive competence, see B Martenczuk, ‘Visa Policy and EU External Relations’ in idem and S van Thiel (eds), Justice, Liberty, Security (2008) 21, 36–42.
107 On the WTO Agreements, see Opinion 1/94, above n 52, paras 22ff.
one can cite the right to promulgate staff regulations and conditions of employment under Article 283 EC or the rules regarding procedures before the European Courts, which are exclusively governed by the CFI’s and ECJ’s Rules of Procedure.\textsuperscript{109}

The Treaties’ restraint in granting the Union exclusive competences is welcome. Exclusive competences are particularly problematic because the Union’s cumbersome, consensus-driven decision-making system cannot reliably satisfy the demands placed on the legislature.\textsuperscript{110} The recognition of an implied ‘emergency legislative’ power on the part of the Member States (as ‘trustees of the common interest’\textsuperscript{111}) highlights this problem. It took quite some time for the actors of European integration, including the Court, to free themselves from the paradigm of exclusivity and discover the virtues of a composite polity in which shared exercise of legislative powers is the constitutional standard case. However, the old paradigm of ‘either–or’ is still resonating in the constitutional discourses on establishing a precise delimitation of ‘who does what’ in Europe.

\textbf{b) Concurrent Powers}

When the ECJ qualifies competences, it generally does so by distinguishing only between exclusive and shared (ie non-exclusive) competences.\textsuperscript{112} However, it is more revealing to further distinguish, within the latter category, between concurrent, parallel and non-regulatory powers. Moreover, the ECJ does not clearly distinguish between an exclusive competence (‘primary exclusivity’) and a concurrent competence that has been exercised exhaustively (‘secondary exclusivity’).\textsuperscript{113}

In contrast to exclusive competences, concurrent competences permit autonomous national legislation provided that the Union has not made use of its competence. If, however, the Union has taken action, a concurrent competence allows it to regulate the matter exhaustively. In other words, the Member States retain their right to autonomously regulate a particular field as long as and to the extent to which the Union has not exercised its powers. Only once the Union has exercised its regulatory power are the Member States prevented from adopting additional rules pertaining to the same matter.\textsuperscript{114} That prohibition is usually unwritten and, from a systemic point of view, is attributable to the primacy of Union law; this effect is also called pre-emption, after the American constitutional doctrine.\textsuperscript{115} The extent to which the Member States may still enact autonomous legislation does not depend on the legal instrument employed by the Union institutions. While directives (Article 249(3) EC) still require the Member State to adopt transposing legislation, the margin of discretion left for them can be reduced to zero. Hence, in using directives, the Union can pre-empt the Member States from any autonomous action by exhaustively regulating a given area or case.\textsuperscript{116} It is noteworthy that

\begin{itemize}
  \item 109 There are, however, sections of institutional law that belong to the concurrent powers, esp Art 190(4) EC.
  \item 110 Notably, the ECB Council, the ECB’s main decision-making body, relies on the principle of a simple majority: Art 10.2 of the Statute of the ESCB. On the ECB’s regulatory power under Art 22 of the Statute, see A von Bogdandy and J Bast, ‘Scope and Limits of ECB Powers in the Field of Securities Settlement’ [2006] No 3–4 Euredia 365, 394ff.
  \item 111 Case 804/79, above n 104, para 30; see M Pechstein, Die Mitgliedstaaten als 'Sachwalter des gemeinsamen Interesses' (1987) 75ff.
  \item 113 See, eg Case 22/70, above n 52, para 31.
  \item 114 See Dashwood, above n 4, 126.
  \item 115 In detail, see R Schütze, ‘Supremacy without Pre-Emption? The Very Slowly Emergent Doctrine of Community Pre-emption’ (2006) 43 CML Rev 1023.
  \item 116 As to exhaustive regulation in the form of a directive, see Case 278/85 Commission v Denmark [1987] ECR 4069, para 12. It can be very difficult to determine whether and to what extent a subject has been
\end{itemize}
this is quite distinct from the early vision of the regulation (Article 249(2) EC) as the sole source of uniform law in ever-wider 'communitarised' fields.\footnote{This point is clearly seen by Schütze, above n 95, 118 and 129. On the implications for the doctrine of legal instruments, see Bast, below chapter 10, section IV.1.}

Concurrent competences can be found above all in the core sectors of the common market, in particular in agriculture, transport and the various harmonisation powers for the establishment and development of the internal market.\footnote{The term 'harmonisation' (and its cognates) is used interchangeably with the term 'approximation' (and its cognates). For comprehensive accounts of the legal concept, see Bock, above n 86, 49ff, and M Ludwigs, \textit{Rechtsangleichung nach Art 94, 95 EG-Vertrag} (2004) 89ff. See also for an early appraisal, see J Currall, 'Some Aspects of the Relation between Articles 30–36 and Article 100 of the EEC Treaty with a Closer Look at Optional Harmonisation' (1984) 4 \textit{YEL} 169.} Yet it is appropriate to exclude from the concept of concurrent competences those harmonisation powers that limit the Union to establish minimum standards, eg Article 137 EC. It is the essence of minimum harmonisation that there is no pre-emption.\footnote{See A Furrer, \textit{Die Sperrwirkung des sekundären Gemeinschaftsrechts auf die nationalen Rechtsordnungen} (1994) 236ff; for a different view, however, see S Weatherill, 'Beyond Preemption?' in D O'Keeffe and PM Twomey (eds), \textit{Legal Issues of the Maastricht Treaty} (1994) 13, 14 and 21.} Regarding the external relations, Member States may be pre-empted from any autonomous action more easily than in the internal realm, since occupation of the entire field is not demanded according to the ERTA doctrine of implied external powers.\footnote{See AG Fennelly in Case C-377/98, above n 90, paras 30–33, and, explicitly, Case C-491/01 \textit{BAT} [2002] ECR I-11453, para 179.} It suffices that the policy area is covered 'to a large extent' by Community rules which could be affected by Member States' concurrent action.\footnote{After all, the Member States' concurrent competence is even a logical precondition for action under Article 95 EC: it would make no sense to 'approximate' policy areas which the Member States no longer have been permitted to legislate on since the entry into force of the EEC Treaty.}

Applying these insights, the Union's important competence under Article 95 EC must be understood as a concurrent competence since legally exhaustive rules are possible.\footnote{For an early appraisal, see J Currall, 'Some Aspects of the Relation between Articles 30–36 and Article 100 of the EEC Treaty with a Closer Look at Optional Harmonisation' (1984) 4 \textit{YEL} 169.} The alternative qualification of Article 95(1) EC as an exclusive competence\footnote{See AG Fennelly in Case C-376/98, above n 79, nos 135–42; but see, by implication, Case C-377/98, above n 90, paras 30–33, and, explicitly, Case C-491/01 \textit{BAT} [2002] ECR I-11453, para 179.} overlooks the fact that internal market harmonisation is consistent with the maintenance of autonomous Member State regulatory competence. The Union can, for example, choose to limit itself to enacting minimum or optional harmonisation to foster mutual recognition.\footnote{For an early appraisal, see J Currall, 'Some Aspects of the Relation between Articles 30–36 and Article 100 of the EEC Treaty with a Closer Look at Optional Harmonisation' (1984) 4 \textit{YEL} 169.} After all, the Member States' concurrent competence is even a logical precondition for action under Article 95 EC.\footnote{For an early appraisal, see J Currall, 'Some Aspects of the Relation between Articles 30–36 and Article 100 of the EEC Treaty with a Closer Look at Optional Harmonisation' (1984) 4 \textit{YEL} 169.} It would make no sense to 'approximate' policy areas which the Member States no longer have been permitted to legislate on since the entry into force of the EEC Treaty.

In sum, exclusive and concurrent competences fundamentally differ as long as the Union has not exercised its power. Once the Union has enacted exhaustive legislation, the difference depends on a criterion that appears to be rather technical, namely, whether the provision that leads to the prohibition to enact autonomous national legislation is at the level of primary or secondary law. One may speak of primary (‘constitutional’) and secondary (‘legislative’) exclusivity in order to demonstrate this affinity and to contrast them with a mere parallel competence (see below, subsection c). One must not, however, confuse the two types of competences, since the exhaustive use of a concurrent competence cannot transform it into an exclusive competence.\footnote{For an early appraisal, see J Currall, 'Some Aspects of the Relation between Articles 30–36 and Article 100 of the EEC Treaty with a Closer Look at Optional Harmonisation' (1984) 4 \textit{YEL} 169.}
Against this background, a remarkable misunderstanding comes to the fore. Political actors who desire an expansion of Member State powers need not embark on the difficult process of amending the Treaties, but should rather try to influence the European law-making process. In particular, the assumption of German Länder that a ‘return’ of power to national and sub-national entities requires a constitutional change is incorrect because their political demands regard only supranational legislation under the non-exclusive powers, ie withdrawal of existing secondary law. One might also mention that this approach would be better targeted, thus increasing the chances of reaching their specific goals.

This is particularly true for the agricultural sector. Article 37 EC is sometimes—and incorrectly—brought forward as the ‘outstanding example’ of an exclusive competence.\(^\text{126}\) It is true that practically all agricultural market organisation law has been exhaustively regulated based on Article 37 EC. The competence is not, however, exclusive because there is no functional need, according to the criteria set out above, that prevents the Member States from enacting legislation independently from Union acts.\(^\text{127}\) The limitations on national competences result instead from the density of the secondary regulations, which is by no means legally required by the EC Treaty.\(^\text{128}\)

The description of the EU’s competences as ‘dynamic’ is another misunderstanding.\(^\text{129}\) It is, of course, true that concurrent competences make it difficult to draw a line between the competences of the Member States and the Union insofar as any additional Union legislation places further limits on the Member States’ competence to regulate the subject matter autonomously.\(^\text{130}\) The boundary is thus constantly moving as the Union enacts further legislation. This flexibility is not, however, an unusual effect of the distribution of competences in federal systems.\(^\text{131}\) This form of ‘dynamism’ is the logical consequence of the nature of concurrent competences, which allows Member States much greater autonomy than the ‘non-dynamic’ exclusive competence. However, the charge is incorrect that the Union has a dynamic order of competences in the sense that the Union’s institutions are able to change the content of a legal basis by their own legislative activity. Even a long-standing practice of exercising a power in a certain way does not suffice to demonstrate that such action is lawful.\(^\text{132}\) On the other hand, the stabilising function of a constitutional order of competence does not require an ‘originalist’ approach in the construction of a legal basis. Long-term change in the understanding of a policy area may well lead to a construction of a legal basis that does not reflect the views of the original framers of the Treaties.\(^\text{133}\)

Looking at the concurrent competences for harmonisation, one discovers that the ECJ has narrowed the scope of Article 95 EC in its *Tobacco Advertising* judgment, in delimiting the problematic breadth it would entail according to alternative constructions as a blanket clause for the regulation of the economy.\(^\text{134}\) This harmonising competence is only applicable in cases where a Union measure is necessary to eliminate distortions of competition with an appreciable effect or trade obstacles which are such as to obstruct the fundamental freedoms and thus have

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\(^\text{126}\) See the Commission’s first paper on subsidiarity, *cf* above n 105.

\(^\text{127}\) This view is confirmed by Art 4(2)(d) TFEU.


\(^\text{129}\) See the criticism of the EU’s alleged ‘dynamism’ in Kischel, above n 9, 37–43.


\(^\text{131}\) *Cf* Art 74 German Basic Law; on this see R Stettner, in H Dreier (ed), *Grundgesetz Kommentar* (2007) vol II, Art 74, para 15.

\(^\text{132}\) See Cases C-95/99 et al Khalil [2001] 1-7413, paras 41ff

\(^\text{133}\) *Cf* eg Case 45/86 *Commission v Council* [1987] ECR 1493, paras 17ff; Case C-403/05, above n 67, para 57.

\(^\text{134}\) See Case C-376/98, above n 79, para 83.
a direct effect on the functioning of the internal market. The mere existence of disparities between national regulatory schemes does not justify a harmonisation.

This interpretation of Article 95 EC, in which the ECJ also incorporates the more specific harmonisation competences (in this case, Article 55 in conjunction with Article 47(2) EC), can be generalised as a comprehensive conception. The ECJ uses the fundamental freedoms to define the scope of competences here. The market freedoms, with their directly applicable prohibitions on unjustified discrimination and market access hindrance, effectively co-ordinate the national legal orders without harmonising them. Yet, insofar as it emerges that the fundamental freedoms alone are not able to guarantee the functioning of the internal market, the individual Member States’ regulations may be subject to European harmonising measures. In particular, since the fundamental freedoms do not prevent Member States from unilaterally adopting measures in order to serve a common good (such as public health or consumer protection), in many cases they may not effectively prevent market fragmentation. Hence, the Union’s competence to enact approximations with a view to realising the internal market extends as far as the fundamental freedoms’ scope of application. This parallelism has the advantage of linking the doctrine of the federal competences to the far more detailed case law on the fundamental freedoms.

Against this background, one can explain why the prohibition on approximation contained in provisions such as Article 152(4)(c) EC is inapplicable under Article 95 EC. Harmonisation necessary for the internal market includes the competence to harmonise national rules being duly justified on the basis of public policy considerations but nevertheless constraining the exercise of the fundamental market freedoms. Once the legal and political case for harmonisation is made, the political choice of weighing the relative importance of the affected interests (here, the appropriate level of health protection) must be determined by the European legislative institutions, whereas the individual Member States, at least in cases of an exhaustive regulation, are no longer able to rely on the primary law’s safeguard clauses (eg Article 30 EC). If the Union legislature were prevented from pursuing health policy goals itself, a problematic one-sidedness for Community law would result, since ‘negative

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135 Ibid, paras 84 and 95; this has become settled case law: see Case C-380/03 Germany v Parliament and Council [ECR] 2006, I-11573, para 37. It needs to be stressed, though, that the ECJ does not always convincingly argue the fulfilment of this legal prerequisite: see recently, Case C-301/06, above n 13, para 71.


137 For cases after Tobacco Advertising I, see eg Case C-491/01, above n 123, para 60; Cases C-465/00, C-138/01 and C-139/01 Österreichischer Rundfunk [2003] ECR I-4989, para 41.


139 Herein lies a hidden implication of the Keck case law, which removes rules concerning selling arrangements that are applied equally to domestic and foreign products from the reach of Art 28 EC and, hence, arguably also from the scope of the Union’s harmonisation competence. On the ‘cross-pollination effect between Articles 28 and 95’, see A Knook, ‘Guns and Tobacco: The Effect of Interstate Trade Case Law on the Vertical Division of Powers’ (2004) 11 Maastricht Journal of European and Comparative Law 347, 374; but see G Davies, ‘Can Selling Arrangements Be Harmonised?’ (2005) 30 EL Rev 370; on Keck, see also T Kingreen, below chapter 14.

140 See the Tobacco Advertising II Case C-380/03, above n 135, paras 39–41 and 135.


integration’ effected by the fundamental freedoms would not be counterbalanced by ‘positive integration’ effected by European legislation.\textsuperscript{143} Such a ‘liberalist’ reading of federal competences would unnecessarily reinforce the critical situation in cases where ‘re-regulation’ at the Union level is seriously hampered by unanimity requirements, as applicable inter alia to fiscal provisions or those relating to the rights and interests of employed persons (see Article 95(2) EC).\textsuperscript{144}

In an overall assessment, concurrent competences as a category provides considerable advantages. The possibility of exhaustively regulating a subject matter is advantageous from the point of view of legal certainty since it can avoid subtle questions of conflicting laws. The dynamics that reside in this type of competence have, however, led to the well-known problems with respect to the Member States’ competences and the transparency problems connected to this. Yet these disadvantages are counterbalanced by the fact that the Member States’ competences are less affected than by exclusive competences, and legal loopholes as well as uncertainty are avoided. Concurrent competences rightly constitute the standard type in the federal order of competences under the current Treaties.\textsuperscript{145}

c) Parallel Powers

The third type of competence includes those empowering provisions under which the Union and Member State competences can be exercised alongside one another. In this case, the Union’s exercise of a competence does not lead to the Member States being prohibited from acting autonomously in the same field. These competences are variously termed ‘parallel’, ‘cumulative-concurrent’ or ‘complementary’ competences.\textsuperscript{146}

Where the Treaties permit the Union and the Member State to enact parallel legislation, they assume that the measures enacted at each level are not in fundamental opposition, but rather strengthen each other. The relevant articles generally use the description of ‘complementing’ the Member State activities (Article 164 EC) or ‘contributing’ to the achievement of common objectives (Article 157 EC). Most of the new powers introduced in the EC Treaty since the Single European Act correspond to this type of competence. Examples include industrial policy (Article 157 EC), economic and social cohesion (Articles 158ff EC), research and technological development (Articles 163ff EC) and development co-operation (Articles 177ff EC). The common foreign and security policy under the EU Treaty also corresponds to this type. The law on state aids (Articles 87ff EC) plays a special role in the area of parallel powers. As a functional, cross-sectoral competence to monitor Member State action, it can, of course, only be exercised by the Union. However, the Member States retain a parallel competence, each according to its respective internal order of competences, to set the legal framework for aids granted by that Member State.

The parallel activity of the Union and Member States requires rules for the co-ordination of conflicting provisions. When both the Union and the Member State simultaneously enact requirements and prohibitions directed at the citizen, the latter must in principle satisfy both. When, however, the legal orders enact contradictory rules of conduct or require the Member State authorities to act inconsistently, the primacy of Union law as a general co-ordinating rule
is applicable.\textsuperscript{147} The range of competences available to the national institutions can thus also be significantly reduced in areas where there is a parallel EU competence, as is readily evident from the example of the law of state aids. A general pre-emption of an entire regulatory field, however, is precluded.

A subgroup of parallel powers has already been mentioned briefly: the Union’s competence to establish minimum standards. The most important examples here are the minimum standards for refugee protection under Article 63 EC, the social policy provisions under Article 137(2)(b) EC, environmental standards under Article 175 EC and certain areas of criminal law under Articles 31 and 34 EU. As a rule, minimum harmonisation permits the Member States to take stricter measures, ie to depart from the ‘Community floor’.\textsuperscript{148} Limitations may arise from other provisions, however, in particular the fundamental freedoms. The difference between minimum and full harmonisation is sometimes fluid here, as the case law on the details of the environmental field demonstrates.\textsuperscript{149} However, the nature as a parallel power, and thus the absence of ‘across-the-board’ pre-emption of Member State activity in that area, is mirrored in the non-exclusive nature of the Union’s treaty-making power under Article 175 EC, hence the possibility of ‘mixed’ participation of the EC and its Member States in various international environmental regimes.\textsuperscript{150} It took even longer than in the internal sphere before case law and scholarship have shaken off the conceptual bounds of exclusivity as the paradigm of Union competence and discovered the existence of parallel external competences.\textsuperscript{151}

From the perspective of the Member States, the advantages of parallel competences are evident. The national authorities are able to continue political activity even within the realm of European legislation and thereby remain visible to their citizens. As a rule, parallel competences are also unobjectionable from an integration perspective in areas where the measures only flank the internal market and are not of central importance to the disciplines of competition or market equality.\textsuperscript{152} The concept of minimum standards may represent an acceptable compromise between legal equality, which creates a level playing field, and regulatory competition, which tends to promote innovation. The goal of establishing clear lines of responsibility by decoupling the decision-making levels cannot be achieved in this way, however. Furthermore, repeated conflicts of laws are pre-programmed.

d) Non-regulatory Powers

Those empowering provisions that permit the Union to act yet restrict its institutions to actions with limited legal effects can be considered a subcategory of parallel powers. Under these competences, the Union is prevented from regulating—hence the term ‘non-regulatory powers’; sometimes they are also termed as ‘complementary’ powers.\textsuperscript{153} Here, the Member States retain the primary legislative competence, yet it is worthwhile construing this type as a separate category since—under normal circumstances—a conflict of laws cannot arise. Therefore it does not require a co-ordination rule, which is different to the parallel competences in the narrow

\begin{itemize}
\item[149] See DH Scheuing, ‘Regulierung und Marktfreiheit im Europäischen Umweltrecht’ [2000] Europarecht 1; Dougan, above n 119, 866ff; on the genealogy, see D Geradin, ‘Trade and Environmental Protection: Community Harmonization and National Environmental Standards’ (1993) 13 YEL 151.
\item[150] See Case 2/00, above n 60, para 47; Case C-459/03 Commission v Ireland [2006] ECR I-4635, para 92.
\end{itemize}
The non-regulative competences can be further subdivided into competences to provide incentives, to co-ordinate and to make recommendations. The Treaties often combine these different variants, which provides further justification for considering these instruments under a unique heading.

Provisions that authorise the Union to undertake so-called incentive measures, excluding any harmonisation, fall under the rubric of non-regulatory competences. They are a legal basis for legal acts utilising non-legal steering mechanisms, in providing the Member States and/or private parties with an incentive to take positive action, primarily through targeted subsidies, pilot projects and symbolic action. Examples can be found in employment, education, culture and health policies, in Articles 129, 149(4), 151(5) and 152(4)(c) EC respectively. The legal acts taken under these empowering provisions take the form of decisions *sui generis* (*Beschluss*), which are not addressed to particular persons. This legal instrument cannot create duties for either the Member States or citizens. The Member States do, however, have an obligation arising from Article 10 EC to facilitate the achievement of the Union’s undertaking.

The co-ordinating competences also belong to this category. The Treaties contain many mechanisms for co-ordinating the Member States’ otherwise autonomous policies as well as mechanisms for facilitating co-operation between the Member States’ authorities. The surveillance of economic policy (Article 99 EC) is one of the better-known examples. Another example is the co-ordinated employment strategy under Articles 125ff EC. It is notable that the European Council is involved in the exercise of both of these co-ordinating competences. In most cases the horizontal competence to co-ordinate the Member States’ authorities lies with the Commission.

Lastly, the recommendation competences also belong to this category. It has already been noticed that non-binding instruments also require a Treaty authorisation. Remarkably, the EC Treaty has conferred a broad competence upon the Commission to make recommendations and deliver opinions (Article 211 EC). In practice, the Commission has used this power cautiously; it might have done so with a view to preserving this special instruments. The Council does not enjoy a general competence to make recommendations. Aside from its recommendations for fiscal and economic policy co-ordination, it is worth mentioning Article 151(5) EC, which empowers the Council to unanimously (!) adopt recommendations. In some instances, the European Parliament and the Council, acting jointly under the co-decision procedure, adopt recommendations such as those on education policy based on Articles 149(4) and 150(4) EC. An explicit power to make recommendations under Article 33 of the Euratom Treaty may even give rise to an external power to conclude international agreements.

Consequently the Union’s institutions and the Member States take non-regulatory competences seriously; European constitutional scholarship should do so as well. Equipping the

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154 However, the principle of sincere co-operation, Art 10 EC, plays a role in the exercise of the non-regulative competences. Moreover, the doctrine of consistent interpretation applies when the Member States decide to transpose a recommendation: Case 322/88 *Grimaldi* [1989] ECR 4407, para 18.

155 See Bast, below chapter 10, section II.4(b); for details, see idem, *Grundbegriffe der Handlungsformen der EU* (2006) 109ff.


157 For the importance of the competence, see G Amato, ‘L’Europa dal passato al futuro’ [2004] Il Mulino 5.

158 When the ‘Treaties give the Commission a co-ordinating task, it is entitled to create a legally binding framework for its administration, which includes the creation of reporting obligations by means of a decision addressed to the Member States: Cases 281/85 et al, above n 57, para 28.


160 But see Art 292 TFEU, conferring such a power on the Council to be exercised, as a rule, on a proposal from the Commission.

161 On the duty to respect the relevant law-making procedure when amending an existing recommendation, see Case C-27/04, above n 30, paras 91ff (regarding the Stability and Growth Pact).

Union with limited non-regulatory competences allows the Union’s institutions to undertake
activities in sectors where the Member States are not prepared to accept deeper integration.
The fact that non-regulatory competences are positively formulated in the Treaties has been a
major factor in limiting the problematic practice of agreements and decisions of the Member
States adopted outside of the Union’s constitutional framework. In particular, the competences
to provide incentives, with all their respect for national autonomy, have an important impact
through the various action programmes, eg the well-known Erasmus programme. It is thus
all the more important to recognise that the Union’s non-regulatory competences are based on
specific attribution in the Treaties. Ad-hoc co-ordination of the Member States through the
European Council, vaguely laid down in the conclusions of its Presidency, should be avoided.
Rather, actions by the Union’s legislative institutions, which demand a clear constitutional
basis, should be favoured.

III. The Lisbon Treaty’s Constitutional Order of Competences

As stated at the beginning of this chapter, different sources of concern have fuelled the debate
over competences. The first is the concern that there is an automatism that deprives the Member
States of their powers and thereby undermines their political relevance, even their statehood;
the following analysis of the Lisbon Treaty proceeds first from this perspective. A second
concern—particularly of the German Länder—deals with reclaiming some of the national or
regional scope of action in the exercise of competences. Even if the limitations on the German
Länder do not really result from the federal order of competences (as part II of this chapter
shows), this source nonetheless yields another angle of appraisal. The third source of concern
involves the reality that Union legitimacy suffers from the fact that its citizens perceive it as a
too diffuse conglomeration. This diffuseness results primarily from the horizontal order of
competences (that is, the Union’s institutional structure) and not from the vertical order.
However, it is undisputed that the vertical order of competences, as well, could be arranged
more transparently and comprehensibly.

1. The Protection of Member States’ Sovereignty

Whether and to what degree the term sovereignty continues to play a useful role in the
relationship between the Union and Member States is quite uncertain. At any rate, the term
still brings together basic issues of the federal order of competences, since demands for its
fundamental reform are often formulated under catchphrases such as ‘protection of national
sovereignty’ against a creeping self-authorisation of the Union. The following analysis does not,
however, evaluate the new powers conferred upon the Union in the TFEU, eg in the fields of
energy or space policy. Rather, it focuses on the general provisions as contained in the new EU
Treaty and Part One of the TFEU. The topic here is whether the Reform Treaty of Lisbon would
reinforce the Member States’ position as bearers of independent, ‘sovereign’ powers in the
European constitutional composite.

action programme in the field of lifelong learning, [2006] OJ L327, 45.
164 See Öeter, above chapter 2.
a) The Basis for Competence

The Constitutional Treaty’s first operative clause, Article 1(1), displayed its determination—at least symbolically—to address concerns about sovereignty. After much debate, the Convention decided against founding Union competence ultimately in the Constitutional Treaty itself. Instead, according to the final formula, the ‘Member States confer’ them upon the Union. Accordingly, pursuant to Article I-11(2) CT, the Union shall act within the limits of the competences ‘conferred upon it by the Member States in the Constitution’. In an earlier version it was still the competences ‘conferred upon it by the Constitution’ (emphasis added). The Lisbon Treaty reads accordingly, in Articles 1(1) and 5(2) TEU-Lis.

Thus, the Convention and the ensuing Intergovernmental Conferences (IGCs) adopted the terminology used in corresponding national constitutional law. European constitutional law comes into direct terminological, though not necessarily conceptual, consonance with national constitutional law. The language of the Lisbon Treaty’s Article 1(1) TEU echoes that of Article 88-2 of the French Constitution (transferts de compétences), Article 93 of the Spanish Constitution (se atribuya . . . competencias derivadas de la Constitución) and Article 23(1) German Basic Law (Hoheitsrechte übertragen), with minor modifications. Interestingly, the French version of the draft Treaty as proposed by the Convention still used the formula of ‘conferent des compétences’, while the first IGC’s version has altered it into ‘attribuent des compétences’, following the usual French denomination of the principle of attributed powers as reflected in Article 5(2) TEU-Lis (principe d’attribution). This terminological correspondence between supranational and national levels—at such a fundamental point—can certainly be welcomed as intentionally ‘peacemaking’.

This, then, would seem to foreclose an understanding of Union competence under emphatic theories of constitution-making (pouvoir constituant). Symbolic emphasis is placed on the political decision not to craft a constitutional document with a legitimacy separate from and independent of the Member States. Instead, insisting on the fact that it was the Member States, acting collectively, that established the Union and vested it with its competences as defined in the founding Treaties seems to constitute yet another Souveränitätsreflex (a ‘sovereignty reflex’), as observers put it. One wonders, though, whether this method of establishing competence tends to undermine Union law as it stands today—which has consisted of and been defined by the legal concepts of direct effect and primacy of Union law. The legal justification of primacy, in particular, has always been somewhat precarious. The ECJ and much of the legal scholarship have based it on the normative premise that Community law forms an autonomous legal order. This autonomy conflicts with widespread notions of a ‘transfer of sovereign power’, for example, in Articles 23(1) and 24(1) of the German Basic Law, which implies a derived, non-autonomous character of EU law. The new formula of the EU Treaty, with the reiteration of the transfer formulation, seems itself to weaken this autonomy. Such fear is...
even more pronounced in view of the failure of the Lisbon Treaty to positively codify the
primacy of Union law, as was foreseen in the Constitutional Treaty.

However, according to a generally held view, primacy would also be valid under the Lisbon
Treaty even without such codification, as confirmed by the Declaration (No 17) referring to the
relevant case law of the ECJ. To the degree that primacy of Union law is beyond dispute, the
theoretical debate on autonomy is becoming less significant in legal practice. Granted, it
remains a legal principle, providing inter alia for the autonomous interpretation of Union law
concepts. Because this autonomy of interpretation is unquestioned, the content of the Union
term 'transfer' or 'conferral' can develop distinctly and separately from its various national
counterparts. The continued application of the ECJ's established doctrines is quite certain. In
the future, theoretical construction should shift the emphasis of these doctrines away from
ideas of separating the legal orders and towards co-operative law-making within a constitu-
tional composite.

b) A Critically Narrow Concept of Competence?

While the protection of Member State sovereignty is thus symbolically underscored, reverse
tendencies are also present. For instance, the Constitutional Treaty did not seem to subsume all
Union activities and measures under the order of competences. According to Article 1(1) CT,
2nd sentence, the Union should not only ‘exercise on a Community basis the competences’
conferred on it, but also act beyond this to ‘coordinate the policies by which the Member States
aim to achieve’ their common objectives. The notion of competence, therefore, seemed to refer
only to legal acts in a narrow sense, not to co-ordinating action. This, in turn, would leave
important processes of policy co-ordination outside the order of competences and beyond its
function of protecting Member States’ jurisdictions against irregular interferences by Union
institutions.

Fortunately, this formulation has not become part of the Lisbon Treaty. Instead, Articles 5
and 6 TFEU provide a basis for a more reasonable understanding of competence, since in both
articles ‘coordination’ falls within the TFEU’s Title I on Union competence. As we have
argued above, this broad understanding is to be preferred, since the Union’s ‘soft’ steering can
massively influence the Member States’ freedom to act. However, it is remarkable that the
Lisbon Treaty neither regulates nor even mentions the so-called open method of co-ordination
(OMC). The proposal of the Convention’s Working Group IX, that ‘constitutional status’
should be assigned to the OMC, was not implemented. Thus a significant realm of political
activity—critical both to democracy and the rule of law—basically remains outside the order of
competences, despite taking place within Union institutions.
c) Preservation and Enlargement of Article 308 EC as ‘Flexibility Clause’

For some critics of the Union’s order of competences, Article 308 EC is an upsetting thorn in the side. Its abolition has long belonged to the central demands of, for example, representatives of the German Länder.\(^{180}\) Indeed, the Article represents the weakest point in the restraining function of the current order of competences.

Nevertheless, the Convention’s proposal maintains the substance of Article 308 EC in Article 352 TEU-Lis and, somewhat ironically, even extends its scope of application. Apparently, neither the members of the Convention nor the IGCs could calm the fears that unforeseen situations would repeatedly call for the Union to take action.\(^{181}\) Even a Union that protects, as a matter of constitutional principle, national freedom to act needs a safety valve such as Article 308 EC. Moreover, the Convention succeeded in persuasively reformulating this empowering provision: the involvement of national parliaments as well as the required consent of the European Parliament better legitimate the exercise of this power. It provides an example of a well-justified deviation from the ordinary legislative procedure of Article 289(1) TFEU (ie co-decision).\(^{182}\)

In contrast to Article 308 EC, the new provision is not limited to the objectives of the common market and applies henceforth to each of the policy areas catalogued in the TFEU. This leaves out common security and foreign policy but notably includes the previous third ‘pillar’. This was a controversial issue even at the Convention;\(^{183}\) the exemption of CFSP was eventually added at the 2007 IGC. The intention that the flexibility clause ‘could not be used to extend the competences of the Union by establishing a new policy’\(^{184}\) is reflected in the text of Article 352(1) TEU-Lis. This provision, however, confers upon the legislature a considerable margin of discretion to determine which action proves ‘necessary within the framework of the policies defined in the Treaties’. Safeguarding Member States’ interests predominantly is a function of the relevant procedural requirements. The continued requirement of unanimity in the Council bestows their strong position, further strengthened by paragraphs (2) and (3). The former entitles national parliaments to take part in the Union’s legislative process and to monitor compliance with the principle of subsidiarity. Additionally, the latter paragraph establishes a prohibition on harmonisation in order to prevent the relevant prohibition under a specific legal basis being circumvented.\(^{185}\) Finally, the ‘flexibility clause’ is not subject to a simplified amendment procedure under Article 48(7) TEU-Lis (see Article 353 TFEU), thus prolonging the unanimity requirement into the future.

d) Reinforced Protection of Essential State Functions and Fundamental Structures

More than anything else, Article 4(2) TEU-Lis reflects the emphasis of reinforced protection of the individual position of each Member State, which could go well beyond a mere restatement of the current law. Three issues can be distinguished.


\(^{182}\) However, it is not entirely clear why the framers of the Treaties apparently provide for discretion on the part of the legislature as to whether the act is adopted according to a ‘special legislative procedure’ pursuant to Art 289(2) TFEU; see M Dougan, ‘The Treaty of Lisbon 2007: Winning Minds, Not Hearts’ (2008) 45 CML Rev 617, 548; see also Bast, below chapter 10, section IV.1.

\(^{183}\) See Draft Text with Comment of the Praesidium, CONV 724/03, 84.

\(^{184}\) Ibid.

\(^{185}\) The prohibition has no relevance for the interpretation of Art 114 TFEU (the successor to Art 95 EC), as demonstrated above in section II.1(e); this view is shared by M Dougan, ‘The Convention’s Draft Constitutional Treaty: Bringing Europe Closer to its Lawyers?’ (2003) 28 EL Rev 763, 769.
First, the newly introduced requirement of ‘equality of Member States before the Treaties’ is not entirely clear in what precisely it demands from the institutions to do or not to do. It vaguely echoes the notion of sovereign equality of states under international law, and appears of little operational importance.

Secondly, Article 4(2) TEU-Lis provides a more detailed version of Article 6(3) EU in determining what kind of ‘national identity’ the Union shall respect, namely, such identities of Member States ‘inherent in their fundamental structures, political and constitutional’. This is a much welcome clarification. It narrows the scope of possible constructions of the identity concept since the myriad of cultural and social idiosyncrasies no longer qualify as legally protected interests. In contrast, protecting the fundamental structures of the Member States as defined in their respective constitutional laws is a plausible claim, which could, in extraordinary cases, serve as a last resort against otherwise lawful action by the EU institutions.

Thirdly, and most relevant in the context of re-defining the federal order of competences, Article 4(2) TEU-Lis prescribes the ‘essential state functions’ to be respected, among them the functions of ‘maintaining law and order’ and ‘safeguarding national security’, the latter being explicitly qualified as ‘the sole responsibility’ of each Member State. Here, different conceptualisations seem possible. One could read the prerequisite of respecting essential state functions in parallel to the first and second clause (respecting equality and identity) and, thus, as a provision establishing a cross-cutting standard for the lawful exercise of a Union competence. This construction seems plausible to us. Yet such requirement is to be interpreted in conformity with the overall objective of offering the citizens ‘an area of . . . security’ as laid down in Article 3 TEU-Lis and the related competences explicitly conferred on the Union.

Seen in this light, it is almost a matter of course, and certainly part of the principle of sincere co-operation, that the EU must not threaten the essential functions of the Member States, whose good functioning it depends on in so many respects. There is, however, room for a more radical view holding that Article 4(2) TEU-Lis establishes a negative competence in defining ‘safeguarding national security’ as an exclusive competence of the Member States limiting the scope of any of the Union competences. As we have argued above, such cross-cutting negative competences would undermine the logic of a working system. The conclusion that the Lisbon Treaty maintains the current order is supported by the difference between the wordings of ‘competence’ and ‘responsibility’ and the overall shortcomings of a bipolar competence order where Member States’ competences are no longer original but become attributed powers conferred in the constitutional document of the Union.

e) The ECJ as Guardian of the Order of Competences

An order of competences is only as good as its safeguarding instruments. As the institution representing the Member States’ interests, the Council has certainly failed on occasion in this regard. Until the 1990s, even the ECJ hardly monitored the Council’s use of competences. Since then, though, the ECJ has evolved into a court of competence, which seems ready, as a matter of principle, to act as an honest broker between the Union and its Member States. This is not to say that there is no ground for engaging in critical discussion as to whether a particular case has

187 See also Arts 72 and 276 TFEU.  
188 See Monar, below chapter 15.  
189 See above section II.1(c) and (e).  
190 The ECJ’s case law corresponds almost verbatim with the statements of the German Federal Constitutional Court on the limiting function of the vertical order of competences; see Opinion 2/94, above n 32, para 30; Case C-376/98, above n 79, para 83; Entscheidungen des Bundesverfassungsgerichts 89, 155, 210 (Maastricht). On the future task of the ECJ as an ‘honest broker’, see von Danwitz, above n 3, 576.
been decided correctly. Moreover, the ECJ’s expanding jurisprudence on citizenship and fundamental rights might create momentum for later European legislation to harmonise these issues, which might, in turn, stretch the harmonisation competences and, thus, the principle of conferral. However, it is undisputed even in Luxembourg that monitoring compliance with the federal order of competences is not a purely ‘political question’ that would not lend itself for judicial scrutiny.

Yet even today, some claim that only a separate court could effectively prevent infringement of Member State sovereignty. Siegfried Broß, a judge at the German Federal Constitutional Court, has regularly come forward with such propositions. This proposal did not find its way into the Lisbon Treaty. Does the failure to establish a new judicial body beside or above the ECJ represent a shortcoming? The proposal to create a competence court has been refuted by persuasive arguments, for example, in critiques by Ulrich Everling and Franz C. Mayer. To our knowledge, no current proposal sufficiently demonstrates the need for such a drastic reform. Critical extensions of the scope of Union law, likely to result from the case law on citizenship and fundamental rights, are not covered by this proposal. Considering all of this, the Lisbon Treaty very judiciously declined to establish a new institution for the resolution of conflicts of competence.

2. Protection of Member States’ Scope of Action against Irregular Exercise of Union Competences

Apart from concerns about an abstract loss of ‘sovereignty’, another source of debate over competence deals with the desire to protect national, regional and local authorities from overly intense exercise of Union competences. The Lisbon Treaty devotes attention to this concern and incorporates methods to protect, or even increase, the Member States’ scope of action.

a) A Revised Principle of Subsidiarity and a Reconstructed Protocol

Some progress was made with the definition of the principle of subsidiarity in Article 5(3) TEU-Lis. The principle in substance corresponds to Article 5(2) EC, but the new formulation is to be preferred. First, the Lisbon Treaty no longer speaks only of the Member States but now also mentions ‘regional and local level’. Secondly, the formulation ‘but can rather’ replaces the nonsensical ‘and can therefore’. Therewith, it is unambiguous that a two-step test is required:

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192 This thought is developed in more detail in A von Bogdandy and S Bitter, ‘Unionsbürgerschaft und Diskriminierungsverbot’ in C Gaitanides, S Kadelbach and GC Rodriguez Iglesias (eds), Europa und seine Verfassung (2005) 309; also sceptical is CD Classen in his note on Case 117/01: [2004] Juristen-Zeitung 513, 514.
193 On the various proposals for the institutional and procedural shape of such competence tribunals, see FC Mayer, Kompetenzüberschreitung und Letztentscheidung (2000) 330ff.
195 See JHH Weiler, ‘A Constitution for Europe?’ in idem, I Begg and J Peterson (eds), Integration in an Expanding European Union (2003) 17, 27 (concluding that the solution to conflicts of competence is ‘the creation of a Constitutional Council for the Community, modelled in some ways on its French namesake’).
196 U Everling, ‘Quis custodiet custodes ippos?’ [2002] Europäische Zeitschrift für Wirtschaftsrecht 337; Mayer, above n 193; see also U Everling, below chapter 19; Mayer, below chapter 11.
197 Rather, this demonstrates the interaction of substantive law and competence law that would make it ill-advised to establish a separate court to adjudicate competences: Classen, above n 139, 437.
the first step requires determination of an insufficiency at the national, regional or local level to deal with the problem, and the second requires determination of the Union’s problem-solving capacity.

Significant improvement can be found in the Protocol (no 2) on the application of the principles of subsidiarity and proportionality, which omits the dubious soft standards in the form of guidelines (see point 5 of the existing Protocol). As a result, the proposed new Protocol contains primarily procedural rules and obligations to give reasons. The Lisbon Treaty thereby implements legal scholarship’s insight that adherence to the principle of subsidiarity is most effectively secured through procedures providing ex ante monitoring.\(^{198}\)

b) Involvement of National Parliaments

National parliaments, widely seen as the ‘loser’ of Europeanisation, become actors with a legal position laid down in primary law. Article 12 TEU-Lis, introduced by the 2007 IGC, provides a summary of the different ways in which national parliaments would be incorporated into the Treaty framework according to the Lisbon Treaty. As regards the exercise of competences, this concerns in particular Article 5(3) TEU-Lis and the above-mentioned Protocol (no 2) on subsidiarity, and, more generally, Protocol (no 1) on the role of the national parliaments.\(^{199}\)

Broadly speaking, they act as an instance of political control, in particular in monitoring compliance with the principle of subsidiarity. Thus, ‘for the first time in the history of European construction, it involves national parliaments in the European legislative process’.\(^{200}\) Their role is notably ‘only’ that of a subordinate safeguard mechanism. Also remarkably, Article 8 of Protocol (no 2) does not grant national parliaments a right of action to the ECJ but, rather, makes such an action dependent on national law and the ‘normal’ requirements of an action for annulment.\(^{201}\) The Commission, under Article 5 of Protocol (no 2), continues to have a special duty to state reasons only for draft legislative acts in the technical sense, which could—given the narrow definition of ‘legislative acts’ in Article 289 TFEU—significantly compromise the effective safeguarding of subsidiarity of other legal acts, including those adopted by the Council based on a Treaty provision that was classified as allegedly ‘non-legislative’.\(^{202}\)

Recapitulating the relevant debate,\(^{203}\) one clearly sees that here, as well, the Convention had the foresight to avert certain doubtful suggestions. Above all, it had been suggested that a subsidiarity committee with consultative powers should be created out of national parliamentarians that should be worked into the legislative process.\(^{204}\) In our view, institutional isolation of subsidiarity outside the political institutions is unconvincing; the questions whether the national level is ‘insufficient’ and whether the European level might ‘better’ handle the problem are not meaningfully separable from the political questions arising from the issue. The evaluation of subsidiarity is, to a large degree, a matter of political discretion, for which the political institutions of the Union must be accountable to the European public. Additionally, such a

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200 Conclusions of Working Group I on the Principle of Subsidiarity, CONV 286/02, 5.


202 See Bast, below chapter 10, section V.I.

203 See Weatherill, above n 91, 30ff.

committee would further complicate the Union’s institutional structure and would further hamper the localising of political responsibility.

Against this backdrop, the Convention’s solution becomes clearly advantageous. It permits less potential for blockade and avoids further complicating the institutional structure of the Union in that it provides for formalised inclusion of the national parliaments in scrutinising legislative proposals instead of setting up an additional institution. The national parliaments’ participation in this ‘early warning system’ can be seen as a promising institutional experiment, whose functioning cannot yet be foreclosed. Of course, it invites national parliaments to dress up any political concern in the guise of a subsidiarity claim. There is a clear danger of artificially channelling political discourse on EU issues at the national level into scandalising ‘infringements’ rather than taking part in a pan-European debate. One should not, however, underestimate the symbolic relevance of being heard and getting involved, which to a certain extent could compensate for the rather weak formal position of the national parliaments. There is also a chance that political ex ante scrutiny and ex post judicial control could mutually enhance each other. Hopefully, with the Convention’s proposal, which the ensuing IGCs did not call into question, a lasting constitutional compromise on subsidiarity was finally reached.

c) Revocability of Union Legal Acts

By contrast, the Lisbon Treaty neglects a weighty problem. The category of concurrent competence brings with it a grave problem in terms of legal technique and the democratic principle. As stated in the second sentence of Article 2(2) TFEU, the Member States ‘shall again exercise their competence to the extent that the Union has decided to cease exercising its competence’. In accordance with a general principle of law, the withdrawal of a legal act requires the same law-making procedure as the original enactment (the *actus contrarius* rule). As confirmed in Declaration (no 18) attached to the Lisbon Treaty, this rule is applicable also for repealing a legislative act actually pre-empting the Member States from exercising their concurrent competence. As a consequence, a Union act remains valid and Member State action remains pre-empted despite the fact that actual support for the act may have long become insufficient. This may appear trivial at first glance. In the Member State governmental systems, a simple majority usually decides, thus making it procedurally relatively easy to amend or repeal existing legislation that lost sufficient political support. In contrast, a Union legislative act can only be amended or repealed by reaching a new qualified majority, or even unanimity, in the Council, next to the support of the Commission and the Parliament. Hence, a minority can block both the amendment of Union law and the resulting release of Member States’ legislatures from pre-emption. This problem has become particularly virulent in the agricultural sector.

The resulting rigidity represents a significant constraint on restructuring the current secondary law in light of the subsidiarity principle. There is an important lesson here: it would be a grave error to assume that qualified majorities, let alone unanimity, in the Council are always autonomy-friendly. Proposed solutions for managing this rigidity have not been accepted. One possible solution would be to relax the conditions under which a legislative act adopted under a concurrent competence can be repealed. For example, if the act’s passage required unanimity, then its abolition may require only a qualified majority after the measure has been effective for some specified period of time. Although it was not agreed on, the comparable proposal of Working Group V of the Convention (if only for Article 308 EC) was commendable and should be maintained as a proposition for future reform.

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206 Kumm, above n 136, 525–30; Dougan, above n 182, 661.
207 See above section II.1(d).
208 Final report of Working Group V, CONV 375/02, 16.
3. Transparency of the Order of Competences

The last issue is the transparency of the vertical order of competences. With the provisions of the new Title on competence (Articles 2–6 TFEU), the Lisbon Treaty succeeds in raising the current level of transparency, despite some unresolved, critical points.

a) The New Presentation of the Order of Competences

At the outset, it should be noted that the Title’s heading, ‘Categories and areas of Union competence’, far better meets the actual contents than the overly broad ‘Union competences’ of its predecessor in the Constitutional Treaty. As was the case there, the ‘scope of and arrangements for exercising the Union’s competences’ (that is, competence in its sense of legal authorisation to enact unilateral measures) ‘shall be determined by the provisions . . . relating to each area’ (Article 2(6) TFEU). The provisions in Title I, building to some extent on the relevant work of the German Federal Council, deal mostly with general questions of categorisation and delimitation of Union and Member State competences. The nerve centre of categorisation is Article 2 TFEU, read together with Articles 3–6 TFEU. It contains general rules for the application and construction of the empowering provisions in the other parts of the Treaties. This new arrangement of the order of competences is an improvement in terms of transparency since it helps to identify the applicable rules governing a particular policy field. By way of cross-referencing, this notably also includes the competences set forth in the EU Treaty (see Article 2(4) TFEU).

It follows from this approach that Title I of the TFEU does not include a catalogue of competences. In view of the complexity of the competences, any catalogue, no matter how well drafted, would have been less precise than the detailed provisions that currently attribute the competences. A simplification of the various legal bases would have very likely come at a great political cost, since the complexity of a competence provision usually directly reflects the underlying complex political compromises. The margin for technical consolidation was practically reduced to zero. It follows that Articles 73 and 74 German Basic Law or Articles 148 and 149 of the Spanish Constitution do not represent a useful example for organising Union competences. The competences attributed by these constitutional provisions are far more indefinite than the competence provisions in the Treaties. As a catalogue of competences did not come into question, they could only be reproduced in simplified form. The Lisbon Treaty avoids mere repetition of the relevant provisions—which would possibly lead to legal uncertainty—by determining the specific category of competence and attaching legal consequences to them.

In principle, the systematisation in Article 2 TFEU is to be welcomed, but some critical questions remain. For instance, under Article 2 TFEU, the federal order of competences has basically three categories, namely, exclusive, shared and ‘supplementary’ competences. According to Article 4(1) TFEU, Union competences are, as a rule, shared competences. This


211 See De Búrca and de Witte, above n 6, 207–8.


213 Using the latter term as a short-hand for the competence to ‘support, coordinate or supplement the actions of the Member States’ as defined in Arts 2(5) and 6 TFEU.
implies a welcome statement of non-exclusive Union competence being the constitutional standard case.\textsuperscript{214} Consequently, the list of areas of shared competence in Article 4 TFEU is non-exhaustive, as opposed to the lists in Articles 3 and 6 TFEU.\textsuperscript{215} The non-comprehensive character of the categorisation is evident from the mere fact that Article 352 TFEU is not mentioned. Furthermore, the three categories do not cover the co-ordination of economic, employment and social policies mentioned in Article 5 TFEU, which is placed in a limbo somewhere between ‘shared’ and ‘supplementary’ competences. A further category is represented by the competences in the CFSP (see Article 2(4) TFEU). Taken seriously, the wording of Article 4(1) TFEU would require assignment of Articles 5 and of CFSP to the category of shared competences—a poor fit for the systematics of the Title. In view of the manifold peculiarities of these policy sectors and the related political sensibilities, the categorisation of the relevant powers deliberately was left in the dark.\textsuperscript{216}

At first glance, Articles 2(2) and 4 TFEU lay down a single category of ‘shared competence’, yet on closer inspection two types of competences can be found hiding under the single denomination. Following its definition in Article 2(2) TFEU, ‘shared competence’ refers exactly to those competences classified above as concurrent.\textsuperscript{217} They can be used in such a way that, eventually, no room is left for autonomous law-making by the Member States. However, the exercise of some Union competences classified as ‘shared’ does not prevent the Member States from exercising theirs, as stated explicitly in Article 4(3) and (4) TFEU. Thus, the legal difference between the two categories developed in part II of this chapter, ie concurrent and parallel competences, continues to exist.\textsuperscript{218} This drafting technique is questionable, at the very least in view of transparency. Article 4(3) and (4) TFEU provokes an e contrario argument that under any other ‘shared’ competence, in particular those related to the areas listed in Article 3(2) TFEU, Union legislation in fact can result in pre-empting Member States from exercising their powers.\textsuperscript{219} This is not always compatible with the provisions in other parts of the Treaty, eg regarding environmental policy (see Article 193 TFEU).\textsuperscript{220}

Finally, and most critically, there is a large degree of uncertainty as regards the areas and instances classified as forming exclusive Union competences.\textsuperscript{221} In Article 2(1) TFEU, the Lisbon Treaty defines the legal consequences of this classification in conformity with current Union law. Yet in view of the observations in part II of this chapter, a surprisingly long list of areas is included in Article 3(1) TFEU. Classifying competition law as an exclusive legislative competence is certainly not a mere restatement of current law,\textsuperscript{222} nor is this categorisation supported by the content of Articles 101ff TFEU. The same holds true for the common commercial policy, since Article 207 TFEU significantly broadens its scope compared with the law as it stands.\textsuperscript{223} In addition, Article 3(2) TFEU still confuses pre-emption through legislative
activity with a priori exclusive competences. Overall, the Lisbon Treaty adopts a wide concept of exclusive Union competence, which is, for reasons explained above, highly problematic.

b) The Persistent Entanglement of Union and Member States

As observed above, quite a number of fellow citizens perceive the Union as a diffuse conglomerate, resulting in serious legitimacy problems. This diffuseness has vertical and horizontal dimensions. Horizontally, the diffuseness flows from the complex institutional framework: how many actually have an even elementary idea of who is responsible for what within the Union? Whether the personalisation of Union politics, which the Lisbon Treaty strives for, or the envisaged reformed interaction among the political institutions will alleviate this is beyond the scope of this chapter. The vertical dimension of Union diffuseness reveals a problem of transparency of its own: citizens can hardly discern the fine line between Union and national activity—and thus adequately address their claims of accountability.

Many demand clarification of the boundary between areas of Union and national jurisdiction. This, though, is only possible by way of disentangling the respective legislative and executive powers and, hence, in defining mutually exclusive competences. If the framers of the Lisbon Treaty had taken this advice seriously, that would have constituted a complete reversal of the constitutional development of the last decades, in which concurrent and parallel powers have emerged as the constitutional standard case of a Union competence. It necessarily would have led to a critical expansion of Union activities far beyond the already broad conception underlying Article 3 TFEU. As we have demonstrated above, the Union has tended to develop not after the American model of separation of powers, but closer to the Swiss and German model of interweavement, even surpassing the latter model in terms of co-operation among the various legislatures. In most policy fields both EU and national competences are exercised, in law-making as well as in the enforcement of the law. This places the notion of fostering transparency by way of decoupling the levels of governance under narrow constraints. The goal of separating the powers could only be achieved at the price of restructuring the Union’s system from the ground up, uprooting the current networks of authorities and, at the end, even providing the Union with its own administrative substructures. The political costs of such an undertaking are prohibitively high and it would hardly be consistent with the concept of subsidiarity. Wisely, the Lisbon Treaty left this the road not taken.

224 Schütze, above n 218, 713.
225 See Dann, above chapter 7.
I. Introduction

For the founding fathers, the establishment of the European Communities was a foreign policy project. It is therefore not surprising that internal and external Community policies are governed by comparable regimes. In its landmark judgment on implied external powers, the European Court of Justice (ECJ) paradigmatically rationalised the wide understanding of EC competences with the impact of international rules on internal policies: whenever European laws are promulgated, 'the Member States cannot, outside the framework of the Community institutions, assume obligations which might affect those rules or alter their scope'.¹ Concurrent activities of the Member States cannot be tolerated, 'since any steps taken outside the framework of the Community institutions would be incompatible with the unity of the Common Market and the uniform application of Community law'.² To date, the constitutional foundations of European foreign affairs are characterised by the assumption of supportive parallelism between external and internal policies. In view of the constant expansion of European

² Ibid, para 31.
foreign affairs, however, their analysis requires a partial detachment from the internal perspective by taking on board the particularities of international relations.

Objectives and themes of European foreign affairs nowadays transcend their supplementary character as an instrument for the protection and projection of internal rules—with the dynamic evolution of the Common Foreign and Security Policy (CFSP) serving as an alternative point of reference. Its progress is not dominated by supranational law-making; rather the CFSP is typified by the identification of strategic goals and the constant adjustment of methods for their realisation. This condition of international relations explains the legal and institutional regime governing the CFSP, thereby asserting the constitutional dichotomy of European foreign affairs between intergovernmentalism and supranationality (section IV). Irrespective of the novelty of foreign policy and defence integration, however, the supranational Community policies under the current EC Treaty remain the historic starting point and continuous centre of gravity of the legal analysis of European foreign affairs. In the supranational arena the parallelism between the constitutional foundations of internal and external action is most tangible—even if the decision-making procedure and the substantive constraints exemplify a variation on the supranational model. Insofar as the particularities of international relations law explain the deviations from the orthodoxy of the Community method (section II).

It remains a challenge for European foreign affairs to guarantee the coherence and complementarity of the different fields of external action in the daily decision-making practice. This concerns the coexistence of the intergovernmental and the supranational spheres just as much as the co-operation with the Member States’ national foreign policies. Existing legal obligations mandate and support the horizontal and vertical co-operation between the Community, the Union and the Member States. One step further, the reform project of the Lisbon Treaty sets its sight on the pragmatic connection of the different levels of foreign policy formulation and articulation with the ultimate objective of uniform external representation (section V). Coexistence and co-operation of the Community, the Union and the Member States is one particularity of European foreign affairs. Their wider constitutional analysis additionally requires a reflection about the background and assumptions of our constitutional argument. They are presented in the preliminary section on the constitutional foundations and particularities of foreign affairs, which cannot ignore the continuous transformation of the international legal and political context.

II. Constitutional Foundations

Within the European Union, the experience of integrating the nation-states into a cosmopolitan empire founded upon the rule of law obscures our understanding of the continued particularities of foreign affairs and international relations beyond Europe. The process of European integration has always been understood as an instrument for the realisation of a rule-based international order guaranteeing eternal peace; it is not force or interests that should guide the European integration project, ‘but a spiritual, cultural instrument: the law’. The establishment of the European Communities as a project of legal integration has never been confined to the intra-European relations among the Member States, but has always had a corollary international dimension. Therefore, its constitutional analysis cannot limit itself to the internal standpoint of a Community based on the rule of law; instead, it must take on board the persistent particularities of foreign affairs and international relations.

3 This solemn account is given by the first Commission president and German law professor W Hallstein, Der unvollendete Bundesstaat (1969) 33 (my translation); on legal integration in a constitutional context, see C Möllers, above chapter 5; U Haltern, above chapter 6.
1. Particularity of Foreign Affairs

European foreign affairs have hitherto not been governed by a uniform legal framework; the current Treaties establish a patchwork of individual external policies with specific objectives and mandates for action.\(^4\) During the constitutional debate following the Treaty of Nice, the European Convention and the later Intergovernmental Conferences of 2004 and 2007 connected the existing components of external action and integrated them in one specific Treaty section on external action. This codification exercise reconstructs the current plurality of external policies as one coherent and complementary European foreign policy with overarching objectives.\(^5\) The introductory sentence of Article 21(1) TEU as amended by the Lisbon Treaty solemnly reaffirms the international vocation of the European project: ‘The Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world.’

As a new terminology, the Treaty of Lisbon introduces the EU’s ‘external action’ as the broad description of its policies towards the wider world; policy fields with widely different institutional and legal arrangements stretching from the Common Commercial Policy to the European Security and Defence Policy unite behind this generic language of ‘external action’. The choice of terminology was not widely debated and seems to follow the designation of the original working group, which drafted a first version of the new horizontal provisions.\(^6\) By contrast, my terminology of ‘Foreign Affairs’ in a volume on the ‘Principles of European Constitutional Law’ reflects my focus on the constitutional foundations of external action. It takes the internal perspective of constitutional law as its starting point and examines it against the background of the particularities of international relations. It builds upon the tradition of the constitutional analysis of foreign affairs in the US and Germany without implying the statal character of the European Union or the naive transplant of constitutional ideas.\(^7\)

Concentrating the investigation on the constitutional dimension of external action implies that substantive foreign policy issues are generally excluded from our analysis; specific problems relating to trade law or security and defence integration are not being dealt with. Instead, this contribution focuses on horizontal questions, such as the role of the European institutions, the scope of European competences and the interaction between national, European and international rules as the traditional subject of the constitutional law of foreign affairs.\(^8\) The analysis of the constitutional dimension of European policy fields follows the emerging European constitutional law doctrine, which ascertains the interpretation of constit-

\(^4\) In the EC Treaty we find specific rules governing the Common Commercial Policy (Arts 131–4 EC), development assistance (Arts 177–81 EC), cooperation with other third countries (Art 181a EC), association policies (Arts 182–8, 310 EC) and economic sanctions (Art 301 EC); they are complemented by the external dimension of internal policies, eg on the environment, and the CFSP in accordance with Arts 11–28 EU.


\(^6\) The Final Report of Working Group VII, ‘External Action’, CONV 459/02, available at http://european-convention.eu.int, does not explain the choice of terminology; reading the report, one is left with the impression that it reflects the preoccupation with instruments and procedures leading to the adoption of specific ‘actions’ which alternative expressions such as ‘relations’ would not have encapsulated.

\(^7\) In the German version of this contribution in A von Bogdandy and J Bast (eds), Europäisches Verfassungsrecht (2nd edn, 2009) I take up the traditional terminology of ‘Auswärtige Gewalt’ embedded in German constitutional law doctrine, which cannot be translated literally; the English title ‘Foreign Affairs’ is inspired by the two leading monographs on external action under the US Constitution by L Henkin, Foreign Affairs and the United States Constitution (2nd edn, 1996) and T Franck, Political Questions, Judicial Answers (1992).
tional norms as its starting point, attempts to understand them in the wider context of constitutional theory and includes, where appropriate, the perspective of other disciplines.\(^9\)

The traditional and common terminology of European ‘external relations’ originates in the historic parallelism between internal and external Community action and does not adequately reflect the new diplomatic and military dimension of the CFSP.\(^10\) In the early decades of European integration the expression ‘external relations’ deliberately avoided the term ‘foreign policy’. According to the then-dominant realist school of international relations studies, statal foreign policy was determined by the ‘high politics’ of diplomacy, security and defence—while international trade, development assistance or environmental protection, as the traditional subjects of European external relations, had no significant impact on international relations.\(^11\) For this reason, the Treaty of Rome did not use the term ‘foreign policy’, thereby reserving it for the ultimate goal of political union after the demise of the European Defence Community (although the founding fathers were aware of the political importance of the Common Commercial Policy in particular).\(^12\)

Today a comprehensive understanding of foreign policy is widely acknowledged, which recognises the importance of economic, environmental or migratory policy aspects.\(^13\) Consciously ignoring the diversity of international relations studies, this chapter builds upon this wider conceptualisation of foreign affairs, classifying the diplomatic and military activities within the CFSP as subsets of foreign policy. In the principal reference document for its foreign affairs, the European Union emphasises the political significance of its trade, environmental and development policies. The European Security Strategy appreciates the linkage between the different external policy instruments under the umbrella of ‘effective multilateralism’.\(^14\) Journalistic essayists contrast this European commitment to ‘soft power’ with the American preference for the ‘hard power’ of military security and intervention.\(^15\) Notwithstanding this popular juxtaposition, the objective of a rule-based international order based on universal normative values constitutes an important orientation for the political image and constitutional foundation of European foreign affairs.\(^16\)

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\(^8\) The constitutional focus on institutions, competences and legal effects reflects the pan-European debate, which is mirrored in the questionnaire on the third topic of the 2006 FIDE ‘External Relations of the EU and the Member States’. Similarly, the US constitutional debate, in particular Henkin and Franck, ibid, and the traditional German approach with recent contributions by C Calliess, ‘Auswärtige Gewalt’ in J Isensee and P Kirchhof (eds), Handbuch des Staatstrechts (2006) vol IV, § 83; V Röben, Außenverfassungsrecht (2007).


\(^10\) In the more recent literature the term is used, often including the CFSP by P Eeckhout, External Relations of the European Union (2004); A Dashwood and C Hillion (eds), The General Law of EC External Relations (2000); M Dony and J-V Louis (eds), Commentaire J Mégret 12: Relations extérieures (2nd edn, 2003); S Kadelbach, Die Außenbeziehungen der Europäischen Union (2006); A Dashwood and M Maresceau (eds), Law and Practice of EU External Relations (2008); R Holdgaard, External Relations Law of the EC (2008).

\(^11\) For an evaluation of European foreign affairs in the light of international relations theory, see the contributions in B Tonra and T Christiansen (eds), Rethinking European Union Foreign Policy (2004); F Petitbecque, ‘L’Autorité diplomatique de l’Union européenne’ in L Azouli and L Burgorgue-Larsen (eds), L’Autorité de l’Union européenne (2006) 51.

\(^12\) Notice the members of the German and Luxemburgish delegations Hallstein, above n 3, 194; P Pescatore, ‘Les relations extérieures des Communautés européennes’ (1961) 103 Recueil des Cours 1, 15.

\(^13\) Essential the contribution by R Keohane and J Nye, Power and Interdependence (1977).


A wide understanding of foreign policy, including the supranational Community policies, relativises the particularity of foreign affairs; external EC policies follow a different pattern than the CFSP. Nonetheless, the later analysis of the EC Treaty provisions governing the role of the European Parliament and the Court of Justice demonstrate that a distinctive constitutional regime prevails. A cursory comparative survey confirms that the European situation does not differ substantially from the national context. The British perception of foreign affairs as a ‘crown prerogative’ may be brushed aside as a monarchic relic. However, the US as the prototype of the western constitutional democracy maintains a special treatment of foreign affairs in constitutional law. The example of post-war Germany deserves our particular attention, since it redesigned its constitutional doctrine after the traumatic experience of the Nazi period in a deliberate attempt to establish the institutional foundation of a viable democracy—and refrained from a widespread ‘normalisation’ of foreign affairs. To date, the assumption of the constitutional particularity of foreign affairs has survived in the case law of the German constitutional court and constitutional doctrine despite the identification of an age of ‘open statehood’. In the same vein, the new constitutions of the Central and Eastern European states after the fall of the Berlin wall have not deviated from the distinctive treatment of foreign affairs. At the same time, the variety of constitutional rules in different countries shows that the common thread of constitutional particularity does not translate into a conceptual blueprint, but depends on the autonomous choices of the constitutional authority.

Most obviously, the guiding hand of the masters of the treaties framed the constitutional arrangements for the CFSP, which the Member States deliberately detached from the supranational integration method under the EC Treaty by designing the distinctly intergovernmental EU Treaty. From the standpoint of the orthodoxy of the Community method, the separation of the pillars appears as the mal nécessaire of a political compromise. This assessment is certainly correct; it should not, however, conceal that the choice against a supranational model for the CFSP can also be rationalised positively. Conceptualising the realisation of the CFSP as an intergovernmental variation on first pillar decision-making does not give adequate consideration to the persistent diplomatic quality of many aspects of international relations. From the perspective of political science, the establishment of the CFSP does not appear as a spill-over of the first pillar into the classical ‘high politics’ of security and defence. In the same way as the constitutional study of foreign affairs must integrate the perspective of international law into its

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16 Art 21(1)(1–2) TEU-Lis, cited at the outset, prominently founds European foreign policy on the international promotion of the European model; less pronounced the present Art 11(1) EU.
18 See Henkin, above n 7.
19 Telling the famous academic dispute between W Grewé, ‘Die auswärtige Gewalt der Bundesrepublik’ (1954) 12 Veröffentlichungen der Vereinigung deutscher Staatsrechtslehrer 129 and E Menzel, ibid, 179.
20 Cp the limited parliamentarisation and judicialisation of foreign affairs traced by C Tomuschat, ‘Verfassungsstaat im Geflecht der internationalen Beziehungen’ (1978) 36 Veröffentlichungen der Vereinigung deutscher Staatsrechtslehrer 7, 18–37; Caliess, above n 8, paras 35–49; differentiating, see R Wolfrum, ‘Die Kontrolle der auswärtigen Gewalt’ (1997) 56 Veröffentlichungen der Vereinigung deutscher Staatsrechtslehrer 38; Röben, above n 8, 3–5.
23 See below section IV.
24 A Pijpers, European Political Cooperation and the Realist Paradigm in M Holland (ed), The Future of European Political Cooperation (1991) 8, 12–13 reminds us that the neo-functional paradigm of European
conventional approach towards European law, the political explanation transcends beyond European studies into the domain of international relations theory.\footnote{Again, the partial detachment from the internal perspective through the integration of the external viewpoint is no specificity of European constitutional law. Domestic constitutional law doctrine comes to a similar conclusion in most nations-states by maintaining that ‘typically the government alone has the appropriate personnel, material and organisational potential to react to alternating international situations swiftly and adequately in order to conduct foreign affairs in the best way possible’.\footnote{International treaty negotiations and successful diplomatic initiatives regularly require increased confidentiality, expert knowledge, support of personal networks and the spontaneity and flexibility of political reaction, which are hardly compatible with the constitutional constraints on domestic law-making and judicial control.\footnote{These particularities of international relations characterise the distinct constitutional regime of European foreign affairs and point at the potential for change reflecting the transformation of the international legal and political context.}}}

Again, the partial detachment from the internal perspective through the integration of the external viewpoint is no specificity of European constitutional law. Domestic constitutional law doctrine comes to a similar conclusion in most nations-states by maintaining that ‘typically the government alone has the appropriate personnel, material and organisational potential to react to alternating international situations swiftly and adequately in order to conduct foreign affairs in the best way possible’.\footnote{As argued in various contributions in Tonra and Christiansen (eds), above n 11; C Hill and M Smith (eds), International Relations and the EU (2005).} International treaty negotiations and successful diplomatic initiatives regularly require increased confidentiality, expert knowledge, support of personal networks and the spontaneity and flexibility of political reaction, which are hardly compatible with the constitutional constraints on domestic law-making and judicial control.\footnote{Entscheidungen des Bundesverfassungsgerichts 68, 1, 87 (Atomwaffeneinrichtungen); for an overview of the conceptual debate in constitutional law theory, see Grewe, above n 19, 130–6; H Treviranus, Außenpolitik im demokratischen Rechtsstaat (1966) 123–57; G Biehler, Auswärtige Gewalt (2005) 3–55.} These particularities of international relations characterise the distinct constitutional regime of European foreign affairs and point at the potential for change reflecting the transformation of the international legal and political context.

### 2. Transformation of the International Context

European integration exemplifies the potential metamorphosis of foreign affairs. Originally, the law of the internal market was a creation of the foreign affairs power of the Member States, but nowadays does not differ substantially in legal terms from domestic rules. The transformation of foreign affairs is not confined to the European continent. At present we are witnessing a profound reorientation of international law and international relations, which may also have repercussions for the constitutional foundations of European foreign affairs. Academic observers should relate the European debate on the constitutional foundations of foreign affairs to the transformation of the international context and identify areas of tension and possible points of contact. In general terms, the argument is about the reappraisal of the particularities of foreign affairs presented above in the light of the ongoing metamorphosis of international law and international relations. Future research will have to assess the degree of change and reposition the constitutional law of European foreign affairs.

A constitutional analysis of the future appearance of European foreign affairs should distinguish different levels of reflection: a dynamic interpretation of primary law will only be possible on a narrow scale given the inherent limits of the dogmatic argument; more important is the critical examination and identification of tensions and frictions between the international legal and political context and the constitutional concept underlying the Treaty provisions; the room for the creative design of new legal patterns widens whenever one concentrates the analysis on the scrutiny of individual foreign policy fields and examines their reorientation on studies intentionally concentrated its argument on the ‘low politics’ of market integration and excluded the ‘high politics’ of security and defence.\footnote{With a view to the limited powers of parliaments and courts, see M Smith, ‘Diplomacy by Decree: The Legalization of Foreign Policy’ (2001) 39 Journal of Common Market Studies 79, 80; Giegerich, above n 21, 416–19; K Hailbronner, ‘Die Kontrolle der auswärtigen Gewalt’ (1997) 56 Veröffentlichungen der Vereinigung deutscher Staatsrechtslehrer 7, 14; M Koskenniemi, ‘International Law Aspects of the CFSP’ in idem (ed), International Law Aspects of the European Union (1998) 27, 27–30; E Denza, The Intergovernmental Pillars of the European Union (2002) 324; differentiating, for example, Menzel, above n 19, 187–200; F Schorkopf, Grundgesetz und Überstaatlichkeit (2007) 284–98; R Bieber, ‘Democratic Control of European Foreign Policy’ (1990) 1 European Journal of International Law 148, 149–54.}
the basis of existing constitutional rules and in the light of international developments. In individual situations it is not always possible to make a clear distinction between these different levels of reflection. The disclosure of the angle of inspection and its theoretical and conceptual underpinning avoids misunderstandings and rationalises the debate among different contributors. Generally speaking, political idealists and legal constitutionalists will champion a supplementary parallelism of internal and external policies; in contrast, political and legal realists may insist on the principled particularity of foreign affairs.28

Among the current developments on the international level, the new pluralism of international actors and the expansion of international law-making have a distinct impact on the constitutional law of European foreign affairs. The new pluralism of international actors within transnational networks challenges the traditional assumption of uniform external relations, which are conducted by the executive and controlled by parliaments and courts insofar as international treaties relate international developments back to the domestic arena.29 Instead, non-state actors gain prominence in particular when they influence international rule-making or operate autonomously.30 The executive monopoly on international state representation disintegrates whenever parliaments, courts and European agencies, such as the European Central Bank, enter into direct contact with their counterparts in third states.31 Many developments can be qualified as administrative in character with only a corollary constitutional dimension.32 As far as the Court of Justice is concerned, it has followed a decidedly conventional approach, which emphasises and protects the autonomy of the European legal order and its institutional foundations against international challenges.33

International rules cover new policy fields and become more detailed, increasingly affecting the position of individuals. When more legislative authority in this sense is being transferred to the international level, the call for improved parliamentary accountability and judicial control is reasonable.34 The spread of international soft law, however, illustrates the difficulties of adapting the traditional pattern of parliamentary and judicial involvement in international treaty-making.35 This advises a cautious approach towards the reorganisation of the traditional model of the foreign affairs constitution; the example of European integration demonstrates that the transfer of legislative functions to the supranational level can only partially be compensated in the national context, requiring reform measures at the international level instead.36 The corresponding catchphrase of the ‘constitutionalisation of international law’ does not in

28 Correspondingly, for the international law, see M Koskenniemi, From Apology to Utopia (2nd edn, 2005).
29 Parliamentary and judicial control of international treaty-making are the focus of section II.2.
33 See below section III.2, specifically on the preservation of the ECJ’s judicial monopoly below nn 73–4; see also the rejection of an autonomous treaty-making capacity of the Commission for co-operation with the US Department of Justice in Case C-327/91 France v Commission [1994] ECR I-3641.
35 See below section III.3.
itself provide a sufficient guideline, since it often conceals a variety of arguments and solutions accompanying an open-ended development.37

One specific and thought-provoking angle of the constitutional analysis concentrates on the role of European foreign affairs in the metamorphosis of the international context. It has been mentioned before that European primary law does not assume a neutral standpoint; rather, it aims at the transformation of the international order on the European example—effectively exporting the model of integration through law.38 Again the constitutional analysis requires careful distinction between the dogmatic interpretation of normative requirements, the contextual study of underlying legal concepts and the formulation of political proposals. Substantive policy studies are well suited to scrutinise the European impact on the reform of the international context, as the example of the European human rights and democracy promotion policies illustrates.39 Similarly, the institutional and legal structure of association and neighbourhood agreements and the co-operation with other regional organisations such as the African Union exemplifies the endeavour to project the European integration method.40 In the constitutional reform debate the aspiration to export the European model blends with the claim for the reform of the European foreign affairs constitution, in particular through reinforced parliamentary and judicial oversight.41

III. Supranational External Relations

For the Member States, the European project was not only an instrument for the reorganisation of the relations between themselves, but had an international dimension from the beginning. More specifically, the realisation of the customs union necessitated common rules for the integration of the common market into the world trading system and the economic relations with (former) colonies. The corresponding achievements of the common commercial and association policies were the starting point of supranational external relations. With the active support of the Court of Justice, the international treaty-making practice of the institutions and repeated Treaty amendments continuously expanded the external Community policies. During this process, the political institutions assumed primary responsibility for the substance of the policies, while the Court of Justice took command of the constitutional basis of European foreign affairs. To date, its case law has been guided by the endeavour to protect the autonomy of the European legal order through the principled parallelism between the constitutional basis of European foreign affairs; only occasionally has the Court integrated the methodological and substantive particularities of international law in its constitutional argument.

38 Read again Art 21(1) TEU-Lis; similarly, among the academic contributors, see Pernice, above n 34, 997–1005; E-U Petersmann, ‘The 2004 Treaty Establishing a Constitution for Europe and Foreign Policy’ in C Gaitanides et al (eds), Europa und seine Verfassung (2005) 176, 182–86; similarly, almost 50 years ago, Pescatore, above n 12, 125–6.
39 See below section III.4(c).
1. Reach of Community Competences

The evolution of the federal balance between national and European competences is visible in both the development of primary law and its interpretation by the Court of Justice. The development of European integration during the past few decades shows that the unity-building principles gained prominence first and were complemented by principles for the protection of diversity later. The development of the Court’s case law on the substantive reach of the EC’s supranational external competences confirms this general finding. In a first expansive phase the European judges extended the reach of external competences beyond the express powers in the EC Treaty and emphasised their exclusive character. During the past 15 years the Court has entered a period of constitutional consolidation that is characterised by the attempt to accentuate the continued relevance of the Member States in foreign affairs and delineate the constitutional limitations of European action.

a) Expansive Phase

In its seminal judgment on the European Agreement on Road Transport, which is widely known by its French acronym AETR, the Court laid the cornerstone of its case law on the principled parallelism between the constitutional regime for internal and external Community policies. Its core finding concerns the generous interpretation of external competences: an authority for the conclusion of an international agreement arises not only from an express conferment in the Treaty—as in the case of the Common Commercial Policy—but may equally flow from other provisions, in particular whenever the Community adopts secondary legalisation in conformity with the principle of conferred powers. The Member States ‘cannot, outside the framework of the Community institutions, assume obligations which might affect those rules or alter their scope’. Early literature coined the term ‘implied powers’ to describe the prevalent understanding of parallel internal and external competences. From a constitutional perspective, the conceptual origin of this ‘AETR doctrine’ deserves closer scrutiny.

The hypothesis of a ‘constitutional import’ is widespread. It follows the generous reading of external competences under the US Constitution, which the opinion of the Advocate General had mentioned (and eventually rejected) but which the Court might implicitly have imported into the European context. This recourse to constitutional law doctrine is not cogent. In contrast, the Court may have borrowed its argument from public international law and its rules governing the treaty-making capacity of international organisations. The reporting judge later identified the French law professor Paul Reuter, who had two decades earlier justified the parallelism of the original treaty-making capacity of the European Coal and Steel Community under recourse to public international law, as the father of the ‘AETR doctrine’.

42 Cp A von Bogdandy, above chapter 1.
43 Case 22/70, above n 1, para 22.
46 See AG Dutheillet de Lamotho in Case 22/70, above n 1, 293, also for the US doctrine of implied powers, which concerns the horizontal reach of executive powers vis-à-vis the Congress (not the vertical delimitation of competences); see also Henkin, above n 7, 36–45.
47 The writing of P Reuter, La Communauté européenne du charbon et de l’acier (1953) 116–23, on the ECSC competences in the light of international legal principles is identified by the reporting judge Pescatore, above n 44, 618, as the source of the AETR jurisprudence; cf Reuter, H-J Hallier, ‘Die Vertragsschlussbefugnis der EGKS’ (1956) 17 Zeitschrift für ausländisches öffentliches Recht 428, 442–7; R-J Dupuy, ‘Du Caractère unitaire de la CEE dans les relations extérieures’ (1963) 9 Annuaire français de droit
The Court of Justice itself is remarkably silent on the conceptual origins of its conclusion, underlining the autonomy of the European legal order instead. Founding the implied external powers on international legal principles would have challenged the conceptual underpinning of the autonomy of the Community legal order.  

Authoritatively, the Court emphasises the need to support the ‘uniform application of Community law’ by preventing the Member States from assuming international commitments which run counter to their obligations under European law. Mirroring its landmark decisions on the direct effect and supreme character of European rules, the AETR doctrine appears as another instrument to protect the effective, uniform and supreme application of the Community law through the external projection of its substantive scope. The guiding principle of protecting the autonomy of the supranational legal order becomes evident if one considers the alternative solution: rejecting an implied external competence, while at the same time obliging the Member States to respect their European law obligations whenever they negotiate for themselves the contents of international agreements with third states on subject areas which are also covered by Community law. Conflicts between international obligations of the Member States and the requirements of European law would have been difficult to avoid, effectively jeopardising the autonomous interpretation and evolution of European law. The Court was not willing to assume this risk; the principled parallelism between internal and external powers protects the supranational legal order.

Despite some initial resistance, the Court’s discovery of implied external powers soon entered the canon of Community law principles. Later Intergovernmental Conferences codified the external activities of the Community which had originally been developed on the basis of the AETR doctrine in combination with the present Article 308 EC (then Article 235 EEC Treaty). At present, the Treaty of Lisbon undertakes the codification of the Court’s AETR doctrine, translating its main findings into explicit Treaty language—despite some remaining uncertainties about the accuracy of the exercise. The original acceptance of the AETR doctrine was, however, accompanied by renewed quarrels about its scope and consequences; the generous reading of the exclusivity of Community competences in various judgments of the 1970s proved particularly controversial. This expansive case law might have been motivated by the desire to shield the emerging international activities of the Community in the early years of their existence and support its recognition on the international scene.

48 See also the next section on the comparison of legal effects of international and European law.
49 Case 22/70, above n 1, para 31; see explicitly Opinion 1/03 Lugano Convention [2006] ECR I-1145, para 131: ‘The purpose of the exclusive competence of the Community is primarily to preserve the effectiveness of Community law.’
51 Thus the original proposal by the reporting judge Pescatore, above n 12, 111.
52 See the newspaper commentary ‘La Cour de justice de Luxembourg a-t-elle outrepassé ses compétences?’ Le Monde, 27 April 1971, 19; the Council and the intervening Member States did not call into question the implied competence in the next Cases 3/76, 4/76 and 6/76 Kramer [1976] ECR 1279, 1291.
53 In particular, the international dimension of the environmental policy (Single European Act) and development assistance (Treaty of Maastricht).
54 Read Arts 3(2) and 216(1) TFEU and its analysis in the light of the drafting history by R Passos and S Marquardt, ‘International Agreements’ in G Amato et al (eds), Genèse et destinée de la Constitution européenne (2007) 875, 888–93.
exclusivity entails an exclusion of national participation, the Court’s case law met repeated criticism calling for a continued role of the Member States in international relations.56

b) Constitutional Consolidation

Twenty years after its AETR judgment, the Court launched a phase of constitutional consolidation of its case law that continues to this day. Building upon the vested supranational powers established earlier, the Luxembourg judges accentuate the constitutional limitations of European action and the continued relevance of the Member States’ foreign affairs powers. Its Opinion 1/94 on the conclusion of the Agreement establishing the World Trade Organisation (WTO) marks the beginning of the new era: the Court reinforces the exclusive supranational competence for the international movement of goods within the General Agreement on Tariffs and Trade (GATT), while rejecting an extension of the Common Commercial Policy or an extensive understanding of the Community’s implied powers concerning the new international framework for trade in services (GATS) and the trade-related aspects of intellectual property rights (TRIPS). Its conclusion is representative of the new prominence of national competences: ‘The Community and its Member States are jointly competent to conclude GATS/TRIPS’.57

Joint competence of the Member States and the Community had become the favourite solution for disputes among the Community institutions and the Member States about the reach of their respective competences. The conclusion of ‘mixed agreements’, which became popular in the 1980s, allows both the Member States and the Community to be regular contracting parties without requiring the precise delimitation of competences. The attraction of mixed agreements lies in the complementary combination of national and supranational powers facilitating the uniform external representation of the European Union. The pragmatism of the arrangement may not satisfy constitutional lawyers, for whom the fusion of external powers confuses the respective spheres of responsibility, thereby creating a mixture of responsibilities that is difficult to untangle from a legal perspective. Tellingly, primary law refrains from the constitutional domestication of the manifold intricacies of mixed agreements; the European Convention discussed their constitutional complexity, but shied away from any codification.58

Yet such constitutional caveats do not lessen the added practical value of mixed agreements as a pragmatic solution to the central challenge of vertical complementarity and coherence between the Member States’ and the Community’s external powers examined below.59

A restrictive reading of the earlier generosity towards exclusivity has characterised the Court’s judgments on the application of the AETR doctrine since the early 1990s. It does not formally renounce its earlier findings, but interprets them narrowly by distinguishing later situations from earlier circumstances.60 Hereafter, an exclusive implied supranational competence is essentially limited to cases where the substance of individual treaty clauses are covered by existing Community rules or where an area of law is to a large extent subject to Community legislation.61 In each individual case one has to ascertain the precise reach of the Community competence, also with a view to the respective contents of the international treaty in question and new Community measures adopted in recent years; a case-by-case approach instead of generalised findings thus characterises the adjudication of the AETR


59 For further considerations, see below section V.1.

60 See the summary of the earlier case law in Opinion 1/03, above n 49, paras 114–33.

61 For details, see Eeckhout, above n 10, 69–100; J-V Louis, ‘La Compétence de la CE de conclure des accords internationaux’ in Dony and idem (eds), above n 10, 57, 50ff.
2. The Court of Justice and International Law

Our preliminary thesis of supportive parallelism between the constitutional foundations of domestic and foreign affairs can be best illustrated with the Court’s approach towards international law. Both the similarities and the variations between the legal effects of international law and its European counterpart can be traced back to the ultimate objective of preserving the supranational autonomy of the European legal order. The Court’s position towards international law was a particular challenge in this respect, since the Court had developed the autonomy of European law by detaching it from the wider context of public international law. Whereas it had originally qualified Community law as ‘a new legal order of international law’, the Court interrupts the linkage in Costa/ENEL, where it states: ‘By contrast with ordinary international treaties, the EEC Treaty has created its own legal system.’ Against this background, two considerations in particular advised the Court to consider its approach to international law carefully in order not to call into question the autonomy of the European legal order.

First, deference towards international law could press the Court into a potential position of subordination vis-à-vis international law and bodies responsible for interpreting it authoritatively (comparable to the location of national courts in relation to European law). Secondly, the arguments and methodological assumptions underlying the status of international law within the European legal order may be juxtaposed to the theoretical underpinning of the autonomy of the Community legal order, thereby challenging the concept of supranationality itself. Do structural differences between the international and the Community legal order justify the latter’s privileges concerning its direct and supreme application within the Member States? Why should national courts recognise the hierarchical supremacy of Community law if the Court itself does not respect the corresponding prerogatives of the international legal order? These questions were most tangible in the 1970s, when the doctrinal foundations of the case law were being laid; but they preserve their explosiveness to this date, as the disagreement about the legal effects of world trade law illustrates.

Every analysis of the Court’s approach towards international law is complicated by the limited reasons given in important judgments. This introversion of the legal argument was no coincidence. On the contrary, Pierre Pescatore, who exerted sizeable influence on the early case law on European foreign affairs both as a legal academic and a member of the Court, later

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62 This extends to the horizontal delimitation of EC policies where the Court complicated the distinction between the CCP and the environmental policy in a series of cases; for details read P Koutrakos, ‘Legal Basis and Delimitation of Competence in EU External Relations’ in M Cremona and B de Witte (eds), EU Foreign Relations Law (2008) 171.

63 Due to its focus on exclusivity the ECJ case law and, as a result, its codification in Art 216(1) TFEU are in this respect ambivalent; for a renewed emphasis on the concurrent nature, see Eckhout, above n 10, 89–100; A von Bogdandy and J Bast, above chapter 8, section II.2(c), and D Thym, ‘Der Binnenmarkt und die “Freiheit der Lüfte”’ [2003] Europarecht 277, 285–8.


65 Case 6/64 Costa v ENEL [1964] ECR 1251, 1268.
identified its prevalent silence about the conceptual basis of the legal effects of international law as a judicial strategy:

This restraint has various reasons, among which the foremost relates to the concern that Community law might disintegrate through the introduction of international law-style arguments. . . Informal amendments and suspension of treaties, the disapplication of Community law on the basis of conflicting national laws and—in ‘serious situations of conflict’—the supremacy of national strength over the law may at least be contemplated in international law. If such thinking is representative for some schools of international law, one understands why the Court of Justice avoided to bring into the Community legal order a Trojan horse loaded with such thoughts.66

Indeed, the Court’s case law demonstrates the desire to sustain the autonomy of the European legal order through its posture towards international law; analogies and differences between the effects of European law in the national legal systems and international law in the Community legal order are guided by the objective to protect the latter’s autonomy. The basic assumption of the Haegeman judgment states that ‘the provisions of (an international) agreement, from the coming into force thereof, form an integral part of Community law’.67 This decisive constitutional assumption is not explained any further; the Court neither justifies its conclusion with the Council decision approving the agreement nor has recourse to the constitutional commitment in Article 300(7) EU.68 Instead, it solely mentions the binding character of the agreement under international law ‘from the coming into force thereof’.69 This ultimately monist standpoint appears as the projection of the relationship between European and national law to the international sphere; correspondingly, the Court had claimed in Costa/ENEL that European law became an integral part of the legal systems of the Member States ‘on the entry into force of the Treaty’.70 Against this background, it comes as no surprise that international law, as an integral part of the EC legal order, shares its supremacy over national law.71 In welcome clarity, a Grand Chamber of the Courts states in 2006 that directly applicable provisions of international agreements ‘prevail over provisions of secondary Community legislation’.72

Whenever the autonomy of European law is at risk the parallelism between the constitutional regime for internal and external affairs comes to an end. On the basis of its jurisdiction to deliver opinions on the compatibility of envisaged agreements with the EC Treaty, the Court has actively defended the hegemony of primary law on various occasions. In particular, it has rejected the integration of the Community into treaty regimes whose bodies might have called into question its institutional responsibility for the authoritative and uniform interpretation of

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68 According to which international agreements are binding upon the institutions and the Member States; the provision is only cited in later judgments as a confirmation of the Court’s finding; similarly on customary international law, which may be applicable within the EC legal order for the sole reason of its existence, even if the Court denies its existence in casu, see Case C-308/06 Intertanko [2008] I-4057, para 51.

69 Case 181/73, above n 67, para 5.

70 Case 6/64, above n 55, 1268; similarly ibid on European law as an integral part of the national legal order—an assumption extended to international law in Case 181/73, above n 67, 5.


72 Case C-344/04 International Air Transport Association [2006] ECR I-403, para 35. The same applies to customary international law and decision of international treaty bodies and organisations; see Uerpmann-Wittzack, above chapter 4.
European law by declaring illegal any ‘change in the internal constitution of the Community’ which an international agreement might entail. Similarly, the Court defends its judicial monopoly on the interpretation of European law against international courts and tribunals. Generally speaking, the Court underlines that ‘the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty’. Read in combination, the openness towards international law and the closure against constitutional interferences demonstrate a mixed monist–dualist approach, which can similarly be found in many national legal orders. Both the openness and the closure are guided by the ultimate objective of protecting the autonomy of the European legal order.

The wide-ranging parallelism of the constitutional foundations of domestic and foreign affairs does not imply that Community and international law should necessarily be interpreted identically in similar situations. Rather, the autonomy of European law requires that differences are identified and dealt with appropriately. The resulting distinct treatment of international law is most evident in the case law governing the direct applicability of international rules. Again, the Court in principle applies the same conditions as for the direct effect of European rules in national legal systems; its abstract formulation mirrors its well-established case law on internal direct effect: a provision in an agreement must be regarded as being directly applicable when, regarding its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.

On the basis of this general finding, the Court supports a differentiation that emphasises the wider systematic context beyond the wording of individual provisions. Hereafter, even provisions with an identical wording as rules of Community law may have a different meaning. For the Court, this option of differentiation is a matter of principle, which, again, reflects its primary preoccupation with the protection of the autonomy of European law. Distinguishing the supranational EEC legal order from the international foundation of the EEA Agreement with a view to the different interpretation of identical provisions motivated its famous qualification of primary law as the ‘constitutional charter of a Community based on the rule of law’. Not even resolutions of the UN Security Council may claim higher normative status than general principles of Community law. Again, the parallelism between the constitutional regime for internal and external affairs comes to a halt when the autonomy of European law is at stake. Unfortunately, the Court’s case law on the direct applicability of international law does not blend into a consistent overall picture. Instead, we observe a patchwork of judgments which


76 See C Tomuschat, in H von der Groeben and J Schwarze (eds), Kommentar zum EU-/EG-Vertrag (2004) Art 281 EC, paras 62–4; it should be noted that the quasi-national approach to international law is in itself not self-evident and follows the assumption of supranational autonomy which severs the linkage with the international legal context.

77 This formulation is first used in Case 12/86 Demirel [1987] ECR 3719, para 14; correspondingly, on the direct applicability of European law, see Case 41/74 Van Duyn [1974] ECR 1337, para 13; further reading is provided by C Kaddous, Le droit des relations extérieures dans la jurisprudence de la Cour de justice (1998) 353–401.


79 Opinion 1/91, above n 73, para 21.

80 Cf the principled dismissal of the primacy of UN law over EC primary law, evading any reference to Arts 25, 48 and 103 UN Charter, in Cases C-402/05 P and C-415/05 P, above n 75, paras 305–9.
demonstrate a primary orientation at the circumstances of individual cases or the specificities of the international agreements in question. As an example: association agreements are interpreted similarly to Community law; principles of international law on the interpretation of agreements are not discussed and the lack of reciprocity rejected as irrelevant—in contrast to world trade law.\(^{81}\) More generally, many observers find it disturbing that the Court limits the judicial enforcement of international obligations to directly applicable rules\(^{82}\)—in contrast to the domestic effects of European law, which, in the absence of direct effect, nonetheless requires national law to be interpreted in conformity with European rules or may inflict state liability.\(^{83}\) Why are international norms not considered as an objective standard for judicial scrutiny even in the absence of direct effect?

One is left with the impression of judicial decision-making, which lacks dogmatic orientation. Future research by European constitutional lawyers may develop a more cogent approach, which pays adequate attention to the perspectives of both European constitutional law and the characteristics of public international law. Multilateral treaty systems with a ‘constitutional’ component are of particular relevance in this respect, as the example of the European Convention on Human Rights, the UN Charter and the WTO illustrates.\(^{84}\) It is probable that no fully consistent dogmatic texture will emerge in the near future, but the holistic examination of different treaty regimes may nonetheless contribute to the better understanding of the overall picture, which respects both the parallelism between European and international law and its limits with a view to the specificities of the international legal context. This overarching analysis ideally allows us to achieve what the Court deliberately evaded in its early judgments: to solidly ground its case law on the status of international law in the European foreign affairs constitution.


In the European Union, decision-making procedures have never been arbitrary formulae, but finely balanced arrangements contributing to the success of the integration project. This assumption extends to the constitutional foundations of foreign affairs. Our thesis of supportive parallelism between the constitutional rules for internal and external action is confirmed by the role of the Commission and the Council: the former enjoys a monopoly of initiative and is entrusted with the executive representation of the Community in international negotiations; the latter decides upon important questions by qualified majority voting.\(^{85}\) In contrast, the role of the European Parliament falls short of its rights in the adoption of secondary legislation—reflecting the limited role of national parliaments in national foreign affairs. A closer inspection of the motivation underlying the special treatment of the European Parliament identifies the particularities of the international law of treaties as the main reason for limited parliamentary involvement, thereby substantiating the argument that the constitutional analysis of foreign affairs needs to integrate the perspective of public international law.


\(^{82}\) Read Eckhout, above n 10, 278–80; I Cheyne, ‘International Instruments as a Source of Community Law’ in Dashwood and Hillion (eds), above n 10, 254.

\(^{83}\) On the ‘indirect effect’ see Case C-106/89 Marleasing, 1990 I-4135; on state liability, see Cases C-6/90 and C-9/90 Francovich [1991] ECR I-5357.

\(^{84}\) For more details and further references, see Uerpmann-Witzack, above chapter 4.

\(^{85}\) For the Common Commercial Policy, see Art 133(3) and (4) EC; for other international treaties, see Art 300(1) and (2) EC.
The Parliament’s limited involvement in foreign affairs is remarkable, since it stands in obvious contrast to the Parliament’s empowerment in domestic European policies in the past decades. On the occasion of all recent Treaty amendments the Parliament had called for a ‘parallel’ extension of its powers in foreign affairs—and failed repeatedly.\(^\text{86}\) Article 300 EC with its detailed rules on the negotiation and conclusion of international agreements shows a significant degree of parliamentary exclusion.\(^\text{87}\) These deviations from the internal decision-making procedure can be explained by the customs of international diplomacy and the requirements of the international law of treaties. There are important differences between the rigidity of domestic legal rules, whose adoption, interpretation and change follows much stricter procedural patterns than the often dynamic, evolutionary and practice-dominated international legal regimes, which our analysis must take into account. They prevent a simple projection of domestic procedures to the international arena and require special rules for the negotiation, conclusion and dynamic evolution of international agreements.\(^\text{88}\)

‘Being diplomatic’ is proverbially different from the open and frank discussions which rightly dominate our parliamentary cultures. It is therefore not surprising that the European Treaties continue the tradition of treaty negotiations as the prerogative of executive agents which are often specifically trained to manage international negotiations; the negotiation room remains closed for parliamentarians, although the members of the other legislative authority, the Council, may constantly shape the Community’s negotiating position.\(^\text{89}\) Parliament’s repeated attempts to get a foot in the door of the negotiation room through its direct involvement in the negotiation procedure had no lasting success. Only temporarily did the Parliament obtain an extension of its rights under Interinstitutional Agreements concluded on the basis of the original EEC Treaty.\(^\text{90}\) Later Treaty amendments led to a partial codification, in particular through the introduction of the parliamentary consent requirement before ratification. Further calls, however, have fallen on deaf ears, and bilateral concessions by the Commission can neither change the restrictive Treaty language nor be enforced against the declared will of the Council.\(^\text{91}\)

Most national constitutions guarantee the parliamentary control of international treaties by means of a parliamentary consent requirement before ratification.\(^\text{92}\) Article 300(3) EC Treaty follows this pattern in principle—although the degree of parliamentary involvement has

\(^{86}\) The EP’s demands are traced by H Krück, ‘Zur parlamentarischen Legitimation des Abschlusses völkerrechtlicher Verträge der EG’ in Geiger (ed), above n 34, 161, 178–82; on the remarkable extension of parliamentary powers in internal law-making, see P Dann, above chapter 7.

\(^{87}\) See, moreover, the EP’s exclusion from the Common Commercial Policy (Art 133 EC), international monetary policy (Art 111 EC) and cooperation in criminal matters (Arts 24 and 38 EU).

\(^{88}\) For a more detailed analysis, see my contribution D Thym, ‘Parliamentary Involvement in European International Relations’ in Cremona and de Witte (eds), above n 62, 201, 214–16.

\(^{89}\) See Art 300(1) EC.

\(^{90}\) See the procedural agreements Luns I (1964) Luns II/Westerderp (1973) and the Stuttgart Declaration (1983) with a view to the original Art 228 EEC Treaty and their analysis by A de Walsche, ‘La procédure de conclusion des accords internationaux’, in Dony and Louis (eds), above n 10, 77, 96–106; MacLeod et al, above n 71, 98–100.

\(^{91}\) Since 1995 the EP has included in the framework agreement on bilateral relations signed with the incoming Commission a provision of parliamentary involvement in Treaty negotiations (last Annex A to European Parliament decision on the revision of the framework agreement on relations between the European Parliament and the Commission (P6_TA(2005)0194), paras 19–21, [2006] OJ C117 E, 125; see also Art 83 EP Rules of Procedure). The Council filed a sharp protest, [2005] OJ C161, 1; for more details, also on the absence of any binding character of bilateral commitments vis-à-vis the Council as a third institution, see again Thym, above n 88, 205–7.

\(^{92}\) Note the comparative study by S Riesenfeld and F Abbott (eds), Parliamentary Participation in the Making and Operation of Treaties (1994).
often been criticised as insufficient.\(^9^3\) More specifically, the EC Treaty does not guarantee the parallelism between the field of application of the domestic co-decision procedure and the consent requirement to international treaties.\(^9^4\) Not even the classical domain of the Parliament’s budgetary prerogatives is subject to parallel treatment in cases of international treaties; the Court concluded that financial commitments of EUR 250 million do not qualify as ‘having important budgetary implications’, which would have commanded parliamentary consent.\(^9^5\) This restriction of parliamentary involvement conflicts with the growing significance of international law-making in a globalised world. It should therefore be welcomed that the Lisbon Treaty realises the parallelism between the Parliament’s internal co-decision powers and the external consent requirement.\(^9^6\)

This laudable extension should not, however, conceal that the consent requirement constitutes an imperfect projection of internal co-decision to the external sphere. It leaves Parliament with the binary choice of approving the outcome of the negotiations or rejecting them altogether; only in special cases might the threat of veto inherent in the consent requirement allow the parliament to exert influence beforehand.\(^9^7\) In regular circumstances the Parliament is presented with the outcome of the diplomatic negotiations behind closed doors as a fait accompli.\(^9^8\) This constraint on parliamentary policy-shaping powers is particularly disappointing for the Euro-parliamentarians, who are—as a ‘working parliament’—arguably at their best when they embark upon the technical debates which dominate many aspects of the day-to-day management of European affairs.\(^9^9\) Again, one should adopt a cautious approach towards any premature extension of parliamentary involvement. A comparison with the extensive powers of the US Senate demonstrates that the parliamentary right to amend individual treaty provisions for purposes of domestic application may result in the blockade of international law-making when complex multilateral conventions are being unravelled.\(^1^0^0\)

International treaties differ from national and European legislation because of their evolutionary and practice-dominated character. An international treaty may not only be put into effect, amended or terminated on the basis of strict and rigid law-making procedures as recognised principles of the international law of treaties include the provisional application, the interpretation in the light of subsequent practice and the suspension with formal revocation.\(^1^0^1\) In addition, we need to set our sights on the adoption of secondary law by international treaty bodies or organisations and the relevance of international ‘soft law’ in its diverse manifesta-

\(^9^3\) Eg by Eeckhout, above n 10, 177; Krajewski, above n 41, 445. Limited parliamentary involvement is no relic of the original EEC Treaty, which had not provided for a parliamentary consent requirement for the conclusion of treaties at all; instead the current rules were introduced in Maastricht.

\(^9^4\) Art 300(3) EC requires consent only for amendments of an act adopted under the co-decision procedure and in this respect does not apply whenever an agreement determines later legislation.

\(^9^5\) See the interpretation of the reference to ‘important budgetary implications’ in Art 300(3) EC in Case C-189/97 Parliament v Council [1999] ECR I-4741; for further details, see Koutrakos, above n 50, 145–7.

\(^9^6\) Art 218(6)(a) TFEU requires consent in the field of application of the co-decision procedure (ordinary legislative procedure). In addition, the specific procedure for the conclusion of international trade agreements is abolished, thereby extending the regular powers of the EP; see Cremona, above n 5, 1364. On the increased role of international law-making, see above section II.2.


\(^9^8\) See Tomuschat, above n 20, 28, for national parliaments.


\(^1^0^0\) Consult Thym, above n 88, 210; it should be noted that the consent requirement has a greater potential in the US and the EU, where the intimate co-operation between the parliamentary majority and the government which characterises the parliamentarian democracies of most Member States does not discourage the effective use of the control powers.

\(^1^0^1\) See Arts 25, 31(3) and 62 Vienna Convention on the Law of Treaties and the corresponding rules of customary international law.
tions. All of these peculiarities of the law and practice of international treaties enhance the influence of the actor which determines the position of each contracting party in this respect—be it on the European or the national level, where the evolutionary and dynamic character of international law has long been identified as the major cause for the 'factual or even legal decline of parliamentary involvement'.

At least in situations which do not require a swift reaction, there are good reasons to give the Parliament a say in the suspension of international agreements and the determination of the European position in international treaty bodies or organisations—mirroring and complementing its initial consent prerogative. Respective calls were, however, rejected by the Intergovernmental Conference drafting the Amsterdam Treaty, which enshrined the Council’s primary responsibility in a new Treaty provision. This relatively recent dismissal of increased parliamentary involvement in international treaty-making underscores that the remarkable empowerment of the European Parliament in domestic law-making does not stretch into foreign affairs. Limited parliamentary control powers are no relic of the early decades of the integration process, but a deliberate choice of recent Treaty amendments. Even an extension of its consent powers would not have matched Parliament’s domestic legislative function, given the factual weakness of the consent requirement in the light of the diplomatic customs and the particularities of the international law of treaties.

4. Substantive Constraints of Foreign Affairs

Europe’s foreign affairs constitution is not limited to questions of competence, procedure and the status of international law. European constitutional law also guides the substantive orientation of external action. All policy choices are first guided by the objectives of external action, which the Lisbon Treaty combines in one overarching provision. In addition, fundamental rights must be respected in all areas of European activity; foreign affairs are not generally excluded from their field of application. Article 6 EU states unequivocally that the Union 'is founded' and 'shall respect fundamental rights'. Moreover, neither the European Convention on Human Rights nor the EU Charter of Fundamental Rights exempts foreign policy from the substantive legal constraints inherent in all human rights guarantees. Both principal sources of EU human rights mandate public authority to apply human rights ‘to everyone within their jurisdiction’ or are explicitly and without exception ‘addressed to the institutions, bodies, offices and agencies of the Union’. However, the application of human rights to foreign policy measures does not necessarily entail the application of the domestic protection regime without modification; conversely, the potential assumption of reduced judicial scrutiny does not imply the moral irresponsibility of substantive policy decisions.

a) Judicial Control

The Court perceives itself as the guardian of the Treaty. It is therefore not surprising that it interprets the procedures and conditions for access to the Court as guaranteeing a maximum degree

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102 Tomuschat, above n 20, 29.
103 Art 300(2) EC and Art 218(9) TFEU; the Treaty is silent on the termination of agreements, which might either be regarded as an actus contrarius to conclusion (and require consent) or follow the suspension procedure by means of analogy; regarding the position of national parliaments vis-à-vis European law-making as a potential model for reinforced powers of the EP, see above section II.2.
104 See, again, Art 21 TEU-Lis.
105 Art 1 ECHR and Art 51(1) of the Charter of Fundamental Rights; the application in principle leads in a second step to a closer analysis of the conditions for and limits of their application to specific foreign policy measures. Generally on EU fundamental rights, see J Kühling in this volume.
of judicial control over the interpretation and application of the Community’s foreign affairs constitution. Its regular judicial powers are complemented by the special procedure of Article 300(6) EC on the control of envisaged agreements prior to their conclusion. The Court’s control function before the entry into force intends to ‘forestall complications’ and avoid any ‘serious difficulties’ which would occur if the Court declared an agreement to be incompatible with the Treaty after its entry into force. Thus, the judicial control of European external action is integrated in the institutional protection mechanisms of a Community based on the rule of law, in which the Court ‘shall ensure that in the interpretation and application of this Treaty the law is observed’. On the basis of this wide understanding of its judicial oversight function, the Court has on various occasions maintained the primacy of the European Treaties over international obligations.

Not surprisingly, the Court was heavily criticised when it first suspended the implementation of an international agreement after its entry into force by declaring an action of annulment against its conclusion to be admissible and well founded. As a result, the Community may not implement the agreement domestically and assumes liability under international law for non-compliance with its obligations. Similar objections have been raised against the annulment of the European Union implementing legislation of UN sanctions against individuals. This option of retroactive judicial control confirms the mixed monist–dualist standpoint of the Court whose openness towards international law has always ended where the autonomy of European law is at stake. Its supervision of the EC implementation of UN sanctions is only the most recent and prominent example of the Court preserving ‘the constitutional principles of the EC Treaty against legal interferences from international law. The Court maintains its principled standpoint that the Community legal order as ‘an autonomous legal system (cannot) be prejudiced by an international agreement’.

Nonetheless, the Court’s control of international activities is not as universal as these prominent human rights cases suggest. Most judgments on the compatibility of international agreements with the EC Treaty have hitherto concerned the vertical delimitation of competences between the Community and the Member States and the horizontal powers of institutions in different policy fields. In addition, we have an established case law only on the application of human rights standards to domestic European legislation implementing, directly or indirectly, obligations under international law: it is possible to challenge the decision approving an international agreement with human rights arguments. The pre-eminence of European human rights standards extends to the implementation of UN sanctions. Autonomous Community instruments with an international dimension, in particular anti-dumping
measures, must similarly respect the general principles of Community law, including EU fundamental rights.\textsuperscript{115} In all these cases, the Court assumes its original mission to protect the rights of European citizens and companies against domestic European implementing legislation: ‘[T]he Community judicature must, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights.’\textsuperscript{116} In contrast, we find only a small number of rulings on the substantive constraints of foreign affairs whenever it acts outside the realm of domestic European implementing legislation. With a view to the objectives of external action, this prevalent judicial silence is not astonishing, since Treaty objectives are generally regarded to have only limited legal implications. As to human rights, the limited number of judgments indicates that there are fewer problems in reality than in the domestic arena, where we observe an extensive case law on human rights protection. One reason for the limited weight of the Court’s case law on the foreign affairs constitution is reduced judicial scrutiny standards.

b) Political Questions?

The Court itself has so far not explicitly recognised whether it exercises full judicial scrutiny over the substantive constraints of European foreign policy outside the reach of domestic implementing measures. In this respect, the assumption of US constitutional doctrine establishes an important point of reference. In the traditional understanding of US constitutional law, sovereign acts of third states are excluded from judicial control (act of state doctrine), foreign policy decisions of other branches of government cannot be scrutinised by the courts (political question doctrine) and the fundamental rights under the US Constitution, at least in principle, apply only to US territory.\textsuperscript{117} A closer look at the constitutional arrangements in EU Member States gives us a different picture. German constitutional law in particular, which Thomas Franck exploits as an alternative model in his critique of the US Supreme Court, assumes that foreign affairs are not immune to judicial control, the courts rather recognising ‘a wide margin of political appreciation on the side political institutions authorised to take the relevant decisions’.\textsuperscript{118} On the basis of a comparative survey of the 12 Member States at the time, Advocate General Damon comes to a similar conclusion: foreign affairs are not generally excluded from judicial scrutiny by the ECJ, which rather exercises judicial restraint.\textsuperscript{119}

Without recourse to the comparative argument, other Advocates General support a similar model, which combines judicial control with reduced scrutiny standards. Thus, Jacobs argues prominently with a view to the estimation of a serious international tension constituting a threat of war that ‘there are no judicial criteria by which such matters may be measured . . . The decision . . . is essentially of a political nature.’\textsuperscript{120} Similarly, Cosmas suggests that the appraisal of the military importance of the Italian holiday island of Capri is subject to a ‘wide margin of appreciation’ of the Member State concerned.\textsuperscript{121} His colleague Léger proposes to

\textsuperscript{115} See the argument in Case C-69/89 Nakajima [1991] ECR I-2069, paras 107–32.
\textsuperscript{116} Cases C-402/05 P and C-415/05 P, above n 75, para 326.
\textsuperscript{118} Entscheidungen des Bundesverfassungsgerichts 40, 141, 178 (Ostverträge); the judgment plays an important role in Franck, above n 7, 97–125; German constitutional law doctrine follows the Court, eg Tomuschat, above n 20, 55–8; Hailbronner, above n 27, 19–22; Calliess, above n 8, 33–4; for a more critical standpoint, see Möllers, above n 34.
\textsuperscript{120} AG Jacobs in Case C-120/94 Commission v Greece [1996] ECR I-1514, no 65.
\textsuperscript{121} AG Cosmas in Case C-423/98 Albere [2000] ECR I-5965, no 54; the ECJ does not decide the question in paras 21–3, since the national court had not provided it with the necessary information; it should be noted that the island of Capri is located near the regional NATO headquarters in Naples.
limit the control of privacy concerns over the exchange of flight passenger name records between the EU and the US ‘to determining whether there was any manifest error of assessment on the side of (the Council and the Commission)’.\textsuperscript{122} One also remembers the related assumption with a view to the direct applicability of WTO law that a powerful role of ‘the Community judicature would deprive the legislative or executive organs of the Community of the scope for manoeuvre enjoyed by their counterparts in the Community’s trading partners’,\textsuperscript{123} Even the \textit{Kadi} judgment recognises that ‘overriding considerations to do with safety or the conduct of the international relations of the Community and of its Member States may militate against\textsuperscript{124} the application of regular protection standards.

It certainly follows from the fundamental importance of the observance of law in the European legal order and the Court’s case law that all public authority is subject to judicial control. Foreign affairs are in this respect not exempted from judicial oversight: ‘[M]easures which are incompatible with the fundamental rights . . . may not find acceptance in the Community.’\textsuperscript{125} The extension of judicial control to the substantive constraints of foreign affairs does not, however, imply that the scrutiny standards should be the same in all circumstances; reduced scrutiny does not contradict the constitutional principles of European law. Even within the single market there are examples of reduced judicial supervision, including core areas of internal Community activity, such as agriculture or the fundamental freedoms.\textsuperscript{126} It follows that the limited parallelism of the constitutional foundations of internal and external action extends to judicial control powers. We have to consider and decide in each individual case whether there are sufficient reasons to reduce the intensity of judicial scrutiny. This allows the Court to pay adequate respect to the particularities of foreign affairs and interpret Community law in the light of the international context.\textsuperscript{127}

c) Substantive Orientation

Reduced judicial scrutiny does not imply substantive irresponsibility of foreign affairs. European foreign policy is not meant to resemble neo-realist power projection that pursues only the European self-interest; instead, the constitutional objectives of European external action explicitly comprise a moral dimension.\textsuperscript{128} Reduced judicial scrutiny rather entails the responsibility for the realisation of the Treaty objectives lying primarily with the political institutions. These must respect the substantive orientation of foreign affairs, but retain a wide margin of appreciation of how to translate the abstract objectives into specific foreign policy measures. One example: with a view to the promotion of human rights, the institutions have developed a plethora of instruments in recent years, all of which aim at the universal

\textsuperscript{122} AG Léger in Case C-317/04, above n 109, no 231; the ECJ annuls the agreement for reasons of competence.
\textsuperscript{123} Case C-149/96, above n 81, para 46; with a view to reciprocity under international law; Krajewski, above n 41, 447, and Uerpmann-Wittzack, above chapter 4, section II.2(a)(ee), identify a similarity with the political questions doctrine.
\textsuperscript{124} Cases C-402/05 P and C-415/05 P, above n 75, para 342, on the right to defence and to a fair trial; similarly, the Court recognises the ‘margin of appreciation’ of the Community legislator in the regulation of property issues (para 360) and maintains the effects of the contested legislation for a limited time period (paras 373–6); AG Poiares Maduro, ibid no 45, had more rigorously ‘reaffirm(ed) the limits that the law imposes on certain political decisions’.
\textsuperscript{125} Thus, the uncompromising statement in Case 5/88 \textit{Wachauf} [1989] ECR 2609, para 17.
\textsuperscript{127} ‘The Court generally emphasises the openness of the EC legal order towards international law, eg in Case C-286/90 \textit{Poulten} [1992] ECR I-6019, para 9: Community law ‘must be interpreted, and its scope limited, in the light of the relevant rules of the international law’.
\textsuperscript{128} See Art 21 TEU-Lis and above section II.1.
advancement of democracy, the rule of law and human rights. From a legal perspective, the introduction of human rights clauses in agreements with third states commands particular attention; during the last 15 years they have become a standard component of the Community’s treaty-making practice. Whenever the suspension of an international agreement based on the violation of its human rights clause affects the legal position of individuals, the Court controls whether the requirements of public international law have been respected by the Community institutions. The preceding foreign policy decision for or against the suspension remains, however, the prerogative of the political institutions; the Court’s judicial control in this respect is limited to ‘manifest errors of assessment concerning the conditions for applying those rules’. Similarly, the Court should not decide whether or not it is appropriate to include a human rights clause in an agreement with specific third states (China, Australia). The underlying appreciation of the political situation and the evaluation of the arguments for or against specific policy decisions remains the prerogative of other institutions. Reduced judicial scrutiny of such decisions turns the spotlight back on the political arena, which has to decide about the substantive orientation of European foreign policy under the critical observation of the general public and the academic community.

IV. Intergovernmental Foreign Policy

Measured in its official purpose ‘to assert its identity on the international scene’, the Common Foreign and Security Policy (CFSP) has failed repeatedly—but nonetheless constitutes an important field of European integration. There have been several explanations for Europe’s initial failure in the former Yugoslavia, its division during the war in Iraq and its impotence in principal international crises, such as the Middle East Peace Process. One factor is the constitutional foundations of the CFSP, which has been designed as the Union’s ‘second pillar’ in deliberate contrast to the orthodoxy of the Community method. Many observers conclude that the rejection of the supranational model constitutes one reason for the CFSP’s tangible failure. It lacks the capabilities to realise the flamboyant promise of a common foreign and security policy. The achievements and deficits of the legal and institutional arrangements for the CFSP are being presented against this background in this section. We shall see that the deliberate rejection of the supranational methodology can be positively rationalised with the strategic quality of international relations.

After the initial failure of the European Defence Community in the 1950s, the Member States did not renounce the ultimate goal of ‘political union’; rather, they adapted the initial


132 Ibid, para 52.

133 Originally, Art B, 2nd indent EU Treaty; today, Art 2 EU; differentiating Art 3(5) TEU-Lis.


135 On the failure of the EDC, see P Gerbet, La construction de l’Europe (3rd edn, 1999) 121–62; projects for the realisation of ‘political union’ in the following decades are presented by J Mischo, ‘Les efforts en vue
ambition and the underlying method for its realisation. Instead of grand projects, they opted for the gradual approximation of national foreign and security policies within informal frameworks which established a common practice of policy co-ordination step by step. The principles and procedures guiding the European Political Cooperation (EPC) were first formalised within the wider Treaty framework of the Single European Act. When the Treaty of Maastricht transferred and modified these provisions within the new second Treaty pillar on the CFSP, it again opted against the categorical conversion through supranationalisation, resuming the path of gradual formalisation instead.\textsuperscript{136} The incremental change continues: Amsterdam introduced the position of the High Representative; since 1999, defence integration has been advanced considerably; and the European Union has concluded multiple international treaties and set its sights on the uniform external representation. Building upon the contents of the constitutional project, the Treaty of Lisbon implements further modifications; again, incremental change through gradual adaptations guides the reform of the CFSP.\textsuperscript{137}

1. Intergovernmental Decision-Making

Only in the early years of its existence was the co-ordination of national foreign policies 'intergovernmental' in the literal sense of exclusive meetings between governmental officials without a joint institutional infrastructure. Meetings of foreign ministers within the EPC were deliberately organised in national capitals independent of Council meetings in Brussels or Luxembourg. The choice of location was a symbol for the sovereign dominance of national governments over the EPC.\textsuperscript{138} Only the Maastricht Treaty established the CFSP as an autonomous international forum for co-operation with the corresponding powers of the Council to adopt legal instruments under the EU Treaty.\textsuperscript{139} However, within the Union’s ‘second pillar’, neither the regular decision-making procedures nor supranational legal principles have applied to date. In this regard, one may continue to describe the CFSP as an intergovernmental policy field in order to distinguish it from the specificities of the Community method.

The institutional particularity of the CFSP is manifest when we consider the central role of national governments in foreign policy decision-making. Both the deliberation and the ultimate decision are almost exclusively limited to the (European) Council, which exercises full control over the contents and reach of all foreign policy measures.\textsuperscript{140} The prerogatives of the Council correlate with the almost complete segregation of the supranational institutions—under both the current Treaty regime and the Lisbon Treaty’s future rules: the Court of Justice has no jurisdiction over the CFSP\textsuperscript{141} and the Commission ‘shall be fully associated’.\textsuperscript{142} Facilitated by its

\textsuperscript{136} See Smith, above n 27, 79; idem, \textit{Europe’s Common Foreign and Security Policy} (2004); the evolution of primary law over the past decades construes as ‘ratchet fusion’ W Wessels ‘Theoretical Perspectives’ in D Mahncke et al (eds), \textit{European Foreign Policy} (2004) 61–96.

\textsuperscript{137} Only at first sight does the Treaty of Lisbon fall behind the Constitutional Treaty by maintaining the pillar structure, since the legal and institutional specificities of the CFSP would have survived behind the façade of the Constitution’s single Treaty framework; cp Cremona, above n 5, 1350–61; D Thym, ‘Reforming Europe’s Common Foreign and Security Policy’ (2004) 10 \textit{ELJ} 5, 5–18.


\textsuperscript{139} Art 30 SEA conceptualised the EPC as a co-operation of the ‘High Contracting Parties’.

\textsuperscript{140} Arts 13–18 EU guarantee the Council’s powers and the lead function of the European Council.

\textsuperscript{141} See Art 46 EU and Art 275 TFEU with a limited exception for sanctions.

\textsuperscript{142} See Arts 18(4), 22(1) and 27 EU, and for the practice S Duke and S Vanhoonacker, ‘Administrative Governance in the CFSP’ (2006) 11 \textit{EFA Rev} 163; under the Treaty of Lisbon the association of the Commission is accomplished through the High Representative in her/his function as Vice-President of the Commission.
actual presence in the Council meetings, the Commission may at best influence the latter’s deliberations through constructive policy proposals. Its privileges under the supranational method have no equivalent in the CFSP: it has no monopoly of initiative, does not control the ministerial bureaucracy in the Council Secretariat and may not challenge the Council or the Member States in the Court of Justice.

Remarkable is the almost complete exclusion of the European Parliament, which lags far behind its limited involvement in supranational external relations. It is not even consulted before the adoption of specific legal instruments realising the CFSP; rather, it is kept regularly informed and shall be heard ‘on the main aspects and the basic choices’ of the CFSP through the Council’s periodic policy reports. Repeated calls for an extension of parliamentary control powers remained fruitless—including the reform project of the Constitutional Treaty. Similarly, the Parliament’s attempt to enhance its influence over the CFSP through ‘democratic blackmail’ by linking an increase in the CFSP budget to greater parliamentary involvement had no lasting success. Only indirectly may the European Parliament, together with national parliaments, exercise authority over foreign and security policy. From a constitutional perspective, the Council remains the institution responsible to unfold and direct the course and contents of the CFSP.

The Council set up an extensive ministerial bureaucracy to prepare and implement the CFSP. In practice, most decisions are prepared with great care and foresight in the Political and Security Committee (PSC), which has turned into the political ‘mind’ of the CFSP in recent years. Under the stewardship of the High Representative, currently Javier Solana, the Council Secretariat has been constantly extended in recent years—mirroring and rivalling the Commission’s directorates general. From a legal standpoint, it is not important whether the Council takes its decisions at spontaneous meetings of national foreign ministers or prepares them in institutionalised fora for debate with the support of numerous civil servants. However, political science emphasises that the institutionalisation of CFSP decision-making has resulted, even without legal supranationalisation, in the de facto ‘Brusselisation’ of European foreign policy, and this has contributed to its increased success. Regular contact between the policy actors, the reorganisation of national foreign ministries and the formation of dedicated staff lay the foundation for the gradual alignment of national foreign policy preferences and the formulation and realisation of joint approaches. The Lisbon Treaty goes one step further when it combines the institutional foreign affairs infrastructure of the Council Secretariat and the

143 Art 21 EU.
144 The present Art 21 EU follows Art 30(4) of the Single European Act and continues as Art 36 TEU-Lis without major modification; on their evolution and analysis, see Thym, above n 31, 110–13.
145 For the discussion in the 1990s, see J Monar, ‘The Finances of the Union’s Intergovernmental Pillars’ (1997) 35 JCMS 57; for later developments, see Thym, above n 31, 113–17. An indirect success of the EP was the promotion of cost-intensive foreign policy instruments such as election monitoring within the first pillar; consider section V.2 below.
146 See Thym, above n 31, 117–23.
147 Art 25 EU and the analysis by A Juncos and C Reynolds, ‘The Political and Security Committee’ (2007) 12 EEA Rev 127; in contrast to the earlier Political Committee, the PSC is a permanent body whose members reside in Brussels; Council working parties prepare individual policy questions for debate in the PSC.
150 On the basis of the constructivist school of international relations theory, see J Øhrgaard, ‘International Relations or European Integration: Is the CFSP sui generis?’ in Tonra and Christiansen (eds), above n 11, 26, 28–32; K Glarbo, ‘Reconstructing a Common Foreign and Security Policy’ in T Christiansen et al (eds), The Social Construction of Europe (2001) 140.
Commission in the European External Action Service under the auspices of the High Representative (formerly known as foreign minister).  

Extralegal considerations also help us to better understand why the dynamic evolution of the CFSP depends only to a limited extent on the reform of its legal and institutional foundations in the EU Treaty. A closer look at the development of primary law since the Maastricht Treaty demonstrates that the Master States have certainly rejected the CFSP's supranationalisation but have followed the Community method in that respect, as they conceptualised the advance of the CFSP through procedural reform, the curtailment of unanimity and restructured legal instruments. The foreign affairs provisions in the EU Treaty assume that the CFSP is being realised through the adoption of legal instruments (Joint Actions, Common Positions and Common Strategies) on the basis of formalised decision-making procedures, which, in particular circumstances, even provide for qualified-majority voting; the regular unanimity requirement is mitigated by the specific institute of constructive abstention and the option of enhanced co-operation.

In practice, these procedural reforms have only had a limited influence over reality. The Council's daily practice illustrates that legal instruments are only adopted whenever the projection of personnel or the dispersal of funds requires a formal legal basis in a Joint Action; for important political statements, however, the Council prefers the informal vehicle of Council Conclusions, Declarations by the Presidency and internal strategy papers to the adoption of Common Positions or Strategies. One example: the European Security Strategy—the central political reference document of the CFSP—was deliberately not adopted as a Common Strategy within the meaning of Article 13 TEU, which would have allowed for the adoption of implementing decisions by qualified majority; rather, it constitutes a non-binding elaboration of the High Representative which was politically approved by the European Council. The informal practice of the CFSP may of course be explained with the resistance of the Member States to limit their freedom of manoeuvre through legally binding obligations and the Treaty's choice not to allow for the adoption of foreign policy decisions against the declared will of any Member State.

One may rationalise the practical irrelevance of most decision-making procedures and legal instruments in the CFSP with substantive differences between domestic law-making and international diplomacy. Supranational law-making characterises the Community method; this model cannot be projected, however, without modification to the international sphere and relations with third states. Even when all Member States unreservedly comply with an official Common Position on the Union’s approach to a particular matter of foreign policy as if it were a directly applicable supranational legal act, the Union’s foreign policy would not necessarily be successful. International relations are classified by their predominant political character, with

151 See below section V.3.

152 In particular, the Treaty of Amsterdam followed this path with the reform of legal instruments and the option of constructive abstention and qualified majority voting in line with Art 23(2) EC; enhanced co-operation was extended to the CFSP by the Treaty of Nice.


154 During my traineeship (Referendariat) with the German Permanent Representation with the EU (Political Department) in the year 2004 I learned that Council Conclusions in particular are as carefully drafted as legal instruments, although they have no binding character as a political declaration of intent.


156 Art 23(2) EU only allows for qualified majority voting where a European position has earlier been agreed unanimously and is moreover qualified by the modified codification of the Luxembourg compromise in the same provision; the passerelle clause of Art 31(3) TEU-Lis facilitates the extension of qualified majority voting; more positive on the potential of legal integration in the CFSP is A Dashwood, ‘The Law and Practice of CFSP Joint Actions’ in Cremona and de Witte (eds), above n 62, 53.
only a corollary legal dimension: North Korea will not give up its nuclear weapons only because the European Union says so in its Official Journal. Rather, successful foreign policy requires the identification of strategic goals and the constant adjustment of methods for their realisation. Whether or not you call it diplomacy, it differs substantially from domestic politics. The success of the CFSP depends primarily on the persuasiveness and credibility of its policies, the support of the Member States and its strategic perception in third states—less on the binding force of internal decisions.

2. Executive Authority in Military Matters

Most tangible is the intergovernmental structure of the foreign and security policy within the European Security and Defence Policy (ESDP), which legally constitutes an integral part of the CFSP. Defence integration has made considerable headway during the past 10 years; in the meantime, the European Union has successfully completed a number of military crisis management operations. Noteworthy from a constitutional perspective is the limited influence of legal norms over its rapid evolution; the general provision of Article 17 EU remains the principal legal basis in the current Treaty. Again, the supranational model of shaping European policy through extensive textual references in primary law is not being followed in the wider field of security and defence policy. Only the future Lisbon Treaty attempts to reflect the dynamic evolution of the ESDP through the modifying codification of the existing practice; as legal snapshots, the new provisions do not, however, entail the constitutional reorientation of defence integration. The ESDP’s current and future constitutional foundations are aptly described with the core principles of ‘recourse’ and ‘voluntariness’.

In principle, European defence integration does not involve the institution of operative capacities at European level; rather, military operations are conducted under recourse to the military capacities of the Member States (‘principle of recourse’). Correspondingly, the reform of the armed services remains a national prerogative that is only co-ordinated within the European Union. On a voluntary basis, the national governments agree on headline goals for the improvement of military capabilities with a view to providing the ESDP with the hardware necessary to actually deploy their armed forces abroad for peace-keeping and peace-enforcement operations. In this regard, the ESDP also benefits from the continued reform efforts within NATO and other bi- and multilateral frameworks for defence co-operation, such as the Eurocorps and the European Armaments Agency OCCAR, which co-ordinates the joint purchase of the Airbus A400M military transport aircraft. Lately, the European Union has also established its own institutions and resources for the improvement of military capabilities,

157 See Art 2, 2nd and 17th indents EU.

158 An extensive and constantly updated overview of civil and military ESDP operations may be found on the Council’s website at www.consilium.europa.eu.

159 See Arts 42–6 TEU-Lis, which also rebrand the ESDP into CSDP (‘Common’ instead of ‘European’); most modifications concern new forms of flexible defence integration (eg the European Defence Agency), which constitute no innovation of the constitutional debate but take up political developments in parallel to the European Convention; for details, see the instructive analysis by H Bribosia, ‘Les nouvelles formes de flexibilité en matière de défense’ in Amato et al (eds), above n 54, 835; more generally on flexibility in the ESDP, see D Thym, Ungleichzeitigkeit und europäisches Verfassungsrecht (2004) 173–6; R Wessel, ‘Differentiation in EU Foreign, Security and Defence Policy’ in M Trybus and N White (eds), European Security Law (2007) 225.

160 This terminology was introduced by S von Kielmannsegg, above n 148, 108–42; idem, ‘The EU’s Competences in Defence Policy’ (2007) 32 EL Rev 213.

161 At present the Headline Goal 2010, including the ‘battle group’ concept, puts the emphasis on qualitative instead of quantitative improvements in order to improve interoperability, flexibility and deployability; for details, see S Biscop, ‘Able and Willing?’ (2004) 9 EFA Rev 509–27.

162 For details, see Auveret-Finck, above n 148.
such as the European Defence Agency and the Civil-Military Cell as the nucleus of an EU headquarters.\textsuperscript{163} With a view to the general character of Article 17 EU, these limited EU capacities do not violate the constitutional ‘principle of recourse’.\textsuperscript{164}

Whenever Member States support the launch of a military operation in the Council they are not legally obliged to contribute troops or other capabilities. Instead, the ‘principle of voluntariness’ underlying the constitutional rules for the ESDP implies that the deployment of their armed forces remains the autonomous decision of each Member State. This leaves ample room for the respect of national constitutional requirements, including the consultation of national parliaments.\textsuperscript{165} Possible operations encompass both peace-keeping and the ‘tasks of combat forces in crisis management, including peacemaking’;\textsuperscript{166} only collective defence is currently not covered by the ESDP, which facilitates the participation of the neutral Member States. The Treaty of Lisbon will advance one step further without, however, imposing new obligations on the neutral Member States.\textsuperscript{167} In reality, the ESDP has always focused on relatively benign peace-keeping operations, leaving more dangerous and politically sensitive operations to NATO. In the long run, however, this division of labour may gradually become blurred, thereby enhancing the potential rivalry between the Union and the Alliance as the principal fora of European defence co-operation.\textsuperscript{168}

European foreign affairs benefit from the supplementary military dimension provided for by the ESDP. Today, the European Union has recourse to the whole spectrum of potential foreign policy instruments ranging from trade, environmental and developmental policies over diplomatic initiatives to military operations. During the last few decades these different means of action have been dispersed at different levels of government; for the first time they are now reunited in the hands of one actor. The corresponding option to combine different policy instruments to meet the specific requirements of an international crisis may prove to be of crucial added value to European foreign affairs. In this regard, ESDP does not lead to the ‘militarisation’ of European foreign policy, whose practice and constitutional foundation are rather committed ‘to preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter’.\textsuperscript{169} It must respect the prohibition of the use of force under international law.\textsuperscript{170}

\begin{itemize}
\item \textsuperscript{163} On the European Defence Agency complementing OCCAR, see Council Joint Action 2004/551/CFSP, [2004] OJ L245, 17; on the civil-military cell, see Biscop, above n 161, 523–6.
\item \textsuperscript{164} For details, see D Thym, ‘Die völkerrechtlichen Verträge der Europäischen Union’ (2006) 66 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 863, 905; against, see S von Kielmannsegg, above n 148, 230.
\item \textsuperscript{165} For a comparative account, see G Nolte and H Krieger, Europäische Wehrrechtssysteme (2002) 60–70; section C of the Decision of the Heads of State or Government on the Concerns of the Irish People on the Treaty of Lisbon of 18/19 June 2009 confirms the voluntariness of troop contributions.
\item \textsuperscript{166} Art 17(2) EU codifies the so-called Petersberg-tasks; for legal limitations of the EU’s current defence powers, see S von Kielmannsegg, ‘The Meaning of Petersberg’ (2007) 44 CML Rev 629; S Dietrich, ‘Die rechtlichen Grundlagen der Verteidigungspolitik der EU’ (2006) 66 Zeitschrift für ausländisches öffentliches Recht 663, 569–75; on the Danish opt-out, see Thym, above n 159, 176–9.
\item \textsuperscript{167} Consider Art 42(7) TEU-Lis; for the Austrian perspective, see J Rehrl, ‘Beistandsgarantie and Solidaritätsklausel’ (2005) 60 Zeitschrift für öffentliches Recht 31; at present the introduction of a common defence obligation requires the activation of Art 17(1) EU.
\item \textsuperscript{168} On the legal dimension of relations between the EU and NATO, see M Reichard, ‘Some Legal Issues Concerning the EU–NATO Berlin Plus Arrangement’ (2004) 73 Nordic Journal of International Law 37; with a view to the future common defence clause in the Lisbon Treaty, see H Krieger, ‘Common European Defence’ in Trybus and White (eds), above n 159, 174.
\item \textsuperscript{170} Consult Uerpmann-Wittzack, above chapter 4.
\end{itemize}
ments European foreign affairs with a military dimension, but does not result in its militaristic reorientation.171

3. Characteristics of Intergovernmental Union Law

European foreign affairs are not founded upon uniform constitutional arrangements, but characterised by the constitutional dichotomy between supranational Community law and intergovernmental Union law, the defining characteristics of which remain ambiguous. We know, however, that the European Union possesses its own international legal personality, which Article 24 EU itself had not clearly recognised but which the treaty-making practice based on the Article established without reasonable doubt. Since 2001 the Union has concluded more than 80 agreements with third states and intergovernmental organisations in the field of the ESDP alone. Its resulting international legal personality complements the European Community’s separate legal personality and the Member States’ original statehood.172 The Treaty of Lisbon will terminate the current ‘legal schizophrenia’ when it merges the separate legal identities of the European Union and the European Community into a single organisation.173

The existence of international legal personality does not imply the pervasive supranationalisation of the intergovernmental Union legal order. Instead, one has to conclude on a case-by-case basis whether the structure of the second pillar argues for or against the transfer of supranational legal principles. This contribution cannot replace this analysis. With a view to the underlying constitutional regime of European foreign affairs, some assumptions shall nevertheless be pointed out. They will persist after the entry into force of the Lisbon Treaty, since it continues the intergovernmental characteristics of the CFSP within a uniform Treaty framework.174 The constitutional characteristics of the intergovernmental foreign and security policies underline that European integration does not lead towards the unmitigated federalisation of European foreign affairs, thereby not generally calling into question the sovereign independence of the Member States in their international relations.175

Generally speaking, one may distinguish two opposing lines of argument which either support the convergence of the Union and Community legal orders176 or emphasise the parallelism between intergovernmental Union law and classical public international law177—even if the distinction is relativised insofar as each faction recognises that at least some principles of the supranational legal order can (or cannot) be applied to the second pillar. Moreover,

172 For details, see Thym, above n 164, 864–99; R Wessel, ‘The European Union as a Party to International Agreements’ in A Dashwood and M Maresceau (eds), Law and Practice of EU External Relations (2008) 152.
173 See Arts 1 and 47 TEU-Lis.
174 In contrast to cooperation in criminal matters under the third pillar, the CFSP will not be supranationalised—and would also have maintained its intergovernmental character under the Constitutional Treaty; Art 24(1)(2) TEU-Lis confirms: ‘The CFSP is subject to specific rules and procedures.’
175 For the protection of national sovereign identity as the main reason for the intergovernmentalism of the CFSP, see Denza, supra n 27, 19; C Hillgruber, ‘Der Nationalstaat in der überstaatlichen Verflechtung’ in J Kensee and P Kirchhof (eds), Handbuch des Staatsrechts (2004) vol III, § 32, para 91; differentiating, see A von Bogdandy, ‘Die Europäische Union als supranationale Föderation’ (1999) 22 Integration 95, 98–9.
177 Decidedly for the international viewpoint: Entscheidungen des Bundesverfassungsgerichts 113, 273, 301 (Europäischer Haftbefehl); ‘Partial legal order which has consciously been assigned to public international law’; among the literature, see A Haratsch, C Koenig and M Pechstein, Europarecht (2006) 35–6; Koskenniemi, above n 27, 30.
some authors emphasise the international legal roots of the European legal order in its entirety by pointing out that all general principles of supranational Community law, including its direct effect and supremacy, may be construed as the expressions of a highly specialised self-contained regime of public international law. This perspective has the appeal that it perceives the intergovernmental Union law as an intermediate stage and does not require the categorical distinction between its supra- or international classification.178

Defining features of Community law include its supranational legal effect on the basis of the transfer of sovereign powers whose exercise permeates into the domestic legal systems whenever supranational rules are directly applicable. Intergovernmental Union law, by contrast, has no direct effect; no competences are being transferred to the European level.179 This follows already from the wording of the Member States’ obligation to respect the CFSP Joint Actions ‘in the positions they adopt and in the conduct of their activity’.180 The Lisbon Treaty states expressly: ‘The adoption of legislative acts shall be excluded.’181 Conceptually, the CFSP does indeed concern the identification and implementation of foreign policy positions, not the legislative impact on individuals.182 The transfer of competences to the European level is neither provided for nor required under the present and future constitutional arrangements underlying the CFSP. Member States are legally obliged to respect Union law but maintain the competence to behave differently in their domestic laws and in relation to third states—though with the consequence of breaching the law. Correspondingly, the CFSP is a concurrent offer of foreign policy and defence co-operation without implying the pre-emptive exclusivity of supranational external competences.183

The EU Treaty does not provide for the judicial control of intergovernmental Union law, which may only be achieved indirectly whenever the Community or the Member States affect the legal position of individuals when they implement CFSP measures.184 In these cases, individuals must seek judicial control of the implementing act before the competent national or supranational Courts.185 Moreover, the European Court of Human Rights (ECtHR) in Strasbourg may activate its residual jurisdiction over European law with a view to the exclusion of cases.


179 See F Dehousse, ‘La Politique étrangère et de sécurité commune’ in Dony and Louis (eds), above n 10, 439, 469–79; Eeckhout, above n 10, 395–409; Denza, above n 27, 30; Koutrakos, above n 50, 393–404; Gosalbo Bono, above n 178, 364; I Govaere, ‘The External Relations of the EU—Legal Aspects’ in Mahncke et al (eds), above n 136, 97, 105.

180 Art 14(3) EU, in obvious contrast to Art 249 EC; correspondingly, Arts 28–29 TEU-Lis; the reform of third pillar legal instruments by the Treaty of Amsterdam has deliberately not been extended to the CFSP; on framework decision in particular, see J Bast, below chapter 10, section II.4(a).

181 Art 24(1)(2) TEU-Lis.

182 Distinguish the special circumstances (i) when national armed forces are integrated into the EU chain of command and (ii) the requirement for national implementation whenever Union law regulates the legal position of individuals; more details are presented in Thym, above n 164, 904–8.

183 On the lack of exclusivity in contrast to the Court’s AETR case law, see Thym, ibid, 902–4.

184 Art 46 EU is clear about the exclusion of the ECJ’s jurisdiction in the CFSP; in future, CFSP decisions on sanctions can be challenged directly in accordance with Art 275(2) TFEU.

185 In the absence of a direct effect, either the Community or a Member State needs to implement CFSP measures which can then be challenged in court; for an action of annulment against an EC regulation implementing a CFSP sanction decision, see Case C-329/05 PKK and KNK v Council [2007] ECR I-439; similarly, national implementation decisions can be challenged in national courts, which may have to apply European legal review standards; consequently, the exclusion of the Court’s jurisdiction under Art 46 EU does not contradict Art 47 of the EU Charter of Fundamental Rights or Art 6 ECHR; for an extensive interpretation of rules on access to the Court, see Eckhout, above n 41, 17–22.
of judicial remedies in Luxemburg. This is of particular importance for civil and military ESDP operations under the political control and strategic guidance of the Council and the PSC. The ECtHR will have to fine-tune and expand its case law when individuals claim the legal responsibility of the European Union in Strasbourg in such circumstances. If the ECtHR maintains a restrictive approach, the individuals concerned will have to seek redress by challenging national implementing measures or military instructions in national courts.

V. Coherence and Complementarity

The European Union is no nation-state which centralises its foreign policy powers at the federal level. Beyond the Community’s exclusive external competences, the Member States are not obliged to act within the legal and institutional framework of the European Union. National governments preserve spheres for autonomous external action: be it because the Union’s competences do not allow for European action, or because the European actors cannot agree on a joint position or do not deem a common approach necessary. In all these cases, national foreign policy maintains its traditional lead function. At the same time, the European Union cannot shape international relations on the basis of its internal division of competences; rather, ‘the strength inherent in united action’ requires the effective co-ordination and common representation of the Union, the Community and the Member States. Coherence and complementarity of national and European foreign affairs constitute the external dimension of the European system of multilevel constitutionalism that is being built upon the non-hierarchical relations between national and European constitutional norms and emphasises the various linkages and interdependences within the European constitutional sphere.

1. Vertical Co-operation: European Union & Member States

It has already been explained that the supranational external powers unfold in parallel to internal law-making. Only after the adoption of legislative acts do the concurrent external powers of the Community turn into an exclusive competence for external action. This case-by-case approach entails the overall picture of a patchwork of national and European competences, which are subject to constant change with a view to the dynamic evolution of the European primary law and the adoption of new internal rules. In contrast, international treaties require a clear division of responsibility and competences; in particular, multilateral conventions, such as UNCLOS and the body of world trade law, cannot adapt their substantive reach to the limits of European powers. Rather, the Community and the Member States have to adapt themselves to the requirements of international law-making. For this reason, the Community and the Member States developed the practice of ‘mixed agreements’, which overcome the...
internal division of competences through joint participation of the Community and the Member States as autonomous contracting parties.

Inherent pragmatism explains the success of mixed agreements: they facilitate the uniform external representation of the Community and the Member States and neutralise internal disputes about the exact delimitation of competences. The Community and the Member States appear as a uniform external actor. As a result, however, their respective fields of responsibility are blurred; the unity of external representation inflicts the downside of confused international identity. European law doctrine struggles to disentangle the net of legal problems raised by the practice of mixed agreements. Most legal questions characterising the European foreign affairs constitution are mirrored in corresponding problems of the law of mixed agreements that cannot be traced in this chapter. The Court has repeatedly supported the practice of mixed agreements by assuming that treaties are covered by the ‘shared’ competence of the Community and the Member States. Constitutional conflicts are pragmatically eased through the emphasis on the duty of co-operation, which mitigates constitutional tensions procedurally and is subject to the Court’s judicial oversight.

In recent years, the international treaty-making practice of the European Union under the second pillar added a new twist to the law of mixed agreements: the conclusion of inter-pillar agreements with the Community and the Union as separate contracting parties, with the latter assuming the position of the Member States in traditional mixed agreements on the basis of Articles 24 and 38 EU. Given its limited scope, the first example of the agreement with Switzerland on its association with the Schengen law does not raise fundamental problems. The situation is more difficult when general association or partnership agreements extensively regulate European relations with a third state. Here, the renunciation of a separate status of the Member States undermines their independence in international relations—irrespective of questions of Union competence which persist under the Lisbon Treaty.

It should therefore be welcomed that the Member States have resisted their extensive substitution by the European Union for the time being—even if the eventual compromise of tripartite mixed agreements with the joint participation of the Community, the Union and the Member States causes new problems of constitutional delimitation.

2. Horizontal Co-operation: European Union & European Community

The dichotomy between the supranational external relations and the intergovernmental foreign policy co-operation generates concerns about conflicting decisions. Article 3 EU

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191 For comprehensive analyses, see J Heliskoski, Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States (2001); V Rodenhof, Die EG and ihre Mitgliedstaaten als völkerrechtliche Einheit bei umweltvölkerrechtlichen Übereinkommen (2008); D O’Keeffe and H Schermers (eds), Mixed Agreements (1983); J Bourgeois et al (eds), La Communauté européenne et les accords mixtes (1997); M Dony, ‘Les Accords mixtes’ in idem and Louis (eds), above n 10, 167–200; Eeckhout, above n 10, 190–223; Koutrakos, above n 50, 150–82; Kaddous, above n 77, 360–9; MacLeod et al, above n 71, 142–63; Nettesheim, above n 45, 456–9.

192 For a thorough analysis, read M Cremona, ‘Defending the Community Interest: the Duties of Co-operation and Compliance’ in idem and de Witte (eds), above n 62, 125.

193 For details, see Thym, above n 164, 894–8.

194 Art 47 EU delineates the Union competence negatively by protecting the EC competences, which include the prerogatives of the Member States which are explicitly guaranteed in the EC Treaty, such as harmonisation of education; in future, agreements may cover both the CFSP and other supranational policies under Art 218 TFEU with the uniform limitation of the Union’s competence in Arts 4–5 TEU-Lis.

195 On the dispute about the Union’s accession to the ASEAN Treaty of Amity and Cooperation and its participation in the future partnership and cooperation agreement with Thailand, see Thym, above n 164, 908–12; for the autonomous participation of the Member States in international relations as a precondition for sovereignty, see Hillgruber, above n 175; Denza, above n 27, 19.
obliges the institutions to ‘ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies’. Respect for this legal obligation is primarily entrusted upon the political decision-making process insofar as the institutions are required to seek the positive complementarity of their external actions (coherence) beyond the prohibition of direct contradictions (consistency). Only when decisions of the Community and the Union enter into direct conflict does judicial review provide an adequate forum to resolve the inconsistency. The Court has repeatedly emphasised that it stands ready to control the border between the pillars and will not refrain from annulling Community or Union legal acts transgressing into the territory of the other Treaty. Legally, the Court adjudicates the rule of Article 47 EU on the demarcation of EU competences in these cases. Its legal analysis focuses on the underlying delineation and allocation of spheres of responsibilities between the EC and the EU Treaties.

For Europe’s foreign affairs constitution, the distinction between intergovernmental conflict management and supranational development assistance is of particular relevance whenever we extend the latter on conflict prevention in line with the European Consensus on Development. The Court explicitly supports the dynamic interpretation of EC development policies, which nowadays cover specific measures in the fight against terrorism and to support peace and security as prerequisites for sustainable development. This example illustrates the evolutionary character of supranational external relations, which nowadays extend to various policy fields that had originally been perceived as potential subjects for the CFSP at the time of the Maastricht Treaty. In this regard, one may identify a constructive rivalry between the Community and the Union; the Parliament and the Commission advocate the adoption of new supranational foreign policy instruments and their generous funding, effectively accomplishing the indirect supranationalisation of European foreign policy through the back door. Community measures on the promotion of democracy and human rights are the best example of external action which only came onto the radar screen of the Community institutions after the wide interpretation of development policy. Supranational foreign policy even stretches into the field of military crisis management when military operations of the African Union are being supported under the African Peace Facility.

196 A comparison of the different language versions demonstrates that Art 3 EU prevents not only negative conflicts (inconsistency used in the English language version), but requires substantive complementarity (cohérence or Kohärenz in the French or German version); see R Wessel, ‘The Inside Looking Out’ (2000) 37 CML Rev 1135, 1149–52; A Missiroli, ‘European Security Policy: The Challenge of Coherence’ (2001) 6 EFA Rev 177.

197 Consider the annulment of a third pillar instrument in Case C-176/03 Commission v Council [2005] ECR I-7879 and of an EC legal act in Case C-317/04, above n 109. The direct conflict of substantive inconsistency regularly also constitutes a violation of competences which the Court may adjudicate under Art 47 EU.


202 See Decision 3/2003/EC of the ACP-EC-Council, [2003] OJ L345, 108; the peace facility is financed by national contributions to the European Development Fund outside the EU budget; this permits financial support for military operations even if the EC and the EU Treaty do not provide a legal basis.
It seems that the rivalry for the reach of supranational development policies and the intergovernmental CFSP is gradually subsiding into peaceful coexistence. The constitutional situation was clarified by the Court judgment on the Commission’s action of annulment against the CFSP support for the collection of small arms and light weapons in West Africa with a view to parallel EC activities under the Cotonou Agreement.\(^{203}\) One step further, the future Article 40 TEU as amended by the Lisbon Treaty emphasises the equal coexistence of the former pillars.\(^{204}\) Clear spheres of responsibility provide the basis for policy-oriented co-operation between supranational and intergovernmental external actions. The example of earlier cross-pillar conflicts about the legal regimes for economic sanctions and dual-use goods illustrates that such constructive co-operation is feasible; in these fields, the Community and the Union nowadays work together without any major friction.\(^{205}\) The present and future constitutional dichotomy between supranational and intergovernmental foreign policy therefore need not be a stumbling block for coherent and consistent foreign policy if the benefits of co-operation are recognised.

### 3. Unity of External Representation: Reform Perspectives

In contrast to domestic politics, foreign affairs are not primarily characterised by law-making but rather are typified by the identification of strategic goals and their political realisation. It follows that uniform external representation contributes per se to the success of foreign policy initiatives; personification supports the visibility of political positions and reinforces their impact in real life. This leads us to the project of establishing Europe’s single face and voice towards the world. Ever since the Treaty of Amsterdam introduced the post of the High Representative, the goal of uniform external representation has symbolised the reform of Europe’s foreign affairs constitution. One should not, however, overestimate its importance: under both the present and the future Treaty regimes the High Representative resembles more a spokesperson or High Commissioner than a national foreign minister; the current role is expressly limited to ‘assisting’ the Council and representing the CFSP ‘at the request of’ the Presidency.\(^{206}\) The first High Representative, Javier Solana, has nonetheless gained considerable influence and has been entrusted with important diplomatic missions, such as the arbitration in the constitutional crisis in Serbia and Montenegro and the negotiations about Iran’s nuclear programme.

The duo of the Council Presidency and the High Representative as the representatives of the CFSP is complemented by the Commission’s executive functions under the EC Treaty, which are personified by the Commissioner in charge of External Relations and the European Neighbourhood Policy, lately Benito Ferrero-Waldner (in addition, there are Commissioners with the portfolios of International Trade, Development and Enlargement).\(^{207}\) The resulting trio of external representation shall at present be mitigated by their joint appearance as the Union’s

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\(^{203}\) Case C-91/05, above n 199, paras 64ff; see also the instructive analyses by Dashwood, above n 156, and Garbagnati Ketvel, above n 186, 88–9.

\(^{204}\) In contrast to Art 47 EU, the Lisbon Treaty no longer aims solely to protect the EC competences; moreover, development assistance is orientated at the eradication of poverty as its ‘primary objective’ under Art 208(1) TFEU. For the standpoint of a member of the Commission legal service, see F Hoffmeister, ‘Inter-pillar coherence in the EU’s Civilian Crisis Management’ in Blockmans (ed), above n 40, 157.


\(^{206}\) Arts 18(3) 26 EU; at present, the external representation of the CFSP is primarily entrusted to the Council Presidency; in future, the High Representative’s role will be extended in line with Arts 18 and 27 TEU-Lis.

\(^{207}\) The allocation of portfolios may be altered at any time; Art 18(4) TEU-Lis preserves the variety in principle. The coexistence of different representatives is not a European specificity but may similarly be found in many nation-states, including the US.
‘troika’, which combines the Council Presidency, the High Representative and the Commissioner for External Relations in one uniform but three-headed grouping. This multiplication of actors may cause internal frictions and external confusion. It should therefore be welcomed that the Treaty of Lisbon preserves the constitutional project to establish a ‘Union Minister for Foreign Affairs’, albeit it under the misleading title of ‘High Representative of the Union for Foreign Affairs and Security Policy’, whose functions are not confined to the CFSP.

Conceptually, the project of a European foreign minister is characterised by its institutional pragmatism. The new post effectively merges the current functions of the Council Presidency, the High Representative and the Commissioner for External Relations without changing the underlying institutional balance. This simple personal union unites their representative tasks, while maintaining the constitutional dichotomy between the supranational and intergovernmental foreign affairs. Due to its ‘double hat’, the High Representative receives its instructions from the Council within the field of the CFSP, whereas it is fully integrated into the decision-making procedures of supranational external relations as a Vice-President of the Commission. It remains to be seen whether in reality this construction proves operable—or leaves the High Representative in a grey zone of vague political responsibility and double institutional loyalty in the face of the Council’s and the Commission’s mutual suspicion that he or she is a Trojan horse of the other institution.

The situation is further complicated by the future President of the European Council, whenever he or she assumes the Union’s international representation ‘at his level and in that capacity’, and the President of the European Commission reciprocates at the same level in order not to swing the institutional equilibrium in the Council’s favour. Such a new troika of High Representative, European Council President and Commission President would obviously run counter to the initial ambition of uniform external representation.

A single voice speaking on behalf of the European Union requires a ‘single mind’ to work out convincing and consensual foreign policy positions. Therefore, structural reforms of the decision-making procedures or the effective collaboration of the ministerial bureaucracies in Brussels and national capitals are crucial for the formulation of joint policies that the High Representative can articulate on the world stage. The position of the foreign minister would not in itself have prevented the division among the Member States on the Iraq war; for lack of unanimity, Europe’s single voice would have remained silent. The discussion about the reform of European foreign policy should therefore not be limited to the tangible question of external representation, but should encompass the constitutional infrastructure of institutions, competences and procedures. This includes the Union’s external representation in third states and with international organisations, which is currently undertaken by Commission delegations, a number of EU Special Representatives and the numerous diplomatic and consular missions of the Member States. Here, co-operation at the local level provides a considerable potential for more effective and efficient foreign policy management. In a further step, the combination of Union delegations within the European External Action Service, in line with the Treaty of Lisbon and future implementing decisions, will lay the basis for additional synergies and the reinforced unity of external representation.

208 For details, see Arts 18 and 27 TEU-Lis and the analysis of the identical rules in the Constitutional Treaty by Thym, above n 137, 18–22; C Grevi, ‘The Institutional Framework of External Action’ in Amato et al (eds) above n 54, 773, 788–95.
209 See my earlier argument in Thym, ibid.
211 Legal issues of active and passive European legation practice are scrutinised by J-V Louis, ‘La Personnalité juridique internationale’ in Dony and idem (eds), above n 10, 29–39.
212 A legal basis for implementing measures is provided by Art 27 TEU-Lis; for more details, see Grevi, above n 208, 796–800; ‘HC Report of Select Committee on Foreign Affairs’, HC Paper (2008) No 3, paras 189–203.
VI. Conclusion

Europe's foreign affairs constitution has been profoundly influenced by the assumption of supportive parallelism between internal and external policies. The Court’s projection of the supranational integration method to the external sphere is no constitutional altruism: its case law on both the implied external powers and the status of international law within the European legal order are motivated by the ultimate objective of protecting the autonomy of Community law. This primary orientation at the internal constitutional standpoint entails an inadequate examination of the specificities of the international legal and political context. An overarching analysis of the constitutional foundations of foreign affairs remedies this deficit by linking the domestic viewpoint to the external perspective. Individual legal questions, such as the direct applicability of international law and the limitations of judicial scrutiny, can thus be grounded solidly in the conceptual foundations of Europe’s foreign affairs constitution. Whenever the procedural or substantive particularities of the international environment contrast with the rigidity of the supranational constitution, the parallelism between the internal and the external constitutional regimes ends. This is noticeable in the rules governing the limited parliamentary control of international agreements.

The EU Treaty has deliberately established a distinct legal and institutional regime for the Common Foreign and Security Policy, which the Lisbon Treaty maintains. Instead of embarking upon the unmitigated federalisation of European foreign affairs, the Member States strive to maintain an original role for themselves in foreign policy—directly because of their residual national competences and indirectly through the intergovernmental structure of the CFSP. Irrespective of national prerogatives, the limited legalisation of the CFSP conforms to the strategic quality of foreign policy the politico-diplomatic character of which the Union cannot unilaterally reorganise on the model of the supranational integration method. The coexistence of the Union, the Community and the Member States requires their constant readiness to co-operate with each other to maximise the substantive coherence and complementarity of European external action. This confirms the particularity of the constitutional foundations of European foreign affairs, which cannot project the domestic integration model to the external sphere without its adjustment to the international legal and political context.
Legal Instruments and Judicial Protection

JÜRGEN BAST

I. Exercise of Public Authority and its Judicial Control as Complementary Constitutional Issues

According to Pierre Pescatore, a long-time judge at the European Court of Justice (ECJ), the Community’s sources of law are the key to the success of European integration—the emergence of a multinational legislature which has at its disposal a whole range of legal instruments for the exercise of public authority. The ‘system of institutional acts’ which are binding on individuals as well as Member States betokens the difference between the Community and public international law with its predominantly contractual instruments.

* I wish to thank Jochen von Bernstorff, Philipp Dann, Anusch Farahat, Julia Heesen and Isabel Röcker for critical comments, and Lenka Dzurendova for a draft English translation. I am also grateful to Lenka for her valuable assistance in preparing the updated version of this text.
If legal instruments constitute the language in which persons subjected to public authority are addressed, then judicial protection is a forum for the addressees to voice their objections. Both modes of communication—sovereign regulation serving the public interest on the one hand and granting judicial protection to those concerned on the other—are essentials of a public law of a liberal kind. Requiring them to be equivalent goes to the heart of our common understanding of the rule of law: ‘ubi potestas ibi remedium’, as it were. One might be tempted to assign the concept of legal instruments entirely to the enabling function of public law, and judicial protection to its constraining function. That would be too simplistic though, since shaping sovereign powers always involves elements of self-constraint and discipline, and judicial control is also meant to articulate the will of the legislator. The challenge to be met in this chapter is a due consideration of the complexities of this interrelation in the specific context of the European Union.

In line with the conception of this volume, I consider the legal instruments of the EU and judicial protection against their use to be constitutional issues of the first order. They concern classic themes of the institutional warp and woof of a polity and the citizen-state relationship. Taking the founding Treaties to be the formal constitution of the Union, as will be done here, the two issues become the subject of a constitutional discourse due to the very fact that they have been regulated in some detail in the Treaties themselves (a method which occasionally implies over-determination and ossification). This holds true mainly with respect to legal protection under the Treaties, which is characterised by an exhaustive enumeration of legal remedies (arg ex Article 240 EC) and a lack of general competence to legislate on matters of procedural law. As is to be shown, the regulatory framework in the Treaties is more fragmented in respect of legal instruments, and the attribution of competences there is also different. Be that as it may, it goes without saying that this article does not present the entire doctrinal knowledge on every instrument and remedy provided for in the Treaties. The aim will rather be to work out the constitutional principles and structural choices that underlie the Treaties’ provisions and guide their construction. The degree to which the constitutional principles have been materialised and the coherence of a particular provision with prior structural choices serve at the same time as a yardstick against which the law in force can be measured and criticised if necessary.

If only because the topic is relatively complex, some restrictions are appropriate. As far as legal instruments are concerned, no attention is paid to primary law as a source of its own, nor to internal agreements between the Member States. Other international law instruments that form part of the Union legal order (agreements with third countries or acts of bodies set up by international agreements to which the EU/EC is a party) are dealt with in some of the other chapters in this volume, but not here. However, unlike in the previous edition, not only shall the legal instruments of EC law be considered but also the specific instruments under the EU Treaty, especially those of the third pillar.

Regarding legal protection, the chapter focuses on judicial procedures that are designed to protect the interests of individuals by authorising a court of law to annul or suspend an unlawful act of public authority. This approach certainly fails to fully address the entire scope of legal protection schemes, omitting, for instance, non-judicial procedures and remedies aiming at results other than nullification. The subject matter will mainly be the action for

2 For reasons, see H Kelsen, ‘Wesen und Entwicklung der Staatsgerichtsbarkeit’ (1929) 5 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 30, 35ff; with some reservations also C Möllers, above chapter 5, section IV.2.
3 Discussed as a competence issue by A von Bogdandy and J Bast, above chapter 8; as a means of shaping the international relations by D Thym, above chapter 9; and as a source of quasi-constitutional commitments by R Uerpmann-Wittzack, above chapter 4.
annulment under Article 230 EC and the preliminary reference procedure according to Article 234 EC. Space precludes discussion of, for example, complaints to the Ombudsman under Article 195 EC or actions for compensation under Articles 235, 288(2) EC. The requirements of Union law concerning legal protection granted by national courts will also merely be touched upon. Judicial procedures relating to the implementation of Union law within and vis-à-vis the Member States have been ignored almost entirely.

As to terminology, this article uses the terms ‘legal instrument’ and ‘type of act’ synonymously, referring to a particular form that the exercise of public authority can take (in German Handlungsform, literally ‘form of action’). The terms describe an abstract type of action as well as the entire group of acts affiliated with that standard instrument (eg ‘the regulation’ or ‘regulations’ as defined in Article 249(2) EC). A ‘legal act’ (or, in short, ‘act’) shall denote the result of a formalised decision-making process, usually laid down in a written text. This is not to say that mere factual or less formalised action is legally irrelevant or that the concept of standard instruments cannot play a useful role for understanding such kinds of action. In the following, however, the analysis shall be restricted to the performance of law-making authorities. ‘Law-making’ in the very broad sense assumed here means the adoption of any legal act, thus encompassing the enactment of individual decisions and of non-binding, but nevertheless formalised, statements. This terminological conception is, on the one hand, based on the language of the Treaties, which use the term ‘acts’ regardless of their nature or form (eg in Article 230(1) EC; in French, the term actes is used; in German, the interchangeable terms Akte and Handlungen). On the other hand, it suggests a theoretical understanding according to which the binding character of a declaration of a public authority’s will does not constitute a prerequisite for its qualification as law.

The study proceeds in four steps (parts II–V). First, an overview of the relevant insights of legal scholarship is provided by giving a historical account of the changing legal discourses on the various instruments, the procedures of judicial protection and their interconnections (II). The two following parts work out the respective legal concepts. The first looks for the systematic interrelation between legal instruments and judicial protection and examines the step-by-step decoupling of the two categories (III). At this point, the question arises which functions the system of legal instruments fulfils apart from legal protection, and which constitutional requirements are provided for in this respect in the Treaties. This part identifies three structural choices regarding the order of legal instruments. Among these, the third one, which is the choice to classify the instruments according to their legal effects, is the most important (IV). The last part evaluates the impact the ratification of the Lisbon Treaty would have on the discussed issues (V).

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II. Sketching the Discipline’s Development: Interplaying Discourses on Legal Instruments and Judicial Protection

The attention judges and legal scholars have directed over the last 50 years to matters of legal protection and instruments of EC and EU law has gone through many phases. Given that the discourses changed over time in surprising parallels, we shall examine the ‘state of the art’ in the two fields of law in their historical order and extrapolate hidden interconnections. The following brief history of the relevant discussions shall in the course of a concise narrative bring together prevailing doctrinal insights concerning the respective instruments and procedures.

1. The ECSC as an Administrative Union: Supranational Decisions and Direct Actions of the Enterprises Concerned

In the early European Coal and Steel Community (ECSC), decisions directly addressed to undertakings in the coal and steel sector dominated the discussion. With this instrument to regulate the mining markets, the ECSC Treaty provided the High Authority (which later became the Commission of the European Communities) with a legal potential that had heretofore been reserved to states. The emerging scholarship on this new entity of international law used doctrines of national administrative law as if to do so were self-evident. Constitutional law could not yet serve as a conceptual point of reference, although some scholars already called the first Community a quasi-federal polity. The ECSC’s law-making institution, the High Authority, was not considered a legislature according to the separation of powers doctrine. Consequently, it could only enact *actes administratifs* in the broad sense of French law.

French administrative law had a large bearing upon the Treaty text and the development of Community law in general. One might here cite the four causes of action (*cas d’ouverture*) contained in Article 33(1) ECSC Treaty (later also appearing in Article 230(2) EC), the logic of which can hardly be understood without being familiar with the Conseil d’Etat’s long-standing case law. The standing of private applicants in respect of a general decision, the predecessor of the EC regulation, should also be mentioned here. Following the French example, the executive nature of the law-making body was essential for the scope of legal protection under the ECSC Treaty, so that an action for annulment was opened for all *actes administratifs*, whether they were *actes réglementaires* or *actes individuels*. However, the distinction between individual and general decisions was still necessary because the causes of action against the latter were—somewhat impractically—limited to a misuse of powers. A classification according to formal features was difficult due to the denotation of both as a *décision*. The oligopolistic

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7 For a fundamental work, see B Börner, *Die Entscheidungen der Hohen Behörde* (1965).
9 See CH Ule, ‘Der Gerichtshof der Montangemeinschaft als europäisches Verwaltungsgericht’ [1952] *Deutsches Verwaltungsblatt* 66, 57ff; Börner, above n 7, 1ff, 29ff, 107ff.
character of the markets involved made it a formidable task to distinguish a general decision from a ‘disguised individual decision’ even according to substantive features.\(^\text{13}\)

Even though the procedural law developed during the early ECSC era was strongly influenced by French practice, the existence of a permanent court which is also competent to hear direct actions brought by the enterprises concerned can be traced back to German influence. Proposals by Monnet and Schuman did not provide for such an institution out of fear it could shorten the discretionary powers of the High Authority.\(^\text{14}\) In the end, however, a conception of the rule of law prevailed according to which any measure of public authority adversely affecting the legal position of a private person must be open to review by an independent court of law. Accordingly, the direct effect of supranational decisions and the capacity to sue in a supranational court constitute two sides of one coin.\(^\text{15}\) The system of legal protection under the ECSC hence set the course for a community based on the rule of law in which judicial protection of individual rights, even if only for big enterprises at that time, was to play a defining role.\(^\text{16}\) The task of the Court to ensure observance of the law (Article 31 ECSC Treaty, now Article 220 EC) tacitly involved even in its early understanding a judicial guarantee of individual rights, which in its substance corresponds to Article 19(4) of the German Basic Law.

The activity of this new judicial body, especially regarding the action for annulment, was followed by the scholars with ample interest.\(^\text{17}\) While the constitutional choice in favour of a community based on the rule of law implied the general possibility of bringing an action against supranational legal acts, it gave no clear answer as to which type of measures the individual could challenge directly. The task of defining reviewable decisions dominated the Court’s case law from the beginning and has remained controversial ever since. Apart from the discussion about distinguishing general and individual decisions of the High Authority—some years later superseded by the controversy about reviewable regulations under the EEC Treaty—reviewable binding decisions had to be differentiated from non-binding, and thus non-reviewable, acts. After the Court had begun to declare that informal letters and communications could constitute reviewable decisions,\(^\text{18}\) the High Authority attempted to reserve to itself the power of definition, proclaiming that undertakings could rely on the fact that only statements that had a certain form were intended to create legal obligations. To this end it established binding criteria concerning the form of acts in its Decision No 22/60.\(^\text{19}\) Among other prerequisites, the terminology used in the heading was to indicate whether the act was a ‘decision’. The ECJ decisively rejected these efforts, although Article 15(4) ECSC Treaty provided the basis for a convincing argument in favour of such a power for the High Authority.\(^\text{20}\) The Court’s steadfast position favouring legal protection was already evident in these early judgments. To preclude the danger of a political institution arbitrarily foreclosing legal protection, formal criteria for the qualification of a reviewable act were to play only a

\(^{15}\) For a forceful account, see B Moser, Der überstaatliche Charakter der Montanunion (1955) 71ff.
\(^{17}\) Besides the contributions cited above, see eg E Steindorff, Die Nichtigkeitsklage im Recht der Europäischen Gemeinschaft für Kohle und Stahl (1952); DG Valentine, The Court of Justice of the European Coal and Steel Community (1955); A Bonaert et al, Fragen der Nichtigkeits- und Untätigkeitsklagen nach dem Recht der Europäischen Gemeinschaft für Kohle und Stahl (1961).
\(^{19}\) [1960] Journal Officiel 61, 1248/60.
limited role. The ECJ was prepared to accept the consequences of decoupling the system of legal protection from the system of legal instruments. The hope that Decision No 22/60 would be able to structure the various types of acts with a single stroke was thus scuttled; the Court’s conception of an act’s ‘nature’, as opposed to mere ‘form’, held sway. Nevertheless, the appearance and the formal organisation of Union legal acts, as they are known today, were developed on the basis of Decision No 22/60.

To conclude, the instruments and procedures established under the ECSC Treaty have been formative for quite a few features of European constitutional law that are valid until today. The Court’s early case law continues to influence EU law and its constitutional doctrines in many respects, as well. We still have the coal dust of the early days of Community law on our clothes, so to speak.

2. The EEC as a Legislative Union: Regulations and Indirect Judicial Protection

It was the agricultural sector that produced the vast majority of legal acts and gave rise to the bulk of legal disputes that followed the establishment of the EEC. Hardly any other field depicts the change in the constitutional fundamentals of integration as precisely as the Common Agricultural Policy does: the shift from a traité loi to a traité cadre, from an administrative to a legislative union, from the Commission to the Council as the main law-making body, from direct implementation of Community law to its indirect implementation through Member States authorities, and hence, also, from decisions to regulations as the standard legal instrument and from actions for annulment to preliminary references as the standard procedure of judicial protection.

a) The Regulation as the Standard Legal Instrument

In this second phase, academic interest in the EEC’s instruments was overwhelmingly devoted to the regulation, the general decision’s more sophisticated successor. Until the end of the 1960s, numerous publications on this legal instrument were presented, among them notably the monographic study by Jean-Victor Louis. The regulations fascinated the scholars, in particular with their ability to affect the legal position of the market citizen in the same way as national acts of parliament do. Qualification as ‘European laws’ or ‘Community statutes’ was prevented only by the separation of powers doctrine, which requires that a ‘law’ or ‘statute’ (Gesetz, loi) be enacted according to parliamentary procedures. Nonetheless, from then on national constitutional law has been an inventory of legal concepts and a point of reference for the understanding of Community instruments.


See in more detail below section IV.2(e).
The issue of primacy of Community law in relation to national law took centre stage. The Commission’s and the Council’s law-making powers—in the language of the Court, both institutions without distinction form part of ‘the Community legislature’—unmistakably had begun to compete with the national parliaments. Especially the regulation and its claim to be directly applicable in all Member States brought up the problem of a collision with national law.

Hans Peter Ipsen cogently theorised that the regulation as set forth in the EEC Treaty was an expression of the new quality of Community law separating it from public international law: the Community character of the regulation was found in the inviolable uniqueness of its uniform application throughout the Community. Manfred Zuleeg saw in Article 189(2), 2nd sentence EEC Treaty (now Article 249(2), 2nd sentence EC) the positivist solution to collisions of national and supranational law. The power to enact regulations also played a significant role for the ECJ when it proclaimed the autonomy of the Community’s legal order. When in Costa v ENEL the ECJ reasoned that Community law takes precedence, it made explicit reference to the unqualified binding force of the regulation and its direct applicability.

With respect to the legal effects of regulations, the ECJ held that national measures which ‘alter [the regulation’s] scope or supplement its provisions’ are not permissible. The Member States are prohibited from taking any action that would conceal the Community nature and the uniform entry into force of a regulation. Accordingly, national authorities cannot adopt binding rules of interpretation for its application by administrative bodies. On the other hand, the choice of a regulation neither obliges the Community legislator to create an exhaustive regime nor automatically entails pre-emption of legislative power on the part of the Member State. Rather, a regulation may grant the Member States’ ample legislative discretion or even oblige them to take implementing action of a normative character. The path has thus been cleared for the regulation’s direct application and, at the same time, its suitability as an instrument of harmonisation, the presumptive domain of the directive.

The ECJ has in general accepted the multifunctional use of the regulation, eg for the conclusion of international agreements, the adoption of organisational rules and even for autonomous Treaty amendment. The thesis based on Article 189(2) EEC Treaty, that regulations are reserved for general rules intended to produce legal effects vis-à-vis third parties, was unable to gain acceptance. General applicability (in French, portée générale) is not an essential element of a regulation; typically, regulations are drafted in general and abstract

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28 Quite a few contributions focused solely on the regulation when discussing the primacy of Community law: see, eg K Carstens, ‘Der Rang europäischer Verordnungen gegenüber deutschen Rechtsnormen’ in B Aubin et al (eds), Festschrift für Otto Riese (1964) 65; RH Lauwaars, Lawfulness and Legal Force of Community Decisions (1973) 14ff.
29 See HP Ipsen, Europäisches Gemeinschaftsrecht (1972) ch 10, para 41.
36 For the latter, see Case 185/73 König [1974] ECR 607, paras 5ff.
terms, but this is not a legal prerequisite.\textsuperscript{40} The ECJ has displayed little inclination to review the institutions’ discretion regarding the choice of the appropriate legal instrument.\textsuperscript{41}

b) Preliminary References as a Means of Legal Protection

The general applicability of regulations became a key concept in a different context, namely, regarding the action for annulment under Article 173 EEC Treaty (Article 230 EC). At first, the ECJ only reluctantly accepted the new rule laid down in Article 173(2) EEC Treaty (today Article 230(4) EC) that, in principle, individuals have no standing against a regulation. It insisted that any such act must have ‘the character of a regulation’ (in French, caractère réglementaire) as far as its substance is concerned, i.e. that its provisions be of general application.\textsuperscript{42} The ECJ also answered the question of whether an individual can challenge a state-addressed decision by referring to the concept of general applicability.\textsuperscript{43} It took some time before the ECJ freed itself from the shackles of this conception and finally rejected the premise that an act cannot simultaneously be of general application and of individual concern to certain natural or legal persons.\textsuperscript{44}

The denial of direct judicial protection against normative acts has provoked a lot of criticism, not least among German legal scholars.\textsuperscript{45} What they especially pointed at was that, for the sake of effectiveness of Community concerns, a structural deficit in terms of the rule of law had been built into the Treaties of Rome. This criticism and the resulting proposals in favour of a revised wording or at least an extended construction of Article 173(2) EEC Treaty were never silenced.\textsuperscript{46} Nonetheless, the orthodox approach adopted by the ECJ has gained more and more weight. Rather than perceiving the limited admissibility of individual actions as a deviation from the principle of the rule of law, the ECJ considered it as a structural choice in favour of a system of legal protection based on co-operation with national courts. In such a system an essential part of individual protection against supranational acts is provided decentrally, i.e. by national courts.\textsuperscript{47} Since the Community has, at the same time, to insist on the exclusive right of the ECJ to declare EC acts void—for reasons of autonomy and equality—a

\textsuperscript{40} See also below section III.2(b).

\textsuperscript{41} See Case 5/73 Balkan-Import-Export \[1973\] ECR 1091, para 18; Case C-163/99 Portugal v Commission \[2001\] ECR I-2613, para 20.

\textsuperscript{42} See Cases 16/62 and 17/62 Confédération nationale des producteurs de fruits et légumes et al v Council \[1962\] ECR 471, 479; on inclusion of this term in Art 263(4) TFEU, see below section V.2(b).

\textsuperscript{43} See Case 231/81 Spijker Kwasten v Commission \[1983\] ECR 2559, para 10; Case 206/87 Lefebvre v Commission \[1989\] ECR 275, para 13.

\textsuperscript{44} See below section III.2(b).


mode of co-operation between the two levels of jurisdiction was needed. This was discovered in the reference for a preliminary ruling under Article 177 EEC Treaty (now Article 234 EC). The ECSC Treaty had provided for a referral procedure of its own; however, it has had little practical bearing.48 Article 177 EEC Treaty, on the contrary, soon advanced to become a trademark of the Community judicial system by enabling a dialogue between the two levels of adjudication.49 Legal doctrine identified the maintenance of unity and independence of the new legal order as the main functions of the procedure; authoritative construction by the ECJ and its exclusive right to declare Community acts void were conceived as procedural corollaries of the demand for uniform and primary application of the law.50 In the influential perception of Joseph Weiler, the preliminary reference procedure, whereby the national courts are invited to use Community law in tandem with the ECJ for their own purposes and, in doing so, promote its acceptance in the Member States, is the key to understanding the constitutionalisation of the EC legal order.51 Viewed from this perspective, it is a means of compliance control vis-à-vis the Member States, and hence a functional equivalent and a far more effective alternative to the infringement proceedings under Article 226 EC.52 Problems were expected first of all in the operative communication between the courts, which is prone to disruptions, not least because of the difficulties of sanctioning the disregard of the duty to make references.53 In the 1990s, after the Maastricht decision by the German Federal Constitutional Court, this discourse evolved into the (still ongoing) debate on judicial Kompetenz-Kompetenz and the limits of primacy.54

It was only with some delay that the reference for a preliminary ruling was attributed any legal protection function.55 The extensive study by Gerhard Bebr published in 1962 dealt only marginally with the procedure under Article 177 EEC Treaty. In its second edition, published almost two decades later, Bebr dedicated nearly half of the volume to ‘Indirect Judicial Control’, and as many as 180 pages to Article 177.56 By the 1970s, the preliminary reference had worked its way into various monographic studies on legal protection.57 Dauses’s influential Leitfaden für die Praxis (‘guidelines for practitioners’), first published in 1986, designated the

48 The first preliminary ruling according to Art 41 ECSC Treaty was issued as recently as in Case 168/82 Ferriere Sant’Anna [1983] ECR 1681.
50 For this view, see C Tomuschat, ‘Die gerichtliche Vorabentscheidung nach den Verträgen über die europäischen Gemeinschaften (1964) 6ff; R Socini, La competenza pregiudiziale della Corte di giustizia delle Comunità europee (1967); on the issue of primacy, see HG Schermers, ‘The Law As It Stands on Preliminary Rulings’ (1974) 1 Legal Issues of European Integration 93, 96ff.
54 On this issue, see in detail FC Mayer, below chapter 11.
56 Cf G Bebr, Judicial Control of the European Communities (1962) 184ff; idem, Development of Judicial Control of the European Communities (1981) 366ff.
guarantee of individual rights as one of the two functions of the procedure, next to ensuring uniformity of the law. However, sceptics pointed out the weaknesses of the preliminary reference procedure: the parties to the main proceeding do not have an enforceable right to initiate a reference by the national judge, they are not involved in the formulation of the questions, and the proceedings before the ECJ are not designed to protect individual rights, despite an obligatory hearing of the parties.

The perception of the preliminary reference as a means of individual rights protection depends essentially on the power of the ECJ to exercise judicial review by declaring a Community act of general application invalid and so to enable the national courts to grant protection against national implementing measures. A reference seeking to invalidate an act under Article 234(1)(b) EC constitutes a functional equivalent to the incidental plea of illegality under Article 241 EC—the latter designed for cases of direct implementation by Union institutions and agencies, the former for indirect implementation by Member States authorities or cases of composite administration involving authorities from both levels. Both procedural means provide indirect legal protection whenever the individual has no standing to bring an action for annulment. These three elements—action for annulment, preliminary reference and plea of illegality—constitute in the language of the Court 'a complete system of legal remedies and procedures' and allow for a qualification as 'a community based on the rule of law'. The Court manifested this understanding first in 1986 in the Les Verts case, when it declared the actions of the European Parliament to be reviewable; this had not been provided for in the Treaties. Only a short time later, the Court used the same principle-based construction in the Foto-Frost case in order to legitimate its own monopoly power to nullify Community legal acts and to establish a corresponding duty of lower courts to initiate preliminary ruling proceedings. Yet, in the understanding of the ECJ, the constitutional principle of comprehensive control of legality and, thus, of legal protection against unlawful acts adversely affecting an individual does not imply a justification for a centralised system of judicial control—on the contrary. In the constitutional standard case, whenever a national authority acts vis-à-vis the individual, the ECJ considers the centralised mode of judicial protection merely subsidiary. The Court instead relies on the loyalty of the national administrative, social and fiscal courts, which have co-operated smoothly with the ECJ since the 1960s and 1970s.

58 MA Dauses, Das Vorabentscheidungsverfahren nach Art 177 EWG-Vertrag (1986) 29; but see still RM Chevallier and D Maidani, Guide pratique: Article 177 CEE (1982) 33; for a similar view, see U Everling, Das Vorabentscheidungsverfahren vor dem Gerichtshof der Europäischen Gemeinschaften (1986) 18ff, at that time judge at the ECJ.
59 Eg Lieber, above n 53, 24ff et passim; Bebr, Development, above n 56, 419ff.
60 See HP Ipsen, ‘Die Verfassungsrolle des Europäischen Gerichtshofs für die Integration’ in Schwarze(ed), above n 49, 29, 35 and 46.
64 Case 294/83 Les Verts v Parlament [1986] ECR 1339, paras 23ff; see Müllers, above chapter 5, section IV.2(b)(a).
67 Statistics on the use of the preliminary reference procedure by the national courts between 1961 and 1980 by Chavallier and Maidani, above n 58, 12ff. Accordingly, more than half of the requests concerned the agricultural sector or the area of social security co-ordination, followed by customs matters.
3. Legislation and Administration in a Composite Polity: Directives and Protection of Rights Derived from Community Law

A third phase, which started in the 1980s and lasted until well into the 1990s, focused almost exclusively on the directive. This reflects the EC’s extended scope of action in fields such as environmental and consumer protection policies, as well as the intensified law-making activity under the internal market programme. There, the EC has to a greater extent availed itself of directives than it has done in more ‘traditional’ sectors, such as competition, trade and agriculture. Apparently, legal problems regarding the regulation or the decision had meanwhile mostly vanished, while the directive, operating at the intersection of national and European legal orders, raised new questions and conflicts. Scholars started to realise that—via the Trojan horse of transposing legislation—directives may exert far deeper transformative effects in the Member States than the one-step instruments often designed just for simple application and enforcement. From the legal protection perspective, a new feature came to the fore: it was no longer the protection against the adverse effects of EC legal acts, but rather the protection of individual rights derived from EC law, that dominated the debate.

a) Discovery of the Directive as an Instrument of Legislation

It had taken a long time for the scholarly community to construe the directive as a ‘truly legislative’ instrument. Until then, the directive was considered to be ‘by its nature a decision addressed to the Member States’ and thus an individual measure, not a general norm. By way of contrast, the ECJ held directives as early as 1984 to be ‘measures having general application’. In the discussions of the 1990s on the right of individuals to challenge directives, the ECJ and the Court of First Instance presumed as a matter of course that the directive ‘normally constitutes an indirect mode of legislation’ and was thus ‘a measure having general scope’. The character of a directive as a legislative act was only discovered when the specialised European academia and, for the first time, the broader legal community turned to the innovations developed by the Court regarding the effects benefiting the individual when directives were improperly transposed. For instance, in the German literature one could witness a mounting wave of publications in the wake of the conflict between the ECJ and German courts concerning the direct effect of the 6th VAT directive (the Becker decision). The Grad case, which concerned a decision addressed to the Member States, did not receive such attention, although Eberhard Grabitz outlined the consequences for the vertical direct effect of directives as soon as 1971. The doctrine of indirect effect, which requires national law to be

69 Everling, above n 39, 52 (my translation); similarly: Lauwaars, above n 28, 32.
construed in conformity with directives, and the doctrine of State liability for improper transposition further fuelled the debate. At the same time, the ECJ increased the prerequisites for the transposition of directives that are designed to create individual rights.

During this phase, the legal community anxiously followed the innovations introduced into Community law by the ECJ. The ECJ’s apparently restless activism scarcely left time to systematically work through and critically analyse the consequences of the recent judgments for the systems of legal instruments and judicial protection. For instance, many observers felt that it was only a question of time before the ECJ would recognise the horizontal direct effect of directives. However, they underestimated the ECJ’s readiness to preserve the unique profile of the directive. Any application of the new doctrines developed in those days (viz direct effect, consistent interpretation and state liability) presupposes an imminent or manifest disrespect of the obligation to transpose a directive within the prescribed period. The power to develop such concepts can thus be based on Article 10 EC, which aims at protecting Community legislation, most often the result of tough negotiation and difficult compromise, from being unilaterally challenged by extralegal means. By contrast, it was hardly to be expected that the Court would respond to the call to recognise the direct effect of a recommendation. Such a ‘non-binding directive’ does not impose an obligation to transpose its provisions into domestic law; thus the idea of sanctioning a breach of law does not apply. Moreover, the ECJ has not continued some exaggerated approaches, eg to introduce special rules on time limits for initiating national proceedings falling within the scope of directives (the famous Emmott doctrine). It might be because of this more moderate position of the Court that even former critics today attest the directive a well-contoured legal shape, which is to be protected against exceptional individual judgments. The biggest hurdle still to be overcome by legal doctrine is to come up with clear criteria for demarcating the boundary between a (not recog-
nised) horizontal direct effect and a (recognised) indirect imposition of burdens in triangular situations.87

The reasons for the remaining dissatisfaction with the contours given to the directive by the Community legislature and the ECJ are to be found not in the doctrines of legal defects, but rather in its insufficient constitutional determination in respect of the federal order of competences.88 The underlying conflict dates back to the early days of the EEC. German-speaking authors in particular, basing their argument on the wording of Article 189(3) EEC Treaty, still claim that the Member States must retain a considerable margin of discretion when transposing directives.89 Confronted with the presumption that the directive is an instrument exclusively reserved for framework legislation, the current usage of the directive does seem to indicate an abuse of discretion on the part of the Community legislature.90 Law-making practice and case law, however, have never accepted this premise.91 Instead, the directive has always been used, as needed, as a loi uniforme that can impose detailed instructions on the Member States as to the legal state of affairs to be created. The trend towards substantive determination of transposing legislation has grown even stronger in the wake of the ECJ’s expanding case law on fundamental rights. Accordingly, the duty of the Member States to construe the provisions of directives consistently with EU primary law implies that the Member States must use any margin of discretion, seemingly left for them by the Union legislature, in conformity with the fundamental rights of EU law.92 Because of this constraining influence that fundamental rights have on acts requiring transposition,93 even a relatively ‘shallow’ harmonisation of laws can lead to a ‘deep’ judicial reshaping of the domestic legal order.94

Leaving aside political demands to shift the directive back to a federal paradigm,95 its expediency as a ‘truly legislative’ instrument with a two-step implementation structure is

88 Cf M Hilf, ‘Die Richtlinie der EG: ohne Richtung, ohne Linie?’ [1993] Europarecht 1, 19ff; see also von Bogdandy and Bast, above chapter 8, section II.2(b).
90 On the duty of the Member States to ensure that fundamental rights are observed when transposing directives and applying national law based on them, see Case C-107/97 Rombi and Arkopharma [2000] ECR I-3367, para 65; Case C-276/01 Steffensen [2001] ECR I-3735, paras 69ff; Cases C-20/00 and C-64/00 Booker Aquaculture and Hydro Seafood [2003] ECR I-7411, para 88; on the interpretation of the results prescribed by a directive consistently with fundamental rights, see Case C-540/03 Parliament v Council [2006] I-5769, paras 61ff and 104–5; Case C-305/05 Ordre des barreaux francophones et germanophones [2007] ECR I-3305, para 28; see also J Kühling, below chapter 13, section III.3(b)(bb).
93 Advocated by Schütze, above n 37, 150–1.
nowadays widely recognised.\textsuperscript{96} The preference of national governments for the directive seems to be rooted mainly in this two-step structure, which leaves to the actors of national politics some scope for publicly discernible activity even where there is little scope for substantive determination.\textsuperscript{97} In return, the Union profits from such voluntary assumption of co-liability in terms of its own legitimacy, as well as from the gains in effectiveness following from the custom-fit incorporation of European legislation into the national legal orders, once the error-prone hurdle of transposition has been taken. With respect to their normative character and regulatory intensity, directly applicable acts of the Union (regulations, decisions) do not differ from acts that require transposition (directives). The decisive difference between a directive and a regulation is that a directive cannot impose obligations of itself on an individual. This basic difference must also be maintained when the legal consequences of a deficient transposition are considered.\textsuperscript{98}

b) The Protection Mandate of National Courts

The potential of the directive to entail a grant of rights to individuals demonstrates that a parallel change in perspectives in the legal protection discourse was by no means accidental. Shortcomings of the composite system of individual rights protection were increasingly detected at the national level, whereby it was not the protection against wrongful EC legal acts that the discussion focused on, but rather the effective judicial protection of individual rights derived from Community law.\textsuperscript{99} The main procedure invoked was again the request for a preliminary ruling. It was to provide legal protection by encouraging the national courts to give effect to Community law, consistently understood by the ECJ as a source of individual rights.\textsuperscript{100} This mutual amplification of effectiveness and individual rights has caused irritations, in particular where it was confronted with well-established doctrine on enforceable subjective rights vis-à-vis the state. The German doctrine, for example, turned out to be too narrow for the purposes of Community law.\textsuperscript{101} The area of law which in the 1990s best depicted the gains and losses of such a ‘functionalisation of individuals’ for the purposes of Community law is environmental law.\textsuperscript{102}

Individual rights can be derived not only from directives, but also from any directly effective provisions of primary and secondary law, including the market access freedoms and anti-discrimination rules of the EC Treaty. The numerous publications dealing with the rights conferred on individuals in directives cover the law-making practice only selectively (the most common instruments are decisions with a specified addressee and regulations; directives make up just 9\% of the current secondary law and 13\% of the acts in force adopted by the Council\textsuperscript{103}). On the other

\textsuperscript{97} T Koopmans, ‘Regulations, Directives, Measures’ in Due et al (eds), above n 8, 595, 691.
\textsuperscript{98} See Case 152/84, above n 72, para 48; Case 14/86 Pretore di Salò (1987) ECR 2545, para 19.
\textsuperscript{100} See Case 61/79 Denkavit Italiana [1980] 1205, para 12.
\textsuperscript{101} See J Masing, Die Mobilisierung des Bürgers für die Durchsetzung des Rechts (1997) 175ff.
\textsuperscript{103} Bast, above n 6, 125ff; for further empirical findings on the choice of instrument by the law-making institutions, see A von Bogdandy, F Arndt and J Bast, ‘Legal Instruments in European Union Law and their Reform’ (2004) 23 YEL 91.
hand, the constantly high interest attracted by the directive serves as a valuable indicator for the qualitative significance of this legal instrument, the impact of which is higher still in cases where the granting of individual rights forms part of the prescribed results. Hence, it was quite appropriate to recognise a Community fundamental right to effective judicial protection for the first time in the Johnston case, in which the litigant invoked an equal treatment directive, whereas such a broadly framed right is not provided for in Articles 6 and 13 of the European Convention on Human Rights (ECHR). Here, a new line of case law started, which conceives the requirements as to effectiveness and coherence of legal protection as a fundamental right and in doing so has paved the way for the far-reaching formulations of Article 47 of the EU Charter of Fundamental Rights. This jurisprudence supplements an older line of case law which obliges the Member States’ courts, with recourse to Article 10 EC, to ensure the protection of individual rights derived from EC law. Since the Unibet case, finally, the two lines have been merged and the right to effective judicial protection has been elevated to a general principle to be materialised jointly by national and European procedural laws.

4. The EU of the Reform Decade: Proliferation of Instruments and Discovery of Old and New Deficits in Protection

In the long decade of reforms flagged by the Treaties of Amsterdams and Lisbon, the general state of the Union’s affairs became subject to criticism from a constitutional law perspective. Both the stock of EU legal instruments and the system of judicial protection were under heightened scrutiny as to whether there was a need for reforming their Treaty basis. Among the plurality of discourses, three main strands can be discerned. The first one deals with the new legal instruments introduced with the pillar structure of the Union, and the deficits in legal protection connected to it (a). The second discussion concentrates on rearranging the order of legal instruments, and was fuelled by the allegation of lacking coherence and transparency (b). The third strand took up, with fresh support from the Court, the discussion on the action for annulment under Article 230(4) EC (c).

a) Framework Decisions and the Deficits in Legal Protection Connected to the Pillar Structure

The new legal instruments introduced by the EU Treaty of Maastricht were of surprisingly limited longevity. The Member States saw the need for reform as early as the Treaty of Amsterdam and created the present nomenclature, by introducing Articles 12–15 EU in the Common Foreign and Security Policy (CFSP) pillar and Article 34 EU in the

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105 Case C-222/84 Johnston [1986] ECR 1651, paras 17ff; on the break with the past marked by this judgment, see V Röben, Die Einwirkung der Rechtsprechung des Europäischen Gerichtshofs auf das mitgliedstaatliche Verfahren in öffentlich-rechtlichen Streitigkeiten (1988) 23ff and 410.
shrunken) third pillar. Judicial protection had at first been almost entirely excluded, until the special regime under Article 35 EU was established. The portions of justice and home affairs that have been incorporated into the first pillar are still subject to some restrictions as to judicial protection under Article 68 EC. However, according to Article 67(2) EC, these restrictions could be repealed by the Council.

Initially, legal scholarship paid hardly any attention to the new EU instruments. This is all the more surprising since the refusal of the framers of the Treaties to apply the standard legal instruments of Community law is an essential aspect of the constitutional compromise reflected in the pillar architecture. Their supranational character, ie the capacity to directly affect the legal position of individuals, was for the time being not acceptable for the purposes of the second and third pillars. Characteristically, the direct effect of framework decisions or decisions was still excluded after Amsterdam, as is the case with any actions brought by individuals.

It was only after the Pupino judgment that a lively debate emerged on the special regime of instruments and procedures in the third pillar. A controversial discussion focuses on the path-breaking choice of the Court to construe the provisions of Title VI EU as consistent as possible to the constitutional standard case as defined by Community law. Following this approach, legal concepts valid under the EC Treaty (such as the duty to sincere co-operation or fundamental rights protection) represent constitutional principles applicable to the entire EU legal order. This far-reaching step towards a uniform substantive constitutional law was arguably a reaction to the extensive use of the powers under the renewed third pillar, which was accelerated all the more by the events of 11 September 2001. The Union thereby pursues intense legislative activity in the rights-sensitive and controversial spheres of criminal law enforcement and preventive fight against crime, without providing for the mechanisms developed in Community law to ensure respect for the rule of law and the principle of democracy. In particular, the Framework Decision 2002/584/JHA on the European Arrest

110 Solely the horizontal order of competences was subject to judicial scrutiny: Case C-170/96 Commission v Council [1998] ECR I-2763, paras 12ff; on the task of the judiciary to guard the order of competences, see von Bogdandy and Bast, above chapter 8, section II.16.


112 The respective issue from a political perspective consisted in finding a way how to answer particularly pressing references in due time without impairing the participation interests of the Member States. A compromise solution has been found in the urgent procedure for preliminary rulings concerning the area of freedom, security and justice, [2008] OJ L24, 39 and 42; see O Dörr, ‘Das beschleunigte Vorabentscheidungsverfahren im RFSR’ [2008] Europäische Grundrechtes-Zeitschrift 349.


114 Case C-105/03 Pupino [2005] ECR I-5285.


116 Legal instruments of the second pillar and the exclusion of judicial control of their use have provoked little criticism so far, cf D Thym, above chapter 9.

117 For such an understanding of principles, see von Bogdandy, above chapter 1, section III.3; for a similar approach to the unity issue, see U Everling, ‘Folgerungen aus dem Amsterdamer Vertrag für die Einheit der Europäischen Union und Gemeinschaften’ [1998] Europarecht suppl 2, 185, 192.


119 On the under-developed role of the European Parliament in the third pillar, see Monar, below chapter 15; on the impossibility to compensate this through enhanced participation of national parliaments, see P Dann, Parlamente im Exekutiveföderalismus (2004) 211ff; idem, above chapter 7.
Warrant has ex post facto turned out to be quite problematic for some Member States, as the obligation to extradite one's own nationals gave rise to constitutional disputes and battles of identity politics. It now seems that the third pillar, with its considerably weaker constitutional basis, could become the battleground of (otherwise thankfully frozen) conflicts between the ECJ and national constitutional courts.

This makes the Pupino case look like an attempt to grab the bull by the horns and simultaneously increase both the effectiveness and legitimacy of EU policy in security matters. As far as the legal regime of the framework decision is concerned, this includes the obligation of national courts to interpret national law in conformity with such acts and in light of EU fundamental rights, the latter being a quite recent concept even as far as directives are concerned. Consequently, all the remaining aspects of the directive’s legal regime should also apply, as long as they do not presuppose direct effect. The parallelity notably includes the concept of state liability for improper transposition of framework decisions, since a claim for compensation according to the Francovich criteria does not require direct effect of the breached act but rather that it entails the grant of individual rights.

This strategy of the ECJ is intrinsically limited by the fact that the third pillar (and even more so the second) is not furnished with a complete system of legal remedies and procedures. At first glance, it is plausible that there is no need for judicial protection when the relevant act does not directly affect the individual—so to say, as an inverted reference to the equivalence of supranational decision-making and the capacity to sue in a supranational court. This thesis ignores the fact that the indirect adverse effects exerted by two-step law-making do not dispense with the need for protection even at the first step, at least when no margins of discretion have been left to the implementing authorities. This applies to framework decisions and decisions under Article 34 EU just as much as it does to directives or state-addressed decisions under Article 249 EC.

The remaining channel for submitting a claim for legal protection to the ECJ is the preliminary reference under Article 35(1)–(4) EU. Accordingly, in the Pupino case the ECJ adopted an interpretation leaning closely towards Article 234 EC, while in essence ignoring the optional character of the former. The rulings in Gestoras Pro Amnistía and Segi pressed ahead with this

121 See O Lagodny et al (eds), Probleme des Rahmenbeschlusses am Beispiel des Europäischen Haftbefehls (2007); F Schorkopf (ed), Der Europäische Haftbefehl vor dem Bundesverfassungsgericht (2006); on the lawfulness from the point of view of EU law, see Case C-303/05 Advocaten voor de Wereld [2007] ECR I-3633, paras 24ff.
122 On these, see in detail Mayer, below chapter 11; on the further aspect to secure an adequate level of fundamental rights protection with a view to the ECHR, see Uerpmann-Wittzack, above chapter 4, section III.3(6)(cc).
123 See Case C-105/03, above n 114, para 43.
124 See ibid, para 60; Case C-303/05, above n 121, para 53; regarding directives, see the references in n 92; on the parallelity, see J Masing, ‘Vorrang des Europarechts bei umsetzungsbedürftigen Rechtsakten’ [2006] Neue Juristischen Wochenschrift 264; A Egger, ‘Die Bindung der Mitgliedstaaten an die Grundrechte der III Säule’ [2005] Europäische Zeitschrift für Wirtschaftsrecht 652.
125 Herein lies a late justification of the reluctance of the ECJ to acknowledgehorizontal direct effect of directives since this would hinder a parallel construction of the two instruments; cf the judgment in Cases C-387/02 et al Berlusconi [2005] ECR I-3565, para 74, which was delivered almost simultaneously with the Pupino decision.
126 Schroeder, above n 115, 368; V Röben, in Grabitz and Hilf, above n 5, Art 34 EU, paras 22 and 45; for an opposing view, see eg Schönberger, above n 115, 1126.
127 As recognised in Case C-105/03, above n 114, para 35; Case C-354/04 Gestoras Pro Amnistía et al v Council, ECR I-1579; Case C-355/04 Segi et al v Council [2007] ECR I-1657, both at para 50.
129 See Kühling, below chapter 13, section I.
130 Case C-105/03, above n 114, paras 28ff.
Jürgen Bast

jurisprudence by developing the enumeration of legal instruments referable to the Court under Article 35(1) EU into a general clause applicable to all acts independent of their form. Just as, since the ERTA case, Article 230(1) EC has been construed as providing for legal review of all acts adopted by the institutions having legal effect vis-à-vis third parties, this third pillar measure having such legal effect must be subject to judicial control in a preliminary reference under Article 35(1) EU. This is an indispensable prerequisite for the ECJ to bestow on the national procedural laws the responsibility to close emerging gaps in legal protection, if necessary, without at the same time abandoning the Foto-Frost doctrine of the ECJ’s exclusive right to declare acts of the Union void.

Applying such a progressive standpoint, the ECJ is tapping the full potential of judicial constitutionalisation. The Court is anticipating as far as possible the ‘communitarisation’ of the third pillar—a goal politically consented to by the Member States, as proven by the Constitutional Treaty and the Treaty of Lisbon. This jurisprudence based on constitutional principles deserves our approval. The ECJ’s perception of the founding principles under Article 6 EU (termed ‘values’ under Article 2 of the new EU Treaty) as not being a mere description of the legal status quo but, rather, a programmatic constitutional objective confers a precarious, stop-gap character on quite a few provisions of Title VI EU: from the point of view of constitutional principles, stated in the ‘Treaties themselves, they appear deficient. The rule of law as a standard for reflexive criticism built into the primary law demands the extension of the legal protection developed under the EC Treaty to all provinces of EU law.

b) Simplification or Systematisation? Options for Reform of the Legal Instruments

While, on the one hand, the special instruments under the EU Treaty have been constantly compared to the ‘normal’ instruments of the EC Treaty, since the mid-1990s a growing number of authors have declared the EC legal instruments itself to be in need of structural repair. Two main approaches in dealing with the uncertain normality of the triad of ‘regulations, directives and decisions’ can be discerned: establishing a new system of instruments by amending the Treaties (aa) and enhanced efforts to provide conceptual systematisation of the current types of acts (bb).

aa) The Calls for Hierarchy and Simplification

The first of the two approaches urges a reform of the Treaties. Its representatives reckon that only a significant change in the constitutional foundations can provide a solution in a situation perceived as ‘abnormal’ and lacking transparency. Here, two interconnected yet partly inco-
The attempt to establish a hierarchy of norms within secondary Community law originates in the realm of politics rather than academia. It can be traced back to the introduction of direct elections to the European Parliament.\(^\text{140}\) Calls for an ‘appropriate hierarchy’ between the different categories of acts have ever since been part of the political struggle for the Community’s catching up in terms of parliamentarisation. In essence, what is called for is a shift in the institutional balance along the lines of the *trias politica* by attributing to ‘parliamentary law-making’ a higher rank than to the mere ‘executive rule-making’ by the Commission and the Council. After the failed attempts to establish such a hierarchy through the Treaty on European Union, this official ‘left-over’ of the Maastricht Intergovernmental Conference (IGC)\(^\text{141}\) was adopted by legal scholarship. In the years that followed, quite a few authors examined the legal instruments’ suitability for building hierarchies and established new classifications.\(^\text{142}\) The hierarchy approach played no role at the IGCs of Amsterdam and Nice, but re-emerged, somewhat surprisingly, in the Laeken Declaration of 2001.\(^\text{143}\) During the European Convention it eventually developed into a fully fledged constitutional argument. Consequently, the inclusion of ‘European laws’ in the resulting Constitutional Treaty and the restoration of the terminological status quo in the Lisbon Treaty will be analysed in detail in a separate section (see below, part V). The present legal situation of a non-hierarchical order of secondary law will be also discussed separately (part IV).

The demand of a simplification of legal instruments, also reflected in the Laeken mandate to the Convention, rests on another concern. It is only loosely connected with the self-conscious pretension of the Union to arm itself with legal instruments reflecting the separation of powers and hence to increasingly mirror a federal state. Reading between the lines, one can detect among the many voices claiming a more transparent order of legal instruments a general feeling of uncertainty that has beset European integration ever since the near failures of the Treaty of Maastricht in the referenda in Denmark and France.\(^\text{144}\) The proliferation of ever-newer types and designations, the unprincipled attribution between institutions, powers and instruments, and the entire Babylonian confusion of Brussels’s law-making machinery have come under strong suspicion of contributing to the legitimacy crisis of the Union.\(^\text{145}\) What a remarkable turn of the tides since Pierre Pescatore’s proud presentation of the ‘system of institutional acts’!

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\(^\text{141}\) See Declaration (no 16) on the hierarchy of Community legal acts.


\(^\text{145}\) See, exemplarily, Koopmans, above n 97, 691; Tizzano, above n 142, 211.
bb) The Contribution of Legal Scholarship to the Reform of Legal Instruments

The second reform camp, in which I count myself, considers a complete system change via hierarchisation and simplification to be largely inadequate. Only part of the problems concerning EU legal instruments should employ the semantics of national constitutional law, yet, regardless of other merits, it is rather doubtful whether such a change in language could help make the European legal order more attractive to the citizens. Moreover, proposals for hierarchisation and simplification already run the risk of transferring outdated legal doctrines from national law into EU law, and often tend to underestimate the costs necessary for a system change. In particular, simplification must not be pursued for its own sake.

On the contrary, a sufficiently broad range of legal instruments is needed in order to satisfy the diversity of law-making action expected from the Union.

Hence, a sound empirical and conceptual basis is required to distinguish an unmethodical proliferation from an adequate differentiation. The further one gets from the core instruments on which the discussion focused in the last decades, the less apparent it is that such a basis exists. Assuming this to be true, as the second reform camp does, gains in transparency and coherence in the sphere of legal instruments can be realised first and foremost by further scholarly research providing a map through the maze.

Indeed, a whole range of treatises on the phenomena largely neglected so far has been published since the more sceptical assessment of the status quo in the first version of the present article. Here is a brief overview of the topics.

(1) First, there are the somewhat curious state-addressed decisions. This type of act cannot be satisfactorily assessed when approaching all decisions pursuant to Article 249(4) EC as administrative acts modelled on the German Verwaltungsakt. The innovative but too far-reaching note by Arno Scherzberg, who declared directives and state-addressed decisions to be mere varieties of a single legal instrument, conceptualisation of this phenomenon has stagnated for quite some time. However, in recent years, the multifarious use of

146 As to the terms employed by the Constitutional Treaty, see von Bogdandy et al, above n 103, 134ff; on the Lisbon Treaty, see below section VI.
147 See ibid, 139ff.
148 For a critique, see A von Bogdandy, Gubernative Rechtsetzung (2000) 41ff; Raiffert, above n 139, paras 1ff.
152 Yet another topic is the instrument of interinstitutional agreements: see comprehensively F von Alemann, Die Handlungsform der interinstitutionellen Vereinbarung (2006), as well as several contributions in issue no 1 of (2007) 13 ELJ. Moreover, there is hardly any research on the special instruments of the ECB: see J-V Louis, ‘The Economic and Monetary Union: Law and Institutions’ (2004) 41 CML Rev 575, 588ff.
state-addressed decisions has become subject to studies inspired by the composite structure of European administration (Europäischer Verwaltungsverbund). Above all, the monographic study of Matthias Vogt on decisions according to Article 249(4) EC has deepened our understanding that state-addressed decisions are a sub-type of that instrument, which is independent of a particular policy sector or function.

(2) An even wider gap between research and practical relevance is evident for the addresseeless decision (also called atypical decision or decision sui generis, in German denominated Beschluss, in contrast to a decision in the sense of Article 249(4) EC, which is called Entscheidung). Since the 1980s, decisions without a specified addressee are adopted in all policy fields and based on nearly all empowering provisions of the Treaties. Nonetheless, it took a long time until scholars ‘discovered’ the addresseeless decision as a regular, non-codified legal instrument instead of referring to it as an ‘unspecified’ act with uncertain legal effects.

In short, the addresseeless decision is a single-stage instrument that entails binding effects erga omnes. As its characteristic feature, it cannot impose, either directly or indirectly, obligations on individuals or Member States. However, it can create actionable individual rights vis-à-vis the Union’s institutions. In addition, as the ECJ found in its famous Erasmus judgment, the Member States have the duty to facilitate the practical results intended by an addresseeless decision. Judicial protection is an issue mainly in triangular situations, ie in cases brought by individuals challenging addresseeless decisions benefiting their competitor, such as in anti-dumping proceedings.

(3) A third topic is the variety of non-binding instruments. Within that family, the opinion and the recommendation have attracted disproportionately high attention, thanks to the reference in Article 249 EC. Less consideration has been given to the most common non-binding instrument—the resolution. Most intense, perhaps, are the discussions on the Commission’s communications and their use as (a substitute for) binding administrative guidelines addressed to Member State authorities. By now largely overcome is the use of the category ‘soft law’. The all too simple dichotomy of ‘hard’ versus ‘soft’ hinders in the context of the EU the perception of the existing functional differentiation of equally

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158 The difficulties of distinguishing addresseeless decisions from decisions having a specified addressee have been compensated in all official languages by using a particular clause preceding the operative part of the act and by the characteristic omission of specifying the addressee(s) in the final clause. Different denominations in the heading are only used in the Danish, Dutch, German and Slovenian languages.

159 For the new approach, see not only my contribution (above n 6, 109ff) but also P Lefevre, Les actes communautaires atypiques (2006); cf also Vogt, above n 157, 19 and 335ff; von Alemann, above n 152, 146ff.


non-binding legal acts. This very fact has been uncovered in a study by Linda Senden that represents a major contribution towards a critical elaboration of the cosmos of non-binding legal instruments and their positions in EU law-making.\(^{166}\)

c) System Change or Fine-tuning the System? Options for the Reform of Judicial Protection

The third contentious topic of the reform decade is the action for annulment initiated by an individual, with its long history.\(^{167}\) Ever since the ECJ adopted the *Plaumann* formula,\(^{168}\) it has provoked passionate discussion as to whether it constitutes a hardly justifiable immunisation against legal protection concerns or an adequate conceptualisation of the choice of the Treaty drafters in favour of a decentralised system of legal protection.\(^{169}\) Among the critics from many quarters, English authors in particular have not been willing to accept the preliminary reference as a proper judicial remedy or, in view of the duration of the whole proceedings, an effective one.\(^{170}\) It was not pure coincidence that in 2002 Francis G Jacobs—not only Advocate General at the ECJ but also a Queen’s Counsel and author of treatises on European judicial protection\(^{171}\)—became a prominent spokesman of this critical movement and kicked off the *Jégo-Quéré*/UPA saga.\(^{172}\) The apparent discrepancy within the Court triggered a surge of publications.\(^{173}\) The drama ended in essence in a confirmation of the status quo ante: the fundamental right to effective judicial protection does play a role in the construction of the admissibility criteria of the action for annulment, but it does not free the applicant from the prerequisite to demonstrate his or her direct and individual concern; disposing of that requirement could be legitimised only through a Treaty revision.\(^{174}\) Apart from that, each Member State is obliged to close potential gaps in legal protection by providing the necessary procedures that enable the national judge to ask the ECJ for a preliminary ruling.\(^{175}\)

Unsurprisingly, views on the credibility and consistency of such an understanding have remained divided. After the UPA decision, there has been consensus at least regarding the yardstick for testing the Court’s approach: the constitutional guarantee to effective judicial protection. UPA is notably not based on the presumption that it could be expedient for the regulatory aims of the Union to seal its legislative activity off from interferences by private litigants, as is the case in some legal orders with respect to parliamentary legislation.\(^{176}\) The real contentious point is whether the test of effective legal protection has to be met by the EU

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\(^{167}\) See above section II.2(b).


\(^{174}\) Case C-50/00 P, above n 172, paras 44–5.

\(^{175}\) Ibid, paras 40–1.

\(^{176}\) Contrary view, eg by Schwarze, above n 47, 932ff; opposed by JD Crooke, *Conflict of Principle and Pragmatism* (1996) 34ff.
judiciary alone or rather by multilevel adjudication of a composite judiciary, ie by putting in place a system of co-operation among Union and national courts.\[177\] If the latter is the case, the reasoning of the ECJ—that it is up to the Member States to close potential gaps in protection by means of their procedural laws—is plausible.

Based on this assumption, only partial fine-tuning of the system is needed.\[178\] Certain problems have arisen regarding legal protection against directly applicable legal acts (typically in the form of a regulation) when these acts do not require any administrative enforcement, which is, owing to the composite structure of European administration, rather rarely the case. There seems to be consensus in the literature that a modification of Article 230(4) EC would be helpful in that respect.\[179\] Further problems apparently exist when the attribution of responsibilities becomes difficult in the mixed proceedings of European composite administration, that is to say, when it gets hard to identify the ‘correct’ level of authority to sue.\[180\] The guarantee of judicial protection is at a risk of withering under the mutual deferrals and immunities of the authorities involved. That problem can hardly be solved, however, at the primary law level; rather, a development of comprehensible case law is required.

In my view, the better reasons militate in favour of retaining the present system. From the perspective of the individual, one has to take into account that any expansion of the right to bring an action comes with an implicit expansion of the obligation to bring an action in order to prevent an act from becoming definitive as against the potential claimant. With a view to the relatively short period for bringing an action set forth in Article 230(5) EC, one can speak of increasing the risk of a res judicata effect.\[181\] By contrast, a reference for a preliminary ruling is not subject to time limits. Having its starting point in the national procedural order that is familiar to the parties, it is in the end the more litigant-friendly solution. Lastly, in order to secure the quality of the case law, which in itself is a requirement of the rule of law, co-operation between the ECJ and the national courts will also be indispensable in the future—not only for clarifying the facts of a case within a well-equipped forum, but also to gauge the mood of actors at the grassroots level concerning a contested legal act of the Union.\[182\]


\[179\] See K Lenaerts, ‘The Rule of Law and the Coherence of the Judicial System of the EU’ (2007) 44 CML Rev 1625, 1627–30; on Art 263(4) TFEU, see below section V.2(b).


III. Doctrinal Analysis I: The Long Road to Formal Neutrality of Legal Protection

In the previous part, numerous interconnections and parallels of the discourses on legal instruments and judicial protection came to the fore. What, then, is the legal relation of these two core concepts of European constitutionalism? In the following, the doctrinal question asked is whether, and in what way, the affiliation of an act with a certain legal instrument determines its reviewability.

The relevance of legal instruments for the regime of legal protection seems undeniable, considering the fact that the relevant Treaty provisions use the terminology of Article 249 EC. The Court itself has from time to time emphasised the strong connection between Articles 230 and 249 EC— but in all but name it has nonetheless gone down a different route since the beginning of the 1970s. By now the system of judicial protection has been almost completely severed from the system of legal instruments. This process of a step-by-step decoupling of the legal protection regime from the system of legal instruments needs to be retraced. As a result, the case law is shown to be based on the principle of formal neutrality of judicial protection. This is here demonstrated by two legal concepts that are both decisive for the assessment of the admissibility of annulment actions according to Article 230 EC: the concept of ‘acts’ according to paragraph 1 and of ‘decisions’ according to paragraph 4.

1. The Concept of Reviewable Acts According to Article 230(1) EC: The General Clause of Judicial Control

In the language of both Articles 230 and 234 EC, ‘acts’ (French actes, German Handlungen) refer to measures that are subject to judicial control. Construing this notion, the Court saw itself confronted with conflicting objectives. On the one hand, it considered maintaining the special character of Community legal instruments necessary. The Court’s policy on legal instruments cannot be understood without accounting for the peril that reference to instruments and practices common in public international law would compromise the Community’s autonomous legal order. This motivation explains the judgments in which the Court denied to qualify an agreement among Member States, concluded outside the framework provided by the Treaties, as acts according to Articles 230 and 234 EC. On the other hand, making the notion of ‘act’ dependent on strict formalities or even on belonging to one of the instruments defined in the Treaties would be in contrast to the broad mandate of the ECJ to ensure that ‘the law’ is observed. This second standpoint has gained the upper hand: all activities of the institutions having legal effects shall be subject to the jurisdiction of the Court. The Court consequently developed the wording of Article 230(1) EC into a general clause of judicial control, according to which a legal action must be available for ‘all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects’ (the ERTA formula).

184 As to the remaining Treaty provisions linking up legal instruments with legal review, see Bast, above n 6, 406ff; on the formal neutrality of acts reviewable according to Art 35 EU, see above section II.4(a).
186 For instance, a reviewable act may even consist of undated decisions of the Commission implicitly referred to in later statements, eg in a press release: Case C-106/96 United Kingdom v Commission [1998] ECR I-2729, para 41.
The test of being ‘adopted by the institutions’ is intended in the first place to exclude acts adopted by the Member States; such acts do not fall within the jurisdiction of the ECJ. The conflicting intentions referred to flare up acutely when an informal agreement has been adopted at the Council level. On the one hand, international law operating between Member States is not recognised as part of Community law; on the other hand, the Council cannot escape judicial scrutiny whenever it wishes to, simply by calling itself an intergovernmental conference. The ECJ found a partial solution in the doctrine of competences: irrespective of its designation or formal appearance, an act within the meaning of Article 230(1) EC is at hand when the subject matter falls within the exclusive competence of the Community. If an act is adopted in a field where the EC has non-exclusive powers, an examination of the circumstances of the individual case is necessary, while the lacking self-designation as a Union act provides strong evidence against the presence of a reviewable act.

Such a broad approach, of course, needed a pacifying corrective, one that the ECJ found in the concept of ‘legal effects’ (in French, *effets de droit*) that a reviewable act is expected to entail. In the language of Article 249 EC, the term can be translated as ‘binding force’. The ECJ tends to ignore the methodological problems of determining whether an act is binding without regarding an act’s formal identity. Concluding an act’s legal effects from its formal identity (visible by its designation and other formal criteria) would have thwarted the Court’s intentions. Anyhow, a designation indicating non-binding force provides prima facie evidence for a lack of ‘legal effects’. Here, the doctrine of competences also plays a role insofar as the Court imputes to the institutions the intention to behave lawfully: if an institution lacks the power to adopt an act with binding force in a given area or case, this is a strong indication that the act does not have ‘legal effects’, while the very existence of such a power indicates that it is in fact binding.

Nevertheless, in some cases the Court has followed a different approach, shifting from a presumption of lawfulness to a presumption of binding force of the act in issue. If the provisions of an act are drafted in a way suggesting their binding force (using ‘shall’ rather than ‘should’), this language is taken seriously. Such an act is considered to entail ‘legal effects’, while formal criteria and the competence issue are unable to rebut this presumption of binding force, even if this effect was exerted unlawfully. For example, in reaction to the growing flood of Commission communications interpreting Community law in general terms, the ECJ held that the pretentious formulations of such statements on alleged, but in reality non-existing, legal effects

189 See Case 22/70, above n 187, paras 3–4. As to the broad notion of exclusivity employed by the Court, see von Bogdandy and Bast, above chapter 8, section II.2(b).
191 In the framework of Art 234 EC, it is for the national court before which the dispute has been brought to determine the relevance of the questions which it submits to the ECJ; accordingly, non-binding actions can be the subject of a preliminary ruling: see Case 113/75 Frescassetti [1976] ECR 983, paras 8/9; Case C-188/91 Deutsche Shell [1993] ECR I-363, para 18.
legal obligations can entail ‘legal effects’, which makes judicial review of such an act admissible and, in the case of lacking powers, also well founded.\footnote{See Case 366/88 \textit{France v Commission} [1990] ECR I-3571, paras 11–12, 23–5; for details, see J Gundel, ‘Rechtsschutz gegen Kommissions-Mitteilungen zur Auslegung des Gemeinschaftsrechts’ [1998] Europarecht 90, 97.}

Thus, in critical cases the ECJ determines whether an act has ‘legal effects’ mainly on a case-by-case basis. In doing so, the central question is whether admitting judicial review is an appropriate outcome in the particular case. The Court consistently refers to the \textit{ERTA} formula, which offers a sufficiently flexible tool.\footnote{Cf Case T-212/02 \textit{Gemeinde Champagne et al v Council and Commission} [2007] ECR II-2017, paras 86ff, on the scope of international jurisdiction of the EU Courts.} The price is the practically complete severing of the criteria for determining when there is a reviewable act from the nomenclature of the instruments. There is a connection only insofar as, once the institutions choose one of the binding instruments contained in Article 249 EC, the act is most assuredly subject to judicial review.

\section{2. The Concept of Contestable Decisions According to Article 230(4) EC: The General Clause of Direct Legal Protection}

On closer analysis, the ‘decision’ in the sense of Article 230(4) EC turns out to be a procedural law concept like the ‘act’ in the sense of Article 230(1) EC. Classifying an act as a ‘decision’ means that a natural or legal person can individually challenge the act before the Court of Justice (in this case, before the Court of First Instance). This does not imply that the act is affiliated with a particular legal instrument.\footnote{The following reconstruction employs insights gained through a study by HC Röhl, who has shown that the Court’s conception has its roots in French administrative law: idem, ‘Die anfechtbare Entscheidung nach Art 230 Abs 4 EGV’ (2000) 60 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 331.} This shall be exemplified through the first two alternatives of Article 230(4) EC—the decision addressed to the applicant (a) and the decision adopted ‘in the form of a regulation’ (b).

\subsection{a) Challenging Decisions Addressed to Individuals}

The definition of the decision in Articles 249, 253 and 256 EC implies an understanding of this instrument characterised by a marked emphasis on formality: a decision must specify the addressee to whom it must be individually notified, and a qualified statement of reasons is to be provided for. The formality aspect is particularly distinct in Article 256 EC in implying that the execution of a pecuniary obligation shall depend solely on the verification of the authenticity of the decision. Coupling direct legal protection of individuals exclusively to the presence of this legal instrument, as seemingly provided for in Article 230(4) EC, unavoidably leads to frictions. The stricter the formal requirements under which an act can impose binding and executable obligations on the individual addressed are, the smaller the scope of individually challengeable acts becomes. Conversely, when a broader notion of ‘decision’, more favourable to legal protection concerns, is favoured, the formal guarantees are at risk of being impaired. In this case, the individual loses the ability to establish with certainty whether or not the legal act at issue imposes the legal effects of a decision on him.

Here, conflicting goals once more become evident, similar to when the Court is confronted with having to define the notion of ‘acts’. The Court has again opted for a broad interpretation, construing the ‘decision’ primarily from the perspective of its functions in terms of legal protection. With respect to the myriad of more or less informal acts, statements or letters that have called for individual contestability, the formality requirements of Articles 249ff EC had to step back, otherwise it would have been too easy for the acting institutions to circumvent the
legal consequence of justiciability. Alternative strategies of ensuring legal protection would have excessively restricted the political institutions’ room for manoeuvre; neither was it feasible to declare all informal acts affecting third parties to be unlawful without exception, nor could they be interpreted across the board as lacking binding effects.

For this very reason, presumably, the Court decided very early on to pursue the approach of attaching no relevance to lacking formal qualifications as far as judicial protection is concerned. The test for the existence of a contestable decision addressed to the applicant was eventually laid down in IBM v Commission in 1981 and has been valid ever since. Accordingly, open to an individual challenge are ‘any measures the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position’. The ‘decision’ is defined solely on the basis of its functions in procedural law: ‘The form in which such acts or decisions are cast is, in principle, immaterial as regards the question whether they are open to challenge under that article.’ This reading of the criteria by the ECJ is in notable contrast to the wording of the Treaty, according to which the contestability of an act depends decisively on the form the act has been cast in. A formal decision according to Article 249 EC addressed to the applicant hence constitutes only one possible variety of individually contestable decisions, which as such must fulfil just minimal formal criteria. The choice of a formal decision sends out a message of secure contestability under the first variant of Article 230(4) EC to the addressee. In return, the addressee of such a decision must reckon that, once the deadline of Article 230(5) EC has expired, the finally binding nature of the decision will be held against him or her. Apart from this res judicata effect, the acting institution is discharged from the burden of implicitly deciding, by choosing a specific legal instrument, on the actual scope of legal protection under Article 230(4) EC.

b) Challenging Decisions Taken ‘In the Form of a Regulation’

The second alternative of Article 230(4) EC seems to refer to a schizophrenic phenomenon: a decision which is at the same time a regulation. Since the leading case, Confédération nationale, the concept has been understood as referring to an act which apparently is a regulation yet lacks the regulation’s characteristic of general applicability. The decisive criterion for a lack of general applicability, as defined by the ECJ, was a closed category of persons affected by the act at the time of its adoption, whereas the number of persons affected and their identifiability at any given point in time has been declared to be immaterial. Once the general applicability of an act was established, this act could never be challenged in a direct legal action taken by an individual.

Summing up the methodology of the ECJ, well-known traits come to the fore. The selective nature of legal protection granted under the EEC Treaty legitimises, and in the eyes of the ECJ even calls for, a qualification as to the contestability of an act irrespective of its official

201 Ibid.
203 Cf Case C-521/06 P Athinaiki Techniki [2008] ECR I-0000, paras 42ff.
204 See above section II.2(b).
designation. The credo was: ‘The choice of form cannot change the nature of the measure.’\(^{208}\) Hence, a decision ‘in form of a regulation’ is a legal act that by its ‘nature’ concerns the addressee individually and directly and therefore can be challenged by him under Article 230(4) EC.\(^{209}\) In other respects, though, the Court applied rules applicable to regulations.\(^{210}\) For example, a regulation enacted in an erroneous procedure has been declared void with \textit{erga omnes} effect, that is to say, with effect vis-à-vis all affected persons, including those who had not challenged the act.\(^{211}\) By qualifying an act as a contestable decision, the Court subjects the challenged act to a specific regime of legal protection without, however, requalifying it as a different legal instrument.\(^{212}\) The necessity to privilege ‘nature’ against ‘choice of form’ originates from the peril of an arbitrary foreclosure of legal protection, but it is also limited to averting that danger.

The imperative conclusion from general applicability to non-contestability was subsequently modified in the 1980s. The focus started to shift to an analysis of the relation between the applicant and the challenged provision—from indentifying contestable acts to determining standing of the persons concerned.\(^{213}\) A change in paradigms emerged on the horizon when the Court for the first time recognised that measures may ‘in fact, as regards their nature and scope, [be] of a legislative character’ and yet ‘the provisions may none the less be of direct and individual concern’ to some of the affected persons.\(^{214}\) The straw that broke the camel’s back was anti-dumping measures. In compliance with the Basic Anti-dumping Regulation, anti-dumping duties are always levied in the form of a regulation, the general applicability of which can, according to the Court’s criteria, hardly be denied. To stick to the established doctrine would have meant to exclude this sphere of EC administration from effective judicial control and to deprive the affected businesses of any protection of the procedural rights granted in the Basic Anti-dumping Regulation.\(^{215}\)

The definitive breakthrough of the new era was accomplished by the ruling of the ECJ in the \textit{Codorniu} case in 1994.\(^{216}\) Since \textit{Codorniu}, establishing the general applicability of a challenged regulation does not automatically imply the inadmissibility of the action. This is also applicable beyond the anti-dumping sector. The \textit{Plaumann} formula no longer serves as an \textit{e contrario} test to falsify the act’s character as a legal norm, but rather as a criterion of sufficient individualisation of the affected person, irrespective of the ‘nature’ of the act.\(^{217}\) The admissibility test according to Article 230(4) EC now consists of two steps. First, whether the action is admissible due to the mere fact that the regulation concerns a restricted class of persons to which the applicant belongs needs to be assessed. If this is not the case, the second step is to examine whether the affected person is, by virtue of certain attributes or circumstances,
individually distinguished in such a way that the act has the character of a decision in relation to him or her.218

It has been left up to the Court of First Instance to draw the consequences from the Codorniu case and to declare that an action challenging a ‘true’ directive could also be admissible provided that the Plaumann criteria are met.219 Such interaction between the two Courts demonstrates their fundamental consensus on matters of legal protection, which was only temporarily fogged by the mêlée about the judgments in Jégo-Quéré and UPA in 2002. Codorniu was not meant to bring about a sea change in favour of a centralised system of legal protection.220 The fundamental relevance of this judgment lies in helping the concept of formal neutrality of legal protection break through.

Although following a certain delay, the concept of a contestable decision now runs parallel to the concept of a reviewable act in the meaning of Article 230(1) EC: decisions in the sense of Article 230(4) EC are all acts, whatever their nature or form, that are of direct and individual concern to the applicant. This definition obviously does not match with that provided in Article 249(4) EC. Hence, the qualification of a legal act as a contestable decision in the sense of Article 230(4) EC is of mere procedural relevance and is silent as to the instrument chosen.221 The long-term objective of the Court to free itself from an instrument-based, enumerative definition of legal protection and to replace it by a general clause took hold over the original concept foreseen by the Treaty framers. Today, the formal neutrality of legal protection counts as one the axioms of European constitutional law.

IV. Doctrinal Analysis II: Structural Choices Regarding the Order of Legal Instruments

The decoupling of legal instruments and judicial protection raises the question of alternative functions that could be assumed by the legal instruments of EU law. Rephrasing the question from the observer’s perspective, ie in view of the tasks of legal scholarship: if the theory of legal instruments has to renounce the traditional protection paradigm, what should take the place of the latter? The constitutional terms of reference essential for answering these questions is analysed below.

First, the structural choice of the Treaty drafters in favour of an open system of legal instruments is reconstructed, as expressed in Article 249 EC (1). The next section examines the choice in favour of a non-hierarchical structure of secondary law that is connected to the establishment of a system of instruments that does not serve the separation of powers (2). The last section of this part deals with the structural choice to differentiate the system of legal instruments according to legal effects. It concludes with the thesis that the central feature of an EU legal instrument is its ‘operating mode’ (Wirkungsmodus, in German). Here it is contended that, while ostensibly paradoxical, the functional strength of a legal instrument lies in the weakness of its legal potential (3).

218 Revealingly, D Booß, in Grabitz and Hilf, above n 5, Art 230 EC, para 56, deems the first step a mere atavism.
220 This has been hoped for by some authors, eg A Arnulf, ‘Private Applicants and the Action for Annulment since Codorniu’ (2001) 38 CML Rev 7.
221 Röhl, above n 198, 333ff; Schroeder, above n 212, Art 249 EC, para 8; Bumke, above n 149, 663; Vogt, above n 157, 28ff; for a different view, see eg M Borowski, ‘Die Nichtigkeitsklage gem. Art. 230 Abs. 4 EGV’ [2004] Europarecht 879, 882.
1. Structural Choice in Favour of an Open System of Legal Instruments

The existing range of codified legal instruments of EC law is characterised by remarkable stability. Article 189 EEC Treaty (now Article 249 EC) has been amended only once, namely when the Parliament was included in the list of law-making institutions listed in the first paragraph. Regarding the decision-making bodies of the ECB, a different drafting technique was chosen. However, the legal effects attributed to ECB instruments as defined by Article 110 EC are precisely those of Article 249 EC, which hence contain identical legal instruments. In order to assess the implications of providing such an inventory of legal instruments, the normative contents of Article 249 EC will be looked at in more detail. Which legal requirements are connected to which legal consequences?

a) The Structure of Article 249 EC

According to usual constructions, Article 249 EC denotes the ‘essential characteristics’ or the ‘structure and effects’ of the listed instruments. Article 249(2)–(5) EC thus designates what legal effects are caused (or potentially caused) by a concrete act once its affiliation with the abstract instrument defined in the respective paragraph is established. However, the question then arises which elements indicate the affiliation with a certain instrument. The common understanding, when confronted with this question, reverses its logic and deduces the formal identity of the act in question from the presence of certain contents typical of the given instrument—contents that allegedly are also provided for in Article 249 EC. In the first understanding, an act is binding on its addressee if it is a decision, and vice versa in the second, i.e. it is a decision if it is binding on its addressee. In law-making practice, the institutions have, at least for all practical purposes, solved this problem by expressly designating in its title what instrument the act is supposed to be, complementing this drafting practice by using fixed solemn forms preceding the enacting terms of the act and a characteristic final provision. It is telling that in almost all cases before the Court the formal identity of the act at hand (e.g. the fact that it is a directive) was not in dispute. However, when exceptionally the formal identity itself was contested, the ECJ tried to avoid the circular argument above, usually resorting to competence issues. Not even the ECJ can derive an act’s formal qualification from its pure content.

b) No Exhaustive Enumeration of Legal Instruments

The cross-referencing of Community instruments with pre-defined legal effects was never so strict that the legal effects set forth in Article 249(2)–(5) EC could not be attributed to instruments other than those catalogued in Article 249 EC. Both in law-making practice as well as in

222 C Zilioli and C Kroppenstedt, in von der Groeben and Schwarze (eds), above n 91, Art 110 EC, para 2. The Statute of the European System of Central Banks invented two further instruments, whose operating mode was previously unknown to the Treaties: guidelines and instructions of the ECB (Art 12.1 ESCB Statute). These instruments are binding upon the central banks in the eurozone to which they are addressed (Art 14.3 ESCB Statute).
223 Cf the considerations of legal theory, relevant also in the Union’s context, by P Reimer, Zur Theorie der Handlungsformen des Staates (2008).
224 G Schmidt, in von der Groeben and Schwarze (eds), above n 91, before Arts 249–56 EC, para 5.
228 As to the legal relevance of the act’s heading, see Case C-255/99 Humer [2002] ECR I-1205, para 48.
229 See above section III.1.
the legal literature there is broad consensus that Article 249 EC does not establish a *numerus clausus* of legal instruments, ie it does not limit the types of acts in their number and content.\textsuperscript{230} It does not even exclude the creation of atypical instruments intended to produce binding legal effects vis-à-vis Member States or individuals.\textsuperscript{231} The wording of the Treaties might be somewhat vague on the question of exclusivity, but the drafting history and teleological considerations militate in favour of an understanding that the Treaties of Rome have placed at the disposal of the institutions a core stock of legal instruments, whose practical testing, further development and supplementation has from the very beginning been intended.\textsuperscript{232} The opposite stance had denied the new Community system the degree of flexibility and ability to improve that is essential in order to meet the tasks entrusted to it. That applies, in essence, to the present-day Union in the same way.\textsuperscript{233} Only an open system of instruments allows the Union to adopt from the national legal systems any well-established instrument that fits its functional needs.\textsuperscript{234} Where there are no similar constellations in the Member States, institutional practice can develop its own ways and create legal instruments tailored to the constitutional framework of the Union.\textsuperscript{235} Inventing and using new instruments is hence to be seen as an implied power of the law-making institutions that has been tacitly conferred on them, together with their substantive powers to regulate a given field. Based on the relative stability of the order of competences, legal instruments can safely constitute a dynamic element of the EU constitutional system.

Legal scholarship’s apparent willingness to accept the institutions’ dynamism in shaping new instruments is at odds with the theory of the instruments’ alleged function of catering to the principle of attributed powers.\textsuperscript{236} For a long time, it had been considered settled that the Treaties normally also provide for the legal instrument which the acting institution may choose, together with the competence to act.\textsuperscript{237} A formally neutral legal basis, in which such a provision on the applicable legal instrument(s) is missing, was considered an exception that requires an examination of whether recourse to the codified legal instruments is possible at all or whether it is instead necessary to resort to *actes hors nomenclature* (acts *sui generis* beyond the catalogue of the Treaty). The doctrine of instruments has had difficulty bringing this interpretation in line with the law as it stands, for even in the original text of the Treaties of Rome the ‘classified’ empowering provisions were in the numerical minority.\textsuperscript{238} After all, Treaty provisions determining the choice of legal instrument are today few and far between, and are usually anachronistic phenomena not suited to serve as a model for developing general legal doctrines. The Treaty drafters themselves are ultimately responsible for the near full decoupling...
of the concept of legal instruments from the concept of legal basis; in fact, in any Treaty revisions since the Single European Act, they have preferred formally neutral competences.\textsuperscript{239} The structural choice in favour of legislative discretion regarding the choice of legal instrument is best demonstrated by Article 100a EEC Treaty, which deliberately abstained from the imperative of using the form of a directive as still foreseen in Article 100 EEC Treaty (now Articles 94, 95 EC).\textsuperscript{240}

c) Limits of the System’s Flexibility

The openness of the system to the creation of new legal instruments is not unlimited. Implied powers of the institutions to shape new instruments can only be accepted if the substantive limits of the Union’s competences are preserved. The dynamics of legal instruments are arguably limited to innovatively combining legal effects recognised as lawful under the Treaties and to refining these cross-breeds into new standard instruments according to the needs of law-making practice. Article 249 EC has a constraining function insofar as it provides for an inventory of possible legal effects of atypical legal instruments.\textsuperscript{241} It would therefore be impermissible, for example, if the Council were to empower the Commission to adopt a new type of ‘decision’ giving direct instructions to Member States’ administrative authorities or regional entities instead of formally addressing the Member States as such.\textsuperscript{242} The obligation to implement EU law falls upon the Member State as a whole, while the internal division of powers is a reserved domain of the State that accounts for the entirety of its authorities and entities.\textsuperscript{243} This view is supported by the silence of Article 249 EC regarding such bodies, which translates the constitutional autonomy of the Member States into the system of legal instruments.

The initial substantive standard to be abided by in the process of shaping new instruments is the principle of legal certainty,\textsuperscript{244} from which the principle of clarity of form can be derived.\textsuperscript{245} The constitutional limits of using atypical acts have been crossed when the legal effects entailed are uncertain.\textsuperscript{246} The imperative of formal clarity is further supported by the general prohibition of a misuse of power referred to in Article 230(2) EC.\textsuperscript{247} This can coincide with the principle of clarity of form if the acting institution has chosen an atypical instrument in order to obscure certain legal effects. The prohibition of a misuse of power attains relevance of its own as a ban of circumvention, ie when the choice of an atypical instrument is meant to avoid requirements of legality attached to a codified legal instrument.\textsuperscript{248} However, in such cases it

\begin{itemize}
\item[\textsuperscript{239}] The most important exception is Art 118a(2) EEC Treaty (now with an increased scope Art 137(2) EC); on the background, see F Rödl, below chapter 17.
\item[\textsuperscript{240}] The Lisbon Treaty has partly reversed this development, as the TFEU involves an odd mixture of legal bases identifying legal instruments (with and without offering a discretionary choice) and form-neutral legal bases. Art 296(1) TFEU acknowledges, in general, the discretion enjoyed by the law-making institutions as to the choice of legal instrument.
\item[\textsuperscript{241}] Bumke, above n 149, 663.
\item[\textsuperscript{242}] On the guidelines and instructions of the ECB (provided for in primary law!), see above n 222; for a problematic case, see the Commission’s Decision 2008/222/EC and Decision 2008/334/JHA adopting the SIRENE Manual and other implementing measures for SIS II, [2008] OJ L123, 1 and 39: ‘The Sirene Manual is a set of instructions to operators in the Sirene Bureaux . . . ’ (point 1.2. of the Manual).
\item[\textsuperscript{243}] See Case C-33/90 Commission v Italy [1991] ECR I-5987, para 24; Case C-224/01 Köbler [2003] ECR I-10239, paras 32 and 46ff.
\item[\textsuperscript{244}] Nettesheim, above n 91, Art 249 EC, para 75.
\item[\textsuperscript{245}] As to the principle that rules must be clear and precise, see Case 169/80 Gondrand Frères [1981] ECR 1931, para 17; Case C-143/93 Van Es Douane Agenten [1996] ECR I-431, para 27.
\item[\textsuperscript{246}] Cf AG Tesauro in Case C-325/91 France v Commission [1993] ECR I-3283, no 21–22.
\item[\textsuperscript{247}] On the conditions for assuming such misuses, see Case 69/83 Lux v Court of Auditors [1984] ECR 2447, para 30.
\item[\textsuperscript{248}] Art 7(2) of the Council’s Rules of Procedure, above n 21, establishes a particular circumvention ban in order to protect the Commission’s right of initiative; constitutionalised in Art 296(3) TFEU.
\end{itemize}
must first be examined whether, due to the similarity of the legal effects caused, the allegedly
circumvented requirement is to be applied to the atypical act by way of analogy.

In sum, sufficient control schemes are at hand to secure the conformity of an open system of
legal instruments with founding constitutional principles. This structural choice constitutes the
most important reason for the Court to insist on the formal neutrality of judicial protection.
Otherwise, upsetting the rule of law could hardly be avoided.249

2. The Structural Choice in Favour of a Non-hierarchical Unity of Secondary Law

Article 249 EC further contains statements on the relation between the legal instruments and the
constitutional institutions. The relationship differs in essential aspects from the concepts
common to national legal orders. In essence, most doctrines of legal instruments translate the
concerns of the separation of powers into formal categories of legal norms and put these
categories into a hierarchical order.250 In contrast, the legal instruments of EU law are,
according to the conception of Article 249 EC, released from fulfilling a separation of powers
function. The respective structural choice in favour of a non-hierarchical unity of secondary law
shall now be discussed.

a) Equality of Law-making Institutions

To begin with, as can be seen in Article 249(1) EC, the Union has not just one, but several
law-making institutions. This is not as such unusual. All European states, in some kind and to a
certain degree, are familiar with non-parliamentary law-making, be it delegated legislation or
other kinds of law-making by executive bodies, and some state constitutions even provide for
parliamentary legislation by sub-national entities. In national law, however, these concurrent
law-making authorities are typically vested with their own instruments different from acts of
parliament, and even where the nomenclature is the same the legal regimes differ depending on
the organ or entity they are attributed to.251 Article 249 EC does not provide a basis for such a
distinction, and likewise the ECJ has consistently rejected any attempts to distinguish the legal
effects of an instrument according to the acting institution.252 There are no ‘Commission regula-
tions’, ‘Council regulations’, ‘co-decision regulations’ or ‘delegated regulations’ under EU law,
but rather simply ‘regulations’ pursuant to Article 249(2) EC. Contrary to the European states in
which the plurality of the sources emerged from different modes of creation (customary v
statutory) and law-making authorities (Crown v Parliament), 253 Union law has decoupled the
process of creating the law from the legal regime of its instruments.

The institutions not only make use of the same instruments, there is also no hierarchy
among the law-making institutions reflecting a scale of legitimacy. Instead, Union law employs
the non-hierarchical concept of ‘institutional balance’.254 The quintessence of this principle,

249 On the interrelation between a system of legal protection based on the type of act and the relative
closeness of the system of sources, see Eberhard, above n 89, 82.
250 See C Möllers, Gewaltengliederung (2005) 86ff; R Schütze, ‘Sharpening the Separation of Powers
FC0501e.pdf (accessed on 22 September 2008).
251 See eg FB Callejón, ‘Das System der Rechtsquellen in der spanischen Verfassungsrechtsordnung’ (2001)
Jahrbuch des öffentlichen Rechts der Gegenwart 413, 427.
253 See A Merkl, ‘Prolegomena einer Theorie des rechtlichen Stufenbaus’ in A Verdross (ed), Gesellschaft,
Staat und Recht (1931) 252, 253.
383; K Lenaerts and A Verhoeven, ‘Institutional Balance as a Guarantee for Democracy in EU Governance’ in
enshrined in Article 7(1) EC, is that each institution may only act within the limits of the powers attributed to it by the Treaties and that, accordingly, the horizontal order of competences so established must not be modified by the acts of any institution. As the inter-institutional relationship is thus based on the autonomy and the equality of the institutions set up by the Treaties, there is also no hierarchy of norms among the legal acts adopted by them. Consequently, an act adopted by one institution can be amended or repealed by another, that is to say, the rule of *lex posterior derogat legi priori* applies. In other words, acts of secondary law are able to derogate from earlier acts of secondary law, irrespective of the enacting institutions involved. This unfamiliar consequence could only be avoided if the horizontal order of competences perfectly apportioned the institutions’ powers so that any derogation from the act of another institution would be ultra vires. In fact, Union law tries to realise this strict delimitation of powers in many areas, but there are also counterexamples where the horizontal order of competences intentionally provides for overlapping empowering provisions. The relationship between Article 137(2) and Article 139(2) EC is an obvious (and extreme) example thereof, since the two articles provide for alternative options of law-making within an identical scope of application. A similar technique of allocating powers is frequently used in basic acts of secondary law whenever the Council reserves the right to override implementing acts adopted by the Commission.

b) Equality of Law-making Procedures

The ability to mutually derogate applies in the same way to acts adopted under different procedures: Union law does not recognise a hierarchy of law-making procedures. For instance, the *lex posterior* rule applies when the law-making procedure foreseen in a particular legal basis has been changed by Treaty amendment. In any case, it is the procedure under the provision in force that is relevant, even when an act is amended or repealed that was previously adopted under a stricter procedure. The same interplay can be observed when two empowering provisions, in force contemporaneously, do overlap *ratione materiae*. According to the case law on the choice of legal basis, the following applies: if a measure falls predominantly within the scope of one legal basis, even though other provisions are also affected, it must be founded on the empowering provision required by its main or predominant purpose or component. As a rule, incidental purposes or components do not require a twofold legal basis, which would necessitate that the substantive and procedural requirements of both empowering provisions be observed. This ‘centre of gravity’ doctrine entails a tacit assumption that has significant ramifications for the structure of secondary law. An act legally adopted has the potential of derogating from previous acts that fall, at least partially, within the scope of other empowering

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256 See Cases 7/56 and 3–7/57, above n 18, 57: ‘the institutions are autonomous within the limits of their powers’; Case 204/86 *Greece v Council* [1988] ECR 5323, para 17.
257 The critical case of delegated legislation will be discussed below in section IV(2)(d).
259 Nettlesheim, above n 93, 763; Bieber and Salomé, above n 142, 915; with respect to the relation between the ECB and the regular law-making institutions, see C Zilioli and M Selmayr, ‘The Constitutional Status of the European Central Bank’ (2007) 44 CML Rev 355, 380; for a different standpoint, see G Schmidt, in von der Groeben and Schwarze (eds), above n 91, Art 249 EC, para 24.
261 The Court upheld this practice: Case 30/70 *Scheer* [1970] ECR I1197, para 21.
262 Bieber and Salomé, above n 142, 916; Nettlesheim, above n 93, 763–4; the opposite view is still widespread: see, eg Biervert, above n 225, Art 249 EC, para 10.
263 See, eg Case C-491/01 *BAT* [2002] ECR I-11453, para 94.
264 Where the procedures laid down for each legal basis are incompatible with each other, one among several main objectives must even be pursued under a single legal basis: see Case C-300/89 *Commission v Council* [1991] ECR I-2867, paras 17–21; Case C-91/05 *Commission v Council* [2008] ECR I-3651, paras 76–7.
provisions without fulfilling the procedural requirements of the latter.\textsuperscript{265} Hence, the application of the \textit{lex posterior} rule does not require that the law-making procedures be parallel. Within this non-hierarchical order of procedures, the power of amendment under any legal basis is confined only by the terms of this particular legal basis: there is a parallelism of law-making and law-amending powers.

Remarkably, this unique constitutional situation has not been changed by the introduction of the co-decision procedure (now Article 251 EC). Rather, co-decision has been seamlessly added to the various law-making procedures of equal rank.\textsuperscript{266} As mentioned above,\textsuperscript{267} the Maastricht IGC refrained from establishing a hierarchy between the different categories of acts adopted by the institutions. Instead, it opened the established spectrum of legal instruments for the use under the co-decision procedure, which soon gained broad recognition as the standard means of providing parliamentary legitimacy in EU legislation.\textsuperscript{268} Thus, the incremental process of expanding the scope of Article 251 EC to further areas was made possible, without requiring that a new hierarchy of norms be worked out for every Treaty amendment.\textsuperscript{269}

c) Equality of Binding Instruments

If a hierarchy of secondary law cannot be derived either from the acting institution or from other procedural aspects,\textsuperscript{270} perhaps it could be based on the type of the instruments as such. Such a superior–inferior relationship cannot be read into Article 249 EC,\textsuperscript{271} even though some authors saw, with regard to the rule of law, a pressing need for establishing criteria for such a hierarchical order among the codified legal instruments.\textsuperscript{272} However, a convincing demonstration of this thesis has yet to be produced. In contrast to national constitutional law, Union law must largely forego the structuring potential a dominant instrument would bring.\textsuperscript{273} Apodictic statements that a directive could never amend a regulation\textsuperscript{274} might arise from the desire to elevate the regulation to a place of pride similar to that of an act of parliament. However, they unduly restrict the discretion as to the choice of legal instrument bestowed on the law-making institution, while lacking a convincing justification in the governing law. When reform of existing secondary law is on the agenda, there is no convincing argument against using a novel instrument;\textsuperscript{275} in fact, there are innumerable examples of regulations, directives, addresseeless decisions and decisions addressed to Member States that amend or repeal each other.\textsuperscript{276} Hence, the ability of mutual derogation can also be established among acts possessing a

\begin{footnotes}
\item 266 Confirmed by Case C-259/95 Parliament v Council [1997] ECR I-5303, para 27.
\item 267 See above section II.4(b)(aa).
\item 268 On the present position of the Parliament, see Dann, above chapter 7.
\item 269 On the Lisbon Treaty, see below section V.1(b).
\item 270 The legal act is attributed to the institution(s) whose contribution has determined its final wording; on the legal functions of the attribution of authorship, see von Bogdandy et al, above n 103, 121–3.
\item 271 Bieber and Salomé, above n 142, 917; Lenaerts and Van Nuffel, above n 230, para 17-054; but see Louis, above n 24, 144.
\item 273 Cf A Ross, \textit{Theorie der Rechtsquellen} (1929, reprinted 1989) 34ff.
\item 274 See Schroeder, above n 212, Art 249 EC, para 21; this was understood probably just as an ban of an implicit derogation by Nettesheim, above n 93, 765; my view is supported by Hetmeier, above n 231, Art 249 EC, para 23.
\item 275 See also Protocol on the application of the principles of subsidiarity and proportionality (1997) No 6.
\item 276 In fact, there are only a few examples of directives amending a regulation: see, eg Art 38(1) of Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States \textit{amending Regulation (EEC) No 1612/68}, [2004] \textit{OJ} L158, 77 (emphasis added).
\end{footnotes}
different form. A certain conservatism as to the choice of instrument, observed in practice on the part of the EU legislature, is not an expression of a legal inability.

Deviations from the principle of mutual derogation might result from the variance of the ‘operating mode’ of the particular instruments involved (ie the legal effects an act entails precisely due to its affiliation with a given type of act). The fact alone that an act is meant to derogate from an older act cannot furnish the new act with legal effects that exceed the limits set by the legal instrument it has been cast in—this is just another formulation of the parallelism of law-making and law-amending powers. Binding force represents the legal effect that is most relevant in this context. A non-binding act cannot derogate from a binding act, otherwise it would have to assume an effect that does not form part of its own operating mode.

d) Equality of Treaty-based and Delegated Acts

The conception of a single-level secondary law is confronted with the weighty argument that implementing acts are generally of an inferior nature. In the given context, the term ‘implementation’ refers to legal acts that do not find their legal basis directly in the Treaties but rather in secondary law. Thus, the implementing act is preceded by an act delegating certain powers, usually called a ‘basic act’ or, borrowing from Latin terminology, an ‘act of habilitation’. Articles 202 and 211 EC indicate that such a conferral of implementing powers is the standard case in Community law. Accordingly, the Council and, acting jointly under the co-decision procedure, the Council and the Parliament can perform as delegating institutions. Article 202 EC indicates that both the Commission and, exceptionally, the Council are institutions exercising delegated (habilitated) powers. In addition, there is the delegated law-making practised by the European Central Bank (ECB). The Court has declared the conferral of powers on Treaty institutions prima facie permissible and employs a broad concept of ‘implementation’, ranging from individual decisions enforcing the basic acts to supplementary legislation through all available instruments, including amendment of non-essential provisions of the basic act. A habilitated act must, however, be consistent with the procedural as well as the substantive requirements set forth in the basic act, even if the acting institution that delegated the power is the same.

Does this bifurcation into basic acts and implementing acts not indicate that there is a fully fledged hierarchy of norms within secondary law? The relation of acts adopted directly under the Treaties and habilitated acts would then be the same, like the relation between

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277 See below section IV.3(b).
279 On the hierarchy effected by Art 300(7) EC, see Uerpmann-Wittzack, above chapter 4, section II.2.
280 The implementing acts of the Union’s institutions must not be confused with implementing measures of the Member States, as the latter does not imply a conferral of powers. The terminological confusion in Art 291 TFEU is quite unfortunate.
282 Outside of the framework of Art 202 EC the Council’s self-authorisation is generally problematic: see Case C-133/06, above n 27, paras 54ff.
283 See Art 110(1) EC.
284 As to the problems from an administrative point of view, see D Riedel, ‘Die Durchführungsrechtsetzung nach Art. 211, 4. Sp. EG’ [2006] Europarecht 512.
287 Cf H Kelsen, Reine Rechtslehre (1960, reprinted 1992) 228ff; Ross, above n 273, 308ff.

380
primary and secondary law, which means that the lex superior derogat legi priori rule would apply. Quite a few authors have come to this conclusion without, however, expressly arguing their case. In consequence, a habilitated act would have to be consistent not only with its basic act, but also with any other acts based directly on the Treaties. The unmistakable model for this conception is the relationship between acts of parliament and executive regulations, commonly present in the Member States’ constitutional orders. This analogy would have the additional advantage of terminological congruence with the separation of powers doctrine: implementing measures could be attributed to the executive branch, whereas rules based directly on the Treaty could be understood as being legislative.

However, on closer inspection, the relationship between acts of parliament and executive regulations proves to be the wrong point of reference. The Spanish and Italian model of ‘delegated laws’ (decreto legislativo) solves the problem of habilitated acts in a far more convincing manner. Following this model, there are hierarchies within secondary law insofar as a delegated act cannot derogate from the delegating act itself, unless the latter explicitly permits this. Such priority is only relative and does not imply a general hierarchy with respect to other acts of secondary law; rather, it merely constitutes a partial hierarchy. Just as a decreto legislativo adopted by a state government ranks on equal footing with an act of parliament and can derogate from such acts except for the delegating law itself, the habilitated acts of Union law rank as secondary law. Hence, other acts of secondary law cannot serve as standards for the legality of the habilitated act, except for the basic act the implementing act is based on.

e) Is the Lack of Hierarchy an Anomaly of the System?

Apart from the somewhat marginalised group of non-binding acts, secondary law appears to be a surprisingly modern society, where there are no differences according to class or origin—one nation under Treaty law. Not all, however, are ready to pledge allegiance to this egalitarian order. On the contrary, some consider it as a structural deficit of European constitutional law.

Nonetheless, one should bear in mind that the hierarchical order of instruments in national constitutional law accompanies the distribution of state functions to various constitutional organs. The higher rank of an act of parliament is both historically and systematically explained by the fact that this instrument is associated with the superior legitimacy of law-making in a parliamentary procedure. This especially concerns the democratic accountability of directly

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288 See, eg H Schmitt von Sydow, in von der Groeben and Schwarze (eds), above n 91, Art 211 EC, para 77; Schmidt, above n 259, Art 249 EC, para 24; Bumke, above n 149, 656 is sceptical.
289 See von Bogdandy, above n 148, 227ff; on the exceptional case of Arts 34 and 37 Constitution française, see ibid, 262ff.
292 A habilitated act may amend provisions of its basic act if the amended provision is ‘nonessential’: see Art 2(b) of the Council Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, [1999] OJ L184, 23; Art 290(1) TFEU includes this conception for the new category of delegated acts.
293 On the concept of partial hierarchies, see Bast, above n 6, 297ff; see also Bumke, above n 149, 654ff; on the partial hierarchy effected by Art 202 EC, see Case C-378/00 Commission v Parliament and Council [2003] ECR I-937, paras 39–40.
294 Cf the references above n 142; also Möllers, above chapter 5, section IV.2(b)(bb).
295 Cf R Carré de Malberg, La loi, expression de la volonté générale (1931) 38ff; H Heller, ‘Der Begriff des Gesetzes in der Reichsverfassung’ (1928) 4 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 98, 118. This applies notwithstanding the existence of executive laws or laws adopted by referenda, present in some constitutional orders.
In contrast, the decoupling of legal instruments from corresponding institutions and procedures, enshrined in Article 249 EC, has found its corollary in the non-hierarchical structure of secondary law. The refusal of Union law to link up legal instruments to the horizontal order of competences and functions allows it to abstain from statements on the relative ‘weight’ of its institutions and from scaling the competing sources of legitimacy reflected in the various law-making procedures. It can perpetuate the tensions between the principles of integration, sovereignty and democracy without having to answer the question of priority once and for all by establishing a hierarchy of norms. In my view, creating a hierarchical order by future Treaty amendment would have merit only if the new hierarchy expressed a comprehensive scale of legitimacy resulting from a consequent parliamentarisation of all law-making directly based on the Treaties. As the Lisbon Treaty demonstrates, it is rather doubtful that there is as yet sufficient political support for such a constitutional reform.

A less demanding concept of hierarchical ordering of legal acts, namely step-by-step problem solving through a multi-staged legislative process, is provided for even in present EU law, in particular through habilitated law-making. The model of partial hierarchies allows for the more complex procedures for major political choices to be reserved so that the compromises reached in the basic act are not questioned again in the subsequent phases of law-making. A cross-sectoral hierarchy of norms is not absolutely necessary to benefit from a more rational way of law-making.

3. Structural Choice for a Differentiation of Legal Instruments According to Legal Effects

Still searching for an adequate understanding of the EU’s legal instruments beyond legal protection and separation of powers alike, one discovers an approach borrowing from administrative law concepts. Following this understanding, the main task of the doctrine of instruments is to identify and elaborate the applicable procedural and substantive standards implied in the use of a particular instrument. The key concept is the function of legal instruments, well beyond legal protection issues, to serve as a repository of a legal regime, i.e. as a ‘memory cache’ for experiences and rules ‘saved’ in a certain instrument, without having to reflect and explicate them in each and every case. Maintaining an equilibrium of legal effects and requirements within the legal regime of a particular instrument is the guiding principle here.

In the following the constitutional provisions that exist regarding this relation of effects and requirements are examined. It will be shown that EU law uses its legal instruments rather sparsely as a repository for specific requirements concerning the validity of its acts. In most instances, an equilibrium of the act’s legal effects and the validity requirements is reached by discharging the concept of legal instruments from the task of defining applicable standards (a). Keeping this in mind, one understands why the instrument’s typical bundle of legal effects, its ‘operating mode’, represents the most significant concept of the theory of EU legal instruments.

297 See below section V.1(b).
298 See, eg the proposal by Bumke to regard the substantive standards of legality (Maßstabslehren) as an integral part of the doctrine of legal instruments: idem, above n 149, 665ff.
299 On this conceptualisation, see Schmidt-Aßmann, above n 150, ch 6, para 34.
300 Ibid, ch 6, para 36.
To enable and constrain legal effects will itself prove to be the major impact of the institution’s choice of instrument and, thus, the main rationale for the existing differentiation of secondary law according to legal instruments (b).

a) The Regime of Validity: Form-specific Requirements Concerning Legality and Effectuality

In order to prove its validity, an act must fulfill certain conditions that stem solely from its affiliation with a particular instrument. Here one should distinguish between requirements for the act to take effect in law (aa) and requirements pertaining to the act’s legality (bb), since EU law has in fact codified this differentiation offered by legal theory.301

aa) Requirements for Taking Effect in Law

As is the case for all instruments, the enacting institution must take a formal decision concluding its internal procedure and definitively laying down the position of that institution. As a rule, an act can immediately take effect in law once this is done, unless the act itself specifies that it shall enter into force at a later point in time. However, according to Article 254 EC, the entry into force of most instruments is under the dilatory condition that the act either be published in the Official Journal or notified to the specified addressee(s).

The publication requirement has always been applicable to regulations because of their potential to directly impose duties on an indeterminate number of persons. This rule is considered to be an expression of a fundamental principle of law: a measure of public authority cannot be enforced against natural and legal persons until they have the opportunity to make themselves acquainted with it.302 The Treaty of Maastricht’s reformulation of Article 254 EC (then still Article 191 EC Treaty) introduced additional criteria. Directives and decisions adopted in accordance with the co-decision procedure, as well as those directives that are addressed to all Member States, must be published to take effect. These provisions reflect, albeit somewhat vaguely, an emerging concept of Community ‘laws’ in a substantive sense, implying that such ‘laws’ have to be published to be legitimate.303

Directives and decisions that do not fall under Article 254(1) or (2) EC shall be notified to the specified addressees and take effect upon such notification (Article 254(3) EC). Individual notification is not, however, a requirement for the act’s legality. Irregularities in notification are immaterial if the addressee otherwise acquires knowledge of the measure, though such a circumstance may have consequences for the period within which an action must be brought pursuant to Article 230(5) EC.304

As far as the addresseeless decision is concerned, the rules on taking effect seem to have a serious loophole: although that instrument entails binding effects, its publication is only voluntary. Without a specified addressee, individual notification is by definition impossible; yet extending the publication requirement of Article 254(1) or (2) EC by analogy is a plausible conclusion only with respect to addresseeless decisions adopted under the co-decision procedure, but not for others.305 This unique regime of immediate entry into force of a binding instrument is justified by the fact that an addresseeless decision is unable to impose obligations on individuals. However, its character as an instrument typically used for acts concerning

301 Cf. Reimer, above n 223, 144ff.
302 See Case 98/78 Racke [1979] ECR 69, para 15; Case C-161/06 Skoma-Lux sro [2007] ECR I-10841, para 37; however, belated publication does not affect the legality of the act: Case C-149/96, above n 278, para 54.
303 But see Art 7(1) of the Council’s Rules of Procedure, above n 21, which has established a different definition of ‘legislation’ for the purposes of public access to Council documents according to Art 207(3) EC.
305 In practice, all addresseeless decisions adopted under the co-decision procedure are published in the section of the OJ that is reserved for ‘acts whose publication is obligatory’.
an indeterminate number of persons would be better satisfied if an obligation to informative publication was established (which would leave the ability to take effect upon adoption untouched).\footnote{306}

**bb) Legality Requirements**

It is now to be examined which provisions make the legality of an act dependent on the form it has been cast in.\footnote{307} If a legality requirement has not been met, the act may be declared void when challenged or withdrawn by the institution that is competent for its adoption.\footnote{308} These legal consequences are not themselves specific to any one instrument.\footnote{309} In particular, uniform criteria are to be applied for distinguishing mere illegality from *ipso jure* nullity, which makes the act inexistent.\footnote{310} Accordingly, an unlawful regulation or directive can even benefit from a *res judicata* effect unless challenged on time, which is rather unusual compared to acts of general application in national legal orders.\footnote{311} The same holds true for the possibility of a retroactive withdrawal of a wrongful piece of legislation.\footnote{312}

The duty to give reasons under Article 253 EC takes centre stage among the legality requirements that do depend on the chosen instrument. It is one of the 'essential procedural requirements' pursuant to Article 230(2) EC.\footnote{313} Article 253 EC must be understood in light of the distinction made in Article 249 EC between binding and non-binding instruments—only the former are subject to this provision. Following this logic, addresseeless decisions come, by analogy, within the scope of the triad 'regulations, directives and decisions'.\footnote{314} It is consonant with the main function of the requirement to give reasons, viz fostering judicial control, that it applies to all reviewable acts according to Article 230(1) EC.\footnote{315} Whether this applies to the instruments under the second and third pillars of the EU Treaty still requires clarification. As of yet, there is no express instruction to be derived from primary Union law.\footnote{316}

Rules on the language regime of the acts represent a second set of legality requirements that depend on the type of instrument. These rules are not provided for in the Treaties, but are in Regulation No 1 of 1958.\footnote{317} The essential content of this Regulation, that is, the requirement

\footnote{306} Under the Lisbon Treaty, addresseeless decisions without exception count among the acts subject to a publication requirement (see Art 297(2) TFEU), which has unclear consequences for the obligatory force vis-à-vis the institutions prior to publication.

\footnote{307} The relevant point in time at which to examine an act’s legality is the date of its adoption: see Cases 15/76 and 16/76 France v Commission [1979] ECR 321, para 7; Cases 96/82 et al NV IAZ International Belgium et al v Commission [1983] ECR 3369, para 16.

\footnote{308} According to a slightly different view, the power to withdraw lies with the institution that has adopted the act: see A Haratsch, ‘Zur Dogmatik von Rücknahme und Widerruf von Rechtsakten der Europäischen Gemeinschaft’ [1998] Europarecht 387, 401ff.


\footnote{311} For a critical view, see Arzoz, above n 309, 316ff.


\footnote{314} This is by no means a truism, as evidenced by the German, Dutch and Danish wordings of the Treaty, which make plain that, strictly spoken, ‘decisions’ under Article 253 EC are only decisions having a specified addressee pursuant to Article 249(4) EC. The ECJ was still doubtful in Case 22/70, above n 187, para 98; but see Case T-382/94 Confindustria et al v Council [1996] ECR II-519, para 49.

\footnote{315} See Cases 8/66–11/66, above n 195, 92ff; also, in the effect, Kaltenborn, above n 230, 474; Oppermann, above n 230, § 6, para 115.

\footnote{316} The Lisbon Treaty, in Art 296(2) TFEU, expressly expands the scope of the duty to give reasons to all legal acts corresponding to the typology of Art 288 TFEU, including decisions adopted in the CFSP.

\footnote{317} Regulation No 1 determining the languages to be used by the European Economic Community, [1952–8] OJ English special edn I, 59.
of 'multilingualism' of certain types of acts, could also be derived from constitutional principles inherent to the Treaties.\footnote{318} What languages an act must be drafted in depends on its addressees. Regulations and 'other documents of general application' shall be drafted in all official languages pursuant to Article 4 of Regulation No 1. Article 5 of Regulation No 1 implicitly expands the scope of acts to be drafted in all languages to acts that are subject to a publication requirement according to Article 254 EC.\footnote{319} Since these acts, in both eventualities, enter into force simultaneously in various languages, all versions must be the subject of the regular law-making procedure. Disregard of this rule constitutes an infringement of an essential procedural requirement.\footnote{320}

Although the third set of requirements is not directly connected to a certain type of act, it belongs thematically into this context since in this respect the legality of an act also relates to the chosen instrument. It concerns the requirements governing the lawful choice of the appropriate instrument.\footnote{321} As a rule, Treaty provisions leave the choice of legal instrument to the acting institution’s discretion. The use of this discretionary power is governed by the principle of minimum intervention, which is to be understood as an expression of the principle of proportionality.\footnote{322} Among two equally suitable instruments the one must be chosen that interferes to a lesser extent with legally protected interests, while, next to the individual rights, the regulatory autonomy of the Member States is also to be accounted for.\footnote{323} All else being equal, a directive must be given preference to a regulation due to the higher degree of deference to individual rights.\footnote{324} It should also be kept in mind, however, that the legislative discretion as to the choice of legal instrument is, as a rule, very broad and hardly amenable to judicial review. On the rare occasion that a legal basis has a clause on legal instruments, it is to be examined whether opting for an instrument that is not explicitly provided for but exert less intensive effects is also covered by the provision.\footnote{325}

In conclusion: the legal instrument is of some importance for the governing rules on the act’s entry into force, but it is only in a few respects—the duty to give reasons and the language regime—that the law-making institutions also set out the legality standards applicable to the respective act together with the choice of legal instrument. As to why that is so, one might cite ‘user friendliness’ speaking in favour of a less complex system, and a lack of structuring according the trias politica which would ask for a greater differentiation of legality requirements.\footnote{326} At any rate, one major reason is the structural choice in favour of an open system of legal instruments. An equilibrium of effects and requirements is best reached if the standards of validity are as independent of the instrument chosen as possible. This enables the broad discretion as to the actual choice of instrument, subject only to marginal judicial control, to be compatible with the rule of law principle.

\footnote{318}{FC Mayer, Europäisches Sprachverfassungsrecht (2005) 44 Der Staat 367, 394ff.}
\footnote{319}{See Case C-361/01 P Kik v OHIM [2003] ECR I-8283, paras 85 and 87.}
\footnote{321}{See Reimer, above n 223, 146ff.}
\footnote{322}{See Nettesheim, above n 91, Art 249 EC, paras 78 and 103; such is also the understanding of Art 5(4) TEU-Lis and Art 296(1) TFEU; against uncodified rules on the choice of legal instruments: Bumke, above n 149, 670–1.}
\footnote{323}{Zuleeg above n 91, Art 5 EC, para 37.}
\footnote{324}{In the effect, this is the general opinion: see, eg C Calliess, in idem and Ruffert (eds), above n 213, Art 5 EC, para 56, usually with view to the protection of Member State’s autonomy; on this misconception of directives, see above section II.3(a).}
\footnote{325}{M Zuleeg ‘Die Kompetenzen der Europäischen Gemeinschaften gegenüber den Mitgliedstaaten’ (1971) 20 Jahrbuch des öffentlichen Rechts der Gegenwart 1, 14; differently the predominant opinion following Ipsen, above n 29, ch 20, para 24.}
\footnote{326}{Bumke, above n 149, 689 and 695.}
b) Operating Mode as the Key to the System of Instruments

The doctrine on EU legal instruments is hardly of much help in judicial procedures in which the legality of an EU act is reviewed. Meanwhile, public law scholarship ought to not only help constrain the exercise of public authority but also provide guidance for its rational use. A doctrine on EU instruments that joins the ex ante perspective of the law-making institutions and explores the legal pros and cons of various formal options is confronted with a broad scope of tasks. The wide discretion enjoyed by the institutions when shaping new instruments in general and choosing a particular instrument in a given case calls for orientation and systematisation to be provided by scholarship, in order for the respective legal effects to remain predictable and for the communication between the law-makers and the addresses of the law to be successful. Striving for both—the predictability and effectiveness of law—is, with a view to the rule of law, also a constitutional imperative.

In my understanding, the ‘operating mode’ thus constitutes the key concept of the EU legal instruments. It refers to the entirety of legal effects an act can entail due to its formal identity, i.e., its affiliation with a standard instrument (either codified or non-codified). The following four aspects of the instruments’ operating mode are essential in respect of a systematic ordering of instruments according to their legal effects:

(1) A first and fundamental criterion is the binding or non-binding character of an act. Quite a number of legal attributes that Union acts may have are dependent on the presence of binding force, most notably the capacity to create actionable individual rights. The regime of legality (duty to give reasons) and the regime of control (reviewability) are differentiated accordingly.

(2) Another important distinction is whether the legal effects of an act are specific to particular addressees or not. Directives and decisions pursuant to Article 249(4) EC are characterised by their addressee-specific operating mode, whereas the legal effects of regulations and addresseeless decisions arise vis-à-vis everyone (erga omnes effect). Using an instrument with an addressee-specific operating mode makes it possible to limit the personal and/or territorial scope of the act’s legal effects. The presence or absence of an addressee-specific operating mode determines the language regime and the governing rules on taking effect.

(3) A third criterion is the differentiation based on whether an act has a one-step or a two-step implementation structure. The legal effects of regulations and decisions, including those without an addressee, emerge when the act enters into force, whereas directives, framework decisions and recommendations require or recommend implementing acts on the part of the Member States. These ‘directive-like’ instruments are characterised by their requirement of transposition (unless they call for pure omissions). Regulations and state-addressed decisions can emulate a two-step implementation structure, if their contents so require; however, this is not a necessary feature of their operating mode.

(4) A fourth aspect concerns the varying capacities to impose legal obligations. The concept of obligatory force, as distinguished from the more general concept of binding force, is a key to understanding the differences between the binding instruments. Whereas regulations or decisions addressed to private persons can impose obligations on anyone within the Union’s jurisdiction, addresseeless decisions cannot oblige individuals or Member States. In terms of its obligatory force, the directive and the framework decision characteristically choose a middle position: both instruments directly impose obligations on the Member States to which they are

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327 See Schmidt-Aßmann, above n 150, ch 1, paras 30–2, ch 6, para 36.
328 von Bogdandy, above chapter 1, section IV.1(b).
330 See above sections III.1 and IV.3(a)(bb).
331 See above section IV.3(a)(aa) and (bb).
addressed and can, through the Member States’ transposing legislation, indirectly impose obligations on individuals. Non-binding instruments do not have obligatory force as such, though under certain circumstances they can indirectly unfold such quality in conjunction with binding legal norms, in particular the principle of the protection of legitimate expectations or the duty of sincere co-operation.\textsuperscript{332}

It has been demonstrated that clear definitions for the operating mode of the most important instruments of Community law can be formulated with the help of the four criteria of binding force, formal addressee, implementation structure and obligatory force. Certainly, classifying the legal instruments at the abstract level of their operating mode remains strangely sterile in comparison to a characterisation that focuses on typical use in practice and their relation to specific regulatory methods. Would it not be more realistic to describe, for example, directives as a means for the harmonisation of laws and regulations as a means for uniform legislation?\textsuperscript{333} Be that as it may, any such gain in plasticity is purchased at the expense of precision. The directive, for example, does not have a monopoly on the harmonisation of Member States’ laws; regulations and state-addressed decisions are similarly suited and, indeed, are often used thusly in practice. Directives can serve not only to stimulate national legislatures but also to induce administrative planning; they can exhaustively regulate a matter or confine themselves to setting minimum standards or obliging the Member States to make reports, and so on. Functional descriptions of EU instruments evidently run the risk of presenting mere empirical excerpts as normative rules. A sound normative and empirical analysis of Union law argues for the recognition of all instruments as multifunctional. The legal regime of each instrument has to be construed in such a manner that it spans its various functions. Function follows legal potential, not vice versa.

But is it still worthwhile to retain directives and various kinds of decisions when the EC Treaty permits the adoption of regulations in nearly all cases that require law-making activity? After all, the regulation’s operating mode includes and surpasses all the other instruments’ legal abilities. Regulations can include non-binding provisions or provisions that do not impose obligations, and can be drafted in such a way as to address a restricted class of persons or require transposing legislation on the part of the Member States. However, apart from the regulation, which can do virtually everything that the Union is authorised to, the operating modes of the other instruments include specific restrictions on the legal effects. Whenever the law-making institutions want an act to not have certain effects, they can avail themselves of such restrictions inset in the operating mode. Seen from this perspective, the specific capacity that a directive has, but which a regulation lacks, is the former’s inability to directly impose obligations on individuals. The addresseeless decision can be cited as another example: its functional advantages lie in its capacity to make determinations for the Union as a whole without creating obligations vis-à-vis the citizens and the Member States at the same time. Due to these ‘built-in’ limitations as to its obligatory force, the addresseeless decision is predestined to be used when the Treaties empower the institutions to adopt ‘incentive measures, excluding any harmonisation’.

Here, an apparent paradox comes to the fore that is fundamental for the logic of the EU legal instruments. In the legal ‘weakness’ of an instrument, its built-in inability, lies its functional ‘strength’. By choosing a seemingly ‘weaker’ instrument, the law-making institutions are able to make use of a repository of limitations for reliably excluding unwanted legal effects.\textsuperscript{334} This is the pivotal point of the EU’s system of legal instruments: the law-making institutions are given a range of options for deliberately limiting the legal effects of their

\textsuperscript{332} See, eg Case 141/78 France v UK [1979] ECR 2923, paras 8ff.
\textsuperscript{333} See, eg Biervert, above n 225, Art 249 EC, para 18.
\textsuperscript{334} For this reason, Röhl (above n 198, 363–4) is overly pessimistic about the ability of EU legal instruments to serve as a repository at all.
acts—through adopting non-binding acts, via limiting effects on specified addressees, through enacting laws that require transposition or by using instruments with a confined obligatory force.

V. Legal Instruments and Judicial Protection after the Lisbon Treaty

The last part of this contribution deals with the innovations introduced by the Lisbon Treaty in the spheres of legal instruments (1) and judicial protection (2). It picks up the reform issues of the recent decade identified above: the problematic pillar architecture, the simplification and hierarchisation of legal instruments and the expansion of the scope of the action for annulment.

1. Restructuring the Legal Instruments: Inventing the European ‘Domain of Laws’

a) Simplification

The issue of simplification shall be discussed first. In the evolving debates of the European Convention the issue had soon boiled down to the question of how to reduce the number of legal instruments.\(^{335}\) As demonstrated by various interventions, though, the bulk of the differentiations foreseen by the Treaties are supported by practical considerations and resist all-too-straightforward simplification.\(^{336}\) Accordingly, all legal instruments provided for in Article 249 EC have had a successor in the Constitutional Treaty (CT) regardless of the new terminology, and some new ones have been recognised for the first time.\(^{337}\) Article 33 CT continued to differentiate legal instruments according to their legal effects (as does Article 288 of the Treaty on the Functioning of the European Union (TFEU)). An exhaustive list has not been pursued either, so that the structural choice for an open system of instruments has remained untouched.\(^{338}\) Finally, the Lisbon Treaty even sees a return to the familiar terminology.\(^{339}\)


\(^{336}\) On the failed plan of the Convention’s Praesidium to allow only for directives adopted directly under the Treaties, see CONV 724/03, 87; on the directive in the CT, see P Prechal, ‘Adieu à la Directive?’ (2005) 1 European Constitutional Law Review 481.


The objective of simplification was to be pursued anyway, at least partially, by uniting two or more legal instruments under one denomination. This applied according to the CT to the ‘European regulation’, the effects of which were to be either that of an EC regulation or that of an EC directive; such poor construction has fortunately been remedied by the Lisbon Treaty. Even under this Treaty the notion of ‘decision’ according to Article 288(4) TFEU remains an amalgamation of instruments: its effects are either that of a decision according to Article 249(4) EC or akin to an addresseeless decision (at the very least, the latter has finally been partly codified). In addition, the new ‘decision’ comprises diverse legal instruments of the CFSP currently enshrined in Article 12 EU, without giving up the substantial differentiations (see Article 25(b) TEU-Lis). Such pseudo-simplification certainly does not contribute to the transparency of the system.

One particular ‘simplification’, however, deserves approval and constitutes probably the most significant innovation of the whole Treaty revision: the removal of the third pillar and thus also of the sector-specific legal instruments under Article 34 EU. The remaining particularities provided for in Articles 67ff TFEU concern the law-making procedures rather than legal instruments. With the entry into force of the Lisbon Treaty the legal instruments developed in Community law could at long last be applied in all internal policies, with the consequence that cross-sectoral communication and learning processes would be enhanced, thus contributing to the coherence of the entire constitutional order.

b) Hierarchisation

The Constitutional Treaty employed a notion which the drafters of the Treaties had in the past carefully avoided: the concept of ‘a law’ (la loi, in French, das Gesetz, in German). From the perspective of continental legal scholarship, this symbolises a quantum leap equal to that of the term ‘constitution’. There are international organisations (and bridge clubs, of course) that have a ‘constitution’, but hardly any of these organisations is making ‘laws’ to express the will of its people. When the political decision was made to save the substance of the failed CT inter alia by withdrawing the language of constitutionalism, the notion of ‘laws’ almost naturally fell foul of the semantic demobilisation. Following the general approach of drafting the Treaty of Lisbon, the terms ‘European laws’ and ‘European framework laws’ should be avoided, yet the distinction between legislative and non-legislative activity upon which it was based, and the legal consequences it was meant to entail, should be preserved.

In effect, this represents an effort to cram square pegs into round holes. The very idea of the CT’s invention of European (framework) laws was to qualify regulations and directives of a legislative character, and only these, as the new legislative instruments of the Union. The Lisbon Treaty eventually dropped the attempt to translate this distinction into the system of instruments. Henceforth, all binding instruments of Article 288 TFEU can constitute ‘legislative acts’ or ‘non-legislative acts’, as the case may be. This is quite different from just avoiding a
tabooed language. This solution has the welcome side effect of restoring the legislature’s power to adopt decisions without a specified addressee, a useful option absent under the CT.

But what is the concept of ‘legislation’ as developed in the CT and maintained by the Lisbon Treaty about? Does it meet the expectations the former raised by employing the loaded term ‘European laws’, or was this terminology part of a merely symbolic constitutionalism that was watered down by the latter for good reason? An appropriate answer may emerge from a comparison with national constitutional law (aa). It reveals a rather modest and partly flawed concept of legislation in the Treaty of Lisbon (bb).

**aa) A Comparative Approach to the European Concept of Legislation**

Drawing from national experience, a ‘law’ is first and foremost expected to be an act of parliament. In this respect, the Lisbon Treaty fares quite well as far as the so-called ordinary legislative procedure is concerned. It defines, as a rule, that Parliament and Council co-decide upon a legislative act (Article 289(1) TFEU). This follows the bicameral approach gradually developed since the Maastricht Treaty and reflects the two strains of democratic legitimacy of the Union.345 Had the Treaty drafters stopped at that point, they would have proposed a convincing classification based on a procedural concept of ‘law’. But the co-decision rule has various exceptions called ‘special legislative procedure’ (Article 289(2) TFEU). It is in fact not one but many different procedures, each defined in the relevant legal basis.346 Some of these special legislative powers need the consent of the Parliament, while others merely require its consultation. Hence, whenever the TFEU so provides, the Council acting as a legislator does not necessarily have to reach agreement with the Parliament.347 In short, there need not be any procedural difference between a legislative and a non-legislative act.348 The Lisbon Treaty’s definition of ‘legislation’ is neither instrument-based nor strictly procedure-based.349

Secondly, a ‘law’ is usually supposed to meet the expectation of being supreme, ranking only below the constitution but prevailing over other instruments enacted under that constitution in case of conflict. According to widespread opinion, such a hierarchy of norms implicitly results from introducing the concept of European laws and framework laws and its Lisbon successors, the ‘legislative acts’.350 Yet one would expect such a break with a structural choice of the past to find a clearer expression.352 Neither the CT nor the Lisbon Treaty provides for a clause stipulating a general hierarchy, and revealingly the Convention’s Praesidium had rejected any requests from the floor to include such a provision.353

Even assuming that the Court will at one point recognise the existence of a hierarchy of norms resulting from the Lisbon innovations, there is no certainty as to what the blueprint for the pyramid would look like. There are up to five categories of acts that could qualify for such a ranking, all of which may take the form of a regulation, a directive or either sort of habituated acts (‘delegated’ acts of the Commission and ‘implementing’ acts of the

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345 Affirmed by Art 10(2) TEU-Lis.
347 Art 16(1) TEU-Lis is somewhat misleading in this regard.
348 Cp, eg Art 23(2) TFEU and Art 109 TFEU.
349 It rather employs a competence-based definition, see more on this in the next subsection (bb).
352 Bumke, above n 149, 692.
The fifth category is non-legislative acts adopted by an institution directly under the Treaties. Would there be a two-tier hierarchy between legislative and non-legislative acts, or rather a system of three, four or five levels? The answer is far from clear. The description of delegated acts to ‘supplement or amend’ a legislative act does not suggest an inferior position and neither does the Treaty in provisions such as Article 43(3) TFEU, which reserves for the Council certain powers in agricultural policy that are to be exercised without consulting the Parliament by way of derogation from the broad legislative competence contained in Article 43(2) TFEU. The suggestion that there is a non-written rule of priority inserted by the Lisbon Treaty proves unmanageable in terms of methodology and implausible in terms of substance.

Summing up this aspect, the new distinctions established in the Lisbon Treaty do not mirror a comprehensive scale of procedural legitimacy and thus do not lay the proper groundwork for a hierarchy of norms. The post-Lisbon division of powers is still governed by the individual empowering provisions of the Treaties and by partial hierarchies between basic and habilitated acts. Within the scope of their respective competences, non-legislative acts prevail over interfering legislation in the formal sense—incidentally, a conception also known in French constitutional law.

A further aspect of what a ‘law’ is expected to entail is the idea which the French call domaine de la loi, the Germans Gesetzesvorbehalt, referring to those subject matters that are exclusively reserved for decision-making by way of legislation in the formal sense. The definitions vary significantly between the respective constitutional orders, yet it is a common characteristic of these ‘domains’ to include constitutionally protected individual liberties: interference with these fundamental rights is only permissible on the basis of, or by order of, a law. Indeed, reading the text of the EU Charter of Fundamental Rights suggests the existence of such a European ‘domain of laws’. According to its Article 52(1), any limitation on the exercise of Charter rights must be ‘provided for by law’. A consistent interpretation holds that the term ‘law’ in Part II of the CT (ie the Charter) has the same meaning as in Part I (which defines the legal instruments). This argument was considerably weakened by the Lisbon shift of language. There are two further arguments supporting a different view. First, the Strasbourg Court also rejects the idea that similar formulations present in the ECHR were drafted in order to guard the prerogatives of a certain branch of government. Secondly, if the institutions of the Union could only interfere with fundamental rights by using a legislative act, any such interference, howsoever justified, would be excluded in areas where such an act is not at the disposal of the institutions. This is the case, in particular, with competition policy. There is no doubt that the relevant regulations, directives and state-addressed decisions potentially interfere with the rights of private subjects. If that kind of activity were lawful only when it takes the form of legislative acts, one part of the Treaties would create competences that...
another part would intend to suppress. Overall, in European constitutional law the chapter on legal instruments is not yet paired with that on fundamental rights protection.

Finally, in most national systems ‘laws’ enjoy a high degree of shielding from the judiciary. If not excluded completely, the right to declare an act of parliament void (or inapplicable) is most often reserved to a special procedure or a special court. In Union law this concept is unknown to date. On the contrary, Article 263(1) TFEU explicitly mentions ‘legislative acts’ among the acts amenable to legal review through normal annulment procedures, including actions brought by private parties. However, at one point the Lisbon Treaty raises questions as to whether its concept of legislation is twinned with legal review. Henceforth, an individual’s action for annulment may be admissible even though the ‘individual concern’ requirement is not met, provided that the contested measure is a ‘regulatory act’ (Article 263(4) TFEU). In the context of the CT, most authors have construed the concept of regulatory acts with a view to the similar term ‘European regulation’, ie a non-legislative instrument according to the CT’s nomenclature. The relaxed conditions for access to legal protection against regulatory acts should thus not apply to the CT’s legislative instruments. I have already proferred a different view under the terms of the CT. In any event, it seems fairly illogical under the Lisbon Treaty to argue that a non-legislative ‘regulation’ in the sense of Article 288 TFEU is a ‘regulatory act’ by definition, while a legislative ‘regulation’ is strictly excluded from being such an act. We will return to this issue in the final section on legal protection. For the present purposes, suffice it to note that the concept of legislative acts in the post-Lisbon Union has no implications for the system of judicial review.

**bb) Reinforcing Public Scrutiny as the Defining Feature of the Concept of ‘Legislation’**

What, if any, are the legal characteristics distinguishing legislative acts from others? The Lisbon Treaty rather sparingly attaches legal consequences exclusively to its legislative acts—though such consequences do exist. They concern certain procedural requirements, and may hence be classified as part of the acts’ regime of validity. Most rules applicable solely to legislative acts concern the transparency of the decision-making process. Not only the Parliament but also the Council shall deliberate and vote in public session when exercising legislative functions, ie deciding upon a draft legislative act. Likewise, under Protocol No 1, on the role of national parliaments, any draft legislative act shall be forwarded to the national parliaments. Protocol No 2, on subsidiarity and proportionality, establishes an early warning system involving the national parliaments in order to foster subsidiarity compliance, which, again, is only applicable when a draft legislative act is at issue. A legislative act under the Lisbon Treaty is, one can conclude, an act which is subject to special public scrutiny. The national parliaments serve as an additional link between the Union institutions and public discourse. This reveals a surprising functional parallel with the national constitutional systems. On the national plane as well, the concept of a ‘domain of laws’ ensures that, by requiring parliamentary procedure, public delib-

### Notes

363 See above section III.1.


367 But see also Art 5(2) TFEU.

368 Art 16(8) TEU-Lis and Art 15(2) TFEU.

369 Confirmed in Art 12(a) TEU-Lis.
eration is enabled, at the same time that public attention is focused on issues of great public importance.\footnote{In detail, see von Bogdandy, above n 148, 199ff.}

It is coherent with this function that the institutions do not have to decide themselves whether an act adopted directly under the Treaties is legislative or non-legislative.\footnote{See Van Raepenbusch, above n 351, 618.} Just a very small number of empowering provisions seems to delegate the task to the Council, most notably the so-called flexibility clause of Article 352(1) TFEU (now Article 308 EC).\footnote{Also Arts 203 and 349(1) TFEU; this calls upon the Council to make plain the choice it has actually made since under the Lisbon Treaty the (non-)legislative character of an act is not signalled by the denomination of the instrument, except for habilitated acts (see Arts 290(3) and 291(4) TFEU).} Accordingly, only a careful analysis of the legal bases provided for in the TFEU can determine whether the distinction between legislative and non-legislative acts is based on reasonable criteria.

Astoundingly, there was hardly any debate within the Convention about which empowering provisions of the draft CT should form part of the domain of European laws.\footnote{For a detailed analysis of the deliberations and the inconsistencies of the results, see JB Liisberg, ‘The EU Constitutional Treaty and Its Distinction between Legislative and Non-Legislative Acts—Oranges into Apples?’, Jean Monnet Working Papers No 1 (2006), available at www.jeanmonnetprogram.org.} The outcome is, to put it mildly, not convincing in all cases. Competition law has already been cited as an example: is the Council really adopting an act of a non-legislative nature, in any meaningful sense of the word, when laying down the general rules for the enforcement of competition law, eg in its anti-trust Regulation No 1/2003?\footnote{See Art 193 TFEU.} When the Council defines the legal framework for administrative co-operation in the areas of freedom, security and justice, eg for cross-border data exchange among police authorities?\footnote{See Art 74 TFEU.} When the Council establishes the limits and conditions for the power of the ECB to impose sanctions on undertakings?\footnote{See Arts 129(4) and 132(3) TFEU.} All this appears, as Dougan has correctly noted, ‘rather arbitrary’.\footnote{M Dougan, ‘The Convention’s Draft Constitutional Treaty: Bringing Europe Closer to its Lawyers?’ (2003) 28 EL Rev 763, 784; reconfirmed in idem, ‘The Treaty of Lisbon 2007: Winning Minds, not Hearts’ (2008) 45 CML Rev 617, 547: ‘a combination of shallow conception and poor execution’.} Bypassing the higher level of public scrutiny and of parliamentary involvement, both at the European and the national level, is precisely what seems to have motivated the drafters in excluding those and other competences from the European domain of laws.\footnote{K Lenaerts, ‘A Unified Set of Instruments’ (2008) 1 EURCont 57, 51; Lenaerts and Gerard, above n 139, 311 and 313.}

One arrives at a mixed conclusion. As in most other sections of European constitutional law, the proposed reform of the legal instruments heralds no revolution but rests mainly on established constitutional structures. The structural choices of the earlier Treaties remain in force, including the decisions to establish the essentially non-hierarchical unity of the acts adopted by the institutions. As far as legal instruments are concerned, form and substance seem more in consonance under the modest terms of the Lisbon Treaty than under the overly ambitious language of the CT.

However, the Lisbon Treaty would bring significant change as for the first time it uses different categories of institutional acts to decide the applicability of transparency rules. This approach is to be welcomed because it rests on the democratic ideal that la loi shall be used for issues of major importance, and intense public debate is therefore required. It would be only one step from here for the ECJ to tap into this distinction and establish different levels of judicial scrutiny, most likely with an inverse threshold. Attaching certain transparency mechanisms to legislative acts may soon prove to have marked only the beginning of a lasting development.\footnote{For prima facie evidence, see C-133/06, above n 27.}

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\begin{itemize}
\item \textsuperscript{370} In detail, see von Bogdandy, above n 148, 199ff.
\item \textsuperscript{371} See Van Raepenbusch, above n 351, 618.
\item \textsuperscript{372} Also Arts 203 and 349(1) TFEU; this calls upon the Council to make plain the choice it has actually made since under the Lisbon Treaty the (non-)legislative character of an act is not signalled by the denomination of the instrument, except for habilitated acts (see Arts 290(3) and 291(4) TFEU).
\item \textsuperscript{373} For a detailed analysis of the deliberations and the inconsistencies of the results, see JB Liisberg, ‘The EU Constitutional Treaty and Its Distinction between Legislative and Non-Legislative Acts—Oranges into Apples?’, Jean Monnet Working Papers No 1 (2006), available at www.jeanmonnetprogram.org.
\item \textsuperscript{374} See Art 193 TFEU.
\item \textsuperscript{375} See Art 74 TFEU.
\item \textsuperscript{376} See Arts 129(4) and 132(3) TFEU.
\item \textsuperscript{378} K Lenaerts, ‘A Unified Set of Instruments’ (2008) 1 EURCont 57, 51; Lenaerts and Gerard, above n 139, 311 and 313.
\item \textsuperscript{379} For prima facie evidence, see C-133/06, above n 27.
\end{itemize}
It is therefore all the more unfortunate that in drawing the line the Lisbon Treaty perpetuates the CT’s weaknesses; important empowering provisions of the TFEU are still classified as non-legislative on a rather arbitrary basis, let alone the activities of the European Council and the Council in the Foreign and Security Policy, which are still completely excluded from the *domaîne législatif* of the Union. It may be true, as Liisberg generously remarked, \(^{380}\) that the project of establishing a breakdown between legislative and non-legislative acts was simply a purposive discourse of the European Parliament (and its friends) to widen the scope of its powers. In that respect, the ‘mission of distinction’ was quite successful, if not accomplished. But this does not compensate for the flaws of a legal concept that will hardly remain a ‘harmless ornament of the European construction’\(^{382}\) but rather, once enshrined in the Treaties, will take on a life of its own.

2. Innovations for the Legal Protection of Individuals

Issues of legal protection were not central to the discussions on the Constitutional Treaty and its successor. This was perhaps due to the fact that the Treaty of Nice already secured, through institutional reform of the judiciary, the capacity of the ECJ to function in an enlarged Union. However, two issues were left unsolved: the deficits in protection resulting from the pillar structure of the Union (a) and pending proposals for modification of the action for annulment under Article 230(4) EC (b).

(a) Extending the Constitutional Standard Case: The Dismantling of the Third Pillar

Regarding judicial protection in the third pillar, the commitment to the constitutional standard case has been nearly as clear as in the sphere of legal instruments.\(^{383}\) The drafters of the Lisbon Treaty replaced Article 35 EU with the general rules on legal protection and also repealed the exceptions according to Article 68 EC.\(^{384}\) The sole deviation from the constitutional standard case still in place is Article 276 TFEU (now Article 35(5) EU), prescribing the limited reviewability as to the ‘validity or proportionality’ of operations carried out by the police and other law-enforcement authorities of the Member States. This constitutes a procedural complement to the substantive attribution of primary responsibility to the Member States with regard to the maintenance of law and order and the safeguarding of internal security (see, in particular, Article 4(2) TEU-Lis and Article 72 TFEU). Different from the particularly problematic Article 68(2) EC, which seems to also comprise actions of EU institutions and bodies, Article 276 TFEU exempts from the jurisdiction of the ECJ only certain activities of the Member States. Thanks to the corresponding jurisdiction of national courts, this does not constitute an insolvable conflict with the rule of law principle.\(^{385}\)

One more extension of the constitutional standard case is worth mentioning here, though its symbolic significance probably surmounts its practical impact. For the first time acts of the European Council shall also be subject to judicial control, even through legal actions brought

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\(^{380}\) See Arts 15(1) and 24(1) TEU-Lis.

\(^{381}\) Liisberg, above n 373, 42–3 (section 4).

\(^{382}\) Ibid, 45.


\(^{384}\) However, according to Art 10 of Protocol No 36, legal acts adopted under Art 34 EU are subject to a five-year transition period during which the regime of Art 35 EU is generally applicable.

\(^{385}\) In the area of the CFSP, jurisdiction of the ECJ remains excluded (Art 24(1) TEU-Lis, Art 275(1) TFEU), while an exception regarding sanctions is provided for (Art 275(2) TFEU). For a critical opinion, see T Corthaut, ‘An Effective Remedy for All?’ (2005) 12 Tilburg Foreign Law Rev 110; see also Uerpmann-Witzack, above chapter 4; D Thym, above chapter 9.
by individuals (Article 263(1) and (4) TFEU). This is consistent with its qualification as an institution of the Union (Article 13(1) TEU-Lis) and indispensable with a view to the self-perception of the Union of being a polity based on the rule of law, as the Court held in *Les Verts vs Parliament*. This Treaty amendment makes clear that there is no legal vacuum at the top of the political system of the Union. It thereby strengthens the normative force of the European Constitution.  

b) Modifying the Constitutional Standard Case: The Modest Reform of the Action for Annulment

The two fundamental provisions of the Union system of legal review under the Lisbon Treaty are the guarantee of individual rights protection according to Article 47 of the Charter of Fundamental Rights and the renewed task of the ECJ to ensure observance of ‘the law’ (ie the rule of law principles) according to Article 19(1) TEU-Lis. These principles are complemented by the emphasised obligation of each Member State to provide the necessary remedies to guarantee effective judicial protection in the entire scope of Union law (Article 19(1)(2) TEU-Lis). These three, partly overlapping, provisions reflect the clear intention of the Lisbon Treaty drafters to affirm the basic structures of the present system as developed by the Court of Justice.

Politically less visible has been the affirmation of the ECJ’s policy to shape the system of judicial protection as form-neutral as possible in decoupling it from the legal instruments. The wordings of the relevant provisions still connecting to certain instruments have been adjusted consistently according to the Court’s case law. For example, the references to regulations in Article 231 EC (Article 264 TFEU: ‘act’) and in Article 241 EC (Article 277 TFEU: ‘act of general application’) have been dropped. While being most welcome in general, the ‘deformalisation’ tendency has been overdone slightly in Article 299(1) TFEU, which, differently from Article 256(1) EC, declares all ‘acts’ that impose a pecuniary obligation on persons other than States to be enforceable. It is not quite clear why the prerequisite of a formal decision with a specified addressee has been dispensed with. To allow for regulations or even informal acts to provide a title of execution is at odds with the principle of legal certainty.  

The amended version of Article 230(4) EC has received far greater attention. Depending on the understanding of the actual relation between the two concepts of ‘decision’ in Articles 230 and 249 EC, the form-neutral term of ‘act’ in Article 263(4) TFEU constitutes either a new conception or simply a codification of the case law since *Codorniu*. Be that as it may, the enumeration principle in legal protection will eventually be overcome when the Lisbon Treaty enters into force. Moreover, dropping the notion of ‘decision’ for an action for annulment to be admissible can, but does not necessarily have to, mean that the *Plaumann* formula will be relaxed in future.

The interesting thing is that further developments of such a kind are left entirely to the discretion of the courts. The Convention and the ensuing IGCs have decided, regardless of the invitation in the *UPA* judgment, against a fundamental revision of the Treaty provisions on judicial protection. Consensus was reached only on a modest expansion of the access to direct actions. For the contestation of ‘regulatory acts’, referred to briefly before, the applicant’s direct concern is sufficient, provided that the act ‘do[es] not entail implementing measures’ (Article 263(4) TFEU). Depending on the respective commentator’s position in the reform

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386 See also von Bogdandy, above chapter 1, section IV.2(a).
387 See in detail above section III.2.
388 This is suggested by Mayer, above n 364, 610.
debate on legal protection, this amendment is seen either as a (far too) small step in the right
direction or as a custom-fit adjustment.\footnote{389}

Those legal scholars who construed the notion of ‘regulatory act’ as a reference to the
omenclature of legal instruments under the CT\footnote{390} (implying that legislative acts as defined in
the CT would not qualify) actually ought to state an implicit, if quite substantial, revision: the
‘regulation’ under the Lisbon Treaty is, in contrast to the ‘European regulation’ under the CT,
not at all restricted to acts lacking ‘legislative’ character.\footnote{391} In my view, however, any acts of
general application can constitute acts of a ‘regulatory character’, including legislative acts in
the technical sense. This was the case even under the terms of the CT and thus is unchanged in
the Treaty of Lisbon. This view is based on the following considerations.

The drafting history of the provision is, on close inspection, quite inconclusive.\footnote{392} The deliber-
ate use of an undefined term by the Convention’s Praesidium reminds one of a ‘dilatory
formulaic compromise’ that leaves broad margins of discretion to the Court to actually construe its meaning.\footnote{393} A comparison of the different language versions reveals that none of
these uses the identical wording for ‘regulatory character’ and ‘regulations’, while the proximity varies considerably.\footnote{394} A survey of the case law demonstrates that the French key
term réglementaire usually does not constitute an antonym of ‘legislation’ but rather one of its
positive attributes; the imaginary antonym to the actes réglementaires is the actes individuels.
Equivalent translations of caractère réglementaire in previous cases are ‘nature as a regulation’\footnote{395} or ‘nature of a regulation’\footnote{396} but also ‘legislative nature’\footnote{397} (Normcharakter, in
German). The conclusion that in the given context the phrases ‘having the character of a
regulation’ (caractère réglementaire) and ‘being . . . of a legislative nature’ (de caractère
normative) have long since had the same meaning is brought to proof by reading the Confédération nationale decision—exactly that judgment whose strict approach is being relaxed by the present revision of Article 230(4) EC.\footnote{398}

With regard to the objectives of the provision, two additional considerations militate in
favour of assuming the distinction of ‘legislative’ and other acts, provided for in the Lisbon
Treaty, to be immaterial for the classification of contestable acts. Both arguments are rooted in
the principle of the rule of law and concern the adequate shaping and controlling of public
authority. First, it would be quite unfortunate if, in the very moment when the long march to


\footnote{390} For references, see above in n 364.


\footnote{392} See CONV 636/03, Final report of the discussion circle on the Court of Justice, nos 20–2. Revealingly, all later attempts to technically ‘clarify’ the issue failed on account of a lack of clarity. On this and the drafting history in general, see M Varju, ‘The Debate on the Future of the Standing under Article 230(4) TEC in the European Convention’ (2004) 10 European Public Law 43, 48ff; Lisberg, above n 373, 38–9 (section 3.5.1); Mayer, above n 364, 610ff.


\footnote{394} Some languages employ a term that corresponds to ‘rule-making’ rather than ‘regulation’: HH Fredriksen, ‘Individuallagemöglichkeiten vor den Gerichten der EU nach dem Vertrag über eine Verfassung für Europa’ [2005] Zeitschrift für europarechtliche Studien 99, 120; see ibid, 119ff, on the question whether addressseeless decisions can have the character of a regulation. Regarding the latter issue also Cremer, above n 364, 579ff.

\footnote{395} See Case 101/76, above n 208, para 24.


\footnote{397} See Case C-76/01 P Eurocoton v Council [2003] ECR I-10091, para 68.

\footnote{398} Cases 16/62 and 17/62, above n 42, summary nos 3 and 5.
formal neutrality of judicial protection has almost reached its destination, new differentiations based on the type of act were introduced. These could cast doubts on the coherence of an open, non-hierarchical system classifying acts according to their legal effects. The new differentiation according to the legislative or non-legislative character of EU acts should not be of relevance in terms of legal protection, even if the dividing line between the two classes were convincingly redrawn. This proposition is affirmed by the second consideration, which focuses on the effective legal protection of the affected individuals. If and when a punctual expansion of access to direct actions for challenging acts of general application is necessary in order to close existing gaps in a predominately decentralised system of judicial protection, it is inconsistent to do so for only some of the problematic constellations. Unlawful legal acts of the Union plainly do not deserve to be shielded from judicial scrutiny. A principle-based construction of the Lisbon Treaty is required in order to better meet the programmatic objective of being a polity based on the rule of law, and to hold the fragile balance between public authority and judicial control.
In Europe, the judge has never been merely *la bouche qui prononce les paroles de la loi*, as the German constitutional court, the Bundesverfassungsgericht (BVerfG) exclaimed in 1987.\(^1\) This statement applies to European constitutional law as well, regardless of the distinct legal traditions of its Member States. Therefore, there are two aspects to the issues of European constitutional adjudication: ultimate decision-making in the multilevel EU system and the relationship between the European Court of Justice (ECJ, the Court) and the national courts. The interplay of the respective courts is not only the subject of the study of European constitutional law doctrine, but the courts themselves actively participate in the shaping of this same European constitutional law.

In the following, the analysis of the relationship between the two levels of courts will be at the forefront of the issue of European constitutional adjudication, rather than a description of the system of legal protection.\(^2\) Such an approach necessarily has to begin with a comparative assessment of the European and national courts’ jurisprudence (I), followed by a theoretical approach (II).


breakdown of the case law (II). I will conclude with observations on the latest developments in the relationship of European and national courts (III).

I. Taking Stock: The ECJ and the Highest National Courts—Conflict or Co-operation?

The highest court at the European level is the European Court of Justice (ECJ) in Luxembourg.\(^3\) The situation is less clear at the national level. Therefore, the first step is to identify the national adjudicating bodies that function as the ECJ’s interlocutors.

The relevant adjudicating entities in the present context are constitutional courts and supreme courts.\(^4\) Special constitutional courts exist, alongside specialised high courts in Austria (Verfassungsgerichtshof), Germany (BVerfG), Italy (Corte Costituzionale), Portugal (Tribunal Constitucional), Spain (Tribunal Constitucional) and, since 1996, Luxembourg (Cour constitutionnelle). Most of the states who joined the EU in 2004 and 2007 have a constitutional court: Latvia (Satversmes tiesa), Lithuania (Konstitucinio Teismo), Malta (Qorti Kostituzzjonali), Poland (Trybunał Konstytucyjny), Czech Republic (Ústavní soud), Slovakia (Ústavný súd), Slovenia (Ustavno sodišče), Hungary (Alkotmánybíróság), Bulgaria (КОНСТИТУЦИОЕН СЪД НА РЕПУБЛИКА БЪЛГАРИЯ) and Romania (Curtea Constitutionale). The accession candidates Turkey and Croatia also have constitutional courts: the Anayasa Mahkemesi and the Ústavni sud Republike Hrvatske, respectively.

Ireland (Supreme Court) and Denmark (Højesteret) have supreme courts that are also constitutional courts. Supreme Courts exist in Estonia (Riigikohus) and Cyprus (Anotato Diastirio tis Dimokratias). In Great Britain, it is the second chamber of Parliament, the House of Lords, that exercises the functions of a constitutional and supreme court (as of September 2009, there is a Supreme Court). In the Netherlands, there are a number of specialised courts of equal rank, inter alia the Raad van State and the Hoge Raad. The situation is similar in Sweden, where the highest (specialised) courts are the Supreme Court (Högsta domstolen) and the Supreme Administrative Court (Regeringsrätten), as well as in Finland (Korkein oikeus, Supreme Court, and Korkein hallinto-oikeus, Supreme Administrative Court). Swedish judges of the two supreme courts also form a Council (Lagrådet) to exercise a non-binding review of draft legislation, whereas Finland has a Constitutional Committee of Parliament (Perustuslakivaliokunta) to control its draft legislation.

In France, there is no formal constitutional court aside from the highest courts for administrative law (Conseil d’Etat)\(^6\) and for civil and criminal law (Cour de cassation). The Conseil constitutionnel, originally limited to the review of draft legislation, increasingly exercises the role of a constitutional court.

Finally, Belgium has specialised supreme courts (Conseil d’Etat and Cour de cassation), and since 1983 a constitutional court that specialised in, but was also limited to, controlling the

\(^3\) Art 19 TEU-Lis clarifies that it is necessary to distinguish between the European Court of Justice as a collective term for all European courts and as a term for the highest of these courts.


\(^5\) Ανώτατο Δικαστήριο της Δημοκρατίας.

\(^6\) Institutions modelled on the structure of the French Council of State (Conseil d’Etat) in Belgium, Netherlands, Greece, and until 1996 also in Luxembourg typically have specialised adjudication-sections which exercise the functions of a supreme administrative court, while other sections have advisory functions. The specific names of the adjudication-section, eg in France *Section du Contentieux*, in the Netherlands (since 1994) *Afdeling Bestuursrechtspraak*, are omitted here.
exercise of competences, the Cour d’arbitrage. In 2007 the Cour d’arbitrage was renamed Cour constitutionelle and can now be considered a constitutional court. In Greece, there are several supreme specialised courts, the Symvoulio Epikrateias7 (Council of State), the Elegktiko Synedrio8 (Court of Auditors) and the Areios Pagos9 (Supreme Court). Beyond that, there is a Special Supreme Court, the Anotato Eidiko Dikastirio,10 which is composed of judges from the highest specialised courts.

To solve conflicts between these courts as well as inconsistencies in their jurisprudence, similar institutions can typically be found in systems with specialised high courts of equal rank. In France, there is a Tribunal des Conflits between Cour de cassation and Conseil d’Etat, and in Germany, there is a Gemeinsamer Senat der obersten Bundesgerichte (Joint Chamber of the Highest Federal Courts).

This summary overview of the highest courts of the Member States leaves us with a rather heterogeneous picture.11 There are, of course, parallels and commonalities, or even cognate relationships, eg concerning the Austrian VfGH as role model for the German, Italian, Spanish and Polish constitutional courts or the French administrative judicature as blue print for the councils of state of Belgium, the Netherlands, Greece and Luxembourg. Contrasts seem to prevail: traditional and venerable institutions (such as the House of Lords in Great Britain or the Conseil d’Etat in France) can be found alongside newly created institutions (in Belgium, Luxembourg and Poland). Courts with comprehensive powers (the BVerfG in Germany, the VfGH in Austria) operate side by side with less powerful tribunals. Sometimes, there are no specific constitutional courts at all (Denmark, Ireland); sometimes, it is the mere idea of constitutional adjudication or judicial review that is not compatible with the constitutional traditions of a Member State (eg in France, Finland and the Netherlands).

One way to improve the understanding of the relationship between the ECJ and the respective supreme national courts is to examine the procedural link between the court levels as foreseen by the Treaties: the preliminary reference procedure under Article 234 EC (Article 267 of the Treaty on the Functioning of the European Union (TFEU)) (1). Apart from this, there are areas of substantive constitutional law that have shaped the relationship between the courts. These include the issue of fundamental rights protection as well as the question of who controls the limits of the EU’s competences (2).

1. Adopting a Procedural Perspective: The Duty to Make Preliminary References under Article 234(3) EC (Article 267(3) TFEU)

European law imposes a duty on national courts to make preliminary references, that is, to request certification, to the ECJ in two situations. Any court or tribunal of a Member State that has doubts about the validity of European law has to make a reference, as the ECJ claims a monopoly as regards deciding upon the validity of European law.12 Then, there is the duty to make references to the ECJ under Article 234(3) EC (Article 267(3) TFEU), which requires that ‘a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law’ shall also bring questions of mere interpretation of European law before the ECJ.13

7 Συμβούλιο της Επικρατείας.
8 Ελεγκτικό Συνεδρία.
9 Αρείος Πάγος.
10 Ανότατο Ειδικό Δικαστήριο.
11 Of course, this heterogeneity extends to the role of the judge in the different legal cultures; in this context, see P Pernthaler, ‘Die Herrschaft der Richter im Recht ohne Staat’ [2000] Juristische Blätter 691.
13 In this context, see Case C-99/00 Lyckeskog [2002] ECR I-4839, paras 10ff; see also Art 35 EU and Art 369 CT.
Thus, there are specific obligations for supreme national courts flowing from primary law as interpreted by the ECJ (a). The national courts’ obedience to these duties, however, will be scrutinised on an empirical basis (b).

**a) Supreme National Courts and the Duty to Make References from the Perspective of European Law**

Following attempts of national courts, in particular the French Conseil d’Etat, to establish a category of clear and obvious interpretation (acte clair) in interpreting EC law, the ECJ decided the matter by means of its own EC law doctrine of acte clair which establishes an extremely strict standard. According to this standard, courts are not obliged to make a reference only if the question of interpretation is not relevant to the judgment, if it has already been decided, or if the interpretation is clear and obvious. From the perspective of European law, a national court decision that violates this standard is a breach of the Treaty in the sense of Articles 226 and 227 EC (Articles 258, 259 TFEU). A court or tribunal of last instance that disregards its duties to make a preliminary reference violates Article 234(3) EC (Article 267(3) TFEU). The principle of the independence of the judiciary notwithstanding, acts of courts or tribunals are attributed to the respective Member State. According to Article 228 EC (Article 260 TFEU), the ECJ, on application of the Commission, can impose a lump sum or penalty payment if the violation continues.

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14 See also the German Bundesfinanzhof [1985] Europarecht 191 (Kloppenburg). The European Court of Human Rights (ECtHR) took sides with the ECJ in these cases: see App No 36677/97 Dangeville v France ECHR 2002-III.


16 For the notion, see E Laferrière, Traité de la juridiction administrative et des recours contentieux (1887) vol I, 449ff; B Pacteau, ‘Note’ [1979] Recueil Dalloz Sirey 64; for more recent cases related to this concept, see, in France, Cour de cassation, chambre sociale, 16 January 2003, Madame X v CMSA, and in Spain, Tribunal Supremo, 7 March 2002, Sentencia del Tribunal Supremo, Sala de lo Contencioso-Administrativo, sección 2.ª, recurso de casación nº 9156/1996; Tribunal Supremo, 13 July 2002, Sala de lo Contencioso-Administrativo, sección 2.ª, recurso de casación nº 4517/1997.

17 Case 283/81 CILFIT [1982] ECR 3415, paras 18ff; for recent objections to the strict CILFIT standard from a Member State perspective (Denmark) see Case C-99/00, above n 13 (see also AG Tizzano, ibid, No 51ff).

18 According to the CILFIT decision, the only cases in which it is safe to assume that there is no duty to refer a question to the ECJ is either when the question is not relevant for the national court’s decision or when the interpretation of EC law is obvious. This is the case only when the correct application of Community law is so obvious as to leave no room for any reasonable doubt. Under the CILFIT criteria, the national court or tribunal has to be convinced that the matter is equally obvious to the courts of the other Member States and to the ECJ. The existence of such a possibility must be ‘assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community.’, Case 283/81, above n 17, para 21. The ECJ will normally not make a statement on the relevance of the reference for the national court’s judgment, Case C-569/89 Piageme [1991] ECR I-2971. It does not have jurisdiction, though, to reply to questions which are submitted to it within the framework of procedural devices arranged by the parties in order to induce the Court to give its views on certain problems of community law which do not correspond to an objective requirement inherent in the resolution of a dispute: Case 244/80 Foglia [1981] ECR 3045, para 18.

19 See for example Art 97(1) of the German Constitution; Art 6(1) ECHR; Art 47(2) of the EU Charter of Fundamental Rights.

20 In this respect, European law adopts a public international law approach towards the Member States; see Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, PCIJ Series A/B No 44, 24.
To date, there have been no Treaty infringement proceedings against Member States resulting from decisions of the national courts.\textsuperscript{21} To the extent that the Commission has entered into the preliminary procedure foreseen in Article 226 EC (Article 258 TFEU),\textsuperscript{22} it has confined itself to ensuring that its view be made clear to the non-complying courts, thus acknowledging the principle of judicial independence, and only admonishing the respective national government to take legislative action in cases of continued or repeated violations.\textsuperscript{23} This seems to indicate the limits of a perspective that explains the relationship between the ECJ and the national courts exclusively in terms of legal arguments.\textsuperscript{24}

b) The Preliminary Reference Practice of Supreme National Courts\textsuperscript{25}

The German BVerfG has so far not made any reference to the ECJ.\textsuperscript{26} It has stated in the Solange I decision of 1974 and in the Vielleicht decision of 1979 that it is in principle bound by Article 234 EC (Article 258 TFEU).\textsuperscript{27} However, the BVerfG has not reviewed the issue of its own obligations under Article 234 EC following the ECJ’s CILFIT decision of 1982.\textsuperscript{28} It has limited itself to specifying the conditions under which the highest specialised German courts are obliged to make references.\textsuperscript{29} The BVerfG’s reluctance to use Article 234 EC or even to clarify its own position on

\textsuperscript{21} For preliminary proceedings against Sweden, though, see E Lenski and FC Mayer, ‘Vertragsverletzung wegen Nichtvorlage durch oberste Gerichte?’ [2005] Europäische Zeitschrift für Wirtschaftsrecht 225; see ibid for the ECHR-aspect of non-references.


\textsuperscript{23} Case Hendrix (Pingo-Hähnchen), Preliminary procedure under Art 169 EC Treaty (now Art 226 EC, Art 258 TFEU), A/90/0406, Reasoned opinion of the Commission SG (90)/D/25672 of 3 August 1990, pt V (dealing with a non-reference by the Bundesgerichtshof (BGH), the German Supreme Court); see Meier, above n 22, 11. Answering a written question from a member of the European Parliament, the Commission stated in 1983 that infringement proceedings do not constitute an appropriate basis for co-operation between the ECJ and the national courts. According to the Commission, the procedure was not designed as a blanket means to review national court decisions but, rather, for use only in cases of systematic and intentional disregard of courts’ duty to make preliminary references, [1983] OJ C268, 25. Note that the Commission establishes special criteria for infringements of EC law by the courts that are not foreseen in the Treaties.

\textsuperscript{24} With state liability for decisions of courts of last instance, the ECJ has created an alternative legal sanction for non-references, though, where once again the individuals help to enforce European law: see Case C-224/01 Köbler [2003] ECR I-10239; Case C-173/03 Tagliadrete del Mediterraneo [2006] ECR I-1777.


\textsuperscript{26} The highest German courts started to make references relatively early: the Bundessozialgericht in 1967 (Case 14/67 Welchsner [1967] ECR 331); the Bundesfinanzhof also in 1967 (Case 17/67 Neumann [1967] ECR 441); the Bundesarbeitsgericht in 1969 (Case 15/69 Südmilch [1969] ECR 363 (German edn, no English translation available); the Bundesverwaltungsgericht in 1970 (Case 36/70 Getreide-Import [1970] ECR 1107); and the Bundesgerichtshof in 1974 (Case 32/74 Haaga [1974] ECR 1201). These courts have continued to use the preliminary reference procedure on a regular basis. For an example of Länder (state) constitutional courts, see the reference from Hessischer Staatsgerichtshof, [1997] Europäische Grundrechte-Zeitschrift 213.


\textsuperscript{28} Above n 17.

\textsuperscript{29} See, eg Bundesverfassungsgericht [2001] Europäische Zeitschrift für Wirtschaftsrecht 255 (Non-reference by the BVerwG) (Case C-25/02 Rinke [2003] ECR I-8349); see also Entscheidungen des Bundesverwaltungsgerichts 108, 289; The Bundesverwaltungsgericht asks whether non-reference by a specialised court violates a fundamental right ‘to have access to the lawful judge’ (Art 101(1) of the German
Article 234 EC was particularly noteworthy in the *Maastricht* decision of 1993, in which the BVerfG reserved for itself the right to review the exercise of competences of European institutions in light of the German Constitution. During the proceedings, the BVerfG utilised a rather original solution in solving questions of EC law interpretation by hearing the Director General of the Commission Legal Service as a witness, instead of making a reference to the ECJ. Furthermore, in the NPD proceedings of 2001, the BVerfG had the unique opportunity to make a principal statement on its obligations under Article 234 EC in a case where it was unquestionably the court of first and last instance (the proceedings to declare a political party unconstitutional under Article 21 of the German Constitution). The BVerfG also did not use this opportunity.

The German court is not alone, however. Other supreme courts have also avoided making references to the ECJ, although their number is shrinking. The Italian Corte Costituzionale in its *Giampaoli* decision of 1991 admitted the possibility, albeit not the obligation, of making references under Article 234 EC, only to reverse its decision at a later date. Pointing to the fact that it is not a court in the sense of Article 234 EC and thus unable to enter into direct contact with the ECJ by means of a preliminary reference, the Corte Costituzionale declared in the *Messagero Servizi* decision of 1995 that it did not consider itself bound by Article 234 EC. Instead, the Corte Costituzionale ordered the court of the previous instance to make a reference to the ECJ. In April 2008, the Corte Costituzionale submitted its very first reference to the ECJ. Explanations for this change include the examples of other constitutional courts submitting references and a modification of the Italian constitution in 2001. The modification introduced European law as limits to legislative power (Article 117). In the context of direct proceedings, with no ordinary courts involved, the Italian constitutional court seems to be prepared to submit preliminary references now.

The Spanish Tribunal Constitucional (TC) has also not made any references yet, and is even reluctant to become involved in cases of non-reference of the other Spanish courts. According to the TC, the application of European law is not an issue of constitutional law, and thus not part of the TC’s jurisdiction. Legal protection against Spanish acts that violate European law,
the TC holds, is provided by the regular Spanish courts and the ECJ. The Portuguese Tribunal Constitucional considers itself bound under Article 234(3) EC, but has so far not made a reference.

The French Conseil d’Etat has made references to the ECJ both before and after the Cohn-Bendit case, dating back to 1970. Still, the Conseil d’Etat issued decisions not compatible with ECJ jurisprudence and in disregard of Article 234(3) EC, even after the ECJ’s CILFIT decision. The Cour de cassation made its first reference in 1967, while the Conseil constitutionnel in 2006 emphasised that there is no possibility for preliminary references in cases that it has to decide within a 60 day period.

The highest Belgian courts, the Conseil d’Etat and the Cour de cassation began to make references early, in 1967 and in 1968. The Cour d’arbitrage, which was created in 1983 and is now the Cour constitutionnelle, first made a reference in 1997. The highest Dutch courts started making references in the early seventies (the Raad van State in 1973, the Hoge Raad in 1974) and have continued doing so on a regular basis. The Luxembourg Cour de cassation made its first reference in 1967, and the Luxembourg Conseil d’Etat joined in only in 1981. The Cour constitutionnel has not made any references yet.

The British House of Lords made a first reference in 1979. Further references have followed on a regular basis. The Danish Højesteret may be one of the more sceptical courts as far as European integration is concerned, but it has nonetheless made numerous references to the ECJ, the first one in 1978. The Irish Supreme Court began to make references in 1983 and has continued this practice regularly since then. The highest Greek courts are also on record with references. The Symvoulio Epikrateias (Council of State) has made references on a regular basis, starting early in 1983. Occasional references have been made by the Elegktiko Synedrio (Court of Auditors) since 1993, and since 1996, there are also references every now and then from the Areios Pagos (Supreme Court).


41 For the (still) diverging approach of the Conseil d’Etat on Art 249(3) EC (Art 288ff TFEU) and the timely limitations of the effect of ECJ decisions, see Commissaire du gouvernement Savoie in his Conclusions in the Tête case (CE Ass 6 February 1998, Tête, Rec 30, Concl 32); P Cassia, ‘Le juge administratif français et la validité des actes communautaires’ [1999] 35 Revue Trimestrielle de Droit Européen 409.


43 CC 27 June 2006, Loi relative au droit d’auteur et aux droits voisins dans la société de l’information, Rec 88; see, with further references, FC Mayer et al, ‘Der Vorrang des Europarechts in Frankreich’ [2008] Europarecht 63.


49 Case 2/76 De Moor [1967] ECR 197.


51 Case 34/79 Henr and Darby [1979] ECR 3795; the House of Lords is on the record with around 30 references.


56 Case C-348/96 Calfa [1999] ECR I-11; in the following case of 1998, Case C-235/98 Pafitis [2000] OJ C63, 21, the proceedings were not continued.
The Swedish Högsta domstolen made a first reference almost immediately after Swedish accession in 1995.\textsuperscript{57} The Swedish Regeringsrätten followed just two years later, in 1997.\textsuperscript{58} The Lagrådet, which takes non-binding control of draft legislation, has not made any references to date. The Supreme Finnish Administrative Court, Korkein hallinto-oikeus, has been making references on a regular basis since 1996.\textsuperscript{59} The Supreme Court, Korkein oikeus, is on record with its first question stemming from 1999.\textsuperscript{60} The Constitutional Committee of Parliament (Perustuslakivaliokunta) has not made any references so far, while the Austrian Constitutional Court, the VfGH, early on acknowledged the option to submit references under Article 234 EC,\textsuperscript{61} and made its first reference to the ECJ in 1999.\textsuperscript{62}

The states that joined the EU in 2004 and 2007 have had very limited opportunities for preliminary references. It is therefore not yet possible to draw reliable conclusions on their inclination or disinclination to make preliminary references. It is precarious, however, that some national courts have not seized opportunities to make references where they did in fact arise. In May 2004, for example, the Hungarian Constitutional Court (Alkotmánybíróság) declared a law concerning the stockpiling of agricultural overproduction, which implemented a Commission regulation, to be incompatible with the Hungarian constitution without making a preliminary reference to the ECJ.\textsuperscript{63} Note that the provisions of the law which it held to be in conflict with the constitution were predetermined by the regulation. The court argued that the subject matter of its decision was solely the constitutionality of the Hungarian law, not the validity or interpretation of European law.\textsuperscript{64}

In a number of proceedings, the Estonian Supreme Court Riigikohus declared a national law implementing the same EU regulation to be inapplicable because it violated European law.\textsuperscript{65} It did not consider it necessary to make a preliminary reference to the ECJ, because the legal situation allegedly was sufficiently clear. Neither did the Polish Trybunal Konstytucyjny, like the German BVerfG, make a preliminary reference to the ECJ in the context of its 2005 decision on the compatibility of the European arrest warrant with Polish law.\textsuperscript{66}

However, the Czech Constitutional Court at least declared its general willingness to make preliminary references to the ECJ in a decision in 2006.\textsuperscript{67}

c) The National Supreme Courts’ Reference Practices—A Mixed Bag?

This brief assessment of the national courts’ reference practices reveals several contradictory points. On the one hand, the strict standard imposed by the ECJ’s \textit{CILFIT} formula is cushioned by a Commission practice that does not sanction non-certification as an infringement under the treaty infringement proceedings. On the other hand, there are important courts and tribunals at the Member State level that do not make references to the ECJ. A similar approach to the BVerfG’s non-reference practice, which is arguably incompatible with the German Constitu-

\textsuperscript{57} Case C-43/95 \textit{Data Delecta} [1996] ECR I-4661.
\textsuperscript{58} Case C-241/97 \textit{Forsäkringsaktiebolaget Skandia} [1999] ECR I-1879.
\textsuperscript{60} Case C-172/99 \textit{Liikenne} [2001] ECR I-745.
\textsuperscript{61} Österreichischer Verfassungsgerichtshof (1996) 23 \textit{Österreichische Zeitschrift für Wirtschaftsrecht} 24 (Bundesvergabeamt); see also K Heller and F Sinnl-Piazza, `Verfassungsrechtliche Aspekte der Anwendung des Gemeinschaftsrechts in den Mitgliedstaaten der EU’ [1995] \textit{Juristische Blätter} 636 and 700, 711.
\textsuperscript{62} Case C-143/99 \textit{Adria-Wien Pipeline} [2001] ECR I-8365.
\textsuperscript{64} Ibid, 6.
\textsuperscript{65} Decision No 3-3-1-33-06, 5 October 2006, \textit{Hadleri Toidulisandite AS}.
\textsuperscript{66} Decision K 18/04 of 11 May 2005; see also Entscheidungen des Bundesverfassungsgerichts 113, 273 (\textit{European arrest warrant}). That there was indeed a need for clarification is demonstrated by the preliminary reference of the Belgian Cour d’arbitrage, Judgment No 124/2005 of 13 July 2005; see now ECJ, Case C-303/05 \textit{Advokaten voor de Wereld} [2007] ECR I-3633.
\textsuperscript{67} Decision Pl ÚS 50/04 of 8 March 2006 (\textit{sugar quotas}).
tion’s fundamental right of ‘access to the lawful judge’ (Recht auf den gesetzlichen Richter, Article 101(1)) and with Article 23 of the German Constitution, existed in Italy and exists in Spain. Thus, nations that established particularly strong constitutional courts in the aftermath of dictatorial regimes follow a different path in their dealings with the ECJ. These courts remain a minority, however, when compared to other courts in the EU. References are made by both the ancient British House of Lords and the rather Euro-sceptical Danish Højesteret, as well as by the Austrian VfGH, a genuinely specialised constitutional court in a similar position as the Spanish, Italian and German constitutional courts.

A closer look at the courts that have not yet made references reveals several motivations, ranging from the way these courts see themselves, to constraints imposed by their respective national constitutions, to a simple lack of opportunities to make references. Of these motivations, the hypothesis of the courts’ self-conception as guardians of their (respective) constitutions seems to have the greatest weight. This self-conception also explains the Polish and Hungarian positions, where young institutions and constitutions are still in the process of consolidation. Another explanation for national courts’ scepticism could be that they do not always seem to trust the ECJ’s alleged self-restraint in dealing with matters of European law—as opposed to directly commenting on national law.

In any case, an analysis of the national courts’ procedural points of contact with the ECJ suggests that there are open questions. The binary empirical question of reference or non-reference alone is too simple, though, to explain what exactly the constitutional law patterns are that define the relationship between the national courts and the ECJ. In order to answer this question, it is necessary to turn to an analysis of substantive legal issues.

2. The Courts’ Relationship from the Perspective of Substantive Law

a) The Perspective of the ECJ

The ECJ claims the monopoly on invalidating (secondary) European law. In 1987, the ECJ held in the Foto-Frost case that national courts are entitled to consider the validity of

68 See the divergent opinions of H Kelsen, ‘Wer soll Hüter der Verfassung sein?’ [1931] Die Justiz 5, in favour of a constitutional court as the guardian of the constitution, and C Schmitt, Der Hüter der Verfassung (1931) 12ff, in favour of the head of the executive (the Reichspräsident) as the guardian of the constitution; Schmitt’s position is severely weakened by the pathetic role President Hindenburg played in the final days of the Weimar Republic in Germany.

69 In this context, see the Arsenal case in Great Britain, where the High Court even decided to ignore a preliminary ruling of the ECJ (Case C-206/01 Arsenal [2002] ECR I-10273), stating that the ECJ had no jurisdiction to make findings of fact or reverse the national court on its findings of fact, [2002] EWHC 2695 (Ch); 1 All ER (2003) 137. This decision was overruled by the Court of Appeal, Court of Appeal (Civil Division), 21 May 2003, Arsenal Football Club v Matthew Reed (2003) EWCA Civ 96. The German Bundesverfassungsgericht considers non-references as violating the German Constitution (see above n 29) only when it is clear that there is a question of interpretation, as opposed to applying European law to a specific case: see Bundesverfassungsgericht [2002] Neue Juristische Wochenschrift 1486; see also Entscheidungen des Bundesverfassungsgerichts 82, 159 (Absatzfonds); Bundesverfassungsgericht [2004] Neue Zeitschrift für Baurecht und Vergaberecht 164.

70 See more on this in K Alter, Etablirung the Supremacy of European Law (2001) 10, referring to ECJ judge Mancini.


72 The ECJ reviews European acts under Art 230 EC (Art 63 TFEU), either as incidental questions under Art 241 EC (Art 277 TFEU) or in the context of a reference under Art 234 EC. See also Art 35 EU; Member State administrations can only make references to the ECJ if they fall under the ECJ’s European law
Community acts and to conclude that a Community act is completely valid, as ‘by taking that action they are not calling into question the existence of the Community measure’. Yet the ECJ also made it very clear that national courts do not have the power to declare acts of Community institutions invalid, pointing to the need to preserve the unity of the Community legal order and to the need for legal certainty. The Court points to the ‘necessary coherence of the system of judicial protection established by the Treaty’ that gives the ECJ ‘the exclusive jurisdiction to declare void an act of a Community institution’. The ECJ emphasises that it is in the best position to decide on the validity of Community acts, as all Community institutions whose acts are challenged are entitled to participate in the ECJ proceedings and can therefore supply information that the ECJ considers necessary for the purposes of the case before it. The proceedings outlined derive their conclusiveness from Article 292 EC (Article 344 TFEU), according to which the Member States commit themselves to not solving disputes over the interpretation or implementation of the Treaty in any other way than provided in the Treaty. Moreover, the obligation of national courts to respect the interpretation of European law as established by the ECJ could also be justified as an obligation arising under Article 10 EC (Article 4(3) TFEU).

In addition to arguments provided by the ECJ in its relevant decisions, another possible explanation for the ECJ’s restrictive approach lies in the Court’s image of itself as the ‘driving force’ behind European integration. If this really was the court’s own perception, conflicts of interest with national courts would be unavoidable. The cautious attitude of the ECJ may also be explained by a certain distrust the ECJ harbours against national courts, which—given a wide latitude in their decision-making—could well try to resist increasing integration through jurisprudence.

The real argument behind the ECJ’s reluctance to give national courts more control, however, probably lies in the principle of the primacy or supremacy of European law in definition of a court (for Public Procurement Awards Supervisory Boards, see Case C-54/96 Dorsch Consult [1997] ECR I-4961); see also Case C-431/92 Commission v Germany [1995] ECR I-2189, on the duties of administrations to respect European law. See also the discussion on the right of national administrations to declare national law to be in conflict with European law in the context of debate on the Doc Morris pharmacy.  

73 Case 314/85, above n 12, paras 11ff.  
74 Ibid, para 14.  
75 Ibid, para 15.  
77 As far as interim measures are concerned, the ECJ has given national courts some leeway to make statements on the validity of European law, all the while insisting on its exclusive powers to determine the validity of these acts as well; Cases C-143/88 and C-92/89 Süderdithmarschen [1991] ECR I-415, paras 14ff; C-465/93 Atlanta [1995] ECR I-3761. Apparently, the ECJ is not even willing to give national courts the right to decide upon legally non-existent acts: for this concept, see Cases 1/57 and 14/57 Société des usines à tubes de la Sarre v High Authority [1957] ECR 105.  
78 The fact that European law prevails over national law in case of conflict may be conceptualised as ‘supremacy’ or as ‘primacy’. Unlike European law textbooks and doctrinal writings, the ECJ has used the term ‘supremacy’ only once in a judgment so far (Case 14/68 Walt Wilhelm [1969] ECR 1, para 3). The term appears as a keyword in a 1972 decision (Case 93/71 Leoncio [1972] ECR 287) and occasionally in Advocate General Opinions (AG Jacobs in Case C-112/00 Schmidberger [2003] ECR 5639, No 5, played it safe: ‘by virtue of the primacy or supremacy of Community law, they prevail over any conflicting national law’). ‘Primacy’ can be found much more frequently in ECJ decisions, albeit often enough the Court just refers to what was said by parties or the national court. For an example of the ECJ clearly using ‘precedence’, see Case C-256/01 Allonby [2004] ECR 1-873, para 77. The Constitutional Treaty uses ‘primacy’ (Art I-10 CT-Conv; Art 6 CT). It is hard to say for a non-native speaker to what extent there is a difference between primacy and supremacy, whether this difference is related to British v American English or whether the term supremacy implies more of a hierarchy or of the German concept of Geltungsvorrang.

408
the case of a conflict of laws as it was developed by the ECJ. The ECJ’s core justifications for the primacy of European law are independence, uniformity and efficacy of Community law. In this perspective, Community law is ‘an integral part of . . . the legal order applicable in the territory of each of the Member States’; provisions of Community law ‘by their entry into force render automatically inapplicable any conflicting provision of current national law.’ This concept of primacy in application, *Anwendungsvorrang* (as opposed to primacy in validity, *Geltungsvorrang*), also applies to the Member States’ constitutional law provisions:

The validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure.

The critics of the Court’s primacy concept are numerous. Among other things, they have pointed out a structural parallel between supreme European law and the law of (military) occupation(!) and have criticised the ‘rigorous simplicity’ of the concept of primacy. The absoluteness of the ECJ’s vision of European law primacy over each and every norm of municipal law—including any provision of the municipal constitutions—has raised the question of whether the ECJ might have overstepped its competences by establishing such an absolute concept of primacy. According to this view, the ECJ’s role is to interpret European law; but the question of how the Member States’ legal orders handle conflicts between themselves and European law, so the critics say, goes beyond a mere question of interpretation.

Admittedly, the ECJ has remained oddly unclear in its statements on the exact source of primacy and of European law itself, even relative to the limited language the ECJ normally utilises in its decisions, merely alluding to what kind of organisation the EC/EU is. The formula used by the Court, however, has evolved over the years, from a new ‘legal order of international law’ (1963), followed by the formula ‘own legal system’ (1964), and the concept of the Treaty as ‘the basic constitutional charter’ (1986) or ‘the constitutional charter of a Community based on the rule of law’ (1991). This constitutional dimension of the
European legal order does emphasise the autonomy of European law, but does not clearly state a separation between EU law and the legal order of the Member States. Rather, this interpretation holds out European law as the overarching legal order within a community of law, which at the same time is taken up and complemented by the Member States’ respective legal orders. The primacy principle would have been codified for the first time in the Constitutional Treaty. The Treaty of Lisbon, however, only mentions the primacy principle in a declaration whose purpose is not entirely clear. It intends either to confirm the rather far-reaching jurisprudence of the ECJ or to affirm that the status quo of the question of primacy is not to be changed. This status quo, of course, is much more complex than the jurisprudence of the ECJ, due to Member States’ resistance to primacy of European law over national constitutions.

b) The Perspective of the Highest National Courts

aa) The German BVerfG

In its decision of 5 July 1967, its first to discuss Community law in detail, the BVerfG emphasised the central role of the ‘act of assent’ to the founding Treaties. Later commentators likened this central role to that of a bridge between EC law and national law, in that—in the German view—the act of assent functions as the decisive ‘order to give legal effect’ (Rechtsanwendungsbefehl) to European law. That very same year, the BVerfG expressed its view of the Community as a distinct public authority in a distinct legal order (Gemeinschaft als eigenständige Hoheitsgewalt in einer eigenständigen Rechtsordnung). This view is still held today. The BVerfG qualified the EEC Treaty as a ‘constitution, as it were, of this Community’ (gewissermaßen die Verfassung dieser Gemeinschaft) and Community law as a ‘distinct legal order, whose norms neither belong to public international law nor belong to the national law of the Member States’. The BVerfG hinted, though, at constitutional limitations on the transfer of public authority rights (Übertragung von Hoheitsrechten) to the EC in the context of the German Constitution’s guarantee of fundamental rights. An answer to this question, however, was not forthcoming at this stage. Not yet.

93 Art 6 CT: ‘The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States.’
94 Entscheidungen des Bundesverfassungsgerichts 22, 134, 142.
95 The Zustimmungsgesetz, a federally enacted law under Art 24 (now Art 23) of the German Constitution. The Art 23 provision dealing specifically with European integration was introduced in December 1992, replacing the old Art 23, which had served as the legal basis for German reunification. Both Art 23 and Art 24 foresee an act of assent for the transfer of public powers. Art 23 establishes two sets of limits: on the one hand, it institutes limits concerning the European construct, which for example has to guarantee a standard of fundamental rights protection essentially equal to that guaranteed by the German Constitution; on the other hand, Art 23(1) points to the limits of how European integration can affect Germany, as the principles mentioned in Art 79(3) are inalienable.
97 ‘eigene Rechtsordnung, deren Normen weder Völkerrecht noch nationales Recht der Mitgliedstaaten sind’, Entscheidungen des Bundesverfassungsgerichts 22, 293, 296 (EWG-Verordnungen) (English translation in Oppenheimer, above n 1, 410). The reference to the EEC Treaty’s ‘distinct legal order’ can already be found in Entscheidungen des Bundesverfassungsgerichts 29, 198, 210 (Abschöpfung), although it is accompanied by a reference to the ‘numerous intertwinements of Community and national law’. On autonomy, see also Entscheidungen des Bundesverfassungsgerichts 31, 145, 174 (Lüticke) (English translation in Oppenheimer, above n 1, 413). Indeed, the formula is reminiscent of Alfred Verdross’ formula of an internal law of a community of States, based on public international law: A Verdross, ‘Règles générales du droit international de la paix’ (1929-V) 30 Recueil des Cours de l’Académie de Droit International 311, as Pernthaler, above n 11, 692, indicates.
98 Entscheidungen des Bundesverfassungsgerichts 22, 293, 298ff (EWG-Verordnungen).

In the Solange I decision of 29 May 1974, the BVerfG stipulated constitutional limits on the primacy of European law and reserved a right of judicial review in order to safeguard the fundamental rights guaranteed by the German Constitution.\(^{99}\)

In a dissenting opinion,\(^{100}\) three of the second senate’s eight judges adopted a different position on the relationship between national constitutional law and European law, which comes closer to the ECJ’s position than the majority opinion. The position adopted by the dissenting minority went much further than even the BVerfG’s Solange II decision\(^{101}\) 12 years later, as the minority considers the BVerfG’s reservation of a constitutional check on EC law—a reservation that the Solange II decision maintains—to be illegal.\(^{102}\) While it also stipulates a limit on the transfer of sovereign rights to the EC, the minority does not consider this limit to necessitate the reservation of a constitutional check.

After indicating a change of its Solange I jurisprudence in July 1979,\(^{103}\) twice in 1981\(^{104}\) and then again in February 1983,\(^{105}\) the Solange II decision of 22 October 1986\(^{106}\) brought the long-expected supplement to the Solange I decision, which—without renouncing the principle of a constitutional law check—defused the fundamental rights issue ‘in a pragmatic sense’.\(^{107}\) The BVerfG insisted that the transfer of public authority to supranational institutions be subject to constitutional limits: there is no authorisation, it held, to give up the identity of the German constitutional order by means of transferring competences to supranational institutions with the result of an ‘intrusion into the fundamental architecture, the constituting structures’ of the Constitution.\(^{108}\) Nevertheless, after an extensive assessment of the development of EC law, the BVerfG held that, ‘as long as’ (solange) an effective protection of fundamental rights is guaranteed at the European level, with a level of protection that is substantially equivalent\(^{109}\) to the inalienable minimum level of protection of fundamental rights under the German Constitution, including a general guarantee of the essential substance (Wesensgehalt) of the fundamental rights, the BVerfG ‘will no longer exercise its jurisdiction to decide on the applicability of derived Community law, that may constitute the legal basis for acts of German courts or authorities in the Federal Republic’.\(^{110}\)

The fundamental rights section of the 1993 Maastricht decision\(^{111}\) and the 2000 Banana decision\(^{112}\) have basically confirmed the BVerfG’s statement of principle in Solange II.\(^{113}\) The
BVerfG jurisprudence shows that the court considers the standard of fundamental rights protection required by the German Constitution to be safeguarded at the European level. Although the BVerfG does not contribute to the protection of European fundamental rights directly by making references to the ECJ, it does contribute indirectly by supervising the duty of the regular German courts to make references.

(2) Powers and Competences: The German Maastricht Decision (1993)

With the Maastricht decision of 12 October 1993, the BVerfG established a constitutional law reserve of power over the exercise of competences by the EC/EU. Accordingly, the BVerfG may examine whether acts at the European level conform to the boundaries set for the transfer of public powers to the EU. The Court justifies its right of control over ultra vires acts (in the decision, the Court says *ausbrechende Rechtsakte*, literally ‘acts breaking out’) by pointing to the constraints of German constitutional law. What the Court actually does within the concept of *ausbrechende Rechtsakte* amounts to an independent interpretation of European law: according to the BVerfG, the plan of integration outlined in the act of assent (*Zustimmungsgebet*) and in the EU Treaty cannot be substantially altered later on by means of European ultra vires acts without losing the cover provided by the act of assent. Taking a closer look at this argument, one realises that this amounts to a doubling of the relevant standards. European acts have to be compatible with the guarantees of the German Constitution and, of course, with European law. This is the case because the BVerfG actually reviews the act of assent to the extent that it covers a given European act. This European act is thus reviewed by the standard of a ‘German version’ of European law (the ‘Constitutional law version’ of EU law). The alleged limitation on scrutinising the act of assent under a German constitutional law standard thus only seems to be a trick: in actuality, the compatibility of a European act with German constitutional law depends on its compatibility with European law—that is, the way the BVerfG interprets European law.

As far as ECJ ‘acts’ are concerned, the Maastricht decision remains unclear about how, in practice, to draw the line between the (permitted) development of the law by European judges introduced into the 1975 Swedish Constitution (in 1994, ch 10(5)): see O Ruin, ‘Suède’ in J Rideau (ed), Les Etats membres de l’Union européenne (1997) 440. Any doubts the Maastricht decision may have raised are resolved by the Banana decision: the Court emphasised that an individual’s constitutional complaint under Art 93(1) or a national court’s reference under Art 100 of the German Constitution will simply be held to be inadmissible unless the individual/the referring court proves a complete erosion of fundamental rights in accordance with Solange II.

114 Bundesverfassungsgericht [2001] Europäische Zeitschrift für Wirtschaftsrecht 255 (Non-reference by the Bundesverwaltungsgericht); see also Entscheidungen des Bundesverwaltungsgerichts 108, 289; for a recent case, see the interim decision of the Bundesverfassungsgericht concerning the implementation of the data-retention directive, [2008] Europäische Grundrechte-Zeitschrift 257.

115 Entscheidungen des Bundesverfassungsgerichts 89, 155 (Maastricht); the decision and the proceedings are well documented in Winkelmann, above n 30; further references are given in Mayer, above n 4, 98ff.

116 Entscheidungen des Bundesverfassungsgerichts 89, 155, 188 (Maastricht), literally ‘acts that break out’.

117 For the terminology, see the earlier decision Entscheidungen des Bundesverfassungsgerichts 75, 223, 242 (Kloppenburg). On the distinction between ultra vires acts in both a narrow sense (ie overstepping competences defined according to area) and a broad sense (ie the general illegality of an act), see Mayer, above n 4, 24ff.

118 Strangely enough, the Bundesverfassungsgericht also used the idea of an underlying ‘integration programme’ in the context of the NATO Treaty, Entscheidungen des Bundesverfassungsgerichts 104, 151 (NATO-Strategiekonzept); see M Rau, ‘NATO’s New Strategic Concept’ (2001) 44 German Yearbook of International Law 545, 570.
and the (prohibited) development of judge-made European law, or between substantial alter-
ations of the European competence provisions and still acceptable alterations.\textsuperscript{119}

The legal consequences of deeming a European act ultra vires would be that this act would
not be binding on Germany. This amounts to a German constitutional law-based reserve of
power over European acts that restricts the primacy of European law. In such a situation, the
BVerfG takes on the role of the guardian.

All things considered, one may well say that the \textit{Maastricht} decision is within a certain
continuity of the BVerfG’s prior jurisprudence on fundamental rights, as far as the concept of a
constitutional law reserve of control that restricts the European law claim for primacy is
concerned. What is striking, though, is the aggressive tone of the decision when compared to
previous decisions.\textsuperscript{120}

One should also note a crucial difference between the fundamental rights issue (\textit{Solange II})
and the competence issue (\textit{Maastricht}): as for the competence issue, the reproach with which
the European level is confronted in case of an ultra vires act goes beyond the bipolar
relationship between the German constitutional order and the European legal order. The
categories of an ultra vires act on the one hand and an act infringing upon the fundamental
rights laid down in the German Constitution on the other hand are utterly different: the
absence of a certain aspect of fundamental rights protection in the jurisprudence of the ECJ can
already occur either for procedural reasons or because the range of a given fundamental right is
defined differently at the European and national levels. In such cases, the BVerfG’s formula for
a co-operative relationship (\textit{Kooperationsverhältnis}) between (\textit{zwischen}\textsuperscript{121}) the BVerfG and ECJ
in the sense of a spare or reserve guarantee in line with the \textit{Solange II} jurisprudence appears
to uphold, in principle, the standard of fundamental rights protection guaranteed by the German Constitution does not necessarily imply a reproach against the
European level; it does not go beyond the bipolar relationship between German and European
legal orders.

This is different in the case of a reproach of an ultra vires act: there is no leeway for a
relationship of co-operation between the BVerfG and ECJ where the question of the limits of
European competences is concerned.\textsuperscript{122} Declaring an act to be ultra vires always implies a
defect in the act. It would also imply a reproach towards the European level and especially to
the ECJ. Moreover, the reproach of an ultra vires act would also concern the validity and/or
application of European law in all other Member States, as an act cannot be ultra vires only in
the bipolar relationship between one Member State and the EU.

Imposing the strict standard implicitly suggested by the BVerfG on the principles of interpre-
tation of European law as developed by the ECJ would significantly reduce the ECJ’s latitude.
This kind of constraint reaches beyond the EU Treaty, the actual subject of the \textit{Maastricht}
decision,\textsuperscript{123} and extends to European law in general. This is therefore a frontal attack on
judge-made European law.\textsuperscript{124}

\textsuperscript{119} See M Zuleeg, ‘Die Rolle der rechtsprechenden Gewalt in der europäischen Integration’ [1994]
\textit{Juristenzeitung} 1, 5; C Tomuschat, ‘Die Europäische Union unter der Aufsicht des Bundesverfassungsgerichts’

\textsuperscript{120} This view is also adopted by U Everling, ‘BVerfG und Gerichtshof der Europäischen Gemeinschaften’ in

\textsuperscript{121} The actual wording in the decision is ‘Kooperationsverhältnis zum EuGH’ (to), \textit{Entscheidungen des
Bundesverfassungsgerichts} 89, 155, 175 and summary No 7 (\textit{Maastricht}).

\textsuperscript{122} A different view is adopted by R Scholz, ‘Zum Verhältnis von europäischem Gemeinschaftsrecht und
nationalem Verwaltungsverfahrensrecht’ [1998] \textit{Die Öffentliche Verwaltung} 261, 267; in fact, Scholz
establishes a relationship of competition, not co-operation, between the ECJ and BVerfG.

\textsuperscript{123} Zuleeg, above n 119, 7.

\textsuperscript{124} See U Everling, ‘Richterliche Rechtsfortbildung in der Europäischen Gemeinschaft’ [2000]
\textit{Juristenzeitung} 217, 227.
By implying a duty of the ECJ to police the principle of subsidiarity and proportionality at the European level in a specific way, the BVerfG claims the power to scrutinise\textsuperscript{125} difficult balancing decisions undertaken by the ECJ as well as the development of European law influenced by the ECJ.

The immediate effects of the Maastricht decision have been limited. Still, at least one court, a Financial Court of the first instance (the Finanzgericht Rheinland-Pfalz\textsuperscript{126}) has declared an EC act to be ultra vires. Other courts (the Bundesgerichtshof, the Oberverwaltungsgericht Münster, the Bundesfinanzhof and also the Verwaltungsgericht Frankfurt\textsuperscript{127}) have been extremely liberal in making use of the concept of EC ultra vires acts without actually declaring any act to be ultra vires. These decisions have revealed quite different understandings of what an ultra vires act may be, extending to an understanding that would make any illicit European act an ultra vires act, no matter what nature the legal defect of the act in question actually is.

In doctrinal writings, the BVerfG’s concept of ultra vires acts has been severely criticised by some\textsuperscript{128} but welcomed by others, to the extent that it has been used as an argument against all kinds of alleged ultra vires acts stemming from the EC, in particular from the ECJ (the ECJ decisions in the Süderdithmarschen, Alcan and Kreil cases).\textsuperscript{129} In any case, the Federal Administrative Court—the BVerwG—and even the BVerfG itself have clearly rejected any attempt to depict the ECJ’s Alcan decision as an invalid and, thus, irrelevant ultra vires act.\textsuperscript{130}

One may ask, though, what the concept of competences is behind the ultra vires accusations concerning the ECJ’s decisions in the Süderdithmarschen and Alcan cases. The argument that the ECJ does not have the ‘competences to regulate’ in the sense of legislative powers suggests erroneously that the ECJ decisions in question contain some kind of quasi-legislative regulation of a competence area, such as a court procedure or administrative procedure; what the ECJ does in the Alcan case is simply enforcing the European control of state aids (subsidies).

Moreover, it is also doubtful whether the Maastricht decision’s initial concept of ultra vires acts actually covers this kind of reasoning in the first place, as there is no doubt that, for example, the control of state aids (subsidies) is in the realm of European competences. The wording of the Maastricht decision seems to indicate that the BVerfG was aiming at ultra vires acts in a narrow sense, as acts beyond the scope of European competences—in other words, as

\textsuperscript{125} Winkelmann, above n 30, 52.

\textsuperscript{126} Finanzgericht Rheinland-Pfalz, [1995] Entscheidungen der Finanzgerichte 378; see also Entscheidungen des Bundesfinanzhofs 180, 231, 236.

\textsuperscript{127} Further references are given in Mayer, above n 4, 120ff.

\textsuperscript{128} JA Frowein, ‘Kritische Bemerkungen zur Lage des deutschen Staatsrechts aus rechtsvergleichender Sicht’ [1998] Die Öffentliche Verwaltung 806, 807ff. What is striking is the fierceness of the debate, at least among some German scholars in the past. See first the news magazine article ‘Sprengkraft der Banane’ Focus 353.

\textsuperscript{129} The term ausbrechender Rechtsakt is used, for example, in Sondergutachten 28 of the Monopolkommission [Opinion on a Commission White paper in 1999, para 72 (against changing the system of European competition law)]; in that context, see W Möschel, ‘Systemwechsel im Europäischen Wettbewerbsrecht’ [2000] Juristenzeitung 61, 52, with further references; Scholz, above n 122, 267 (against the Alcan decision as an ausbrechender Rechtsakt); R Scholz, in T Maunz and G Dürig, Kommentar zum Grundgesetz (looseleaf, last update June 2007) Art 12a, paras 189ff (against the ECJ’s Kreil decision as an ausbrechender Rechtsakt); F Schoch, in idem et al, Verwaltungsgerichtsordnung (looseleaf, last update Jan 2008) § 80, paras 270ff (against the ECJ’s Süderdithmarschen decision as an ausbrechender Rechtsakt); In 2007, the 2005 Mangold decision of the ECJ (C-144/04 Mangold [2005] ECR I-9981) has similarly been criticised as an ultra vires-act in proceedings before the Bundesverfassungsgericht (2 BvR 1661/06 [Honeywell], pending).

\textsuperscript{130} Bundesverwaltungsgericht [1998] Deutsche Zeitschrift für Wirtschafts- und Insolvenzrecht 503; Bundesverfassungsgericht [2000] Europäische Zeitschrift für Wirtschaftsrecht 445; The Bundesverwaltungsgericht has also refused to declare the Banana-regulation (Entscheidungen des Bundesverfassungsgerichts 102, 147) or the Broadcasting Directive (Entscheidungen des Bundesverfassungsgerichts 92, 203) ultra vires.
acts that transcend the realm of European jurisdiction. It did not seem to aim at the question of separation of powers, ie which institution has what kind of power at what level. Surely, the BVerfG did not want to introduce some kind of general legality check on European law, to consider any kind of formal or substantial legal defect of European acts.

(3) The Consistency of the BVerfG’s Case law: Controlling the Bridge

In summary, in spite of the BVerfG’s recognition of the autonomy of the Community legal order, the BVerfG has always seen the acts of assent to the respective Treaties, based on the German Constitution, as the link between European law and national law, with the Member States remaining the ‘Masters of the Treaties’.\(^{131}\) Moreover, this is a linear, continuous link, and not a one-time link that becomes irrelevant once the German legal order has been ‘opened up’ to European law. Policing this link, or, to revisit Kirchhof’s metaphor, controlling this bridge, enables the BVerfG to effectuate far-reaching indirect control over the application of European law by applying the standard of German constitutional law under the guise of interpreting and controlling the act of assent to it.

The alleged ‘autolimitation’ policy of the BVerfG, according to which the BVerfG and ECJ adjudicate in spheres independent of each other, merely acts to blur the fact that policing the constitutional limits imposed on transfers of public authority under Articles 23/24 of the German Constitution amounts to an indirect control of European law. Indeed, the BVerfG consistently imposes constitutional law limits on the primacy of European law. These limits justify the BVerfG’s claim of entitlement to control European law as the guardian of the German Constitution. In its Görgülü decision concerning the rank of the European Convention on Human Rights in Germany, the BVerfG revealed in passing the underlying reason for its claim of a right to control European law when it spoke of a ‘reservation of sovereignty’.\(^{132}\) The clinical and distanced attitude towards European integration, which is evident in the latent and more or less gradual equalisation of European law with other public international law, has been criticised even from within the BVerfG.\(^{133}\)

The BVerfG has never relinquished its claim to a right to decide the point at which it would leverage its constitutional control; it merely modified this threshold. This is especially visible in the Solange I/Solange II shift, where the Court reversed what it considered to be the principle and what the exception. Only the dissenting opinion in the Solange I case indicated a willingness to completely abandon a right of judicial review over the constitutionality of European law, albeit insisting on constitutional law limits. Finally, the difference between the fundamental rights issue and the ultra vires issue should be stressed, as ‘ultra vires acts’ and ‘acts violating fundamental rights as accorded by the German Constitution’ are different categories.

\textit{bb) Other High Courts of the EU 15}\(^{134}\)

Claims of some form of last instance reserve of power over the legality of European law can be found in Italy (in the Corte Costituzionale’s decisions in the Frontini\(^{135}\) and Fragd\(^{136}\) cases),

\begin{enumerate}
\item[131] Entscheidungen des Bundesverfassungsgerichts 75, 223 (Kloppenburg).
\item[132] Entscheidungen des Bundesverfassungsgerichts 111, 307, 319 (Görgülü).
\item[133] See the separate opinion of Judge Gerhardt in Entscheidungen des Bundesverfassungsgerichts 113, 173 (European arrest warrant), who accuses the senate majority of refusing to participate constructively in the development of European solutions.
\item[134] For a more detailed account of the jurisprudence of the different courts see Mayer, above n 4, 143–271.
\item[136] Decision No 232/89 (Fragd), Foro italiano I (1990) 1855 (English translation in Oppenheimer, above n 1, 653).
\end{enumerate}
Ireland (in the Supreme Court cases on abortion\textsuperscript{137}), Denmark (in the Højesteret’s Rasmussen decision of 1998, the Danish Maastricht case\textsuperscript{138}), Greece (in the Council of State’s DİKATSA decision 1998\textsuperscript{139}), Spain (in the Tribunal Constitucional’s Maastricht opinion of 1992\textsuperscript{140}) as well as France (the Conseil constitutionnel’s decision of 2006 concerning the Droit de l’auteur and the Conseil d’État Arcelor decision of 2007\textsuperscript{141}).

Jurisprudential developments that may turn into similar claims of the right to judicial review over European law can be detected in Belgium (in the Cour d’arbitrage’s jurisprudence on treaty law\textsuperscript{142}). Similar indications, which point at least to the remote possibility of courts claiming a reserve of power over European law, can be found in extrajudicial avenues in Sweden (in a statement from the highest court on the constitutional amendments in the context of accession to the EU\textsuperscript{143}) and in Austria (in the Official Government Statement on accession\textsuperscript{144}).

Other Member States have not fully developed a standard of national constitutional law control over European law, but such a possibility remains open. Portugal’s constitutional law includes limits on European integration.\textsuperscript{145} In addition, because of the primacy of parliamentary decisions in Great Britain, the British constitutional reserve of power over European law—which exists in principle with the claim to have retained parliamentary sovereignty—is unlikely to be activated by the courts alone.\textsuperscript{146}

Both the structural circumstances of the constitutional law and the general trend of the jurisprudence in regard to the European law/national law relationship make it highly improbable that a reserve of power will be claimed in Luxembourg (no possibility for national courts to control European law plus Community-friendly courts) and the Netherlands (no constitutional court, no judicial review of international agreements and unconditional precedence of international obligations, even over the constitution). For Finland, court claims of reserve of power over European law are equally unlikely because of the constitutional order (no possibility for courts to review European law compatibility with the constitution).

\textsuperscript{137} SC SPUC (Ireland) Ltd v Grogan [1989] IR 753.
\textsuperscript{139} Council of State No 3457/98 Katsarou v DİKATSA; see in this context also the Opinion Council of State No 194/2000.
\textsuperscript{141} CC 27 June 2006, Loi relative au droit d’auteur et aux droits voisins dans la société de l’information, Rec 88; CE No 287110 Ass 8 February 2007, Arcelor (see Mayer et al, above n 43); see also CE 30 October 1998, Sarran (1998) 14 Revue française de droit administratif 1081; Cass 2 June 2000, Fraisse; CE 3 December 2001, SNIP as well as CE Cohn-Bendit, above n 15.
\textsuperscript{144} ‘Erläuterungen zur Regierungsvorlage über das Bundesverfassungsgesetz über den Beitritt Österreichs zur Europäischen Union’, 1546 der Beilagen zu den Stenographischen Protokollen des Nationalrates der Republik Österreich, XVIIIth GP.
\textsuperscript{145} Art 7(6) of the Portuguese Constitution; according to this provision, Portugal may—under the condition of reciprocity—enter into agreements for the joint exercise of the powers necessary to establish the European Union, in ways that have due regard for the principle of subsidiarity and the objective of economic and social cohesion.
\textsuperscript{146} House of Lords, Factortame v Secretary of State [1991] 1 AC 603; see also House of Lords, Macarthys v Smith (No 1) [1979] 1 All ER 325 (329) and the ‘metric martyrs’ case, High Court QBD, Thoburn v Sunderland City Council et al [2002] 4 All ER 156; in this context, see Bamforth, above n 96.
In most Member States where a power to control European law is either being claimed or merely discussed, this power is justified on constitutional law grounds. In other words, in these Member States, the primacy of European law over national law does not automatically extend to constitutional law. The Netherlands is a special case: not only do the Dutch courts lack the authority to judicially review European law, but there are also no constitutional constraints on European law at all, as the Dutch constitutional order recognises the primacy of Community law without reservation.

In contrast, German and Italian jurisprudence establishes a link between a national court’s finding a European act ultra vires and the violation of core constitutional law. In Germany the argument centres on the German Constitution’s principle of democracy,\(^\text{147}\) in Italy on the fundamental principles of the Italian Constitution known as counter-limits, or controlimiti.\(^\text{148}\) The jurisprudence of the Højesteret in Denmark points to a privileged position for constitutional provisions on liberties and on national independence. The French Conseil constitutionnel has recently expressly referred to the constitutional identity of France as a limit for European law.\(^\text{149}\)

What appears to be particularly threatening for legal unity and the uniform interpretation of European law in the case law of the highest courts and tribunals is the phenomenon of interpreting European law from the perspective of the national constitutional order, generating a parallel version of European law (a constitutional law version of European law). Such power to engage in an autonomous interpretation of European law on its compatibility with the respective constitutions (thus doubling the standard of scrutiny) is claimed by the BVerfG in Germany (see above), the Corte Costituzionale in Italy (in the Frontini case\(^\text{150}\)), the Supreme Court in Ireland (inter alia in the Campus Oil decision\(^\text{151}\)), the Højesteret in Denmark (in the Maastricht decision Carlsten/Rasmussen\(^\text{152}\)) and recently the French Conseil constitutionnel and Conseil d’État.

Overall, there is a certain tendency in the jurisprudence of a not entirely insignificant number of Member States. This tendency is characterised by an emphasis of elements of the national constitutional order that are unalterable, thus ‘primacy-proof’, by the constitutional limitation of the primacy principle and by an autonomous interpretation of European law by national courts, which could lead to results that diverge from the ECJ’s findings. This autonomous interpretation of European law from a Member State perspective could be coined ‘parallel interpretation’ of European law, establishing Member State constitutional law versions of European law.\(^\text{153}\) In this respect, former German ECJ judge Ulrich Everling’s assessment of a ‘potential for conflict’\(^\text{154}\) existing at the level of the Member States appears to be confirmed.

\(^{147}\) Entscheidungen des Bundesverfassungsgerichts 89, 155 (Maastricht).
\(^{148}\) M Cartabia, Principi inviolabili e integrazione europea (1995) 8 and 95ff; on the controlimiti, see the decision of the Italian Consiglio di Stato 4207/05 of 19 April 2005, Admenta et al v Federfarma [2006] 2 CMLR 47.
\(^{149}\) CC 27 June 2006, Loi relative au droit d’auteur et aux droits voisins dans la société de l’information, Rec 88; see Mayer et al, above n 43.
\(^{150}\) Above n 135.
\(^{152}\) Above n 138.
\(^{153}\) In this context, see O Dubos, Les juridictions nationales, juge communautaire (2001) 857ff, who openly suggests giving Member State courts EC law jurisdiction.
\(^{154}\) Everling, above n 120, 68; see also R Streinz, ‘Verfassungsvorbehalte gegenüber Gemeinschaftsrecht’ in Cremer et al (eds), above n 113, 1437.
cc) The Highest Courts of the Youngest Members of the EU 27 and Prospective Member States

From 2004 to 2007, the EU was enlarged by 12 Member States from Central and Eastern Europe, and it has commenced accession negotiations with Turkey and Croatia. Therefore, the role of the highest courts in these states in relation to the ECJ deserves closer attention.\(^\text{155}\)

In Poland, where the Constitution takes precedence over international law obligations (Article 90), it is the Constitutional Tribunal that decides inter alia on the compatibility of international treaties with the Constitution. When the Constitutional Tribunal declared the law on the implementation of the framework decision concerning the European arrest warrant to be incompatible with Article 55 of the Polish Constitution,\(^\text{156}\) it did not expressly address the question of primacy. Only a few days later, however, the Tribunal explained in its decision on the constitutional compatibility of the Accession Treaty that the Polish Constitution enjoys primacy in application and in validity above any other law.\(^\text{157}\)

In Hungary, the Constitutional Court has already made explicit reference to the German BVerfG's Maastricht decision. After accession, the court declared a Hungarian law on the stockpiling of agricultural overproduction to be invalid,\(^\text{158}\) even though the law implemented a Community regulation and despite that fact that such a direct confrontation between European and Hungarian law could have been avoided.\(^\text{159}\)

Article 1(2) of the Czech Constitution stipulates that the Czech Republic has to respect its duties under international law. According to Article 10 of the Constitution, public international law enjoys primacy over national law, though not over constitutional law. In a decision of 8 March 2006, the Constitutional Court explicitly referred to the jurisprudence of the BVerfG (Solange II) and the Italian Corte Costituzionale. It held that the Czech Republic had transferred sovereign rights to the EU, as allowed by Article 10a of the Constitution, but that this transfer of competences had taken place under the caveat that the EU would use these competences in a manner compatible with Czech sovereignty and the rule of law.\(^\text{160}\) The court confirmed its position in the decision on the Treaty of Lisbon in November 2008.\(^\text{161}\) What the court achieves here is to balance the European integration clause of the constitution (Article 10a) with the sovereignty clause (Article 1) and the clause prohibiting certain modifications of the constitution (Article 9(2)).

The case law of Estonia's Supreme Court on the association agreement with the EU already indicated a willingness to bring the interpretation of the Constitution and the duties flowing from European law into line.\(^\text{162}\) In its 2006 Hadleri decision the court consequently avoided controlling an Estonian law implementing a regulation according to the standards of the Estonian Constitution. Instead, it declared the law inapplicable solely on the basis of its incompatibility with European law.\(^\text{163}\) The debate about the Constitutional amendment in 2006,  

\(^{155}\) For the following overview, see the contributions in AE Kellermann et al (eds), EU Enlargement: The Constitutional Impact at EU and National Level (2001) by J Justynski (Poland), 279, 283ff; A Harmathy (Hungary), 315, 325; V Balaš (Czech Republic), 267, 273ff; T Kerikmäe (Estonia), 291, 299ff; A Usacka (Latvia), 337; V Vadapalas (Lithuania), 347, 349ff; P Vehar (Slovenia) 367, 371ff; PG Xuereb (Malta), 229, 239ff; N Emiliou (Cyprus), 243, 246ff; V Kunová (Slovakia), 327, 335; E Tanchev (Bulgaria), 301, 306; A Ciobanu-Dordea (Romania), 311, 312; M Soysal (Turkey), 259, 262ff.

\(^{156}\) Decision P 1/05 of 27 April 2005.

\(^{157}\) Decision K 18/04 of 11 May 2005.


\(^{160}\) Decision Pl ÚS 50/04 of 8 March 2006 (sugar quotas); see also Pl ÚS 66/04 of 3 May 2006 (European arrest warrant), [2007] 3 CMLR 24.

\(^{161}\) Decision Pl ÚS 19/08 of 26 November 2008 (Treaty of Lisbon).

\(^{162}\) Decision No 3-4-1-11-03 of 24 September 2003, Vilu and Estonian Voters Union; Decision Nr 3-4-1-12-03 of 29 September 2003, Kulbok.

\(^{163}\) Decision No 3-3-1-33-06 of 5 October 2006, Hadleri Toidulisandite AS.
which should already have been implemented upon Estonia’s accession, gave the Supreme Court the opportunity to position itself. In a statement on 11 May 2006, it stipulated a nearly unconditional primacy of European law. It held that any part of the Estonian Constitution that is not compatible with European law must not be applied.164

Latvia has had a Constitutional Court since 1996. The statute on Latvia’s international agreements of 1994 stipulates that international obligations take precedence over statutes, but not over the Constitution. Yet the Latvian Constitutional Court also seems to adopt an integration-friendly attitude in its case law.165

The Lithuanian Constitution is complemented by a constitutional addendum on Lithuania’s membership in the EU, which states that European law enjoys primacy over national law, but not over national constitutional law. The Constitutional Court adhered to the literal meaning of the rule in its fundamental decision on the question of primacy of 14 March 2006166 and has not changed its opinion since.167

In Slovenia, the Constitution also claims precedence over international obligations. The Slovenian Constitutional Court has confirmed this in several decisions.168 The constitutional provision on Slovenia’s membership in the EU, Article 3a, does not provide any further information on the question of primacy.

As for Malta, the Maltese Constitutional Court seems to have concerns about the relationship with the European Convention on Human Rights.

According to the jurisprudence of the Supreme Court in Cyprus, international agreements take precedence over statutes, but not over the Constitution. Article 148(2) of the Cypriot Constitution answers the question of primacy in favour of European law, yet without mentioning constitutional law. The Supreme Court managed to avoid the question of primacy over the domestic constitution in its judgment on the implementation of the European arrest warrant—just like the German and Polish courts—with the argument that it was only controlling national law that implemented a framework decision of the third EU pillar. In doing so, it explicitly mentioned the relevant German, Polish, Greek and French decisions.169 Overall, the court seems to be open-minded about European integration.170

In Slovakia, the constitutional amendment of February 2001 has introduced a specific, detailed provision dealing with European integration (Article 7), which provides for the primacy of European law over domestic statutes. It is unclear, though, whether the Slovak Constitutional Court would also extend this provision to constitutional law. Note that the court suspended the process of ratification of the Constitutional Treaty until further constitutional review had taken place.171

In Bulgaria, the 1991 Constitution attributes international agreements a rank superior to statutes but inferior to the Constitution,172 which would bind the Constitutional Court on this question.

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164 Comment No 3-4-1-3-06 of 11 May 2006.
168 See decision Rm-1/97, 7.
169 See Decision No 133(1)/04 of 7 November 2005, with an English summary available at www.supremecourt.gov.cy; see also among the multitude of decisions on the European arrest warrant Entscheidungen des Bundesverfassungsgerichts 113, 273; Polish Constitutional Court, decision K 18/04 of 11 May 2005; Greek Supreme Court, decision 504/2005; French Conseil d’Etat, CE 368282 of 26 September 2002.
170 See the speech by C Artemides, Supreme Court of Cyprus, in A Mavcic (ed), The Position of Constitutional Courts Following Integration into the European Union (2005) 159; also available at http://www.us-rs.si/media/zbornik.pdf (7 January 2009).
171 Decision of 18 January 2006, Dostal et al.
172 Art 5(4) of the Bulgarian Constitution.
The situation has become much clearer for Romania and the Romanian Constitutional Court after a comprehensive constitutional amendment was passed in 2003. The new Title VI now regulates the transfer of sovereign rights as well as the questions of direct applicability and primacy—at least over national statutory law.

In Croatia, another country with a Constitutional Court, international agreements become part of the internal legal order. Finally, in Turkey, it is expected that, in the case of accession, the Turkish Constitutional Court would explicitly follow the lead of the Solange I and Solange II jurisprudence of the BVerfG and the Frontini and Fragd decisions of the Italian Corte Costituzionale.

This summary indicates that almost all new Member States, as well as Turkey and Croatia, have a constitutional court and that, in a number of cases, unconditional primacy of European law over the constitution is not compatible with the current constitutions of these countries. Some of the guardians of the constitutions are developing pragmatic solutions to the problem. Nevertheless, it seems safe to say that most of the highest courts and tribunals of the youngest Member States may be reluctant to unconditionally accept the ECJ’s claim to be the final arbiter on European law. This is especially apparent in the decision of the Polish Constitutional Tribunal on Polish EU membership of May 2005, which is exceptionally drastic in terms of content and style.

3. Interim Summary

One must not get carried away with the results of the analysis of the case law: after all, there is no open conflict in the relationship between the ECJ and the highest national courts. Still, the lack of willingness to engage in a conversation with the ECJ by means of preliminary references points to the potential for disobedience. It indicates the extent to which national courts could be willing to insist on an original position vis-à-vis the ECJ. In this respect, the German BVerfG and the Spanish Tribunal Constitucional, but also courts in younger Member States, like the Hungarian Alkotmánybíróság, stand out.

Even without crossing the threshold to open conflict, there are still some worrying tendencies in the case law of the highest courts and tribunals of the Member States. These tendencies may be coined ‘frictional phenomena’. They include the insistence on primacy-proof elements of the national constitutional order (e.g. fundamental rights, fundamental principles, national constitutional identity) and the autonomous interpretation of European law by Member State courts (in the context of competences), which may lead to an interpretation distinct from the ECJ’s interpretation (a parallel interpretation, generating national constitutional law versions of EU law).

Another tendency is the apparent connection between the existence of specialised constitutional tribunals and a debate on the limits of European law (Germany, Italy and Spain). From the perspective of European law, therefore, the absence of central national constitutional courts acting as guardians of their constitutions against European law appears advantageous.

From a Member State perspective, the recent establishment of constitutional courts in some

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174 See above n 157.
175 The relevant statements of the national courts are often made outside an actual legal question, as obiter dicta or in the context of a mere legal opinion. A plausible explanation for this is that the courts are emitting signals here that are also meant to be received by the ECJ, having an anticipatory effect on the ECJ: see Alter, above n 70, 118, referring to E Blankenburg on European policy-making.
long-standing (see e.g. Belgium) and almost all younger Member States is therefore only consequential. Still, as the Danish example illustrates, even the absence of a central constitutional court cannot prevent national claims to a final say over European law.

II. Adopting an Analytical and a Theoretical Perspective

Although the frictional phenomena between the ECJ and the highest courts of the Member States detected in part I have not yet crossed the threshold to open conflict, one may still reflect upon how to resolve the friction (1) and how to put these frictional phenomena into a theoretical perspective (2).

1. Dealing with the Question of Ultimate Jurisdiction

One way to approach the potential for conflict inherent in the question of ultimate jurisdiction is to identify a set of legal tools or instruments which may help shape the legal context or the legal basis of the respective courts, with a view to clarifying the respective positions, in order to rationalise and, along that line, resolve the conflict.177

Differences of opinion between the European and the national legal orders on the location of the ultimate control competence on European law could be defused by modifying the attribution of competences (in the broadest sense) or standards applied by a court. The ‘Irish solution’ bears testimony to this: a primary law protocol annexed to the Maastricht Treaty stipulates that nothing in the European treaties shall affect the application in Ireland of Article 40.3.3 of the Constitution of Ireland (prohibition of abortion). Similar attempts to limit EU competences are Britain’s and Poland’s so called ‘opt-outs’ of the EU Charter of Fundamental Rights in the 2007 Treaty of Lisbon. There is a need for differentiation, though: actual or potential competence conflicts may be solved by way of the ‘Irish solution’ for individual and specific subject matters. Where competence for ultimate decision-making on questions of ultra vires acts is concerned, however, competing judicial claims cannot be prevented by even the most detailed substantial provisions on the attribution of competence. The most straightforward explanation for the limited problem-solving capacity of the ‘Irish solution’ is that a certain margin of interpretation can never be ruled out where rules of law are concerned.

One could also consider adopting an institutional approach, by establishing a judicial or political mode of competence control. Judicial control (courts of competence) would mean the establishment of special courts for resolving competence conflicts.178 Comparable proposals have repeatedly been made for the EU,179 even by acting judges of the German BVerfG (e.g. a proposal of a special Treaty Arbitration Court composed of 15 representatives of national courts and one ECJ representative,180 or a ‘Common Constitutional Court’ bringing together

178 This is something that was suggested early on in the history of the US federal system, but without success. The most recent suggestion to establish a Court of the Union dates from 1962. For the details, see Mayer, above n 4, 308.
members of ‘the Member State constitutional courts’. Other proposals in this context include suggestions to establish a European Supreme Court (Europäischer Oberster Gerichtshof) or a European Constitutional Tribunal (Europäisches Verfassungsgericht), a Union Court of Review, a Constitutional Council or a European Conflicts Tribunal.

A political control of competences could be assigned to existing institutions such as the Council of Ministers and the European Parliament, or to institutions that would have to be newly created, such as a special parliamentary committee. A second thought could also be given to mechanisms that emphasise conflict prevention through special procedures and deliberation, like reports or ombudsman proceedings, rather than dispute settlement through decision-making.

Without entering into a detailed appraisal of the proposals, it seems fair to say that new institutions would have only a limited problem-solving capacity. First, it cannot be stressed enough that there already is a court of competence—the ECJ. ECJ Judge Colneric once presented a detailed account of the jurisprudence of the court in the field of competences. Introducing an additional court with comprehensive powers would amount to a complete reshuffle of the institutional setting at the European level. As to the suggested ex ante control of competences, they would fail to catch ECJ decisions. Moreover, an institution composed of European members and national members on an equal basis would probably be unable to solve or prevent conflicts. In sum: new institutions would not prove effective in resolving all possible conflict scenarios. It seems to me that the crux of the competence issue in non-unitary systems is to ensure that all actors exercise a consistently high level of sensitivity in matters of competences. This can be achieved neither by the wording of competence provisions, however detailed they may be, nor by institutional arrangements alone. This points to the importance of the ‘soft’ mechanisms mentioned above (procedures, reports, etc), which aim at a structurally different and cautious approach towards competences.

Nonetheless, a conceivable institution would be an additional forum for judicial dialogue between courts of the different levels, but without the authority to take binding decisions. In the past, judicial dialogue, the continuous conversation between the courts of the different

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185 P Lindseth, ‘Kompetenzabgrenzung im europäischen Verfassungsverbund’ [2000] Juristenzeitung 866, 874 and 876, suggests the establishment of a Subsidiarity Committee (Subsidiaritätsausschuss). Similar to this is the proposal by J Schwarze, ‘Kompetenzverteilung in der Europäischen Union und föderales Gleichgewicht’ [1995] Deutsches Verwaltungsblatt 1265, 1267 (a Subsidiaritätsausschuss as a body that would take binding decisions, though); see also in this context the debates of Working Group I of the Convention, CONV 286/02 (http://europeanconvention.eu.int).
188 A different view—at least concerning the last point—is taken by A von Bogdandy and J Bast, above chapter 8, who emphasise the significance of the European institutional structure.
189 On this notion, see Pernice, above n 1, 29.
levels by means of the Article 234 EC (Article 267 TFEU) procedure, has proven to be a fundamental element of the constitutionalisation of the Community legal order driven forward by the ECJ.\(^{191}\) Dialogue, discourse and conversation between the courts seem to bear a substantive problem-solving potential. In this sense, establishing a ‘Joint Senate of the Highest Courts and Tribunals of the European Union’ may be a good idea. This would mean that numerous already existing informal contacts\(^{192}\) between the courts were placed in a more formal setting.

Beyond new institutions, another overall approach would be to strengthen structural safeguards of Member States’ interests and specific safeguards of Member State courts that may play an indirect role in setting a threshold for national courts’ claims of ultimate jurisdiction in questions of European law. There are two approaches that have been developed in the US in order to elucidate the relationship between federal level and state level, which may aid a better understanding of the EU.

The theory of political safeguards of federalism\(^{193}\) emphasises the safeguards of state interests by means of structural characteristics of the overarching (federal) level, which in turn allows courts to exercise self-restraint. It has been noted by Koen Lenaerts that this approach actually suits the EC/EU constellation even better than the US situation.\(^{194}\) However, the Member State courts themselves need to be convinced that structural safeguards of Member State interests are adequate at the European level.

The basic concept behind judicial federalism in the US is the guarantee of autonomous and comprehensive powers for the state courts in a multilevel system. Some of the doctrines and mechanisms developed in the US in this context\(^{195}\) may be of some interest for the EU. A procedure similar to the certification procedure (whereby federal courts submit references to state courts on questions of state law) could, for example, be helpful in all cases where provisions at the European level (eg Article 6(3) EU, see below) can be interpreted as referring to national law. Such a procedure would also emphasise the autonomy of Member State courts and counteract the impression of an existing hierarchy between the courts of the different levels.

Finally, reconceptualising primacy may help. Unconditionally accepting primacy of European law over any national law has been equated to the creation of federal statehood at the EU level.\(^{196}\) The term that is used in the Swedish debate for the unconditional acceptance of primacy, prostration,\(^{197}\) is even more graphic, as it symbolises the utmost kind of humble subordination. The surrender of possibilities of using constitutional law to fend off the primacy claim of European law is viewed as subordination under a ‘foreign’ power. Note, though, that such subordination is not merely a theoretical idea but, in the case of the Netherlands, for example, part of the constitutional law of the country.

The Irish solution of a protocol at the level of European primary law to preserve the sacrosanctity of national constitutional provisions on abortion could be regarded as simply being peculiar to the specific anti-abortion provision of the Irish Constitution. However, it may be read more broadly as a revocation of European law’s claim to primacy in respect of specific Member State interests, which are of particular importance in a given case. Consideration for


\(^{192}\) In this context, see www.confcoconsteu.org; www.uepcsj.org; www.juradmin.eu.


\(^{195}\) For a detailed account, see Mayer, above n 4, 310ff.


\(^{197}\) Ruin, above n 113, 440.
Member State matters is not such an unusual concept. Indeed, it may be found in the original Treaties. Examples include the public service (Article 39(4) EC, 45(4) TFEU) and official authority exceptions (Article 45 EC, 51 TFEU), and the exceptions from the fundamental freedoms in Articles 30, 46 and 55 EC (Articles 36, 52 and 62 TFEU), all of which are uniform concepts of Community law. It is also conceivable, then, that a common set of fundamentals of national constitutional law could be established that could be declared exempt from the primacy of European law.

Article 6(3) EU (Article 4(2) of the EU Treaty of Lisbon (TEU-Lis)) goes beyond mere Union-wide exceptions to European law. According to this provision, the European Union shall respect the national identities of the Member States. Here, a uniform European concept of national identities would be meaningless. This provision clearly refers back to the Member States. Article 4(2) TEU-Lis, referring to ‘fundamental structures, political and constitutional’, now makes clear that national identity includes constitutional identity. Therefore, Article 6(3) EU or Article 4(2) TEU-Lis could be seen as a starting point on the European level to revoke the claim of primacy of European law over Member States’ constitutional identity. Article 6(3) EU is complemented by the principle of sincere cooperation (Article 10 EC, 4(3) TEU-Lis), which has been said to contain a duty of the EU to respect national constitutional structures.

One may ask how the concept of national identity can be given meaning on the European level. One answer could be to include the Member States into the process of clarification of the concept: it is hardly surprising that it is an Irish academic contribution that develops the idea inherent to Article 6(3) EU (Article 4(2) TEU-Lis) of protecting fundamental (constitutional) national choices further into attributing to national courts of last instance the role of determining the content of such choices, as recognised and protected by European law. This is where a European version of the American certification procedure mentioned earlier could be helpful. The core idea of considerations for constitutional principles of the Member States on the European level can also be detached from Article 6(3) EU: one proposal suggests a duty for the Community, in conjunction with Article 10 EC (Article 4(3) TEU-Lis), to consider and respect national constitutional structures when exercising European competences. Article 4(2) TEU-Lis already takes a step into this direction.

Individual courts have begun to use the idea of national constitutional identity to build a bridge between European and national constitutional law. In this context, it is helpful to turn to

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198 For an overview, see DR Phelan, Revolt or Revolution (1997) 422ff.
199 See B de Witte, ‘Droit communautaire et valeurs constitutionnelles nationales’ (1991) 14 Droits 87, who, attempting to define such a set of common fundamentals, acknowledges that the crucial problem of the respective Member States’ specific constitutional provisions which shape national constitutional identity remains ‘identité constitutionnelle nationale’, ibid, 95.
201 Phelan, above n 198, 416. In order to avoid a revolt or a (legal) revolution and to maintain the legitimacy of the national legal orders, Phelan suggests an amendment to the Treaties that would give primacy (over European law) to basic principles of the Member States’ constitutions relating to life, liberty, religion and the family, which are predicated on visions of personhood and morality (not of the market or the proper distribution of goods) peculiar to each Member State. The rights through which these principles find expression would be regarded as superior to European law within their sphere of application. The exact range of this reservation would be established by the respective national courts or other institutions of last resort (ibid, 416, 417ff). Critical of Phelan are MP Maduro, ‘The Heteronyms of European Law’ (1999) 5 European Law Journal 160, and N MacCormick, “Risking Constitutional Collision in Europe?” (1998) 18 Oxford Journal of Legal Studies 517; in this context, see also DR Phelan, ‘The Right to Life of the Unborn v the Promotion of Trade in Services’ (1992) 55 Modern Law Review 670.
202 On that proposal, see H-P Folz, Demokratie und Integration (1999) 387; in the German debate, the principle in Art 10 EC is typically referred to as Union loyalty (Unionstreue), a concept reminiscent of federal comity or loyalty (Bundestreue).
the remark of the French Conseil constitutionnel, which stated implicitly in 2004 and explicitly in 2006\(^\text{203}\) that national constitutional identity is a limit to the primacy of European law. A similar approach can also be found in the recent jurisprudence of the Spanish constitutional court.\(^\text{204}\)

To sum up: there is indeed a set of tools and instruments that could be used to minimise the friction between the highest national courts and the ECJ. First, a modification of the law is a possibility, with a view to clarifying the scope of the primacy principle, particularly in relation to the national constitutions. Other, complementary, legal options include adopting a type of judicial federalism and relying on the courts’ self-restraint on the condition of political structural safeguards of Member State interests. One may also consider institutional solutions with a view to the creation of juridical or political institutions that bring together the European and the Member State levels, or solving selected conflicts by modifying the allocation of competences.

2. Adopting a Theoretical Perspective

\(\text{a) Existing Approaches}\)

One way to approach differences between national courts and the ECJ is to reject either one or the other position by legal arguments. This approach was adopted, for example, by commentators on the *Maastricht* decision, who repeatedly attempted to prove either the BVerfG or the ECJ ‘wrong’ with arguments based either on constitutional law\(^\text{205}\) or on European law,\(^\text{206}\) and occasionally even on public international law.\(^\text{207}\) The efficacy of this kind of approach is rather limited, as the indications are that neither national courts, such as the BVerfG, nor the ECJ are willing to surrender ground to the respective counter position.

A position apparently inspired by this view touches the limits of legal reasoning. It considers this type of conflict to be unresolvable on a legal level. In terms of legal theory, this can be conceptualised as a conflict of *Grundnorms* in the Kelsenian sense, for which no further legal solution is available.\(^\text{208}\) From this point of view, the ECJ and the highest national courts and tribunals could be considered *Grenzorgane*, or borderline institutions, in the Verdrossian sense: that is, institutions bound by law, but not subject to any legal control, so that the resolution of a conflict is merely a political or sociological matter,\(^\text{209}\) and ultimately a ‘question of power’.\(^\text{210}\)


\(^{206}\) See eg Tomuschat, above n 119, 494ff; for further references, see Mayer, above n 4, 117.


\(^{209}\) See A Verdross, *Völkerrecht* (1950) 246ff, referring to Hans Kelsen.

This is also the core of the argument of those who propose leaving the ‘ultimate umpire’ question open and unresolved. The attraction of these latter approaches is without doubt their level-headed pragmatism. It is likely that these approaches are inspired by some kind of calm confidence that the friction between the courts will not escalate into open conflict. Thus, it cannot be denied that the frictions between the courts are easier to overlook than open conflicts.

What remains a problem, however, is that these approaches—in particular when referring to a conflict of Grundnorms—are probably too hastily giving up on what law, and constitutional law in particular, is all about: legal certainty and the legal constraint of power. After all, there is also some evidence that the national courts’ positions have caused some harm in terms of legal certainty already. In Germany, some lower court judges can give a detailed account of how the BVerfG’s concept of ultra vires acts did induce resistance against European acts in national courts.

In search for concepts, one may also consider the ‘relationship of cooperation’ (Kooperationsverhältnis) invented by the German BVerfG in its case law to describe the relationship between the ECJ and the highest national courts of Member States. One should note, though, that the BVerfG refers to the relationship of co-operation in the Maastricht decision only in the context of the protection of fundamental rights. This leads back to the difference between the two categories ‘ultra vires acts’ and ‘acts violating fundamental rights as accorded by the German Constitution’. Academic writings before the Maastricht decision also suggested co-operation between BVerfG and ECJ in the context of fundamental rights only, and not for ultra vires acts.

Although the BVerfG has used this concept of a relationship of co-operation since the Maastricht decision, the nature and scope of this concept remain ill-defined and require further clarification.

b) Embedding the Problem into a Modern Concept of Constitutionalism

As previously shown, possibilities for dealing with the differences between the courts by shaping the legal environment do exist. The fact that these possibilities are not followed through may indicate that the problem simply is not serious enough or not taken seriously enough to change the law. Another explanation is that national governments simply do not understand the
problem.\textsuperscript{218} Or could it be that the conflict between the courts itself has a role to play in the relationship between the EU and the Member States—that of indirectly safeguarding Member States’ interests? On that reading, the claims of the Member States’ courts of ultimate jurisdiction would allow Member States to circumvent European law obligations that are not in line with their interests. Leaving the question of ultimate jurisdiction open thus appears to be in the interest of Member States, as reserving the right of Member State courts to claim ultimate jurisdiction could be considered a kind of compensation for the ever-decreasing influence of Member States on decision-making at the European level. Thus, national court claims of ultimate jurisdiction may even have some stabilising potential, as they may well lead to minority opinions among Member States, eg in a vote, to be taken into consideration at the European level,\textsuperscript{219} contributing to maintaining the balance between the two levels.

The challenge for European constitutional legal science is to capture phenomena of European constitutional reality within a modern concept of constitutionalism. Friction between courts and the function of this friction are a part of this European constitutional reality.


(1) Constitutions and the Concept of Verfassungsverbund

Whether it is accurate or desirable to speak of the existence of a European Constitution is subject to debate, to say the least. The introduction of the Constitutional Treaty would not have settled this debate either.\textsuperscript{220} Correspondingly, the fact that the Lisbon Treaty refrains from using the constitutional rhetoric has no relevance for the further clarification of the European constitutional dimensions.\textsuperscript{221}

The critics do not only query the decoupling of the concept of constitution from the concept of ‘State’.\textsuperscript{222} They also point to the risk of weakening the national constitution, inherent in the idea of a European Constitution, since the structural security built into national constitutions is called into question. Thus, the argument continues, a constitution is the enactment of an existing legal culture that must be developed to some degree, and this level of development has not yet been achieved as regards the EU.\textsuperscript{223} Such an emphatic approach to the concept of constitution may have numerous advantages, not least the familiarity of the interpreters of the constitution with this concept.

In consideration of the developments at the supra-state level throughout the second half of the twentieth century, a different strand of constitutional thought has called for a ‘rethinking of the concept of constitution’.\textsuperscript{224} It seems to me that, under the changed circumstances of a

\textsuperscript{218} See Alter, above n 70, 182ff, who points to the different time horizons and focuses of politicians and judges.

\textsuperscript{219} For the exploitation of national constitutional courts’ positions, see M Hilf, ‘Solange II: Wie lange noch Solange?’ [1987] Europäische Grundrechte-Zeitschrift 1, 2: ‘In den politischen Beratungen vor allem des Rates wurde gelegentlich die Karte der Karlsruher Richter als letztes Mittel ausgespielt’ [‘In the political deliberations in particular in the Council, occasionally pointing to the judges in Karlsruhe was used as a last resort’].

\textsuperscript{220} Technically, the Constitutional Treaty was still a treaty of public international law.

\textsuperscript{221} On the elimination of the constitutional rhetoric, see FC Mayer, ‘Die Rückkehr der europäischen Verfassung?’ (2007) 67 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 1141.


\textsuperscript{223} ‘Große Entwürfe und kleine Schritte’, Handelsblatt, 8 August 2001, 6.

‘post-national constellation’ (Jürgen Habermas, Michael Zürn), a more pragmatic concept of constitutionalism, emphasising that there is no state or public power beyond that established by the constitution, is probably more helpful in explaining the phenomena relating to European integration.

As far as the European Union is concerned, there are two observations that seem to be relevant in the present context: first, European public authority or public power in the EU already exists, which affects the individual directly in his or her legal status; secondly, at least the German Constitution points beyond itself by referring to the objective of a unified Europe (zur Verwirklichung eines vereinten Europas) in the Preamble and in Article 23(1). With this in mind, one may answer the question of whether there is a constitutional dimension to European integration in the affirmative. One possible conceptualisation of this constitutional dimension is to depict ‘the’ European Constitution as a complementary structure of national and European constitutions. This concept is known as Verfassungsverbund. The closest literal translation of this term is ‘composite (or compound) of constitutions’, though the substance is better captured by ‘multilevel constitutionalism’. According to this concept, a European constitution already exists, and arises from both the national and European constitutional levels. European and national constitutional law form two levels of a unitary system in terms of substance, function and institutions. On this


226 A Arndt, ‘Umwelt und Recht’ [1963] Neue Juristische Wochenschrift 24, 25; ‘In einer Demokratie gibt es an Staat nicht mehr, als seine Verfassung zum Entstehen bringt’ ['In a democracy, there is no more to a “State” than established by the constitution']; see also P Häberle, Verfassungshybris als Kulturwissenschaft (1998) 620.

227 The description of Gemeinschaftsgewalt as Herrschaftsgewalt is already suggested by Badura, above n 224, 59.


reading, the principle of primacy in application (Anwendungsvorrang) does not imply a hierarchy of norms in the sense of the general hierarchical superiority or inferiority of either European or national (constitutional) law:231 ‘The hallmark of the Verfassungsverbund is its non-hierarchic structure.’232 One may identify the individual as the deeper basis of validity for this European composite of constitutions, to whom the public powers allocated to both the national and European component constitutions may be traced back to.233 This is different from classical international law constructs, and this is also where a justification of the concept of primacy may be found.234

(2) Multilevel Systems

Beyond such concepts of European constitutionalism, Josef Isensee’s still valid comment that the EU is slipping away from established, traditional typologies of public international and constitutional law235 illustrates why one may have to try to go beyond the traditional typologies—one of which is ‘constitution’—in an even more principled way, and establish new concepts such as ‘multilevel systems’.

The comparative law context which is inherent in European integration also speaks in favour of referring to an analytical concept as neutral as possible. The variety of legal and constitutional concepts in Europe arising from differences in language and legal culture (as may easily be illustrated by the different understandings of state, federalism, sovereignty and constitution) necessitates an enormous amount of conceptual and terminological clarification before one uses these terms and notions in the EU context. The mere translation of new terms and concepts such as Staatenverbund or Verfassungsverbund, for example into English, proves to be highly problematic; whereas ‘multilevel constitutionalism’ carries at least the idea behind the concept, the English translation of Staatenverbund, ‘compound of states’,237 remains clumsy. Nuances between Verbund (compound or composite) and Verband (association) pale into obscurity.

A largely neutral concept that could be used in this context is the ‘multilevel system’.238 It is especially useful that the image of distinct levels is not necessarily linked to superordination,

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231 This may be the difference between supremacy and primacy. On hierarchies, see R Bieber and I Salomé, ‘Hierarchy of Norms in European Law’ (1996) 33 CML Rev 907, 912; see also Spanish Tribunal Constitucional, Case 6603/2004, Declaration 1/2004.
233 In this sense, see I Pernice, ‘Die Europäische Verfassung’ in Cremer et al (eds), above n 113, 1319, 1324; see also idem et al, ‘Renewing the European Social Contract’ (2001) 12 King’s College Law Journal 61; The problematic nature of this approach’s emphasis on the individual is highlighted inter alia by UK Preuss, ‘Contribution to the Discussion’ (2000) 60 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 384ff.
234 This cannot be explored in more detail at this point. On the concept of European constitutionalism, see eg the contribution by C Möllers, above chapter 5.
236 For the objections raised against the ‘traditional repertoire of terms and concepts’, see Schuppert, above n 235, 53; see also E-W Böckenförde, in idem, Staat, Nation, Europa (1999) 8, and references in the previous edition.
238 For more detail, see the previous edition.
supervision and subordination. Levels may also be understood as platforms that may be at equal height in one case and at different heights in another, or even circling freely around each other.

Public power is not primarily defined by the monopoly of power—the traditional concept used inter alia to define elements of sovereignty—but rather by the mere decision-making power (leaving aside the question of enforcement capacity), typically expressed in the specific form of norm- or law-making capacity. The decision-making power represents a subset of the elements that characterise the traditional concept of state and public power: the monopoly of force plus exclusive law-making powers. Levels in the context of a legal multilevel system are decision-making levels.

Decision in this context is a cipher for decision-making operating under the rule of law, ie determined by and organised according to law.

\textit{bb) The Role of Courts in a Multilevel System}

If the European Constitution can be conceptualised as a complementary structure in the sense of multilevel constitutionalism (\textit{Verfassungsverbund}), European constitutional adjudication may have to be conceptualised in a similar way. On a positive reading, the European Constitutional Court would consist of both the highest national courts and tribunals and the ECJ. Since, from the theoretical perspective of multilevel constitutionalism, the authority of both the national courts and the ECJ stems from the individual, there is no presupposed hierarchy between the courts; rather, there is a duty of co-operation.

Empirical analysis indicates that, ultimately, the subjects of conflict in the relationship between the levels are the issue of primacy and the question of the source of European law, its basis of validity. The latter question is controversial in the context of the concept of a composite constitution or multilevel constitutionalism (\textit{Verfassungsverbund}) to the extent that it implies a statement on the source of European law. This question can be left open if one avoids this issue by simply referring to the EU as a multilevel system.

As far as the primacy issue is concerned, the multilevel description exposes the minimum requirements for a conditional principle of primacy between distinct levels of public powers to function: the primacy question can only be answered unambiguously according to the content given to it at the overarching level. In the EU, this content is the principle of precedence in application (\textit{Anwendungsvorrang}) of the law of the overarching level. Yet precedence in application does not necessarily imply a hierarchy; rather, it is a rule on the right of way. In English, for example, the difference between a hierarchical and a non-hierarchical right of way rule can

\textsuperscript{239} The monopoly on the (legitimate) use of force as the basis for state and public authority structures is emphasised inter alia by M Weber, \textit{Wirtschaft und Gesellschaft} (1985) 835ff.


\textsuperscript{241} For a similar concept, see FW Scharpf, \textit{Optionen des Föderalismus in Deutschland und Europa} (1994) 25 and 29; R Mayntz, ‘Föderalismus und die Gesellschaft der Gegenwart’ (1990) 115 \textit{Archiv des Öffentlichen Rechts} 232; see also Schuppert’s description of the EC as a political entity with several decision-making levels, above n 235, 39, or as \textit{Mehrebenenentscheidungs-}system (system of multilevel decision-making) by M Zürn, ‘Über den Staat und die Demokratie in der Europäischen Union’, \textit{ZEK-Diskussionspapier} 3 (1995) 19ff.

\textsuperscript{242} In this context, see the concept of the state suggested by H Heller, \textit{Staatslehre} (1934) 228ff, according to whom the state is an organised entity of effective decision-making (\textit{organisierte Entscheidungs-}und \textit{Wirkungseinheit}); see also von Bogdandy, above n 240, 217.

\textsuperscript{243} The German Bundesverfassungsgericht stated in \textit{Entscheidungen des Bundesverfassungsgerichts} 73, 339, 367ff (\textit{Solange I}) that there is a ‘functional intertwinement of the European and Member State judicatures’, including a ‘partial functional incorporation of the ECJ into the domestic court system’.

\textsuperscript{244} ‘The pessimistic view would be a competition of the courts. See, eg M Kumm, ‘The Jurisprudence of Constitutional Conflict’ (2005) 11 \textit{ELJ} 262.

\textsuperscript{245} In this context, see H Hofmann, ‘Von der Staatssoziologie zu einer Soziologie der Verfassung?’ [1999] \textit{Juristenzeitung} 1065.
be grasped more easily on a terminological basis, as a distinction between (hierarchical) supremacy and non-hierarchical primacy is possible. In order to avoid conflicts, any claims for elements of national law, in particular constitutions, to be exempt from the primacy of European law have to be recognised by both levels in principle, and must be determined consensually by them, in specific cases. This leads to the core question of where to locate the ultimate jurisdictional claims of the highest national courts and tribunals at the European level. The answer points to Article 234 EC (Article 267 TFEU) in a procedural perspective and to Article 6(3) EU (Article 4(2) TEU-Lis)—ie the respect of national constitutional identity—in a substantive perspective. The interpretation of the latter norm has to be accomplished by both the highest national courts and the ECJ. The fundamental rights saga from Solange I to the Banana decisions of the ECJ and the BVerfG seems to indicate that the respective courts of ultimate decision, as guardians of the interests of the respective levels, are already working towards establishing a core of (constitutional) law exempt from the primacy of European law, which is accepted as such on both levels. This is confirmed by the decisions of the French Conseil constitutionnel on the national constitutional limits of European law set by the respective Member State’s constitutional identity (see above).

c) Objections to Composite and Multilevel European Constitutional Adjudication

Whether one starts out from multilevel constitutionalism or merely from a multilevel description of legal systems, the idea of a complementary structure of European constitutional adjudication raises numerous objections.

aa) Asymmetry

The heterogeneity of the highest national courts and tribunals described earlier is not limited to the role of the judge, the language of the decisions and the acceptance of judge-made law in 27 and more Member States. There are also differences in the range of powers and jurisdiction of the highest national courts. Hence, the concept of a complementary European constitutional judiciary leads to a very different shape of European constitutional law adjudication from Member State to Member State. In Germany, for example, the strong constitutional court may claim exemption from European primacy for certain national constitutional law principles, whereas in the Netherlands, which lacks a constitutional court, this possibility does not exist.

On one hand, this kind of asymmetry is intrinsic to the heterogeneity of the EU Member States, which is one of the crucial constitutional hallmarks of the Union. On the other hand, proposals in some of the Member States for judicial reforms, going as far as the introduction of genuine constitutional courts, may be part of a trend towards convergence, promoted to some extent by the ultimate jurisdiction issue. This, at least, has been indicated by the Swedish

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246 On this in particular, see the Spanish Tribunal Constitucional, Judgment of 13 December 2004, DTC 1/2004, according to which ‘primacía’ means primacy in application in case of collision between national and European law, while ‘supremacía’ means a claim to the highest hierarchical position. See also AC Becker, ‘Vorrang versus Vorherrschaft’ [2005] Europarecht 353; see above n 78 on the difference between primacy and supremacy.

247 More general objections against the concept of (constitutional) jurisdiction as such and theories dealing with judicial review will not be addressed here. For the American debate on judicial review, see A Bickel, The Least Dangerous Branch (1962); M Tushnet, Taking the Constitution Away from the Courts (1999).

248 In this context, see J Tully, Strange Multiplicity (1995) 183ff (constitutions as ‘chains of continual intercultural negotiation’).

249 Considering the number of states where judicial review of parliamentary decisions is still considered an anomaly, one cannot yet speak of a general convergence in Europe towards judicial review exercised by constitutional courts. However, see Tomuschat, above n 4, 245ff.
example. In any case, almost all of the youngest Member States have established a constitutional court.

Generally speaking, this is the point where the merits of the multilevel approach become apparent: the relevant borderline between public powers in the EU is the line between the European and Member State levels. The way the fundamental rights issue developed is a good illustration that it may well be enough to have one single court on one level—say, the German BVerfG—determining the constitutional interests of that level. This is not to say that the BVerfG may be some kind of role model for other courts in other Member States; rather, it is simply to say that the reservations expressed by the BVerfG in the field of fundamental rights have contributed to making the case law of the ECJ clearer in this area. All Member States have benefited from this, whether or not they have a constitutional court that has voiced similar national concerns as the BVerfG. In that sense, the BVerfG could be seen as not only the guardian of the German Constitution, but also a guardian of the interests of the Member State level generally. The same applies, of course, for the other highest national courts and tribunals in their respective positioning towards the ECJ.

The objection that the ECJ and the highest national courts are not really comparable—in spite of occasional descriptions of the ECJ as a constitutional court—carries particular weight. It possibly points to an asymmetry between the courts in question, which excludes any concept of complementary jurisdiction in respect of European constitutional law. On that reading, the ECJ and the highest national courts and tribunals are just too different.

One example of something that distinguishes the ECJ from the highest national courts is the fact that it is an exception for individuals to appear before the ECJ. In European procedural law, the Member States, the Commission and national courts (by way of references) are privileged parties. These are the ECJ’s preferred interlocutors. The ECJ has confirmed this in its recent case law, in opposition to the Court of First Instance and against the advice of the Advocate General. This seems to indicate a conception of the ECJ’s function as relating specifically to maintaining and strengthening European integration, rather than a concern for focusing on the protection of individual rights.

The Convention discussed introducing a fundamental rights complaint, modelled more or less on the German Verfassungsbeschwerde. In the context of the constitutional reform required by accession to the EU, the Swedish government wanted to make sure that Swedish courts would have the same powers as far as European law is concerned as the German Bundesverfassungsgericht. Justitiedepartmentet, ‘Våra Grundlagar och EG—förlag till alternativ’, Departementsserien 1993:36.


A similar objection is made by P Badura, ‘Contribution to the Discussion’ (2000) 60 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 353, against the multi-level concept, when pointing to the lack of comparability of the levels.

On this, see H Schepel and E Blankenburg, ‘Mobilizing the European Court of Justice’ in G de Búrca and JHH Weiler (eds), The European Court of Justice (2001) 9, 18ff; see also the rather strict approach of the ECJ concerning the admissibility of third party interventions, Case 6/64, Order of 3 June 1964, Costa [1964] ECR 614.

Case C-50/00 P, above n 216; against, see AG Jacobs, ibid, No 59ff, and the Court of First Instance: Case T-177/01 Jégo-Quéré v Commission [2002] ECR II-2365, paras 41ff, 50; overruled by Case C-263/02 P Commission v Jégo-Quéré [2004] ECR I-3425. There is now a minimal improvement in the position of individuals in Art 263 TFEU; for details, see J Bast, above chapter 10, section V2(b).

H Rasmussen, The European Court of Justice (1998) 198ff; see also L Hooghe and G Marks, Multi-level Governance and European Integration (2001) 26ff.

as well as a substantial modification of Article 230(4) EC.\textsuperscript{257} In the end, there was no agreement on opening up direct access to the European courts.

The most serious objection in the present context is probably the one pointing to the differences in democratic legitimacy between the ECJ on the one hand and the highest national courts and tribunals on the other. Unlike the courts of some Member States, who take their decisions ‘in the name of the people’,\textsuperscript{258} the ECJ does not even reveal in whose name or on whose behalf it is speaking. This raises the question of whom or what legitimises the ECJ. According to Article 223 EC (Article 253 TFEU), the European judges are appointed by the governments of the Member States without any parliamentary participation—either European or national.\textsuperscript{259} In contrast, the judges of the German BVerfG, for example, are elected by the German Parliament (Article 94 of the German Constitution). It is nevertheless true that the selection of ECJ judges can be democratically justified by chains of legitimacy, some of which are longer than others. Moreover, it should be noted that European law does not prevent parliamentary participation at the Member State level, the case of Austria providing an example.\textsuperscript{260} The Treaty of Lisbon slightly enhances transparency by introducing a panel which is to give an opinion on candidates’ suitability to perform the duties of Judge and Advocate General.\textsuperscript{261}

Generally speaking, one will find numerous unanswered fundamental questions on the legitimacy of judges at the Member State level as well,\textsuperscript{262} and the German procedure of selecting the highest judges by way of parliamentary participation could itself be criticised for not being as transparent as, say, the US solution of public hearings of the prospective judges.

In the end, the utterly different understandings of and approaches to the nature and range of democratic legitimacy of courts are probably simply the corollary of the heterogeneity of the Member States.

\textsuperscript{257} See the final report of WG II, CONV 354/02, point C, and the debate within the Discussion circle on the Court of Justice (Circle I), CIRCLE I WD 08, para 17ff; CONV 543/03; see also the hearing of the President of the ECJ Rodríguez Iglesias in Circle I on 17 February 2003, CONV 636/03 (against opening up Art 230(4) EC); the hearing of the President of the CFI Vesterdorf on 24 February 2003, CONV 588/03 (in favour of broadening Art 230(4) EC, see similarly AG Jacobs, WG II WD 20, and also judge Skouris, WG II WD 19); see also U Everling, ‘Rechtsschutz im europäischen Wirtschaftsrecht auf der Grundlage der Konventsgesetz’ in J Schwarze (ed), Der Verfassungsentwurf des Europäischen Konvents (2004) 263; FC Mayer, ‘Individualrechtsschutz im Europäischen Verfassungsrecht’ [2004] Deutsches Verwaltungsblatt 606; Bast, above chapter 10.

\textsuperscript{258} This aspect is highlighted in the comprehensive study by Dubos, above n 153, 855.

\textsuperscript{259} The history of the recent appointments of the German judges Everling, Zuleeg and Hirsch is not exactly a story of success, as all of them were one-term judges. This seems to indicate some deficiencies in the current procedure. Alter, above n 70, 200, reports that U Everling was initially seen as having a greater appreciation of the borders of EC authority, and that M Zuleeg, rather than being reappointed, was replaced by G Hirsch from Bavaria in part because of the perception that he was too willing to interpret European law expansively. The problem may simply be a lack of interest of the governments in the issue, though.

\textsuperscript{260} Art 23c of the Austrian Constitution, the Bundes-Verfassungsgesetz.

\textsuperscript{261} Art 255 TFEU; there is still the problematic issue of former European Commission officials becoming judges or working for judges, which raises the question of informal channels between the Commission and the Court. This and the role of the judges’ collaborators, the référendaires, who do not even appear on the Court’s homepage, is something that has not attracted much scholarly attention so far. It is therefore possible that important elements for understanding of the ECJ’s functioning still lie in the dark.

\textsuperscript{262} For a German perspective, see A Voßkuhle and G Sydow, ‘Die demokratische Legitimation des Richters’ [2002] Juristenzeitung 673; Pernice, above n 1, 36, emphasises the functional legitimacy of the European judiciary.
bb) The Evaporation of Responsibilities—Who is to Define the Common Good?

There are more fundamental objections than asymmetry to a concept of complementary jurisdiction in European constitutional law. They concern the issue of accountability and the question of how to establish a concept of ‘common good’ in such a complex system. Just as a certain fuzziness or lack of clarity has developed over time in the realm of the executive between Council, national governments and administrative structures, so a composite structure of jurisdiction might be vulnerable to an unclear and ill-defined division of responsibilities and jurisdiction. This could lead to a vacuum of responsibility for fundamental rights protection in concreto, as the Banana cases indicated. There, the principles were upheld, but the banana importers went bankrupt. It would be a serious problem indeed if a forum for the definition of the common good, the place where a concept of solidarity could also be developed, became less and less discernible. Solidarity-free individualisation would then have reached the realm of constitutional law as well.

cc) Is There any Added Value in Theories of Composite Structures of Adjudication?

The value of conceptualising what the courts in the EU do or should do by means of a non-hierarchic, composite multilevel structure may be summarised as follows: starting from a concept that covers the national and the European levels, and thus establishing responsibilities of adjudication on European constitutional law for both of them, the non-hierarchic relationship of the courts takes on a clearer form, constitutional clarity is enhanced and a reciprocal strengthening of constitutional bonds and limits is achieved.

The multilevel approach can serve as a starting point to develop criteria for determining the limits of responsibilities and as a conceptual basis for the constitutional dialogue between the courts, which are allotted functions according to a specific concept of constitutionalism. This means rejecting the conflict paradigm and accepting the co-operation paradigm more readily. To some extent, the non-subordination of national courts, which keep a national constitutional identity (Spain, France, see above), could be explained and legitimised in terms of European constitutional law; it would no longer automatically be seen as an infringement of European law. In any case, there would also be clear limits on how national courts may act, which would remove the foundations of misleading legal reasoning (particularly in respect of ultra vires acts).

3. Interim Summary

The ‘frictional phenomena’ that exist between the highest national courts and tribunals of the Member States and the ECJ can be legally analysed and their specific manifestations can be shaped by law. They have a function in the relationship between EU and Member States. There are theoretical tools that can help to constructively explain and conceptualise this function and
the empirical findings of differences between the courts. By means of concepts such as the *Verfassungsverbund*, or the multilevel system, the cooperation paradigm can be emphasised.

### III. Recent Developments in the Relationship between European and National Courts

Since the fall of the iron curtain in 1989/1990, the number of EU Member States has increased from 12 to 27 and the legal basis of European integration has been changed several times. The most recent phase of the integration process came to an end in October 2007 with the Treaty of Lisbon.267 These changes in the circumstances and foundations of European integration have an effect on the fundamental questions of European constitutional law, which also pertain to national courts. For example, the elimination of the pillar structure of the EU with the Treaty of Lisbon carries with it a broadening of the ECJ’s jurisdiction.

However, the system of adjudication on the European and national levels was not at the centre of the reform process. Neither the ‘Draft Treaty establishing a Constitution for Europe’ of the 2002/2003 Convention268 nor the modifications of that draft introduced along the ensuing Intergovernmental Conference in 2003/2004 and agreed upon in June 2004 nor the 2007 Treaty of Lisbon contain substantive changes as far as the ECJ or the national courts are concerned. The core issues of the constitutional process nevertheless touch the system of adjudication in the EU (1). Numerous open questions remain (2).

#### 1. The Courts and the Core Topics of the Constitutional Reform Process

In the context of the debate on the delimitation of European powers and competences,269 a new, additional court of competence was suggested,270 but not agreed upon. Instead, the Treaty of Lisbon uses—just like the Treaty on a Constitution for Europe—categories of competences and a stronger control of the principle of subsidiarity, where national parliaments now have a role to play. Still, the recurring—unsubstantiated271—accusation that the ECJ is not fulfilling its functions may have damaged the position of the ECJ, with destabilising side effects for the entire system of European constitutional law adjudication. The issue of competences is an example of how debating constitutional topics that are not directly related to the courts may generate side effects that affect the courts.

This kind of side effect can also be detected in the institutional debate. Should, for example, the Commission, due to its composition or due to changes in the institutional arrangement, be decreasingly able to fulfil its role as guardian of the Treaties, then this could have an indirect effect on the ECJ, increasing its burden of responsibility for the defence of the supranational

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267 The Treaty of Lisbon still needs to be ratified, and should come into force in 2010.
268 See document CONV 850/03; it is only at a very late stage that a forum for debating ECJ-related questions was introduced, albeit with a rather limited mandate. For the mandate of this ‘Discussion circle on the Court of Justice’ (Circle I), see CONV 543/03. For the final report, see CIRCLE I WD 08.
269 According to the ‘Declaration on the future of the Union’ annexed to the Treaty of Nice, one point for discussion was ‘inter alia’ the question of ‘how to establish and monitor a more precise delimitation of powers between the European Union and the Member States, reflecting the principle of subsidiarity’.
270 See above nn 180ff for proposals made by two judges of the German Bundesverfassungsgericht; see also U Everling, ‘Quis custodiet custodes ipsos?’ [2002] Europäische Zeitschrift für Wirtschaftsrecht 357, rejecting this kind of proposal; for the debate in the Convention see document CONV 286/02.
271 Just see Case C-376/98 Germany v Commission [2000] ECR I-8419; see also Mayer, above n 187, 594ff, and German ECJ Judge Colneric, above n 188.
originality and independence of the entire integration project. The dichotomy of legislature and executive might be taken to imply that the separation of powers concept of the nation state can simply be applied to the EU. This is not necessarily the case. The judiciary may be the last remaining institution to be implementing the driving idea behind European integration of the last 50 years, which was to mediate political conflict by means of law, and its (assumed) rationality.272

The extension of qualified majority voting (QMV) in the Council of Ministers is also an issue which does not prima facie concern the courts but still affects their role. The connection between QMV and the ECJ as well as European constitutional adjudication is well illustrated by the Banana Regulation:273 Germany actually voted against the regulation in the Council but was nonetheless bound by it, and then had to solve the massive fundamental rights problems that arose at home as a result. More generally speaking: extending QMV also means that governments may no longer be able to act as guardians of certain interests in the Council. To the extent that these interests are well enough established to be covered by constitutional law (such as fundamental rights), the national courts may be forced into a more activist role as defenders of these interests against the EU, in particular when these interests can be designated integration-proof elements of national constitutional law.

In this context, the further legalisation of the protection of fundamental rights in the EU comes into view. The reference in Article 6 TEU-Lis to the Fundamental Rights Charter makes the latter legally binding.274 This could make more apparent the divergence in control, scrutiny and standards of protection between the European level and at least some of the Member States.275

The binding character of the Charter could entail fundamental changes for the ECJ as well. Even without a constitutional complaint procedure276 it is possible to contemplate a paradigm shift away from an economic community towards a fundamental rights community.277 There are sporadic calls for a transfer of responsibility for fundamental rights from the legislative power to the judiciary, which is to act once again as the 'motor of integration'.278 However, it cannot be ruled out that this would overburden the ECJ.

2. Open Questions

There are numerous questions about the future of the courts which were not raised in the Convention or the IGC, but which still need answering.279 As well as the question already

272 The Carpenter decision of July 2002, where the ECJ seems to disregard any limits that Art 51 of the EU Charter of Fundamental Rights might impose on the ERT case law—this seems to indicate that it might not be easy to circumnavigate the ECJ. See Case C-60/00, Carpenter [2002] ECR I-6279; I Pernice and FC Mayer, in Grabitz and Hilf, above n 200, after Art 6 EU paras 32ff.
274 In December 2000, the Charter was only announced as a solemn political proclamation: see [2000] OJ C364, 1.
276 See above n 256.
278 Kirchhof, above n 223.
279 For the debate on the reform of the European court system, which has strangely been decoupled from the general constitutional debate, see inter alia JHH Weiler, ‘Epilogue: The Judicial Après Nice’ in G de Búrca and idem (eds), The European Court of Justice (2001) 215ff; U Everling, ‘Zur Fortbildung der Gerichtsbarkeit der Europäischen Gemeinschaften durch den Vertrag von Nizza’ in Cremer et al, above n 113, 1103ff, with further references.
touched upon, of how to establish a concept of the common good in the EU, there are foreseeable logistical and infrastructural obstacles to a functioning ECJ in an EU of 27 or more Member States, with possible side effects for European constitutional law adjudication in the entire EU. These obstacles include the language problem and the question of how to ensure a balanced composition of the Court and its component parts based on equal representation of Member States.

One may question whether the agenda of the reform process ignored fundamental questions of European law. A decision on the range and limits of the (common) market, for example, is long overdue. This issue concerns not only social and cultural specifics of the Member States, but also fundamental choices of a society on the market-state relationship, taking into consideration social and other preferences. The ECJ’s PreussenElektra judgment illustrates that, in the area of the relationship between free movement of goods and environmental protection, in spite of the pronouncement in Keck, the ECJ is finding it increasingly difficult to remain consistent in its case law on the limits of the market. More recent examples of the significance of the ECJ jurisprudence on fundamental freedoms, which concerns fundamental societal decisions and the conception of the fundamental freedoms (in these cases, horizontal applicability), are the decisions Viking and Laval.

Reflections on European constitutional adjudication are embedded into the context of attempts to conceptualise public power in an era of globalisation and internationalisation, which reaches beyond European integration. Similar frictional phenomena between the Member States and the EU may occur there, with similar lines of conflict. The ECJ may find itself, vis-à-vis courts or other adjudicating bodies outside the EU, in a position which resembles the position national courts have adopted towards the ECJ. The ECtHR needs to be mentioned in this context as, with its control inter alia of the EU, it also plays a role in the system of European constitutional adjudication. It remains to be seen whether, once the EU becomes a member of the Convention system, as provided for in Article 6(2) TEU-Lis, the ECtHR will only review acts of the EU on an exceptional basis. Moreover, there are numerous new

280 The increasing number of languages may not be just a logistical problem, it may also adversely affect the clarity of Court decisions and contribute to the fuzziness of European law: see I Pernice and FC Mayer, in Grabitz and Hilf, above n 200, Art 220 EC paras 86ff; see also FC Mayer, ‘The Language of the European Constitution—Beyond Babel?’ in A Bodnar et al (eds), The Emerging Constitutional Law of the European Union (2003) 359; see also idem, ‘Europäisches Sprachenverfassungsrecht’ (2005) 44 Der Staat 367.

281 Case C-379/98 PreussenElektra [2001] ECR I-2099; on fundamental freedoms, see the contribution by T Kinggreen, below chapter 14.

282 Case C-438/05 ITF (Viking Line) [2007] ECR I-10779; Case C-34/10 Laval [2007] ECR I-11767.

283 See ECtHR (GC) App No 45036/98 Bosphorus v Ireland (2006) 42 EHRR 1, where the court establishes a kind of Solange II formula with respect to the EU, which allows the Court, however, to activate its control mechanism in each individual case. See also ECtHR (GC) App No 24833/94 Matthews v UK (1999) 28 EHRR 361, para 251; ECtHR App No 62023/00 Emesa Sugar v Netherlands, following Case C-17/98 Emesa Sugar [2000] ECR I-665 (on the right to respond to the AG’s opinion, see in this context ECtHR App No 39594/98 Kress v France ECHR 2001-VI); see also the case ECtHR App No 56672/00 Senator Lines v 15 EU Member States (2004) 39 EHRR SE3; following Case T-191/98 R Senator Lines v Commission [1999] EIR II-2531 and Case C-364/99 P (R) Senator Lines v Commission [1999] EIR I-8733. The ECtHR-proceedings were not continued following the CFI decision in Cases T-191/98, T-212/98, T 213/98 and T-214/98 Atlantic Container Line v Commission [2003] EIR II-3275. Looking at the references to each other’s cases that can be found in both ECJ and ECtHR decisions and at cases such as App No 56677/97 Dangeville v France ECHR 2002-III, where the ECtHR took sides with the ECJ, the relationship between the ECJ and the ECtHR seems to be characterised by co-operation and mutual respect on this point. Note that the ECtHR referred to the EU Charter of Fundamental Rights before the ECJ did, App No 25680/94 I v UK ECHR 2002-VI, para 80; App No 28957/95 Goodwin v UK ECHR 2002-VI, para 10, pointing to Art 9 of the Charter; see for the relationship between ECJ and the WTO-‘courts’, Case C-377/02 Van Parys [2005] ECR I-1465.

284 In its Bosphorus decision (above n 283), the ECtHR established the question whether the ECJ ensures a fundamental rights protection that is substantially equal to that of the European Convention on Human Rights as a test, which it did not apply eg to the Bundesverfassungsgericht.
fundamental questions, ranging from the question of how to tame new, previously unknown threats to individual freedom relating to economic power or issues related to globalisation and its effects on UN or world trade law to the question of how to legitimise new forms of governance. The answers to these questions will also affect the role and function of national and supranational courts.

IV. Summary and Conclusion

The analysis of the conflicts between the highest courts and tribunals at the European and Member State levels goes far beyond the mere relationship between these courts. Looking at this relationship offers more general insights on how Member States deal with the tension between their national legal orders and the European legal order, and where the crucial points for potential conflict are located within the European construct. Beyond the law, national courts also reflect changes in mood or opinion, regarding European integration, within the respective Member States. The differences and conflicts between the courts can be considered representative of more general trends and differences of opinion.

All in all, it is still premature to regard the relationship between the ECJ and the highest national courts and tribunals to be a consolidated relationship, but it is on the right path, heading towards a complementary structure of European constitutional law adjudication. This path is characterised by embracing cooperation instead of collision and by elements of a constitutional conversation between the courts, sometimes quite indirect, on questions of fundamental rights protection, primacy or the preservation of national constitutional identity. The character of this conversation varies, depending on the Member States involved.

It remains to be seen what effect the enlargement by 12 Member States as of 2004 and 2007 as well as the Treaty of Lisbon, with its renewed contractual foundations of European integration, will have. Thus, in these times of change in Europe, what is true in general for

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285 In that context, see Cases C-402/05 P and C-415/05 P Kadi et al v Council and Commission [2008] ECR I-0000.
288 Wherever the Constitutional Treaty has been or wherever the Treaty of Lisbon will be the subject of constitutional law proceedings in the Member States, European constitutional law will evolve. The cases concerning the Constitutional Treaty before the German Bundesverfassungsgericht (2 BvR 839/05 and 2 BvE 2/05, filed on 27 May 2005 by MP Peter Gauweiler) have been dropped, see also the Slovak Constitutional Court (Decision of 14 July 2005 to halt the ratification), and the Czech Constitutional Court (filed on 2 February 2005 by President Vaclav Klaus). For other cases dealing with the Constitutional Treaty, see, in Great Britain, the Court of Appeal of England and Wales, R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Southall and Anor, [2003] 3 CML Rev 18 (judicial decision not to decide on a referendum); in France, Conseil constitutionnel, Decision 2004/505 DC (2004) 273 Journal Officiel 19885 (on that FC Mayer, ‘Europarecht als französisches Verfassungsrecht’ [2004] Europarecht 923); and in Spain, Tribunal Constitucional, Case 6603/2004, Declaration 1/2004, 13 December 2004, [2005] 1 CML Rev 39 (on that Becker, above n 246). For the compatibility of the Treaty of Lisbon with the French constitution, see Conseil constitutionnel, Decision 2007-560 DC (2007) 302 Journal officiel 21813; in that context, see Mayer et al, above n 43. The Czech Constitutional Court decided on the Treaty of Lisbon on 26 November 2008, case No PI US 19/08 (published as No 446/2008 Coll). The German Constitutional Court considered the Treaty of Lisbon to be compatible with the German constitution in its decision of 30 June 2009 (cases 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09), elaborating on the topics of national constitutional identity, ultra vires control and the principle of European law friendliness of the German constitution.
European integration in an EU of 27 or more Member States applies likewise to the relationship between the courts: when facing crucial decisions, it is all-important to preserve and secure what has already been achieved. Offering concepts and ideas to this end is not the only, but a particularly befitting task for the science of European constitutional law.
Part III

The Legal Position of the Individual
I. Introduction

European Community law is the product of a process of transformation. It has emerged as an autonomous legal order from a series of international treaties. The role of the European Court of Justice (ECJ, the Court) was crucial in this respect. Long-term treaty objectives have been attributed direct applicability and supremacy over municipal law, individual rights have arisen from Member State duties, and the EEC Treaty, the central document of European integration, has been reinterpreted as a constitution. According to the Court, the law of the European Community—today the Union—has become a legal system whose subjects are not only the...

* The author thanks David Rabenschlag for useful comments on earlier versions of this contribution.

1 James Joyce, Ulysses (Bodley Head edn, 1960) 430.
2 Case 6/64 Costa v ENEL [1964] ECR 585, 593.
3 Case 26/62 van Gend & Loos [1963] ECR 1, 12.
Member States but also their citizens. The Treaty of Maastricht, by inserting a new part on Union citizenship into the EC Treaty (now Articles 17–22 EC), suggested that this path would be followed further. The individual appears to have been placed in the centre of Union law. The ECJ seems to stress this change in paradigm in emphasising that ‘Union citizenship is destined to be the fundamental status of nationals in the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality’.

Investigations into the legal substance of Union citizenship undertaken in the 1990s have resulted in very heterogeneous assessments, which differ according to the chosen reference point. Restricting analysis to the existing rules of the EC Treaty will ensure a conservative conclusion, especially if such assessments are based on a comparison with rights available to national citizens. Such comparison, which is suggested by the wording of the Union ‘Treaties, almost inevitably leads to disappointment.

Others assess Union citizenship in light of its future potential. Here, too, the national citizen stands as an ideal in the background and encourages diverse projections. Many of these assessments reflect the debate concerning the endurance and prospects of a European people and a European constitution. One line of enquiry traces the foundations of citizenship to pre-legal identities. The appreciation of Union citizenship then depends on what is deemed indispensable for a constituency with respect to pre-existing factors of a social nature that create identity.

Other contributions express the opinion that Union citizenship can be structured by law; it may thus constitute the prerequisite of an active European citizenship, the continuing development of which will be influenced by a gradual enhancement in legal status.

After the ECJ had developed its case law on the status of Union citizenship, the initial scepticism about its contents and potential appeared to have ceased; however, this reappraisal relates primarily to free movement (Article 18 EC) and corresponding social rights.

As far as the political status of Union citizens is concerned, the old controversy came up again in

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6 See, eg N Reich, Bürgerrechte in der Europäischen Union (1999) 5 and 450ff.
15 See below section III.3.
comments on the draft of the Constitutional Treaty. Since the Reform Treaty of Lisbon has not changed much in that respect, the dispute is still topical.

Therefore, it is now equally tempting to juxtapose perspectives of citizenship relating to positive law and political theory for two reasons. The first reason is methodical in nature. Strictly speaking, both perspectives deal with two different and unrelated discourses. The question arises whether this must necessarily be the case or whether there are links that could provide more mutual interest. The second reason lies in the pioneering role that Union citizenship plays in the discussion concerning a European constitution. Both initiatives share the idea of creating integration and identification by law. The overriding question is: what value can terms influenced by the theory of state have at the European level?

This article will first consider the object and purpose of the rules governing Union citizenship (II). Thereupon, the positive law governing Union citizenship will be investigated in order to find the reasons for its negative evaluation in legal writing to date (III and IV). The final section will consider the horizon of constitutional political expectations opened up by the introduction of Union citizenship using the social science debate as a basis (V). Comparing the state of both the legal and the social science discourse could prove to be profitable for the future structure of Union citizen rights.

II. The Notion of Union Citizenship

1. History

The story of the metamorphosis of the individual in the Community legal order has often been told. It starts with the artificial birth of the ‘market citizen’, a ‘reduced functionalist concept of an individual’. This concept describes the individual as a holder of economic freedoms, the judicial enforcement of which serves to realise the Common Market. The establishment of Union citizen rights in the EC Treaty represents the final chapter of this tale; however, it remains open, as Union citizenship was introduced as open to development (Article 22 EC). Accordingly, the citizen’s status in the new body politic of the European Union has yet to be defined. Confronting the market with the Union citizen may have a heuristic value. However, it is doubtful whether such comparison charts the development with sufficient clarity.

On the one hand, individuals under the Community legal order were never mere market citizens. The original EEC Treaty opened up the prospect of polical rights by providing for elections to the European Parliament (Article 138 (3), now Article 190 EC). In 1962, even before the Court of Justice had acknowledged the direct effect of fundamental freedoms, the


Commission took the view that individuals in the Community legal order exercised their fundamental rights not simply as mere factors of production but as holders of civil rights. The case law relating to fundamental Community rights began in 1969 with the Stauder case, which dealt with the personality right of a welfare recipient who wished to purchase products subsidised from EC funds at a reduced price without having to reveal his identity. Apart from his status as a beneficiary of a programme to dismantle agricultural surpluses, it was impossible to consider him as an actual holder of economic freedoms of the EC Treaty. At the same time, legislation on co-ordinating European welfare law was introduced which also granted pensioners as well as relatives of employees and the self-employed outside their country of origin equal access to national systems of social welfare at their place of residence. The first Council initiatives with the aim of a ‘Europe of citizens’ go as far back as 1969, when the customs union had been prematurely realised, but direct effect of some fundamental rights had not yet been fully recognised by the Court.

On the other hand, fundamental freedoms are not constitutive for Union citizenship and therefore do not necessarily entail the latter. A Union citizen is a person who has the nationality of a Union State (Article 17(1), 2nd sentence EC). By contrast, holders of fundamental freedoms are all those upon whom the Community legal order has conferred such rights. The free movement of goods does not depend on the nationality of the trading partners. The right to free movement can also be extended by treaty to nationals of non-EU states, despite the fact that it is reserved to Union citizens according to the wording of the EC Treaty. Such treaties have been concluded with European Free Trade Association member states and accession countries, including Turkey. Thus, fundamental freedoms are constitutive for Union citizenship only as far as union Citizens may not be deprived of them.

Comparing the status between market and Union citizens makes it clear that, in Community legislation and political initiatives, personal rights have become increasingly independent of fundamental freedoms. First traces can be found in the initial Treaties, such as the prohibition of discrimination on grounds of nationality (now Article 12 EC). The most important impulses emanated from European labour law and social legislation, the subjective guarantees of which initially served the freedom of employees but gradually became independent of the existence of an employment contract. At the same time, the demand for a political status of migrants within the EC arose. In 1974, the Council of Paris asked the Commission to review the special

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24 See, eg Case 41/74 van Duyn [1974] ECR 1337, para 5/7 (free movement of employees); Case 2/74 Reyners [1974] ECR 631, para 29/31 (freedom of establishment); Case 33/74 van Binsbergen [1974] ECR 1299, para 24/26 (freedom to provide services).
25 See especially Arts 28, 31 and 36 of the Agreement on the European Economic Area, [1994] OJ L1, 3; with respect to Turkey, see eg Case C-262/96 Sürül [1999] ECR I-2685, para 60; as to the privilege of Union citizenship, see C-325/05 Derin [2007] ECR I-6495, paras 62ff.
26 On the other hand, Article 17 EC does not require Member States to reserve citizenship rights to Union citizens, see Case C-145/04 Spain v United Kingdom [2006] ECR I-7917, para 76.
27 See references above n 22.
rights which citizens of Member States could be granted as members of the Community.\textsuperscript{28} The notion of the rights to vote and to stand as a candidate at municipal elections in the place of residence dates from this time.\textsuperscript{29} The Tindemans Report, submitted in 1975, recommended more citizens’ rights, including equal access to public offices, dismantling of border controls, promotion of school and student exchange programmes, mutual recognition of diplomas and improved consumer protection.\textsuperscript{30} For the time being, however, the direct election of the European Parliament and a uniform passport were the only obvious signs of a ‘Europe for citizens’.\textsuperscript{31}

The Draft Treaty Establishing the European Union produced under Altiero Spinelli was passed by European Parliament in 1984 and employed the term ‘Union citizenship’ for the first time.\textsuperscript{32} The European Council of Fontainebleau convened the Adonnino Committee—named after its chairman—which had the task of adopting Community measures ‘to strengthen and promote its identity and its image both for its citizens and for the rest of the world’.\textsuperscript{33} The subsequent reports of the group already contained most of the rights which Union citizens now have under the EC Treaty.\textsuperscript{34} In the same year, the ECJ granted tourists the right to rely on (passive) freedom of services and, by widening the scope of the fundamental freedoms in this way, made an important step towards defunctionalising the freedom of persons.\textsuperscript{35} The 1987 ‘Erasmus’ Decision of the Council concerning student exchange was the first legal act to refer to a ‘Europe for citizens’.\textsuperscript{36} In the following year, the Commission submitted its proposal for the right to vote in municipal elections.\textsuperscript{37} A little later, in 1990, the Council issued three directives on the right of persons with no occupation to reside outside their home state.\textsuperscript{38}

These initiatives show that the freedom of movement and granting of political rights were seen as the most important elements in creating Union citizenship. Something more recent is a third component which arose from the efforts of the Union institutions to increase the identifi-
cation with Europe, to make the Union more citizen-oriented and to create a sense of accountability vis-à-vis the individual. This attitude is reflected in Article 1(2) EU, which declares its aim to be ‘an ever closer union among the peoples of Europe’; decisions should be taken ‘as closely as possible to the citizen’. According to Article 2(3) EU, one aim of the Union is ‘to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union’.

All three elements mentioned so far are reunited in the form of individual rights in the EC Treaty: freedom of movement (Article 18 EC), the right to vote (Article 19 EC) and freedom of information rights in relation to Union institutions (Articles 21 and 255 EC). In its section on citizens’ rights, the Charter of Fundamental Rights of the European Union,39 would be elevated to the status of the Founding Treaties by way of reference in Article 6(1) of the EU Treaty of Lisbon (TEU-Lis), also grants the right to ‘good administration’, which is closely connected to the third group (Article 41 Charter). The right to protection abroad by diplomatic and consular authorities of other Member States additionally appears as a fourth component (Article 20 EC).

Union citizenship is not limited to these rights, but extends to all rights and duties of Union law (Article 17(2) EC). One of the most fundamental guarantees is the right to freedom of discrimination (Article 12 EC), which, seen in the light of Union citizenship, looks like a right to civil equality. Those rights also include fundamental freedoms resulting from constitutional traditions common to Member States (Article 6 EU) and social rights, which have hitherto mainly existed on the basis of the secondary legislation40 to which the Charter of Fundamental Rights refers (Articles 27–38 Charter). The rights guaranteed in Articles 18–21 EC nevertheless have a special symbolic value. As a rule, only nationals enjoy complete freedom of movement within the state borders.41 Likewise, the rights to vote and to stand for election are usually reserved to them alone. Diplomatic and consular protection, an expression of the state’s sovereignty over persons, forms an important component of the reciprocal relationship of protection and obedience that exists between citizens and the state according to classical political theory.42 Since the creation of the rights of market citizens, European citizens have thus been granted many attributes that resemble political rights. Therefore, an investigation as to how far the parallels between state citizenship and Union citizenship extend and how each relates to nationality appears to be unavoidable.43

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41 Cp Art 11(1) of the German Grundgesetz; Art 5(4) Greek, Art 16 Italian, Art 32 Lithuanian, Art 44 Maltese, Art 52 Polish, Art 44 Portuguese, Art 32 Slovenian, Art 19 Spanish, and Arts 14 and 15 Cypriot Constitutions; provisions in relation to the acquisition of real estate in § 44(2) of the Danish Constitution, which is allowed in terms of primary law by a Protocol, § 34 of the Estonian, § 7 of the Finnish and Art 23 of the Slovakian Constitutions, as well as Art 14 of the Czech Charter of Fundamental Rights, place nationals and foreigners legally resident on an equal footing, providing, however, for further legislation with respect to aliens.
2. The Legal Concept of European Citizenship

a) Nationality

Nationality and citizenship depend on each other but are not congruent.\(^{44}\) Depending on the view taken in constitutional theory, nationality describes either a status or a legal relationship because of which the individual is subject to a state’s jurisdiction.\(^{45}\) It has consequences in international and constitutional law.

In terms of international law, nationality forms a basis of a state’s jurisdiction and a crucial requirement for the exercise of diplomatic protection in relation to other states.\(^{46}\) Essentially, states are free to establish the requirements governing acquisition of nationality. However, a merely formal attribution of nationality is not sufficient to create a legal relationship that third states are bound to recognise. In its famous \textit{Nottebohm} judgment concerning the exercise of diplomatic protection on behalf of a naturalised citizen, the International Court of Justice held that the legal bond of nationality had to correspond to social reality. Nationality had to be supported by a genuine, existential and emotionally rooted commitment to the state; otherwise, it would be ineffective and would not give rise to any obligations vis-à-vis the claimant state.\(^{47}\) This restriction is primarily significant for individuals who possess more than one nationality. It accords with the conflict of laws statutes of many states to choose the effective nationality as a reference point in such cases.\(^{48}\) Under international law, nationality therefore serves to resolve collisions of jurisdiction.

According to most constitutions, nationality alone does not establish any rights or duties of an individual. However, it may represent a necessary condition for some of them, such as the right to vote in elections, access to public offices and compulsory military service. To this extent, nationality is a framework for legal relationship that is to be filled out by law.\(^{49}\)

b) Citizenship

Citizenship, on the other hand, describes the adherence to a body politic in a way that identifies a person as a full member thereof.\(^{50}\) \textit{Citoyens}, creatures of the enlightenment, are united by freedom, equality and brotherliness.\(^{51}\)

Expressed in terms of rights, they necessarily include protective citizens’ rights of the bourgeois, which aim to protect the individual against arbitrary interference by state authority. Historically, however, such rights were only limited to the states’ own nationals for relatively

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\(^{44}\) In German, the terms \textit{Staatsangehörigkeit} and \textit{Staatsbürgerschaft} have to be distinguished: see R Grawert, ‘Staatsangehörigkeit und Staatsbürgerschaft’ (1984) 23 \textit{Der Staat} 179, 182; see also T Wobbe, ‘Soziologie der Staatsbürgerschaft’ (1997) 8 \textit{Staatswissenschaften und Staatspraxis} 205, 207ff; the English and French pairing of the terms \textit{citizenship/nationality} and \textit{citoyenneté/nationalité} does not wholly correspond, see B Guiguet, ‘Citizenship and Nationality’ in M La Torre (ed), \textit{European Citizenship} (1998) 95; D Gosewinkel, ‘Untertanschaft, Staatsbürgerschaft, Nationalität’ [1998] \textit{Berliner Journal für Soziologie} 507.

\(^{45}\) A Makarov, \textit{Allgemeine Regeln des Staatsangehörigkeitsrechts} (1962) 21ff.


\(^{47}\) Developed by the International Court of Justice in the \textit{Nottebohm Case} (Liechtenstein v Guatemala) [1955] ICJ Rep 4, 23.

\(^{48}\) See also Art 5(1) of the introductory law to the German civil code (\textit{Einführungsgesetz zum Bürgerlichen Gesetzbuch}).

\(^{49}\) Grawert, above n 44, 183; A Randelzhofer, in T Maunz and G Dürig, \textit{Kommentar zum Grundgesetz} (looseleaf, last update June 2007) Art 16, para 9, refers to its character of a ‘stand-by status’.

\(^{50}\) Gräwert, above n 44, 182ff.

short periods of time. What are constitutive for a citizen’s status are political rights, ie primarily the rights to vote and to stand for election. In historical comparison and in political theory they constitute the criterion of exclusion that distinguishes the fully effective status of a citizen from other forms of membership, especially from that of mere subjects. Having regard to the consequences of industrialisation, English sociology first recognised that the status of a citizen also incorporates social rights.

Citizenship may have its origin in political philosophy, but this does not mean that it is not a legal concept. The German Basic Law employs it twice. Article 33(3) draws a distinction between civil (bürgerlich) and citizens’ (staatsbürgerlich) rights, and makes clear that both are independent of religious or other affiliation. Article 33(1) Basic Law guarantees all Germans equal political rights. According to the prevailing opinion, the people from whom all state authority derives according to Article 20(2) Basic Law are German citizens eligible to vote. This is equally so in most other Union States.

Empirically and legally, therefore, only nationals can be in full possession of all political rights. Those who stress that nationality serves as a criterion of exclusion point to this connection between nationality and citizenship.

c) Union Citizenship

aa) Nationality as a Condition for Union Citizenship

Taking account of the guarantees contained in Articles 17–21 EC, it becomes clear that parallels to nationality are neither possible nor intended. Article 17(1), 2nd sentence EC requires
nationality by granting Union citizenship to those who are nationals of a Member State. The two are inseparable: Union citizenship cannot be acquired alone, nor can it be forfeited without giving up nationality. As the Declaration to the Final Act of the Maastricht Treaty makes clear, the concept of nationality is determined by national law and not autonomously according to Community law. Member States decide who is a Union citizen. A peculiarity in comparison with general international law lies in the fact that Member States must recognise such decisions on a mutual basis. In one case, an Italian–Argentine dual national wished to establish himself as a dentist in Spain following his studies in Argentina, his country of origin. The ECJ regarded the fact that Spanish law required effective nationality as incompatible with the prohibition of discrimination underlying the fundamental freedoms. It might follow that nationals who possess another EU nationality may not be prejudiced in comparison with beneficiaries of personal fundamental freedoms from other Member States either. Therefore, discrimination à rebours—which is otherwise not ruled out in the case law of the ECJ—is impermissible in such cases. A further limit to the Member States’ jurisdiction with respect to nationality law is set by the duty of loyalty to the Community (Article 10 EC), which prohibits Member States from obstructing a common immigration policy (Article 63 EC).

No Union rights standards exist for the reverse constellation that a substantial part of the population does not possess any nationality, as is the case in some new Member States. Thus, the nationality laws of Estonia and Latvia entail the statelessness of a large number of members of the Russian minorities. Under the Schengen acquis, they are hence to be considered as non-Union-citizens and excluded from all rights corresponding to Union citizenship. Also, for a right to naturalisation, Union law does not provide for any basis. The only remedy appears to be a right to legalisation of residence, which may be founded on Article 8 of the European Convention on Human Rights (ECHR).

bb) Union Citizenship as a Complement to State Citizenship

Union citizenship is therefore based on a familiar foundation if it makes the creation of citizens’ rights dependent on nationality. Article 17(1), 3rd sentence EC makes clear that the guaranteed rights are attached to those of citizens: ‘Citizenship of the Union shall complement and not

\[Europarecht\] 433, 446, with parallels to the \textit{lex patriae (Indigenat)} introduced by German States in the nineteenth century; similarly, see S Hobé, ‘Die Unionsbürgerschaft nach dem Vertrag von Maastricht’ (1993) 32 \textit{Der Staat} 245, 258ff; R Hofmann, ‘German Citizenship Law and European Citizenship’ in La Torre (ed), above n 44, 149, 163ff; C Schönberger, \textit{Unionsbürger} (2005) 301ff.

61 Commission, above n 43, 8.
63 Final Act to the Maastricht Treaty, Part III, 2nd Declaration (on nationality of a Member State); see also Conclusions of the European Council in Edinburgh, Bulletin EC 12-1992, 26ff; with respect to British nationality law, see Case C-192/99 Kauf [2001] ECR I-1237; C-145/04, above n 26, paras 74ff.
66 This is a consequence of the reference of the ECJ in Case C-369/90, above n 64, para 10, that the Member States must make use of their powers ‘having due regard to Community law’; see A Hatje, in J Schwarze (ed), \textit{EU-Kommentar} (2000) Art 17 EC, para 4.
Union citizenship aims to create political rights of participation with regard to the Union’s sovereign powers that correspond to political rights in the state. This certainly applies to the basic right to participate in European elections (Article 190(4) EC), as well as the rights of petition, information and access to documents (Articles 21 and 255 EC). However, Union citizenship extends beyond this, for the rights of Union citizens are not solely levelled against the Union and its institutions. Addressees of the freedom of movement (Article 18 EC) and the right to participate in European and municipal elections at the place of residence (Article 19 EC) are the Member States. To this extent, Union citizenship aims to ensure equal rights between nationals and members of other Union States throughout the Union. The provision on diplomatic-consular protection (Article 20 EC), also addressed to Member States, extends this status to the intergovernmental field of foreign affairs.

Thus, according to these Treaty provisions, the Union represents not only a supranational organisation but also a compound unit consisting of Member States, the European Communities and an overarching superstructure, i.e. it is a multi-level system. Parallel considerations between national and Union citizenship only make sense when considering this background.

### III. Elements of Union Citizenship in Positive Law

#### 1. Individual Rights Based on EC Law

According to Article 17(2) EC, citizens of the Union enjoy the rights conferred by the Treaty and are subject to the duties imposed thereby. Therefore, the rights of Union citizens are not limited to Articles 18–20 EC. References made in the EC Treaty to ‘this Treaty’ also include the secondary law issued on its basis.

**a) Fundamental Freedoms**

Since the free movement of goods relates not only to persons but also to products, it is available to anyone whose economic activity falls within the scope of the EC Treaty. It does not depend on Union citizenship. The same applies in relation to the free movement of payment and capital, certain restrictions notwithstanding. By contrast, personal fundamental freedoms are based on the nationality of Member States (Articles 39(2), 43 and 49 EC). However, they may be extended to nationals of third states by international agreement.

It is important for the understanding of the relationship between fundamental freedoms and Union citizenship that the former required a cross-border reference, at least according to the

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70 The German Federal Constitutional Court uses the term *Staatenverbund*, which may probably be translated as compound association of states (see *Entscheidungen des Bundesverfassungsgerichts* 89, 155, 184, 190 (*Maastricht*), and which has a certain connotation to types of international organisations as founded under international law; the reciprocal relationships between intertwined levels of states and supranational structure are better expressed by the notion of multi-level constitutionalism, as suggested by I Pernice, ‘Europäisches und nationales Verfassungsrecht’ (2001) 60 *Veröffentlichereungen der Vereinigung Deutscher Staatsrechtslehrer* 148, 163ff.

71 As is the case in Art 220 EC.
European citizens can only claim fundamental freedoms as against their own state if the latter intends to prevent them from exercising such rights. Otherwise, domestic discrimination remains permissible. The introduction of Union citizenship has left the case law unaffected in this respect. Hence, it appears that freedoms are still understood as serving the creation of the common market. This does not comply with the concept of all citizens being equal before the law. The question as to whether provisions constituting Union citizenship also benefit state nationals and will eventually lead to the removal of domestic discrimination can only be answered by investigating the single guarantees individually. In any case, there is no reason to believe that fundamental freedoms represent a constitutive dimension of European citizens’ rights. They amount to nothing more than their historical beginning, one of several components that have not lost their original functionalist purpose.

b) Secondary Law: Union Citizens as Taxpayers, Welfare Recipients and Consumers

Broad concepts of European citizenship also include secondary law. Like citizens within the national legal order, European citizens also possess rights for which nationality and thereby Union citizenship are not required. European citizens are therefore beneficiaries of rights guaranteed by Community law not only because they are national citizens of Member States, but because of further roles and identities. In their status as employees, they enjoy protective rules under labour law and, together with self-employed individuals, possess the right of equal access to national welfare systems. They are affected by rules of other Europeanised legal areas in their capacity as taxpayers, consumers, students, victims of adverse environmental effects, addressees of legal measures concerning foreign nationals, members of minorities or simply persons who have, need or spend money in the form of the new common currency. Why should the status of European citizenship not result from the sum of these rights?

Behind all of this, there is no settled idea concerning the rights a person has or should have by law. This is because there are different reasons for guaranteeing rights. On the European level, the harmonisation of indirect taxation as well as the establishment of employment and environmental standards were designed to create similar conditions of competition. In addition, provisions concerning consumer transactions improve transparency of cross-border competition between prices and terms. The European co-ordination of social law facilitates the free movement of employees, the mobility of trainees and students being one of its pre-effects. Accordingly, some rights are granted to all those who reside, trade or buy products within the Community. Other rights concern the treatment of nationals and therefore can only be claimed by foreigners with EU nationality.

All this affects the status of the citizen only insofar as that status must include the enjoyment of relevant rights on the basis of a general prohibition on discrimination (Article 12 EC). In this respect, such rights are no different from personal rights granted by statute in national legal systems. The connection to the rights of Union citizens produced by Article 17(2) EC is therefore misleading. One can hardly claim that citizens have a system of rights to which this Treaty clause appears to refer.

72 See T Kingreen, below chapter 14.
74 An overview and further references can be found in J Gundel, ‘Die Inländerdiskriminierung zwischen Verfassungs- und Europarecht’ [2007] Deutsches Verwaltungsblatt 269.
76 Reich, above n 6, 76ff.
2. Rights of Union Citizens

The provisions of Articles 18–22 EC primarily determine the substance of Union citizenship. It is difficult to determine their importance since the provisions have formed the subject of scientific discourse in very different areas. As the following will show, the question of their implementation involves—besides European law—aspects of constitutional law, local government law, administrative procedural law, international law and social law.

a) Freedom of Movement

Union citizenship attributes central significance to the right to move and reside freely within the territory of Member States (Article 18 EC), since this is the precondition for exercising most fundamental freedoms and basic rights. It aims at a general freedom of movement, independent from economic freedoms. A more detailed consideration proves that this aim has not yet been achieved.

The dispute that had arisen upon the introduction of this provision as to whether Article 18 EC was directly applicable has been decided. The ECJ, having deliberately avoided this question at first, has now expressly recognised its direct effect. This finding alone does not lead far, however, since Article 18 EC does not go beyond the acquis communautaire in terms of content. The provision can only be invoked if none of the fundamental freedoms, including all of their limitations, are at issue. Thus, it does not help to solve the problem of domestic discrimination. Furthermore, existing 'limitations and conditions' continue to apply. Conditions limiting the area of protection include the evidence of adequate basic provisions and health insurance required by secondary law. The continuing validity of public policy exceptions in Articles 39(3), 46 and 55 EC establish limitations which a fortiori apply to all those who cannot rely on one of the fundamental freedoms and which are filled out by the Member States. Additionally, 'objective considerations of public interests' pursued by Member States may justify limitations provided the goal pursued is legitimate and the restriction proportional. The Court thus extended the mandatory requirement test known from the fundamental freedoms to Article 18 EC.

Further restrictions result from the accession treaties with the new Member States. They allow old Member States to suspend free movement of workers and freedom of services for a period of up to seven years. Among others, Austria and Germany have used that exception, and the Member States whose citizens were concerned are likewise entitled to do so on the basis of reciprocity. On its surface, Article 18 EC remains unaffected by these measures, but the whole mechanism contradicts the notion of a comprehensive freedom of movement that underlies Union citizenship.

77 For a comprehensive analysis, see J-M Acker et al, ‘Citoyenneté européenne’ in Ecole nationale d’administration (ed), Mise en œuvre du traité de Maastricht et construction européenne (1994) vol 1, 323ff.
78 Commission, above n 43, 15; Benlolo Carabot, above n 60, 477ff.
81 See, eg Case C-92/01 Stylanakis [2003] ECR I-1291, para 18.
82 See above nn 74 and 75.
83 Art 7 Dir 2004/38/EC, above n 38; see also Case C-466/01 Kaba II [2003] ECR I-2219, para 46.
84 Case C-406/04 De Cuyper [2006] ECR I-6947, para 40; Case C-192/05 Tas-Hagen [2006] ECR I-10451, paras 33ff.
86 With respect to Cyprus, whose status entails problems of a different kind, the realisation of free movement on the whole island does not depend on the Union and its present Member States alone, see M Uebe, ‘Cyprus in the European Union’ (2003) 46 German Yearbook of International Law 375, 390ff.
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In sum, it seems as if one hand is taking away what the other has just granted. However, there are four differences found in comparison to the former legal situation. The first is that the freedom of movement is being placed on a constitutional basis. Now, even persons who do not exercise any fundamental freedoms, such as those seeking employment, students and pensioners whose rights of residence have hitherto been based on secondary law, can claim a guarantee anchored in the Treaty, which thus can be described as a fundamental right. Secondary law is to be interpreted in light of this freedom. Secondly, Article 18(2) EC now provides a uniform legal basis for the adoption of secondary law on freedom of movement, thereby removing existing uncertainty concerning the proper bases of competences. For this purpose, Article 18(2) EC allows measures facilitating the freedom of movement but no new restrictions. Thirdly, the ECJ takes Article 18 EC as a reason to construe exceptions to free movement rights even more narrowly than before; restrictions must comply with the proportionality test, which in effect may enhance the level of protection. Fourthly, Article 18 EC offers the ECJ a reference point to extend social and cultural rights to all those legally residing in the territory of the Member State concerned by means of judge-made law and on the basis of the general prohibition of discrimination contained in Article 12 EC.

Therefore, Article 18 EC certainly heralds an enhancement and extension of the freedom of movement, though it has not changed much of its acquis communautaire in terms of substance. As of today, there are still substantial restrictions on the freedom of movement within the Union.

b) Political Rights

Article 19 EC grants Union citizens resident in Member States, of which they are not nationals, the right to vote and to stand as candidates at municipal (Article 19(1) EC) and European elections (Article 19(2) EC). The link to Union law is different in each of the cases. Whilst Article 19(1) EC is closely connected to the right of free movement (Article 18 EC), Article 19(2) EC is also important in relation to the legitimacy of the Union’s exercise of powers—even if this is not immediately obvious.

aa) The Right to Vote and to be Elected at the Local Level

The right to vote in municipal elections is regarded as facilitating the freedom of movement. It aims to compensate for the loss of political involvement at the local level caused by leaving the country of origin and to make integration easier by ensuring equal rights with nationals of the host state. The opportunity to participate in decisions at the local level, which has the most

88 On the repeal of Dir 90/366/EEC, above n 38; until recently, there existed two Regulations and nine Directives on the right to entry and residence; they are now consolidated in Dir 2004/38/EC, above n 38, which was based on Article 18(2) but also on Articles 12, 40, 44 and 52 EC.
89 Haag, above n 65, Art 18 EC, para 17; Hatje, above n 66, Art 18 EC para 13.
91 Ibid, paras 96ff.
92 Case C-83/96, above n 79, para 60; see also below, s III.3(c).
obvious consequences for citizens at all levels of state organisation, can make it easier to become accommodated in another environment.

The right to vote in municipal elections has an important constitutional aspect. As in France, Spain and Portugal, implementing that right in Germany required a constitutional amendment.94 According to the leading interpretation of the relevant provisions of the Basic Law, only German nationals could exercise the right to vote in elections.95 The sovereignty of the people (Articles 20(2) and 28(1) Basic Law), which refers to the German people, is entrenched according to the eternity clause of Article 79(3) Basic Law, defining the core elements of the Constitution as unchangeable, but the dependency between nationality and the right to vote in municipal elections does not belong to this reserve.96 This is basically because the representative bodies of municipalities are believed to form part of the executive and not the legislature.97 The right of Union citizens to vote in municipal elections was therefore facilitated by introducing a new Article 28(1), 3rd sentence Basic Law. The transposition of the Directive on municipal elections98 comes within the jurisdiction of the States and has meanwhile been accomplished. The German Länder have also extended the right to vote to local referenda, where provided for, by granting a right of participation.99

The introduction of the right to vote in municipal elections had been planned for a long time.100 From a legal point of view, it influenced the organisation of the state and represented a clear break with the constitutional traditions of some Member States. Regardless of the practical importance that the right to vote in municipal elections has for the approximately five million citizens resident outside their country of origin, it indicates that the Union has become a constitutive factor in the organisation of sovereign power in the European multi-level system.

**bb) Rights to Vote and to Stand for Elections to the European Parliament**

The right to vote in European elections is only related to the right to vote in municipal elections insofar as it guarantees certain rights of political participation in the place of residence. Article 19(2) EC enables, for example, a Portuguese to participate in the election of the 99 delegates allotted to Germany (Article 190(2) EC). Thereby, the right to vote in European elections differentiates with respect to nationals of third party states according to nationality, but within the Union exclusively according to the place of residence. The electorate is constituted by the citizens of the Union and not by the peoples of European states. Article 10(2) TEU-Lis expresses this principle very clearly: ‘Citizens are directly represented at Union level in the European Parliament’ (see also Article 14(2) TEU-Lis). This link to Union citizenship is a natural conse-

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95 Entscheidungen des Bundesverfassungsgerichts 83, 37 (Ausländerwahlrecht I, concerning the right of non-nationals to vote in the Land of Schleswig-Holstein); Entscheidungen des Bundesverfassungsgerichts 83, 60 (Ausländerwahlrecht II, concerning the right to vote in Hamburg).

96 Entscheidungen des Bundesverfassungsgerichts 83, 37, 59 (Ausländerwahlrecht I); Federal Constitutional Court (Bundesverfassungsgericht), [1998] Neue Zeitschrift für Verwaltungsrecht 52.

97 See, eg Entscheidungen des Bundesverfassungsgerichts 65, 283, 289.


99 See, eg the Constitution of Baden-Württemberg, Art 72; the Local Communities Acts (Gemeindeordnungen) of Hesse, § 30; of Rhineland Palatine, §§ 17a, 13; of Saxony, §§ 24, 16; of North-Rhine Westphalia, §§ 25, 21, here in connection with § 7 Municipal Elections Act.

100 Above n 37.
sequence of establishing direct elections to the European Parliament. However, reservations are expressed in this regard, i.e. that the success threshold—distributed unequally between Member States anyway—will be further reduced to the detriment of underrepresented states.\footnote{101} The German Federal Constitutional Court has nevertheless not pursued such objections\footnote{102} as they are also untenable, even more so in light of the insignificant participation at elections.\footnote{103}

Like the right to vote in municipal elections, the right to vote in European elections, according to the wording of Article 19(2) EC, only extends to Union citizens who reside outside their state of origin. However, that provision cannot intend to place citizens residing abroad in a privileged position, so it must also confer a right to vote on nationals as well.\footnote{104}

The right to vote and to be elected is an individual right of all citizens under Article 3 of the first Protocol to the ECHR, the content of which, in turn, forms part of primary law of the Union (Article 6 EU). The case law of the European Court of Human Rights confirms such a conclusion. It deems the European Parliament to be entrusted with genuine legislative functions so that contracting states must ensure an election to that end.\footnote{105}

The procedures are set forth in the Directive on European elections.\footnote{106} It stresses the intention behind Article 19 EC to expand the rights of Union citizens by allowing citizens to exercise the right to vote in elections in the country of origin instead of the place of residence. However, it did not aim to establish the planned uniform election procedure (Article 190(4) EC). The Directive is limited to questions concerning the personal right to vote in elections such as the application principle and to excluding multiple elections and candidates.

Article 19(2) EC is significant because, seen in the light of Article 6 EU and Article 3 of the first protocol to the ECHR, it grants a personal component to the right to vote in European elections which to date has been conceived in purely institutional terms at European level (Article 190(1) and (3) EC: ‘representatives . . . shall be elected’).\footnote{107} Nationality is no longer a crucial factor in that respect. Thus, the EC Treaty is moving towards the notion of a European demos.\footnote{108} More than any other component of Union citizenship, this provision triggers considerations concerning the role Union citizens could play in organising the expression of will in Europe. This will be investigated in detail under part IV below.

c) Petition, Information, Access to Documents

Union citizens—like all residents within Union territory—are granted a series of rights which can and should be attributed an auxiliary function in connection with active citizens’ rights. This is true for the right of petition and the right to appeal to an ombudsman (Article 21(1) and (2) in conjunction with Articles 194 and 195 EC), the right to information (Article 21(3) EC), intro-
duced by the Treaty of Amsterdam, and access to documents (Article 255 EC), adopted by the EC Treaty at the same time. These rights are listed together in the Charter of Fundamental Rights (Articles 42–44 Charter).

The right to file a petition contains a guarantee which performs two functions in a national context. On the one hand, it is regarded as a link between the citizens and their parliament, which opens up a certain possibility of political influence. On the other hand, it provides legal protection, since it offers the opportunity to pursue individual matters outside formal legal remedies. At the European level, it expressly refers to all matters for which the Community is responsible, but it is the practice of the Parliament to extend it to the whole Union. Therefore, the substance of the guarantee is widely drawn. Nevertheless, more than half of the petitions do not pass the threshold of permissibility. Most cases will lack the required personal impact.

The right to appeal to an ombudsman stresses the protective aspect of the right to complain. On this procedural path, wrongs committed by Union institutions in the course of their activities can be investigated. The responsibilities of the ombudsman extend beyond those of the Community to the so-called third pillar, ie co-operation with police and the courts in criminal matters. The concept of maladministration in Article 21(2) EC closely corresponds with the principles of ‘good administration’ to which Article 41 of the Charter refers. These guarantees may help to increase discipline in the performance of official tasks and form a core set of rights designed to implement the idea of democratic governance. In the past years, this remedy was used increasingly.

The right to information contained in Article 21(3) EC fits into this context. At first glance, it offers nothing more than the right to use one’s mother tongue before the Community institutions or the ombudsman, and to receive an answer in that language provided it is one of the Community languages (Article 314 EC). Whether the right is limited to this formal aspect depends on the conditions which the answer requested must satisfy. The Union has expressly committed itself to more citizens’ rights and greater transparency (12th recital of the Preamble, Article 1(2) EU and Article 255 EC), which suggests an interpretation extending beyond the mere right to use one’s own language. It represents a claim to information, the content of which will depend not only on the matter in question but also on legitimate interests in confidentiality (Article 287 EC).

The claim to information overlaps in part with the right of access to documents in the possession of the institutions enumerated in Article 255, ie Council, Commission and Parliament. The personal right of citizens referred to in Article 255 EC forms a relatively new instrument of monitoring administrative practice. It stems from self-commitments of the institutions and has been further defined in a Transparency Regulation based on Article 255(2)

115 However, the guarantee is confined to the institutions referred to in that article or mentioned in Art 7 EC and cannot be invoked against agencies, see Case T-120/99 Kik v OHIM [2001] ECR II-2235, para 64, upheld on appeal in Case C-361/01 P Kik v OHIM [2003] ECR I-8283, para 83.
116 Hatje, above n 66, Art 21 EC, para 4; M Hilf, in E Grabitz and M Hilf (eds), Das Recht der EU (looseleaf, last update Jan 2008) Art 21 EC, para 1.
The rule is that individuals must be granted access without having to prove a special interest. However, the Transparency Regulation sets out the interests in confidentiality that can be raised against this law. Such exceptions include public security, defence, foreign relations and financial, currency and economic policy, as well as the protection of privacy, in particular data protection. In addition, access can be refused in order to protect economic interests of a judicial or investigative procedure. Finally, there is no right to access documents of a preparatory character or such information that may only be distributed with the consent of a Member State. This Regulation has been criticised for being too restrictive. However, case law interprets exceptions narrowly. The ECJ refers to the Transparency Regulation as a law that contributes substantially to a status of active citizenship, enhances participation of the Union’s citizens in the decision-making processes, provides for more legitimacy, efficiency and accountability of public administration in a democratic system and strengthens respect for fundamental rights.

Such rights to control and information are indispensable for an administration that is close to the citizens. Some of them can also breathe new life into the administrative traditions of many Member States which only recognise a restricted access of the public to information. As with the participation of Union citizens in elections, however, such rights are used relatively little. This particularly applies in relation to the right of access to information. The Commission is conscious of this problem and attempts to confront it by making citizens aware of their rights to participation. Ultimately, the rapprochement of the Union to its citizens encounters non-legal limits.

d) Protection by Diplomatic and Consular Authorities

Article 20 EC aims to open up a completely different dimension of personal rights. Union States’ diplomatic and consular authorities must grant all Union citizens protection in states outside the Union in which their home state is not represented. Co-operation between diplomatic and consular representatives forms part of the common foreign and security policy (Article 20 EU). Article 20 EC therefore expresses the joint responsibility of Union States. In order to understand this provision, it is useful to remind oneself that, when the Maastricht Treaty entered into

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123 For figures, see Commission, above n 43, 20 and 22, where, however, they are evaluated more optimistically; see also data in COM(2007) 548.


125 The so-called functional protection that international organisations grant to their officials is not covered, neither is any other protective activity of the EU or EC; see Case T-572/93, Odigistra [1995] ECR II-2025, para 77.
force, there were only five states in which all Union States were represented and, in the EU 27, this is the case only in three states.\textsuperscript{126} The concern to improve the position of tourists and business people abroad appears citizen-friendly. However, the extent and applicability of this guarantee are fraught with uncertainties which mitigate its effectiveness.

To begin with, it is not completely clear what kind of protection is to be provided. The German text version refers to ‘diplomatic and consular protection’ (\textit{diplomatischer und konsularischer Schutz}). According to the practice in international law, consular protection primarily embraces administrative activity such as issuing passports, supporting citizens in matters relating to family and inheritance law, providing representation before a court and legal aid.\textsuperscript{127} These tasks can be directly performed by other states acting in a representative role.\textsuperscript{128}

By contrast, diplomatic protection, as a technical term, refers to the situation where a state supports its own nationals in relation to breaches of international law by another state.\textsuperscript{129} This activity focuses on taking up compensation claims of individuals arising from a shortfall in the minimum established by customary international law with regard to the protection of life, personal integrity and property. If the home state assumes its national’s demand for reparation against the responsible state, then, at least according to the traditional understanding of international law, it effectively pursues its own claim.\textsuperscript{130} If a third state wishes to pursue this claim, the consent of the claimant and the defendant states is required.\textsuperscript{131}

It thereby becomes clear that Article 20 EC cannot guarantee a right to diplomatic protection \textit{strictu sensu} to individuals. However, the substance of that guarantee does not extend to diplomatic protection in the classical sense either—contrary to its German wording, which apparently seems to be clear but is actually misleading.\textsuperscript{132} This is proved by the versions in other authentic languages, which refer to ‘protection by the diplomatic or consular authorities’ (‘protection par la part des autorités diplomatiques et consulaires’ etc). The context in which the term ‘diplomatic protection’ is used in international law also opposes such an interpretation. Diplomatic protection does not require the victim’s state of origin to maintain an embassy in the defendant state, nor must the claim be brought on that state’s territory. By contrast, protection by diplomatic authorities can also be consular protection,\textsuperscript{133} to which existing transposition law has been limited.\textsuperscript{134}


\textsuperscript{127} See Art 5 Vienna Convention on Consular Relations (24 April 1963) 596 UNTS 261 (VCCR).

\textsuperscript{128} Art 8 VCCR.

\textsuperscript{129} I Brownlie Principles of Public International Law (2003) 391ff.

\textsuperscript{130} \textit{Case concerning Mavrommatis Palestine Concessions (Greece v UK)}, PCIJ Rep Series A No 2, 12; \textit{Nottebohm Case (Liechtenstein v Guatemala)}, above n 47, 24.

\textsuperscript{131} \textit{Barcelona Traction Light and Power (Belgium v Spain)} [1970] ICJ Rep 2, 47.


\textsuperscript{133} Art 3, 2nd sentence VCCR, above n 127; Art 3(2) of the Vienna Convention on Diplomatic Relations (18 April 1961) 500 UNTS 95.

Article 20 EC is limited not only in substance but also in effect. Sentence 2 of the provision obliges Member States to agree upon the ‘necessary rules’ and to start ‘international negotiations’. A view that attributes Article 20 EC direct effect is hardly tenable in the light of this provision. The first steps to implement the claim to protection were three decisions by the Member States which, for their part, require adoption by national law. This has not yet happened in all Member States. More than a decade after what is now Article 20 EC entered into force, Member States have still not been able to grant it effective force.

Accordingly, Article 20 EC—like Article 18 EC—seems to promise more than it can deliver for the time being. It does not add anything to current international law, according to which consular protection and auxiliary services of diplomatic protection can be provided by third states if the territorial state agrees.

3. Rights of Union Citizens and Prohibition of Discrimination

a) The Link between Union Citizenship and the General Prohibition of Discrimination

The prohibition of discrimination because of nationality (Article 12 EC) belongs to the Union citizen's rights. Equality before the law is a decisive element of any citizen status. In its report on Union citizenship, the Commission also refers to initiatives against discrimination on other grounds.

For an analysis of the impact Article 12 EC has on Union citizenship, it is useful to recall its wording. Accordingly, ‘without prejudice to any special provisions contained [in this Treaty], any discrimination on grounds of nationality shall be prohibited’. Most rights of Union citizens aim at national treatment, either expressly (Articles 19 and 20 EC) or implicitly (Article 18 EC). Therefore, they in effect prohibit Member States from discriminating on grounds of nationality just like Article 12 EC. Technically, requirements of equal treatment contained in Articles 18–21 EC thus take precedence as ‘special provisions’ over the general principle of equality under Article 12 EC. On the other hand, they also belong to the ‘scope of application of this Treaty’, and Article 17(2) EC refers to the ‘rights conferred by this Treaty’, which, in turn, include Article 12 EC.

The ECJ has derived far-reaching consequences from such reciprocal linking. Some judgments refer to a connection of Articles 12 and 18 EC, others to one of Articles 12 and 17, and yet others to Article 18 EC alone; it appears that the precise construction does not indicate any difference in substance. The guiding idea of its case law is that Union citizens who reside in the territory of a Union State on a regular basis can rely on their citizen status regarding all cases within the objective scope of the EC Treaty. The consequences are hard to predict. For now, they mainly concern social and cultural rights.

136 The Commission’s Fourth Report (above n 111) states that Decision 95/533 (above n 134) was implemented by May 2002. At least the German Law on Consular Matters has not yet been amended to date. Accordingly, consular protection is still restricted to German citizens and—to the degree it seems appropriate—to their non-German family members.
137 This point is rightly stressed by Schönberger, above n 60, 385ff; R White, ‘Free Movement, Equal Treatment, and Citizenship of the Union’ (2005) 54 International & Comparative Law Quarterly 885, 894ff.
138 Commission, above n 43, 26ff.
b) Derivative Social Rights

Although Community law does not grant any original claims under social welfare law, it does establish the inclusion of certain groups of persons into the national systems of welfare benefits, subject to requirements which vary according to legal basis. Up to now, access to national social security schemes has been open to beneficiaries of free movement rights and their relatives. However, it has always been necessary to display a connection to one of the personal fundamental freedoms.

In its case law following the Martínez Sala decision, the ECJ uncoupled such benefits from the requirement of a right of residence derived from fundamental freedoms and attached them to the status of Union citizen. The Court supports a claim to share social welfare rights by Article 18 EC in conjunction with Article 12 EC in relation to all Union citizens who legally reside in the relevant Member State.\(^{141}\)

Since residence—as in the Martínez Sala case—can also be based on national law, Member States are free to take measures terminating it. The flipside of this case law can therefore be a more restrictive practice by immigration authorities in the Member States than before.\(^{142}\)

However, it must be observed that Community law similarly governs domestic law regulating foreign nationals. Here, account is taken of the ‘limitations and conditions’ referred to in Article 18 EC. Moreover, the need for social aid is not by itself sufficient to justify expulsion.\(^{143}\)

In the Grzelczyk case, a French student had become dependent on social welfare in the fourth year of study after having financed himself for three years. The ECJ held that the Member States are expected to observe a certain degree of solidarity with Union citizens who are in a situation of temporary unforeseen hardship and held measures of expulsion to be contrary to the Treaty.\(^{144}\)

In the Collins case, the Court affirmed that Member States are not prohibited to maintain statutes according to which the granting of aid to those seeking employment is restricted to persons who have resided for a minimum period of time within their respective territories, provided such laws are based on clear criteria known in advance and effective remedies are at hand.\(^{145}\)

For those who reside lawfully in one of the Member States, the Martínez Sala doctrine might have considerable consequences in the area of social law.\(^{146}\)

The prohibition of discrimination contained in Article 12 together with Articles 17 and 18 EC constitutes a comprehensive general clause that covers virtually all areas where application of national law concerns the lawful presence of individuals in a Member State. In the D’Hoop case, where the Court held...
that nobody should suffer disadvantages from crossing borders within the Union with respect to transitional unemployment benefits, it becomes manifest that nationality loses its significance as a criterion of social welfare law and gradually gives way to the residence principle.\textsuperscript{147} The general concept is that discrimination on the basis of crossing borders requires special justification.\textsuperscript{148} Based on the case law just outlined, some derive a legal right of Union citizens to basic social security.\textsuperscript{149} This appears to be a misunderstanding of the underlying idea; it is not social security but free movement that has triggered these consequences.\textsuperscript{150} Unequal treatment, which has its origin in the diversity of national laws, thus remains possible in principle.\textsuperscript{151} The social status of Union citizens as developed by the Court can be characterised as a right to equal social protection. The reactions on some of the cases decided so far were sometimes highly critical and motivated by the fear of social tourism.\textsuperscript{152} However, the number of cases in which those derivative social rights may be invoked are rather restricted; they mostly concern students and persons who used to be beneficiaries of the free movement rights of workers. It appears that the Court is making an effort to adjust the rights of these persons to the status guaranteed by Articles 39 and 43 EC.\textsuperscript{153}

c) Derivative Cultural Rights

The right to use one’s own language provides a further example of the almost boundless potential of this case law. The ECJ granted German and Austrian defendants—against whom criminal proceedings had been commenced in the Trentino–South Tyrol region—a claim to have proceedings held in their mother tongue.\textsuperscript{154} The basis for the prohibition on discrimination according to Article 12 in conjunction with Article 18 EC was provided by Italian law, which granted such a claim to members of the German-speaking community resident in the province of Bolzano. The case was distinguishable from the existing decisions on social security law because criminal law does not come within the scope of the EC Treaty. Apparently, this legal development is exclusively carried by the status of Union citizen.

In another case, Union citizenship was linked with aspects of privacy. Garcia Avello, a Spanish citizen residing in Belgium and married to a Belgian, wanted his children—who held dual nationality—to be named in the Spanish tradition, ie that they be given two second names, which was contrary to Belgian practice. The Court held that it involved serious disadvantages if...
dual nationals would have to bear names under two different legal systems; this discrimination was not justified.\textsuperscript{155}

Speculation arises as to the consequences that such an extension of rights might have. The case law allows ambivalent analysis. On the one hand, this statement should not lead to the assumption that there is complete equality before the law. With respect to minority rights, there is no reason to assume a general claim to the use of one’s mother tongue before national courts of other Member States\textsuperscript{156} or to enhanced rights of defendants in procedures before EU institutions such as, for example, in EC competition law.\textsuperscript{157} On the other hand, this observation notwithstanding, the judgments reported demonstrate that the Court is tying an ever-tighter net between Union citizenship and fundamental rights.

4. The Relationship between Union Citizenship and Fundamental Rights

As has been pointed out, Articles 18–21 EC do not define Union citizenship exhaustively. The general reference in Article 17(2) EC to all rights and duties of Community law has already been examined in connection with secondary law. Furthermore, it has been stressed that written primary and secondary law does not by itself enhance citizen status. This effect was only achieved by the Court’s rulings. The linking of Union citizenship to the freedom from discrimination, one of the few fundamental rights set forth in the EC Treaty, represents an important step towards a legal cross-connection between Union citizenship and fundamental rights.\textsuperscript{158} This provision raises the question as to how each relates to the other. In this respect, the aim cannot be to reserve all fundamental rights—libertarian rights in particular—to Union citizens.\textsuperscript{159} However, fundamental rights provide information as to how a body politic is constituted. In particular, the question arises as to whether the recognition of individuals as citizens corresponds to libertarian rights which fill the concept and aim of Union citizenship with substance.\textsuperscript{160}

Initially, there were no connections between the case law on fundamental rights and Union citizenship. Whereas Union citizenship is derived from the initiatives of the Council and the Commission, Community legal rights owe their creation to a correction of the EC law’s claim to supremacy. That means that, on the one hand, uniformity, prevalence and effectiveness particularly of secondary law cannot be placed in question by national fundamental rights. On the other hand, however, the legitimacy of the Community legal order will suffer adverse effects if this loss is not compensated.\textsuperscript{161} This may be why Union citizenship and fundamental rights do not refer to each other in the Treaties either. The EU Treaty, in Articles 6 and 7, recognises fundamental and human rights in a rather general way, whereas Union citizenship is regulated in the EC Treaty—an almost paradoxical distribution, considering the current significance of each subject.

\textsuperscript{156} But see P Hilpold, ‘Unionsbürgerschaft und Sprachrechte in der EU’ [2000] Juristische Blätter 93, 99; N Reich, ‘Union Citizenship—Metaphor or Source of Rights?’ (2001) 7 ELJ 4, 13ff; critical is F Palermo, ‘The Use of Minority Languages: Recent Developments in EC Laws and Judgments of the ECJ’ (2001) 8 MJ 299, 312ff. The right to obtain the free assistance of a translator still forms the minimum standard according to Art 6(3), lit a and e of the ECHR.
\textsuperscript{160} See the interpretation of ‘civis europaeus’ by AG Jacobs in Case C-168/91 Konstantinidis [1993] ECR I-1191, No 46.
\textsuperscript{161} Cf Entscheidungen des Bundesverfassungsgerichts 37, 271 (Solange I), and Case 11/70 Internationale Handelsgesellschaft [1970] ECR 1125, para 3.
Commentators have criticised the lack of a conception of citizens’ rights, which is becoming ever more obvious behind this hitherto rather loose connection. Despite a basic recognition of the merits of the ECJ and its decisions concerning fundamental rights, it is accused of enforcing personal rights not for their own sake but only where expedient for Community law, while otherwise subordinating them to Community interests.\textsuperscript{162} Such objections veil the desire to intensify the protection of legal rights so that they are not a limitation to but an end of the Community’s activity and participate just like other rules that implement objectives of the Treaty in the *effet utile.*\textsuperscript{163} The corresponding attempts by the Parliament have not yet met with success.\textsuperscript{164} Their realisation would mean reorganising the Union from a special-purpose association of economic integration into a genuine community of fundamental rights and values, as a supranational version of the European Council. However, this is not on the agenda due to the distribution of roles between Member States and Union.

Essentially, the Charter of Fundamental Rights has not changed this in any way.\textsuperscript{165} It attempts to increase the value of human rights without affecting the functionality of the Union\textsuperscript{166} and, indeed, brings fundamental rights into contact with citizens. In accordance with its Preamble, the Union ‘places the individual at the heart of its activities’ and ‘strengthen[s] the protection of fundamental rights . . . by making those rights more visible in a Charter’. Until now, this was achieved not by amending the Treaties but by creating a reference document, which is not legally binding in itself.\textsuperscript{167} Critics of Union citizenship will note that it shares with the Charter a comparable desire to promote identification of citizens with the Union by the formulation of rights whilst at the same time keeping their practical effectiveness in check.

Chapter V of the Charter is dedicated to the further development of Union citizenship but fails to provide any new perspectives in this respect. It paraphrases the rights of citizens contained in the second part of the EC Treaty and complements them by the right to ‘good administration’ (Article 41 Charter) already mentioned—firmly established long before in case law—and the right to access documents (Article 42 Charter), which has hitherto been regulated outside Union citizenship in the institutional part of the EC Treaty (Article 255 EC).\textsuperscript{168} Some provisions also cite Union citizens as beneficiaries of rights but do not go beyond the sands of positive law in this respect. Personal fundamental freedoms have been summarised into a quasi-right to exercise fundamental rights (Article II-15(2) Charter). In addition, one paragraph in the article on the freedom of assembly and of association refers to expression of political will of Union citizens in European parties (Article 12(2) Charter, which corresponds to Article 191 EC). The Charter therefore maintains the status quo.


\textsuperscript{165} See Kühl, below chapter 13.

\textsuperscript{166} For a comprehensive analysis, see M Warhelet, ‘La charte des droits fondamentaux: un bon pas dans une course qui reste longue’ (2000) 36 Cahiers de Droit Européen 585.


\textsuperscript{168} The right to freedom of movement (Art 45 Charter) appears at first glance to be drawn wider than in Art 18 EC because there is no reservation of conditions and limitations; however, this is contained in the general limitation of Art 52(2).
Yet many connections between the status of citizen and fundamental rights could develop as time goes by. Court decisions already point in that direction, connecting Union citizenship with rights to family life and privacy. Insofar as Article 19 EC grants a right to vote and to be elected, all the rights that are required to participate in elections must be enforced. These are the rights to free speech, information, assembly, equal rights to media access and the free exercise of office and mandate. Article 12 EC provides the key granting access to rights which state constitutions often reserve to their nationals, irrespective of the Charter’s status. Therefore, even if the courts did not continue their new trend of using the Charter as a source of law, and any changes to its present status notwithstanding, Article 12 EC has generally granted all Union citizens access to citizens’ rights in state constitutions.

The European Convention on Human Rights provides further leverage for enhancing the value of fundamental rights for Union citizens. In this context, the impulses radiating from the European Court of Human Rights are too often overlooked. In one case, where the public was not involved as required by a directive on environmental law, the Court expressly stated that this stage in the administrative procedure was connected to the substantive guarantees of the Convention. Particular importance is attached to the publicity of administrative decisions as a requirement of transparency. The Strasbourg Court decided that nationals of the EC, within the Union, are not to be considered as foreigners so that their political rights could not be limited according to Article 16 of the Convention. In the more familiar Matthews decision, the Court regarded the European Parliament (EP) as a legislative body pursuant to Article 3 of the Additional Protocol of the Convention and granted inhabitants of Gibraltar the right, as against the UK government, to participate in EP elections.

5. Duties of Union Citizens?

Article 17(2) EC implies that Union citizens have rights as well as duties. The significance attributed to constitutional obligations in the texts of national constitutions varies according to the constitutional tradition in question, but, in most cases, they play a secondary role to fundamental rights. They usually serve as an implied basis for constitutions expressing republican constitutional duties expected of national citizens in the sense of a contribution. Examples include the duty to obey the Constitution and law (Articles 9(2), 18, 21(2) and (4) Basic Law), the duty to work (Article 58 Portuguese Constitution, Article 35 Spanish Constitution), the duty to pay taxes (Article 31 Spanish Constitution) and the duty to perform compulsory military service (Article 12a Basic Law, Article 30 Spanish Constitution). If Article 17(2) EC is determined by this understanding, then it awakens associations with the image of the state. It is doubtful whether it can plausibly be given substance.

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169 Case C-274/96, above n 79; Case C-148/02, above n 155.
170 Above n 167.
171 On the connection between the participation of the public in industrial plant supervision according to the ‘Seveso-Directive’, the freedom to receive and impart information (Art 10 ECHR) and the right to privacy (Art 8 ECHR), see ECtHR (GC), App No 116/96/735/923 Guerra et al v Italy ECHR 1998-I, 210.
172 With respect to Art 10 ECHR (freedom of expression) ECtHR, App Nos 15773/89 and 15774/89, Piermont v France [1995] Series A No 314, para 64; commentary by J-F Flauss (1996) 7 Revue Trimestrielle des Droits de l’Homme 364. The judgment is however based not only on the fact that the plaintiff possessed the nationality of a Member State of the EC but also on the latter’s status as a Member of the Parliament; it did not depend on the lawfulness of the residence (see paras 44, 49).
173 Above n 105; with respect to the implementation see Case C-145/04, above n 26.
Notwithstanding the agreement underlying all legal systems to observe the legal rules from which it is constituted, EC law does not contain any duties comparable to political duties. The Community legal order does not demand either direct or indirect taxes, or compulsory military service. Even the prohibition of the abuse of law only constitutes an inevitable limit of law and not an autonomous duty.\(^{175}\)

As with the expectation of diplomatic protection abroad, political duties (as they are usually described) also arise in the conflict between protection and loyalty.\(^{176}\) There is pressure within the Union for such a sphere of protection—visibly so in the proposal for an area of freedom, security and justice (Articles 2(4) and 29 EU) and the proclamation of a European Social Charter.\(^{177}\) There is little to suggest that there are any duties relating to loyalty. Accordingly, Article 10 EC can be interpreted as merely meaning loyalty to the federation within a federal system. The structural policy and other programmes of financial assistance might amount to a form of financial compensation, but certainly not a duty of solidarity among citizens.\(^{178}\) Moreover, despite surrounding itself with attributes of statehood, such as a flag or an anthem, the Union does not expect personal duties of loyalty. The Union courts its citizens not because it expects them to perform duties but because it wishes to be accepted as a body politic for which everyone feels a sort of ethical responsibility.

It is not necessary to establish duties of Union citizens in order to realise the aims by which Union citizenship is to be pursued, ie the strengthening of personal rights, the promotion of freedom of movement and, thereby, the integration of the peoples of Europe together with an increase in legitimacy of the Union. A constitutional style related to that of a state only leads to misunderstandings which, in the interests of the parties involved, are to be avoided.

6. Interim Evaluation

The investigation provides a split picture. It suggests that a uniform legal analysis of Union citizenship is not possible unless one is prepared, from the outset, to measure it against a pre-defined vision of the role of citizens in Europe. Yet each of the rather disparate guarantees must be assessed individually—despite their common orientation towards images of political rights. The freedom of movement granted by Article 18 EC not only incorporates the acquis communautaire into positive law but also helps it to achieve significance in terms of constitutional law, a uniform basis for enacting new secondary law and a view to further development (Article 18(2) EC).

The right to vote (Article 19 EC) offers a starting point for further considerations concerning the legitimacy of sovereign power at the local and European levels. Active citizenship is no longer determined by nationality but by place of residence. However, it currently lacks significance in the real world.

The rights to petition, information and access to documents (Articles 21 and 255 EC) essentially refer to other provisions of the EC Treaty and confirm the vested rights which exist in any event. In this respect, the right to access documents introduced innovative accents since it was previously—and still is—unrecognised by many legal systems. At the same time, such rights help to implement the active rights of citizens which are not exercised to a significant degree.

\(^{175}\) Reich, above n 156, 21ff.


On closer examination, the right to diplomatic and consular protection (Article 20 EC) only has a symbolic significance overall. The right adds practically nothing to that already possible under applicable international law and it appears that it will not be implemented in the foreseeable future.

Thus, the Treaty concept of citizenship appears comparatively weak. As always, it has received dynamic force by the Court. The link between the prohibition of discrimination (Article 12 EC) and the right of residence (Article 18 EC) has considerable potential to transfer the concept of national treatment inherent in Union citizenship to social and cultural rights, as well as to fundamental rights in general. It shows most clearly the resolution to overcome the long-standing tendency to model individual rights on economic freedoms. It is not the first time in the history of European integration that judicial development has served to counteract the relative inaction of the Union’s political institutions.\textsuperscript{179} To date, links between Union citizenship and basic rights have only resulted from the case law of the European Court of Human Rights. However, civil liberties could complement citizens’ active rights if the ECJ were to further develop its approach and transfer the fundamental idea of the \textit{Sala} decision based on Article 12 EC to the latter.

If one takes the contents of the individual guarantees into account, then all of them attempt to place Union citizens on an equal footing within their scope. This concept is indebted to the principle of equality before the law, which constitutes a genuine attribute of any modern concept of citizenship.\textsuperscript{180}

\section*{IV. Union Citizenship in the Lisbon Treaty}

It was one of the motives that induced the invocation of the Constitutional Convention and the negotiations around the Constitutional Treaty to strengthen the ties between the Union and its citizens. An impression of this spirit is still visible in the Reform Treaty of Lisbon, even though some of it has vanished. The Preamble of the Charter of Fundamental Rights, which was meant to be incorporated as Part II of the Constitutional Treaty, announced the objective to place ‘the individual at the heart’ of the Union’s activities and ties the establishing of European citizenship up with the creation of an area of freedom, security and justice. The new approach of the Lisbon Treaty to refer to the Charter (Article 6 (1) TEU-Lis) instead of incorporating it certainly has a symbolic significance, but does not change much with respect to its substance. The operative text of the Constitutional Treaty, as well as now the Lisbon Treaty, still reflects the wish to enhance the weight of individual rights in various ways. The values on which the Union is based contain, according to Article 2 TEU-Lis (which takes up Article 2 CT), respect for human dignity, freedom, democracy, equality, the rule of law and the respect for human rights. In other parts of the Treaty that take up what is existing law, the language was changed so that provisions which were addressed to the Member States or the Union’s institutions now name the citizens as subjects of the Union’s policies, principles and obligations. In Article 3(2) TEU-Lis (Article 3 CT) the Union offers ‘its citizens’ an area of freedom, security and justice without internal frontiers. The European Parliament shall no longer consist of representatives ‘of the peoples of the States brought together in the Community’ (Article 189 EC) but representatives of the citizens alone (Articles 10(2), 14(2) TEU-Lis, formerly Article 46(2) CT). With a view to their political rights, the principle of democratic equality applies, and all ‘shall receive equal atten-

\textsuperscript{179} On this distribution of roles and their reasons see the classical exposition in JHH Weiler, ‘The Transformation of Europe’ (1991) 100 \textit{Yale Law Journal} 2403ff.

\textsuperscript{180} Thus, the next step to realise that ideal will have to be to abandon domestic discrimination, which is still beyond the reach of Union law.
tion’ from the Union’s institutions (Article 9 TEU-Lis = Article 45 CT). New principles of participatory democracy, like openness and transparency, and new procedures, such as public hearings and referenda, are supposed to improve the legitimacy of the Union (Articles 11(4) and 15 TEU-Lis = Articles 47(2) and 50 CT).

Thus, a certain effort is made in the Reform Treaty to find a new rights-based legal language. Looking at the substance of the new provisions, not much has changed with respect to the specific citizens rights examined above. An important exception, however, is Article 21(3) TEU-Lis (Article 125(2) CT). This provision is meant to amend Article 18(2) and (3) EC, which provides for a basis of Union competences in the field of free movement. Article 21(3) TEU-Lis now allows for ‘measures concerning social security or social protection’. The exact impact of that power is not yet entirely clear. It may well be read as empowering the Union to harmonise social security schemes and welfare law. This would go beyond the Court’s case law and depart from the present character of EU social law which has hitherto been of a co-ordinating character, safeguarding that migrant workers, self-employed persons and other Union citizens do not suffer discrimination under domestic law in comparison to nationals of the state in which they reside. The question is not as sensitive as may appear, since Article 21(3) TEU-Lis requires the Council to decide unanimously. Hence, it appears as if the social dimension of citizenship has found its way into primary law.

First reactions on the new provisions about Union citizenship were controversial. Critics deplore that the Convention missed a chance to offer new opportunities to identify with the Union, whereas more optimistic analysts hold that the Constitutional Treaty—and the same would be valid for the Lisbon Treaty—has brought about a change of paradigm by taking a step forward from state-oriented obligations as they are usually found in Treaties towards genuine subjective rights of a constitutional character. Consequently, it appears that Union citizenship will continue to permit different projections, depending on the perspective from which it is assessed.

V. The Future of Union Citizenship

1. Union Citizens in the European Multi-level System

Union citizenship has turned out to be fragmentary and, in its present state, needs further elaboration (Article 22 EC). It is an open concept in every respect. For this reason, its true potential cannot be revealed by an analysis of positive law alone.

The diverse projections based upon various evaluations derive from different assumptions concerning the future of Europe. It is striking that this discussion is held exclusively in normative terms and scarcely takes empirical contributions into account. The following sections attempt to make some connections.

a) Citizen Status and Identity

Whether Union citizenship is merely a legal construction or whether it also exists in social reality is a question to which different scientific disciplines offer divergent answers, depending on the methodology used. Regardless of discipline, it is possible to distinguish two positions.

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182 Kanitz and Steinberg, above n 150, 1035.
The frontlines between the different camps in the disputes concerning democracy in Europe, Union citizenship and a European constitution largely run in parallel. Essentially, a rough distinction can be drawn between 'multinational' and 'universal' views.184

**aa) The Multinational Tradition**

A multinational picture of Europe—which is basically a traditional public international law perspective on the Union—presents the Union Member States as the significant parties. In terms of legitimacy, the Union is a creation of the peoples of nation states. This view is sceptical of the social requirements and possible development of an overarching European *pouvoir constituant* with its own constitution, a European democracy and an active citizenship. The Union’s subject of legitimacy, according to that view, requires a shared bond that does not exist.185 The criterion regarded as crucial varies.

The German Federal Constitutional Court, in its famous Maastricht decision, points in this direction. With regard to the principle of democracy, the Court takes account of social and political homogeneity as a requirement of ‘people’, the legitimising community.186 The body politic of the Basic Law must accordingly retain an adequate reserve of its own fields of responsibilities. In this respect, the Court does not rule out complementary strands of legitimacy concerning areas over which the Union exercises sovereign authority: on the contrary, it considers them as the necessary consequence of further steps towards integration. However, the moment when this can or should occur is still some way off. Thus, the Union regarded as a ‘compound of states’ (*Staatenverbund*) cannot currently possess a legitimising community of its own. The people of Europe legitimise the Union by their respective national parliaments; in this respect, the European Parliament plays a merely complementary role. Union citizenship, accordingly, is a mere subsidiary institution that expresses the existing degree of joint policy organised at the Union level in terms of individual rights but can in no way reach the significance of national citizenship.187

Academic literature also refers to the importance of socio-cultural requirements for a European citizenship.188 According to Dieter Grimm, formerly on the bench of the German Constitutional Court, there is no European public with a pan-European, cross-border discourse on ‘European’ themes; cultural pluralism and linguistic variety are regarded as substantial obstacles.189 Others believe evidence of European solidarity to be crucial: this alone made it:

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186 *Entscheidungen des Bundesverfassungsgerichts* 89, 155, 186 (Maastricht); see also P Kirchhof, ‘Deutsches Verfassungsrecht und Europäisches Gemeinschaftsrecht’ [1991] *Europarecht* suppl 1, 11; for a critique, see B-O Bryde, ‘Die bundesrepublikanische Volksdemokratie als Irrweg der Demokratietheorie’ (1994) 3 *Staatswissenschaften und Staatspraxis* 305.

187 *Entscheidungen des Bundesverfassungsgerichts* 89, 155, 184ff, above n 70; in *Entscheidungen des Bundesverfassungsgerichts* 113, 273, 298 (concerning extradition according to the framework decision on the European arrest warrant) the Court alludes to the potential of Union citizenship to pre-empt or to degrade state citizenship, but states that this had not happened so far.

possible to tolerate outvoting by majority decisions across borders. However, such evidence is said to be hard to provide.\textsuperscript{190}

The present form of democratic accountability in the Union, then, appears to be the only plausible concept. The connection between Union citizens only exists in law—in their subjective rights, to be more precise.\textsuperscript{191} According to this viewpoint, the citizens of Europe form a loose association of individuals completely unconnected with the Union itself. Democracy in Europe would then be an arrangement organised by the Member States in their co-operation within the Union, legitimised by their people and which can be dispensed with at any time.

The basic assumptions of this model are empirically formulated but are normatively intended. They are based on what is regarded as obvious, and for this reason do not take results of empirical social research into account. Their weakness lies in the fact that they can be countered by contrary theses with the same justification. One objection is that it is almost impossible nowadays to satisfy the demand for social and political homogeneity derived from a pre-formulated picture of society even within the nation states.\textsuperscript{192} However, a certain immunisation against such criticism is achieved by keeping crucial criteria vague. One exception is the argument that a common political discourse is impossible owing to the lack of a European public.\textsuperscript{193} The counter-argument is that the required discourse could be produced and influenced by the occupation of certain political fields,\textsuperscript{194} and by the formation of procedures and institutions.\textsuperscript{195}

A further objection is directed against the exclusiveness with which conditions of state democracy are referred to as a reference model. A comparative consideration of the state and the Union tends to neglect the peculiarities of the Union as a supranational organisation. National sovereignty is regarded as indivisible. The notion is not entertained that the Union could be composed of complementary and supplementary elements of a connected whole in which sovereignty is exercised at several levels of power,\textsuperscript{196} as is the case in federal systems.\textsuperscript{197}

\textsuperscript{189} Grimm, above n 12; but see P Häberle, ‘Gibt es eine europäische Öffentlichkeit?’ [1998] Thüringische Verwaltungsblätter 121, 124ff.


\textsuperscript{192} With respect to the example of Switzerland, see B Schoch, ‘Eine mehrsprachige Nation, kein Nationalitätenstaat’ [2000] Friedens-Warte 349.

\textsuperscript{193} Grimm, above n 12.

\textsuperscript{194} W Kluth, Die demokratische Legitimation der Europäischen Union (1995) 49ff.


\textsuperscript{196} But see N MacCormick, Questioning Sovereignty (1999).

\textsuperscript{197} With respect to the USA, see Supreme Court, García v San Antonio Metropolitan Transit Authority 469 US 528, 549 (1985) per Blackmun, J: ‘The States unquestionably do retain a significant measure of sovereign authority. They do so, however, only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.’ In US Term Limits, Inc v Thornton 115 S Ct
Advocates of the opposing line of thought believe the state has been defeated as a reference point of identification and direct their attention towards establishing a body politic by a special legitimising community of citizens beyond statehood. According to this idea, the origin of a body politic lies in the voluntary agreement on constitutive elements. In the 'post-national constellation', Union citizenship can form the nucleus of a federal system with a European constitution. However, seen from the conceptual basis of this theory, there is no justification for replacing the personal isolation of the state by that of the Union. Rather, their arguments are based on the notion of the universality of subjective rights, the granting of which does not depend on traditional memberships. Upon this basis, justification is required if Union State nationals alone are granted political rights at the state level. From that perspective, Union citizenship replaces one criterion of exclusion (ie nationality of a state) by another (ie nationality of a Member State).

If the attribution of political rights is mainly a postulate of equality, the consequence is a 'post-national citizenship' that allocates rights not according to the legally established nationality but according to the place of residence. Consequently, Union citizenship would also have to be overcome. For the Union, Article 63(4) EC offers a starting point according to which the Council can establish rights which nationals of third party states with a right of residence in a Member State also enjoy in other Union States.

This view derives arguments from some tendencies to uncouple individual rights and duties from nationality. Human rights can be invoked by all who reside within the jurisdiction of a state that recognises them, as is spelled out in Article 1 ECHR. Similarly, many conventions of the International Labour Organisation and other treaties of international law introduce social rights which attach to the characteristic of employment alone. The obligation to pay tax, which is occasionally cited as an example of a civil duty, depends mainly on residence, not on nationality.

1842 (1995) the Supreme Court did not agree on whether the holder of sovereignty was an American people or the people of the States of the USA; the opinions of Judges Thomas, Rehnquist, O’Connor and Scalia decided in favour of the latter: see the commentary by KM Sullivan (1995) 109 Harvard Law Review 78.


201 Reich, above n 156, 18ff.
Even within a national context, the rights or duties referred to were at most temporarily constitutive elements of the status of citizen, if at all. Yet objections go deeper than that. At its core, the point radical universalism makes is that (Union) citizenship should not depend on nationality. Critics complain that a body politic cannot be established on the basis of civil rights and belief in abstract norms alone, and that the effect of common integrative factors is underestimated. They parade many arguments that have played a role in the debate on liberalism versus communitarianism.

This contribution cannot investigate the contingencies of a cosmopolitan extension of the status of citizenship. Taking Union citizenship as it is conceived in Article 17 EC as its starting point, it will restrict itself to the consequences of the framework positive law offers in this regard.

b) Identities of Citizenship in Multi-level Systems

Objections that the republican basis of the state is overemphasised or neglected might overlook promising attempts to classify Union citizenship within the framework of the vertical structure provided. As with some of the approaches discussed, such criticisms also follow a federalist paradigm, but avoid placing normative demands on Union citizenship in relation to its requirements. The point of departure is the hypothesis that citizen status is simultaneously possible at the Union and Member State levels. Evidence must then show that there are sufficient common elements for a united expression of will with regard to the current responsibilities of the Union.

A crucial role has always been attributed to the common culture of the Member States. Here, the attempt to track down pre-existing social foundations of a body politic repeats itself. However, it would be a misperception to understand the leitmotiv of culture as a homogenising force. The Union is based on the diversity of European culture and has accepted this as the most important justification for the principle of subsidiarity. Linguistic variety also forms part of the acquis culturel of the Union. Cultural diversity might be in constant conflict with nationality, but it is constitutive for Union citizenship. Only under this condition can one ask for its own genuine identity.

An approach orientated towards the aim of citizen participation assumes that awareness of identity entails that members of a group share a common fate and exercise dispositive rights granted to them for their influence. The relevant models would be those which connect cultural diversity to the recognition of equal and political rights together with the form of

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202 See above section II.2(b).
203 Kraus, above n 184, 206.
204 See the contributions in A Honneth (ed), Kommunitarismus (1995); see also M Reddig, Bürger jenseits des Staates? (2005) 185ff.
206 See Art 151(1) EC (‘common cultural heritage’). The familiar statement of Monnet also comes to mind: ‘If I had the chance to begin again, I would start with culture’, see T Oppermann, Europarecht (2005) § 28, para 53.
democratic expression of will. In relation to the Union, they would have to be transferred to its own system of rule. Several disciplines describe this by the concept of the multi-level system, which is receptive to very different models.

The search for empirical requirements for such a ruling model uncovers research relating to sociology and social psychology which investigates the European identity of Union citizens. ‘Identity’ means the self-perception and portrayal of a human being which results from the awareness of belonging to certain groups or having distinct characteristics. Identity is, to a large degree, based on contingent factors, and for many is therefore based on contexts which are ‘non-homogenous’ and graded according to different levels of identity. In this respect, several identities are cumulatively possible without any of them having to claim precedence. Identity can also be distinguished in terms of culture and region (besides gender-, age-, religion-, biography-, profession-specific criteria): it can therefore display local, regional, national and European reference points. Transferring this assumption to the Union, it can be established by empirical methods that the existing system of several tiers is reflected in the consciousness of Europeans. Regular rises in the ‘Eurobarometer’ also show that most Union citizens see essential parts of their identity in both their state of origin and ‘Europe’.

Empirical findings cannot indicate normative postulates, such as moral requirements of solidarity. However, to my knowledge, it is not claimed that the constitutional role of citizenship in Europe can be developed from the reserve of multi-level identities alone. Three results deserve emphasis:

— The opinion of the necessarily exclusive nature of the position of the individual in terms of citizenship does not do justice to the empirical facts; normative conclusions based thereon are problematic.
— One cannot presume that Union citizenship is lacking any kind of social basis.

211 See the contributions in M Walzer, Civil Society and American Democracy (1992).
215 Recently, 63% of all those questioned in the Union Stated their affinity to ‘Europe’, 50% with the EU; the data vary considerably according to region, from 84% positive statements with respect to Europe in Poland and 64% the Union in Luxembourg and Italy, down to 27% to both in Cyprus. Source: Standard Eurobarometer 65, 70, collected March/May 2006, published January 2007, available at http://europa.eu.int/comm/public_opinion/archives/eb_arch_en.htm (accessed on 31 January 2008).
Such studies have shown that identities are particularly influenced by political discourses expressed in the media.\(^{216}\)

Identity and discourse, therefore, exercise mutual influence over each other.\(^{217}\) European public opinion does not have to be a precondition for active Union citizenship, but can emerge in parallel. Thus, Union citizenship can clearly be created by legal means as well. The decisive point is not whether active citizenship has already existed with adequate characteristics of identification in the social sense but whether chances of identification are opened up and accepted.

The question now turns to whether there are any models of accountability beyond the nation state that adequately reflect social reality and their possibilities of development.

c) The Complementary Relationship between Citizen Status and Political Participation

This analysis would correspond to a multi-level model with different legitimising communities (demoi).\(^{218}\) Depending on the level concerned, the group of active citizens is constituted according to individual or several different criteria. Nationality is decisive when allocating political rights at the national level; otherwise among Union citizens the matter only concerns the centre of their lives, which is represented by the place of residence.\(^{219}\) However, citizenship outlined in Union law and expanded at the European level can only promote its social reality by creating genuine opportunities to participate in European politics.\(^{220}\) Here lies the real problem of its legal construction.

2. Union Citizenship and Democracy in Europe

If reference to the legal debate concerning democracy in Europe is sought, two options can be ruled out: (i) the present discussion is not concerned with the Utopia of a European federal state, the democratic organisation of which would have to be proposed;\(^{221}\) and (ii) the model of democracy sustained by universalist moral philosophy, the voters of which are constituted by those who have decided in favour of life in the Union and accept the rules of shared expression of will,\(^{222}\) exceeds the concept of Union citizenship.

It has been presumed here that European citizenship can coexist with national citizenship.\(^{223}\) Citizens must participate in decision-making processes at both levels. Proposals for improving existing rules will pursue this objective and aim at strengthening elements of active citizenship by legal means in order to promote a common identity, responsibility and solidarity, such as

\(^{216}\) O Angelucci, ‘Europäische Identitätsbildung aus sozialpsychologischer Sicht’ in Elm (ed), above n 214, 111; Reddig, above n 204, 181ff, 194.

\(^{217}\) Shaw, above n 177, 563.


\(^{220}\) On this connection, see UK Preuß, ‘Problems of a Concept of European Citizenship’ (1995) 1 ELJ 267, 276ff.


\(^{223}\) Weiler, above n 214, 324ff. Accordingly, the national level represents the sphere of the affinitive emotionally rooted identity, the European level the empire of the rational, determined by the perception that tasks of common interest can only be solved peaceably and in a legally ordered procedure; against this view, see Barber, above n 10, 250ff.
European referenda, but also a genuine procedural involvement in the constitutional process that would go beyond separate ratification by Member States.

To a certain degree, the notion of an active citizenship has become a strategy of the European Commission and has made transparency, control and good administration the leading concepts of its administrative policy by different initiatives. Some traces of the notion of an enhanced role of civil society can be seen in newly adopted Treaty provisions. A first step in that direction was the amendment of Article 257 EC—which deals with the Economic and Social Committee—by the Treaty of Nice. Accordingly, the Committee shall consist of representatives ‘of the various components of organised civil society’. The discovery of civil society becomes more visible in the Constitutional and Reform Treaties, according to which the Union is supposed to ‘maintain an open, transparent and regular dialogue with representative associations and civil society’ (Article 47(2) CT and Article 11(2) TEU-Lis). Associations and churches are honoured as particularly important associations (Articles 48 and 52 CT, Article 11(1) TEU-Lis and Article 17 of the Treaty on the Functioning of the European Union (TFEU)).

A further point, rightly regarded as decisive, is the promotion of legal equality amongst Union citizens, which must complement the recognition of diversity. The Constitution expressly connects equality and democracy (Article 14 (2) TEU-Lis). Equality is placed on top of the provision on democratic principles (Article 9 TEU-Lis), and countless provisions of the Reform Treaty stress equality of all citizens, freedom from all kinds of discrimination and the principle of equal treatment. Certainly, no one will accuse the Convention of having neglected that issue.

Important as means of participatory democracy and the high esteem of egalité may be, the value of citizen status can only be further enhanced if the institutional framework is transformed—in particular, if the European Parliament assumed the function of a genuine parliament within the jurisdiction of the Union. This demand is already suggested by the present Treaty’s choice of wording, for if political rights form the decisive criterion with regard to citizen status and, furthermore, if the identity of European citizen can only be constituted and further developed by the creation of European discourse, then it must be matched by substantial democratic procedures and institutions. In the Constitutional Treaty as well as in the Reform Treaty of Lisbon, this demand has been passed by once again. At this point, political limits to further development of the status of Union citizen become visible. The divergence between the symbols chosen in the language of the Treaty and the institutional architecture of the Union leads to an aporia. This will continue to be one reason why citizens remain at a distance from the Union, despite attempts by the Commission, the Parliament and the Convention to bridge the gap.

226 For the importance of upgrading the role of civil society as a compensation for the legitimacy deficit of the Union, see O De Schutter, ‘Europe in Search of its Civil Society’ (2002) 8 ELJ 198.
228 It forms a focus of the Third Report, above n 43, 2, 4 and 26ff; also Shaw, above n 117, 424ff.
3. Union Citizenship and European Constitution-making

The experience with Union citizenship has repeated itself in the debate concerning the European Constitution.\textsuperscript{229} The choice of the term ‘Constitution’ triggered associations to which the content ultimately agreed upon could not correspond\textsuperscript{230} and has rightly been abandoned. The convention procedure could be interpreted as an attempt to organise a step towards consolidating the Union, for a change, not in the intergovernmental procedure hitherto pursued, and to lend it an improved basis of legitimacy. The new quality of the procedure consisted in the parliamentarisation of the drafting stage. It is not devoid of irony that the failure of the whole undertaking resulted in a revival of the Intergovernmental Conference method.

In the political system it has been widely underestimated, or even consciously neglected, that the role citizens play has an influence on their European identity. The citizens themselves hardly ever adopted constitutions in a factual sense. Social contracts are philosophical fictions according to which constitutional practice can be subsequently interpreted.\textsuperscript{231} However, to believe that citizens will accept a constitution over the course of time by practical experience risks making the basis of the Union a fiction.\textsuperscript{232}

VI. Concluding Remarks

There are two discussions concerning Union citizenship that are independent from each other. One concerns the positive law of the EC Treaty and the case law, the other concerns the future role of active citizenship in the Union.

Analyses of the legal substance of Union citizenship as it was set forth in the founding Treaties usually show its limitations. They bring together the lines of development relating to freedom of persons with the political rights of participation and control. However, the provisions inserted into the Treaty alone have only resulted in an insignificant enhancement of the status of European individuals. The driving force is the ECJ, true to its tradition of transforming weakly conceived legal institutions into strong concepts of rights. The connection of Union citizenship with social and cultural participation rights developed by the Court lends Union citizenship new substance, the core of which is the concept of national treatment for all who make lawful use of their free movement rights. The consequences have become visible in national social law, but the potential goes beyond and might embrace individual rights in general.

The scholarly discussion concerning the future form of Union citizenship can refer to the cross-border legitimising community of the Union, the creation of which Article 19(2) EC appears to anticipate. It has many conditions because it is influenced not only by views on the continuance of the integration process but also by the communitarian/liberal debate concerning the position of the individual and by the discourse concerning the make-up of body politics without socio-cultural unity. It verifies which projections the concept of citizen allows and contrasts sharply with stocktaking of positive law.

\textsuperscript{229} See C Möllers, above chapter 5.
\textsuperscript{230} See the critique developed in A von Bogdandy, ‘Europäische Verfassung und Europäische Identität’ [2004] Juristenzeitung 53.
\textsuperscript{232} Cf R Bellamy, ‘Between Past and Future: The Democratic Limits of EU Citizenship’ in idem et al (eds), Making European Citizens (2006) 238; critical about the constitutional debate is KH Ladeur, “‘We, the People …’—Relâche?” (2008) 14 ELJ 147.
If one accepts that the status of the citizen is defined by the granting of political rights, then cross-connections to the normative question concerning social basis, democratic make-up and the multi-level architecture of the Union necessarily result. The empirical contributions, which play a subordinate role in the normative debate, certainly do not allow any compulsory conclusions for the views of European active citizenship, but they do show that identities are changeable and can be moulded by institutions and, not least, by law.
I. Introduction

Two major developments have taken place since the publication of the first edition of this book. On the one hand, the Treaty of Lisbon paved the way for incorporation of the catalogue of fundamental rights into Community law. This represents a milestone in the effective protection of fundamental rights at the Community level. The fact that, contrary to the initial intentions of the Constitutional Treaty, the Charter itself was not included in the text is just a minor blemish. Due to its binding character, a new fundamental rights text will acquire Treaty-like status, thereby giving considerable impetus to further improvement of fundamental rights protection at the Community level. On the other hand, however, the number of potential conflicts in the field of fundamental rights has again increased considerably. As a result, the German debate, which sometimes unnecessarily dramatises fundamental rights conflicts, may subsequently receive its empirical material. This development is primarily attributable to the growth of competences of the EC/EU particularly in the second and third pillars, which are increasingly utilised.

1 The 'exit protocol' is far more problematic; see below section II.2(c).
2 See, eg R Scholz, 'Grundrechtsprobleme im europäischen Kartellverfahren' [1990] Wirtschaft und Wettbewerb 99, 107ff; on the so-called 'Solange III debate'. Scholz called upon the German Federal Constitutional Court (Bundesverfassungsgericht) to check EC law against German fundamental rights standards, arguing that the rights of companies are not sufficiently protected by the ECJ; see idem, 'Wie lange bis "Solange III"?' [1990] Neue Juristische Wochenschrift 941, on the claim that freedom of expression is not sufficiently protected at the Community level as regards obligatory warnings on tobacco products.
3 See, eg Case C-377/98 Netherlands v Parliament and Council [2001] ECR I-7079, paras 69ff; the judgment seeks to determine the appropriate level of protection of human dignity as regards the patentability of isolated parts of the human body.
4 In addition to this, there have been organisational changes in constitutional law with respect to the Community legislative process, a process which is characterised by a shift from unanimous voting to majority
applies, in particular, to measures in the area of freedom, security and justice, which immanently threaten the fundamental rights on account of a reductionistic concept of freedom.\(^5\) The European Court of Justice (ECJ) has recently reacted to such conflicts and considerably expanded the (fundamental) rights review within the framework of the third pillar.\(^6\)

However, the partly interventionist approach of the Community institutions in the first pillar also aggravates fundamental rights conflicts. In this respect, the EU data retention directive serves as a good example.\(^7\) Pursuant to this directive, the Member States have to adopt legislative measures by means of which all providers of electronic communications services or communications networks are obliged to retain all data relating to the traceable use of electronic communications for a period of not less than six months and not more than two years. Among other things, this obligation also results in the storage of the localisation data of callers, which can later be used for creating movement profiles of callers. These strict data retention obligations are primarily justified as necessary to combat terrorism. Formally, however, the directive was based on the competence of the internal market according to Article 95 EC.\(^8\) Especially in view of the intensity of interference\(^9\) of these data retention obligations imposed outside the scope of an implementing law, the German Constitutional Court (Bundesverfassungsgericht) could hardly deem them proportionate to the German right of informational self-determination according to Articles 2(1) and 1(1) of the German Basic Law and in particular in relation to the privacy of telecommunications according to Article 10 of the German Basic Law.\(^10\)

Moreover, the ECJ is increasingly faced with critical issues concerning the interpretation of fundamental rights, not only in view of interference by the Community legislature, but also in terms of the national application of primary and secondary EC law complying with Community fundamental rights. In a recent case, the ECJ denied the right of a trade union to picket building sites in order to force a foreign service provider to enter into payment negotiations and to sign a collective agreement for workers sent by the provider. Such an interference with the freedom to provide services would not be justified by the right of trade unions to take collective action. Be that as it may, it is nevertheless surprising that the ECJ did not adequately decision-making. These changes make it more difficult to uphold fundamental rights standards of Member States in the Community legislative process. In this context, see FC Mayer, ‘Grundrechtsschutz gegen europäische Rechtsakte durch das BVerfG’ [2000] Europäische Zeitschrift für Wirtschaftsrecht 685, 687.

\(^5\) See the criticism by J Monar, below chapter 15, section II.3, concerning the implicit concept of ‘freedom’.


\(^7\) Dir 2006/24/EC of the Parliament and of the Council on the retention of data, [2006] OJ L105, 54; for criticism of this directive, see D Westphal, ‘Die Richtlinie zur Vorratsspeicherung von Verkehrsdaten’ [2006] Europarecht 706; see critical comments on the retention of data by AG Kokott in Case C-275/06 Promusicae [2008] ECR I-271, No 82, referring to the strict rulings of the Bundesverfassungsgericht: ‘It may be doubted whether the storage of traffic data of all users without any concrete suspicions—laying in a stock, as it were—is compatible with fundamental rights . . .’. (references omitted).

\(^8\) Ireland and Slovakia filed an action for the annulment of this directive on the ground that the wrong legal basis was chosen. The Court of Justice dismissed the action on 10 February 2009 (Case C-301/06 Ireland v Council and Parliament).

\(^9\) This intensity is extremely high given the scope of interference, the retention of data irrespective of suspicion and the deterrent effect achieved by the data retention.

\(^10\) Several actions have already been filed with the Bundesverfassungsgericht in form of a class-action type of constitutional complaint and are still pending at the time of writing; see [2008] Europäische Grundrechte-Zeitschrift 257. In a preliminary injunction some complaints have already proved (provisionally) successful, see preliminary injunction in file number BvR 236/08, most recently repealed on 22 April 2009.
address the interests underlying this particular dispute. In particular, this decision lacks a detailed analysis of the actual scope of the right to take collective action.\(^{11}\)

The Community institutions thus cause or are faced with serious fundamental rights conflicts, a fact which certainly does not justify a rollback to Solange I in the sense of the early case law of the Bundesverfassungsgericht where the German Constitutional Court would check EC law against German fundamental rights standards ‘as long as’ (solange) those standards are not properly safeguarded by the ECJ.\(^{12}\) It rather shows the need for a more comprehensive protection of fundamental rights at the Community level, with the ECJ acting as the leading interpreter of fundamental rights. The ECJ is increasingly meeting these expectations by transforming into a fundamental rights court. Moreover, the European Parliament has reinforced its position as a guarantor of fundamental rights, especially in those areas where its participation in the legislative process is reduced to mere consultation. The actions brought by the European Parliament against the interference of the Council with fundamental rights in the area of freedom, security and justice impressively prove this development.\(^{13}\) Therefore the European Parliament itself is strengthening the role of the ECJ as a court for fundamental rights. Duly reflecting these developments, the Fundamental Rights Agency, which was created at the beginning of 2007, may play an important role in paving the way for the European Union to become a Community of fundamental rights.\(^{14}\)

Here, the control of the activities of the institutions of the Union and of the Community should be the focal point. In that respect, the end of the era of the ‘planned constitution’ calls for a stricter standard of scrutiny. In this context, the term ‘planned constitution’ is used as a reference to the priority of achieving the goals of integration.\(^{15}\) These goals have to be achieved irrespective of the extent to which ‘radical changes to the laws of the Member States’\(^{16}\) are required and to which negative effects are caused in areas relevant to fundamental rights.

Thus, the reference to national fundamental rights would tackle the problem described at the wrong level, in that the conflict between the achievement of the goals of integration and the respect for fundamental rights must be solved at the level of the EU by expanding the fundamental rights of the Community.\(^{17}\) Therefore, the practice of giving priority to the achievement of the goals of integration must be restricted, since such goals may only be pursued within the frame of fundamental rights protection at the Community level. The process of integration is subject to this restriction at a stage at which it has already attained a high level. Thus, the end of the era of the ‘planned constitution’ and the corresponding strengthening of fundamental rights protection do not threaten the achievement of the goals of

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\(^{11}\) See Case C-341/05 Laval [2007] ECR I-11767, paras 86ff; see also F Rödl, below chapter 17.

\(^{12}\) With a view to the first pillar, this conflict was mitigated by the Solange II legal practice and relativised in the subsequent decisions of the Bundesverfassungsgericht. The Bundesverfassungsgericht now limits itself to an overall review of the fundamental rights protection at Community level. There will be no control of specific cases as long as (‘solange’) the EC-level of protection is satisfying in general; see, eg Entscheidungen des Bundesverfassungsgerichts 118, 79 (Treibhausgas-Emissionsberechtigungen); see n 187 below for the case law within the area of the third pillar.

\(^{13}\) See especially Case C-540/03 Parliament v Council [2006] ECR I-5769, paras 52ff.

\(^{14}\) For details on the concept of a fundamental rights community, see A von Bogdandy, ‘Grundrechtsgemeinschaft als Integrationsziel?’ [2001] Juristenzeitung 157; for information on the Fundamental Rights Agency, see below section II.2.


\(^{17}\) Ibid, 199.
integration. In the medium or long term, this development might lead to a shift from expanding fundamental (market) freedoms to strengthening fundamental rights.\textsuperscript{18}

In any case, the partly controversial debate regarding an appropriate level of fundamental rights protection at the level of the European Union has shown how important such protection is in order to ensure and solidify the achievements of integration. Therefore, it is and will be of utmost importance to debate the protection of fundamental rights in the European Union, as it is no longer a purely German debate (a querele allemande, as the French would say), but a matter of general concern for the Community.

The following analysis deals with the important issue of fundamental rights in EU constitutional law in three steps. Part II is dedicated to the development and current status of fundamental rights in Community law, whereas the more detailed part III explains and develops a legal doctrine of fundamental rights (in German, a Grundrechtsdogmatik). The latter spells out the central approach and primary concern of this analysis. It is hoped that this contributes to the European legal doctrine of fundamental rights. In terms of methodology, this approach is substantially rooted in traditional German fundamental rights jurisprudence but also founded on the case law of the European Court of Human Rights (ECtHR). Moreover, this paper is based on the firm conviction that the ECJ will have to provide significant impulses for the protection of fundamental rights in Europe and that an improved legal doctrine of fundamental rights is an important prerequisite to this end. Thus, this paper focuses on the protection of fundamental rights by courts and presupposes that legal scholarship may be helpful in the development of a more elaborate legal doctrine of fundamental rights by the ECJ. Against this background, there will be a closer examination of the importance of legal doctrines in the field of Community law.\textsuperscript{19} The concluding part IV takes a brief look at the need for institutional amendments.

\section*{II. Phases of Development of Fundamental Rights Protection}

The impetus provided by the proclamation of the Charter of Fundamental Rights allows for an exposition of the development phases of fundamental rights protection in two stages. The adoption of the Charter is regarded as a turning point, although only the integration of the Charter into EU primary law within the framework of the ratification of the Treaty of Lisbon will actually prove the accuracy of this assertion. A catalogue of fundamental rights provides visibility and publicity for the fundamental rights guaranteed therein, and thus leads to a higher degree of legal certainty.\textsuperscript{20} It also facilitates the fundamental rights debate at the European level and strengthens the legitimating force of fundamental rights.

\subsection*{1. The Development of Fundamental Rights Protection by the ECJ}

The development of fundamental rights protection by the ECJ is generally known to have proceeded in three stages, starting from a phase of refusal\textsuperscript{21} via a phase of recognition of funda-

\textsuperscript{18} For further details relating to this context, see T Kingreen, below chapter 14.

\textsuperscript{19} For more details, see J Kühling and O Lieth, ‘Dogmatik und Pragmatik als leitende Parameter der Rechtsgewinnung im Gemeinschaftsrecht’ [2003] Europarecht 371.

mental rights forming an integral part of the general principles of Community law to a phase in which the scope of fundamental rights protection is extended with regard to the Member States as addressees of fundamental rights. It is a well-documented fact that the Court embarked on this judicial development of the law not least because of the critical dialogue with national (constitutional) courts, supported by initiatives of the other Community institutions, especially those of the European Parliament. The ECJ had realised that the legitimacy, the primacy and the uniform application of Community law were endangered by the lack of fundamental rights protection under Community law. Regarding this development and the rather impressive catalogue of core fundamental rights guarantees as developed by the Court, it is sufficient to refer to the extensive accounts contained in numerous essays and more recent monographs.

A convincing doctrine of sources from which fundamental rights are derived (be they legal or subsidiary sources), however, remains elusive. In this respect, Article 6(2) EU did not serve to completely clarify this problem either. According to that provision, the Union shall respect the fundamental rights as guaranteed by the European Convention on human Rights (ECHR) and as they result from the constitutional traditions common to the Member States as general principles of Community law. It is hence the central legal source. The ECJ primarily bases its case law on the ECHR and the constitutional traditions common to the Member States.

The autonomous specification by the Community on the basis of common institutional traditions and the ECHR developed as the method of determination. Whereas comparisons of legal systems were initially central, they became less important due to the enlargement of the European Union to 27 Member States and were replaced by recourse to the ECHR. The orientation towards judgments of the ECtHR has also increased recently. In its case law, the ECJ does not consider itself bound in any way by the fundamental rights guaranteed by the Member States or by the ECHR. Rather, the Court aims at preserving the widest possible degree of flexibility when specifying fundamental rights. Nevertheless, the comparison of different legal systems and the ECHR will form the basis for any later specification. The aim is to develop a standard which does justice both to national values and the ECHR, and which corresponds to the structure of the Community and its goals. It would be impossible to propagate a solution that runs contrary to the core values of a Member State; this may also be derived from the proviso to respect the national identities of the Member States in Article 6(3) EU. The method seems to suggest a tendency to orientate oneself towards a wide-ranging standard, but not a maximum standard in the sense of guaranteeing all national maxims of protection. The reason is that Community law also contains a reasonable compromise between justified interests of the Community—such as a functioning administration—and far-reaching protection of the individual through fundamental rights. Furthermore, in multi-tier constella-

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23 See below section III.3(b).
26 Further remarks in the previous edition of this volume, 505ff.
27 Concerning this concept, see the previous edition of this volume, 506, with further references. See H-J Papier, ‘Die Rezeption allgemeiner Rechtsgrundsätze aus den Rechtsordnungen der Mitgliedstaaten durch den Gerichtshof der Europäischen Gemeinschaften’ [2007] Europäische Grundrechte-Zeitschrift 133, for basic information on the protection of fundamental rights traditions of the Member States by the ECJ.
28 See also the references in the previous edition, and the recent statistics of references to the ECHR provided by R Uerpmann-Wittzack, above chapter 4, section IV.1(b)(aa).
tions, the fundamental rights of an individual collide with those of another individual (freedom of expression of a civil servant versus the protection of the honour of another civil servant) so that any attempt at ‘maximum expansion’ would in any case soon reach its limits.

However, the development of common European fundamental rights standards by means of analysis of national legal systems and orientation towards the ECHR as interpreted by the ECtHR only constitutes the starting point of a specification of fundamental rights. The second step of ascertaining whether such a right fits within the structural framework and objectives of the Community also bears greatly on the process of specification.29 However, any fundamental right must also conform to the distinctive features of a supranational legal order. Moreover, scope is provided for teleological considerations against the backdrop of the functions and goals of the EC, and thus for value judgments of the Community. A critical analysis of the recent case law raises the question whether or not the ECJ orientates its decisions too strongly towards the case law of the ECtHR, thereby threatening to neglect the special features of the supranational integration community.30

2. The Fundamental Rights Debate in the Era of the Charter of Fundamental Rights of the European Union

a) Time for a Radical Re-orientation of the Development of Fundamental Rights?

The drawing-up and subsequent proclamation of the Charter of Fundamental Rights has led to a deluge of opinions on the status of fundamental rights protection in the European Union.31 The proclamation of the Charter constitutes a turning point in the Community system of fundamental rights protection that provides an opportunity for a fundamental reorientation of the development of fundamental rights. The furthest reaching comments were made by Alston and Weiler, who demanded progressive and energetic politics of fundamental rights for the EU, which in their opinion requires shifting fundamental rights protection from the courts to the legislation and the executive.32 In spite of the fact that some of their criticisms are justified,33 this approach does not correspond with the predominant traditions of the Member States with regard to both individual aspects and the general tendency. Thus, the introduction of a separate

29 This wording was first employed in Case 11/70 Internationale Handelsgesellschaft [1970] ECR 1125, para 4.
30 See, in particular, below section III.5(c)(cc)(4).
Directorate General on fundamental rights would be a questionable novelty, as there are no ministries of fundamental rights in the Member States.

The establishment of the EU Fundamental Rights Agency (FRA) may, however, be regarded as a first small step towards the ‘management of fundamental rights’, which represents a better institutional approach in view of the independence of the FRA and its ‘emancipation’ towards the European Commission. The FRA is the successor to the European Monitoring Centre on Racism and Xenophobia, which was established in Vienna in 1998. It does not serve to protect the rights of individuals by dealing with individual complaints, but rather to protect fundamental rights standards in general. Its primary task is to collect data and information relating to fundamental rights and to give comments on relevant subjects, also on its own initiative. In view of its competences, its influence will thus be rather limited. Its actual influence on the actions of the Community institutions will largely depend on whether it succeeds in establishing its reputation and standing by preparing convincing expert opinions. This first step towards the management of fundamental rights by the Community should not be underestimated, though. Especially in conjunction with a legally binding Charter of Fundamental Rights, the FRA might evolve into an important interpreter of fundamental rights, particularly controlling legislative measures with respect to fundamental rights standards.

It also seems somewhat dubious to assume that the institutions of the Community or of the Union could provide the legitimating force for expansive fundamental rights policies. It is impossible to overlook the counterproductive potential for disintegration inherent in such an idea. Furthermore, this would mean glossing over the now established complimentary performance of fundamental rights protection by national, international and supranational organs. It rather seems more advantageous to place the emphasis on strengthening and developing present concepts on the protection of fundamental rights. Fundamental rights protection by the courts will receive a considerable stimulus if the Charter becomes legally binding. Nevertheless, Alston and Weiler’s warning should be heeded when developing a legal doctrine of fundamental rights: it is not advisable to focus solely on the judiciary when seeking fundamental rights protection. Thus, it must be realised that any attempt to transfer the particularly German method of obtaining fundamental rights protection through the courts (i.e. a judicial expansion of fundamental rights) to the Community or Union level would, in the constitutional reality, result in a shift of power from the legislation and the executive to the judiciary. This remark seems particularly noteworthy in view of the importance attached by the German constitutional court to fundamental rights and the high expectations placed on an adequate jurisprudence of the ECJ on fundamental rights. The importance attached to fundamental rights arguments in Germany to control the democratically legitimised legislation does not correspond at all to a common European standard. However, this does not necessarily have...
to be detrimental to the protection of fundamental rights in the constitutional reality. Nevertheless, in light of positive experiences in Germany, the recognition of this fact does not hamper advocating a higher relevance of fundamental rights review and thus also a higher significance of the legal doctrine of fundamental rights within the European Union.

b) Catalyst Effect, but not Legally Binding

To date, the Charter of Fundamental Rights does not possess any legal force and will only become legally binding after the Treaty of Lisbon has been ratified by the ‘High Contracting Parties in accordance with their respective constitutional requirements’ as laid down in Article 6(1), 1st sentence of this Treaty (TEU-Lis). Until then, the ECJ may only draw inspiration from the Charter, which has been the case so far. Nevertheless, the already recognisable effect of the Charter on the development of fundamental rights in the EU should not be underestimated. First, those institutions of the EC subject to the jurisdiction of the ECJ may declare themselves bound, although this is not justiciable by the Court. Furthermore, the Charter constitutes the essence of the status quo obtained through a comparison of different legal systems. This was mainly guaranteed by the composition of the Convention, as 45 of the 62 members were Members of Parliament of their respective Member State or were appointed by the Member State governments. Compared to the European Parliament’s previous catalogues of fundamental rights, this actually confers an entirely new legitimating force on the Charter. Therefore it is not surprising that first Advocates General, then the Court of First Instance (CFI) and finally also the ECJ itself referred to the Charter in order to confirm the protection of fundamental rights under EU law. Important in this respect was also the ‘as-if approach’, which shaped the drawing-up of the Charter. According to this approach, the Convention prepared the Charter as if the latter were subsequently to be incorporated into the Treaties and would thus obtain the binding nature of primary law.

Even if some aspects of the Charter are not entirely compelling from a doctrinal point of view, it can have a catalytic effect on the development of a theory of EU fundamental rights. An impetus could be provided by the system of uniform restrictions pursuant to Article 52(1) of the Charter, although exceptions are possible. This concept could prove a great success for the Convention. The system of uniform restrictions is supposed to avoid the development of an intransparent and frequently inconsistent system of restrictions that can, for example, be

40 See the reference in n 44 below.
41 However, this cannot distract from the fact that the Charter is not based in Community primary law as otherwise the Parliament would be guilty of an abuse of form and of procedure. The Commission is also not permitted to perform ‘autolegislative functions’ by independently declaring certain rules to be binding, yet rules could become binding insofar as an administrative practice is established. Regarding the question of whether Community institutions may declare themselves bound by the Charter and how this might be reviewed by the ECJ, see S Alber, ‘Die Selbstbindung der europäischen Organe an die Europäische Charta der Grundrechte’ [2001] Europäische Grundrechte-Zeitschrift 349, 350ff.
observed with regard to both the ECHR\(^{48}\) and the German Basic Law.\(^{49}\) Criticism to the effect that a uniform system of restrictions lacks the additional directive force of a system where restrictions are adapted to individual fundamental rights\(^{50}\) is refuted by experience to date.\(^{51}\) However, the first sentence of Article 52(3) of the Charter begs the question whether it will be possible to consistently apply a system of uniform restrictions. From its wording, the stipulation to interpret rights contained in the Charter which are identical to rights guaranteed by the ECHR by employing the standards of the ECHR also applies to the system of restrictions (‘the meaning and the scope . . . shall be the same’; ‘leur sens et leur portée sont les mêmes’). This results from the fact that the scope (portée) of fundamental rights is mainly defined by applying the restrictions. Nor does the provision in the second sentence of Article 52(3) of the Charter preclude a further differentiation of the system of restrictions; rather, it serves to promote it. Thus, a system of restrictions that differentiates between fundamental rights corresponding to the ECHR and other fundamental rights contained in the Charter is necessary.

The thematic classification of fundamental rights into six chapters (Dignity, Freedoms, Equality, Solidarity, Citizens’ Rights and Justice) has also proved interesting for doctrinal purposes. This attempt of establishing a coherent system is to be welcomed, although some critics have already pointed to questionable results in individual cases\(^{52}\). However, this did not solve the problem of classifying fundamental rights according to their functions. The lack of classification according to the different dimensions of protection is particularly obvious in chapter IV, ‘Solidarity’. This chapter covers a conglomerate of different fundamental freedoms (Article 28 ‘Right of collective bargaining and action’), rights of participation (Article 36 ‘Access to services of general economic interest’), governmental or public duties to protect (Article 30 ‘Protection in the even of unjustified dismissal’) and fundamental objectives of state policy (Article 37 ‘Environmental protection’), impeding the further classification of individual guarantees.\(^{53}\) To this extent, a lot of effort is still required for the development of a theory of fundamental rights, yet in future it will be possible to discuss these questions within the framework of a common European debate on fundamental rights based on the Charter as a prominent document. In any case, the Charter also contributes to accelerating the development of a common European language for the doctrine of fundamental rights.

Finally, it has to be emphasized that the content of the Charter partly goes, or is at least likely to go, beyond the fundamental rights established as general principles of law. It remains

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\(^{48}\) See Art 8(2) EU Charter, which only permits interference with the right of protection of personal data if there is a ‘legitimate basis laid down by law’; of a more serious nature are the unresolved reservations contained, inter alia, in Art 16 of the Charter relating to the freedom to conduct a business, which is merely recognised ‘in accordance with Union law and national laws and practices’.


\(^{50}\) Consider only the restrictions contained in the respective second paras of Arts 8–11 ECHR: while interference with the right to respect for private and family life in the interest of the economic well-being of a country is explicitly permitted in Art 8(2) ECHR, this justification is not contained in the provisions on freedom of religion, freedom of expression or freedom of assembly. This suggests that the formulations employed for the restrictions are marred by historical coincidences.

\(^{51}\) See, eg the criticism by KA Bettermann, Grenzen der Grundrechte (1976) 3, who speaks of a ‘Schrankenwirrwarr’ (‘mess of restrictions’).

\(^{52}\) For a different opinion, see Schmitz, above n 39, 838.


\(^{54}\) This applies in particular to the protection of families, which was spread over several chapters of the EU Charter (Arts 7, 24 and 33). See the critical comment by Schmitz, above n 39, 834.

\(^{55}\) It is, for instance, arguable whether the right of access to placement services (Art 29) is just a derivative right of participation or an original right of performance if a Member State does not offer this kind of service; see below section III.2(b)(cc) and (dd).
to be seen, however, if some fundamental rights will be able to provide a push for development at the Community law level.\textsuperscript{54}

c) Charter of Fundamental Rights and ‘Exit Protocol’—Cracks in the Community of Values?

Should the Treaty of Lisbon be ratified by the Member States, this text will provide an enormous impetus for the development of fundamental rights protection. At the same time, however, the ECJ will be faced with quite a few new questions of interpretation. In particular, the ECJ will have to clarify the relationship between the Charter of Fundamental Rights and the fundamental rights that are protected as general principles of Community law. Article 6(2) TEU-Lis provides that the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as general principles of Community law. Therefore it will be indispensable to differentiate between the fundamental rights as laid down in the Charter and those as general principles of law, because the UK and Poland waived the application of the Charter of Fundamental Rights to their territories in a separate protocol. Article 1(1) of the protocol on the application of the Charter of Fundamental Rights to Poland and the UK says that

\begin{quote}
the Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.
\end{quote}

Therefore, the differentiation between fundamental rights as general principles of law and the fundamental rights laid down in the Charter always has a direct impact on the fundamental rights protection in the UK and in Poland.

Moreover this ‘exit protocol’ clearly indicates that the UK and Poland (which joined this protocol later) do not wish any kind of integration by way of a fundamental rights jurisdiction by the ECJ. The direction of this refusal is particularly evident in Article 1(2) of this protocol saying: ‘In particular nothing in Title IV of the Charter creates justifiable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national laws.’ Article 2 refers once again explicitly to those provisions of the Charter, which concern national law and national practice, such as the workers’ right to information and consultation with the undertaking (Article 27), the right of collective bargaining and action (Article 28), and the right of protection in case of unjustified dismissal (Article 30).\textsuperscript{55} Apart from the undermining of fundamental rights in the Charter itself,\textsuperscript{56} this shall ensure that case law does not create any protection exceeding the national status quo. The UK’s refusal of integration by the judiciary has to be seen against the background that the UK has a completely different approach to fundamental rights protection according to which social rights are guaranteed not by the judiciary, but by the democratically legitimised legislature.\textsuperscript{57}

\textsuperscript{54} See, e.g. the optimistic commentary by M Ruffert on the right to good administration according to Art 41 of the Charter: M Ruffert, in Calliess and Ruffert (eds), above n 31, Art 42 EU Charter, para 21; see also the well-founded scepticism of Rödl regarding the further development of the labour constitution, below chapter 17, section IV.2(b).

\textsuperscript{55} This double safeguarding might be attributable to the case law of the ECJ, ‘where a Community provision refers to national legislation and practice, Member States cannot adopt measures likely to frustrate the objective of the Community legislation of which that provision forms part’; see Case C-383/05 CGT [2007] ECR I-611, para 35.

\textsuperscript{56} See, e.g. S Krebber, in Calliess and Ruffert (eds), above n 31, Art 27 EU Charter, paras 8ff.
Against this background, the ‘exit protocol’ should not be overdramatised. There is no major disagreement about fundamental values in Europe. On the contrary, it shows a critical attitude towards the ‘judicial activism’ of the ECJ, which could be intensified by a fundamental rights charter. This attitude is certainly understandable. However, the objections raised by the UK had the negative side effect that the Charter has already been revised and qualified several times so that the ‘exit protocol’ is all the more awkward. Moreover, it is a blemish that one Member State opted out of the fundamental rights protection as a core component of the constitution. However, this is put into perspective for two reasons. On the one hand, the Community fundamental rights are primarily supposed to moderate and control the power of the Union and of the Community. On the other hand, the protocol only applies to the specific additional guarantees of the Charter, not to the fundamental rights as general principles of Community law. However, the protocol impedes a dedicated development of fundamental rights granted by the Charter and will therefore unnecessarily intensify the dual approach to fundamental rights as laid down in the Charter and those as general principles of law. Nevertheless, there is still hope that the dispute about the Charter of Fundamental Rights could prompt the ECJ to activate the Charter in the aforementioned primary direction. The data retention directive, for example, shows that a stricter control is necessary. It will become evident here that the Charter of Fundamental Rights includes quite a few rights which may go beyond the scope of the current protection based on the ECHR and the constitutional traditions of the Member States. The fundamental right of data protection serves as a good example.

III. Core Elements of a Legal Doctrine of Fundamental Rights

1. Functions and Necessary Development of the Legal Doctrine of Fundamental Rights

a) Functions of the Legal Doctrine of Fundamental Rights against the Background of Diverging Fundamental Rights Cultures

To date, it has proved difficult to define the Union’s fundamental rights in more detail because of the relatively vague and partly divergent wordings of fundamental rights in the constitutions of the Member States, the ECHR and the catalogues of fundamental rights compiled by the European Parliament. As far as the wide and open-ended formulations are concerned, the same applies to the Charter of Fundamental Rights. The many different ways of specifying fundamental rights obstruct the development of a general consensus on fundamental rights jurisprudence. As part of a system-transcending criticism regarding the treatment of fundamental rights, it is possible to argue against this background that the interpretation of fundamental rights should only be done on a case-by-case basis by the courts concerned. Thus, legal doctrine would be superficial if one understands it as a science penetrating and systematising legal problems by providing theorems, fundamental rules and principles as part of a

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59 Mayer, above n 58, 1157ff, also rightly refers to this fact.

60 See also Monar, below chapter 15, section V.3.

61 This system-transcending criticism has to be differentiated from a criticism of, for example, the positive duties derived from fundamental rights. This criticism is inherent in the system, because it basically acknowledges the authority of a doctrine but criticises individual patterns and methods of this doctrine.
rational discourse. However, there is one obvious advantage of working with legal doctrine: a transparent, well-founded and definite fundamental rights jurisprudence based on coherent legal doctrine provides essential points of orientation for those formulating a rule and those applying it, as well as creating legal certainty for the addressees of a rule. A developed legal doctrine can cope with the variety and complexity of new problems by providing solution patterns and aiding categorisation. Furthermore, the solutions provided by legal doctrine set a standard, which may only be derogated from once better solutions have been offered. Therefore, working with legal doctrine leads to an optimisation of the patterns and solutions offered to solve a problem. The quality, once achieved, cannot be reduced because new solutions will always be tested against the old standard. Obviously, this does not result in conserving the old standard at all costs. On the contrary, the old standard serves as an incentive to develop better solutions. Legal doctrine constitutes a common language to determine the compatibility in constitutional law of both decisions made by the executive and the legislature and of rulings by the judiciary in the form of checking and counter-checking the instance of control. Legal doctrine is the medium by which common and diverging values may be communicated, and it provides a background against which agreement and divergence may be explicitly analysed. Thus, legal doctrine confers substantial gains in efficiency and, ultimately, legitimating force.

At Community level, the development of a coherent legal doctrine in the area of fundamental rights is still in its infancy, at least insofar as the case law of the ECJ is concerned. Besides the present lack of a legally binding catalogue of fundamental rights, this is one of the major reasons for the factual or perceived deficits of fundamental rights protection under EU law. The development of a common European legal doctrine of fundamental rights need not occur from scratch, although the Member State traditions regarding the development of legal doctrine in general and of a legal doctrine of fundamental rights in particular are very heterogeneous. A corresponding fundamental rights debate is taking place not only in Germany, but also in other Member States, such as Italy or Spain. In further Member States—for example, Austria and Belgium—such a debate has been developing in the recent years. This means that it is possible to take account of the experience of those Member States. There is a strong argument in favour of following the more developed legal doctrines of fundamental rights at the level of the EU. At least in the cases of Germany, Italy and Spain, the system of protecting fundamental rights played an important role in inspiring confidence in the political systems. As democratic legitimacy is rather weak at the European level, a strong fundamental rights discourse might compensate this to a certain extent. Apart from the legal doctrines of the Member States, inspiration may be drawn from the rich source of case law on the ECHR, which contains numerous well-developed doctrinal patterns and detailed structures of examination.

However, the importance of doctrinal work should not be overestimated, either. On the one hand, it is just one building block on the way towards realising successful fundamental rights protection within the European Union. On the other hand, the Member States’ differing cultures of fundamental rights have to be taken into account. In comparison with the German tradition of fundamental rights, these point to a higher degree of caution as regards fundamental rights review of the legislature, to take just one example.

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63 However, quite a few efforts have already been made to transfer German fundamental rights doctrine to Community fundamental rights. On the freedom of communication, see eg J Kühlung, *Die Kommunikationsfreiheit als europäisches Gemeinschaftsgrundrecht* (1999) 359ff; in general, see D Ehlers, ‘Allgemeine Lehren’ in idem (ed), *Europäische Grundrechte und Grundfreiheiten* (2005) § 14, paras 1ff.

64 See especially the French tradition, Kühlung, above n 63, 252ff.
b) The Necessity of Further Development of the Present Legal Doctrine of Fundamental Rights of the ECJ

It is therefore necessary to further develop the present legal doctrine of fundamental rights of the ECJ. Primarily, various legal considerations suggest a strict orientation towards the standards set by the ECHR as the source of inspiration, despite the fact that so far neither the EC nor the EU has been directly bound by the ECHR. However, such an orientation is necessary since the Member States of the EU are bound by the ECHR.65 Taking into account the obligation of co-operation in Article 10 EC, which places an obligation on the institutions of the Community to show consideration for the Member States’ constitutional structures and obligations under international law,66 it is necessary to show as much consideration as possible for the standards of the ECHR when developing the fundamental rights of the Union. Although this is only an obligation to guarantee the ECHR standard as a minimum standard, it is advisable for pragmatic reasons to also adopt the legal doctrine of the ECHR insofar as no specific amendments need to be made due to the distinctive features of the EC: after all, the easily traceable and rich experience of the ECHR as well as the advanced legal doctrine of the ECtHR would prove advantageous. Furthermore, an orientation towards the standards of the ECHR as a minimum standard guarantees a much higher level of predictability than the development of fundamental rights standards by means of comparing the Member States’ constitutional traditions, which is of limited comprehensibility. Moreover, the Lisbon Treaty implies accession by the EU to the ECHR. This growing orientation towards the standard provided by the ECHR also corresponds to current case law of the ECJ.67

However, the different functions of the ECHR on the one hand, seeking to achieve a minimum consensus, and the EU on the other, seeking a higher level of integration, should not be ignored. This requires additional consideration of the Member States’ fundamental rights traditions as well as a definition of the contents of fundamental rights, which must fulfill the systematic imperatives of the Constitution of the Union and implies a tendency to strengthen fundamental rights. The specification of fundamental rights must occur in a critical dialogue with the legal community,68 and legal scholarship must contribute by compiling the values embodied in national fundamental rights and by including these when critically following the process of fundamental rights specification. Issues at the core of future dogmatic development in particular include the determination of the horizontal and vertical scope of fundamental rights, i.e., their binding force as regards the institutions of the EU and of the EC on the one hand and action by Member States on the other.

Since publication of the first edition of this book, several judgments have shown that the ECJ is willing to engage in doctrinal debate. The judgment concerning the directive on the right to family reunification may serve as an example.69 This case dealt with the rights of minor children of third country nationals to family reunification and the corresponding interpretation of the relevant Directive 2003/86/EC with due consideration of the right to respect for family life. The European Parliament had filed an action for annulment of several provisions of this directive with the ECJ.

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65 See the case law of the ECHR on the commitment of the EU Member States to the ECHR: ECtHR App No 24833/94 Matthews v UK ECHR 1999-I, para 32; in particular, see also ECtHR (GC) App No 45036/98 Bosphorus v Ireland ECHR 2005-VI, 197ff, paras 149ff; see Uerpmann-Wittzack, above chapter 4; see AH Parga, ‘Bosphorus v Ireland and the Protection of Fundamental Rights in Europe’ (2006) 31 EL Rev 251.

66 W Kahl, in Calliess and Ruffert (eds), above n 31, Art 10 EC, para 72, which also provides further references.

67 See the statistical survey given by Uerpmann-Wittzack, above chapter 4.

68 An enumeration of the persons belonging to the legal community is provided by J Bengoetxea, The Legal Reasoning of the European Court of Justice (1993) 126.

2. Functions and Classification of Fundamental Rights

a) Possible Classifications

An important element of any legal doctrine of fundamental rights is the question of what functions fundamental rights fulfil and how they can be classified. In Article 52(5), the Fundamental Rights Charter emphasises the difference between rights and principles. The future legal doctrine of fundamental rights will therefore have to classify the different guarantees of the Charter according to this categorisation and explain the differences with reference to Article 52(5). A further classification could focus on the different possible situations in which fundamental rights may be invoked. So far, one can derive from the case law of the ECJ that fundamental rights are basically used to check legislative and executive acts. Therefore, fundamental rights are used as ‘control norms’. The case of Connolly illustrates this situation.\(^{70}\) However, fundamental rights can also be referred to when interpreting other norms (‘interpretation norm’). Article 52(5) of the Charter reduces principles to this function. Thirdly, they can be applied in order to limit other norms such as the fundamental freedoms (‘limitation norm’). The case of Schmidberger is an example of this function.\(^{71}\) Other situations may additionally be classified.

b) Subjective (Negative) Rights and Positive Obligations

aa) The Difference between Subjective (Negative) Rights and Positive Obligations

A further classification could refer to the different ‘protective functions’ of fundamental rights. In the current case law of the ECJ, the prime function is that of a subjective (negative) right or individual right (in German, *subjektives Abwehrrecht*). One may (attempt to) apply fundamental rights in order to hinder interference by state authorities, eg in the case of Connolly in order to protect one’s freedom of opinion against interferences of the Commission.\(^{72}\) In that respect, it is a negative right as it prohibits certain state action.\(^{73}\) Nevertheless, other functions do exist. Although the following categories are partly rooted in German fundamental rights doctrine, which corresponds to the fundamental rights doctrines of other Member States to only a limited extent, the legal doctrine of the ECJ\(^{74}\) to date, and especially that of the ECtHR, shows that a parallel development at the international level and thus also at supranational level is possible, although one hardly finds explicit references to the different protective dimensions (yet). Nevertheless, it is argued that such dimensions should be made explicit in an EU legal doctrine of fundamental rights as it allows for a more rational discussion of what functions fundamental rights should fulfil. Therefore, the proposal to adopt and develop the following doctrinal concepts does not pursue a specific outcome that certain fundamental rights should reach. It is rather a proposal for a common language enabling a rational discourse of certain aims fundamental rights might fulfil. One might classify the remaining functions

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\(^{71}\) Case C-112/00 *Schmidberger v Austria* [2003] ECR I-5659, para 74.

\(^{72}\) Case C-274/99 P, above n 70, paras 37ff.

\(^{73}\) Within a strict classification of duties one may classify it as a ‘duty to respect’; for this approach, see the General Comment No 12 of the Committee on Economic, Social and Cultural Rights, available at www2.ohchr.org/english/bodies/cescr/comments.htm (accessed on 1 August 2009).

\(^{74}\) A striking example is Case C-540/03, above n 69, paras 52ff, in which the ECJ clearly differentiates with respect to the right to live with one’s close family between subjective (negative) rights (‘when a Member State is required not to deport a person’) and positive obligations (‘when it is required to let a person enter and reside in its territory’).
under the heading ‘positive obligations’ as they all oblige state authorities to act in a certain manner.\(^\text{75}\)

\textit{bb) Duty to Protect as Central Positive Obligation}

The most developed positive obligation is the duty to protect (also against private parties).\(^\text{76}\) In this context, two different doctrinal constructions are possible. First, it is possible to widen the concept of interference by classifying approval by the state of private intrusion on fundamental rights as interference by the state. Secondly, objective or positive duties to protect may be derived from fundamental rights, which in specific cases become concrete duties to act and then correspond to similar rights of the individual to action by the sovereign power (rights providing protection or \textit{Schutzgewährrechte} in German). In its judgment on a positive duty of a state to protect in \textit{Hatton}, the ECtHR (both the Chamber and the Grand Chamber) explicitly discussed these two possibilities of construction. The Court rightly pointed out that the respective standards of justification both for a sovereign interference with fundamental rights and for a possible violation of a duty incumbent on the state to protect (or, more generally, to act) are comparable.\(^\text{77}\) However, the Chamber still prefers constructing a positive duty to protect, whereas the Grand Chamber did not decide this question.\(^\text{78}\) The approach of the Chamber should also be employed for the EU doctrine of fundamental rights, in order to emphasise the special nature of this constellation as well as the specific limits of fundamental rights review thereof. When developing a dimension of duties to protect, the ECJ may take recourse to its parallel case law on the fundamental freedoms.\(^\text{79}\) Additionally, some approaches contained in the fundamental rights jurisprudence to date may also be interpreted to this effect, such as the judgment in \textit{Familiapress} on maintaining press diversity.\(^\text{80}\) Moreover, in its recent judgment in the case \textit{Promusicae} the ECJ basically accepted the concept of positive obligations even if it did not interpret the rules in question in a way so as to oblige the Member States to communicate personal data in order to protect the fundamental right to property and the fundamental right to effective judicial protection. This was the case as a balance had to be struck between those rights in their positive function on the one hand and the right that guarantees the protection of personal data and hence of private life in its negative function on the other hand.\(^\text{81}\) Thus, duties to protect may be derived from fundamental rights and may, in individual cases, become enforceable rights providing protection (also against private persons). The question of the effect of fundamental rights between private parties (horizontal effect, or in German, \textit{Drittwirkung}) must also be viewed in this context. Thus, duties on the state to protect may be invoked against

\(^{75}\) For such an approach with respect to the ECHR, see C Grabenwarter, \textit{Europäische Menschenrechtskonvention} (2003) § 19.


\(^{77}\) ECtHR (Chamber) App No 36022/97, above n 43, para 96; ECtHR (GC), App No 36022/97 \textit{Hatton et al v United Kingdom} (2003) 36 EHRR 51, paras 98, 119; see the earlier judgment ECtHR App No 16798/90 \textit{López Ostra v Spain} [1995] Series A No 303C, para 51.

\(^{78}\) ECtHR (Chamber), App No 36022/97, above n 43, para 95; ECtHR (GC), App No 36022/97, above n 77, para 98.


\(^{81}\) Case C-275/06 Promusicae [2008] ECR I-271, paras 61ff.
actions by private parties without having to take recourse to the doubtful construction of private parties being bound by fundamental rights.\textsuperscript{82}

From the perspective of a horizontal division of powers, it must, however, be taken into account that the formulation of such duties constitutes a sensitive interference with the scope for evaluation and the margin of discretion of both the legislature and the executive respectively. There is a danger that these bodies may be reduced to being the executing organs of imperative duties of protection in constitutional law.\textsuperscript{83} Thus, it is generally only possible to assume an obligation to take effective measures, but not to perform certain actions if more than one action proves effective. Nevertheless, in this context the development of concrete duties of protection must take place with regard to individual fundamental rights and their respective significance for the individual as well as the activities concerned.

To this extent, a development of fundamental rights protection by means of procedural safeguards seems advisable as well. Regarding the right to respect for one’s private and family life and home (Article 8 ECHR), a duty to examine may be assumed in the event of expected interferences with fundamental rights. This has been confirmed by the ECtHR in \textit{Hatton}, a case concerning possible health endangerments trough environmental conditions.\textsuperscript{84} However, the proviso on environmental protection and the improvement of the quality of the environment in Article 37 of the Charter probably merely constitutes the formulation of a general objective of only limited validity as regards positive duties on the state to act and particularly to protect (a ‘principle’ in the sense of Article 52(5) of the Charter).\textsuperscript{85}

From the perspective of a vertical division of powers, it must be pointed out that, unlike a state, the Union is not subject to an encompassing duty to protect its citizens because the Union only possesses limited competences in specified areas. Yet this still makes it possible to consider duties to protect when applying Community law, even if the EU does not possess competences in this area. Thus, an obligation to maintain diversity may be taken into account in the sphere of the fundamental freedoms (see \textit{Familiapress}\textsuperscript{86}), merger control\textsuperscript{87} or the Telecommunications Framework Directive.\textsuperscript{88} However, while institutions of the EU or of the EC may only be obliged to perform certain acts within their competences, Member States may only be obliged to do so if the area concerned is within the field of application of Community law.

\textit{cc) Derived Participatory Rights Corresponding with the Positive Obligation to Give Access to Collective Benefits}

From the ECJ’s legal doctrine of equal treatment, positive duties on the state to give access to the enjoyment of certain collective benefits and a corresponding derived participatory right (in

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\textsuperscript{82} This is also the approach taken in \textit{Hatton}, above n 43; also Kühling, above n 63, 379ff.

\textsuperscript{83} To this effect, see CD Classen, ‘Die Ableitung von Schutzpflichten des Gesetzgebers aus Freiheitsrechten’ (1987) 36 \textit{Jahrbuch des öffentlichen Rechts der Gegenwart} 44, referring to the legislation.

\textsuperscript{84} ECtHR (Chamber) App No 36022/97, above n 43, paras 97ff; ECtHR (GC) App No 36022/97, above n 77, paras 99ff and para 128; one can also distinguish organisational and procedural safeguards as another category, see for such an approach with respect to the ECHR Grabenwarter, above n 75, § 19 III.

\textsuperscript{85} The doctrine of fundamental rights also faces the challenge of clarifying the scope of the protection of health, the environment and the consumer provided in Arts 35, 37 and 38 EU Charter, respectively. Eg, the first sentence of Art 35 EU Charter provides a ‘right of access to preventive health care and the right to benefit from medical treatment’; in contrast to the second sentence which—in accordance with the other provisions—merely requires ‘a high level of … protection’ in the definition and implementation of all Union policies.

\textsuperscript{86} Case C-368/95, above n 80.


German, *derivative Teilhaberechte*) may also be derived as a further function of fundamental rights. Thus, the ECJ has pointed out that the principle of equal treatment requires that the granting of a certain right to a group of persons is extended to a comparable group of persons.  

These rights are referred to as derived participatory rights because the right of the individual may only be derived from the rights of a group. The Charter of Fundamental Rights provides an array of rules that may be interpreted as such derived participatory rights. This applies to the right of access to placement services pursuant to Article 29 and to the right of access to services of general economic interest in Article 36. Some of the procedural rights, such as the right to an effective remedy and the right to a fair trial in Article 47(1) and (2), can be classified as derived participatory rights as well.  

Classic negative rights may also contain a participatory right component, however: in its judgment in *VDSÖ* (Vereinigung demokratischer Soldaten Österreichs v Austria) [1994] Series A No 302, paras 37ff, 49, the ECtHR stated with reference to freedom of expression that a refusal by an authority to allow members of the Austrian Army to insert their satirical magazine into an established distribution system within the barracks constituted a violation of the victims’ rights arising from Article 10 ECHR.  

This implies at least a dimension of derived participation.  

Thus, it may be concluded that it is possible to develop elements of derived participatory rights from individual fundamental rights for the purposes of a legal doctrine of EU fundamental rights.

**dd) Original Rights to Performance Corresponding with Positive Obligations to Provide Benefits**

Original duties to provide benefits on part of the state (in German, *originäre Leistungsrechte*) go one step further: they confer a claim to sovereign performance of a service even if this has previously not been provided for by law. The provisions in Articles 29 and 36 of the Charter, which have been discussed earlier to the effect that they may be read as participatory rights, may also be understood as original duties of the state to provide benefits. This also applies to the granting of legal aid referred to in Article 47(3) of the Charter or the right to social and housing assistance contained in Article 34(3) of the Charter. Furthermore, similar protective components may be found in general fundamental rights, such as the deduction of a claim to legal aid from the right to a fair trial in Article 6 ECHR.  

Thus, these provisions form the basis for corresponding claims even if such guarantees are not provided for in other provisions of Community law or in the law of the Member States.

In this case, there is a special challenge for the legal doctrine of fundamental rights to differentiate between the core of participatory rights and the layer of original rights to performance and to develop different standards. It must be taken into account that original rights to performance have only a limited tradition in constitutional law. They cause particularly sensitive interferences with the margin of interpretation and the margin of discretion of the executive and especially the legislature because they result in strains on the public budget and thus restrict parliamentary budget sovereignty. Therefore, special caution is necessary when developing these rights. As with the duties to protect, the restrictions concerning the competences apply when viewed from a vertical perspective.

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89 Regarding the prohibition of discrimination in Art 12 EC, see Case 186/87 *Cowan* [1989] ECR 195, paras 10ff; critical comment is given by M Rossi, ‘Das Diskriminierungsverbot nach Art 12 EGV’ [2000] *Europarecht* 197, 215, who points out that alternatively the exclusion of both groups from the right would be possible as well as equal but distinctive treatment. This scope for action by the Member States is unnecessarily restricted by the interpretation of the ECJ.

90 See also, with respect to the ECHR, Grabenwarter, above n 75, § 19 II.

91 ECtHR App No 15153/89 *Verenigung demokratischer Soldaten Österreichs v Austria* [1994] Series A No 302, paras 37ff, 49.


93 ECtHR App No 11932/86 *Granger v UK* [1990] Series A No 174, paras 44ff; ECtHR App No 18711/91 *Boner v UK* [1995] Series A No 300-B, paras 30ff; ECtHR App No 19380/92 *Benham v UK* ECHR 1996-III, paras 60ff.
Apart from that, the ECJ will have to decide on the question of how to interpret the ‘safe-guard clauses’ in some of the Charter rights already referred to. For example, it will be interesting to see if the ECJ will elaborate the right of collective bargaining and action according to Article 28 of the Charter beyond its status quo in Community and national laws, although the clear wording of the norm prohibits such an elaboration. In that respect, it may be a better idea to have recourse to the fundamental rights as general principles of law which are not restricted by such clauses.

3. Who is Bound by Fundamental Rights? The Reach of Fundamental Rights

Next to the institutions of the EU and the EC (a), Member State authorities may also be considered (b) as being bound by fundamental rights. However, it is more convincing from a doctrinal point of view to reconstruct the effect of fundamental rights between private parties (horizontal effect, or Drittwirkung) within the framework of sovereign duties to protect.94

a) The Binding Effect on the Institutions of the EC and the EU

The binding effect of the fundamental rights of the EU on the Community institutions has been established by the case law of the ECJ without any resistance having been offered. The obligation applies both to abstract general- as well as concrete individual Community action.95 National courts, especially the German Bundesverfassungsgericht and the Italian Corte Costituzionale, not only welcomed this development, but demanded and inspired it.96 The binding effect of EU fundamental rights on the institutions of the EU has now been laid down in Article 6(2) EU.97

b) The Binding Effect on the Member States as a Determinant of the Vertical Scope of the Fundamental Rights of the Union

Dealing with the question of the binding effect of fundamental rights of the Union upon the Member States, one has to keep in mind that this question is also an important aspect of the questions of how far fundamental rights should reach and how far integration through fundamental rights should go.

aa) The Position of the ECJ—Fundamental Rights within the Scope of Application of Community law

It was not until a later phase in the case law of the ECJ that the more difficult question first arose of whether Member States were bound by fundamental rights of the EU in their actions. This question constitutes the central issue of the important debate on the future scope of Union fundamental rights from a vertical perspective.98 It is quite possible that the respective case law
of the ECJ has not yet fully developed. However, important trends are emerging: the ECJ is neither employing the approach of utilising fundamental rights to review all actions by Member States, nor is it absolutely refusing to conduct such an examination. Rather, the ECJ compromises by stating in its case law that if a rule falls within the scope of Community law, any fundamental rights review must employ as its standard those fundamental rights whose observance the Court ensures. Thus, the main question appears to be how to determine when a national rule touches upon those fundamental rights whose observance is ensured by the ECJ. In view of the growing extent of regulation by Community law, the potential scope for finding Member States to be bound is extraordinarily broad and clear criteria for the determination of the extent to which Member States may be bound will have to be established by the case law of the ECJ.

To date, two situations in which such a binding effect is to be affirmed have arisen from the case law of the ECJ. One situation concerns the implementation of secondary Community law as well as the administrative enforcement of Community law. It is graphically referred to by Weiler as an ‘agency situation’: Member State authorities execute or implement an act initiated by Community law. The ECJ first explicitly formulated this line of reasoning in the Wachauf judgment, which concerned the execution of a regulation in the dairy sector. This approach had already formed the basis of the ECJ’s very first judgment of its fundamental rights jurisprudence, in which the Court merely hinted at a fundamental rights review in an obiter dictum, obliging the Member State to apply a Commission decision in such a manner as to not violate the fundamental rights of the individual. However, it is necessary that such a binding effect on the Member States also applies to the implementation of a directive. As regards measures by Member States in the implementation of administrative procedures, the judgment in Hoechst may be referred to. The ECJ pointed out that national authorities affording assistance to the Commission in the implementation of administrative procedures must respect general principles of Community law. At an early stage the question arose whether this category may be extended to include contested measures by the state which do not have the purpose of implementing secondary Community law but which show a clear connection thereto.

Since the judgment in ERT, a second category of Member State measures has been subject to a fundamental rights review by the ECJ: in ERT, the Court determined that if a Member States

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103 Case 29/69, above n 22, 419, paras 4ff.
104 The earlier judgment in Johnston was interpreted to this effect: Case 222/84 Johnston [1986] ECR 1651, paras 17ff, which was concerned with the review of the right to an effective judicial remedy under national law transposing an EC directive. This was commented upon by J Weiler and N Lockhart, ‘"Taking Rights Seriously" Seriously’ (1995) 32 Common Market Law Review 579, 609.
106 Above n 104; see R Lawson, ‘The European Court of Justice and Human Rights’ (1992) 5 Leiden Journal of International Law 99, 105ff; J Temple Lang, ‘The Sphere in which Member States are Obliged to Comply with the General Principles of Law and Community Fundamental Rights Principles’ (1991) 19 Legal Issues of European Integration 23, 27; see also the ECJ’s reasoning in Case C-299/95 Kremcow [1997] ECR I-2629, paras 15ff, where it was stated that the applicable provisions of national law ‘were not designed to secure compliance with rules of Community law’; this dictum is emphasized by M Holoubek, ‘Anmerkungen zum Urteil des EuGH vom 29.5.1997’ [1998] Justizblatt 237, who argues that a new general category could be based thereon.
invokes an exemption to one of the fundamental freedoms, the justification must be interpreted
in light of fundamental rights.\footnote{Case C-260/89, above n 100, paras 42ff; confirmed by Case C-62/90 Commission v Germany [1992] ECR I-2575, para 23.} The ECJ has extended this line of reasoning to include the
inherent restrictions upon the fundamental freedoms, ie ‘mandatory requirements’ in the case
of Article 28 EC and ‘overriding reasons relating to the public interest’ in the case of Article 49
EC.\footnote{Case C-23/93 TV10 [1994] ECR I-4795, paras 22ff; Case C-368/95, above n 80, para 24.}

\textit{bb) The Future Consolidation of the ECJ’s Point of View}

A review of fundamental rights in the case of an ‘agency situation’ is widely accepted. More
troversial, however, is the review of the implementation of a directive.\footnote{See J Bast, above chapter 10, section II.3(a).} Sometimes,
Member State protection of fundamental rights is seen as sufficient when making use of the
scope of implementation associated with a directive, while the fact that the Community institu-
tions are bound is emphasised when it comes to those parts of the directive that are mandatory.
While the latter is true, the former is to be doubted. Thus, the concept of a directive which,
according to Article 249(3) EC, leaves to the Member States a choice of form and methods
when implementing set targets binding under Community law is in favour of taking into account
distinctive national features, also with regard to fundamental rights. Moreover, this helps to
clearly separate the legal spheres, whereby the scope for implementation is only subject to a
review of the Member States and the directive-based component is subject to a review under
Community law.\footnote{To this effect, see T Kingreen, in Calliess and Ruffert (eds), above n 31, Art 52 EU Charter, para 12.} However, Member State measures necessitated by directives still originate in
Community law: without the initial act under Community law, many cases of jeopardising
fundamental rights due to Member State action would not occur. This provides support for the
theory that Member States must adhere to the standard of Community fundamental rights if an
interference with fundamental rights occurs when making use of the scope for implementation
directives, irrespective of parallel protection (which is not always sufficiently available)
granted by fundamental rights of the Member States. This is the only way in which an EU-wide
uniform (minimum) standard of fundamental rights may be guaranteed against interference with
fundamental rights caused by Community law. In an ‘agency situation’, the victim obtains
protection not only against direct measures of Community institutions, but also against
measures caused by Community institutions which required national institutions for their reali-
sation. The citizen also obtains a guarantee that rights granted by Community law will be
implemented into national law in such a way as to ensure conformity with Community
fundamental rights.

Based on this approach, the case law on the review of Community fundamental rights with
respect to the so-called restrictions on the restrictions or general limits to restrictability (in
German, \textit{Schranken-Schranken}) of the fundamental freedoms is to be followed (ie particularly
Articles 30, 39(3) and 46 EC, in conjunction with 55 and 58 EC). It must be conceded, though,
that the arguments usually employed (such as the primacy of Community law, the uniform appli-
However, upon closer inspection, the argument to the effect that restrictions constitute areas of
exception and are therefore outside the reach of Community fundamental rights\footnote{However, to this effect, see T Kingreen, \textit{Die Struktur der Grundfreiheiten des Europäischen Gemeinschaftsrechts} (1999) 168.} turns out to
be a circular argument because what is to be proved is in fact presupposed. Ultimately, it must be
taken into account that the fundamental freedoms grant rights which are part of Community law and which—just as the whole of Community law—must therefore be interpreted in conformity with Community fundamental rights, also as regards their possibilities of restriction. By employing a proportionality test, it is possible to preserve the necessary scope for Member States action both in this case and when reviewing the leeway for implementation of directives. To this extent, a more precise definition of the standard of review may occur by means of adopting a modified version of the ECHR concept of ‘margin of appreciation’.

Within the scope of application of the Fundamental Rights Charter, this argument will be seen in a new light insofar as Article 51(1), 1st sentence of the Charter only refers to the ‘implementation of Union law’, thereby possibly excluding the ERT situation of limitations on the exercise of fundamental freedoms from fundamental rights control. On the other hand, the explanations of the Praesidium, which have to be considered according to Article 52(7) of the Charter when interpreting the Charter, explicitly refer to the case law of the ECJ, which is an argument in favour of keeping both constellations. If Article 51(1), 1st sentence of the Charter is really interpreted contrary to the present case law, there would be another reason to simultaneously revert to the general principles of law and the established case law. This would further strengthen the unfortunate dichotomy between the fundamental rights as guaranteed in the Charter and those fundamental rights guaranteed as general principles of law.

c) Increase of the Case Categories (Situations)?

Beyond consolidation of the ECJ’s present approach, its line of jurisprudence appears to become increasingly developed, an occurrence affecting both situations. The judgment in the Steffensen case is interesting and quite convincing in this respect. This case dealt with the question of the consequences of procedural law when implementing Community law. Following the established steps of examining the equivalence and effectiveness of national procedural law, the ECJ conducted a fundamental rights review in its judgment, thus causing a justifiable extension of the implementation constellation. Moreover, this will cause certain aspects, which have so far been covertly considered within the review of the equivalence and effectiveness of procedural rights accompanying rights induced by Community law, to be debated in an explicit fundamental rights discourse. This development has to be welcomed.

Whereas cases like Carpenter follow the logic of the second constellation, the Karner case, in which the Court conducted an extremely superficial review of the fundamental rights.

114 This will be discussed below in section III.5.(c)(cc)(4); the proposal by Ruffert, above n 111, 529, to restrict review to a prima facie control must be rejected; instead, the ECHR standard should be preserved. USchildknecht, Grundrechtsschranken in der Europäischen Gemeinschaft (2000) 225, even believes that a uniform (Community) standard should be applied.
115 To this effect, see T Kingreen, in Calliess and Ruffert (eds), above n 31, Art 52 EU Charter, para 17 with further references; D Scheuing, ‘Zur Grundrechtsbindung der EU-Mitgliedstaaten’ [2005] Europarecht 162, 181ff.
117 See also the positive assessment by Scheuing, above n 115, 179, who speaks about a ‘Rechtsschutzgefährdungskonstellation’ (constellation threatening the effective protection of rights).
118 Case C-60/00 Carpenter [2002] ECR I-6279, paras 40ff; it is arguable whether the freedom to provide services is affected in this case, but the following fundamental rights review is consistent. Scheuing, above n 115, 165ff, convincingly argues that the ECJ certainly wanted to enter into a fundamental rights review in this case; see also his appropriate classification of the ECJ judgment in Cases C-465/00 and C-139/01 ORF [2003] ECR I-4989, paras 68ff, as a case in which the provisions of a directive have to be interpreted in light of fundamental rights (ibid, 172ff); in Case C-144/04, Mangold [2005] ECR I-9981, para 75, the case law of the ECJ has not been expanded either, because this particular case focused on the legal effect of a directive, ie a situation in which the provisions of a directive had to be implemented. It is unclear whether Cases C-458/03 Parking Brixen [2005] ECR I-8612, paras 47ff, and C-410/04 ANAV [2006] ECR I-3303, paras 19ff, represent
although it had previously refused the application of fundamental freedoms within the meaning of *Keck*, remains inscrutable. Where does the relationship to Community law originate from?

The *Keck* case law implied that ‘selling arrangements’ are ‘not by nature such as to prevent . . . access to market’ (ie not interfering with the free movement of goods). In the *Karner* case, the Court argued to the same effect by pointing out that the current rules are not capable of actually or potentially hindering intra-Community trade. But then there is no reason for conducting a fundamental rights review, because fundamental rights do not apply if the scope of application of EC law does not cover the free movement of goods for reasons other than those of the *Keck* case law. The fundamental rights review could only be justified if the ECJ held the hardly convincing view that, in the *Keck* case, the rules on the free movement of goods do apply and are then restricted again (in a second step) by the *Keck* case law. If that was not the supporting reason, it may only be hoped that the ECJ was just mistaken. Maybe this is attributable to the fact that the Advocate General, in his opinion regarding the *Karner* case, justified the restriction on the free movement of goods in the event that the Court does not agree with the non-application of the rules on the free movement of trade in this case.

However, this also proves the negative consequences of the ECJ’s lack of doctrine, because the entire case law of the ECJ on the vertical reach of fundamental rights lacks explicit reflection of the reasons supporting it. Therefore it is difficult to extrapolate the future development of this case law, impeding a critical debate and even fueling speculations about an ‘unwanted’ development of the Court’s case law.

At the present stage of integration, however, it does not seem appropriate to increase the situations in which Member States are bound by fundamental rights. This applies, in particular, to the suggestion of Advocate General Jacobs in the *Konstantinidis* judgment to declare that Member State actions are fettered by fundamental rights vis-à-vis nationals of other Member States present in that Member State. Even less desirable is a result which would declare all actions by Member States to be bound by fundamental rights—as has been established in the US by *Gitlow v New York*—because this would constitute a fundamental step towards a federal order for which no basis is provided in Community primary law. Rather, such a step would have to be supported by a political impulse in the shape of a far-reaching catalogue of fundamental rights. Otherwise, a severe threat of disintegration would be expected, and the now a further development of the present case law insofar as the ECJ obviously does not apply the principles of equal treatment and non-discrimination as ‘restrictions on the restrictions’ or general limits to restrictability, but at the level of the scope of protection parallel to fundamental freedoms.

119 Case C-71/02 Karner [2004] ECR I-3025, para 44.
121 See AG Alber in Case 71/02, above n 119, 68ff.
122 See the speculation of Scheuing, above n 115, 174ff.
123 F Jacobs had assumed that there was a sufficient connection to Community law if a Community national goes to another Member State as a worker or self-employed person. Such a ‘civis europaeus’ would be entitled to assume that, ‘wherever he goes to earn his living in the EC, he will be treated in accordance with a common code of fundamental values’ without having to prove a further connection to Community law: AG Jacobs in Case C-168/91 *Konstantinidis* [1993] ECR I-1191, No 46; see also F Jacobs, ‘European Community Law and the European Convention on Human Rights’ in N Blokker (ed), *Towards More Effective Supervision by International Organizations* (1994) vol II, 561, 564. The ECJ did not comment on this opinion and did not follow it as the Court required an economic disadvantage in order for Community law to become applicable: Case C-168/91, ibid, paras 13ff; see also the critical annotation by R Lawson, ‘Case C-168/91’ (1994) 31 CML Rev 395, 406ff.
125 Recently, the former chief justice of the Bundesverfassungsgericht and former Federal President, Roman Herzog, attacked the ECJ for what he perceives as unacceptable judicial activism. He also referred to fundamental rights cases to support his view: see R Herzog and L Gerken, ‘Stoppt den Europäischen Gerichtshof’, Frankfurter Allgemeine Zeitung, 8 September 2008, 8.
established complimentary performance of fundamental rights protection by national, international and supranational interpreters would be endangered unnecessarily.\textsuperscript{126} However, Article 51(1) of the Charter only obliges the Member States to respect the fundamental rights of the Union when implementing Union law. No expansive tendencies may be derived from this formulation.

Therefore caution should be exercised when extending the two categories, such as in an agency situation, to constellations which do not refer to the implementation of a particular directive but which are closely related to it, as has been done by the ECJ in both the \textit{Johnston} and \textit{Steffensen} cases.\textsuperscript{127} The fact that the directive conferred rights whose implementation threatened national procedural law might have been the crucial aspect justifying a fundamental rights review in these cases.

4. Who May Assert Fundamental Rights?

Unlike the question of who is bound by fundamental rights, the question of who may assert them is less contested. Apart from some particular rights for Union citizens, such as right to vote (see Article 39(1) of the Charter), all natural persons are ‘born’ obligees of the fundamental rights of the EU (including officials). Moreover, legal persons are generally obligees as well.\textsuperscript{128}

5. The Structure of Examination of Fundamental Rights

\textit{a) Overview of the System of Examination}

One of the main points of criticism in German legal literature levied against the present case law of the ECJ concerns the lack of a suitable and coherent structure of examination of fundamental rights. Thus, it is often difficult to comprehend whether sufficient consideration of the interests involved has occurred. Sometimes, when analysing the area protected by a fundamental right, it even remains unclear which right is being examined.\textsuperscript{129} Not only does this cause negative knock-on effects concerning the general orientation function of the fundamental rights review, but problematic results may also be produced in individual cases. Therefore, the necessary further development of the ECJ’s fundamental rights legal doctrine must include an improvement in the structure of examination employed. Recent judgments of the ECJ already suggest such an improvement.\textsuperscript{130} In general, it is recommended that further improvements should be guided as far as possible by the system of examination employed by the ECHR. Inspiration may also be drawn from the legal doctrine of the Member States.

The structure of examination may vary according to the different rights concerned. In this respect, the subjective (negative) rights in particular differ from the positive obligations. The following explanations focus on the structure of examination of the subjective (negative) rights

\textsuperscript{126} See below section IV.
\textsuperscript{127} Case 222/84, above n 104; Case C-276/01, above n 116; see Lawson, above n 106; Temple Lang, above n 106.
\textsuperscript{128} For further references, see the German version of this article.
\textsuperscript{129} For the first case, see Case C-280/93, Germany v Council [1994] ECR I-4973, paras 94ff; for the second case, see the ruling in Cases 46/87 and 227/88, above n 105, para 19; for an example of the critique in German academic literature, see M Nettlesheim, ‘Grundrechtliche Prüfdichte durch den EuGH’ [1995] Europäische Zeitschrift für Wirtschaftsrecht 106; more positively, see U Kischel, ‘Die Kontrolle der Verhältnismäßigkeit durch den Europäischen Gerichtshof’ (2000) Europarecht 380.
\textsuperscript{130} See, eg the judgment in Case C-274/99 P, above n 70, paras 40ff, or the explicit references to a comprehensive alternative examination in Cases C-465/00 and C-139/01, above n 118, paras 82ff.
as they are of prime importance. Particularities of the examination of the equality principle and positive obligations will be dealt with separately (section III.5.d below).

As a first step, this requires a description of the area protected by the fundamental right in question. The second step of examination aims at determining whether there has been an interference with the exercise of a fundamental right. The ECtHR usually combines these steps (section b below). In a third step, it must be examined whether the interference may be justified (section c below). Article 52(1) of the Charter of Fundamental Rights also implies such an interplay of the exercise of a fundamental right, its restriction and the justification for the restriction. According to this provision, any restriction must be provided for by law and must respect the essence of the right at issue, as well as the principle of proportionality. Employing the predominant terminology of German fundamental rights doctrine, the reasons justifying interference represent restrictions on fundamental rights. The requirements to be met by the legal basis may, however, be regarded as formal restrictions, whereas the principle of proportionality and the respect for the essence of rights and freedoms may be considered material restrictions of (sovereign) restrictive measures and thus as ‘restrictions on the restrictions’ or general limits to restrictability.

b) The Area Protected by Fundamental Rights and Interference Therein

The area of protection of a fundamental right (its protective scope, or Schutzbereich) describes the area of action which is guaranteed by the fundamental right in principle and the sovereign restriction of which requires a justification. In other words, it defines its scope. It is to be regretted that the ECJ has only commented briefly on questions relating to the area protected by a fundamental right. However, this should change when the Charter of Fundamental Rights is incorporated into primary law. The influence of a fixed text on the analysis of the area of protection is not to be underestimated. Examinations of the areas protected by fundamental freedoms show that the ECJ is basically willing to carry out such analyses. Even without the incorporation of the Charter, the ECJ should therefore develop more clearly the legal positions which are objectively protected and should examine whether it is possible to limit these. Thus, when specifying the fundamental rights of the Union, the Court may refer to the Charter of Fundamental Rights as the essence of the traditions of the Member States. Additionally, an orientation towards the case law of the ECtHR is recommended. First corresponding indications may be found in the case law of the ECJ.

To date, the development of legal doctrine as regards the interference with or restriction of the exercise of a fundamental right has been completely neglected. The risks of this lack of legal doctrine become especially apparent in the judgment passed in the ORF case, one of the first cases where the occurrence of an interference is explicitly examined. According to the ECJ, the mere recording of data did not constitute any interference. If the ECJ really wants to stick to this opinion with a view to the data retention directive of the EC, the Court would completely miss a relevant point.

The lacking elaboration of legal doctrine on the question of interference is all the more problematic as there exist certain problems specific to the Community that require the development of an independent legal doctrine. Interference may be defined as any impairment of the legal position protected in principle by the fundamental right in question. In individual cases, it

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132 See, eg the recent Case C-71/02, above n 119, paras 46ff.
134 Cases C-465/00 and C-139/01, above n 118, para 74.
may be difficult to determine to what extent a mere danger to the position of a fundamental right may already constitute an interference. This problem is especially prevalent as regards the review of the legal provisions contained in directives. The question arises whether a provision in a directive itself or only a national implementing act constitutes an interference. If the Member State is obliged to implement the provision concerned, then the wording of the directive already contains an obligation to interfere in the exercise of specified fundamental rights. Therefore, the duty of transposition causes a situation endangering fundamental rights equal to an interference by the Member State when implementing the directive.\(^{135}\)

c) Justification of an Interference with Fundamental Rights

To date, the structure employed by the ECJ in examining justifications for interferences with fundamental rights has varied widely. However, a uniform system of examination in the area of central freedoms has emerged from the experience of the ECHR: this is regulated by the respective provisions on restrictions (see especially the second paragraphs of Articles 8–11 ECHR). Accordingly, the formal requirement of whether the interference is covered by an enabling legal basis must first be examined (aa). It must then be substantively determined whether the interference pursues a legitimate objective (bb). Next, the proportionality of the interference must be assessed (cc). These requirements are also provided in the general restriction clause in Article 52(1) of the Charter of Fundamental Rights. To this the guarantee of the very substance of rights in the first sentence of Article 52(1) must be added (dd).

aa) Interference Must be Founded on a Legal Basis

The requirement of a legal basis (‘provided for by law’ in Article 52(1) of the Charter) has already been picked up by the ECJ. In the *Hoechst* judgment, the ECJ argued that ‘in all the legal systems of the Member States, any intervention by the public authorities in the sphere of private activities of any person, whether natural or legal, must have a legal basis’ and that this need ‘must be recognised as a general principle of Community law’.\(^{136}\) In EU law, the legal basis for an interference may be found in primary law and in regulations, but especially in directives in connection with national implementing measures thereof. However, if Member State measures are being examined which do not implement Community law, the concept of law as developed by the bodies of the ECHR will apply. This extensive concept also includes unwritten law not enunciated in legislation to encompass Common Law system.\(^{137}\)

In the practice of the ECtHR, other formal requirements concerning the legal basis have been tightened in the context of the freedoms mentioned as regards two aspects which are also relevant for the legal doctrine of Union fundamental rights: the enabling provision must be formulated with sufficient precision and must be adequately accessible. The addressees of a norm must be able to align their conduct according to specified rules and must be able to foresee potential sanctions. Thus the relevant norms must be sufficiently publicised to enable the addressee to have an indication thereof without considerable (or even financial) effort. This is referred to as ‘accessibility’. Moreover, the norm must also be as precise as possible in order to show clearly for what purposes and with which tendency it may be employed. General clauses must be sufficiently clarified through case law. In the period immediately following their introduction, it must be possible to foresee the tendency of their becoming applicable.

\(^{135}\) This is also assumed by AG Fennelly in Case C-376/98 and Case C-74/99 *Germany v Parliament and Council* et al [2000] ECR I-8419, No 146ff, especially No 165: ‘the Advertising Directive imposes restrictions on freedom of commercial expression’.

\(^{136}\) Cases 46/87 and 227/88, above n 105, para 19 (italics added).

\(^{137}\) See, eg ECtHR App No 6538/74 *Sunday Times v UK* [1979] Series A, No 30, para 47.
The jurisprudential development of the ECHR bodies has clearly shown that the importance of these principles is increasing.\textsuperscript{138}

These strict requirements, which have developed in a similar way in Germany and in other countries, may be transferred to EU law. Regarding the criterion of accessibility or availability, the ECJ has already stated that the principle of legal certainty requires that regulations only enter into force once the relevant issue of the Official Journal is de facto available in that Member State.\textsuperscript{139} Additionally, Union citizens must also have access to implementing legislation of directives before these directives may possess a negative legal effect. Furthermore, the ECJ affirmed in the \textit{Könecke} judgment that ‘a penalty, even of a non-criminal nature, cannot be imposed unless it rests on a clear and unambiguous legal basis’.\textsuperscript{140} This must apply to the preciseness of the enabling legal basis of any sovereign action.\textsuperscript{141} The requirements concerning the enabling provision for action apply as regards the isolated examination of the basis itself (eg the examination of the provisions of a directive) as well as the examination of the implementing measures based thereon. In the case of directives, however, it must then be distinguished as follows: the requirements concerning preciseness only fully apply to the formulation of the objective of the directive. Concerning the form and the methods of national possibilities for implementation, it is the characteristic feature of a directive that it leaves to the Member States ‘the choice of form and methods’ pursuant to Article 249(3) EC. This causes a certain openness in the formulation of the elements of a rule. However, the precise formulation of a rule must then be guaranteed in the national implementing acts.

\textit{bb)} Legitimate Objective

The ECJ is of the opinion that fundamental rights may only be limited if ‘those restrictions in fact correspond to objectives of general interest pursued by the Community’.\textsuperscript{142} The scope of possible Community interests legitimating interference has been interpreted very widely in the ECJ’s case law to date and ranges from economic considerations\textsuperscript{143} to interests of the Community institutions.\textsuperscript{144} Some opinions by Advocates General, however, suggest a stricter approach as regards the examination of the genuine pertinence of the objectives advanced. Thus, in his opinion on the \textit{Aids test} case, Advocate General van Gerven doubted whether, in a concrete situation, the ‘economic well-being of the country’ may be invoked as a justification for an interference with a person’s private life.\textsuperscript{145} As regards the fundamental rights of the EU, a careful examination of the reasons advanced for restriction is recommended. This also corresponds to the formulation of the proportionality principle in the second sentence of Article 52(1) of the Charter, which requires that restrictions ‘genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others’. This test of examining whether objectives are ‘genuinely’ promoted introduces a strict examination of whether the legitimate objectives advanced are capable of justifying the interference.

\textsuperscript{138} To take the example of Art 10(2) ECHR; Kühling, above n 63, 168ff, with further references.
\textsuperscript{139} Case 98/78 \textit{Racke} [1979] ECR 69, para 19ff.
\textsuperscript{140} Case 117/83 \textit{Könecke} [1984] ECR 3291, para 11.
\textsuperscript{142} Case 5/88, above n 102, para 18; see also the seminal judgment in Case 4/73, \textit{Nold} [1974] ECR 491, para 14.
\textsuperscript{143} Cases C-143/88 and 92/89 \textit{Zuckerfabrik Süderdithmarschen} [1991] ECR I-415, para 76, referring to the aim to ensure ‘that losses incurred by an economic sector are not borne by the Community’.
\textsuperscript{145} AG van Gerven in Case C-404/92, above n 144, para 27; Schildknecht, above n 114, 164, 197ff, believes that this results in a de facto restriction of admissible justifications for interference as provided for by the ECHR.
However, this already refers to the criterion of suitability of a measure as one aspect of proportionality. Altogether, the question arises whether the examination of the legitimate objective should not be included in the proportionality test, as is usual in German fundamental rights doctrine, but not in the legal doctrine of the ECtHR. However, an independent examination of the legitimate objective makes it possible to better carve out the objectives pursued, as may be seen from the case law of the ECtHR.

c) The Principle of Proportionality

As regards the principle of proportionality, many important questions of legal doctrine remain to be solved: the proportionality test plays a central part in the development of the legal doctrine of fundamental rights. It seems advisable to adapt the structure of examination to the general three-part proportionality test (suitability, necessity, proportionality in the narrow sense) usually employed in the examination of fundamental rights in Germany. This test is mainly used by the ECJ within the framework of examining possible violations of the fundamental freedoms and in an isolated examination of the proportionality principle. However, the ECJ sometimes even employs this test when examining fundamental rights. On the other hand, the ECtHR mostly conducts a one-step examination orientated directly towards a balancing of the conflicting interests and rights, ie the proportionality test itself. Yet there are also some cases containing elements of the first two steps of examination. The three-part structure of the test provides a useful framework in that the genuine capability to attain the objective as well as the recourse to alternatives to the sovereign action in question, which may prove less of an interference, may already be debated at the level of examining the suitability and necessity of a measure. Thus, even at these levels, the proportionality test contributes to a substantive review of sovereign interference with fundamental rights while simultaneously contributing to the subsequent application of proportionality in the narrow sense if this should still prove necessary. Therefore, this test should also be employed as regards the review of interferences with EU fundamental rights.

However, the most importance must be attached to the carving-out of parameters for the balancing of interests within the framework of assessing proportionality itself. To date, this constitutes the greatest omission of the review function of the ECJ, which has all too often also examined in the same step whether there has been any interference with the very substance of the fundamental right guaranteed. This is then curtly denied, based on principle, without sufficient analysis of interests at play or a precise examination of the workability of the sovereign measure in question. Incidentally, the principle of proportionality should be completely integrated into the examination of fundamental rights as this is the only way to guarantee a


147 For an examination of necessity in relation to freedom of expression, see the judgment of the ECtHR App Nos 13914/88 et al Informationsverein Lentia v Austria [1994] Series A, No 276, para 39. It is pointed out that there is a growing convergence with the proportionality test employed by the ECJ; see D Kugelmann, ‘Zur Zulässigkeit eines öffentlichen Rundfunkmonopols nach Art 10 EMRK’ (1994) Zeitschrift für Medien- und Kommunikationsrecht 281, 286. When examining freedom of possession, however, there is no determination of necessity: see K Gelinsky, Der Schutz des Eigentums gemäß Art 1 des Ersten Zusatzprotokolls zur Europäischen Menschenrechtskonvention (1996) 104ff, with further references.

148 See the reference above n 129.
review specific to the fundamental right in question in individual cases. In view of Article 51 of
the Charter and the increasing orientation towards the rights of the ECHR, a separate exami-
nation of the proportionality principle, which had been recognised in the ECJ’s case law at an
early stage, is now outdated.

(1) Suitability

It must first be examined whether the sovereign measure is suitable for, ie is capable of, attaining
the objective pursued. This shows how important it is to subject the reasons for interference to a
close examination (see above section bb). These reasons are now reviewed to see whether they
may be realised with the means employed and whether they are in fact used for these
purposes.\textsuperscript{149} However, at this stage of the examination, a wide margin of appreciation must be
granted to sovereign authorities when judging the suitability of a measure. This is especially so if
it is necessary to determine the efficiency by empirical research and if this does not provide
much assurance. In this context, it must be pointed out that, seen from the perspective of a
procedural guarantee of fundamental rights, there may exist a sovereign duty to improve
knowledge of the suitability of interferences, to examine the measures and to change or adjust
these if necessary.\textsuperscript{150}

(2) Necessity

As a second step, it must be examined whether the means employed are in fact necessary. This
will be the case if, at the time the measure was adopted, there were no other means available
which were equally efficient but less onerous. The examination is performed from an ex ante
perspective. At this stage, the sovereign authorities are once again at an advantage when judging
the efficiency of alternative options for action: they must be granted a wide margin of appreci-
ation. This corresponds to the procedure employed by the ECtHR and by the German courts as
well as to the approach of Community law.\textsuperscript{151} Here, one may use comparative law to show alter-
native possibilities for regulation that are equally efficient in attaining the objectives pursued,
but which prove less onerous. The reasoning employed by the ECtHR in \textit{Informationsverein Lentia}
constitutes an example of the relevance of such an examination.\textsuperscript{152} Similarly, in \textit{Österreichischer Randfunk} the ECJ asked whether a certain measure was necessary or could be
substituted by another measure which was equally efficient but less onerous.\textsuperscript{153}

(3) Proportionality in the Narrow Sense

There is no doubt that the core of the entire proportionality test is constituted by the determi-
nation of proportionality itself (‘proportionality in the narrow sense’), ie the examination of
whether the means employed are in proportion to the objectives pursued. First indications for
this assessment are provided by the results gained at the first two stages. Thus, the review of
suitability has shown the degree of efficiency of the measure in question. Subsequently, another
assessment of the objective pursued must occur showing which public or private interests serve
to legitimate this objective. Next, the severity of the interference must be judged. Guidance may

\textsuperscript{149} This ‘in fact’ test (\textit{Tatsächlichkeitstest}) corresponds both to the approach taken in Art 52(1) EU Charter
(‘genuinely meet objectives of general interest’; italics added) as well as the case law of the ECJ on the
principle of proportionality in areas other than fundamental rights: Case C-157/99 \textit{Smits} [2001] ECR I-5473,
paras 75, 90ff; Case C-262/99 \textit{Louloudakis} [2001] ECR I-5547, paras 69ff.

\textsuperscript{150} On such duties to examine, see ECtHR (Chamber) App No 36022/97, above n 43, paras 97ff; see also
ECtHR (GC) App No 36022/97, above n 77, paras 99ff and, para 128.

\textsuperscript{151} See Kühling, above n 63, 402ff, with further references.

\textsuperscript{152} See the reference above n 147.

\textsuperscript{153} Case C-465/00, above n 118; C-138/01, above n 118; C-139/01, above n 118, para 88.
be provided by the results of the necessity examination. It must be examined whether the measure entails a substantial reduction of central protected positions. After an assessment of the interests concerned, it is possible to balance these. The balancing act, including the determination of appropriate margins of discretion for the legislation and the executive, may be considerably controlled by the legal concept of the margin of appreciation.

(4) Degree of Control and Margin of Appreciation

However, the application of the proportionality test also shows the limits of making the case law on fundamental rights more dynamic as fundamental rights must not lose their framework character for the entire legal order. Both in principle and as regards various details, a substantive consideration of the legal doctrine of the ECtHR and especially of the concept of the margin of appreciation (or in French marge d’appréciation) is recommended. According to this concept of degree of control, the Member States of the ECHR are generally left a margin when determining an appropriate level of balance either between private interests inter se or between public and private interests. In this context, the term margin of appreciation is not understood in a narrow sense as referring merely to the existence of discretion when choosing an appropriate measure, but as referring to the discretion in assessing potentials for danger or other factors. The intensity of interference permissible and the discretion inherent in attributing values to be protected depends thereupon. The bodies of the ECHR ensure that all sovereign measures remain within the margin allowed. This concept plays a central role in establishing common European standards. Thus, by employing a margin of appreciation, the ECtHR has carved out areas in which a considerable development of common European standards is guaranteed already. This results in the Member States of the ECHR being accorded a smaller scope for evaluation. However, if there is no such common ground or if controversial questions of morality are concerned, the Member States of the ECHR will be left a greater margin.

The legal concept of a margin of appreciation may also be employed for the benefit of Community law. It is capable of controlling the entire proportionality test, but especially the balancing process in the third step of the examination. As under the ECHR, the margin of appreciation makes it possible to distinguish between the different subject areas concerned, and it makes it possible to employ a variable degree of control, varying in time, which gives sufficient consideration to newly developing common opinions. Furthermore, the concept of a margin of appreciation which is variable has another crucial advantage in Community law: it makes it possible to differentiate between stricter standards as regards action by institutions of the Community and of the Member States when executing Community law on the one hand and more lenient standards as regards other action by Member States merely connected to Community law on the other. It has already been emphasised that, in this regard, it is not possible to apply the same standards if conflicts with core national opinions on the reconciliation of public and private interests are to be avoided and an organic development of common European standards is to be secured. A good example for such a more lenient test is the recent Omega judgment of the ECJ, in which the Court left such a margin of appreciation to the Member State with respect to the interpretation of human dignity as a general principle of

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155 Recently repeated in the judgment ECtHR App No 31611/96 Nikula v Finland (2002) 38 EHRR 45, para 46.

156 See above section III.3(b)(bb).
law.\textsuperscript{157} Omega, a German company operating an installation known as a ‘Laserdrome’ in the city of Bonn, challenged the compatibility with Community law of a prohibition order issued against it by the Oberbürgermeisterin (Bonn’s local government). This order was issued because Omega used equipment in its establishment which included submachine-gun-type laser targeting devices and sensory tags fixed to jackets worn by players. The game played in the ‘laserdrome’ included hitting those sensory tags. At the core of the case was a conflict between freedom to provide services as a fundamental freedom and human dignity as a fundamental right. When striking the balance between those rights, a considerable margin of appreciation may be left to the Member States. The Court should nevertheless adequately address the interests and rights concerned, which was hardly the case in the Omega judgment.

The concept of a margin of appreciation may play a role not only in the vertical delimitation of competences between the Community and the Member States, but also at the level of horizontal division of powers. The description of the individual steps of applying the proportionality principle has already shown that, in certain questions, it is for the Community legislature to perform the prerogative of assessment with regard to the determination of suitability, necessity and appropriateness of measures.\textsuperscript{158} This prerogative goes much further in relation to the legislation than in relation to the executive. In future, it will be important to develop a concept to answer the question of which aspects may be better assessed by Community institutions. Therefore, the application of the concept of the margin of appreciation to Community law is to be welcomed. This is already discernible in some opinions and recent judgments of the ECJ.\textsuperscript{159}

However, when adopting the international law concept of a margin of appreciation into supranational Community law, it must be taken into account that the circle of Member States of the Community is—despite the recent enlargements—much more homogeneous than that of the High Contracting Parties of the ECHR. The Community also possesses a much greater level of integration, so a higher degree of common standards is therefore to be expected. Furthermore, a distinction must be made with regard to the type of measures to be examined. To take an example, it is absolutely necessary to develop a uniform standard in relation to executive action by the institutions of the Community.

Based on this approach, orientation may be provided by the figure of ‘democratic society’ referred to by the proportionality test of several rights guaranteed by the ECHR (see especially the second paragraphs of Articles 8–11 ECHR).\textsuperscript{160} Further differentiation according to the fundamental rights concerned is also conceivable. However, a sweeping distinction that would lead to a prima facie review for economic fundamental rights and an increased degree of control with regard to other fundamental rights must be rejected,\textsuperscript{161} as should any line of argumentation that assumes a higher degree of intensity of interference with regard to economic fundamental rights in the face of the original character of the Community treaties as

\begin{footnotesize}
\begin{enumerate}
  \item Case C-36/02 Omega [2004] ECR I-9609, paras 34ff; nevertheless there is no explicit reference to a margin of discretion of the Member State with respect to the fundamental right and the keyword ‘margin of discretion’ is only used with reference to the freedom to provide services (ibid, para 31).
  \item This is extensively discussed by Schildknecht, above n 114, 51ff.
  \item This was supported already by AG van Gerven in Case C-159/90 Grogan [1991] ECR I-4703, No 37; clearly to be seen in Case C-274/99 P, above n 70, para 49; however, it is to be doubted whether this case really required such a margin of appreciation as it was concerned with restrictions placed upon the expression of opinion of a civil servant for which a general standard at Community level must be developed. There were no obvious reasons for granting such a margin.
  \item After extensively discussing whether this tendency is derived from the case law of the ECJ, Schildknecht, above n 114, 259, tentatively concludes that this is the case.
\end{enumerate}
\end{footnotesize}
In view of the depth of integration achieved to date, a higher degree of intensity of a measure of interference may not be justified by referring to objectives of integration. However, this does not make it impossible to adhere to distinguishing on the topic concerned provided that this is controlled by primary law. Thus, the permissible degree of interference with a fundamental right is greater in an economic branch shaped by planned economy (such as agriculture) than in other economic branches. Nevertheless, under these circumstances it is not possible to do without an appropriate level of fundamental rights protection. A strict review of measures of interference with a high degree of intensity is indispensable for an appropriate protection of fundamental rights. Furthermore, it is suggested that the individual fundamental rights be distinguished, with a central area of protection specific to each fundamental right being carved out. As regards freedom of expression, this could be considered for those contents of the freedom of communication referring to the *res publica*.

A distinction concerning interference by the legislation dependent on whether or not the measure concerned was taken by a majority vote must, however, be rejected. The degree of control of sovereign interference may not be dependent on the relevant voting procedure under Community law; neither may it be assumed that a measure adopted by a unanimous vote will constitute less of a danger to fundamental rights. Despite all Member States thus having been involved in scrutinising a measure, there is still the possibility that a compromise endangering fundamental rights may have been achieved.

The recent case law of the ECJ reveals a rather uncritical transfer of the concept of margin of appreciation from the ECHR context to the Community fundamental rights discourse. A striking example is the recent judgment on the tobacco advertisement directive, Directive 2003/33/EC. Here the ECJ states that

the discretion enjoyed by the competent authorities in determining the balance to be struck between freedom of expression and the objectives in the public interest which are referred to in Article 10(2) of the ECHR varies for each of the goals justifying restrictions on that freedom and depends on the nature of the activities in question. When a certain amount of discretion is available, review is limited to an examination of the reasonableness and proportionality of the interference. This holds true for the commercial use of freedom of expression in a field as complex and fluctuating as advertising.

This line of argument is not at all clear. Does the Court refer to the Convention concept of margin of appreciation? And does the Court really want to claim that there should be no strict control of the Community legislation (sic!) in an area such as advertising as it is a fluctuating field? This would not be convincing at all. The fact that laws are divergent might be a reason for a margin of appreciation left to the Member States once fundamental rights are scrutinised when applying fundamental freedoms with respect to actions of Member States, but this cannot logically be referred to once the ECJ controls the Community legislation harmonising those laws strictly. On the other hand, maybe the ECJ rather wanted to reduce the level of protection of commercial communication in comparison to communication with *res publica* relevance. That might be more convincing. Once again, it becomes clear that the ECJ has to develop a legal doctrine of fundamental rights of its own. This might be inspired by the case law of the ECtHR, but must be adapted to the Union’s legal and political framework.
The Guarantee of the Essence of Rights (Wesensgehaltsgarantie)

As yet, the precise content of the guarantee of the essence (or the very substance) of rights remains unclear. Little orientation is provided by the law of the ECHR. It may be derived from the case law of the ECtHR that interferences which detract from the substance of a right are to be rejected categorically.\(^{167}\) In German constitutional law, the debate surrounding the interpretation of the guarantee of the essence of rights (which is contained in the German Basic Law) is mainly concerned with whether its relative or absolute theory should be followed.\(^{168}\) If one decides to follow the first approach in its more popular subjective variant, the guarantee of the essence of rights only possesses declaratory importance as the very substance must be determined by means of a balancing process in each individual case and thus, as a result, coincides with the proportionality test. In contrast, the subjective variant of the absolute theory is based on the belief that in each individual case there must remain a core of the right for the individual, while the objective variant seeks to prevent an undermining of the right altogether and demands a conservation of the substance of each right. There is no determination of the essence of rights in most other legal systems. However, references to the essence of rights may be found in the Greek, Italian, Portuguese and Spanish Constitutions and in those countries’ constitutional literature, which indicates the conservation of the substance of rights.\(^{169}\)

In this context, the remarks by Otto y Pardo are of special interest: with regard to Spanish constitutional law, he points out that it is inadmissible to reduce the protection of fundamental rights to a mere protection of the essence of those rights.\(^{170}\) This must be emphasised particularly in view of the sometimes cursory style of examination employed by the ECJ, which briefly denies that the very substance of the rights guaranteed by a fundamental right has been infringed before concluding that the interference with the exercise of a fundamental right was admissible.\(^{171}\) However, from this approach of the ECJ it is not possible to draw any definite conclusions as regards the function and the effect of the guarantee of the very substance of rights in Community law. Although this approach recourses to the guarantee of the very substance of rights, there is no precise definition nor delimitation vis-à-vis considerations of proportionality. In view of the argument submitted here in favour of a more highly-developed proportionality test and the fact that it is explicitly referred to in Article 52(1) of the Charter, the guarantee of the essence of rights should be accorded the status of an additional element of protection. However, no further review effect may be developed on the basis of the relative approach.

It may be noted that the essence of rights is mainly referred to by states whose catalogues of fundamental rights were developed as a response to totalitarian rule. This indicates the motivation for introducing an additional doctrinal figure in order to review interferences with human rights: law must be preserved from a complete loss of substance and must not be degraded to become an empty shell. Since the Union has overcome totalitarianism and socialism, a reference to the essence of a right as an explicit (and independent) safeguard seems reasonable. Thus, as a further admissibility criterion, Community law should examine whether a specific interference results in the entire fundamental right being undermined. Therefore, an absolute

\(^{167}\) See ECtHR App No 1474/62 et al, Belgian Languages Case ECHR [1968] Series A, No 6, para 5 (plenary session); see also R Weiβ, Das Gesetz im Sinne der Europäischen Menschenrechtskonvention (1996) 137ff.

\(^{168}\) For an overview Alexy, above n 62, 267ff.

\(^{169}\) See Kühling, above n 63, 288, 306, 315, 331, 343.


\(^{171}\) See, eg Case 265/87 Schräder v Commission [1989] ECR 2237, para 18; O Müller-Michaels, Grundrechtlicher Eigentumsschutz in der Europäischen Union (1996) 53, who discusses the way in which the Court guarantees the very substance of rights when protecting the fundamental right of property, claims that there is no real but only a verbal restriction.
and objective review of the essence of rights must be performed\textsuperscript{172} which, in everyday life, will possess a cautionary function vis-à-vis those institutions interfering in the exercise of fundamental rights.\textsuperscript{173}

d) Particularities of the Examination of the Equality Principle and Positive Obligations

A coherent structure of examination is even less developed for the fundamental rights and dimensions of protection other than those freedoms forming the core negative rights. The sole exception is constituted by the equality principle, which has featured extensively in the case law of the ECJ as Article 141 EC contains various aspects of the principle of equal treatment concerning equal rights for men and women in the workplace; additionally, the EC Treaty exhibits several other cases in which equal treatment is stipulated, especially the general prohibition on discrimination on grounds of nationality in Article 12 EC.\textsuperscript{174} These provisions stipulating equal treatment form part of the general equality principle affirmed by the ECJ. This prohibits ‘treating like cases differently,... without such differentiation being justified by the existence of substantive objective differences.’\textsuperscript{175} The principle of equality is violated if essentially similar situations are treated differently or if essentially different situations are treated similarly. It must be further examined whether there is a valid justification for differing treatment: some reasons for unequal treatment are per se inadmissible, such as differentiating on grounds of nationality pursuant to Article 12 EC. Finally, it must be shown that the unequal treatment is proportionate.\textsuperscript{176} It is thus possible to adopt essential aspects of the legal doctrine of fundamental freedoms. This also applies to the equality provisions in the third chapter of the Charter. However, the affirmative action contained in Article 23(2) of the Charter, which permits measures providing for specific advantages in favour of the under-represented sex, will require specific further development as regards its legal doctrine. This must occur by reference to existing case law of the ECJ.\textsuperscript{177}

It is also necessary to develop a separate coherent structure to examine violations of duties to protect. It has already been pointed out\textsuperscript{178} that the examination of a right providing protection is parallel to that of an original right to performance by the state so that the corresponding legal doctrine may be referred to. However, a concrete right providing protection will only be justified in the (exceptional) case of a reduction of the state’s scope for action to perform a specific act. In parallel to the examination of negative rights, it is probably more suitable to examine the violation of duties to act developed from the various fundamental rights, eg duties to examine. Similarly, in parallel with the examination of negative rights, a violation of a duty to protect may be examined in the event of total inactivity or of wholly inappropriate measures being taken. This corresponds to the approach to be found in the case

\textsuperscript{172} Arguing for such an approach of Community law to freedom of profession R Stadler, \textit{Die Berufsfreiheit in der Europäischen Gemeinschaft} (1980) 364ff.


\textsuperscript{175} See the seminal judgment in Cases 17/61 and 20/61 Klockner-Werke at al v High Authority [1962] ECR 325, 345; in the later jurisprudence, see eg Case C-306/93 SMW Winzersekt [1994] ECR I-5535, para 30; see also Kischel, above n 174.

\textsuperscript{176} On the structure of examination usually employed by the ECtHR see eg ECtHR (GC) App No 29515/95 Larkos v Cyprus ECHR 1999-I, para 29, and ECtHR App No 34406/97 Mazurek v France ECHR 2000-II, para 48.


\textsuperscript{178} See above section III.2(b).
law of the ECJ on duties to protect under the fundamental freedoms and to the approach taken by the Bundesverfassungsgericht with regard to duties of protection in fundamental rights.

As regards its structure of examination, a derived participatory right is usually similar to an equality right. As in that case, it must first be examined whether a certain group of persons may assert a certain claim and whether the petitioner belongs to that group of persons, or whether the petitioner may be compared to the other group of persons. It must then be examined whether possibly differing treatment may be justified.

However, the examination of an original duty of provision regularly consists of a single-step determination of whether a corresponding claim exists. This structure of examination also applies to some of the judicial fundamental rights and to various citizens’ rights containing a positive duty on part of the state. As far as the duties of provision and the corresponding original rights to performance are concerned, there remains a considerable need for further development of a legal doctrine of fundamental rights.

IV. Outlook: An Institutional and Substantive Working Programme

Both the existing basis and the substantive programme for developing the legal doctrine of fundamental rights have been outlined. The future case law of the ECJ will particularly need to further clarify the horizontal and vertical scope of fundamental rights, focusing on the development of the respective standards for review. In this context, an extension of the concept of margin of appreciation will prove to be of great use. Numerous individual questions of legal doctrine will also have to be solved, such as determining the contents of participatory rights and of rights to performance by the state. Additionally, further aspects that have not been addressed in this paper will have to be discussed. From the perspective of the theory of the fundamental freedoms, the question will be raised as to whether these contain elements of fundamental rights. The answer to this question largely depends on whether the fundamental freedoms continue to be extended as ‘limitation norms’ and, as part of this process, on the extent to which they become independent of their functional (referring to the internal market) and transnational (cross-border) roots; the greater the extent to which this occurs, the bigger the areas of overlapping fundamental rights will become. On the other hand, if the fundamental freedoms are to be mainly employed as prohibitions of discrimination, then their importance will diminish with the growing integrationist force of the internal market while fundamental rights will simultaneously gain prominence as standards for the review of harmonisation through secondary law.

Apart from the incorporation of the Charter into primary Community law, which will be realised by the ratification of the Treaty of Lisbon, which measures are to be taken to facilitate the ECJ discharging its function of protecting fundamental rights must also be considered with regard to institutional law. The answer to this question has to be found both within the Community system of legal protection and in coexisting relationships outside the Community. Thus, within the Community, individuals and, if necessary, groups must have better possibilities to bring an action before the ECJ. Ultimately, it must be deemed sensible to introduce the right to bring a complaint of unconstitutionality or of a violation of a fundamental right (in German, 179 On the structure of examination usually employed by the ECtHR in relation to judicial fundamental rights containing a positive duty, see eg ECtHR App No 15919/89 Palumbo v Italy, Judgment of 30 November 2000, paras 42 and 47.

180 See basic comment by Kingreen, below chapter 14; see also A Schultz, Das Verhältnis von Gemeinschaftsgrundrechten und Grundfreiheiten des EGV (2005) on the relationship between (Community) fundamental rights and fundamental freedoms of the EC Treaty.

181 For a different view, see Rast, above chapter 10. To the same effect and on the basis of Art 6(1) ECHR, see T Corbert and F Vanste, ‘Waves between Strasbourg and Luxembourg: The Right of Access to a Court to Contest the Validity of Legislative or Administrative Measures’ (1996) 32 YEL 475, 504ff.
Verfassungsbeschwerden). This would provide the ECJ with the possibility to strengthen its role as a constitutional court. Also pointing in this direction is the continuous shift of functions to the CFI, which at the same time is being turned into a substantial specialist court by the increasing use of chambers. As far as the relationship of coexistence of various interpreters of fundamental rights at European level between the ECJ, the ECtHR and national constitutional courts is concerned, a further expansion of the complimentary, sometimes parallel, exercise of functions is necessary. After an initial phase of conjuring up conflicts which proved quite fruitful, the current efforts to jointly develop and expand an appropriate system of fundamental rights protection at Community or Union level will have to be intensified. Therefore, the dimension of conflicts still conceivable at present should not be overestimated.

From a German perspective, the tense relationship between the ECJ and the Bundesverfassungsgericht in matters of fundamental rights eased after the latter reduced its review activities. Here, the performance of complimentary functions in the first pillar has been fully clarified. Pursuant to Article 23(1) of the German Basic Law, the Bundesverfassungsgericht limits itself to co-operating in the realisation of a unified Europe that ‘provides a protection of fundamental rights essentially equivalent to that’ of the German Basic Law. This reduces the function of the Bundesverfassungsgericht in that it may only examine whether there are indications—in an individual case or in general—pointing to the existence of structural deficits in the ECJ’s system of fundamental rights protection. Even in the event of the Bundesverfassungsgericht finding such deficits to exist, all possibilities for co-operation would have to be exhausted in accordance with the mandate to participate in the development of the EU in Article 23(1) of the German Basic Law before the Bundesverfassungsgericht could exercise its competence to quash Community law. This has been referred to by the former senior judge of the Bundesverfassungsgericht, Jutta Limbach, as a ‘very theoretical reserve competence’ (‘sehr theoretische Reservekompetenz’). This means in particular that the Bundesverfassungsgericht would have to express such reservations itself and refer the case to the ECJ under the preliminary ruling procedure provided for in Article 234 EC, or that it would have to oblige the courts of specialised jurisdiction to do so.

Even in its controversial judgment on the German act to implement the framework decision on the European arrest warrant, the Bundesverfassungsgericht did not back away from this stance either. In particular, this judgment can hardly be considered as a ‘declaration of war’ on the ECJ. The Court’s statement in an obiter dictum that the German legislative bodies may refuse the implementation of framework decisions if they infringe German fundamental...
rights is not problematic, as long as it does not conflict with a corresponding higher-rank case law of the ECJ. Maybe it only referred to the possibility of non-implementation of secondary law which is obviously contrary to primary law. However, even if the obiter dictum and the sub-text of the judgment were problematic, the main text would mitigate possible conflicts, because the Court applies national fundamental rights protection only within the area of discretion of Member States transposing EU law into national law. Therefore it may be doubted whether the Bundesverfassungsgericht seriously aims to have a conflict with the ECJ. As with the Solange case law, its main concern is to convince the ECJ of an effective fundamental rights review also in the second and third pillars.

Upon closer inspection, (putative) conflicts between the ECHR and the fundamental rights of the EU may also substantially be dissolved. In any case, the potential for conceivable conflict is largely reduced by a factual orientation of the ECJ towards the ECHR as interpreted by the ECtHR. Articles 52(3) and 53 of the Charter lead to the same result in that the standard of the ECHR is observed in the event of conflict. The Solange-like case law of the ECtHR, which reviews Member State actions by calling upon the responsibility of the signatory states of the Convention, largely contributed to the defusion of the conflict between Convention fundamental rights and Community law, although the ECtHR basically reserved the right in the Bosphorus judgment to review a comparable fundamental rights protection on a case-by-case basis at Community level. Apart from that, possible conflicts will be defused in future by the fact that the European Union can accede to the ECHR. In any case, the ratification of the Treaty of Lisbon would establish such competence on the part of the EU. Both the ECtHR and the ECJ will benefit from this accession as regards fundamental rights issues.

Ultimately, the everyday work of the various interpreters of fundamental rights is shaped by co-operation and inspiration with the aim of guaranteeing an optimal level of fundamental rights protection for all citizens. To this extent, the isolated dialogue on pending judgments must be reinforced by institutional possibilities for exchanging ideas. This is already happening in the mild, yet effective form of informal exchanges of opinions.

Irrespective of that, doctrinal jurisprudential contributions in the area of fundamental rights can inspire the fundamental rights case law of the ECJ, a fact that is proven by the recent decisions of the Court.

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189 Entscheidungen des Bundesverfassungsgerichts 113, 273, 301 (Europäischer Haftbefehl).
190 In this context, see Case C-475/01 Commission v Greece [2004] ECR I-8923, para 19.
191 To date, all putative discrepancies have proven to be harmless; see Kühling, above n 63, 57ff.
192 Grabenwarter, above n 31, 340ff; for further considerations, see the previous edition and Uerpmann-Wittzack, above chapter 4.
193 See the reference in n 65 above.
194 To this effect, see Uerpmann-Wittzack, above chapter 4, section III; see also C Eckes, ‘Does the European Court of Human Rights Provide Protection from the European Community’ (2007) 13 EPL 47, 65ff, criticising this case law and warning against ‘double standards’.
195 See Uerpmann-Wittzack, above chapter 4.
197 As regards possible further reaching forms of a co-operative relationship between the ECtHR and the ECJ, see S Alber and U Widmaier, ‘Die EU-Charta der Grundrechte und ihre Auswirkungen auf die Rechtsprechung’ [2000] Europäische Grundrechte-Zeitschrift 497, 507ff, who also believe in the value of informal contact (ibid, 510); Pache, above n 183, 606, who fears that showing consideration informally will not suffice in the future; Turner, above n 15, 466ff; on the possibility of a preliminary reference procedure, Pache, above n 183, 606; and Krüger and Polakiewicz, above n 183, 101, who coin the term Gutachtenkompetenz (competence to deliver an expert opinion); Turner, above n 15, 466ff, suggests the setting-up of a Chamber of Human Rights at the ECJ, which would further informal exchanges and which would result in a uniform level of human rights protection. If requested to do so, this Chamber would also give opinions as part of the legislative process on the human rights dimension of intended legislation.
Fundamental Freedoms

THORSTEN KINGREEN

I. The Fundamental Freedoms in the Jurisprudential Discourse

The concept of the ‘fundamental freedoms’ of the EC Treaty is one of the rare doctrinal creations concerning Community law that has proven to be successful. Though the German expression Grundfreiheiten (fundamental freedoms) as the generic term for the free movement of goods (Articles 28 and 29 EC, Articles 34 and 35 of the Treaty on the Functioning of the European Union (TFEU)), the free movement of workers (Article 39 EC, Article 45 TFEU), the freedom of establishment (Article 43 EC, Article 49 TFEU), the freedom to provide services (Article 49 EC, Article 56 TFEU) and the free movement of capital (Article 56 EC, Article 63 TFEU) cannot be found in the Treaties currently in force and is employed no more than casually by the European Court of Justice (ECJ),


2 The Treaties speak of fundamental freedoms. With reference to the European Convention of Human Rights, however, see eg Art 177(2) EC and Art 6(2) EU.

I sincerely thank Susanne Henck for her dedicated and patient assistance with the draft translation.
uncertain who holds the copyright for the term Grundfreiheiten.\(^4\) However, it is possible to date its first application back to the first half of the 1990s, since when its use has continually spread. Since the mid-1980s, the case law on fundamental freedoms had become increasingly inconsistent. It became difficult to draw the line of demarcation between those Member State measures which have negative effects and those which have no specific effect on the Common Market: from rulings on extended retail opening hours,\(^5\) to the restriction of employment on Sundays\(^6\) and the maintenance of the private law concept of culpa in contrahendo,\(^7\) each measure intended to regulate economic life appeared to require strict justification on the basis of the fundamental freedoms. Legal uncertainty reigned. Finally, in 1993, the judgment in Keck and Mithouard not only limited the scope of application covered by the fundamental freedoms, it brought an end to the decades of self-confinement of legal scholarship, in which the German legal literature on European law limited itself to pondering upon the exegesis of the ECJ’s decisions. It is no exaggeration to say that it heralded the end of the era of ECJ positivism. It was not only the still unanswered question whether the principles of Keck, developed for the free movement of goods, were also to be applied to the other fundamental freedoms, it was also the methodologically rather destitute reasoning of the Court for this jurisprudential turnabout, which legal scholars naturally understood as a virtual request to leave the specifics of an individual case behind and develop new theoretical concepts of their own. The ‘increasing tendency of traders to invoke Article 30 of the Treaty as a means of challenging any rules whose effect is to limit their commercial freedom’\(^8\) was a reason for the increasing workload of the Court, but was rather unsuitable as a general legal concept as the Court could always refrain from it in the next case.

These are the reasons why an evident change in the methodological approach of the analysis of the fundamental freedoms can be observed in German legal literature published after the Keck judgment. This change in approach was also responsible for the success of the newly employed term Grundfreiheiten. Alongside the treatment of singular specific topics, for the first time publications tried to develop and deduct the common theoretical and methodological features of the principles of the free movement of goods and workers, the freedom of capital movements and payments, and the freedom of establishment and to provide services. Generic terms were developed, as it was believed that the subject matter that was categorised with these terms would then be accessible by a systematic and uniform approach, when focusing on conceptual similarities rather than circumstantial differences. Thus, the new term stands for the understanding that a general theory on fundamental freedoms was required. In this analysis,

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\(^2\) The earliest source known to this author is H Runge, ‘Das Recht der Europäischen Gemeinschaften’ [1964] *Juristische Schulung* 305, 307.


\(^6\) Cases C-267/91 and C-268/91 Keck [1993] ECR I-6097, para 14; see also below section II.1(c).
German legal scholars are supported by the case law of the ECJ, which increasingly emphasises that the fundamental freedoms are indeed based upon common methodological principles.9

This change of approach to a more systematic analysis of the fundamental freedoms has influenced all legal literary genres since the mid-1990s. In academic literature, this is best demonstrated by the example of Rudolf Streinz’s standard work on fundamental freedoms. Not only has the sheer number of pages relating to the fundamental freedoms almost doubled between the first edition in 1992 and the fourth in 1999, the textual structure of the work reveals a striking material change in the scholarly perception of the subject matter during this decade. Whilst, in the first edition, the fundamental freedoms were dealt with each in a separate chapter and the general principles applying to all freedoms were only treated in the context of the free movement of persons, spanning some three pages,10 the fourth edition contains a whole separate chapter on the issue headed ‘The Fundamental Freedoms of the Common Market’ and almost half of it is dedicated to a description of the general principles.11

A comparable development took place with the legal commentaries: whilst earlier editions refer to fundamental freedoms only in passing, today the term and concept is to be found in every keyword index.12 Despite the immanent limits of a commentary that treats every article of a law or statute separately, even in these publications the authors try to implement a systematic methodological approach based upon the general principles of German fundamental rights.13

The same can be observed for articles published in law reviews or other legal magazines and periodicals: first to notice a ‘convergence of the economic freedoms in European Community law’14 was Peter Behrens in 1992. Since 1995, articles on the topic of the so-called Allgemeine Lehren (general theories)15 and on a methodological ‘convergence’ of the fundamental freedoms16 have been published regularly. Even singular methodological issues, in particular those pertaining to the direct horizontal effect and the grounds for justification, are discussed uniformly for all fundamental freedoms.17

A compendium on fundamental freedoms, several dissertations and other monographs complete this picture of the literary situation.18

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12 See the more recent commentaries from C Caliess and M Ruffert (eds), EU/EGV (3rd edn 2007); J Schwarze (ed), EU-Kommentar (2nd edn 2009); R Streinz (ed), EU/EGV (2003).
17 See also references below in sections III.1(b) and IV.
18 See W Frenz, Europäische Grundfreiheiten (2004); M Hoffmann, Die Grundfreiheiten des EG-Vertrags als koordinationsrechtliche und gleichheitsrechtliche Abwehrrechte (2000); T Kingreen, Die Struktur der
This theoretical systematic approach is surely the very contribution some expected, some hoped and some feared the German European law jurisprudence would supply. In his education, the German jurist has been imprinted with the idea that not only the methodology concerning German fundamental rights but all legal scholarship is an attempt to systematise and methodise the plenitude of individual regulations. Based on such a systematised body of knowledge, decisions of the courts and scholarly opinions on law in accordance with general theoretical concepts and categories have been developed. The primary concern and pursuit of German legal education is not the question of the adequacy or reasonableness of a (legal) system, but the construction of such a system by means of methodology. Legal methodology wants to develop abstract common principles for connected complexes of rules to facilitate the application of the law and the predictability of decisions by administrators or judges, and to thus enhance the effective implementation of the law in general.\(^{19}\)

This approach to the subject matter, widespread in the German European law jurisprudence, is not undisputed and has been urged to justify its methods. One critique of this approach is that it is overly self-contemplative and is hence not adaptable to other schools of Europeanised scholarship of European law. Such a critique is justified if the methodological principles developed for a national set of rules are introduced indiscriminately and without adjustment to the European discourse; if jurisprudence does not acknowledge social or economic developments; and if, as a result, ‘closed circuits of discussion’\(^{20}\) on the national or discipline level are installed, signalling a lack of willingness to join in the European-wide reflection on methods.\(^{21}\) Such critique is, however, unjustified if and as long as it is based on an exaggeration of the classic antagonism between the Anglo-American case law approach, ie the comparison of individual cases,\(^{22}\) and the systematic abstract method more prevalent in systems of civil law, like Germany, and further, if it culminates in the conclusion of the total incapacity of the latter to contribute to the understanding of European law. Theoretical concepts do not just appear out of nowhere. Cases inspire the methodological imagination of jurists, and decisions of the courts, correct and incorrect, are the very basis of jurisprudential systematising analysis. This applies even more to European law that mainly derives its essential content and structures from the continuing branching out of the ECJ’s case law, rather than from the provisions of the EC primary law’s framework and secondary law, which is so often a result of political compromises.\(^{23}\)

Based on case material, on comparison and comparability, systematic abstract concepts are a crucial instrument in the attempt to attain knowledge beyond singular cases. Methodology is not doctrine, but ‘assistance in the process of enhancing the feasibility of abstract regulations for implementation’,\(^{24}\) ie assistance in the positivistic motivated attempt to organise the existing stock. Finally, methodology makes law—which should not simply be memorised case by case—


24 F Müller, juristische Methodik (1997) 229 (my translation); see also KF Röhl, Allgemeine Rechtslehre (2001) 414ff.
case—both more teachable and learnable. However, methodology that refrains from offering an abstract framework for the solution of cases becomes as fruitless and vain as a submissive acceptance of ECJ positivism without criticism.

The fundamental freedoms are an important—and maybe the best—demonstration of the hypothesis that a pragmatic case law approach and an abstract theoretical–methodological analysis are not irreconcilable antipodes. On the one hand, no other legal area of European Constitutional law can draw from such a plenitude of case material, which every jurisprudential analysis must be based upon. On the other hand, there is no other field of law whose theoretical basic principles are as disputed, as, indeed, the very plenitude of the case material is the result of the lack of predictability of court decisions, and this again is a result of the under-developed theoretical–methodological discourse.

This chapter starts by addressing the historical political context of the methodology of the fundamental freedoms (II), continues with a systematisation of the fundamental freedoms based on a theoretical concept (III) and ends with a short perusal of the discussion on the horizontal effect of fundamental freedoms between private parties (IV).

II. The Fundamental Freedoms in the Processes of Europeanisation and Constitutionalisation

The main question such a methodological approach to fundamental freedoms has to answer is what fundamental freedoms are. One assumes that they might be something similar to fundamental rights, but at the same time are quite different. The features of this ‘being different’ become clearer when embedded in the context of constitutional law of the EU: just as with any other legal rule, the key to understanding the fundamental freedoms is their legal and political context. Yet to understand their context enlightens their historical role in the process of Europeanisation and Constitutionalisation and their present function in constitutional law. As an element of systematic interpretation, this function is an indispensable prerequisite to understand the theoretical structure of the fundamental freedoms.

1. The Political Institutional Context I: The Horizontal Relationship between the ECJ and the European Legislator

a) The Fundamental Freedoms during the EC Crisis

Historically, the prominent contribution of the fundamental freedoms to the successful implementation of the Common Market is a consequence both of the original weakness of the European legislator and of the subsequent reaction of the ECJ, considering itself an ‘emergency power stand-by unit’ of integration. Both circumstances established the typical complementary relationship between acteur and souffleur. Whenever and insofar as legislative organs lacked the

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25 See A von Bogdandy, above chapter 1, as well as the committed plea for ‘more methodology’ in European law by J Kühling and O Lieth, ‘Dogmatik und Pragmatik als leitende Parameter der Rechtsgewinnung im Gemeinschaftsrecht’ [2003] Europarecht 371ff.


27 As a classic source, see CF Savigny, System des heutigen Römischen Rechts (1840) vol I, 214; for a more recent source of systematic interpretation in European law, see Case 283/81 CILFIT [1982] ECR 3415, para 20, according to which ‘every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole’.
political capacity to fulfil the task of integration, which was initially in particular the Council, the ECJ would throw itself into the breach and sweep away any hindrances in the way of establishing the internal market.

When, in 1963, the ECJ rendered the individual a direct subject of Community law—true to Monnet’s motto that it is not states that are united but people—and confirmed the primacy of Community law over any rule of national law in the Costa v ENEL judgment of 1964, the political process of integration was on the verge of slipping into its first deep crisis.

Shortly after the initial euphoria at the beginning of a new Europe waned, the fundamental differences between the key political players regarding the further process of integration surfaced. These differences culminated in 1965 in the French ‘empty chair policy’. The French obstruction was only ostensibly related to the financing of the common agricultural policy; actually and more fundamentally it was targeted at the constitutional structure of the Community and specifically a rejection of employing majority decisions within the Council and strengthening the Council and the Parliament. In the end, its aim was to prevent any changes to the constitutional structure of the Community. Though the crisis was settled by the Luxembourg Compromise of 29 January 1966, a heavy political price was paid: the requirement of unanimity within the Council remained in effect, which effectively inhibited all necessary harmonisation of laws for the development of the internal market.

The problem came to a head in 1973 due to the accession of new Member States (the UK, the Republic of Ireland and Denmark), which increased the problems of harmonisation once again and rendered the decision-making process even more burdensome. The more the legislature exhibited functional incapacities, the more evident the functional advantages of the Court became, an insight the judges of the Court themselves were not the last to gain.

An obligatory jurisdiction imposed on the Member States beyond the nation-state was in any case a truly revolutionary innovation on the international political stage. Moreover, of all the European institutions, the Court was in the best position to fuel the vehicle of integration, which was at that time slowing down somewhat: unlike the Council, the Court must answer when called upon for a decision and, as far as the Court was concerned, there was never any doubt that its judgments—again in comparison to political decisions—would be accepted, albeit with the occasional grumble. Therefore, when efforts towards harmonisation came to a halt, two particular judgments of the Court must have seemed like the light at the end of the tunnel. Both rulings still influence the doctrine of fundamental freedoms.

Since the Dassonville decision in 1974, the ECJ has interpreted national trade rules which ‘are capable of hindering, directly or indirectly, actually or potentially, intra-community trade’ as a violation of the principle of free movement of goods. This was a ‘double breakthrough’: first, the individual was now in the position to file infringements of the fundamental freedoms with all domestic courts; and secondly, the Dassonville formula does not limit the scope of

31 Haltern, above n 26, § 2, paras 68ff.
32 R Lukes, ‘Rechtssetzung und Rechtsangleichung’ in MA Dauses (ed), Handbuch des EU-Wirtschaftsrechts (looseleaf, last update Apr 2008) s B II, para 87, in which it is claimed that the 1970s represented a practical standstill for harmonisation.
34 See Case 8/74 Dassonville [1974] ECR 837, para 5. The same applies to the freedom to provide services: see Case 33/74 van Binsbergen [1974] ECR 1299, paras 10–12. After some initial reluctance the ECJ now applies the principle of the free movement of persons to all transnational interferences. This is particularly evident in the following cases: Case 107/83 Klopp [1984] ECR 2971, para 19, on the freedom of establishment, and Case C-415/93 Bosman [1995] ECR I-4921, paras 90 and 96, on the free movement of workers.
application to particular forms or means of hindrances, and therefore protects not only against discrimination, but also against all other forms of constraint (rights of freedom). With the Cassis de Dijon decision, the ECJ formulated its prerogative to submit all limitations on trade in the common market to its scrutiny, applying the standards of the fundamental freedoms as a test for legality.

Such limitations were and are primarily those hindrances which had not been abolished by means of legislative harmonisation. National measures containing such unjustified hindrances are not invalid but merely inapplicable in cross-border trade. Despite the validity of national regulation in intrastate trade, the decisions of the ECJ put pressure on the national legislative bodies to harmonise intrastate with interstate regulation, so that they do not place citizens in a worse position in intrastate matters than in those of a cross-border nature (reverse discrimination). This shows that any interpretation of the fundamental freedoms as a test of national measures influences the balance of power between the legislature and the judiciary as intended by the constitution. The wider the ECJ interprets the fundamental freedoms, the more the weight is shifted from the principles of harmonisation of laws (in particular Article 95 EC) towards those of the fundamental freedoms, from the legislator towards the ECJ.

At first, this precarious constitutional shift was considered an opportunity rather than a problem. This perception was favoured by the fact that the legislative powers were vested mainly in the executive and not in a legislator, directly democratically legitimised by election, whose political primacy might have had to be respected.

In the second influential decision, of Cassis de Dijon in 1979, the ECJ once again slipped into the role of the souffleur in the political process of integration. From the principle of free movement of goods, the Court derived the requirement that the import of goods that were legitimately manufactured and marketed in another Member State must not be subject to any hindrance. This was a clear rejection of the opinion—widespread at the time—that such restrictions were to be accepted until the overall harmonisation of the Community had been achieved. At the same time, the ECJ had given itself the role of herald of the principle of mutual recognition (the so-called country of origin principle), which has since been adopted and implemented by the other organs as a ‘new strategy’. The decision of Cassis de Dijon was a milestone decision also in terms of methodology. The ECJ interpreted Article 28 EC to contain implied restrictions, which have since been acknowledged as unwritten grounds of justification alongside those of codified law (eg Article 30 EC). These implied restrictions are applicable to all fundamental freedoms: any obstacle to internal trade that may arise out of differences in domestic rules on the marketing of products must be accepted ‘insofar as these provisions are necessary to meet mandatory requirements’.

This formula answered the needs of the time: on the one hand, the wide scope of application of the Dassonville formula needed recapturing on the level of justification; one the other hand, in this critical phase of the process of integration, the necessary flexibility of judicial harmonisation of laws was preserved. As a result, the contours of Article 28 EC began to blur, for the decisions of the ECJ did not state much more than that all unjustified hindrances of transactions within the internal market were forbidden, not elaborating on any of the many questions that its reasoning stirred up. However, in a time of faltering legislative harmonisation, firm theoretical principles appeared to be

40 See Case 120/78, above n 37, para 8.
inappropriate restrictions on the successful process of harmonisation preformed by the judiciary.

This was how the methodological foundation of the fundamental freedoms was laid in the 1970s. The decisions of Dassonville and Cassis de Dijon extended the fundamental freedoms to rights of freedom against all undue constraints on cross-border transactions, independent of the question whether this constraint constitutes a discrimination (rights of freedom). The ECJ became the motor of harmonisation of laws and the fundamental freedoms its fuel. The acknowledgement of subjective rights promoted the citizens to the position of an important ‘functionary of integration’; their own interests were mobilised and used as a contribution to the achievement of a Community legal order.

Yet this is far less remarkable than the fact that, though the Dassonville and Cassis de Dijon decisions—with their wideness and pallid methodological contours—are only understandable in the particular political constellation of the 1970s, they still have a formative influence on ECJ case law, even in a fundamentally changed political environment.

b) The Fundamental Freedoms after the Single European Act

Without a continuously self-renewing political will for integration the vision of a European unification would not have been possible in the long term, and, as such, this political will had to manifest itself in continuous legislation. Thus, various institutional reforms, especially regarding legislation, more than once rescued the Community from crisis in the 1960s and 1970s.

A significant progress regarding democracy in the EU was the upgrade of the European Parliament to a democratic co-legislator. Though the first direct vote in 1979 did not alter its limited powers, it did change the basis of legitimation and thereby its self-conception. This was expressed above all in a constitutional initiative, which gave a significant impetus for the Single European Act in 1987 and in which the Parliament, for the first time in the legislative process, actively participated. Since then, the participation of the Parliament has gradually been expanded, in particular by implementation of the co-decision procedure under Article 251 EC.

The second fundamental institutional change concerned the decision-making process in the Council pertaining to harmonisation of laws. In order to bring the Commission’s ambitious internal market programme of 1985 into practical effect, the Single European Act contained Article 100a EEC Treaty (today Article 95 EC): this Article introduced—for measures on harmonisation of laws—the first exemption from the principle of unanimity. Another major obstacle in the way of swifter harmonisation dating back to 1960s and 1970s was finally removed: up to 31 December 1992 over 90% of the notified legal acts contained in the White Paper were passed and actually put into action.

One could presume that the realisation of the legal process and the strengthened legislative activity on the part of the European legislative would have had an effect on the interpretation and theory of individual rights (fundamental rights, fundamental freedoms). Indeed,
concerning the fundamental rights, an analysis of the case law proves that assumption. Whilst, by the end of the 1980s, the number of decisions relating to fundamental rights could be counted on the fingers of two hands, it increased significantly in the beginning of the 1990s.\footnote{For a more elaborate compilation, see Kingreen, above n 13, Art 6 EU, paras 93ff.} A praetorial catalogue of fundamental rights was compiled, no longer solely restricted to the exercise of economic rights, and with it, the first elements of a European theory of fundamental rights were formulated.\footnote{See J Kühling, above chapter 13.} The reasons for this were obvious: exercising a strengthened legislative power, the potential of the Community to become an adversary of private spheres protected by fundamental rights was now perceived more acutely, and thus the need for supranational legitimation grew—especially after the ECJ asserted categorically that fundamental rights guaranteed by national law were not being applied as a legal standard for legal acts issued by the Community.\footnote{See Case 11/70 \textit{Internationale Handelsgesellschaft} [1970] ECR 1125, para 3.}

One could have expected that a comparable shift of perception would also take place regarding the fundamental freedoms, as their formulas were only understandable by reference to the specific constitutional situation of the 1960s and 1970s. Far from it! The principles introduced by \textit{Dassonville} and \textit{Cassis de Dijon} remained relatively unchanged, at least until the beginning of the 1990s. Largely supported by the literature, all fundamental freedoms were gradually transformed from general principles of non-discrimination into rights of freedom.\footnote{For an overview of the developments in jurisprudence and legal literature, see Kingreen, above n 18, 40; for a definition of the term ‘right of freedom’, see above section II.1(a).}

Though the requirement of a cross-border reference point was formally maintained,\footnote{There is an emphasis on the inapplicability of the fundamental freedoms to ‘internal matters’ in Case C-41/90 \textit{Höfler} [1991] ECR I-1979, para 37; Case C-332/90 \textit{Steen} [1992] ECR I-341, para 9.} the ECJ found itself presented with an increasing number of national regulations, which no longer had anything to do with the problem of crossing national borders within the European Common Market. The reason was that almost any national regulation could potentially influence cross-border transactions and the indistinctive \textit{Dassonville} formula did not serve as an effective filter.\footnote{Regarding the importance of the definition of ‘discrimination’ for the fundamental freedoms’ methodology; see below section III.1(a).} In the hands of the market participants, the fundamental freedoms were turned into a sharp sword, giving them the unforeseen opportunity to do away with the ‘old ways’, the elimination of which had not been accomplished in the national political process. Often the gravamen of the national regulations was argued simply with the dissimilarity of the national legal systems. This was the case, for example, with the German prohibition on price comparisons in advertisement that was considered as an interference, as the various systems of advertisement and sales promotion would result in the entrepreneur having to adapt to a new system in every single Member State.\footnote{See Case C-126/91 \textit{Yves Rocher} [1993] ECR I-2361, para 10.} In this case, however, the Court decided which system of regulations was the most suitable.\footnote{R Jollet, ‘Das Recht des unlauteren Wettbewerbs und der freie Warenverkehr’ [1994] \textit{Gewerblicher Rechtsschutz und Urheberrecht International} 1, 14.}

c) The Fundamental Freedoms in the Era of Constitutionalisation

With the Treaty of Maastricht, the process of integration entered a new phase, best described as the period of constitutionalisation. At the same time, as the economic integration deepened through the Economic and Monetary Union, the necessity to understand Europe as a political entity was articulated, thus requiring the EC and EU Treaties to develop a form of constitutional
legal system that would overcome the traditional connection between state, citizen and constitution.\footnote{56}

The theory of the fundamental freedoms has essentially remained in the state of the 1970s, unaltered by this constitutional development. This assessment is not substantially shaken by the 1993 judgment in \textit{Keck and Mithouard}.
\footnote{57} At most, it is possible to speak of a ‘cautious change’,\footnote{58} as the main principles enumerated in \textit{Dassonville} and \textit{Cassis de Dijon} have not been subject to significant correction. Since the decision in \textit{Keck}, the ECJ has made the well-known distinction between rules which contain provisions relating to the goods themselves (eg their description, form, measurements, weight, constitution, presentation, labelling and packaging) and those that serve to limit or prohibit the various means of sale. Whilst the product-related, indiscriminately valid provisions would be subject to Article 28 EC, measures related to the modalities of sale no longer represent interferences with that very provision. The requirement clearly is that the relevant provision affects both internal and external products in the same manner, legally as well as factually.\footnote{59} What is remarkable about this decision is that it led to a renaissance of the requirement of discrimination. Given up in the 1970s—apparently prematurely—it was resuscitated in relation to the modalities of sale, for \textit{Keck} exempts non-discriminatory modalities from the scope of applicability. However, the question whether the test in \textit{Keck} can be applied to the other fundamental freedoms is still unanswered. If applied, the next question is what the consequences of such a transfer are for the test of justification, which partially differentiates between discriminating and non-discriminating measures.\footnote{60}

Much has been speculated about the reasons underlying the decision in \textit{Keck}. It seemed reasonable to place the decision in a wider context, drawing on the altered constitutional legal norms to explain \textit{Keck}. For example, the principle of subsidiarity as introduced by the Maastricht Treaty (now Article 5(3) EC) has variously been made responsible\footnote{61} for the ‘dramatic judgment’\footnote{62} in the so-called ‘November Revolution’.
\footnote{63} Others observe the return to a rather more traditional practice of free trade within the internal market.\footnote{64} Another explanation is that this change might be due to the introduction of the majority voting in the Council. The same principle reduced deficits in the EU’s legislative capacity. This might have persuaded the ECJ to resign freely from its role of an eager promoter of the harmonisation of laws. However, the ECJ itself offered a more pragmatic reason for the new approach, namely that it was merely a matter of an increasing workload.\footnote{65} In fact, in the short term the \textit{Keck} judgment led to a reduction in the workload of the Court, because part of the national regulation did not fall within the scope of the fundamental freedoms anymore—due to an impractical fiction.\footnote{66} As a result, there was no change in the theory on the fundamental freedoms as developed in \textit{Dassonville} and \textit{Cassis de Dijon}: their wide formulation still means that the fundamental freedoms not only serve to protect from specific cross-border limitations, but far beyond that

\footnote{56} For evidence on the debate, see C Calliess, in idem and Ruffert (eds), above n 12, Art 1 EU, paras 20ff.
\footnote{57} Cases C-267/91 and C-268/91, above n 8.
\footnote{58} W Möschel, ‘Kehrtwende in der Rechtsprechung des EuGH zur Warenverkehrsfreiheit’ [1994] \textit{Neue Juristische Wochenschrift} 429, 430.
\footnote{59} See Cases C-267/91 and C-268/91, above n 8, para 16; the reasoning has been upheld ever since.
\footnote{60} See below section III.1(b).
\footnote{63} N Reich, ‘The “November Revolution” of the European Court of Justice’ (1994) 31 \textit{CML Rev} 459, 459.
\footnote{64} See N Reich, ‘Urteilsanmerkung’ [1993] \textit{Zeitschrift für Wirtschaftsrecht} 1815, 1816.
\footnote{65} See Cases C-267/91 and C-268/91, above n 8, para 14.
\footnote{66} For more see below section III.1(a)(bb).
the ECJ still regards them as general claims for deregulation, at least as far as product-related regulations are concerned.\textsuperscript{67}

It can therefore be concluded that the basic elements of the structure of the freedoms as laid down in the 1970s have emerged almost unscathed from the subsequent fundamental constitutional reforms. The wide and blurred formulae, born out of legal urgency, preserved necessary flexibility in the crisis of the Community and have survived even to the present day. This is astonishing, since the fundamental freedoms, like any other legal principle, depend upon their context and may only be interpreted within this context. Judicial interpretation of a constitution adjusts the constitutional power structure and is restricted by the same structure at the same time. It is obliged to serve the principle of the separation of powers, not as an abstract idea but rather as the concrete concept outlined by the respective constitutional system. Each theory relating to subjective rights therefore reflects upon their general character, their normative direction and their substantial scope of application in the context of a particular constitution and on the basis of the principles of a constitutional theory or notion of the state.\textsuperscript{68}

The central issue of any theory on subjective rights emerges from this dependency on the context: whether it is existentially linked to a particular constitution and its historical roots in a certain point in time or whether it contains a vision, derived from an overarching understanding of the same constitution, that might outlast the concrete historical and constitutional situation in which it was first formulated. Before attempting to answer this, the vertical political institutional context of the matter needs to be explored.

2. The Political Institutional Context II: The Vertical Relation between the ECJ and the Legislators of the Member States

The dependency of the fundamental freedoms on their constitutional context is even better perceived when considering not only the horizontal, inner-European relation between the ECJ, the Council and the Parliament, but also when taking the vertical relationship between the ECJ and the legislative organs of the Member States into account.

a) Fundamental Freedoms as Multi-level Norms

In terms of economic constitutionalism, the fundamental freedoms are, in accordance with Article 14(2) EC (Article 26(2) TFEU), components of the internal market. The concept of the internal market is intended to achieve the still uncompleted objective to remove all obstacles on intra-community trade and to merge the national markets into one unified market.\textsuperscript{69} This market is intended to be the place where the individual freedom to economic activity might be exercised without regard to borders between Member States. It is not borders, but economic efficiency that shall be the prime point of resource allocation. Hence, the final goal of the economic constitutional concept of the internal market is to diminish the relevance of legal differences between the Member States for economic decisions—described by Walter Hallstein, in comparing them to the turnpikes at internal crossings, as ‘invisible borders’\textsuperscript{70}—as much as possible. This is where the fundamental freedoms come into play: they are the public law ‘trampoline’ that gives all participants in the EU economy the opportunity to leap over the normative ‘turnpikes’ between the national markets.

\textsuperscript{67} Eg Case C-415/93, above n 34.


\textsuperscript{69} See Case 15/81 Gaston Schul [1982] ECR 1409, para 33; see also A Hatje, below chapter 16.

\textsuperscript{70} See W Hallstein, Der unvollendete Bundesstaat (1969) 94.
This function of the fundamental freedoms points to a more fundamental issue: that the federal structure of a political association is, for the equality of its subjects, an ‘open flank’. Every federal system entails the danger that each member state will seek to influence the competition with other member states by means of open favouritism of its own citizens or by increasing opportunity costs by legal differences to other systems, causing the costly necessity of adaptation. One could speak of federal risk zones. Most federally organised states, therefore, have multi-level norms benefiting individuals, specially tailored to such risk zones. They are always part of the supreme all-state legal order. Through the power of their inherent supremacy, they render the membership to one member state irrelevant for the treatment by another. Unequal treatment by a member state for the reason that an individual belongs to another member state is therefore prohibited. Multi-level norms transfer into EU law the principle of non-discrimination on grounds of nationality developed in public international law: all members of the system should be treated equally in all states, regardless of their personal relation to a single other state. Thus, deficits emanating from the fact that non-citizens lack the right to vote and thereby lack an important right to influence the democratic make-up and socio-economic system of a member state they are not citizen of can also be compensated for. To compensate for the lack of political participation, economic and social participation is offered instead. The entitlement to intra-federal or intra-regional equality of treatment does not necessarily require the incorporation of the same laws in each legal system. Nevertheless, it facilitates legal unification, as equal treatment of one’s own citizens alongside those of other member states can best be achieved by implementing uniform (minimum) standards.

Based on the idea of diminishing the tensions of federal risk zones, multi-level norms have only really taken a constitutional hold in political systems with a distinctive federal character, eg in the US (Article IV, section 2(1)—the so-called interstate privileges and immunities clause), in Switzerland (Articles 43(2) and 43(4) of the Bern Constitution), in Article 139(1) of the Constitution of Spain and in Article 33(1) of the German Basic Law (the so-called common indigenat). However, multi-level norms are not restricted to the states with a federal system; multi-level norms can be found wherever federal risk zones exist, in other words, also on the level of supranational and international co-operation. Therefore, if the concept of the multi-level system is applied to all political associations with a polycentric structure of power, the fundamental freedoms can be characterised as multi-level norms. The fundamental freedoms are complemented by other prohibitions of discrimination with the goal to further transnational integration, eg Article 12(1) EC, furthermore, Article 19(1), 1st sentence EC in relation to municipal voting, Article 75(1) EC for transport and Article 90(1) EC for taxation policies. Article III(4) GATT is another increasingly important international multi-level norm.

The prohibition of unequal treatment based on citizenship presupposes the coexistence of different legal systems, which are superimposed by an all-state legal order. These premises explain the dependency between the multi-level norm and the concrete allocation of powers between the all-state and state levels. The multi-level norms equalise differences between the legal systems of the member states: to the extent to which law is unified by a cross-national legal system, they correspondingly lose their practical relevance. The historical development in Germany exemplifies this: whereas Article 3(1) of the Constitution of the German Reich of 1871 had a wide scope of application due to the distinct federal structure of the German Reich, Article 33(1) of the German Basic Law has the mere status of a ‘wallflower’ in the ‘unitarian federal state’ (Konrad Hesse) of the Federal Republic of Germany. In contrast, other examples

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71 See G Dürig, in T Maunz and G Dürig, Kommentar zum Grundgesetz (looseleaf, last update Dec 2007) Art 3(1) para 233.
72 On this knock-on effect of the fundamental freedoms, see above section II.1(a).
74 See also U Pfütze, Die Verfassungsmäßigkeit von Landeskinderklauseln (1998) 14 and 40ff.
of multi-level norms, such as the US interstate privilege and immunities claim, have remained significant principles even today, and are no less disputed in their scope than the scope of the fundamental freedoms.\footnote{75} In relation to Article III(4) of the General Agreement on Tariffs and Trade, whether and to what extent the theory developed around the fundamental freedoms can be transferred to the World Trade Organisation (WTO) remains a subject of controversy.\footnote{76} Thus, it can be said for all multi-level norms that (i) multi-level norms are practically relevant to the extent that competences remain with the constituent states; and (ii) their relevance necessarily decreases with the degree to which the law of all constituent states is harmonised.\footnote{77} The insight into the interdependence of multi-level norms and the constitutional allocation of competences is the decisive prerequisite for the formulation of a theory of multi-level norms. It also demonstrates that the individual multi-level norm cannot be understood without cross-reference to its concrete constitutional and organisational context.

\textbf{b) The Fundamental Freedoms in the Constitutional Federation of the European Member States}

The reduction of federal risk zones by the fundamental freedoms facilitates the harmonisation of laws. Especially in the formative years of the Community, harmonisation contributed to the establishment of the new legal system.\footnote{78} However, this knock-on effect not only represents an opportunity, it can also cause problems, because the claim to equal treatment of the individual can collide with the competences of the Member States. This tension is noticed most acutely in those policy fields in which the Member States interests and competences are distinctively articulated, eg social or defence policy. The fundamental freedoms therefore find themselves in a unique, yet for multi-level norms typical, area of conflict: they should diminish all discriminatory effects that might emanate from the coexistence of all national legal systems gathered under their conceptual roof without levelling federal diversity and differences. This seems like the attempt to square the circle.

A broadening of the perspective reveals that this issue is not merely a problem related to the allocation and delineation of powers between the various political elements but, rather, one of asserting the primacy of politics in trans- and supranational contexts. In political science this is referred to as the ‘asymmetry between positive and negative integration’.\footnote{79} Whilst negative integration refers to the necessary removal of national trade restrictions to realise the free internal market, positive integration means active measures of the Community in the pursuit of positively defined policy goals beyond the idea of the internal market, eg in the policy field of environment or consumer protection. The advantage that negative integration (supposedly) has in comparison to positive integration is that it can implement Community law in the national legal systems almost ‘behind the back’ of national politics and can thus contribute considerably to the realisation of the internal market. Negative integration as a prerogative of the Community needs neither to consider the vertical allocation of competences nor to deal with the tedious political caucus race for consensus: it just enacts the rights of the Community, ie the fundamental freedoms. The scope of negative integration depends only on the adjustment of the standard of examination; each alteration might lead to a shift in the vertical and horizontal balance of powers.

It has been often admonished that this asymmetry between the ever-advancing negative integration and the apparently stagnating positive integration, eg in social policy, may

\footnote{75} See also L Tribe, \textit{American Constitutional Law} (2000) 1250ff.
\footnote{76} Appropriately reserved is A von Bogdandy, ‘Verfassungsrechtliche Dimensionen der Welthandelsorganisation’ [2001] \textit{Kritische Justiz} 255, 278 as well as 425, 433.
\footnote{77} For an early reference, see P Laband, \textit{Das Staatsrecht des Deutschen Reiches} (1911) 186.
\footnote{78} See above section II.1(a).
ultimately cause a problematic ‘splintering of the responsibility for public welfare’ reflecting the crisis of the nation-states caused by decreasing steering capacity while challenged by internationalisation. In this regard, while the Community lacks the power of positive legislation, the Member States lose as ‘local heroes’ the ability to assert the primacy of politics in the supranational context and to react to the social and ecologically undesired side effects of cross-border transactions, due to the wide scope of understanding of the fundamental freedoms. Ernst-Wolfgang Böckenförde, a prominent scholar of constitutional law, cautions that the State’s merging of political, economic and social spheres to one political entity, which is the foundation of the modern welfare state and social market economy, once so arduously achieved, is now endangered by this very asymmetry.

This dichotomy between the European and Member States’ legal system, as well as between social and competition policy, is an unjustified acumination if set in such an irreconcilable opposition. Thus, negative integration may be a preliminary stage for positive integration and, consequently, may contribute to building transnational political institutions, which will ensure the enforcement of the primacy of politics in the supranational context. Notwithstanding this, methodologically untamed fundamental freedoms have the potential to place the mobility of a European civic society, or even a fraction of it, over the common public interests as articulated by the Member States. A supranational interpretation of the fundamental freedoms, which loosens the link between them and their specific transnational function, transforms them into claims for deregulation. The primacy of the primarily economically oriented Community law leads inadvertently to a priority of the economic interests of some individuals over the public interests concerning culture, society and environment, as realised in the organisation of the state. In short, this hierarchy of norms leads to unintended and unjustified primacy of certain policy fields and values. Such one-dimensionality obviously contradicts the original idea of a European ‘spill-over’: at no point in time had the primacy of the economic integration been designed to serve such a purpose. On the contrary, the decision to exempt social policy from the Community legislation was based simply on the disagreement of the competing protagonists France and Germany regarding their respective scope of influence on the project of the internal market; this was not, however, due to a general disdain for social politics. The underlying design of the future European Community rather understands transnational freedom and the provision of services of general interests by the Member States as the two halves of a whole, the economic integration as a key to the social and political integration.

The Commission is therefore right to emphasise that it must remain the essential objective of the Community to find equilibrium between the requirements of the internal market and the consideration of the general welfare interests. The Commission also concedes that maintaining this equilibrium is at present ‘a very tricky balancing act’: ‘the single market is continuing to expand and public services, far from being fixed, are having to adapt to new requirements’. The market mechanisms sometimes

82 See Böckenförde, above n 80, 25.
83 However, the question is justified whether this Hegelian idea of such an hierarchical monocratic steering of a whole civil society by the nation-state has not entered the archives of outdated political myths a long time ago, for more see U Haltern, ‘Europäischer Kulturkampf’ (1998) 37 Der Staat 591, 600ff.
84 For the categories of transnationality and supranationality, see below, s 3.
85 Thus, due to the primacy of Community law over national law, ie in this case German law, the regulations on social security systems are subordinated under the regulations on antitrust, though the respective provisions are on the same level of the hierarchy of norms. The consequence of this is that statutes on social security have to pass the test of antitrust laws (Arts 81ff, 86 EC).
have their limits; as a result the potential benefits might not extend to the entire population and the objective of promoting social and territorial cohesion may not be attained. The public authority must then ensure that the general interest is taken into account.

Therefore, the Community needs to respect the economic and social systems of the Member States. ‘It is for the Member States to make the fundamental choices concerning their society, whereas the job of the Community is merely to ensure that the means they employ are compatible with their European commitments.’

87 This assessment corresponds with the fact that the ECJ has shown prudent restraint in formulating impacts of the fundamental freedoms on the national social security systems, eg in initially applying the fundamental freedoms only as a prohibition of discrimination.

88 A methodological explanation for this surprising deviation, which continues in the test for grounds of justification, is not in sight. However, it is the only way to exempt the whole national regulation on welfare state issues from an additional need to justify; in fact, it is a result of the acceptance that transnational freedom and its fundament in the concept of the welfare state are complementary parts of a whole.


90 See von Bogdandy, above n 91, 11ff.
means of constitutional theory more complex forms of political entities beyond the nation-state, in order to recapture the fragmentation of citizens’ status as a result of Europeanisation. That the concept of multi-level constitutionalism has gained a foothold in the EC Treaty in the meantime will be demonstrated by just a few examples—the subject cannot be dealt with here exhaustively:93 the idea underlying Article 16 EC is that the maintenance of a system of public service by the Member States and the supranational market belong together as reciprocally dependent elements of the vision of a common European society.94 Article 17 EC breaks up the antipodal dichotomy of both legal systems, forging both intra- and supranational elements of the legal status of the individual to the new term of citizenship of the Union, which represents affiliation and construction of identity.95 The concept of a European citizenship shows that the law of the Community does not want to challenge, but wants to acknowledge the elements of citizenship as part of the pan-European constitutional law, in other words, that ‘the legal status of the individual in the world beyond the nation state is not adequately described without taking into account the legal status of the individual in the state’.96

This close interdependency has to be reflected and considered by any theory of fundamental freedoms. The more complex the entire system grows, the more it depends on the smooth co-operation between its subsystems, i.e. the smooth interaction of political processes. The more complex it grows, the more susceptible the system becomes to detrimental interferences by any dysfunctional element and the more difficult it becomes to replace one element with another. The degree of stability and comfort of the European house depends to some extent on the fact that the interior decorator is not responsible for the static of the building as well. Another consequence of the close interdependence of the national and the European level is that the classic means to reduce complexity in huge organisational systems, derived from the principles on federal state systems, i.e. hierarchy (of norms), can only exert its system-stabilising effect if applied moderately.97 The potential of the fundamental freedoms to bring about radical disruption to the system by interference in the various national legal orders is just as great as the need to conquer national protectionism. The process of ‘multi-level constitutionalism’ renders urgent the task of precise adjustment of the fundamental freedoms, which takes into account the fundamentally polycentric structure of the Union but without neglecting the still pressing task to remove ‘dysfunctional fragmentation and diffusion’.98

3. Transnational Integration or Supranational Legitimation?

The theory of fundamental freedoms may contribute significantly to the realisation of a kind of ‘constitutional networking’99 that is indispensable for the compatibility of the European and Member States’ constitutions, as well as for the compatibility of individual and public interests. The functional integration of the fundamental freedoms into this constitutional network,

93 See Kingreen, Sozialstaatsprinzip, above n 90, 390ff.
95 See A Hafic, in Schwarze (ed), above n 12, Art 17 EC, para 10: the citizenship of the Union mirrors the concept of a divided sovereignty and a divided responsibility for the well-being of the individual (my translation); for more detail see S Kadelbach, above chapter 12.
97 See F Snyder, General Course on Constitutional Law of the European Union (1995) 55: ‘The task of the makers of EU constitutional law is how to organise relations of authority in a non-hierarchical and polycentric polity.’ For a co-operative and dialogical supranationality, see also A von Bogdandy, above n 91, 48.
98 See in general ibid, 50.
however, requires a clearer methodological positioning of the freedoms than the ECJ has seen necessary to enunciate so far. The theory of the fundamental freedoms has fallen behind the general constitutional development and does not reflect the evolution of the EU from a monothematic economic–political union in the 1960s and 1970s to a complex system of multi-level constitutionalism (Europäischer Verfassungsverbund, literally ‘European composite of constitutions’) at the beginning of the twenty-first century. Thus, as the fundamental freedoms can only be properly understood and structured as multi-level norms in a concrete constitutional context, the plain formulae of the 1970s are of no use today.

A prerequisite for any integration of the fundamental freedoms in the concept of multi-level constitutionalism is to emphasise the basic differences between them and fundamental rights. The functional differences between fundamental freedoms and rights can be condensed into the terms of ‘transnational integration versus supranational legitimation’.  

100 In the history of Community law, the process of transnational integration started first. ‘Transnational integration’ signifies the process by which territorial borders are abolished and national prerogatives on legislation are transferred to the Community in order to diminish their relevance for economic and non-economic transactions.  

101 The term ‘supranational legitimation’ has a connotation that refers to the concept of a state bound by constitution and all above by fundamental rights (German Rechtsstaat); thus, the theory of fundamental rights also claims on a supranational level that the exercise of sovereign power is only legitimate if limited by fundamental rights (Article 23(1), 1st sentence German Basic Law; Article 6 (1) and (2) EU; Articles 2, 6(1) and (2) of the EU Treaty of Lisbon (TEU-Lis)).

In the 1970s, when the ECJ rendered the first groundbreaking judgments on the fundamental freedoms, the case law on fundamental rights was still in its early stages. Until the 1980s, there was nothing more to be learned from the case law than that Community law acknowledges fundamental rights on the European level and derives them from the international declarations on human rights and the constitutions of the Member States.  

102 For a long time, legal scholarship focused on questions arising from the process of transnational integration, neglecting the question of supranational legitimation based on fundamental rights. Consequently, the relation between constitution and law on the European level was rather more one-dimensional than on the domestic level; whilst constitutions contain, according to a traditional understanding of their function, not only rules for the creation of laws but also rules to legitimate and limit this creation, the EC Treaty was not meant to be the source of and the means for legitimation of an already existing pre-constitutional order; rather, it technically served the purpose of integrating existing subsystems into a new supersystem. The objective of reducing federal risk zones  

103 explains why from the beginning so many provisions on transnational integration were enacted and so few on supranational legitimation. However, when the Community’s legislative activity increased, the zones of possible conflicts with fundamental rights grew. More and more voices called for supranational legitimation based on the rule of law. This is reflected in a marked increase in the number of decisions on fundamental rights issues in the 1990s. Whilst the Community’s fundamental rights satisfy this need for legitimation caused by the emerging European legal system, the fundamental freedoms were (and still are) an important element in creating this system as they furthered the harmonisation of laws, especially in the early years of the Community. The fundamental freedoms were a prerequisite for the establishment of the Common Market—and the fundamental rights were its


101 An overview of the theories of integration can be found in Calliess, above n 56, Art 1 EU, para 9.

102 On the development, see Kingreen, above n 13, Art 6 EU, paras 20ff.

103 See also above section II.2(a).
result. In short, what the fundamental freedoms created the fundamental rights must now seek to legitimate.

III. Methodological Implementation of the Context Analysis

The theoretical differentiation between norms on transnational integration and supranational legitimation stirs up a number of questions: what are the consequences of this differentiation for the structure and scope of applicability of the fundamental freedoms (1)? Should regulations affecting fundamental freedoms only be enacted by the means of a formal law (in German ‘Gesetzesvorbehalt’; reservation of statutory powers) (2)? Is the Union bound by the fundamental freedoms (3)? And, finally, are the Member States bound by the fundamental rights developed by the law of the EU (4)?

1. The Theoretical Structure and Scope of the Fundamental Freedoms

a) The Fundamental Freedoms as Prohibition of Discrimination

aa) Review of an Understanding of the Fundamental Freedoms as Rights of Freedom

The question whether the fundamental freedoms only serve to cover those specific gaps of protection in cross-border transactions (transnational integration) or intend to complement the national and supranational protection of the individual by fundamental rights and serve the purpose of a general liberalisation (supranational legitimation) is mirrored in the question whether the fundamental freedoms are to be categorised as rights of equal treatment, i.e., that they just protect against discrimination, or are so-called rights of freedom, which serve as safeguards against all undue and disproportional restrictions of cross-border transactions, irrespective of the question of discrimination. This parallelism originates from the fact that rights of freedom and rights of equal treatment have different theoretical structures: in the test of violation of a right for equal treatment, the crucial question is whether the sovereign treats two equal situations, in this case a domestic and a cross-border transaction, differently. This tripartite structure helps focus on the question whether a measure impedes the cross-border trade specifically, which constitutes discrimination, or encumbers cross-border trade just as much as the domestic, which does not fall under discrimination. For the merely bipolar test of a right of freedom, the decisive point is whether the impediment also would have occurred in the absence of the measure in dispute. Its perspective takes into account only the relation between the sovereign and the individual protected by the right of freedom. Restrictions of cross-border trade are thus also infringements when domestic transactions are treated equally. As regulations on transnational integration, the fundamental freedoms serve to reduce specific deficits of protection in cross-border transactions in the Common market (federal risk zones). They do not claim to protect against all disproportional restrictions on the exercise of freedom like fundamental rights. The differentiation between fundamental rights and freedoms is thus levelled when fundamental freedoms are transformed by case law and literature into just a second layer of fundamental rights. Though the ECJ tried to tailor the fundamental freedoms to fit their genuine purpose of protection against federal risk zones better with the formula in Keck, it still uses the pallid, and now outdated by constitutional development, Dassonville formula.104

104 See above section II.1.
tional framework of today, fundamentally changed in its structures, is highly problematic, because it maintains the more general claim that all limitations on cross-border transactions have to pass the test of the fundamental freedoms. The Dassonville formula is apt to relativise the Keck formula. This assessment is supported by decisions in which the ECJ employs fundamental freedoms like fundamental rights, severing the cord between the freedoms and their original function of transnational integration.

Therefore, it was not the product—the pharmaceutical itself—which was subject to the ban on mail-order sales of pharmaceuticals as pronounced in Doc Morris, but a modality of its sale; hence, it should have been categorised by the Court as a sales-related regulation according to the Keck doctrine. The ECJ had earlier categorised a Greek regulation on restricting the permission to sale baby food to pharmacies equally, thus, implicitly prohibiting mail-order sales, too. Though foreign pharmacies were not allowed to sell baby food in Greece, the regulation was held to be non-discriminatory and no infringement of the freedom of free movement of goods. In conspicuous contrast, both the ECJ and the Advocate General avoided classifying the ban of mail-order sale of pharmaceuticals as a modality of sale. Whereas the ECJ did not refer to the former decision at all, the Advocate General included in her opinion the short, illuminative note that the test of Article 28 EC should not be limited to a ‘mechanical application’ of the both traditional criteria of the Keck formula. Indeed, rather than dealing with the question whether domestic and foreign persons were treated equally, the opinion of the Advocate General was focused on the criterion of market access, which has been favoured by the legal literature as well. It was held to be decisive that the method of sales affected by the ban is important for the opening up of a market. Not much is gained from this statement, as the internet, overcoming all spatial distances, is important to everyone, so which market and which participant is referred to? How, for example, should bans on medical or legal advice in a chatroom be qualified? If the criterion of market access wants to implement the Keck formula in relation to sales modalities as well, its examination cannot uncouple itself from the question of the effects of the measure on domestic market participants. However, the relevant statements of the ECJ are rather meagre: although it examines whether a discrimination of foreign market participants exists, it confines itself to the apodictic remark that the ban on the mail-order business hits these harder than domestic market participants who would be able to sell drugs in their pharmacies. This rather global assertion does not do justice to the complexity of the definition of the right comparison group, whose genuine function it is to filter out regulations containing specific cross-border hindrances of market access. A closer examination of the mail-order sales ban shows that it is not foreign, as opposed to domestic, pharmacists that are put to a disadvantage but non-resident, as opposed to resident, pharmacists: that is, the necessity of a personal contact between pharmacist and consumer hits the pharmacist in Munich who wants to gain a foothold on the pharmacy market in Trier by means of a mail-order business just as hard as his colleagues in Athens, but considerably

107 See Becker, above n 13, Art 28 EC, para 49.
110 For their function in the test for discrimination in general, see B Pieroth and B Schlink, Grundrechte (2008) paras 431ff; in favour of European subjective public rights is S Plötscher, Der Begriff der Diskriminierung im Europäischen Gemeinschaftsrecht (2003) 41ff.
111 See also the fundamental criticism by W Schroeder, in Streinz (ed), above n 12, Art 28 EC, para 46ff.
112 This is the essential difference, for instance, in relation to cases of bans on advertisements which bulkhead off the domestic market for foreign products: see eg Case C-405/98 Gourmet International Products [2001] ECR I-1795, para 21.

533
harder than the operators of pharmacies in Trier and in Luxembourg.113 Moreover, the regulations on the transfer of soccer players of a national soccer association that the ECJ deals with in its Bosman decision114 hinders not only a transfer from Schalke to Turin, but equally one to Dortmund.

This somewhat imprecise determination of the comparison group loosens the tie of the fundamental freedoms with the Keck formula, for which the requirement of a specific discrimination of the non-domestic situation is constitutive. Only the strict adherence to the requirement of a cross-border reference, ie a specific discrimination of the foreign situation, procures the filter effect desired by the ECJ itself, which prevents the ‘increasing tendency of traders to invoke Article 30 of the [EEC] Treaty [now Article 28 EC] as a means of challenging any rules whose effect is to limit their commercial freedom’.115 If, however, measures similarly affecting domestic and foreign traders are also qualified as interferences, the objective to limit the wide Keck formula to specific cross-border impediments cannot be achieved. Yet every measure regulating economy will also always have cross-border consequences. If this is enough for the assumption of interference, then market access rights become rights to a regulation of the market in general; the fundamental freedoms mutate into fundamental rights to protect against any restriction of economic activity. Thus, the freedom of movement of goods influenced the decision in Doc Morris as if it were the German fundamental right to engage in work (Article 12(1) German Basic Law): the test was whether this fundamental right was disproportionately influenced by the mail-order sales ban.

bb) A New Attack on the Keck Formula: The Opinion of AG Maduro in Alfa Vita Vassilopoulos

The function to serve transnational integration of the fundamental freedoms is strengthened by the opinion of Advocate General Maduro in Alfa Vita Vassilopoulos.116 The subject matter of the decision was the sale of bakery products following the ‘bake-off’ method. In accordance with this procedure, bakery products that are either semi-baked or fully baked and then frozen are defrosted and made ready by a short final baking or reheating at the respective point of sale. Two Greek sales outlets chains took offence in the Greek authorities’ interpretation and application of the legislation on ‘bread-making’ to ‘bake-off’ products, as a result of which the points of sale for these products had to meet all the specifications that are required for bakeries, eg the owner had to have a license to maintain a bakery. If any of these were not met, independent points of sales, and also the ovens in sales outlets, would be closed down. The domestic court brought the question before the ECJ of whether a national regulation subjecting the sale of ‘bake-off’ products to requirements which generally apply to the preparation and baking of complete baked bread and bakery products constitutes an infringement of Article 28 EC.

Although the Advocate General—and the ECJ joined his reasoning later—held this measure to be an infringement of Article 28 EC, he grasped the opportunity to criticise the Keck ruling in a rather fundamental way, focusing in particular on the impracticable differentiation between product-related arrangements and ‘selling arrangements’.117 In fact, ever since the introduction of the Keck formula, its focus on the rather formal differentiation between measures on the product itself and its distribution has been criticised as not being suitable to support the objective of establishing an internal market. It suggests the possibility of differentiating unmistakably between the production of a good and its distribution, neglecting the fact that

113 As to critique on the comparison group, albeit without any substantiation, see AG Stix-Hackl in Case C-322/01, above n 108, no 71.
114 See Case C-415/93, above n 34.
115 See Cases C-267/91 and C-268/91, above n 8, para 14.
117 Ibid, nos 24–52; see also AG Kokott in Case C-142/05 Mickelsson [2009] ECR I-0000, nos 38–56.
product design and marketing regularly influence each other and are sometimes hard to disentangle.\textsuperscript{118}

This thesis is strengthened by the case law on the legislation on advertisement.\textsuperscript{119} Advertisement is mostly seen not as part of the product itself, but as part of its marketing, and thus its distribution and sale. However, restrictions or prohibitions concerning scope and kind of advertisement may hinder market access in a manner that affects the establishment of an internal market. For example, a prohibition of all advertising for the consumption of products ‘which is linked to traditional social practices and to local habits and customs’ is liable to impede ‘access to the market by products from other Member States more than it impedes access by domestic products, with which consumers are instantly more familiar’.\textsuperscript{120} This reasoning is still within the interpretatory range of the Keck formula, if the same is interpreted to require a discriminatory measure related to the sales of goods.\textsuperscript{121} However, the Court ignores this when it reasons, in referral to its pre-Keck case law, ‘that the possibility cannot be ruled out that to compel a producer to discontinue an advertising scheme which he considers to be particularly effective may constitute an obstacle to imports’.\textsuperscript{122} This conclusion from a restriction of distribution free of discrimination to an obstruction of the access of a product to the market erodes the fundamentals of the Keck decision. If a categorical difference is to be made between the design of a product and the scheme of its distribution, then this very difference bars one from inferring a restriction related to the product from a restriction of sale.

The deficiencies of the Keck formula are also sustained by the fact that the ECJ has decided on cases repeatedly without ever mentioning the Keck formula. In some decisions, it simply bases its decision on a ‘reduction of imports’,\textsuperscript{123} Often it dismisses an alleged infringement of the free movement of goods in consideration of the ‘too uncertain and indirect effects’ on the intra-Community trade, which is astonishing if one considers that the original ruling in Dassonville\textsuperscript{124} includes exactly such potential (and thus certain) effects on the Community’s market.\textsuperscript{125} Though causing additional import costs, the prohibition against discharging certain dangerous substances into the territorial or inland waters of a Member State\textsuperscript{126} is ‘too uncertain and indirect’ in its effects. The same holds true for tolls on the traffic of goods,\textsuperscript{127} obligations to supply a certain area with mineral oil products\textsuperscript{128} and to exclusively avail of the mooring services of local companies in certain harbours.\textsuperscript{129} This scheme of reasoning was formulated before Keck. The reason why it is still employed remains obscure, given that the decisive aspect of a regulation is whether it regulates the product or its distribution.\textsuperscript{130}

Finally, the ‘bake-off’ case shows that it is anything but easy to differentiate between product-related arrangements and selling arrangements. The relevant Greek provision does not


\textsuperscript{119} More detailed and with case material Kingreen, above n 13, Arts 28–30 EC, paras 177ff.

\textsuperscript{120} Case C-405/98, above n 112, para 21.

\textsuperscript{121} For a more critical view, see AG Maduro in Cases C-158/04 and C-159/04, above n 116, no 29, who states that already in this decision the Court has distanced itself from its criteria as set down in Keck.

\textsuperscript{122} See Case C-239/02 Douwe Egberts [2004] ECR I-7007, para 52.


\textsuperscript{125} See critical also AG Kokott in Case C-142/05, above n 117, no 42–46; T Körber, \textit{Grundfreiheiten und Privatrecht} (2004) 146; see also Mayer, above n 20, 816ff.


\textsuperscript{129} See Case C-266/96 Corsica Ferries France [1998] ECR I-3949, para 31.

\textsuperscript{130} For more sources in the literature on the topic of the incoherent post Keck case law, see Kingreen, above n 13, Arts 28–30 EC, paras 169ff.
regulate features of the product itself, but only sets the requirements for the place where the production process is completed. In the meaning of the Keck formula it does not regulate ‘designation, form, size, weight, composition, presentation, labelling, packaging’\(^{131}\) of the bakery products, only the site of production. It is not the ‘how’ of the bread itself; it is the ‘how’ and ‘where’ of its completion. It is not the import of (still frozen) bread, it is a regulation on how and where its final baking shall take place—a typical measure on modality of sale.\(^{132}\) Also, the spirit of the difference pointed out in Keck sustains the classification of the Greek provision as a measure on sales modalities. The ECJ itself has emphasised repeatedly that the classification has to reflect the different consequences that product and sales arrangements have on market access.\(^{133}\) Product-related provisions prevent a certain product from entering the domestic market in the same condition as it is manufactured, if not produced specifically for this market. Beer could not be imported into Germany if not produced in adherence to the German purity law\(^{134}\) and pasta could only be marketed in Italy if made from 100% durum wheat.\(^{135}\) Provisions on the product are capable of impeding access to the market. They partition the internal market by regulating qualities which the product must already have when crossing the border. Modalities of sale generally do not impede access to the market but affect all market participants after successfully entering the market in the same way. The provision sets in after the boundary post has already been passed, so to say. Indeed, provisions on the modalities of sale regulate, but they only partition if they discriminate between imported and domestic goods. Hence, only discriminative modalities of sale may constitute an infringement of the fundamental freedom in Article 28 EC.

There is a certain peculiarity that distinguished the products of the ‘bake-off’ case as the production process at the time of the crossing of the border was not completed. Even if one would follow the bold construction of the Advocate General that the place of final baking is a feature of the product,\(^{136}\) and thusthe subject matter of the provision is really the product itself and not its distribution, it would be a product-related provision without the effect of impeding market access. The bread could be imported into Greece without changing any features of the product and is subject to the same requirements every other frozen bread produced in Greece has to meet.\(^{137}\) The ECJ dealt with a comparable case in Morellato.\(^{138}\) The matter in dispute was an Italian provision imposing the obligation of pre-packaging any half-baked bread that was made ready for consumption by a final baking at the point of sale. The ECJ refers here to its case law whereby provisions of packaging are product-related provisions and this obligation could not be classified as a modality of sale. Like in the ‘bake-off’ case, a significant feature was, as the ECJ also points out, that the bread was imported at a stage when its production process was not yet completed. Consequently, the disputed provision did not prevent or impede the access into the domestic market of the half-baked bread since the import legislation of the Member State does not make it necessary to alter the product in order to comply with that requirement. In those circumstances, and

\(^{131}\) This well-known formula listing possible subject matters of product-related provisions can be found in Cases C-267/91 and C-268/91, above n 8, para 15.


\(^{133}\) See Cases C-267/91 and C-268/91, above n 8, para 17; see further Case C-416/00 Morellato [2003] ECR I-9343, para 31.

\(^{134}\) See Case 178/84 Commission v Germany [1987] ECR 1227.


\(^{136}\) See AG Madaro in Cases C-158/04 and C-159/04, above n 116, no 15ff.

\(^{137}\) Hence, the provision does not constitute a discrimination.

\(^{138}\) See Case C-416/00, above n 133.
since it relates only to the marketing of the bread, which results from the final baking of pre-baked bread, [the requirement for prior packaging] is in principle such as to fall outside the scope of Article 30 of the Treaty, provided that it does not in reality constitute discrimination against imported products.139

On these lines, the anxious effort of the ECJ to adapt this reasoning to the categories of the Keck formula is palpable. According to its own case law, the ECJ holds product-related provisions to always be discriminatory infringements of Article 28 EC, not only if the provision additionally constitutes discrimination. It is even more remarkable that the ‘bake-off’ case does not allude to Morellato in any way. Finally, the decisions are not compatible with one another. As little as it was necessary for the half-baked bread destined to be sold in Italy, it was necessary for the half-baked bread destined for the Greek market ‘to be altered in order to comply’ with the national requirement in question.140 It remains a riddle, why a requirement on packaging—whose relation to the product is much more obvious in terms of the Keck decision—is classified differently than requirements concerning the site of finishing the product. Both requirements are effective after an unhindered access of the domestic market and are applicable to all half-baked breads regardless of their origin.

In view of this hardly coherent case law, one might be led to believe that one is witnessing a legal déjà vu. In his opinion on the ban on advertising outside their pharmacies non-medicinal products (in addition to or exclusively) sold in the pharmacies, Advocate General Tesauro pointed out that the ECJ had repeatedly answered the question as to whether such regulations infringe upon the free movement of goods differently in the past. He observed that the different answers were a result of choosing different approaches to resolve the respective matters at hand.141 This was the very reason why the ECJ diagnosed an ‘increasing tendency’ of market participants ‘to invoke Article 30 of the Treaty [Article 28 EC]’.142 Fifteen years later, the Court seems to be moored in the same muddy waters from where it wanted to embark to new horizons and seek greener pastures of legal methodology. The contours of the Keck formula blur and the rulings are amassing in which the distinctive limitation to ‘products of other Member States’ is barely perceptible.143 Also, in the ‘bake-off’ case any erudition as to whether and to what extent the measure in dispute specifically affects imported goods is missing. In fact, the main proceedings, involving only parties from Greece, indicate that the regulation also affects internal transactions in Greece. Looking back at the years after the Keck decision, Advocate General Maduro’s summary is sobering:

[Although Keck and Mithouard was intended to limit the number of actions and to restrain the excesses which resulted from the application of the principle of free movement of goods, in the end it increases the number of questions about the precise scope of the principle.144]

Maduro, himself a critical literary observer of the jurisprudence of the ECJ,145 correctly emphasises the function of transnational integration of the fundamental freedoms.146 He concedes that fundamental freedoms in certain cases have an effect of liberalisation of national economies. In the end, he states that

139 See ibid, para 36.
140 So the reasoning in ibid, para 35.
141 See AG Tesauro in Case C-292/92 Huenermund [1993] ECR I-6787, no 20ff; for an analysis of the jurisdiction, see also Kingreen, above n 13, Arts 28–30 EC, paras 161ff.
142 See Cases C-267/91 and C-268/91, above n 8, para 14.
143 See also Case C-322/01, above n 109, paras 71ff.
144 See AG Maduro in Cases C-158/04 and C-159/04, above n 116, no 34.
145 See M Puiares Maduro, We, the Court (1998) 173ff.
146 See AG Maduro in Cases C-158/04 and C-159/04, above n 116, no 36ff; for a criticism see Oliver and Enchelmaier, above n 3, 676ff.

537
the fundamental objective of the principle of free movement of goods is to ensure that producers are put in a position to benefit, in fact, from the right to carry out their activity at a cross-border level, while consumers are put in a position to access, in practice, products from other Member States in the same conditions as domestic products.\footnote{AG Maduro in Cases C-158/04 and C-159/04, above n 116, no 39ff.}

From this position he reaches the conclusion, which is correct and decisive for a theory on the general principles of the fundamental freedoms, that the fundamental freedoms solely prohibit discrimination. He states

that the task of the Court is not to call into question as a matter of course Member States' economic policies. It is instead responsible for satisfying itself that those States do not adopt measures which, in actual fact, lead to cross-border situations being treated less favourably than purely national situations.\footnote{Ibid, no 41ff (emphasis in the original).}

Though Maduro does not apply this ambitious methodological approach consistently in the case at hand,\footnote{For more detail, see T Kingreen, ‘Keine neue Frische in der Rechtsprechung zu den Grundfreiheiten: Der EuGH und das aufgebackene Brot’ [2006] Europäisches Wirtschafts- und Steuerrecht 488, 492.} it is a significant contribution to resuscitating the scholarly discussion regarding what fundamental freedoms are and what they are not. Maduro demonstrates convincingly that the concept of discrimination and its application to different types of cases are key to the methodological implementation of the function of transnational integration.

\textbf{b) Consequences on the Test of the Justification of the Interference}

The missing methodological consistency affects not only the test of scope of applicability but also the test of justification. This is based on the interrelatedness of the test whether the subject matter falls within the scope of application and fulfils the requirements set for an infringement of the respective freedom and the test whether the infringement is justified. The more the scope of application is widened, the more the need increases to recapture this broadness by means of the test for grounds of justification in order to draw ‘the line of demarcation between market and state, between competitive allocation and authoritative responsibility’.\footnote{See P Genschel, ‘Markt und Staat in Europa’ (1998) 39 Politische Vierteljahresschrift 55, 57 (my translation).} The fundamental freedoms demonstrate this connection more than clearly. Since there is no useful criterion in the test for applicability, which might exact a certain filtering effect, this function has to be fulfilled by the grounds of justification, and thus the grounds for justification have to be expanded accordingly with regard to their applicability.\footnote{R Streinz, ‘Konvergenz der Grundfreiheiten’ in H-W Arndt et al (eds), Völkerrecht und deutsches Recht (2001) 199, 201, argues equally in this direction.}

Due to this reciprocity, the test for grounds of justification is somewhat dichotomous. Infringements on the fundamental freedoms can be justified not only by codified grounds of justification (Articles 30, 39(3), 46(1) and 55 EC), but also by unwritten grounds, which the ECJ itself developed in the \textit{Cassis de Dijon} judgment. Meanwhile, the ECJ has even expanded their applicability to the other freedoms.\footnote{See Case 120/78, above n 37, para 8; see in addition Cases 110/78 and 111/78 van Wesemael [1979] ECR 35, para 35 on the freedom to provide services (the ‘general interest’); Case C-255/97 Pfeiffer [1999] ECR I-2833, para 19 on the freedom of establishment; Case C-237/94 O’Flynn [1996] ECR I-2617, para 19 on the freedom of movement of workers. For an extensive analysis, see M Ahlfeld, \textit{Zwingende Erfordernisse im Sinne der Cassis-Rechtsprechung des Europäischen Gerichtshofs zu Art 30 EGV} (1997).} The need to introduce general interests as unwritten grounds of justification is the result of the width of the \textit{Dassonville} formula, which required a
narrowing down by taking into account opposing interests, and because the codified grounds of justification are interpreted very restrictively, in particular the general ‘public policy’ clause.\textsuperscript{153}

Thus, the Cassis formula is simultaneously a corrective for a wide interpretation of the scope of applicability and the restrictive interpretation of written grounds of justification. This corrective function places the formula in a methodological ‘no man’s land’ between the scope of applicability and the grounds of justification. This is mirrored by the fact that the ‘mandatory requirements’ are categorised by some as elements restricting the scope of applicability\textsuperscript{154} and by others as grounds of justification.\textsuperscript{155} Case law has asserted neither of the opinions. In some decisions, the ECJ speaks of the ‘mandatory requirements’ in context with the interpretation of Article 28 EC\textsuperscript{156} but then enunciates the other position (in the case of Wurmser, even within the same judgment) so that a national law ‘may only be excused from compliance with the requirements of Article 28 EC if it can be proven that it is necessary to effectuate mandatory requirements’.\textsuperscript{157} None of the alternatives seem satisfactory. It is questionable to classify them as parts of the scope of applicability because the ECJ actually uses schemes of reasoning resembling the test for grounds of justification. Thus, in order to maintain a certain degree of methodological transparency, the test should not be classified as part of the test for applicability. However, it is also not methodologically convincing to classify the formula as a part of the test for grounds of justification. Considering that codified grounds for justification have to be interpreted restrictively according to repeatedly confirmed case law, it seems almost ludicrous to add unwritten exemptions, factually foiling this very directive to interpretation.\textsuperscript{158} This also exemplifies the difficulties of integrating the unwritten ‘mandatory requirements’ consistently into the structure of the fundamental freedoms, all the more so when not supported by any legitimation derived from the EC Treaty.

Not only is it difficult to integrate the Cassis formula within the traditional methodological framework, it is also increasingly causing confusion in regard to its content. It is unclear which forms of infringement can be justified on grounds of Articles 30, 39(3), 46(1) and 55 EC and additionally on grounds of ‘mandatory requirements’. This question is of considerable practical impact because the ECJ interprets the codified grounds of justification very restrictively, especially the justification based on ‘public policy’.\textsuperscript{159} Hence, important goods of the Community, like protection of the environment, can only be classified as ‘mandatory requirements’. This problem is the result of an original defect of the Cassis formula: it is often overlooked that the formula did not answer the decisive question as to what kinds of infringement fall under its scope of applicability. It was only later that the ECJ added a qualifying relative clause to the Cassis formula, though without pointing out that the original formula did not contain this clause. According to it,

\textsuperscript{153} See further Kingreen, above n 18, 155.

\textsuperscript{154} In favour are M Ahlfeld, above n 152, 81ff; I Millarg, \textit{Die Schranken des freien Warenverkehrs der EG} (2001) 93ff.

\textsuperscript{155} Such is the—perhaps dominant—opinion in German legal literature: U Becker, ‘Von “Dassonville” über “Cassis” zu “Keck”’ [1994] \textit{Europarecht} 162, 166; Ehlers, above n 15, § 7, para 63; Jarass, above n 15, 719; Schroeder, above n 111, Art 30 EC, para 33.


\textsuperscript{157} See also Case 113/80 Commission v Ireland [1981] ECR 1625, para 10; Case 25/88, above n 156, para 11.

\textsuperscript{158} See Kingreen, above n 18, 52; W-H Roth, ‘Diskriminierende Regelungen des Warenverkehrs und Rechtferitung durch die ‘zwingenden Erfordernisse’ des Allgemeininteresses’ [2000] \textit{Wettbewerb in Recht und Praxis} 979, 984.

\textsuperscript{159} See Case 377/83 Kohl [1984] ECR 3651, para 19. The methodologically dubious argument (Kingreen, above n 18, 154; S Leible, in E Grabitz and M Hilf, \textit{Das Recht der EU} (looseleaf, last update Jan 2008) Art 30 EC, para 2; Roth, above n 158, 983) of the ECJ in this regard is the exceptional character of the grounds of justification, see eg Case C-205/89 Commission v Greece [1991] ECR I-1361, para 9.
obstacles to free movement within the community resulting from disparities between the national laws must be accepted in so far as such rules, applicable to domestic and to imported products without distinction, may be recognised as being necessary in order to satisfy mandatory requirements.\footnote{Presumably stated for the first time in Case 261/81 \textit{Rau} [1982] ECR 3961, para 12.}

In subsequent decisions the ECJ spoke not of ‘validity without distinction’, but mostly of ‘applicability without distinction’.\footnote{See Case 25/88, above n 156, para 10; Cases C-1/90 and C-176/90, above n 156, para 12.}

Thus it was understood by the legal literature that (openly or hidden) discriminative provisions were only to be justified on codified grounds, whereas non-discriminatory measures could also be justified by unwritten bases on objectives serving the common good.\footnote{See L Defalque, ‘Le concept de discrimination en matière de libre circulation des marchandises’ (1987) 23 \textit{Cahiers de Droit Européen} 471, 478. See also Case 177/83, above n 159, paras 15, 19; Case 229/83 \textit{Leclerc} [1985] ECR 1, paras 26, 29. Very clear on the matter are Case 25/88, above n 156, para 11; Cases C-1/90 and C-176/90, above, n 156, para 13; Case C-224/97 \textit{Ciola} [1999] ECR I-2517, para 16.}

Indeed, the body of case law on Article 28 EC contains cases in which the Court deals with the factually differentiating effect of a non-discriminatory provision, answers the question of infringement in the positive and only allows a justification on grounds of Article 30 EC.\footnote{See Case 16/83 \textit{Prantl} [1984] ECR 1299, paras 22ff; see also Case 207/83 \textit{Commission v UK} [1985] 1201, paras 19ff; see further Cases C-34/95, C-35/95 and C-36/95 \textit{De Agostini} [1997] ECR I-3843, paras 44ff, for discriminatory provisions with relation to distribution in the spirit of the Keck formula.}

In other cases, however, the ECJ applies the test of ‘mandatory requirements’, though the test for a hidden discrimination has already been answered positively.\footnote{See Case C-2/90 \textit{Commission v Belgium} [1992] ECR I-4431, paras 34, 36. The Court held that the provision in question did not constitute a discrimination due to the ‘particular nature of waste’ based on Art 175(2), 2nd sentence EC (‘with the exception of waste management’), though waste from Belgium was treated differently from that from other Member States, which was why the AG recommended to find the provision an infringement of Art 28 EC. This was held up by Case C-379/98 \textit{PreussenElektra} [2001] ECR I-2099, paras 73ff, although AG Jacobs criticises the case law so far as ‘erroneous’ (iden in Case C-379/98 \textit{PreussenElektra} [2001] ECR I-2099, no 225ff). Critical as well is W Kahl, \textit{Umweltprinzip und Gemeinschaftsrecht} (1993) 182; C Nowak, ‘Die Grundfreiheiten des EG-Vertrages und der Umweltschutz’ [2002] Verwaltungsarchiv 368, 389; S Heselhaus, ‘Rechtfergigung unmittelbar diskriminierender Eingriffe in die Warenverkehrsfreiheit’ [2001] \textit{Europäische Zeitschrift für Wirtschaftsrecht} 645, 646; R Streinz, ‘Urteilsbesprechung’ [2001] \textit{Juristische Schulung} 596, 597: ‘uncoordinated conglomerate of grounds of justification’ (my translation); ‘contribution to heighten the confusion on the methodology of the grounds of justification even more’ (my translation). See also Case C-415/93, above n 34, paras 121ff. Similarly, the ECJ handles restrictions on the cross-border offer and acceptance of health-care services, which can only be categorised as open discriminations; see Nowak and Schnitzler, above n 89, 629.}

Finally, in some decisions, the ECJ simply does away with the discriminatory character of the measure, using dubious arguments and interpretations. The ECJ has to employ such tricks with open discriminations now and then. In some cases the protection of such public interests or goods (such as protection of the environment) could legitimise open discriminations, but these goods do not fall within the scope of the codified grounds of justification due to their restrictive interpretation (Articles 30, 39(3), 46(1), 55 EC); the \textit{Cassis} formula, however, is also not applicable, because its applicability is restricted to measures without discriminatory effect and, perhaps, to hidden discrimination, thus open discriminations cannot be justified on grounds of ‘mandatory requirements’.\footnote{See Case C-2/90 \textit{Commission v Belgium} [1992] ECR I-4431, paras 34, 36. The Court held that the provision in question did not constitute a discrimination due to the ‘particular nature of waste’ based on Art 175(2), 2nd sentence EC (‘with the exception of waste management’), though waste from Belgium was treated differently from that from other Member States, which was why the AG recommended to find the provision an infringement of Art 28 EC. This was held up by Case C-379/98 \textit{PreussenElektra} [2001] ECR I-2099, paras 73ff, although AG Jacobs criticises the case law so far as ‘erroneous’ (iden in Case C-379/98 \textit{PreussenElektra} [2001] ECR I-2099, no 225ff). Critical as well is W Kahl, \textit{Umweltprinzip und Gemeinschaftsrecht} (1993) 182; C Nowak, ‘Die Grundfreiheiten des EG-Vertrages und der Umweltschutz’ [2002] Verwaltungsarchiv 368, 389; S Heselhaus, ‘Rechtfergigung unmittelbar diskriminierender Eingriffe in die Warenverkehrsfreiheit’ [2001] \textit{Europäische Zeitschrift für Wirtschaftsrecht} 645, 646; R Streinz, ‘Urteilsbesprechung’ [2001] \textit{Juristische Schulung} 596, 597: ‘uncoordinated conglomerate of grounds of justification’ (my translation); ‘contribution to heighten the confusion on the methodology of the grounds of justification even more’ (my translation). See also Case C-415/93, above n 34, paras 121ff. Similarly, the ECJ handles restrictions on the cross-border offer and acceptance of health-care services, which can only be categorised as open discriminations; see Nowak and Schnitzler, above n 89, 629.}

However, even with regard to open discrimination the ECJ does not abide by the consequences of its own ruling. For example, the Court used the unwritten grounds of justification of the \textit{Cassis} formula to justify the openly discriminatory clauses for foreign soccer players in the professional leagues without ever mentioning Article 39(3) EC, ie one of the codified grounds of justification.\footnote{See Case C-224/97 \textit{Ciola} [1999] ECR I-2517, para 16. See also Case 16/83 \textit{Prantl} [1984] ECR 1299, paras 22ff; see also Case 207/83 \textit{Commission v UK} [1985] 1201, paras 19ff; see further Cases C-34/95, C-35/95 and C-36/95 \textit{De Agostini} [1997] ECR I-3843, paras 44ff, for discriminatory provisions with relation to distribution in the spirit of the Keck formula.}

Nevertheless, in its \textit{Ciola} judgment of 1999 the Court stressed again that national rules with discriminatory character ‘are compatible with Community law only if...'}
they can be brought within the scope of an express derogation, such as Article 56 of the EC Treaty [now Article 46 EC].

The legal literature increasingly addresses the inconsistent case law of the ECJ. Even a former judge of the ECJ himself admits that the ECJ stands on 'shaky ground' and is in need to go on a quest for a consistent methodology of the grounds of justification. Some suggest distinguishing between open and hidden discriminations and opening up the latter group to the Cassis formula. If done so, only hidden protectionism is rewarded, and it is not comprehensible why it should be easier to justify a hidden discriminatory provision than a provision stating openly the criteria the discrimination is based on. This is the reason why more and more agree that the Cassis formula should be applicable to all kinds of infringement. In principle, this is reasonable: why should it be possible to justify open discriminations on the ground of the protection of national treasure mentioned in Article 30 EC and not because of the protection of the environment, a treasure undoubtedly no less important?

The actual source of the problem is rarely spoken about: it is the Cassis formula itself. The acceptance of this praetorial creation without criticism is astonishing, at any rate for a jurist acquainted with the German constitutional law. If anyone would dare to add unwritten reservations of statutory powers to the existing list of topics only the parliament might enact a law on, one would certainly gain the disapproval of one’s colleagues. Students who attempt this in examinations or essays would find themselves at the lower end of the grade spectrum. The Cassis formula, however, has found a lot of friends. This is hard to understand, following the ECJ reasoning sometimes: on the one hand, the ECJ establishes the directive of restrictive interpretation of the codified grounds of justification based on their nature as exemptions and then, on the other hand, constantly enumerates new unwritten public goods to justify whatever kind of infringements of the scope of protection, thus ignoring its own rule of singularia non sunt extendenda. Again and again, new ‘mandatory requirements’ are asserted for which there appears to be no immediate point of reference in the Treaties. A conclusive catalogue of these public goods is not presented in relation to any fundamental freedom. This gives the impression that there is in fact hardly any single aspect of public life that might not be subsumed under the Cassis criteria. Even objects of legal protection expressly cited in Article 30 EC are classified as ‘mandatory requirements’. In such circumstances the case law would benefit from a more positivistic stance: all grounds for justification should be attributed to the parts of the Treaties where they are mentioned by the text—in other words, Articles 30, 39(3), 46(1) and 55 EC. They all contain the thematically unlimited clause of ‘public policy’ and,

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167 C-224/97, above n 163, para 16.
171 See Kingreen, above n 18, 104 and 162.
172 See also the formulation used in Case 120/78, above n 37, para 8: ‘in particular’. Cf Case C-353/89 Commission v Netherlands [1991] ECR I-4069, para 18, in relation to Art 49 EC.
174 See also the issue of health provision in Case 120/78, above n 37, para 8, which the ECJ included in the list of mandatory requirements, but then discovered that this consideration was already included within the context of Art 30 EC: Cases C-1/90 and C-176/90, above n 156, para 13.
therefore, the classic ‘security outlet’ for the national interest of international treaties. By means of the public policy provisions, the ‘mandatory requirements’ can be integrated and legitimised, and then included in the required examination of proportionality of means and ends.

In conclusion, the inconsistent adjudication of the ECJ demonstrates that the unwritten criterion of ‘mandatory requirements’ is not only an alien element in the test on grounds for justification, but also within the entire methodological concept of the fundamental freedoms. The Cassis formula attempts to correct what cannot be corrected. The decision of the Court not to implement the requirement of unequal treatment in the test of ‘infringement of the scope of protection’ cannot be compensated for with the Cassis formula. As such, the concept as developed by the ECJ and the prevailing legal opinion remains somewhat half-hearted: the fundamental freedoms were not meant to provide protection against all burdens arising from cross-border transactions, but rather against only some of them. They were meant to be freedom rights, but at the same time they had to be different from fundamental rights. The precise definition of this ‘being different’, however, remains unresolved, and it is not surprising that case law on the fundamental freedoms is being steered to a large extent by weak formulae, inhering a certain dose of arbitrariness. The inconsistent theory of justification paradigmatically supports the thesis that in the long term the tests of Dassonville and Cassis cannot serve as a reliable basis for a consistent theory of fundamental freedoms.

2. The Reservation of Statutory Powers

It is seldom asked whether or not the principle of reservation of statutory powers applies to fundamental freedoms. So far, the ECJ has applied this principle only to fundamental rights, not to freedoms. The German legal literature tends to assert the necessity of a law as the legal basis for regulations that might constitute infringements on fundamental freedoms. Some draw on the wording to argue in favour of the applicability of this principle, but the wording of the individual fundamental freedoms offers little ground for such an interpretation. Additionally, it has to be considered that it was not in the concept of the fundamental freedoms as agreed upon by the parties of the Treaties to give individuals actionable claims, which might trigger the applicability of the principle of reservation of statutory powers. The crucial question is more basic, ie whether this principle is a methodological category compatible with the theory of fundamental freedoms. In Germany, the principle is inextricably linked with the theory of fundamental rights, with the idea that restrictions of civic rights by the state, eg freedom and property, are only legitimate if the essential criteria of the situation in which freedom can be restricted are defined in an act of law passed by the parliament. This idea is rather alien to the English legal system. In the end, this interplay between freedom guaranteed by a state bound by constitution and fundamental rights as highest goods (Rechtsstaat) and democratic legitimation is not the objective fundamental freedoms are meant to serve. Fundamental freedoms do not primarily protect against the sovereign power of the own state, whose political process can be influenced by exercising the right to vote and who is only allowed to

175 See also H Schneider, Die öffentliche Ordnung als Schranke der Grundfreiheiten im EG-Vertrag (1998) 57ff, also on several cases subsumed under the term public policy.
176 See Kingreen, above n 13, Arts 28–30 EC, para 85.
178 See Ehlers, above n 15, § 7, para 82; Jarass, above n 15, 222.
179 See also above section II.1.
limit the freedom of the citizens based on a rightfully passed law. Further, fundamental freedoms
guarantee freedom where democratic participation hits its limits—precisely because it has limits!
Federal risk zones are a result of the tendency of the Member States towards protectionism in favour of their own citizens, and it is the goal of the fundamental freedoms to compensate for
the lack of opportunities for civic participation.

Thus, the principle of reservation of statutory powers is not compatible with the transna-
tional integration function; rather, the principles of that legal system prevail which the national
measure originates from. Measures of the Member States are subject to the constitutional law
of the respective Member State, thus, in the legal systems of the common law a written legal
basis will not be deemed necessary, whereas in Germany the principle of reservation of
statutory power is applicable. If, but only if, an infringement of a fundamental freedom constitutes at the same time a violation of the fundamental rights of the Basic German Law, a law
passed by the German parliament is indispensable. As far as a horizontal effect of the funda-
mental freedoms exists, it is simply wrong to pose the question, because individuals do not need a law to legitimate their deeds protected by the fundamental rights.

3. The Union as Addressee of the Fundamental Freedoms?
The differentiation between transnational integration and supranational legitimation is also
helpful for determining who is the addressee of the fundamental freedoms. A problem here is
especially whether the Union itself belongs to the group of addressees, a question answered
positively by case law and literature, though rather in passing and not in depth. As norms
for transnational integration, the fundamental freedoms compensate for federal risk zones,
which are a result of the polycentric exercise of sovereignty in the European multi-level constit-
tution. The Union legislator, however, does not generally establish regulations that would
impede the market access between states but, rather, supports their abolition. Even less is he
prone to favour cross-border transactions over domestic transactions. Even so, he has to justify
any restriction of individual rights and discriminations as much as the Member States, and this
justification is a matter of supranational legitimation of the Community, not transnational legiti-
mation: it falls within the scope of applicability of the fundamental rights of the Community,
not the fundamental freedoms.

4. The Fundamental Rights as Part of the Test of Proportionality of Means and Ends
The categories of transnational integration and supranational legitimation also begin to blur if
one follows the reasoning in case law and literature, which argue that when Member States
infringe the fundamental freedoms they are also bound by the fundamental rights of the Union. The fundamental rights of the Union thus strengthen the impact of the fundamental

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181 See below section IV.
183 See Becker, above n 13, Art 28 EC, paras 101ff; Oliver, above n 62, 71ff; Schroeder, above n 111, Art 28 EC, para 29.
freedoms on the level of justification. If the regulation falls within the scope of applicability of a fundamental freedom, it also falls within the scope of applicability of the fundamental rights of the Union and, simultaneously, the applicability of the fundamental rights of the Member States is excluded. The consequences are far-reaching; for example, in Carpenter, in order to test the eviction order of a member of a third country, the ECJ applied the principle of free movement of services, which only the claimant’s British husband could have invoked, using this freedom to arrive at a test of the eviction order by means of the Union’s fundamental rights.\(^{185}\) Even if accepting the premises of the ECJ, it is equally incomprehensible to apply the Union’s fundamental rights in a case in which there is not even any infringement of the fundamental freedoms by the requirements of the Keck formula.\(^{186}\) The definition of the scope of applicability of the fundamental freedoms has a domino effect with a considerable impact, given the vast extent the ECJ interpretation has given to the fundamental freedoms. Thus, if any national regulation with cross-border effects is subject to the fundamental freedoms, then the Member States are ultimately bound to a large extent by the Union’s fundamental rights. Further, national fundamental rights are no longer applicable.

This case law had always been hard to understand, since a necessity to bind the Member States effectively exists only insofar as it is necessary to secure the uniform application of the Community’s law.\(^{187}\) If, however, a Member State is allowed to avail itself of grounds of justification and the exemptions criteria are met, the Community accepts non-uniform regulations.\(^{188}\) In the end, this binding of the Member States by the Union’s fundamental rights and freedoms causes the outlines of the categories of transnational integration and supranational legitimation to blur: the fundamental freedoms protect against specific burdens in interstate situations, but the legitimation of the Member States is derived from their subjection to national fundamental rights. Subjection under the fundamental rights of the Union is not necessary. Article 51(1), 1st sentence EU Charter of Fundamental Rights limits the duty of the Member States to an execution of sovereignty in accordance with the law of the Union. If, however, a Member State invokes an exemption from the duty to execute the Community’s law, he does not execute the Union’s law at all, but is suspended from the duties of the contract as far as the grounds of justification for infringements of the fundamental freedoms are applicable. A Member State’s measure that can be classified as justified infringement of the fundamental freedoms by a Member State is thus no execution of Community law in the sense of Article 51(1) of the Charter.\(^{189}\)

The limited subjection of the Member States under the fundamental rights of the Union has been discussed intensely; however, is has been mainly discussed without consideration of the fundamental freedoms. This is even more astonishing as the ‘endless vastness’ of the fundamental freedoms.
mental freedoms and the subjection of the Member States under the fundamental rights, which is thus linked to the applicability of the fundamental freedoms, have the potential to destroy the complementary protection provided by the Union’s and Member States’ fundamental rights. Questions on fundamental freedoms are always questions on fundamental rights and vice versa.

IV. The Horizontal Effect of the Fundamental Freedoms

In addition to the applicability of the fundamental freedoms on measures of the Member States, which one could call vertical as they are directed from the supranational level to the national, their impact on actions between only private persons (and thus ‘horizontal’) is increasingly being subjected to legal discussion. The question is whether the fundamental freedoms only protect citizens with actionable rights against the state (so-called ‘subjective public rights’) or whether in certain cases they are also actionable against private parties (‘having a horizontal effect’). An analysis of the ECJ’s jurisprudence reveals that the ECJ follows two dissimilar approaches.

1. Direct Horizontal Effect?

The ECJ is most willing to assume a direct horizontal effect between private parties who, based on their special position, have the legal capacity for autonomous regulation of parts of economic life, eg sports associations. The reasoning behind this tendency is that the individual can evade application of the rules of an association just as infrequently as regulation of the state, and that the line between private and state exercise of functions is often drawn differently in the respective Member States. In order to ensure the comparability with national legislative powers, it has been proposed in legal literature that the scope of a direct horizontal effect is limited to such associations, which have a certain ‘social power’ or even a monopoly position.

Whether the ECJ accepts this limitation or assumes an unlimited direct effect amongst private individuals is unclear. In particular, the case law on the free movement of goods

performed a number of somersaults. At first, the Court seemed to recognise that fundamental rights also constitute actionable rights amongst private individuals. In the Deutsche Grammophon judgment, it was deemed that the merging of the national markets to form one unified market would not be attainable ‘if, under the various legal systems of the Member States, nationals of those States were able to partition the market and bring about arbitrary discrimination or disguised restrictions on trade between Member States.’

Certainly, this was a statement formulated rather generally and could also be interpreted as to mean that only private law provisions, rather than the private exercise within the scope of these provisions, would fall under the scope of Article 28 EC. Following that decision, however, the ECJ has regularly distinguished between the existence of a status as provided by a protective regulation and the exercise within the scope of such, and in doing so has applied Article 28 EC only to the latter. Indeed, the judgment in Dansk Supermarked from 1981 speaks clearly in favour of an unlimited horizontal effect of the fundamental freedoms. In this case, it was deemed ‘impossible in any circumstances for agreements between individuals to derogate from the mandatory provisions of the Treaty on the free movement of goods’.

In further proceedings, such statements do not appear to emerge: indeed, relevant decisions do not even refer to Dansk Supermarked. It is quite obvious that the ECJ does not want to subject the private stipulations themselves under Article 28 EC, but preferably only those norms that grant rights not corresponding with Article 28 EC. Accordingly, the Court held in 1988, in relation to a non-aggression clause of a patent licensing agreement, that it must be borne in mind that those articles [Articles 28 et seq EC] form part of the rules intended to ensure the free movement of goods and to eliminate for that purpose any measures of Member States likely to form, in any way, a barrier thereto. Agreements between undertakings, on the other hand, are governed by the rules on competition in Articles 85 et seq of the Treaty [Articles 81 et seq EC], whose aim is to maintain effective competition within the common market.

All in all, it appeared, at least for the free movement of goods, as if the concept of a direct horizontal effect—except for autonomous regulations by associations—had been taken off the table. However, the Court held that private persons shall be bound by the principles of free movement of persons (Articles 39 and 43 EC) and services (Article 49 EC). Mainly the Court subjects the autonomous regulation of national sport associations under these two freedoms. This is based on the reasoning that the private regulation is functionally equivalent to that of the state. The exercise of the fundamental freedoms would be endangered ‘if the abolition of barriers of national origin could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations which do not come under public law’.

The unions are also subjected to the fundamental freedoms, eg when calling for a boycott:

In this regard, it must be borne in mind that, according to settled case law, Articles 39 EC, 43 EC and 49 EC do not apply only to the actions of public authorities but extend also to rules of any other nature aimed at regulating in a collective manner gainful employment, self-employment and the provision of services.

195 See Roth, above n 191, 1233.
200 See Case 36/74, above n 191, para 18; also Case 13/76 Donà [1976], 1333, paras 17ff; Case C-415/93, above n 34, paras 82ff; Cases C-51/96 and C-191/97, above n 191, para 47; Case C-176/96, above n 191, paras 9ff.
201 Case C-438/05 ITF [2007] ECR I-10799, para 33.
Apparently, the direct horizontal effect shall not be limited to private regulation or other measures originating from private associations. In Angonese, however, the ECJ applied the freedom of movement of persons and access to employment to contractual stipulations drafted by privates. The subject matter of the case was a notice of a private bank undertaking in South Tyrol announcing a job opening. One of the conditions for entry to the competition was possession of a certificate of bilingualism (in Italian and German), issued after a language test in the province of Bolzano. The ECJ answered the question of a subjection of the private bank undertaking under (now) Article 39 EC. It held that this Article ‘is drafted in general terms and is not specifically addressed to the Member States’ and that ‘it is designed to ensure that there is no discrimination on the labour market.’ This can only be ensured, the Court held, in relation to a provision of the Treaty that was mandatory in nature, in which the prohibition of discrimination applied equally to all agreements intended to regulate paid labour collectively, as well as to contracts between individuals. Without further differentiation, the Court closes with: ‘Consequently, the prohibition of discrimination on grounds of nationality laid down in Article 48 of the Treaty [now Article 39 EC] must be regarded as applying to private persons as well.’

Thus, with regard to the direct horizontal effect, the Court differentiates between the freedom of goods, on the one hand, and freedoms of persons and services, on the other. However, there is no real explanation for this differentiation. One possibility could be that the applicability of the antitrust law suggests itself as an alternative in handling these cases with a body of law that is closer in nature to the freedom of goods. As a freedom of ‘products’, the antitrust and competition law is applicable to the freedoms of services as well as to the freedoms of goods. However, the horizontal effect is only applied to the latter, not to the former.

2. The Alternative: The Right to Protection

In recent times, the theory of the direct horizontal effect has been resuscitated. Interestingly, another discussion is developing simultaneously. It was in 1998 that the ECJ first approved of a duty of the Member State to protect the free movement of products and persons from disturbances by private parties by means of active measures. In the decision concerning the violent protests of French farmers against fruit and vegetable traders from other Member States, the Court acknowledges that Article 28 EC ‘also applies where a Member State abstains from adopting the measures required in order to deal with obstacles to the free movement of goods which are not caused by the State’. The Court held that Article 28 EC obliges the Member States in connection with Article 10 EC ‘to take all necessary and appropriate measures to ensure that that fundamental freedom is respected on their territory’. In such a constellation the Member State is the guarantor of the fundamental freedoms, which implies the obligation to protect from any actions of private persons by means of positive action. If this protection of foreign market participants is not granted by the Member State, this negligence constitutes

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203 Ibid, para 30.
204 Ibid, para 35.
205 Ibid, paras 34ff.
206 Ibid, para 36.
209 Ibid, para 32.
discrimination. However, the Member State always has the prerogative of judgment on the degree of necessary protection and the means to achieve that degree of protection. According to the ECJ, it falls within the competences of the Member States to determine which measures are necessary to maintain public safety and order. The Court could, however, examine whether the Member State has adopted appropriate measures for securing the free movement of goods. In the French farmer case, the Court affirmed a violation of the duty to protect, and in doing so established a claim to be guaranteed a certain protection by the Member State. Over many years there had been a series of increasingly serious outbursts of violence against farm traders from other Member States without France undertaking suitable countermeasures—despite numerous demands issued by the Commission.

The relation between a direct horizontal effect between privates and an obligation of the state to protect market participants against other privates’ actions is yet to be determined. Why does the ECJ choose the construction of a direct horizontal effect if the case pertains to sports associations and unions calling for boycott, and why does it choose a duty of the state if it pertains to rioting farmers? The circumstance that the angry farmers do not have an address to which a writ of summons can be served, unlike the Belgian soccer association and the Finnish Union of Seamen, may be factually relevant, but in terms of legal theory it is a rather unsatisfactory argument.

The concept of the right to protection is, however, somewhat more convincing. It spares the legislative and administrative competences of the Member States, on whom a duty to protect is imposed but who themselves can decide how this duty is to be fulfilled. As such, direct intrusion into the domestic private law systems can be avoided and their coherence can be maintained. Additionally, a negative aspect of the concept of horizontal effect is that it changes the function of the fundamental freedoms from individual rights against the public power to obligations in relation to all citizens. Structurally, the fundamental freedoms are not designed to impose duties on private parties. If any sense can be deduced from the distinction between state and society, then this sense should be that the private individual who is bound by the fundamental freedoms cannot take recourse to public policy or security in order to justify his own actions. Apparently, the ECJ itself is aware of this problem. In many horizontal effect cases, the ground of justification is not specifically pointed out by name. The examination of any grounds for justification begins nebulously with the question of whether the interference is 'objectively justified'.

Finally, the concept of a right to protection also serves to avoid procedural inconsistencies. In the course of the infringements procedures under Article 226 EC, only breaches of the Treaties by bodies and organs of the state may be pursued; private individuals are not allowed to file complaints with such content. The concept of horizontal effect, therefore, significantly reduces the legal remedies available to the Commission because, according to the prevailing opinion, the legal possibility to institute proceedings under Article 226 EC depends on the proof, to be presented by the Commission, that the Member State has an influence on the interfering natural or legal person.

210 Ibid, para 33.
211 Ibid, paras 38ff.
212 For further discussion, see Kingreen, above n 18, 195ff; Burgi, above n 191, 330ff; Streinz and Leible, above n 191, 464ff.
213 See Burgi, above n 191, 330; Streinz and Leible, above n 191, 466.
214 On the fundamental right in the German Basic Law, see B Pieroth and B Schlink, Grundrechte: Staatsrecht II (2002) para 175.
215 See Roth, above n 191, 1241.
216 See eg Case C-176/96, above n 191, para 51.
217 See W Cremer, in Calliess and Ruffert (eds), above n 12, Art 226 EC, paras 27ff.
The differentiation between private and sovereign restrictions is not understandable because, if the non-protection by the state constitutes a form of discrimination, it cannot be treated procedurally any differently from an active interference emanating directly from a Member State.

V. Conclusion

The fundamental freedoms remain a fascinating subject for research within the field of European constitutional law. It will remain fascinating for quite a while because we are dealing with a body of case law that still offers several avenues of attack and invitingly open flanks, asking legal commentators to develop their own theoretical concepts, which go beyond the exegesis of individual decisions. The approach unfolded here sketches the fundamental freedoms as a special category of subjective public rights, not identical with the category of fundamental rights. This plea for a ‘back to the roots’ approach should not be misunderstood as a call for slowing down the process of integration. Such a dichotomous ‘either/or’ of Euromanticism and Europhobia is hopefully outdated. The Union has become a capable political community, and the law of the Member States and the law of the Union have entered a state of interdependency and strive for homogeneity and mutual completion. Thus, it might be time to refocus the application of the fundamental freedoms on its original function, serving again as a multi-level norm for transnational integration. The scholarly interest in the fundamental freedoms goes beyond methodological questions of individual cases or singular topics. A rewarding research approach might be to analyse the function and the effects of subjective rights in multi-level systems, taking into account different constitutions at different times and places. Such a categorisation would also need to take into account WTO law. So far, there has been no such methodological categorisation of subjective rights in multi-level systems. Based on a comparison of legal systems and on an analysis of individual cases, the interdependence between subjective rights and the federal allocation of competences would be a main focus for an analysis that might yield some fundamental new insights in the constitutional function of the fundamental freedoms.

218 For a different viewpoint, see Vieweg and Röthel, above n 207, 19ff.
219 On tendencies of constitutionalisation, see von Bogdandy, above n 76, 265ff, 425ff.
The Area of Freedom, Security and Justice

JÖRG MONAR

I. Introduction ................................................................. 552
   1. Relevance of the Subject ........................................... 552
   2. Scope of the Subject ............................................... 553
   3. Methodology ....................................................... 554
II. The Fundamental Treaty Objective and its Conceptual Dimension .... 554
   1. The AFSJ as a Fundamental Treaty Objective .................. 554
   2. The Concept of Area ............................................... 556
   3. The Concept of Freedom ........................................... 558
   4. The Concept of Security ........................................... 559
   5. The Concept of Justice ............................................ 560
III. The AFSJ in the Treaty Architecture .................................. 562
   1. The Pillar Divide .................................................. 562
   2. Implications of the Pillar Divide ................................. 564
   3. A Contested Divide ................................................. 565
   4. The Abolition of the Pillar Structure by the Treaty of Lisbon ... 567
IV. Differentiated Participation as a Constitutional Component of the AFSJ ... 569
   1. Differentiation as a Constitutional Issue ....................... 569
   2. The Opt-outs ...................................................... 569
   3. The Opt-in Possibilities ......................................... 570
   4. The ‘Enhanced Cooperation’ Possibilities ...................... 571
   5. The position of the Schengen ‘Associates’ ...................... 572
V. An Area of Cooperation rather than Integration ............................. 573
   1. The Cooperative Orientation of the Current Treaty Framework ... 573
   2. The Commission and the Court as (Limited) Factors of Integration ... 575
   3. The Reaffirmation of the Cooperation Rationale by the Treaty of Lisbon ... 578
VI. The Place of the Individual in an Area of Cooperating Member States .......... 578
   1. The Individual as a Passive Beneficiary of the AFSJ ........... 578
   2. Two Missed Opportunities: The Charter of Fundamental Rights and Union Citizenship ................................................................. 579
   3. The Protection of the Rights of the Individual .................. 580
VII. Conclusions ............................................................... 584
I. Introduction

1. Relevance of the Subject

A decade ago, justice and home affairs (JHA), which constitute the material content of today’s ‘area of freedom, security and justice’ (AFSJ), would still have been an unlikely subject for a chapter in a book on principles of European constitutional law. In the period of the Treaty of Maastricht (1993–99), EU measures still had to be based on the provisions of the ‘old’ Title VI EU, which established neither objectives nor basic principles for what was described simply as ‘matters of common interest’ and was governed by purely intergovernmental co-operation procedures with instruments and decision-making provisions largely similar to those of the Common Foreign Security Policy. Arguably substantial JHA measures were adopted in the context of the Schengen system, based on the 1990 Convention implementing the 1985 Schengen Agreement, but this took place outside of the EC and EU context. It was only with the Treaty of Amsterdan in 1999—which, inter alia, brought a whole range of fundamental objectives, new competences, new instruments, a partial communitarisation and the incorporation of the Schengen system—that the JHA domain, now regrouped within the AFSJ, acquired a position of constitutional importance in the context of the Union’s legal framework.

The constitutional importance of the AFSJ was afterwards confirmed in the process which led to the adoption of the Constitutional Treaty. With the AFSJ belonging to the fastest growing policy-making area and issues like the fight against terrorism and illegal immigration figuring high on the European agenda, the European Convention gave the AFSJ a lot of attention in its work. The Praesidium defined a specific set of questions and challenges in the JHA domain, a special Working Group (‘X’) then worked out a range of substantial proposals which were complemented by additional initiatives (such as the ambitious Fischer/de Villepin proposals of November 2002) and, finally, numerous changes and new elements regarding the AFSJ were introduced in the final draft of the constitution adopted by the Convention in July 2003. Some of these reforms proved to be rather controversial in the 2004 IGC. This applied, in particular, to the question of majority voting on legislative measures in the criminal law domain and the introduction of a European Public Prosecutor’s Office. The tortuous compromises which were arrived at in the Constitutional Treaty have mostly been taken over in the Treaty of Lisbon, with some additional changes mainly regarding decision-making rules and ‘opt-out’ arrangements. It should be noted in this context that the changes introduced by the Treaty of Lisbon to the EC and EU Treaties with regard to the AFSJ are more numerous than those with regard to any other fundamental objective or policy-making area of the Union.

Yet apart from the fact that the AFSJ has found a firm place in the constitutional architecture of the EU, three other considerations can underline its relevance for this architecture:

First, the creation of the AFSJ touches upon essential functions and prerogatives of the modern nation-state. Providing citizens with internal security, controlling access to the national territory and administering justice have since the gradual emergence of the modern nation-state in the seventeenth/eighteenth century and its theoretical underpinning in the writings of Hobbes, Locke, Montesquieu and Rousseau all belonged to basic justification and legitimacy of the existence of the state. The fact that, since the 1990s, the EU has developed a steadily increasing role in this domain means that it has entered into one of the last domains of
exclusive national competence, not by replacing the Member States as primary providers of internal security and justice, but by emerging as a more and more important additional provider of these essential public goods must be regarded as a process of constitutional change of primary importance.

Secondly, although no law enforcement powers have been transferred to the EU institutions and agencies, measures adopted in the context of the AFSJ can have significant implications for the rights of individuals. To give just a few examples: the mutual recognition of judicial decisions, the harmonisation of substantive criminal law, the enhanced cross-border exchange of personal data between law enforcement agencies, the standardisation of controls on persons at external borders, the minimum harmonisation of procedural and substantive asylum law all affect the extent to which and the way in which individuals are subject to the exercise of public power by the competent authorities of the Member States. The rather technically sounding term ‘justice and home affairs’ should not make one forget that the EU is dealing here with issues relating to the most invasive forms of state action, such as deprivation of liberty, refusal of entry at borders, expulsion and uncovering of personal data. These are issues of constitutional importance for the national systems—and should therefore also be regarded as such as far as the EU level is concerned.

Thirdly, precisely because of the significance of EU action in the context of the AFSJ from the point of view of essential state functions and prerogatives, as well as the rights of the individual, the constitutional legitimacy of EU action must be regarded as a fundamental issue. This involves not only questions of the division of powers between the Union and the Member States, but also of parliamentary and judicial control, which, again, can be qualified as being of an essentially constitutional nature.

These three considerations also provide the justification for placing the chapter on the AFSJ in the part of this book which deals with the place of the individual in the Union’s constitutional order. Although the AFSJ does not establish any specific rights of the individual, it is essentially aimed at—and draws its justification from—providing the individual with certain public goods, such as added internal security, the conditions for ensuring the free movement of persons across internal borders and better access to justice in cross-border proceedings. In addition, the individual is in a special sense ‘concerned’ about the AFSJ as measures taken in pursuance of its objectives can directly or (via the national authorities) indirectly affect his fundamental rights.

2. Scope of the Subject

Because of the dynamic development of the AFSJ as a political objective, its borderlines have tended to be more fluctuating in official EU documents than used to be the case with the JHA domain before 1999, extending increasingly also to fundamental rights protection and EU citizenship issues. The latest multi-annual programme of the EU for the strengthening of the AFSJ, for instance, comprises special sections on fundamental rights protection and EU citizenship. Yet these are arguably cross-policy horizontal issues where the precise borderline between the AFSJ and other fields is sometimes difficult to establish. Having regard also to the fact that fundamental rights and EU citizenship are covered by separate chapters elsewhere in this volume, this contribution will focus on what can be regarded as the core areas of JHA, ie the subject matters covered by Title IV EC and Title VI EU: asylum, immigration, border controls, judicial co-operation in civil matters, judicial co-operation in criminal matters and
police co-operation. Fundamental rights protection and EU citizenship issues will be covered
only insofar as they are of specific relevance to the aforementioned fields. Such a delimitation of
the subject is also justified by the fact that Title IV EC and Title VI EU are the only parts of the
Treaties which are explicitly linked to the objective of the AFSJ. 8

3. Methodology

This chapter is based on a ‘law in context’ approach which complements the analysis of relevant
treaty provisions and case law by an extensive consideration of programme documents, political
declarations and actual measures of the EU institutions in the domain of the AFSJ. We take the
view that the constitutional interpretation of the AFSJ needs to be placed within the larger
political context in which it is developing. This view seems justifiable not only because this
context can help to elucidate the actual scope and meaning of EU constitutional law regarding
the AFSJ but also because both the legislative acquis and the relevant case law remain far more
limited in the case of the AFSJ than in other ‘older’ domains of European law and
policy-making. At least in part, our reasoning about constitutional law in this domain develops
more from the interests at stake, declared objectives and institutional practice than the abstract
and systematic consideration of the relevant legal provisions and case law, something which is
more typical for legal analysis according to the common law than the civil law tradition.

II. The Fundamental Treaty Objective and its Conceptual Dimension

1. The AFSJ as a Fundamental Treaty Objective

With its inclusion in the list of objectives of Article 2 EU, the maintenance and development of
the Union as an ‘area of freedom, security and justice’ is part of the fundamental objectives of
the EU which provide a general binding orientation for action by the EU institutions. The AFSJ
as an Article 2 EU objective can be compared to similar provisions of fundamental orientation
for law and policy-making in national constitutional systems. 9 The term ‘area’ in conjunction
with the ringing terms of ‘freedom’, ‘security’ and ‘justice’ replaced the former much more
technical and neutral Maastricht Treaty description of EU action in this domain as ‘co-operation
in the fields of justice and home affairs’. At least formally, the 1999 treaty reform has elevated
what had hitherto been a mere domain of ‘common interest’ to a fundamental political project
of the Union ranking at the same level as the other fundamental objectives listed in Article 2 EU,
such as Economic and Monetary Union and the Common Foreign and Security Policy (CFSP).
The Lisbon Treaty not only upgrades the AFSJ in the list of fundamental treaty objectives from
the current fourth 10 to the second position of the fundamental treaty objectives, 11 but also
provides for the Union to ‘offer its citizens’ this ‘area of freedom, security and justice’ (Article
3(2) of the EU Treaty of Lisbon (TEU-Lis)). The new terminology used here establishes for the
first time an explicit link between the Union as a provider of the AFSJ and the individual (the
‘citizen’) as the beneficiary.

8 See Art 61 EC and Art 29 EU.
9 In German constitutional law the term ‘Staatszielbestimmungen’ is used to describe such fundamental
orientation objectives. On this concept, see the seminal work of K Sommermann, Staatsziele und
Staatszielbestimmungen (1997).
10 After the promotion of economic and social progress, the assertion of the Union’s identity on the
international scene and the protection of the rights and interests of the nationals of the Member States.
11 Right after the Union’s general aim ‘to promote peace, its values and the well-being of its peoples’.
Article 2 EU (as well as Article 3(2) TEU-Lis) does not define the substance of the AFSJ, but states that it is an area without ‘internal borders’ and links it to the objective of the free movement as within the AFSJ ‘the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime’. Although no explicit reference is made to Article 14(2) EC (Article 26(2) of the Treaty on the Functioning of the European Union (TFEU)), the AFSJ is thereby assigned the task of contributing to the old Community objective of the free movement of persons through the listed ‘compensatory’ measures. This makes the free movement of persons a constituent element of the AFSJ as a treaty objective and the freedom to move across internal borders ensured by means of these measures an important part of what the AFSJ ‘offers’ the citizen according to Article 3(2) TEU-Lis. It should be noted, however, that in the context of the AFSJ the ‘free movement of persons’ is essentially defined through the absence of controls on persons at internal borders (Article 62(1) EC; Article 67(2) TFEU), no reference being made in this context to the fundamental (market) freedoms under Community law, which arguably contribute to an ‘area without internal borders’ in a different sense.

The reference to the major fields of JHA action as means to ensure the free movement of persons has a strong historical foundation. Both the Schengen co-operation and the introduction of JHA as a EU policy-making domain by the Treaty of Maastricht were driven to a considerable extent by the rationale of ‘compensating’ potential internal security risks resulting from the abolition of controls on persons at internal borders and other forms of liberalisation in the context of the internal market by measures at external borders and in other JHA areas. This compensatory logic has also been upheld by the European Court of Justice (ECJ) in Case C-378/97, in which the Court argued that the abolition of controls at internal borders ‘presupposes harmonisation of the laws of Member States governing the crossing of the external borders of the Community’ and other related JHA issues.

However, the link between the AFSJ and the objective of assuring the free movement of persons is limited to the ‘locating’ term ‘in which’, so clearly this link does not exhaustively define the AFSJ. As a political objective, the AFSJ has in fact grown far beyond a mere rationale of compensatory measures to become a self-standing integration objective. This is amply demonstrated in the two multi-annual programmes for the development of the AFSJ, the 1999–2004 Tampere Programme and the current 2004–2010 Hague Programme, in which relatively few references are made to the free movement of persons and related compensatory measures.

In the Treaties this larger scope of the AFSJ is brought out, in particular, in Article 29 EU, where it is said that, in the context of the AFSJ, it shall be the Union’s objective ‘to provide citizens with a high level of safety’, and in Article 61(e) EC, which refers to the ‘high level of security’ (drawn together in Article 67(3) TFEU) aimed at by the measures in the fields of police and judicial co-operation in criminal matters. This constitutes a sort of broad internal security mandate in favour of the individual (the ‘citizens’), which, here, is not linked back to the free movement of persons or any explicit ‘compensatory’ rationale. The Lisbon Treaty goes even further in making clear that the AFSJ is more than just the sum of compensatory measures for the free movement of persons by providing in Article 67(4) TFEU that in the context of the AFSJ the Union shall ‘facilitate access to justice’, this in particular through the principle of

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12 See T Kingreen, above chapter 14.


17 By providing only for a ‘high level of security’, Art 67(3) TFEU removes the confusing parallel use of ‘security’ and ‘safety’.

555
mutual recognition. A better ‘access to justice’ must therefore be regarded as a third public
good which the AFSJ is aimed at to ‘offer’ the individual next to a ‘high level of security’ and
the absence of controls at internal borders/free movement of persons.

Yet the general provisions we have been dealing with so far, although clearly of constitu-
tional importance for the AFSJ, do little to ascertain the scope and meaning of the very broad
terms of ‘area’, ‘freedom’, ‘security’ and ‘justice’. Other provisions and elements have to be
taken into account to clarify the meaning of each of these component elements of the AFSJ as a
fundamental treaty objective.

2. The Concept of Area

The first term that is of importance for clarifying the scope and meaning of the AFSJ as a treaty
objective and political project is that of ‘area’. This term has become increasingly popular
among European policy-makers since the 1990s. It is used frequently inside of the EU—the
notions of a ‘European research area’, a ‘European higher education area’ and of a ‘European
social area’ are prominent examples—but also beyond EU borders, as the ‘European Economic
Area’ (EEA) demonstrates. In each case, the term is used for designating broad frameworks for
common action that go beyond mere intergovernmental co-operation but fall short of fully
fledged ‘common policies’ with all the supranational characteristics of the classic Community
method, allowing instead the use of a wide variety of methods of governance in this domain.
The same logic was also behind the choice of the term ‘area’ for designating the AFSJ objective
on the basis of the Treaty of Amsterdam: with several Member States being clearly unwilling to
commit themselves to any ‘common policies’ in accordance with the Community method in the
JHA domain but others being firmly intent on moving beyond the existing intergovernmental
framework, the term ‘area’ emerged during the 1996/97 IGC negotiations as a compromise that
all sides could live with as it allowed for the accommodation of both different ambitions for EU
JHA action and different frameworks and instruments of governance. A particular advantage of
the term area was—and still is—that it is wide and flexible enough to allow for the inclusion of
both the persisting predominantly intergovernmental co-operation in the context of the
so-called third pillar (Title VI EU) and the communitarised fields of the so-called first pillar
(Title IV EC).

The concept of an ‘area’ is also flexible enough to accommodate the wide range of rather
diverse fields covered by the AFSJ: asylum, immigration, border controls, judicial co-operation
in civil matters, judicial co-operation in criminal matters and police co-operation. Both the
objectives pursued and the instruments used to achieve them in these fields are necessarily
rather different. It is sufficient to compare, for instance, the fields of asylum policy, judicial
coop-eration in civil matters and police co-operation. In the first, the main focus is on the
common definition of minimum guarantees and procedures regarding asylum seekers; in the
second, it is essentially the facilitation of the cross-border administration of civil justice; and in
the third, enhanced information exchange and operational co-operation between national law
enforcement authorities. In each case the objectives of EU action are necessarily different, as
are the primary instruments to achieve them. This is also reflected in the Treaties, which, in the
case of asylum policy (Article 63(1) EC; Article 78(2) TFEU), for instance, place a major
emphasis on the use of regulatory instruments, whereas in the field of police co-operation the
main focus is placed on measures supporting cross-border co-operation between police forces,
such as the strengthening of Europol (Article 30 EU; Article 88 TFEU). The AFSJ therefore
lacks a natural substantive coherence, but this is compensated for by the historical coherence

18 Hereinafter the terms ‘first pillar’ and ‘third pillar’ will be used, though they do not appear in the
Treaties.
provided by the development of the JHA domain since the beginning of the 1990s, the political will of EU policy-makers to merge—with more than occasional difficulties—these fields into a single domain and the coherence provided by the common legal and institutional framework.\(^{19}\) The term ‘area’ is sufficiently flexible to accommodate the material heterogeneity of the domain.

Apart from being a political compromise solution that also allows for different governance solutions for the different JHA fields, the term ‘area’ obviously also has a territorial meaning. As Article 2 EU refers to the objective of ‘maintaining’ the Union as an AFSJ (and Article 3(2) TEU-Lis of ‘offering’ it to the citizens), the implication is obviously that this ‘area’ already exists. This is of some significance as it formally establishes the concept of the national territories—which, because of the sensitivity of the JHA domain from the national sovereignty and territoriality principle point of view, remain very much national JHA ‘areas’—forming a single EU ‘area’ for the purposes of measures in the JHA domain. This ‘single area’ concept makes it much easier to perceive and present challenges in the JHA domain as common challenges which have to be met by common responses, a political discourse which has been reflected in countless Council and Commission documents since 1999. The linking of the AFSJ with the free movement of persons (which has already been analysed) reinforces this ‘single area’ concept, as does the characterisation of the AFSJ as an ‘area without internal borders’ (Article 3(2) TEU-Lis) at least as far as controls at these borders are concerned. A further indication of the ‘single area’ concept can be found in paragraph 3 of the Presidency Conclusions of the 1999 Tampere European Council, where the Heads of State or Government used for the first time with regard to the AFSJ the term ‘our territory’ (rather than the plural ‘territories’) in respect of challenges in the asylum and immigration domain.\(^{20}\) The frequently referred to objective of a ‘European judicial area’ where judicial decisions are recognised everywhere and EU citizens enjoy similar possibilities of access to justice everywhere is another example of the single territorial dimension of the area concept.

The concept of the AFSJ as an ‘area’ is therefore in two respects specific to and characteristic of the JHA domain as it has emerged from the Amsterdam Treaty reforms. On the one hand, it serves as a flexible concept for governance in this domain which allows the accommodation of both different ambitions of the Member States and different governance requirements in the individual policy fields. On the other hand, it gives to the AFSJ project a single territorial dimension which—at least symbolically—overcomes the strict division between national territories in accordance with the territoriality principle and facilitates a common challenge/common response rationale in the JHA domain.

What makes the AFSJ quite peculiar as a fundamental treaty objective is that it links the ‘area’ concept to no less than three public goods whose delivery is absolutely central to the functions and legitimacy of the state or indeed any organised polity: freedom, security and justice. There is no other example in the Treaties of such and so many fundamental public goods referred to in the context of a single objective. With the Union not being a state and the Treaties only providing—as will be shown below—a limited range of explicit competences for the EU institutions to act in the JHA domain, the Union is quite obviously not in a position to provide freedom, security and justice to European citizens in the full sense of these words. This raises the question what these terms actually mean in the context of the AFSJ. Although the EU is rich in examples of using ambitious terminology that has remained devoid of much of the content it suggests—the CFSP is only one example—at least elements of a more specific understanding of freedom, security and justice can be taken from the Treaties and some of the programme documents on the AFSJ.


\(^{20}\) Above n 15.
3. The Concept of Freedom

As far as freedom is concerned, the Treaties themselves provide one clear element of a definition: Article 2 EU (Article 3(2) TEU-Lis), which establishes the AFSJ as a treaty objective, defines the ensuring of the free movement of persons as one central objective for action in the JHA domain. This is reinforced by Article 61(a) EC, which establishes the general aims for action in the communitarised JHA fields of Title IV EC, and the emphasis on ensuring the absence of controls on persons at internal borders (Article 62(1) EC; Article 67(2) TFEU). Being able to move across borders without being subject to controls can surely be regarded as a positive element of freedom for EU citizens, so that there is in this respect some justification for including this fundamental public good in the denomination of the AFSJ project.

Yet to understand freedom only as freedom of movement would obviously be a rather restrictive understanding of the term—even more so as the abolition of controls on persons does not apply to the EU as a whole but only to the Schengen countries (see below section IV on differentiation). It is not surprising that the Member States, after having introduced the term in such a grand way in the Amsterdam Treaty, did not want to leave it at that. In the Vienna Action Plan of December 1998, the first programme document on constructing the AFSJ, an effort was therefore made to give freedom a more extensive meaning in the context of the AFSJ. In paragraph 6 of the Action Plan it was actually spelled out that the Treaty of Amsterdam would open the way to give freedom ‘a meaning beyond free movement of people across borders’, a meaning which would include:

freedom to live in a law-abiding environment in the knowledge that public authorities are using every-thing in their individual and collective power (nationally, at the level of the Union and beyond) to combat and contain those who seek to deny or abuse that freedom.\(^{21}\)

The paragraph then finishes with a rather perfunctory reference to this freedom needing to be ‘complemented by the full range of human rights’. This is one of the rare instances in which an official Council text indulges in some quasi-philosophical reflections on the rationale of action by European public authorities—and as such quite remarkable. The result, however, is an essentially negative definition of freedom in the context of the AFSJ, with freedom essentially understood as the containment of threats posed to individual freedom by criminals. This definition obviously establishes a strong link between freedom and the second of the AFSJ public goods, security, provided for by Articles 61(e) EC and 29 EU (Article 67(3) TFEU). What it does not do is give the term freedom a more precise positive meaning, as could have been achieved, for instance, by a cross-reference to the citizenship of the Union (see below, section VI 2) or to the aim of providing better access to justice in cross-border disputes (codified only in Article 67(4) TFEU). As a result, the concept of freedom in the AFSJ context emerges as comprising one single positive element—freedom of movement—and one broader negative dimension—freedom as absence of criminal threat.

Having regard to these initial conceptual limitations, it is not too surprising that the Council has subsequently found it difficult to fill the freedom heading of the AFSJ with concrete positive meaning. This is clearly shown in the latest programme document, The Hague Programme, where one finds under the major section title ‘Strengthening freedom’ a whole range of objectives in the fields of asylum, immigration and border controls that are mostly aimed at the restrictive management of migration challenges and ensuring border security,\(^{22}\) objectives which most EU citizens—and certainly third-country nationals—would very likely...

\(^{21}\) Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on the creation of an area of freedom, security and justice, [1999] OJ C19, 1.

\(^{22}\) European Council, Hague Programme, above n 6; see especially s 1.7, on the management of migration flows.
not normally associate with freedom. In its 2005 report on The Hague Programme, the European Union Committee of the British House of Lords noted ‘a striking lack of ambition in “freedom” provisions, such as EU citizenship rights, anti-discrimination measures, the fight against racism, and rights for third country nationals legally resident in the EU’. This fully corresponds to the absence of any such ambition in the fundamental treaty provisions.

4. The Concept of Security

Of all the three public goods in the AFSJ denomination, security has probably the most concrete meaning and corresponds best to the ‘normal’ understanding of the term from a public policy perspective. Article 29 EU makes it clear that what is aimed at is internal security against the threats posed by crime as it establishes it as the Union’s objective for the remaining third pillar JHA fields to provide citizens with ‘a high level of safety’ through ‘common action... in the fields of police and judicial co-operation in criminal matters’ in order to combat and prevent a number of listed serious forms of cross-border crime, an objective which is repeated—this time using the terms ‘high level of safety’—in Article 61(e) EC. No security risks other than those relating to crime are mentioned in the Treaties and programme documents, although in practice the extensive action taken in the context of the AFSJ against illegal immigration can be taken as an indication that the Member States consider immigration challenges at least as a ‘societal security’ risk.

The Vienna Action Plan has also given security a clear freedom-providing function by stating that the full benefits of any ‘area of freedom’ will never be enjoyed unless they are exercised ‘in an area where people can feel safe and secure’, emphasising as well that the Amsterdam Treaty is aimed at offering ‘enhanced security’ to citizens. In a certain sense this connection puts security as an objective above freedom as the effective exercise of the second public good is made dependent upon the guarantee of the first. Both the Tampere Presidency Conclusions of 1999 and The Hague Programme of 2004 reinforced this implicit predominance of the security function by stating that citizens have the right to expect the Union to address threats to their freedom from crime through Union-wide measures. A similar public expectation and legitimacy claim has not been made for either freedom or justice.

In terms of content, the AFSJ concept of security is therefore a quite straightforward one: to provide citizens with a higher (‘enhanced’) level of internal security through common measures against crime. There is, however, one important difference with regard to traditional national notions of internal security, and this is the only subsidiary role which is assigned to the EU in this context. The Treaties are highly protective of national competences in the internal security field. Articles 33 EU and 64(1) EC (Article 72 TFEU) provide that the relevant AFSJ treaty provisions ‘shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security’. Article 4(2) TEU-Lis states generally that the Union shall respect ‘essential State functions including... maintaining law and order and safeguarding national security’ and that ‘in particular, national security remains the sole responsibility of each Member State’. The programme documents adopted by the European Council have been equally clear on this point. The aforementioned Vienna Action Plan, for instance, repeats the restriction of Article 33 EU

24 The Treaty of Lisbon draws these two provisions together in Art 67(3) TFEU.
26 Action Plan of the Council and the Commission, above n 21, paras 9 and 11.
27 European Council, Tampere Programme, above n 15, paras 6 and 40; European Council, Hague Programme, above n 6.
and emphasises that the aim is not to create a ‘European security area’ with uniform detection and investigation procedures, and that the responsibilities of Member States to maintain law and order and safeguard internal security should in no way be affected by the AFSJ. The Union should therefore clearly not replace the Member States in their security-providing function but add to it.

In this context, consideration also has to be given to the AFSJ as being subject to the constitutional principle of subsidiarity as laid down in Articles 5 EC and 2 EU (Article 5(3) TEU-Lis), which is aimed at ensuring that the exercise of EU competences sufficiently protects the Member States’ autonomy. Although no specific reference is made in the current Titles IV EC and VI EU to subsidiarity, the principle lies very much at the core of the AFSJ security concept in the sense that the Member States—keen to preserve their primary role and autonomy as security providers—will normally only allow the EU to address internal security issues which—because of their cross-border nature—can potentially be more effectively handled through common action at EU level. In practice, this has meant that forms of crime with no cross-border dimension—such as youth crime or burglaries—have so far remained almost totally outside of the scope of EU action, which has focused primarily on serious cross-border crime, such as transnational organised crime and international terrorism. The Lisbon Treaty strengthens the importance of the subsidiarity principle by providing that national parliaments shall ensure that the proposals and legislative initiatives submitted in the fields of police and judicial co-operation in criminal matters ‘comply with the principle of subsidiarity’ (Article 69 TFEU) under the ‘early warning mechanism’ foreseen by the Protocol on the application of the principles of subsidiarity and proportionality—a further indication of national concerns about a potential creeping erosion of national state functions in the internal security domain.

The internal security concept applicable to the AFSJ is therefore limited not only through its primary focus on crime threats—‘new’ security dimensions, like food and environment security, are not covered—but also because of its merely supplementary role to that of the Member States as primary providers of internal security, the importance of the subsidiarity principle and the resulting focus on serious cross-border crime phenomena. This, however, should not make one underestimate the constitutional importance of the ‘Europeanisation’ of internal security, which can indeed be described as a change of paradigm with regard to the traditionally purely national understanding of the concept.

5. The Concept of Justice

As regards the justice element of the AFSJ, the Treaties do not give a general definition. They only provide for fairly specific objectives—such as the prevention of conflicts of jurisdiction between Member States—and types of action to be taken—mutual recognition and minimum harmonisation measures—and this separately for the fields of judicial co-operation in civil and in criminal matters (Articles 65 EC and 31 EU; Articles 81–86 TFEU). The Vienna Action Plan had initially raised the stakes by declaring that it would be the Union’s ambition on the basis of the AFSJ provisions ‘to give citizens a common sense of justice throughout the Union’. Having regard to the fact that under the justice heading the Treaties mainly provide for measures facilitating ‘judicial co-operation’—and not for any kind of integrated EU justice system—creating a

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29 See A von Bogdandy, above chapter 1.
31 Action Plan of the Council and the Commission, above n 21, para 15.
'common sense of justice' seems a rather ambitious objective. On a more modest scale, however, the justice element of the AFSJ is indeed aimed at making a difference in citizens' (and companies') experience of justice by ensuring—as spelled out in the Tampere Presidency Conclusions—that they 'are not discouraged or prevented from exercising their rights' by the differences between the national systems of justice.32 This is to be achieved—as again made clear in The Hague Programme—on the one hand through better access to justice in cross-border legal proceedings and whenever citizens or companies have to use the legal system of a country other than their own, and on the other by ensuring that judicial decisions rendered in one country are also valid in others through mutual recognition.33 A crucial element of the AFSJ concept of justice is therefore that of a 'genuine European Area of Justice'—a terminology used in both the Tampere and The Hague Programme documents—in which the differences between the national systems do not any longer constitute obstacles to an effective rendering of justice in judicial cases with a cross-border dimension.

Like in the case of the AFSJ concept of security, the AFSJ concept of justice is to some extent limited in its scope by the principle of subsidiarity. Although no specific reference is made to subsidiarity, the principle obviously applies because of Articles 2 EU and 5 EC (Article 5(3) TEU-Lis), and it is actually frequently invoked as a consideration for deciding whether or not and to what extent action at the EU level should be taken. A recent example is the Council conclusions on the amended EC Directive on criminal measures aimed at ensuring the enforcement of intellectual property rights of 21 February 2007, which comprise a direct reference to the principle of subsidiarity as a main reason for scrutiny of 'the need of criminal measures at EU level to protect intellectual property rights'.34 The judgment of the ECJ in Case C-176/03,35 which resulted in the annulment of the 2003 Council Framework Decision on the protection of the environment through criminal law because of an infringement of Community competences as protected by Article 47 EU, has been interpreted by the Commission a justifying potentially quite extensive Community measures relating to the criminal law of the Member States whenever those are considered necessary for the attainment of Community objectives.36 Yet the negative reactions of several Member States concerned about the implications of such 'activism' on the national criminal justice systems37 has since led the Commission to tread more carefully in this respect, and there has never been any formal proposal to aim at some sort of a European civil and/or criminal law code. The AFSJ concept of justice, both on grounds of the subsidiarity principle and the line of action pursued so far by the EU institutions, is therefore clearly not aimed at the creation of a uniform system of justice throughout the Union but to ensure that—through instruments of 'judicial co-operation'—justice rendered in any of the Member States does not put citizens or companies from other Member States at a disadvantage and that justice is not lost because of the persisting borders between the Member States. Put in even more simple terms, the AFSJ concept of justice is essentially constructed around the idea of ensuring that justice—while still administered by the Member States—is no longer obstructed by borders. In spite of the limitation of this concept of justice to cross-border issues, it comprises a potential of real benefit to the individual, especially because of the aim to increase access to justice (newly emphasised by Article 67(4) TFEU), which has

32 European Council, Tampere Programme, above n 15, para 28.
33 European Council, Hague Programme, above n 6, s 3.
found a concrete expression in, for instance, the 2003 Directive on legal aid in cross-border disputes.\textsuperscript{38}

This concept of justice, like that of freedom, has a strong link with the security dimension of the AFSJ. This link is formally provided for by the Treaties, as measures in the field of judicial co-operation in criminal matters are placed under the general objective of providing citizens with a high level of security (Articles 29 EU and 61(e) EC; Article 67(3) TFEU). The Vienna Action Plan put the security dimension in quite forceful terms by stating that the ‘area of justice’ is aimed at ‘bringing to justice those who threaten the freedom and security of individuals and society’.\textsuperscript{39} The AFSJ concept of justice therefore has a strong law enforcement dimension to it. Yet, again, this has to be understood from the perspective of the problem of the borderlines between the national systems as the intention is to ensure that ‘criminals . . . find no ways of exploiting differences in the judicial systems of the Member States’.\textsuperscript{40} Put in simpler terms, the justice concept of the AFSJ is one in which the elimination of borders as an obstruction to claiming justice has as a parallel the elimination of borders as potential screens for criminals behind which to escape from justice.

If one looks at the three concepts of freedom, security and justice together, one can clearly see that security is the main linking element: it is part of the rationale of the justice concept of the AFSJ and at the same time an essential condition of its concept of freedom. This central position of the security objective does not differ substantially from the importance given to the safeguarding of internal security in national constitutional orders.\textsuperscript{41} In practice, though, the evolution of the AFSJ has been marked by a growing preponderance of security objectives—accelerated by the post-9/11 terrorist threat perception—which gives some justification to the argument about a growing ‘securitisation’ of the AFSJ as well as the critical questions raised with regard to the right balance within the AFSJ between security on the one hand and freedom and justice on the other.\textsuperscript{42}

III. The AFSJ in the Treaty Architecture

1. The Pillar Divide

If the combination of the three fundamental public goods of freedom, security and justice makes the AFSJ a rather special constitutional objective, the positioning of this objective and related provisions in the architecture of the Treaties clearly adds to its peculiarity. Whereas other fundamental objectives listed in Article 2 EU, such as economic and monetary union or the CFSP, are very much single pillar objectives in the sense that they are to be achieved through measures in the context of one of the Union’s three pillars, the AFSJ is essentially a cross-pillar objective: the provision for the maintaining and the development of the Union as an AFSJ in Article 2 EU serves as an ‘umbrella’ provision for more detailed provisions and objectives, instruments and mechanisms which are divided up between Title IV EC in the first pillar on the one hand and Title VI EU—the third pillar—on the other.

\textsuperscript{38} Council Dir 2002/8/EC \textsuperscript{[sic!]} to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, [2003] OJ L26, 41.
\textsuperscript{39} Action Plan of the Council and the Commission, above n 21, para 15.
\textsuperscript{40} European Council, Tampere Programme, above n 15, para 5.
\textsuperscript{41} See generally M Möstl, \textit{Die staatliche Garantie für die öffentliche Sicherheit und Ordnung} (2002).
Title IV EC regroups the communitarised JHA policy-making fields. It starts with a reference to the objective of progressively establishing the AFSJ in Article 61 EC, which shall be attained through action regarding the free movement of persons and border controls, asylum and immigration, and judicial co-operation in civil matters. Article 61(e) EC establishes a link to measures in the sphere of police and judicial co-operation in criminal matters which are governed by Title VI EU, the only cross-reference between the EC and EU Treaty parts governing JHA action. This is followed by more specific provisions on individual policy fields: border controls (including visa policy) in Article 62 EC, asylum and immigration in Article 63 EC and judicial co-operation in civil matters in Article 65 EC. The other provisions of Title IV EC deal with cross-cutting issues of relevance to all the first pillar JHA fields: Article 64 EC protects the responsibilities of the Member States regarding the maintenance of law and order and the safeguarding of internal security—a strong assertion of national competence regarding these core functions of the state—and provides for the possibility of emergency measures in cases of a ‘sudden inflow’ of third-country nationals—a reminder that at the time of the Amsterdam negotiations some Member States were still under the influence of the mass refugee movements resulting from the wars in former Yugoslavia. Article 66 EC deals with administrative co-operation between the Member States and the Commission—a provision that has not acquired much practical importance; Article 67 with the decision-making rules during and after the five-year ‘transitional period’, which ended on 30 April 2004; Article 68 with the remaining slight restrictions on role of the Court of Justice; and Article 69 with the British, Danish and Irish ‘opt-outs’ (to which we will return below). What all of these provision have in common is that they provide for exceptions of the Title IV EC policy fields from the general regime of the EC Treaty, exceptions that can be regarded as important enough to consider Title IV EC to some extent as a separate ‘JHA pillar’ within the first pillar.

The provisions in Title VI EU, covering police and judicial co-operation in criminal matters, follow a structure that is roughly similar to those in Title IV EC. The general introductory Article 29 EU refers to the objective of the AFSJ, provides for the focus of EU action on the fight against crime and lists the broad areas of co-operation for this purpose. Articles 30 and 31 EU then provide in some detail for individual objectives and measures to be achieved in the fields of police co-operation and judicial co-operation in criminal matters respectively. This is followed, again, by a wide range of provisions on specific issues of general importance for co-operation under this Title: on the conditions under which law enforcement authorities may operate in the territories of other Member States (Article 32 EU), on the responsibilities of the Member States regarding the maintenance of law and order and the safeguarding of internal security (Article 33 EU), on the legal and other instruments to be used (Article 34 EU), on the (restricted) role of the Court of Justice (Article 35 EU), on the role of the Coordinating Committee and the Commission (Article 36 EU), on international action (Articles 37 and 38 EU), on the role of the European Parliament (Article 39 EU), on ‘enhanced co-operation’ between Member States (Articles 40 to 40b EU), on the use of the EC budget (Article 41 EU) and on the possibility—often referred to as a ‘passerelle clause’—of transferring parts of co-operation under this Title to the communitarised domain of Title IV EC (Article 42 EU).

The in part very detailed and specific procedural and institutional provisions of Title VI EU as well as the strong security orientation given to it by Articles 29 EU and 61(e) EC—which is not established for Title IV EC—make Title VI EU very much a separate part of the EU Treaty which also justifies the common reference to it as the Union’s third pillar. One should note that, apart from Article 42 EU (see below), which has never been used, Title VI EU contains no reference to the communitarised fields of Title IV EC. Although the first and third pillar parts of the AFSJ are obviously linked through the common objective of the AFSJ in Article 2 EU and the fact that they are served by the same institutional framework (European Council, Council, Commission, Parliament, Court of Justice), the treaty architecture keeps them otherwise rather separate from each other in terms of legal bases for action, instruments,
decision-making procedures and even some institutional provisions. One can best consider the AFSJ—as a result of the Treaty of Amsterdam—as a triangular construction from the point of view of the Treaties, with the fundamental AFSJ objective forming the top of the triangle, with a strong link to the Title IV EC areas on the one side and the Title VI EU areas on the other, but a rather weak—at best ‘dotted’—link on the base side.

2. Implications of the Pillar Divide

The architecture of the AFSJ in the Treaties—which is the result of the Amsterdam Treaty compromises—has a number of significant consequences for EU action in the JHA domain: as a result of the pillar division different legal bases, instruments and decision-making procedures have to be used depending on the JHA subject matter, a division which is also reflected in different strings of decision-making in the Council structure. This complicates the decision-making process and can—in the case of matters with a cross-pillar dimension—lead to the need to adopt separate legislative acts under Title IV EC and Title VI EU for the same purpose. An example for the latter is the prevention of the facilitation of unauthorised entry and residence, a crucial element in the fight against illegal immigration: because of the Title IV EC competences in the fields of immigration and border controls, the Council had to adopt on 28 November 2002 a first pillar Directive on defining the facilitation of unauthorised entry, transit and residence, and at the same time—because of the penal law competences under Title VI EU—a third pillar Framework Decision on the strengthening of the penal framework for the same types of offences. The different majority requirements under Title IV EC and Title VI EU—mostly qualified majority voting in the first case, unanimity only in the second—can also mean that it takes longer to agree on the respective third pillar elements of an issue, and problems of coherence can emerge between parallel first and third pillar legislative acts. The fact that the Commission has to share its right of initiative with the Member States by virtue of Article 34(2) EU means that the treaty does not provide for a single political driving force similar to the Title IV EC fields—which also contributes to a different decision-making context.

More problematic from a constitutional point of view than any problems of effectiveness and efficiency resulting from the pillar divide are the elements of differentiation it brings to judicial and parliamentary control. With one notable exception—the limitation of the preliminary rulings procedure to questions originating from national courts of last resort (Article 68 EC)—the judicial review competences of the ECJ under Title IV EC are equivalent to those it enjoys in other parts of the EC Treaty, yet under Title VI EU its role has been substantially restricted. According to Article 35(1) and (2) EU, the Court can only accept preliminary ruling requests from the jurisdictions of member states who have submitted a declaration to that effect, and this only in relation to Framework Decisions, Decisions and Conventions, not as

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44 As a result of Council Decision 2004/927/EC (OJ L396, 45), adopted pursuant to Art 67(2) EC, the co-decision procedure with qualified majority voting has applied since 1 January 2005 to all communitarised JHA areas under Title IV EC with the exception of measures relating to legal immigration and to family law, to which the unanimity requirement continues to apply.

45 With an obvious element of institutional self-interest, the Commission has argued that the shared right of initiative of each of the Member States that does not favour what it calls a true ‘European dimension’, nor the accountability of the Member States’ legislative initiatives, which are not submitted to the ex ante impact assessment of Commission initiatives: COM(2006) 331, 12.


47 By the end of 2006 only 16 out of 25 Member States had made such a declaration.
regards Common Positions or primary law. Pursuant to Article 35(6), actions for annulment against Framework Decisions and Decisions can only be introduced by the Commission or a Member State, not individuals—as is possible under Article 230 EC in the case of a direct and individual concern. Although recent case law of the ECJ has strived to ensure greater unity in its role across the pillar divide (see below), as these provisions seem to imply, there is a clear difference between judicial review possibilities—and therefore also judicial protection of individuals—under the first and third pillar parts of the AFSJ.

The pillar divide has similarly important implications on the parliamentary control side: by virtue of Article 39(1) EU, the European Parliament needs only to be consulted on legally binding acts under Title VI EU. This contrasts the European Parliament’s co-decision powers in all areas of Title IV EC, with the exception of matters of legal immigration and family law. As a result, the Parliament has substantially different scrutiny and control possibilities under the different pillar parts of the AFSJ, which constitutes another element of constitutional ‘asymmetry’ in the AFSJ.

3. A Contested Divide

The pillar divide within the AFSJ has been exposed to a number of challenges by the Commission, the European Parliament and individuals which highlight the tensions affecting the co-existence of two different legal frameworks under the same fundamental objective—the AFSJ—and within the same constitutional framework. These challenges have provided the ECJ with an opportunity to both reduce and define the pillar divide.

The Court has contributed to a partial reduction in the pillar divide mainly on the basis of rule of law and legal coherence considerations. An essential part of this reasoning has been the affirmation of the Court’s own role within the AFSJ, which started with the ruling in Case C-170/96, in which the Commission sought the annulment of a Joint Action of the Council on airport transit visas which the Commission felt should have been adopted on a first rather than third pillar basis. The Court did not annul the Joint Action but did reject the Council’s argument that the Court was lacking jurisdiction, affirming its right to guard the EC domain against possible infringements caused by third pillar acts. It did so on grounds of Article 47 EU (at that time still Article M EU Treaty), a provision subject to the jurisdiction of the Court that provides that EU action under Titles V and VI EU shall not affect the competences and acquis of the EC.

The Court of First Instance (CFI) has taken a similar position in Case T-228/02. This case—coming after a range of other cases also dealing with challenges to the placing of suspected individuals and entities on the so-called terrorist lists for the purpose of financial and other property sanctions—concerned the financial sanctions adopted by the Council against the alleged terrorist organisation Modjahedines du peuple d’Iran on the basis of EC Regulation No 2580/2001, which in turn implemented a Common Position adopted on the basis of

48 For details, see J Bast, above chapter 10, section II.4(a).
49 Pursuant to the already mentioned Decision 2004/927/EC, above n 44.
50 Unsurprisingly, the Parliament has repeatedly called for an extension of its co-decision powers to police and judicial co-operation in criminal matters by a use of Art 42 EU. See, eg the Resolution on progress made in 2004 in creating an area of freedom, security and justice (P6_TA(2005)0227) [2006] OJ C124 E, 398.
53 In two of the earlier cases the CFI had refused to enter into the merits of the case by adopting the position that the UN legal acts at the origin of the sanctions imposed enjoyed supremacy over EC/EU law. See below section VI.3; R Uerpmann-Wittzack, above chapter 4.
Articles 15 (CFSP) and 34 EU (AFSJ) that had been the initial EU decision to freeze funds. While stating that the Common Positions were, in principle, outside of its jurisdiction, the CFI nevertheless emphasised that it had jurisdiction to hear an action for annulment ‘to the extent that, in support of such an action, the applicant alleges an infringement of the Community’s competences’.

Yet with its judgment in Case T-228/02 the CFI reaffirmed not only its power to review any first pillar measures implementing third pillar measures but also its general role in safeguarding the application the rule of law across the pillar divide. It in fact annulled the EC Decision to freeze the Modjahedines’ assets, implementing the second and third pillar measures on grounds of not containing a sufficient statement of reasons and non-observation of the right to a fair hearing. The rule of law approach to bridge the pillar divide has been further developed in two recent judgments of the ECJ in appeal proceedings against dismissal orders issued by the CFI—Gestoras pro Amnestía and Segi—which had declared inadmissible actions for damages by two groups which had been the object of financial sanctions Decisions as alleged terrorist groupings by virtue of an EU Common Position. While recognising that the provisions under Title VI EU did not provide for any action for damages—and admonishing a corresponding reform—the Court held that because, pursuant to Article 6 EU, the Union is based on the rule of law and the respect of fundamental rights, ‘the institutions are subject to review of the conformity of their acts with the treaties and the general principles of law, just like the Member States when they implement the law of the Union’. The Court thereby affirmed that all measures adopted by EU institutions which directly affect individual rights—indeed from the pillar under which they are adopted—can be made subject to judicial review by the ECJ under the preliminary rulings procedure, extending this even to Title VI EU Common Positions, although these are not listed in Article 35(1) EU as acts on which a preliminary ruling can be requested. The border line between the pillars is therefore permeable to the jurisdiction of the Court at least as regards the protection of the principle of the rule of law and of fundamental rights.

Of at least similar importance has been the Court’s case law regarding the definition of the border line between the first and the third pillar. A landmark decision in this respect is the already mentioned ruling of the ECJ in Case C-176/03, in which the Court established that criminal law measures may be based on a first pillar legal basis if and insofar as this ‘is necessary in order to ensure the effectiveness of Community law’. This decision has certainly moved the pillar border line within the AFSJ and has been widely interpreted as opening up a pathway for the development of substantial EC penal law, thereby at least partially communitarising criminal law contrary to the Member States’ original intention to keep this field within the realm of Title VI EU. Yet the strong emphasis of the Court on the specific Community objectives of the act in question should not be overlooked.

56 Case T-228/02, above n 52, para 56.
57 Ibid, para 173.
59 Case C-354/04 P and Case C-355/04 P, above n 58, each at paras 47 and 50.
60 Ibid, para 51.
61 Ibid, para 54.
63 Ibid, para 52.
In the opposite direction, the Court has clarified the borderline between the pillars in relation with the controversial agreement with the United States on the anti-terrorism related processing and transfer of (air) passenger name records (PNR) data. In May 2004 the European Parliament had sought the termination of the agreement because of both its concerns about adequate protection of personal data and the aim to assert its co-decision rights. On 30 May 2006 the ECJ in fact annulled the Council decision to conclude the agreement, forcing the EU to terminate the agreement and come to a new arrangement with the US. In its judgment the Court did not enter into the substance of the data protection arguments put forward by the Parliament, but nevertheless annulled both the Commission’s data protection ‘adequacy’ decision and the Council’s decision, concluding that the agreement on grounds of their first pillar legal base (Article 95 EC) was inappropriate. The ECJ held that the data transfer issues covered by the agreement concerned not data processing necessary for a supply of services, but ‘data processing regarded as necessary for safeguarding public security and for law-enforcement purposes’, which effectively pointed to the need for a third pillar legal basis. The annulment forced the Council to renegotiate the agreement with the US—which used the opportunity to get more favourable terms—and to conclude it—with less favourable terms for the Union—in October 2006 on a Title VI EU legal base. With this Pyrrhic victory the Parliament, which, as a result of the new Title VI EU legal base, was deprived of any co-decision role, was therefore at the origin of an affirmation of the principle that the main purpose of the act—in this case Title VI EU ‘security’ purpose—must be decisive for the choice of the legal basis.

4. The Abolition of the Pillar Structure by the Treaty of Lisbon

Much of the above will become part of the history of the complexity of EU integration if and when the Treaty of Lisbon enters into force—though not everything. Under the new architecture all JHA fields will be governed by Title V TFEU, which constitutes a ‘merger’ of the current Title IV EC and Title VI EU. As a result, the current pillar division will be removed and, with it, the current legal divide in the JHA domain. This will put an end to the need to adopt parallel legislative acts under the different pillars in certain domains of cross-pillar implications (such as money laundering), reduce the potential for controversies over the appropriate legal basis and facilitate the negotiation and conclusion of agreements with third countries on cross-pillar matters. The formal removal of the pillar divide will also make a contribution to legal certainty and transparency within the AFSR as there will be a single set of legal instruments, the current EC legal instruments taking the place of the current Title VI EU in the fields of police and judicial co-operation in criminal matters. Both judicial control in the AFSJ and the coherence of its constitutional framework will be strengthened by the removal of the current restrictions on the role of the ECJ in the third pillar fields.

It should be noted that the single treaty framework which would have been established for the AFSJ by the Constitutional Treaty will not be achieved, the establishment of the fundamental objective (Article 3(2) TEU-Lis) and the Charter of Fundamental Rights (to which we will come back) still remaining in a different treaty from the TFEU. However, the triangular architecture will at least be replaced by a single hierarchical relation between the ‘fundamental’ provisions of the Treaty on European Union and the more ‘operational’ ones of the TFEU.

66 Ibid, para 37.
68 On the choice of the legal basis, see generally A von Bogdandy and JB Bast, above chapter 8.
Some elements of the pillar divide will survive, mainly in the field of decision-making rules. The Treaty of Lisbon will make the current EC co-decision procedure—under the new name of the ‘ordinary legislative procedure’ (Article 294 TFEU)—with an exclusive right of initiative of the European Commission, co-decision by the European Parliament and qualified majority voting in the Council the standard decision-making procedure under Title V TFEU. There will, however, be a range of exceptions: as is currently the case under Title VI EU, the Commission will have no exclusive right of initiative in the fields of police and judicial co-operation in criminal matters. Article 76 TFEU provides that initiatives can also be brought by a quarter of the Member States. A unanimity requirement will still apply to the adoption of free movement-related provisions concerning passports, identity cards, residence permits and any other such documents (Article 77(3) TFEU), measures concerning family law with cross-border implications (Article 81(3) TFEU), the establishment of minimum rules concerning ‘other’ (ie not explicitly mentioned) aspects of criminal procedure (Article 82(2)(d) TFEU), the identification of ‘other’ (ie not already explicitly mentioned) areas of serious crime for which minimum rules concerning the definition of criminal offences may be introduced (Article 83(1) TFEU), the establishment of the European Public Prosecutor’s Office (Article 86(1) TFEU) and the possible extension of its mandate (Article 86(4) TFEU), legislative measures regarding operational co-operation between national law enforcement authorities (Article 87(3) TFEU) and the laying down of the conditions and limitations under which national law enforcement authorities may operate in the territory of another Member State (Article 89 TFEU). It needs no further explanation that these are indeed particularly sensitive issues from a national sovereignty and territoriality point of view, but the fact remains that important parts of the national veto possibilities currently provided for by Title VI EU will continue to apply. Similar exceptions can also be found with regard to the role of the Parliament, which will be given co-decision powers on most of the AFSJ issues but will be limited to assent or consultation procedures on the subject matters requiring unanimity in the Council. All this means that, from an institutional and procedural point of view, the old pillar division will continue to exist at least to some extent. This ‘hidden’ continuation of the pillar separation could lead to a continuation of some of the existing problems with the adoption of cross-cutting packages of measures on certain JHA issues because of different procedures, majority requirements and forms of involvement of the Parliament.69

There is also another dimension to the afterlife of the third pillar. By virtue of Article 9 of the Lisbon Treaty Protocol on Transitional Provisions, the legal effects of the acts of the institutions, bodies, offices and agencies of the Union adopted on the basis of the third pillar prior to the entry into force of the Treaty of Lisbon will be preserved until those acts are repealed, annulled or amended. While this may seem a necessity at least technically, Article 10 of the same Protocol is clearly inspired by a political desire not to give up too quickly on some of the intergovernmental elements of the third pillar. According to this article, for a period of five years the powers of the Commission to launch infringement proceedings (Article 258 TFEU) will not be applicable to legal acts adopted on the basis of Title VI EU, and the restricted powers of the Court of Justice of the European Union with regard to these acts under Title VI EU of the Treaty on European Union will remain unchanged. This will ensure quite a bit of a survival for the ‘old regime’ well into the second decade of the century.

69 This is largely in line with the compromises already arrived at in the context of the Constitutional Treaty. See J Monar, ‘Justice and Home Affairs in the EU Constitutional Treaty’ (2005) 1 European Constitutional Law Review 226.
IV. Differentiated Participation as a Constitutional Component of the AFSJ

1. Differentiation as a Constitutional Issue

The AFSJ is marked by a high degree of differentiated participation because of the so-called opt-out and/or opt-in possibilities granted to several Member States, which are mainly but not exclusively related to the incorporation of the Schengen system into the EC/EU acquis in 1999, to which one has to add the specific clauses on ‘enhanced co-operation’ and the association of non-Member States with the Schengen system. In the Treaty of Lisbon these forms of differentiation are not only maintained but further expanded, mainly through the granting of extended opt-outs and a facilitated triggering process regarding ‘enhanced co-operation’. This strong degree of differentiation—which is higher and more diverse in this domain of EU law and policy-making than in others—should be regarded as a constitutional component of the AFSJ as it exempts the Member States concerned from parts of the primary law objectives and rules relating to the AFSJ, creating not only different degrees of membership but also an ‘optionality’ of participation for only some Member States that goes against the concept of a 'single area' and the desirability of a single and coherent constitutional framework that is equally applicable to all Member States. While these different forms of differentiation were necessary—as part of the ‘compromise package’ of the Treaty of Amsterdam—for the establishment of the current Treaty framework for the AFSJ, their existence can also be taken as an indication of the absence of a 'constitutional consensus' on the scope and finality of the AFSJ.

2. The Opt-outs

Opt-outs have been granted to three countries on the basis of Protocols annexed to the EU and the EC Treaties by the Treaty of Amsterdam: the UK, Ireland and Denmark. Protocol No 3 guarantees to the UK the continuation of its right to exercise controls on persons at its borders to other Member States and grants to the UK and Ireland a derogation from the Schengen acquis to continue the special arrangements between them for maintaining the Common Travel Area. As a result, Ireland and the UK are exempted from the substantial Schengen acquis relating to the Schengen border control system and, in particular, they do not participate in the abolition of controls on persons at internal borders, arguably one of the most important elements of the AFSJ. Protocol No 4 grants the two countries a complete opt-out (the term is not used because of its negative political connotations) also from the communitarised fields under Title IV EC. Protocol No 4 finally grants Denmark a similar opt-out from Title IV EC as the one of Ireland and the UK, but with specific provisions on opting-in possibilities (see below) which take into account the special position of Denmark as a Schengen member not wishing to be bound by communitarised Schengen measures. Of all the opt-outs, the Danish one—which is the result of a political commitment entered by the Danish government prior to the 1993 second referendum on the Maastricht Treaty to participate in the JHA domain only at an intergovernmental level—is the most peculiar. As a result of the three Protocols, therefore, three Member States

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72 Protocol (No 3) on the application of certain aspects of Article 14 of the Treaty establishing the European Community to the United Kingdom and to Ireland (1997).
73 Protocol (No 4) on the position of the United Kingdom and Ireland (1997).
74 Protocol (No 5) on the position of Denmark (1997).
can in principle stay completely outside of the first pillar part of the AFSJ. Such a complete self-exclusion could obviously deprive the three countries from participating in measures of benefit to them, however, so it was part of the ‘Amsterdam deal’ to provide for possibilities to opt in.

3. The Opt-in Possibilities

Article 3 of Protocol No 4 gives Ireland and the UK an opt-in possibility as regards any measure proposed under Title IV EC at the latest three months after it has been proposed. Even if they decide not to opt in at this stage, they can do so later by virtue of Article 4, subject to the approval of the Commission. In addition, Article 8 of the same Protocol grants Ireland the possibility to opt out from the Protocol—a sort of opt-out from the opt-out—if it no longer wishes to be covered by it. Both Ireland and the UK therefore have an opt-out status from Title IV EC which is combined with a selective opt-in possibility. Denmark has also been given an opt-in possibility, but the Danish case is more complicated because its status as a Schengen member puts it under pressure to adopt all Schengen related measures under Title IV EC. Article 5 of Protocol No 5 deals with this problem by providing that Denmark has six months to decide whether it will implement any Council decision building on the Schengen acquis in its national law. Whenever Denmark does so, this decision creates only an obligation under international law between Denmark and the other Member States. This is one of the most peculiar arrangements in the whole EU legal system because it effectively gives Denmark an opt-out from the specific obligations of the EC legal order in spite of the fact that the measures in question are EC legal acts.75 The special arrangements for Denmark are completed by an opt-out from the opt-out possibility, similar to the Irish one, if Denmark no longer wishes to avail itself of its Protocol.

The Treaty of Lisbon not only fully maintains both the opt-out and the opt-in possibilities for the three Member States, but extends—with a number of procedural changes and slight variations76—their scope from current first pillar JHA fields to the third pillar fields of police and judicial co-operation in criminal matters. This concession had to be made to the three ‘opt-outs’ in order to make them accept the communitarisation (in all but name) of the Title VI EU fields within the framework of new Title V TFEU with the introduction of qualified majority voting and co-decision by the European Parliament.

In practice, the opting-in possibilities provide the opt-outs with a very high degree of flexibility. Not only can they decide to opt in during the decision-making stage, they can also do so later—if they change their mind—after the other Member States have adopted the measure. While their votes are not counted if they have not decided to opt in before the formal adoption in the Council, they fully count in case of a declared opt-in, and in any case they participate in all the Council deliberations irrespective of any opt-in decision. In practice, this ‘pick-and-choose’ option has been extensively made use of, with the UK and Ireland, for instance, having opted into most proposals concerning asylum, illegal immigration and civil law, but only very few concerning visas, borders and legal migration.77

75 On the questions of constitutional consistency this raises, see D Thym, Ungleichzeitigkeits und europäisches Verfassungsrecht (2004) 103–7.
76 The Danish opt-out, for instance, will not apply to the laying down of the conditions and limitations under which national law enforcement authorities may operate in the territory of another Member State (Art 89 TFEU)—the unanimity requirement in the Council and the mere consultation of the European Parliament on these measures apparently being considered sufficiently ‘intergovernmental’ to the Danish Government to relinquish the opt-out on this issue.
There are also a number of limitations to the opt-in flexibility. In February 2004, the British government—which, despite its opt-out from the Schengen internal border regime, strongly supports EU measures to strengthen external border management—notified the Council of its wish to participate in the EC Regulation establishing the EU external border management agency Frontex. This was rejected by the Schengen Member States on grounds that the Frontex Regulation constitutes a measure building upon the Schengen border control acquis from which the UK enjoys a complete opt-out. Not content with this rebuff, the British government, joined by Ireland, went before the ECJ to seek an annulment of this decision. However, on 18 December 2007 the Court ruled that the UK (and Ireland) could not participate in the Frontex Regulation without first having accepted the part of the acquis on which that measure is based—a nice example of the involuntary exclusion effects that might result from opt-outs.

4. The ‘Enhanced Cooperation’ Possibilities

The existing opt-outs are an indication that differences between the Member States over the nature and scope of the AFSJ as an integration project can be too substantial for them to go ahead together. In order to prevent this from becoming an obstacle to any progress in the AFSJ domain—and, indeed, as a kind of ‘safety valve’—the Treaties offer the instrument of ‘enhanced co-operation’ as an option for just a group of Member States to go ahead with deeper integration in certain JHA areas. Articles 11 EC and 40 EU enable such an ‘avant-garde’ group of Member States to establish an enhanced co-operation under both Title IV EC and Title VI EU and to fully use EC/EU institutions and procedures in this context. Article 43(a) EU, however, provides that such co-operation may only be undertaken as a measure ‘of last resort’, and there is a whole range of conditions attached to it, such as a minimum of eight participating Member States, openness to all member States, and respect of the existing acquis, the single institutional framework and the interests of non-participating Member States. The Schengen system formally constitutes the first case of such a differentiated form of integration in the JHA domain, although it was obviously established long before the Amsterdam Treaty. Other than this, this instrument has not been used so far, although its potential application has on a few occasions been used to put pressure on Member States in an isolated position. The Belgian presidency of the second half of 2001, for instance, hinted at a potential use of enhanced co-operation in case the Italian government would not lift its isolated objections against elements of the Framework Decision on the European Arrest Warrant.

As in the case of the opt-outs, the Treaty of Lisbon not only maintains existing enhanced co-operation possibilities (Articles 20 TEU-Lis and 326–334 TFEU) but further enhances the differentiation potential they provide. The new Treaty in fact provides for a quasi-automatic establishment of enhanced co-operation in the AFSJ in a number of cases. As regards the adoption of directives establishing minimum rules regarding criminal procedure (Article 82(3) TFEU) and establishing minimum rules concerning the definition of criminal offences (Article 78 Council Reg 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States, [2004] OJ L349, 1.
80 Art 1 of Protocol (No 2) integrating the Schengen acquis into the framework of the European Union (1997) establishes Schengen formally as an ‘enhanced co-operation’ in the sense of the Treaties.
83(3) TFEU), a Member State that considers that the draft Directive may affect fundamental aspects of its criminal justice system may request a suspension of the ordinary legislative procedure and the referral of this act to the European Council.\(^{82}\) If the European Council does not reach an agreement within four months, a group of at least nine Member States has only to notify Council, Commission and EP that they wish to adopt the Directive in question by way of an enhanced co-operation in order to be able to proceed. Of equal significance are the new possibilities for a group of at least nine Member States to apply a similar procedure if unanimity cannot be reached with regard to the establishment of a European Public Prosecutor’s Office (Article 86(1) TFEU) and with regard to measures concerning the operational co-operation between police forces (Article 87(3) TFEU).\(^{83}\) In both cases the 9+ group can refer the measure to the European Council. If the European Council fails to reach an agreement within four months, it will be sufficient for that group to again simply notify the institutions of their wish to proceed with the respective measure on the basis of enhanced co-operation to obtain the authorisation to do so.

In a sense, the enhanced co-operation possibilities are just another—although potentially more constructive—variation of the logic of pursuing separate interests within the AFSJ which also forms the basis of the opt-outs. Whereas in the case of the opt-outs certain Member States have reserved themselves the right to participate only in those (further) measures developing the AFSJ which they consider to be in their interest, enhanced co-operation offers groups of Member States the chance to propose\(^{84}\) and proceed with certain common measures even if their interest in them is not shared by the others. From a constitutional perspective this is of considerable significance, as it means that the AFSJ—although a fundamental common treaty objective—is not the same for all Member States and, consequently, does not offer the same in terms of ‘freedom, security and justice’ to EU citizens. If one assumes, for instance, that EU legislation facilitating cross-border operational co-operation between national law enforcement agencies in the sense of Article 87(3) TFEU does indeed contribute to ‘ensuring a high level of security\(^{7}\) in the sense of Article 67(3) TFEU, it would in case of a use of the enhanced co-operation facility arguably do so only (or primarily) for the citizens of the participating Member States—which introduces a clear differentiation in the provision by the EU of a fundamental public good for the individual.

5. The position of the Schengen ‘Associates’

A special aspect of differentiation within the AFSJ is that three non-EU countries, Iceland, Norway and Switzerland have concluded Association Agreements with the EU on their participation in the Schengen border control system which provide for the abolition of controls on persons at internal borders between them and the EU Schengen Member States and the implementation by those countries of most of the Schengen acquis.\(^{85}\) By virtue of a Protocol signed on 28 February 2008 between the European Union, the European Community, Switzerland and the

\(^{82}\) A procedure now often referred to as ‘emergency brake’.

\(^{83}\) This is one of the few changes introduced by the Treaty of Lisbon which were not already provided for by the Constitutional Treaty.

\(^{84}\) As already mentioned, legislative initiatives in the respective fields can also be brought by a quarter (at least) of the Member States. This opens up the possibility of a 9+ group bringing in a legislative initiative, which is right from the start designed to be rejected by the others simply in order to get the ‘automatic’ authorisation to proceed with enhanced co-operation.

Principality of Liechtenstein,\(^{86}\) the latter is going to be accede to Switzerland’s association with the implementation, application and development of the Schengen acquis. As a result, Iceland and Norway have been part of the Schengenland area since 25 March 2001, Switzerland since March 2003 and Liechtenstein will probably be fully integrated by the end of 2009. As a result, a substantial part of the acquis of the AFSJ—the Schengen acquis—applies to four non-member countries but not to two Member States, the UK and Ireland. This is not without some peculiar consequences from a constitutional point of view. EU citizens travelling from one of the two opt-outs to a Schengenland country, for instance, arguably do not enjoy the same rights when crossing internal borders as do non-EU citizens from one of the associate countries doing the same, as the first are subject to controls on persons and the second not, a situation which runs at least against the ‘spirit’ of EU citizenship (with its right to free movement) as a privileged status for the nationals of EU Member States.

Iceland and Norway were included in the Schengen system as a result of the accession of Denmark, Finland and Sweden to Schengen in order not to disrupt the Nordic Passport Union between the Scandinavian countries. Switzerland opted for a similar association status because of the benefits of inclusion in the Schengen system from an internal security, asylum and migration policy perspective. There is, however, a political price that the three associates had to pay for their inclusion in the Schengen system without being members of the EU. As Schengen associates, they have to implement all the legal acquis of the Schengen system without having formal decision-making powers in the Council of the EU. According to the formula of ‘decision-shaping rather than decision-making’ provided for by the Association Agreements, they can participate in those parts of the JHA Council meetings which deal with Schengen items (so-called ‘mixed’ agenda items) and express their views on proposed measures, but if those measures come to formal adoption only the EU Schengen Member States have voting rights.\(^{87}\) This can also be regarded as a peculiar feature of the AFSJ framework. It was the result not only of political preferences on the side of EU Member States but also of the need to maintain the autonomy of the Community legal order as affirmed by the ECJ in Opinion 1/91 on the European Economic Area Agreement.\(^{88}\)

V. An Area of Cooperation rather than Integration

1. The Cooperative Orientation of the Current Treaty Framework

The old Maastricht Treaty third pillar was entitled ‘Co-operation in the Fields of Justice and Home Affairs’, thereby emphasising the intergovernmental nature of this area of EU policy-making. Although the Treaty of Amsterdam has brought substantial reforms and a symbolically much more appealing overall objective, co-operation between the Member States remains the prevailing principle of the AFSJ. With the matters covered by the AFSJ generally being considered highly sensitive from the point of view of national sovereignty,\(^{89}\) some Member States having particular concerns about the implications of potential harmonisation for

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86 Protocol on the accession of the Principality of Liechtenstein to the Agreement on the Swiss Confederation’s association with the implementation, application and development of the Schengen acquis, see Council Doc 16402/06 [sic!] of 13 February 2008 and [2008] OJ L83, 3 (signature).
89 On the national sovereignty issue in the context of the AFSJ, see E Barbe, Justice et affaires intérieures dans l’Union européenne (2002) 23.
their legal systems, and many JHA fields—such as immigration and the fight against crime—figuring high on the national political agendas, there has been a considerable reluctance to transfer competences to the EC/EU in the AFSJ context and to relinquish control over national governance instruments. Instead, the AFSJ is marked by a strong political preference for focusing EU action on reinforcing co-operation between the national systems rather than forcing major change on them through any real attempt at integrating them into a single system with a strong set of common rules and common institutions with cross-border operational powers.

The emphasis on co-operation rather than integration has a firm grounding in the Treaty framework. The co-operation rationale is particularly strong in the context of Title VI EU. Article 29 EU defines ‘common action by the Member States’—i.e. not any ‘common policy’ or action by the Union or its institutions—as the primary instrument by which to achieve a high level of safety within the AFSJ. The two main third pillar agencies—Europol and Eurojust—are identified as the means through which ‘closer co-operation’ between the respective competent authorities of the Member States is to be achieved (Article 29 EU), the Treaty not providing for any more distinct role or power of those agencies than ‘to facilitate . . . coordination’ between the national authorities through various activities (Articles 30(2)(a) and 31(2)(a) EU). ‘Approximation’ of rules on criminal matters only to take place ‘where necessary’ (Article 29 EU), and is limited to ‘minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking’ (Article 31(1)(e) EU). In order to limit any potentially more invasive impact on the national systems, there are the ‘constitutional safeguards’ of Article 33 EU, which provides that Title VI ‘shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security’, and Article 35(5) EU, pursuant to which the ECJ shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

Within the category of the numerous provisions protecting national systems against integrative effects also falls Articles 34(2)(b) and (c) EU, which explicitly excludes any direct effect of Framework Decisions and Decisions under Title VI EU. The armour of protection of the national systems is completed by a range of institutional provisions such as the aforementioned unanimity requirement in the Council and the limited role of the European Parliament, and also the aforementioned strictly subsidiary concepts of ‘security’ and ‘justice’ at the EU level.

Even in the communitarised fields of Title IV EC, however, the principle of co-operation has a firm foundation. Although this is a Community policy-making domain, the Title does not provide for the establishment of any ‘common policy’, and, rather than defining a general competence for the EC to act in a field where a lot of common measures are envisaged, such as asylum (Article 63(1) EC), the Treaty is limited to listing the main types of measures. The potential impact on the national systems is, again, reined in by an emphasis on ‘minimum standards’ in the fields of asylum and refugee policy (Article 63(1) and (2) EC) and on

90 The particular concerns of the UK and Ireland with respect to their common law systems are the most prominent example.

91 The term of ‘integration’ is used here—along the lines of the definition of economic integration developed in B Belassa, ‘Towards a Theory of Economic Integration’ (1961) 14 Kyklos 1—with the very basic meaning of a process leading to the creation of single new system through the merging of several separately existing ones, as opposed to ‘co-operation’ as a process where these systems interact but remain essentially separate.
co-operation, mutual recognition and the promotion of the ‘compatibility of rules’ in the field of judicial co-operation in civil matters (Article 65 EC). As already mentioned, the unanimity requirement—arguably the most effective barrier to unwanted integration—has been also maintained for two particularly sensitive fields under Title IV EC: legal immigration and family law.

If one takes a brief look beyond the ‘written constitution’ at the ‘living’ constitution, as far as the AFSJ is concerned, one can observe that the latter is very much in line with the former. Since the Tampere European Council of October 1999, which elevated mutual recognition to ‘cornerstone’ of the EU ‘area of justice’,92 there has been a major emphasis on the principle of mutual recognition in both civil and criminal matters, which is aimed at facilitating co-operation between the national judicial systems without imposing major harmonisation on them. The harmonisation in the asylum policy field has in most cases followed the ‘minimum standards’ approach designed in Article 61 EC to the extent of being ‘minimalistic’, while in the field of legal immigration the integrationist attempt made by the Commission with its initiative of July 200193 regarding legal immigration for work purposes has completely failed and been replaced by a strategy aimed at coordinating national policies with minimum harmonisation in certain sectors only. It is also noteworthy that the Member States have so far not conferred any executive operational powers to the special agencies established in this domain (Europol, Eurojust, Frontex), all law enforcement powers remaining in the hands of national authorities.

2. The Commission and the Court as (Limited) Factors of Integration

Because of the variety of conflicting interests at both the EU and the national level, the EU is a highly dynamic system in which prevailing principles—even if of constitutional importance—rarely remain unchallenged and not subject to change. The same has happened to the prevailing co-operation logic in the AFSJ.

The most political and radical challenge to the predominance of co-operation rather than integration in the AFSJ has come from the European Commission. In June 2006 it proposed to use Article 42 EC to transfer matters currently falling under Title VI EU to Title IV EC—with full co-decision by the European Parliament and qualified majority voting in the Council—to use the second indent of Article 67(2) EC to bring legal migration under the EC co-decision procedure and to extend the powers of the ECJ under Title IV EC by bringing them fully into line with the powers the Court of Justice otherwise enjoys under the EC Treaty.94 This proposal actually went further in terms of communitarisation—and hence integration potential—than the reforms of the Treaty of Lisbon as it did not provide for any of the safeguards for Member States in the most sensitive fields of police and judicial co-operation, such as the ‘emergency brake’ and remaining unanimity requirements (see section III.4 above). Unsurprisingly, the proposal, the acceptance of which would have required unanimity in the Council, met with stiff opposition from several Member States, including the 2007 German presidency, which was concerned about potential interferences with its attempt to revive the Constitutional Treaty. In spite of strong support from the Finnish presidency, a majority of the Member States and the European Parliament, it was practically shelved by the December 2006 European Council and has since become obsolete because of the Treaty of Lisbon. The strong support given by a majority of Member States to the proposed abolition of the third pillar may have helped,

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92 European Council, Tampere Programme, above n 15, para 33.  
94 COM(2006) 331 and—dealing with the extension of the powers of the ECJ—COM(2006) 346. As to the introduction of an urgent preliminary ruling procedure applicable to references concerning the area of freedom, security and justice, see Bast, above chapter 10.
however, to generate a positive momentum for the 2007 Lisbon Treaty breakthrough on this issue.

With the Commission’s attempt at achieving constitutional change without another treaty reform having failed, the contribution of the ECJ to such change has appeared all the more clearly. Some elements of its recent case law on AFSJ-related issues of relevance in this context have already been mentioned in section III.3 above. Arguably, the affirmation of both the Court’s power to review any third pillar measures with regard to their implications for the first pillar domain and its role in safeguarding the application of the rule of law and fundamental rights in AFSJ-related measures makes the particularly strong co-operation rationale under Title VI EU subject to at least some degree of integrative control by the ECJ and the integrative constraints imposed by common rule of law and fundamental rights standards.

Yet the Court has adopted other positions which counterbalance at least to some extent the prevailing co-operation principle. One of those emerged from the Court’s ruling in the famous Pupino case,95 which concerned the legal effects of a Title VI EU Framework Decision. The Framework Decision contained provisions for the protection of particularly vulnerable victims—in this case young children—in criminal proceedings. The Italian Code of Criminal Procedure contained some provisions to such effect, but these were more restrictive and did not cover the situation in question. The question was therefore whether the rules of the Italian Code should be interpreted extensively in order to make them compatible with the Framework Decision. Notwithstanding Article 34(2)(b) EU, which excludes any ‘direct effect’ of Framework Decisions, the Court held that ‘the principle of conforming interpretation is binding in relation to framework decisions adopted in the context of Title VI EU’ and that

when applying national law, the national court that is called upon to interpret it must do so as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues.96

While falling short of a full direct effect under EC law—which would give rise to a contra legem conclusion and force the substitution of the incompatible national legislation—the Court went a long way with this decision to align the legal effects of framework legislation under the strongly cooperative context of Title VI EU with those of the arguably more integrative context of similar EC legislation. The ECJ also puts its position within the framework of a wider reasoning by stating that

irrespective of the degree of integration envisaged by the Treaty of Amsterdam in the process of creating an ever closer union among the peoples of Europe . . . it is perfectly comprehensible that the authors of the Treaty on European Union should have considered it useful to make provision, in the context of Title VI of that treaty, for recourse to legal instruments with effects similar to those provided for by the EC Treaty, in order to contribute effectively to the pursuit of the Union’s objectives.97

With that, the Court affirmed the need for an overarching uniformity of the effects of legal instruments in order to ensure the effective pursuit of the EU’s objectives, a logic of effectiveness which in the given case was made to prevail over the logic of pure co-operation interfering as little as possible with the national legal systems.

Another issue on which the Court followed a reasoning based on an integrated rather than purely cooperative understanding of the AFSJ are its rulings on the application of the ne bis idem principle, arguably a principle of constitutional relevance. Being laid down in Article 54 of the 1990 Convention implementing the Schengen Agreement (CISA),98 it requires Member States to recognise judgments in criminal proceedings delivered by jurisdictions of other

95 Case C-105/03 Pupino [2005] ECR I-5285.
96 Ibid, para 43.
97 Ibid, para 36.
98 Since 1999 incorporated into the EC/EU acquis.
Member States on whatever different substantive or procedural criminal law provisions these may be based. In Gözütok and Brügge,99 the first of a series of cases on the issue, the Court held that Member States must recognise the decision reached by a court in another Member State regardless of a potentially different outcome under their own criminal law legislation as, by virtue of the ne bis in idem (‘double jeopardy’) principle enshrined in Article 54 CISA,

there is a necessary implication that the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied.100

With this position the ECJ affirmed again a unitary principle applying to the whole of the AFSJ—in that case, mutual recognition under the ne bis in idem principle as a fundamental safeguard101—which is more in line with the logic of an integrated area of justice than with one in which national systems only cooperate while fully maintaining their national rules.

As a result of the above, the Court clearly appears as a factor of change in the constitutional context of the AFSJ in the sense that it has repeatedly asserted principles in line with a more integrated understanding of the AFSJ than the predominance of the co-operation principle suggests. It has been suggested, however, that, having regard to the continuing sensitivity of certain AFSJ matters, such as criminal justice matters, the Court might need to pursue a more cautious interpretative approach,102 and the Court can evidently not change the current fundamentally cooperative orientation given to the AFSJ domain by both the Treaty framework and EU policy-makers.

Yet the Court is far from pursuing a systematically pro-integrationist line of reasoning with regard to the AFSJ. In the recently decided preliminary ruling Advocaten voor de Wereld103 the Court upheld the principle of mutual recognition—a core principle of co-operation within the AFSJ—against the argument that its application would require a higher degree of harmonisation as a prerequisite. The Court in fact rejected the argument that the abolition of the double criminality requirement under the 2002 Framework Decision on the European Arrest Warrant was incompatible with the principle of legality because of the absence of full harmonisation of the offences in question, by stating that the Council was justified in its view,

on the basis of the principle of mutual recognition and in the light of the high degree of trust and solidarity between the Member States, that, whether by reason of their inherent nature or by reason of the punishment incurred of a maximum of at least three years, the categories of offences in question feature among those the seriousness of which in terms of adversely affecting public order and public safety justifies dispensing with the verification of double criminality.104

The Court thereby took—besides the public order and security purpose of the measure in question—‘trust and solidarity’ between the Member States as a ground for dispensing with the need for further substantive harmonisation, a position which is arguably more in line with a cooperative than with an integrative approach.

100 Ibid, para 33. The Court’s judgments in Case C-467/04 Gasparini [2006] ECR I-9199 and Case C-150/05 Van Straaten [2006] ECR I-9327 were based on the same reasoning.
103 Case C-303/05 Advocaten voor de Wereld [2007] ECR I-3633.
104 Ibid, para 57.
3. The Reaffirmation of the Cooperation Rationale by the Treaty of Lisbon

The Treaty of Lisbon continues the primacy of co-operation between the national systems. Article 67(1) TFEU makes the constitution of the AFSJ subject to the ‘respect [of] the different legal systems and traditions of the Member States’ and Article 4(2) TEU-Lis states generally that the Union shall respect ‘essential State functions including . . . maintaining law and order and safeguarding national security’. All this arguably represents a further protection against integrative measures which might interfere with the existing national systems. In the fields of police and judicial co-operation in criminal matters, the term ‘common policy’ continues to be avoided in favour of a systematic use of ‘co-operation’ (Articles 82–85 TFEU), the limitation to minimum harmonisation is maintained (Article 83 TFEU), the role of Eurojust and Europol is still to ‘support and strengthen’ co-operation between national authorities (Articles 85(1) and 88(1) TFEU), the protection of the national responsibilities of the Member States with regard to the maintenance of law and order and the safeguarding of internal security is enshrined in the same terms as before (Article 72 TFEU) and the Court of Justice continues to have no competence with regard to the exercise of these responsibilities by the respective national authorities (Article 276 TFEU). In the currently already communitarised fields of asylum and immigration the new Treaty introduces for the first time the term ‘common policy’, but still defines only a list of measures rather than a general competence for the Union (Articles 78 and 79 TFEU).

The only slight evolution towards a more integrative approach is the repealing of Article 34(2)(b) and (c) EU, which provides for the exclusion of ‘direct effect’ for legal acts under Title VI EU. However, the already referred to judgment of the Court in Pupino had already done much to erode this exclusion on the consideration of the overall effectiveness of EU legislation, and the communitarising merger of Title VI EU in the new Title V TFEU made the exclusion difficult to maintain anyway. While the Treaty of Lisbon seems to follow the logic of effectiveness as regards the effects of AFSJ legislation, though, it does little otherwise to restrain the primacy of the preservation of national legal systems on which the prevailing rationale of co-operation is based.

The question of whether co-operation as the dominating principle of the AFSJ is actually sufficiently effective for the EU to achieve its objectives in this domain lies outside of the scope of this chapter, but there can be no denial of the fact that this determines the AFSJ domain ‘constitutionally’, setting it apart from other policies, such as competition policy and the common commercial policy, which are arguably based more on a logic of integration of the national systems. The AFSJ remains essentially an area of co-operation between states—which has major implications for the position of the individual.

VI. The Place of the Individual in an Area of Cooperating Member States

1. The Individual as a Passive Beneficiary of the AFSJ

On the basis of our above analysis, it can be said that the Union ‘offers’ (Article 3(2) TEU-Lis) the AFSJ to its citizens105 essentially through the facilitation and strengthening of co-operation between the Member States. This is certainly fully in line with the merely subsidiary role

105 The use of the term ‘its citizens’ suggests a clear distinction between EU citizens and third-country nationals. Yet the absence of controls at internal borders applies to both EU citizens and third-country nationals (Art 62(1) EC), and the new Art 61(2) TFEU provides for the ‘fair treatment’ of third-country nationals in the context of EU policies on asylum, immigration and external border controls.
assigned to the Union in this domain, especially as regards the sensitive internal security field in which the Member States’ competences and autonomy are ‘constitutionally’ protected in a very comprehensive way (Article 33 EU; Article 72 TFEU). There is also no question that that the removal of obstacles to that co-operation—which are normally linked to the persisting ‘borders’ and differences between the national systems—can provide real added value to the individual citizen, especially as regards the three public goods specifically identified in the Treaties, ie ensuring the free movement of persons across internal borders, a high level of internal security and facilitating access to justice (see above, section II 1). In this sense, the individual is clearly the main beneficiary of the AFSJ, although most of the measures adopted are not aimed directly at the individual but at facilitating co-operation between the relevant national authorities.

The co-operation rationale on which the AFSJ is constructed so far also means that the added value that the AFSJ brings to the individual continues to be essentially provided by the Member States through their facilitated and strengthened co-operation—not by the Union and their institutions. This somewhat reduces the potential for output legitimacy that the AFSJ can generate for the Union. In addition, the individual remains a passive beneficiary in the sense that (s)he is ‘offered’ the benefits of the AFSJ without being in a position to effectively claim them. There is in fact not a single provision in current Title IV EC and Title VI EU (as well as new Title V TFEU) which establishes any specific rights of the individual within the AFSJ. The provision which comes closest to such a right is Article 62(1) EC (Article 67(2) TFEU) under which the Union shall ‘ensure’ the absence of controls on persons at internal borders, but this absence of controls is obviously subject to the special AFSJ public policy and internal security exception clause of Article 33 EU (Article 72 TFEU), and the 2006 Schengen Borders Code provides in fact for ample possibilities for Member States—subject to a number of procedural requirements—to temporarily reintroduce controls on persons at internal borders for public policy and internal security considerations. The absence of controls at internal borders is therefore not a claimable individual right, and even less so is there a claimable right to the already mentioned (rather vague) objectives of a ‘high level of security’ or ‘facilitated access to justice’.

The term of the Union ‘offering’ the AFSJ to the citizens describes the position of the citizen within the AFSJ therefore quite well by underlining his/her purely passive position as a recipient. It is a term which also curiously reminds oneself of the favours granted to the subjects as forms of ‘royal grace’ under the enlightened absolutism of the 18th century. It fits nicely to the fact that the European Council—which even under the Treaty of Lisbon remains outside most mechanisms of legal and political control and hence comparable to ‘a king in the constitutional regimes of the 19th century’—has reserved itself the right ‘to define the strategic guidelines for legislative and operational planning’ within the AFSJ (Article 68 TFEU).

2. Two Missed Opportunities: The Charter of Fundamental Rights and Union Citizenship

Because of the predominance of internal security objectives within the AFSJ and its resulting ‘securitisation’ the AFSJ is often seen as being marked by a serious lack of balance between security and the rights of the individual. The restrictive orientation of EU measures in the fields of asylum and immigration policies—often referred to under the label of ‘fortress

107 A fitting term used by von Bogdandy, above chapter 1.  
Europe’—add to the image of an AFSJ in which more emphasis is placed on repressive measures than an the freedom and justice components of this fundamental treaty objective.\textsuperscript{109} These critical perspectives often fail to assess the AFSJ within the broader context of Member States’ national JHA policies—which in many cases are distinctly more repressive and invasive on individual rights.\textsuperscript{110} Yet they clearly have some justification. It therefore seems regrettable that recently two opportunities to ‘constitutionally’ counterbalance this lack of balance and repressive orientation in favour of individual rights have been missed.

One of those has been missed in the context of the legal codification of the EU Charter of Fundamental Rights by the Treaty of Lisbon.\textsuperscript{111} Although several of the rights established by the Charter are of direct relevance to the AFSJ (see the following section) the Treaty contains no specific reference to the Charter as a whole or any of its provisions. The reference in Article 67(1) TFEU to the Union constituting ‘an area of freedom, security and justice with respect for fundamental rights’ could not have been drafted more vaguely and could have been perfectly well introduced without the Charter even existing. What has been missed here is the opportunity to make the rights of the Charter an integral part of the AFSJ as a fundamental treaty objective, with direct references to the most relevant rights wherever appropriate. This would have ‘constitutionally’ strengthened the freedom and justice components of the AFSJ.

The other missed opportunity is related to the citizenship of the Union.\textsuperscript{112} Having regard to the fact that the Union ‘offers’ the AFSJ to its citizens (in the wording of Article 3(2) TEU-Lis), it seems indicative of the low importance attached in this latest round of treaty reforms to the status of Union citizenship that Article 20 TFEU makes no reference whatsoever to what EU citizens are ‘offered’ in the context of the AFSJ. A no less obvious ‘missing link’ is that between the references to the absence of controls on persons at internal borders in AFSJ-related provisions (Article 3(2) TEU-Lis, Articles 67(2) and 77(1)(a) TFEU) and the right to free movement as part of the citizenship of the Union according to Article 20(2)(a) TFEU (currently Article 18(1) EC). What has been missed here from the perspective of the AFSJ as a major constitutional objective is to give it another positive dimension by making what it ‘offers’ an explicit part of what citizens can expect from the Union as part of their citizenship status.

3. The Protection of the Rights of the Individual

The EU citizen may be the main beneficiary of the AFSJ, but he or she may also become a ‘victim’ of it. There can be no doubt that measures in the AFSJ domain can affect fundamental rights of individuals in a much more direct way than, for instance, most of the single market measures. After all, the AFSJ covers issues that are part of the most invasive forms of state action vis-à-vis the individual, such as the arrest of persons, prison sentences, the freezing of personal property, and the storage and analysis of personal data. This is also true of third country nationals, who—if asylum seekers or illegal immigrants—may additionally be exposed to the restrictive side of EU asylum and immigration policies. The risks to the rights of the individual are increased by the fact that the AFSJ remains essentially an area of cooperating states with major persisting differences between relevant national legislation and structures, especially in

\textsuperscript{109} This critical perspective has recently been developed in a very comprehensive way and from various angles in H. Toner et al (eds), Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy (2007).

\textsuperscript{110} One example among many is the (in)famous Part 4 of the 2001 British Anti-Terrorism, Crime and Security Act, which allowed the Home Secretary to detain non-British citizens, pending deportation, indefinitely without trial (replaced by the 2005 Prevention of Terrorism Act after its condemnation by a ruling of the Law Lords of 16 December 2004).

\textsuperscript{111} On the legal codification of the Charter, see Kühling, above chapter 13.

\textsuperscript{112} On Union citizenship see Kadelbach, above chapter 12.
the fields of criminal law and law enforcement. All this raises the question of the adequate protection of the rights of the individual within the AFSJ.

With regard to the EU construction as a whole, the AFSJ is obviously subject to the general rule of law and fundamental rights provision of Article 6(1) and (2) EU, with its references to the ECHR and the common constitutional traditions of the Member States. This is substantially strengthened by Article 6 TEU-Lis, with its reference to the new legal value of the Charter of Fundamental Rights and the Union’s adherence to the ECHR. In relation to the financial and other property sanctions imposed on alleged terrorists and terrorist groupings on the so-called terrorist lists, in Gestoras pro Amnestia and Segi the Court has left no doubt that both the EU institutions and—when applying EU law—the Member States are subject to review of the conformity of their acts with respect to the rule of law and fundamental rights even if—as currently under Title VI EU—the Treaty does not explicitly provide for all necessary legal remedies.\textsuperscript{113}

The controversial terrorist lists have given the Court an opportunity to develop more concretely at least some elements of the protection of the rights of the individual vis-à-vis action taken by the EU institutions for internal security purposes. In three recently decided cases—\textit{Modjahedines, Sison} and \textit{Al-Aqsa}\textsuperscript{114}—the Court of First Instance has annulled three Decisions adopted by the Council on the basis of EC Regulation 2580/2001\textsuperscript{115} to freeze the funds of the plaintiffs on grounds of not containing a sufficient statement of reasons and the non-observation of the right to a fair hearing. Referring to the ‘balance’ to be struck ‘between observance of the fundamental rights of the persons included in the list at issue and the need to take preventive measures to combat international terrorism’, the CFI recognised, on the one hand, the right of the Council to impose such sanctions against presumed terrorists on an initial basis without informing those concerned in advance,\textsuperscript{116} but firmly upheld, on the other hand, the obligation for the Council to give—either concomitantly with or as soon as possible after the adoption of the initial decision—in a clear and unequivocal way the reasons for the adopted sanction and to effectively guarantee the rights to a fair hearing as the two main elements of the rights of defence.\textsuperscript{117} The CFI criticised in particular that the applicants had not only been unable effectively to make their views known to the Council, but also, given the lack of any statement of the actual and specific grounds justifying those decisions, had not been placed in a position to make good use of their right of action before the Court, given the connection between the guarantees of the rights of defence, of the obligation to state reasons and of a fair hearing.\textsuperscript{118}

The need for measures restricting the rights of individuals for internal security reasons to at least be properly justified has also been upheld by the ECJ in Case C-503/03.\textsuperscript{119} On application by the Commission, the Court ruled that Spain had breached its obligations under EC law by repeatedly refusing a Schengen entry visa to two Algerians on the basis of an Schengen ‘alert’ under Article 96 CISA\textsuperscript{120} placed by Germany. Both men, Mr Farid and Mr Bouchair, were

\begin{itemize}
  \item \textsuperscript{113} Case C-354/04 P and Case C-355/04 P, above n 58, paras 51 and 53. On the importance of the ruling for judicial protection under Title VI EU, see U Haltern, ’Rechtsschutz in der dritten Säule der EU’ [2007] Juristen-Zeitung 772.
  \item \textsuperscript{114} Case T-228/02, above n 52; Case T-47/03 \textit{Sison v Council} [2007] ECR I-73; Case T-327/03 \textit{Stichting Al-Aqsa v Council} [2007] ECR II-79.
  \item \textsuperscript{115} Council Reg 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, [2001] OJ L344, 70.
  \item \textsuperscript{116} Case T-228/02, above n 52, para 128; Case T-47/03, above n 114, paras 174–5 and 177.
  \item \textsuperscript{117} Case T-228/02, above n 52, paras 91, 138 and 173; Case T-47/03, above n 114, paras 141 and 226; Case T-327/03, above n 114, para 63.
  \item \textsuperscript{118} Ibid, para 165, para 219 and para 64 respectively.
  \item \textsuperscript{119} Case C-503/03 \textit{Commission v Spain} [2006] ECR I-1097.
\end{itemize}
married to Spanish nationals and were as such entitled to the rights of free movement under EC law. The Court held that under EC law these rights could only be suspended—and, as a result, entry refused—after a verification of whether their presence constitutes ‘a genuine, present and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society’. The decision of the Spanish authorities to refuse an entry visa only on grounds of a Schengen alert without further verification of whether these persons actually constitute a threat in the above sense was therefore declared a failure to comply with the rights of the individuals concerned under EC law.

The protection provided by the Court for individual rights against potential encroachments by Union measures in the internal security domain nevertheless has its limitations. While it is true that in the aforementioned Modjahedines, Sison and Al-Aqsa cases the CFI annulled the EC Decision to freeze the plaintiffs’ assets on grounds of not containing a sufficient statement of reasons and non-observation of the right to a fair hearing, the annulment only concerned EC implementing decision, not the Common Position on which it was based. In Modjahedines the CFI emphasized that the non-observation of the above-mentioned legal guarantees provided a ground of annulment only because the UN Security Council Resolution 1373(2001) at the origin of the Common Position had in fact left discretion to the Council as regards the individualisation of the sanctions concerned, as a result of which the Council was bound to observe all applicable legal guarantees under EC law. The Court explicitly recognised in this context the ‘broad discretion’ of the Council in deciding on the imposition of the sanctions and declared that ‘the Community Courts may not, in particular, substitute their assessment of the evidence, facts and circumstances justifying the adoption of such measures for that of the Council’, so that its judicial review role would need to be limited to the respect of procedural rules and the exclusion of a manifest error of judgment or abuse of power. This actually leaves a broad margin of discretion to the Council when it comes to deciding on the inclusion of persons in the terrorist lists—and no legal remedy under EU law at all if the sanctions result directly from a person being put on the terrorist list by the UN Sanctions Committee.

This is not the only instance of the CFI having shown a certain reluctance to review the substantive grounds of the Council for imposing sanctions on individuals in the fight against terrorism. In two of the earlier terrorist lists cases—Yusuf and Kadi—the CFI had even refused to enter into the merits of the case by adopting the position that the UN Security Council Resolutions at the origin of the sanctions imposed enjoyed supremacy over EC/EU law, a reasoning which has attracted some vivid criticism.


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120 This Article justifies a refusal of entry into the Schengen zone if the person concerned has been convicted of an offence carrying a penalty involving deprivation of liberty of at least one year (Art 96(2)(a) CISA), or if he has been subject to a measure based on a failure to comply with national regulations on the entry or residence of aliens (Art 96(3) CISA).
121 Case C-503/03, above n 119, para. 48.
122 Ibid, paras 54–5. This case also illustrates the tension potential between the restrictive Schengen external border policy and the EC freedom of movement rights.
124 Case T-228/02, above n 52, para 107.
125 Ibid, para 159. In identical terms: Case T-47/03, above n 114, para 206.
the sanctions, this time essentially on grounds of the responsibility of the Member States to ensure within their respective jurisdictions adequate protection of the rights of the persons concerned, including their rights to seek a ‘de-listing’ of their names by the UN Sanctions Committee. It should be noted, however, that in its recent ruling on the Kadi and Al Barakaat appeal cases of 3 September 2008 the Court of Justice has overturned the earlier CFI decisions to leave the sanctions in place. In this judgment the Court concluded on a violation of the right to effective judicial protection, asserting at the same time the constitutional nature of that right and the Court’s right to subject measures implementing UN Security Council Resolutions to a full judicial review in the light of this and other Community constitutional principles.130

The Court has adopted a much less qualified position on the rights of the individual within the AFSJ with regard to the application of the ne bis in idem principle, which can be regarded as an essential individual right in the development of the justice element of the AFSJ. In Gözütok and Brügge131 (already referred to above) the Court gave a broad interpretation to the ne bis in idem provision of Article 54 CISA. It held that the principle also applies to prosecution cases ending with out-of-court settlement in one of the Member States. In both cases the Court found that the suspension of prosecution in the first Member State dealing with the respective case (Netherlands/Germany) after a pecuniary out-of-court settlement had, by virtue of Article 54 CISA, a barring effect on the later prosecution cases against Mr Gözütok and Mr Brügge for the same facts (drug dealing/assault) in the two other Member States concerned (Germany/Belgium) which had resulted in higher sentences—in the case of Mr. Gözütok even a prison sentence. The Court justified this broad interpretation by stating that the objective of Article 54 CISA, ‘to ensure that no one is prosecuted on the same facts in several Member States on account of his having exercised his right to freedom of movement’, could not be fulfilled unless it also applies to decisions definitely discontinuing prosecution in a Member State, even if these do not take the form of a judicial decision.132 In Van Straaten the Court ruled on similar grounds—referring again to the right to free movement—that Article 54 CISA also applies to final acquittals for lack of evidence.133 With some reason. these rulings have been described as important steps towards the transformation of the ne bis in idem principle from a national legal principle to a ‘transnational human right’.134 It should be noted, however, that the Court itself, rather than placing the ne bis in idem principle into a broader fundamental rights context, has only linked it to the right to free movement.135

The Treaty of Lisbon strengthens the position of the Court with regard to the AFSJ. As a result of the abolition of the pillar divide, the preliminary rulings procedure will—subject to the aforementioned transitional period—become mandatory also in the current third pillar fields. Article 267 TFEU also removes the current restriction in the first pillar AFSJ fields of the right to request preliminary rulings to national courts of last instance. If this already strengthens the judicial protection possibilities of individuals, this is even more true of the applicability of the extended action for annulment provision of Article 263(4) to all AFSJ

131 Cases C-187/01 and C-385/01, above n 99.
132 Ibid, para 38.
133 Case C-150/05, above n 100, paras 57–61. On the link with the right to free movement see also Case C-436/04 Van Estbroeck [2006] ECR I-2333, para 34, where the Court held that the ‘right to freedom of movement is effectively guaranteed only if the perpetrator of an act knows that, once he has been found guilty and served his sentence, or, where applicable, been acquitted by a final judgment in a Member State, he may travel within the Schengen territory without fear of prosecution in another Member State’. See also H Kühne, ‘Ne bis in idem im Gemeinschaftsrecht’ [2006] Juristen-Zeitung 1019.
matters, which allows any natural or legal person to institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures. This can be regarded as a necessary response, inter alia, to the judicial protection deficits which have become obvious in the case of the Council’s terrorist lists.

The full incorporation of the EU Charter of Fundamental Rights by the Treaty of Lisbon is also likely to strengthen the framework of a comprehensive protection of the rights of the individual by—and, where necessary, against—the EU institutions and agencies. Some ‘thinner’ levels of protection of relevance for AFSJ measures will be reinforced through the incorporation of the Charter. This applies, in particular, to the quite comprehensive right to the protection of personal data (Article 8), which is of increasing importance—having regard to the proliferation of databases and exchange systems in the context of the AFSJ (SIS II, Europol, Eurodac, etc) and the rapidly developing co-operation with third countries. One example of the latter is the Europol–USA Agreement providing for the exchange of personal data concluded on December 2002. Also of considerable relevance for the AFSJ are the judicial rights laid down in Title VI of the Charter. With the inclusion of the right to legal aid (Article 47, last sentence), the principle of proportionality of offence and penalty (Article 49) and the right not to be tried or punished twice for the same criminal offence (ne bis in idem principle, Article 50), these judicial rights clearly go beyond mere minimum guarantees, such as the rights to an effective remedy and the principles of presumption of innocence and of legality. Taken together, they define important elements of a common approach of the Member States to criminal justice and could well serve as important foundation stones for the gradual creation of an EU criminal justice system based on high standards of protection of civil liberties and human rights. It remains to be seen, however, to what extent the reserves maintained by Poland and the UK with regard to the application of the Charter rights to their national legal systems and practices will limit the reach of its positive potential throughout the AFSJ.

VII. Conclusions

Since its introduction by the Treaty of Amsterdam, the AFSJ has become a major element of the constitutional order of the EU, adding a new dimension to the relationship between the EU and its citizens. It well merits its place among the fundamental treaty objectives of Article 2 EU (Article 2 TEU-Lis) on grounds of both its relevance for political and legal integration and for the interests of its citizens as regards ensuring a high level of internal security, the absence of controls at internal borders and access to justice. The individual citizen is the main intended beneficiary of the public goods the AFSJ ‘offers’, but his/her status as a beneficiary is a rather passive one as the AFSJ does not establish any claimable rights. The opportunity to ‘constitutionally’ link the AFSJ with the rights under the Charter of Fundamental Rights and Union citizenship has been missed.

The main focus of the AFSJ is on the provision of internal security, which is of particular sensitivity from the national sovereignty point of view. As a result, Member States have limited

\[136\] At the time of writing the Council has still failed to reach agreement on the Framework Decision on data-protection in the fields of police and judicial co-operation in criminal matters, which has been under negotiation since 2005.


the Union’s role to a subsidiary one which focuses on cross-border challenges to internal security and is circumscribed by a number of safeguards protecting the Member States’ autonomy and competences as regards national internal security measures and structures. This largely accounts for co-operation between rather than integration of the national systems being the main basis of the AFSJ, as the facilitation and strengthening of co-operation can deliver some results in line with AFSJ objectives without interfering too much with national legal systems and structures in the politically sensitive AFSJ fields. The pillar divide of the AFSJ—with its costs in terms of coherence, democratic and judicial control of the AFSJ—is another reflection of Member States’ reluctance to engage in substantial common policy-making in the more sensitive fields of the AFSJ. This divide will vanish with the Treaty of Lisbon, but not without leaving substantial traces of the third pillar in the decision-making procedures on some sensitive police and criminal law matters and maintaining the general cooperative orientation of the AFSJ.

A major characteristic of the AFSJ is its high degree of differentiation because of the opt-outs, opting-in and enhanced possibilities of co-operation, a clear indication of the absence of a fundamental consensus on the nature and finality of the AFSJ as a political project. This is not without repercussions to the individual, as the ‘freedom’, ‘security’ and ‘justice’ provided by the EU can vary depending on the degree of participation of a Member State in the AFSJ. The Treaty of Lisbon increases the differentiation potential by extending the opt-outs and facilitating access to enhanced co-operation. While this was a vital part of the Lisbon Treaty compromise, allowing for the abolition of the pillar divide and the communitarisation (in all but name) of police and judicial co-operation in criminal matters, it undermines both the political and legal coherence and the credibility of the AFSJ as a fundamental treaty objective delivering certain public goods to all EU citizens.

As the AFSJ is dealing with some of the most invasive measures that public authorities can take vis-à-vis the individual, the protection of individual rights must be regarded as a crucial issue for the legitimacy of the AFSJ as a whole. This is all the more true as there has been a growing ‘securitisation’ of the AFSJ, accelerated by the post-9/11 terrorist threat. In spite of the restrictions imposed on its role under the current Title VI EU provisions, the Court has systematically reaffirmed its right to subject all EU measures in the AFSJ domain to judicial review with regard to rule of law and fundamental rights issues. However, while there is now, in particular, substantial case law firmly upholding the protection of the rights of defence and the application of the ne bis in idem principle, the CFI has left the Council a wide margin of discretion on internal security measures in the case of the terrorist lists. The legal codification of the Charter of Fundamental Rights by the Treaty of Lisbon will make a contribution to strengthen ‘thinner’ levels of protection as regards measures adopted or implemented by EU institutions and agencies—and thereby further protect the citizen as the main beneficiary of the AFSJ against the risks of becoming a ‘victim’ of it as well.

140 Which is obviously part of the question of the finality of the Union as a whole. See U Everling, below chapter 19; U Haltern, above chapter 6.
Part IV

The Constitution of the Social Order
I. Economic Constitution and European Integration

1. Relevance of the Subject

The relevance of the subject of the European economic constitution remains unchanged. In the horizontal dimension, the systemic choice of the EC Treaty in favour of an open market economy with free competition is subject to various relativisations. The judicial significance of these relativisations for the economic system and the political constitution has not yet been sufficiently clarified. In particular, the discussions on the importance of the services of general economic interest and the limits of the regulated markets’ liberalisation have been exemplary.

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in displaying the necessity of asserting and preserving the guarantees of a free market order in a network of economic and socio-political objectives which is full of tensions. Hence, the relation of the welfare state and other regulatory policies to the systemic choice and the functional guarantees ensuring the same, ie the fundamental (market) freedoms and fundamental (human) rights, as well as the guarantee of undistorted competition, must be conceptualised in legal terms as precisely as possible. However, sediments of very diverse economic conceptions have settled in this Treaty. Thus, the development of universal solutions for possible conflicts between market and intervention are limited from the outset.

Regarding the vertical dimension, due to the enlargement of the EU, the European economic constitution encounters national economies which are mostly still in the process of transformation from planned economy to market economy. The legal constraints and political margins will be of significant importance to these countries when adjusting to the strong competition within the European internal market. This problem aims at the controversial relation between the European economic constitution and its national counterparts, and especially to those guarantees which are barely compatible with the market concept of the EC Treaty. On the other hand, national conceptions equally have an effect on the European economic constitution. Thus, it would be of interest to discover what kind of pressure for change—identifiable in fundamental constitutional choices—could be put on the EU. Hence, a rough inspection of the national constitutions is necessary to get a somewhat complete picture of the legal situation of the economic constitution in the Union.

Although the economic constitution, on its surface, is related to the functioning of the economy, it nonetheless remains an integral part of the common fundamental legal order, ie part of Europe’s currently, at least in a substantive sense, existing multi-level constitution.

2. Terminology and Functions of the Economic Constitution

The term ‘economic constitution’, as formulated primarily by Walter Eucken and Franz Boehm, has belonged to the permanent inventory of German, and especially of European, jurisprudence for decades. However, the meaning and use of the term remain disputed.

a) Approach

Economic constitution lies at the intersection between economy and jurisprudence. For this reason, the interpretation differs depending on the particular context. The common starting

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3 This topic is enjoying increased attention: see, eg P-C Müller-Graff, ‘Die Verdichtung des Binnenmarktrechts zwischen Handlungsfreiheiten und Sozialgestaltung’ [2000] Europarecht suppl 1, 7.


point of all definition efforts is a regulatory approach which considers economic systems to be protected by institutions and rules. The approach consequently has to attribute an important guaranty function to the state and its legal systems. In the broadest sense, economic constitution can be understood as the political choices determining the order of national economy,7 ie of those factual and functional contexts which involve the distribution of scarce resources by means of prices.8 In this respect, the term can provide the differentiation between various national economic models of ideal economies, but that is not very useful for legal purposes. Additionally, an understanding of the economic constitution as the totality of all legal rules that control the economic process of the national economy does not go beyond the mere description of the legal framework of economic activity.9 This may be helpful for an economic analysis of the existing law. The legal debate of the last decades on a potential theory of the economic constitution, however, is aimed at more specific objectives. This debate refers to a normative extraction of commercial law, which deals with the right to dispose of scarce goods and services, and with the conditions under which one is enabled to do so.10 At the same time, the economic constitution marks the scope of economic policy which should remain mainly unchangeable, and hence should be abstracted from the current political processes.

b) Definitions

On the one hand, the legal concept of the economic constitution deals with the clarification of the systematic relation between the economic and the legal system, with the functional requirements of the economic system and its legal safeguards being the main focus. On the other hand, economy and economic policy should be allocated to one another according to legal criteria in order to draw general conclusions as to the relation between economic freedom and state intervention.11 Yet not only the present situation should be grasped and legally defined: the objectives and solutions for conflicts of different options should also be determined for the future. Irrespective of concrete economic systems, the core issue is the control and restriction of power by law, a power which can be exercised by the state as well as by private actors.12 The solution to the question of power, which belongs to the fundamental tasks of every constitution, is therefore the key to understanding the economic constitution’s legal function. The economic constitution not only serves as a yardstick for private and governmental action, it also connects the functional area of economy, and its legal foundations, with the political sphere and the relevant section of the constitution.13 Accordingly, the definition of the legal economic constitution as ‘the sum of structural elements of the system of economy under constitutional law’14 is widely recognised today. However, this formula has proven to be in need of expansion, since the process of European integration, based on a common market with strong competition, has clearly shifted the balance between the constitutional levels. The question of the economic constitution is now,
more than ever, directed at the legal foundations of the EU. In particular, the EC Treaty contains substantial statements about the regulatory principles and guarantees of economic activities, so that the Treaty’s written and unwritten norms comprise the elements of the economy’s development applicable for the Member States.15

c) Delimitations

The function of the European economic constitution is certainly not to equip a particular economic model with legal enforceability.16 The legal strength of an economic constitution and the limits it sets for authorities and private parties cannot derive primarily from a specific economic model but, rather, must come from the respective standard of applicable norms.17 The relevant regulations, particularly in Community law, are less an expression of a coherent economic concept than the result of different economic and political objectives, which have changed and developed through the decades. Indeed, elements of ordoliberal and social market economic conceptions can be recognised. However, a closer view shows that even the explicit choice in favour of a market economy is qualified by opposite principles and powers of intervention, so that the direct consultation of certain economic models as a means of interpretation is not an option.18 If a specific economic model is legally guaranteed, the normative relevance of such a guarantee is generally restricted to the reference to the fundamental functional conditions of the specific model, but does not limit the state or European Community institutions to the mere execution of certain fundamental economic principles.

3. The European Economic Constitution

As the German Basic Law (Grundgesetz) is integrated into the composite constitution of the EU, the issue of the economic constitution has to be seen in the context of the new and superior European legal system, with the latter being characterised by structural and functional peculiarities which also define the European economic constitution.

a) Expansion of the Debate to a Superior Reference System

The ongoing discussion on the economic constitution of the Grundgesetz has found itself faced with a new and superior system of references since Germany has set up and joined the European Communities. As to whether a command economy (or similar) is legally permitted or the social market economy has to be taken as a fixed constant has become a question directed at the Treaties of the Communities. Interestingly, their constitutional nature in this regard has not been seriously challenged.19 The EEC Treaty has proven to be a prototypical economic constitution: it contains rather fragmentary regulations without a real political chapter, but it provides, in conjunction with the national constitutions, a decisive legal basis for the shaping of business life.20 From the German perspective, the EEC Treaty, with its distinctive preference in favour of the market, is a clear and definite contrast to the ‘economic neutrality’ of the Grundgesetz. Thus, Community law was able to oppose plan-oriented economic concepts when at the end of

15 See also Oppermann, above n 4, § 13, para 2ff.
16 The same approach is made by G Nicolaysen, Europarecht II (1996) 318; a different approach is taken by Poiares Maduro, above n 6, 103ff.
17 See Nicolaysen, above n 16.
18 For more details, see section II.1.
19 Cp Ophüls, above n 6, 140ff, who takes the constitutional nature of the EEC Treaty for granted.
20 See Scherer, above n 6, 82 referred to the EEC Treaty as an ‘Economic Constitution per se’.
the 1960s the economic miracle abated and such concepts enjoyed a renaissance as a political option.\textsuperscript{21}

Today the focus has been changed.\textsuperscript{22} The current discussion is concerned with the guarantees and securities assured by a welfare state, which have been declared indispensable by the national constitution, in order to avoid being forced to submit them to ‘unbridled capitalism’\textsuperscript{23} in the European internal market.\textsuperscript{24} Further, the discussion deals with the significance of consumer protection and health issues when restricting the fundamental freedoms. The knowledge of the fragmentary nature of Community law in the area of economic constitutional law has proven to be a constant of this discussion.\textsuperscript{25}

b) The Composite Character of the European Economic Constitution

One the one hand, the EC Treaty contains a number of substantial structural elements of the economy, which have been specially secured against divergent national concepts through the direct effect and the primacy of Community law. On the other hand, the EC Treaty remains a fragmentary regulatory instrument, even after the latest reforms, which leaves essential areas of general economic policies to a large extent in the hands of national authorities. When considering the aspect of exercise of power, it is not only the Community and major private interests that must have legal limitations: the Member States, as an important third factor, must also be made subject to legal and political control.\textsuperscript{26} This task must be jointly fulfilled by every part of the European composite constitution, which in this respect also means every part of the composite economic constitution.\textsuperscript{27}

c) Functional Characteristics of the European Economic Constitution

There is a special additional function of the Community’s economic constitution: it remains the core of European Community law, the ‘engine’ of the integration process, which uses the economy as the initial basis for interstate unification without, however, stopping at the economy’s borders. It combines the concept of negative integration by means of the prohibition of restrictions addressed to the Member States and of positive integration by means of active political formulation.\textsuperscript{28} The Court of Justice has emphasised repeatedly that neither the internal market nor competition are goals in themselves, but rather instruments for the achievement of higher integration objectives—placed above the economy.\textsuperscript{29} In this respect, the European economic constitution has not only a conserving, constraining function but also a pronounced dynamic character. However, this objective also has an impact on the regulative and other powers of Community law, which may cause conflicts with fundamental economic choices.


\textsuperscript{22} For the contemporary discussion of the Internal Market Concept, see articles in [2004] Europarecht suppl. 3.

\textsuperscript{23} E-W Böckenförde, ‘Welchen Weg geht Europa?’ in \textit{idem}, \textit{Staat, Nation, Europa} (1999) 68, 100ff, perceives this danger if one sticks uncritically to the logic of economical-functional integration.

\textsuperscript{24} Concerning the welfare state principle in the EU, see the recent work by T Kingreen, \textit{Das Sozialstaatsprinzip im europäischen Verfassungsverbund} (2003).

\textsuperscript{25} For further information, cp Ophüls, above n 6, 141 and 175.


\textsuperscript{27} On the idea of co-operation in multilevel constitutionalism, see ibid. 58.

\textsuperscript{28} See in particular Mussler, above n 26, 62 for more information on this differentiation which can be traced back to J Tinbergen, \textit{International Economic Integration} (1954).

\textsuperscript{29} Opinion 1/91 \textit{EEA I} [1991] ECR I-6079, para 50.
4. Scope for Economic Policy Formation

The European economic constitution does not establish a static order but creates a flexible legal framework which entails a considerable politico-economic scope for interpretation and implementation by the Member States and their institutions.

The European Court of Justice (ECJ) has always respected the economic political discretion of the Council, the Parliament and the Commission, as laid down in the control maxims of Article 33(1) of the European Coal and Steel Community Treaty. It states that judicial review does not range over ‘the evaluation of the situation, resulting from economic facts or circumstances’. It has also left a considerable margin of discretion to the Member States. The renouncement of control leads to a so-called elastic relationship between competition and intervention. Therefore, discretion is the central legal category of the European economic constitution, the hinge between the principles of the market and the political competences of the Treaties. This, however, is not a sufficient basis for a legal theory of the economic constitution because legally it is the Treaty that decides whether to establish the supremacy of the market and of competition over objectives which can only be achieved by interference with the market, or if the relationship between the two is defined according to different principles. European economic constitutional law therefore requires a ‘leeway doctrine’ (Spielraum-Dogmatik) in order to apprehend the reciprocal assignments of market economy and sovereign regulation legally and predictably.

II. A Systemic Choice and its Legal Guarantees

A characteristic feature of Community law is the systemic choice in favour of an open market economy with free competition. This choice is equipped with a series of legal guarantees, which provide a sufficiently precise scale of control by the ECJ and the national courts. At the same time, the Community institutions and the Member States possess important competences, giving them considerable influence in the economic process. The normative content of the economic constitution of the EU results from a synopsis of market economic guarantees on the one hand and the economic powers of the Community and the Member States on the other. It is correctly apostrophised as a ‘mixed constitution’.

1. The Choice in Favour of an Open Market Economy and Free Competition

According to Articles 4(1) and 98 EC, the economic policy of the Community and its Member States is expressly bound to the ‘principle of an open market economy with free competition’. In the same way, the European monetary policy should be orientated according to this principle, as stated in Articles 4(2) and 105(1) EC. The Treaty of Lisbon maintains the choice in favour of an

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32 On the idea of co-operation in multilevel constitutionalism, see Mussler, above n 26, 58.
33 See also the critical analyses of Behrens, above n 8, 86; H-U Petersmann, ‘Thesen zur Wirtschaftsverfassung der EG’ [1993] Europäische Zeitschrift für Wirtschaftsrecht 593; for an economics perspective, see Mussler, above n 26, especially 166ff.
34 See Poiares Maduro, above n 6, 160; Nicolaysen, above n 16, 320.
open market economy and free competition (see Article 120 of the Treaty on the Functioning of the European Union (TFEU), as well as Article 127(1) TFEU concerning the monetary policy), but underlines the social responsibility in Article 3(3) of the EU Treaty of Lisbon (TEU-Lis) (‘social market economy’).

a) Legal Quality

The legal significance of a choice in favour of a system of open market economy is certainly under dispute. Predominantly, its legal value is considered to be rather low. Often, the questions of justiciability and speciality are not sufficiently distinguished in this context. The ‘principle of an open market economy with free competition’ is a legal term and is hence generally justiciable. Compared to the principle of subsidiarity, it presents no great difficulty in the application of law, as specific legal features giving it substance can be attributed to the fragments of its term. They may be very indefinite and abstract; this is, however, not a question of justiciability, but rather one of speciality in relation to other provisions that codify these features more precisely. Nevertheless, the individual cannot directly plead the choice in favour of an open market, due to the lack of sufficient certainty. As a result, this choice alone cannot form the basis for the subjective right of a Union citizen to claim maintenance of a market economic system. As an objective principle, however, this systemic choice has both a substantial and a structural component.

b) Contents

Substantially, the choice in favour of an open market economy and free competition refers to the functional conditions of a competition-controlled market economy. Regardless of possible system variations, this includes economic freedom, the co-ordination of supply and demand in competition, and free entry to and exit from the market. The expressly stated openness of the European economic area refers principally to the internal and world markets. The lack of reference to social orientation is not to be equated with an indifference of the Treaty to these protected goods. This aspect of European economic policy is already firmly anchored in Article 2 EC, according to which a high level of social protection is aspired. The Treaty of Lisbon describes the market economy as ‘social’, and hence stresses the existing structures. Consequently, the Treaty of Lisbon does not contain a new economic constitutional direction, but rather has a different emphasis. However, it does not change the general direction of the above-mentioned choice, which is also expressed in the ‘Treaty of Lisbon, which demands a ‘highly competitive’ social market economy.

Structurally, the establishment of a competition-driven market economy and the choice in favour of the same constitute the prohibition of a change of system. Thus, neither the Member States nor the Community can introduce binding centrally administered or overplanned economic systems unless the elimination or limitation of market principles is
expressly allowed, as is the case in agricultural policy and in the area of the European Atomic Energy Community. Furthermore, the principle of an open market economy establishes a general relation of ‘rule and exception’, which submits any intervention into the economic freedom of action to compulsory justification according to the standards of proportionality. Finally, the principle of an open market economy with free competition is the guiding principle for the interpretation of the EC primary law’s economically relevant guarantees and competences, as well as for the provisions of secondary law.

2. Guarantees of a Market Economy

Under the Community’s economic constitution, the basic principles of a market economy are formed by a series of justiciable guarantees, as succinctly described by Jürgen Basedow. On the one hand, they concern core elements of the market economic system; on the other hand, the specific integrating function of the European economic constitution is legally mapped out by these guarantees.

a) Private Autonomy as Fundamental Requirement for a Market Economic System

A market economic system is characterised by decentralised activity of the economy’s subjects and the resulting private-autonomous realisation of self-made goals. Private autonomy refers especially to the individual's disposition of its own labour and income, but is also concerned with the freedom to decide where and how much capital is to be invested, and what sorts of goods and services are to be produced or provided. Legally, the market economic system is guaranteed particularly by legal personality, individual and entrepreneurial freedom of trade, and the mutual allocation of spheres of liberty according to the principle of equality under European law.

aa) The Economic Participant as Legal Person

The individual’s legal personality is presumed and recognised by Community law and has existed for natural persons in all EU Member States for over 100 years, enabling self-determined participation in commerce. Hence, the legal freedom of action, apart from its importance for human rights, is recognised as an essential element of a market economic system. However, the Treaties contain no general regulations on the legal status of natural persons corresponding to paragraph 1 of the German Civil Code. Nevertheless, the Union citizenship of Article 17 EC indicates a comprehensive legal personality of the individual. In addition, the case law of the ECJ on the (unwritten) fundamental rights is enlightening. In this respect, the Court expressly acknowledges—as, for example, in the Stauder judgment—the ‘rights of the person’ as one of the Community guarantees. Further evidence for assigning subjective rights through the direct effect of the freedoms of the Treaty can be inferred from various judgments of the ECJ.

The possibility of natural persons to organise themselves in legal persons, ie legal entities that broaden the scope of individual freedom and facilitate the participation in legal relations, is equally important for the economy. Legal persons are likewise recognised by Community law,

41 See Wittelsberger, above n 37, Art 98 EC, para 6.
42 See Case C-9/99 Échirolles Distribution [2000] ECR 1-8207, para 25, on the function and legal quality of this principle; Baquero Cruz, above n 6, 79.
43 For the following, see the groundbreaking work by Basedow, above n 12, 15 and 26.
44 See Mussler, above n 26, 35.
45 See Basedow, above n 12, 33.
47 See the pathbreaking Case 26/62 van Gend & Loos [1963] ECR 1.
as Article 48 EC, on the equality of companies, illustrates. To realise the freedom of establishment, companies that can also be organised as legal persons are equated with natural persons who are citizens of Member States. Further reference is found in Article 230(4) EC, which states that legal persons can also seek legal protection before the Court of Justice.

**bb) Individual and Entrepreneurial Freedom of Action**

The individual and the entrepreneurial freedom of action are linked to legal personality. This freedom enjoys legal protection as a fundamental right under Community law. The still non-binding EU Charter of Fundamental Rights, which will become legally binding upon the entry into force of the Treaty of Lisbon,\(^48\) has codified a range of rights relevant for business activities, such as the freedom to choose a profession, entrepreneurial freedom and private property rights. These and other related rights are already recognised as unwritten general principles of Community law. Moreover, even a ‘general economic freedom’ is derived from the provisions concerning the Common Market. Such a freedom not only has a subjective right character, but also legally supports the choice in favour of a market economy.\(^49\) According to Article 6(1) EU, these rights and freedoms become legally binding contents of the Member States’ national economic constitutions. They form the necessary foundation for the unfolding of individual business initiatives and responsibilities at all levels of the European composite constitution. The legal framework in which the economic processes take place is accordingly private law,\(^50\) the existence of which is presupposed and recognised by Community law, but which is at the same time increasingly influenced by European law.\(^51\)

**cc) Equal Rights for Market Participants**

A further characteristic of market economies constituted on a competitive basis is the principle of equality under law for market participants in trade and industry. It is ensured by the generally accepted unwritten principle of equality combined with special anti-discrimination regulations.\(^52\) These regulations include the prohibition of discrimination based on nationality (Article 12 EC) and the directly economically relevant commandment, ‘equal pay for equal work’ for women and men (Article 141 EC). In addition, there are the fundamental freedoms (in German, \textit{Grundfreiheiten}), which, in their undubious core at least, prohibit discrimination.\(^53\) Some of the fundamental freedoms apply only partially to the citizens of the Member States, with the exception of special regulations of secondary law or international obligations, as, for example, the free movement of workers. However, this does not change anything in the principle adjustment of an economic system based on the equality of its participants.

**b) Co-ordination through Trade on the Open Markets**

The core principle of a market economic system is the balance between supply and demand of scarce goods and services. This balance is created by numerous individual decisions of the

\(^{48}\) However, with restrictions for Poland and the UK (see Protocol (No 30) on the application of the Charter; see also A Hatje and A Kindt, ‘Der Vertrag von Lissabon: Europa endlich in guter Verfassung?’ [2008] \textit{Neue Juristische Wochenschrift} 1761.

\(^{49}\) See T Schubert, \textit{Der Gemeinsame Markt als Rechtsbegriff} (1999) 333, on system guarantees in particular, see, 403.


\(^{53}\) Cf Scherer, above n 6, 110, for an overview of this conception of fundamental freedoms.
market partners. The process involves an anonymous co-ordination process that can determine who can provide access to scarce goods and services, and at what price.

aa) Assured Availability of Products and Services

A requirement for private autonomous decision-making in this respect is an assured availability of products and services, and a stable currency.54

(1) Private Property

A primary constitutional element of a market economic system is the private ownership of the means of production.55 The Community legal system has two levels of guarantees, which are in an apparent state of mutual tension and conflict. On the one hand, according to Article 295 EC, ‘this Treaty shall in no way prejudice the rules in the Member States governing the system of property ownership’. Thus, the norm establishes a reservation of powers allowing the Member States to decide on the ownership structure of means of production, in accordance with their respective economic and other policy preferences.56 From the Community’s perspective, it is interesting that the reservation of competence applies not only to the citizens’ legal property but also to all other legally protected positions of private ownership, such as trademark rights, copyright protection and company shares.57

On the other hand, the right to private ownership as guaranteed under Community law needs to be respected, as it is legally binding not only for Community institutions but also for the Member States, insofar as they act within the scope of the Treaty’s application. The fundamental right to private ownership was thoroughly developed by the ECJ in the Hauer decision.58 The Court stated that European law protects private property rights in accordance with Article 1 of the Additional Protocol of the European Convention on Human Rights (ECHR). Accordingly, interferences with property rights require legal justification and must be proportional. The EU Charter of Fundamental Rights takes up this concept in its Article 17, and even expands it to the express protection of intellectual property and explicitly only permitting expropriation against compensation.59 Private property is therefore by no means at the unlimited disposal of the Member States and the European Community.

(2) Stable Currency

A stable currency is another integral aspect in assuring availability of products and services. The institutional and legal precautions involved in establishing a stable common currency are quite remarkable. They range from the independence of the European Central Bank from instructions of national governments (Article 108 EC) and their banknote monopoly (Article 106 EC) to the alignment of the common monetary policies with the primary target of price stability (Article 105(1) EC) and to the duty of the Member States to avoid excessive fiscal deficits. From the perspective of market economic systems, more legal safeguards to secure a stable currency are hardly imaginable.60 However, according to Article 2 EC, the national central banks, which are

54 See Eucken, above n 7, 256, for a description of the requirements of a stable currency. He however only claims a ‘certain level of stability’.
55 Ibid, 271.
60 However, for a critical view, see M Seidel, ‘Konstitutionelle Schwächen der Währungsunion’ [2000] Europarecht 861.
integrated into the European System of Central Banks, have the additional duty—whilst safeguarding the goals of stability—of supporting common economic policy goals: namely, growth and employment policies (Article 105(1) EC). Possible friction resulting from the structure of the European economic constitution will be addressed later.

bb) Reduction of Market Barriers through Fundamental Freedoms

An important objective for the European economic constitution is the opening of the national markets for supply and demand of goods, persons and services from all Member States. It constitutes an area without internal frontiers in which ‘the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty’, as formulated in Article 14(2) EC. The openness of the markets consequently secures the exercise of private autonomy within the Union.61

The related rights to free movements of goods, persons and services follow the economic insight that politically defined territories do not necessarily have the optimal calibre for economy. They are supposed to promote Community-wide competition as well as freedom of movement, and therefore trigger the expected affluence of the internal market according to the principle of comparative advantages.62 Additionally, the fundamental freedoms form the spearhead of the actual integration objective which demands the reduction of economic safeguards in order to allow political unification. In this respect, they are just as much an integral part of the economic constitution as of the political constitution of the Union. The fundamental freedoms grant the individual a direct applicable right of discrimination-free transnational economic activity.63

Moreover, they prohibit practically any obstruction of cross-border activities by a state, the Community and private actors unless they are legally justified.64 In particular, the interpretation of the fundamental freedoms as prohibitions of restriction—largely achieved by the Court of Justice—has increased the scope of application of the Community’s economic constitution. Accordingly, in modification of the famous Dassouville formula, it is already an infringement of a fundamental freedom if a measure limits or prevents an activity guaranteed under the freedoms of the Treaty ‘actually or potentially, directly or indirectly’.65

Also, the ‘mandatory requirements’ of the Cassis decision and the ‘selling arrangements’ of the Keck case law were not able to prevent potentially all national regulations in the areas of the economic and social order from being obliged to legitimise themselves by the testing standards of the fundamental freedoms.66 The present discussion on the position of the social security system in the internal market, such as the use of medical services in other Member States, is typical for this tendency.67 The ECJ also supports this tendency. Recently, it had to decide if the right to take collective action, including the right to strike, is excluded from the scope of the fundamental freedom laid down in Article 43 EC. The Court held that neither

61 See P-C Müller-Graff, in von der Groeben and Schwarze (eds), above n 37, pre Art 28 EC, para 3.
62 Ibid, paras 3ff.
64 This effect not being uncontested, however, see ibid, para 828, pointing out the differences between the fundamental freedoms.
65 Ibid.
66 T Kingreen, Die Struktur der Grundfreiheiten (1999) 104; see also Poiares Maduro, above n 6, 78.
Article 137(5) EC, which excludes the right of association, the right to strike and the right to impose lock-outs from the Community’s regulatory competences, nor the fundamental nature of the right to take collective action is such as to render Article 43 EC inapplicable to the collective action at issue in the main proceedings.68 With reference to its preceding case law, the Court pointed out that the protection of a fundamental right is a legitimate interest that, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty.69 The exercise of the fundamental rights at issue must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality.70 Thus, restrictions of fundamental rights have to be measured with the testing standards of the fundamental freedoms.

In addition, the Court has consistently interpreted exceptions to the fundamental freedoms very strictly. From the perspective of the choice in favour of a market economy, the extension of those guarantees, which are part of an open market system, is positive. However, regarding the political scope for activity, namely of the Member States, a close critical eye should be kept on these extensions.

c) Freedom of Communication

Freedom of communication is of primary importance for the openness of the markets.71 In a highly differentiated economic system, the freedom of communication has proven to be a prerequisite for effective competition. Without the freedom of communication, initial contact and exchange of information between suppliers and potential purchasers would hardly be possible. Competition can only function when the economic subjects’ ‘constitutive lack of knowledge’ can be removed by provision of information.72 Still, the most important manifestation of economic communication, ie advertisement, is understood simply as an annex of economic freedom, which is unsuitable for both the special characteristics of communication processes and their importance for a competitively systemised economy. For this reason, especially the case law of the European Court of Human Rights on the protection of commercial communication by the freedom of speech of Article 10 ECHR should be gradually taken over by the ECJ.74 So far, the Court of Justice has considered advertisement to be protected by the free movement of goods and services.75

d) Limited External Access

Compared to the internal market, the openness of the European market to external areas is less distinct.76 This is because the customs union amongst the Member States necessarily demands the delineation of the ‘internal market’ towards third party states. Any importing and exporting ultimately requires an administrative procedure designed to ensure the correct processing of the goods according to customs law. In addition, the freedom of movement for workers, the freedom of establishment and the freedom to provide services are reserved for citizens of the

70 See Case C-438/05, above n 68, para 46.
71 Basedow, above n 12, 17, has called attention to this aspect.
76 For an economic viewpoint, see Mussler, above n 26, 123.
Union. The free movement of capital in relation to third party states is guaranteed as well; however, it is subject to more extensive limitations than the movement of internal domestic capital. In this respect, Hans Peter Ipsen’s formula, which describes the common market as ‘internal freedom and external unity’, is absolutely justified. This unity in relation to third countries has also been recognised by the Court of Justice, which has only allowed direct applicability of international treaties in the EU under very limited conditions. Generally, trade and industry participants are not entitled to derive any rights from these treaties, which would allow the validity of EC secondary law to be questioned. This is especially true for the rules and regulations of the World Trade Organisation (WTO) agreements. The political prerogatives of Council and Commission predominate here, and can be seen in cases of economic embargos by the Community on third countries. According to Article 301 EC, foreign trade can be restricted if this has been decided within the framework of the Common Foreign and Security Policy or, although disputed, under the Common Commercial Policy agreed upon according to Article 133 EC. The Reform Treaty of Lisbon allows the Council to adopt restrictive measures also against natural or legal persons and groups or non-state entities (see Article 215(2) TFEU, which enlarges the scope of Article 301 EC).

c) Competition as an Instrument of Co-ordination

Competition law, as stated in Articles 81ff EC, protects the openness of the markets in the Community against market limitations and distortions originating from companies or the state. It is the expression of an open market economy with free competition particularly of the task outlined in Article 3(1)(g) EC, according to which a ‘system of undistorted competition’ should be established. Under pressure from France, this objective of creating a system of ‘undistorted competition’ has been eliminated with the Lisbon reform. However, the enumeration of objectives in Article 3 TEU-Lis contains the establishment of a highly competitive social market economy. Moreover, the competition goal has been included in the Internal Market and Competitition Protocol, according to which the internal market provides a system which protects competition from distortion. Hence, undistorted competition is an immanent element of the internal market. Articles 81ff have not been altered in the Lisbon reform so that, all in all, no fundamental reorientation of the economic political concept of competition law can be noticed.

The principal contribution of European competition law to secure the choice for a market economy through justiciable guarantees is dealt with there.

aa) Legal Framework

The prohibition of restrictive practises (Article 81 EC) and the prohibition of abuse of a dominant position within the common market (Article 82 EC) protect the openness of the

77 See Streinz, above n 63, paras 786–8, who is also giving an overview.
78 See Nicolaysen, above n 16, 398.
80 Cp also M Hilf and F Schorkopf, WTO und EG: Rechtsskonflikte vor dem EuGH? [2000] Europarecht
74.
82 The enlargement of the scope of Art 301 EC by the Treaty of Lisbon is a reaction to Case C-402/05 P Kadi et al v Council and Commission [2008] ECR I-0000. Object of the appeal procedure was the Council Reg 881/2002, which was based on Arts 60, 301 and 308 EC and allows to freeze all funds and economic resources belonging to, or owned or held by, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex I. Disputed was as to whether sanctions against persons could be adopted based on Art 301 EC.
83 See J Drexl, below chapter 18, for more information on competitive systems and on competition law.
market primarily against interventions by private enterprises. Violations lead, in accordance with Article 81 EC, directly to the invalidity of the underlying legal transactions. The provisions are directly applicable and can thus be pleaded by individuals to defend themselves against restrictive practices and abuse of dominant positions of competitors.\(^{84}\) In contrast to the freedom of movement, competition rules are not solely connected with cross-border related issues, but also include domestic national processes when hindering free international trade.\(^{85}\) The scope of application of European competition law further includes activities of companies in third countries by covering those activities that could have a negative influence on undistorted competition within the internal market.\(^{86}\) Merger control is legally established only under secondary law but is no less important because of it.\(^{87}\) Public enterprises, enterprises with special or exclusive rights and undertakings which offer services of general economic interests as well as financial monopolies must generally follow the entire Treaty and align themselves with the system of undistorted competition (Article 86 EC). Article 86 EC is a compromise between states with mainly privately organised economies and those with a pronounced public sector. Principally, the regulation treats the two economic systems equally, and herein lies the importance for the European economic constitution.\(^{88}\) Furthermore, state aids are subject to Community monitoring, when effecting cross-border trade between the Member States (Articles 87ff EC). With the intention of preventing discriminatory treatment of trade participants, it restricts the economic political power of the Member States considerably. Finally, according to the case law of the Court of Justice on Article 10 EC, Member States are obliged to refrain from all measures which could endanger the realisation of a system of undistorted competition.\(^{89}\) The rules of competition are therefore a yardstick to measure legal acts of the state.\(^{90}\)

### bb) Areas Excluded from Competition

Certain economic areas, products and services are excluded from competition principles and are subject to special regimes. The Common Agricultural Policy (Articles 32ff EC) is an important example, as competition law is only applicable to the extent determined by the Council (Article 36 EC). The Treaty does not generally oppose a strong market-directed farming economy, but makes such a change dependent on a previous legislative decision. Furthermore, in transport policy (Articles 70 ECff)\(^{91}\) and for the distribution regime of nuclear materials according to the Treaty establishing the European Atomic Energy Community (Articles 52ff), the principle of competition is only applicable with certain restrictions. The reasons are security of supply and administration of scarce resources, but also consideration of structures and political resistance in Member States. The special position of the coal and steel industry has been largely transferred into the legal framework of the internal market with the expiration of the European Coal and Steel Community Treaty.

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84 W Weiß, in Caliess and Ruffert (eds), above n 81, Art 82 EC, para 73.
85 See Basedow, above n 12, 51.
90 For an in-depth analysis, see A Bach, Wettbewerbsrechtliche Schranken für staatliche Maßnahmen nach europäischem Gemeinschaftsrecht (1992).
91 In the decision on community transport policies, the Court of Justice has emphasised that this area should principally be integrated in the regime of the common market: Case 13/83 Parliament v Council [1985] ECR 1513, para 62.
**cc) Competition and Market Malfunction**

The system of free and undistorted competition can be disturbed for a variety of reasons. For example, information deficits, negative external effects, ruinous competition, or natural or technical monopolies can lead to a more or less distinct 'market malfunction', which cannot be managed by the supervision of competition alone. These deficits in the allocation efficiency of the market are largely only adjustable by regulative interventions. Such interventions are capable of strengthening the market mechanisms and therefore, if correctly designed, are not a foreign body in the market economic constitution of the EU. In any case, such corrections are legally part of the economic competences of the Community and the Member States, and can have conceptual consequences for the market within the Union. The Treaty of Lisbon, by allocating an exclusive competence to the Union regarding the rules of competition necessary for the internal market’s functioning, explicitly authorises the Union to undertake the described measures.


The Community and Member States can interfere in the market processes for different reasons and, through their intervention, can either limit or promote the free economic development of market participants. The legal framework contains, on the one hand, a legally binding principle of an open market economy and its corresponding safeguards and, on the other hand, a variety of political objectives and corresponding powers opening a wide area of appreciation and discretion.

**a) Goals of Community Activities**

The fundamental goals of Community activities are stipulated in Article 2 EC. The comparatively modest canon of goals of the EEC Treaty of 1957, according to its Article 2, aimed at a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the Member States. In the meantime, the catalogue of goals has been expanded and now contains diversified primary goals which determine Community actions. The following goals belong to the EC’s direct economic-related tasks: harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, raising the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.

**b) Instruments**

Corresponding to the economic emphasis of Article 2 EC, the establishment of a common market and an economic and monetary union (Article 4 EC) are essential instruments in the realisation of these goals. An economic policy is to be introduced to serve as a fundament for a common currency, realised by the Member States and the Community within their respective competences. The term ‘economic policy’ can be understood, in the broadest sense, as the

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92 See Basedow, above n 12, 14, for more information on the importance of a market breakdown for the economic constitution.

93 See M Zuleeg, in von der Groeben and Schwarze (eds), above n 37, Art 2 EC, para 13, for more information on the instrumental character of these policies, which, however, can be interpreted as objectives.
entirety of measures which should serve specific goals and be used to influence and steer the economic process.\textsuperscript{94} This understanding of the term also forms the basis of the requirements of Articles 4 and 98 EC.\textsuperscript{95} In addition, the activities of Article 3 are mentioned, which in part stand for independent policy fields of the Community, where they can have a regulating, co-ordinating or supportive effect. The catalogue of Article 3 EC has also been steadily expanded in the recent decades.\textsuperscript{96} Its development reflects the various intervention concerns of the Member States, which in the end can no longer be exclusive national pursuits in a ‘de-bordered market’ with cross-border competition and, above all, the framework of a monetary union. Regardless of the factual classification into specific political areas, most of these activities allow interventions into the economic process. Whether these interventions conform to the market or distort competition depends particularly on their specific form and the circumstances. In any case, they reveal a potential for intrusion that is of central importance for a theory of the European economic constitution.

c) Consequences for a Theory of a European Economic Constitution

The central legal task to systematically grasp the relation between the guarantees of a market economic order and the economic powers and exception clauses can only be fulfilled if one distinguishes between the Community’s and the Member States’ economic policies according to the distribution of competences. Both levels in the composite European economic constitution take measures that have an effect on the factual and functional connections of the economy. However, due to its wide scope of applicability and its supremacy, Community law (Union law plays no essential role in this context) functions as a yardstick for the actions of the Member States. Admittedly, the boundaries should not be drawn too strictly where both protagonists co-ordinate their respective policies or where national measures are subject to Community supervision. These intersections do not, however, change anything in the general predominance of Community law, which guides and restricts in various ways both the EU institutions and the Member States with regard to market relevant measures.

III. Formative Scope of the Community in Economic Policy

The legal profile of the Community’s economic policy results from the analysis of the following themes: (1) the instruments of economic policy, (2) political areas and (3) legal limits of the decision-making process. A separate examination is required for the institutionally independent monetary policy (4).

1. Instruments of Economic Policies

The instruments available for economic policy are an initial parameter allowing an estimation of the Treaties’ potential for intrusion in this area. In this respect, regulating interventions by Community legislation and co-ordination can be distinguished on the basis of non-compulsory

\textsuperscript{94} See A Heertje and H-D Wenzel, Grundlagen der Volkswirtschaftslehre (2001) 369.
\textsuperscript{95} See CC Steinle, Europäische Beschäftigungspolitik (2001) 79, who gives more examples of differing, yet too narrow, views which try to limit economic policy in the sense of the Treaty. Regarding the limited competences of the Community, their approach is not persuasive if the Member States and the Community are to maintain their own economic policies at the same time.

604
recommendations. Additionally, there are benefits in the form of financial aid or grants, given either to the Member States or to private economic participants.\textsuperscript{97}

The legislation of the Community is the focus of legal consideration, which is natural, because legislation determines the legal framework of economic activities within the internal market and can also influence the course of economic processes. Further, it has an impact specific to Community law, which particularly includes the direct effect, its primacy and the liability of the Member States. Moreover, the Union citizens have been granted subjective rights, which can be used not only to defend market freedoms but also to secure general public interests. This has become a matter of practical importance in the area of environmental protection.\textsuperscript{98}

2. Areas of Community Economic Policies

The centre of the potential for intrusion are the areas of Community economic policy and their corresponding powers, and can be classified, in spite of some overlapping, according to the instruments’ target areas into the categories of regulatory policy, progressive policy as well as distribution and social policy.

a) Regulatory Policy (\textit{Ordnungspolitik})

An essential feature of the European economic constitution is the comparatively precise layout of the framework of economic activity in the form of the basic decision of Article 4(1) EC and the related guarantees of an open market economy with free competition. However, this does not mean a closed system, inaccessible to later modification and limiting economic policy to a strict execution of norms. Rather, the institutions are empowered to equip the market economic layout with regulatory policies.

aa) Opening the Market by Approximation

An important series of rules and regulations is aimed at an effective opening of the market through approximation of national laws. This is directly connected to the goal of the European internal market's realisation. Important elements to achieve this goal are the empowering provisions of Articles 94 and 95 EC, as well as competences relating to particular market freedoms or tax harmonisation.\textsuperscript{99} These rules, however, have proven to be ambivalent in relation to regulatory policy. They are applied where the fundamental freedoms allow different legal frameworks regarding trade and industry in the Member States, which restrict the openness of the market and therefore work against ‘an area without internal frontiers’ (see Article 14(2) EC). Ideally, the approximation of laws should enhance the cross-border openness of the market by reducing legal hurdles and thus augmenting the equality of market participants. Hence, national laws are substituted by Community regulations that, from the perspective of the economic participants, can restrict the economic freedoms just as well.\textsuperscript{100} However, equal conditions of competition generally bring about corresponding liberal

\textsuperscript{97} In this respect, there is an immense variety of subdivisions and nuances of definition, above all concerned with separating sovereign intervention in the broadest sense from factual results of private activity.

\textsuperscript{98} The expansion of subjective legal positions in Community law is no longer limited to the implementation of the internal market; see A Hatje, \textit{Die gemeinschaftsrechtliche Steuerung der Wirtschaftsverwaltung} (1998) 307.

\textsuperscript{99} A thorough overview is provided by W Kahl, in Calliess and Ruffert (eds), above n 81, Art 95 EC, paras 2ff.

\textsuperscript{100} See Mussler, above n 26, 134, for more information on the problem of Communitarian approximation of laws as opposed to the competition of various national regulation systems.
benefits, which have a positive effect on the market. The tendency to overload the approximation of laws with horizontal provisions containing goals outside the bounds of economics, such as the protection of public health or environmental protection, turns out to be problematic and will be given more attention in the following paragraphs. In the hands of a legislator preoccupied with intervention measures, this may well become the vehicle of functional interests opposed to competition.\textsuperscript{101} The example of the directive, later declared void, completely banning adverts promoting tobacco products marked a low point of this tendency.\textsuperscript{102} However, in its decision on the Tobacco Directive, the Court of Justice limited the competences of the Community to approximate differences that have not only a hypothetical but also a tangible effect on commerce within the internal market.\textsuperscript{103} This limits the ‘social formulation’ by the European legislators on the one hand, while extending the scope of the Member States' national policy on the other.\textsuperscript{104}

\textbf{bb) Liberalising Regulated Markets}

A further area of regulatory policy measures is the liberalisation of regulated markets. Liberalisation policies are partially based on Article 86(3) EC, which, in addition to Article 95 EC, has provided the legal basis for a series of directives for the liberalisation of telecommunications services.\textsuperscript{105} The rules further allow the enactment of individual Member States’ decisions to deal with specific problems for regulated services and the activities of public undertakings in the respective Member States.\textsuperscript{106} Furthermore, these categories of measures are based on the internal market competence of Article 95 EC, which has been used to liberalise the postal services.\textsuperscript{107}

\textbf{b) Procedural Policy}

The Community’s possibilities to influence the economic process require more differentiated considerations. The policies governing monetary and currency policies, relevant in the context of these considerations, will be analysed in a separate section.

\textbf{aa) Financial Policy}

Financial policy does not play an important role in Community economic policy. First, the Community’s budget volume is too small to be used effectively as an instrument of financial global control. Secondly, the Community lacks the power to specifically determine the type and amount of its revenues by itself. The Community’s own revenues are, according to Article 269 EC, allocated to it by primary law; neither the keys for imposition nor the upper limits are at the discretion of the institutions.\textsuperscript{108} Even import and export duties are subject to legally binding rules within the framework of the WTO. At best, the ECJ’s recognition of an implied power to introduce economic policy-motivated steering taxes gave the institutions a certain radius of


\textsuperscript{103} Ibid, para 106.

\textsuperscript{104} See also Müller-Graff, above n 3, 58; C Calliess, ‘Nach dem ‘Tabakwerbung’-Urteil des EuGH’ [2001] Jura 311.

\textsuperscript{105} See the overview by C Jung, in Calliess and Ruffert (eds), above n 81, Art 86 EC, paras 60ff.

\textsuperscript{106} Ibid, paras 63ff.

\textsuperscript{107} Ibid, para 62.

\textsuperscript{108} See Oppermann, above n 4, § 11, para 837.
action in the area of financial policy. These instruments have not yet attained any real practical significance.

**bb) Structural Assistance Measures**

A further group of rules empowers the Community, partly in cooperation with the Member States, to undertake measures for providing structural assistance. Structural policy is the correlative of competition control, which should serve to actively strengthen competition through market-revitalising initiatives. It can therefore be seen as a sort of ‘completion to regulatory economic policy’, with an influence on the frame of the economic process. On the other hand, assistance measures are an integral part of policy instruments that should primarily serve to promote economic growth. This double function can also be seen in the pertinent legal bases of the Treaty. Some examples are the industrial policy (Articles 157ff EC), the research and development policy (Articles 163ff EC), and the active support of trans-European networks (Articles 154–156 EC), which should strengthen the competitiveness of the European economy and its infrastructure.

First, structural funds (regional, social, agrarian, cohesion) are at the service of regional competitiveness. Simultaneously, they are intended to be an instrument of Community solidarity, although it would be a mistake to consider them as surrogates for federal fiscal adjustment. The redistribution effect of the funds is too small for such an objective. Nonetheless, the volume of financing is worth mentioning. For the funding period 2007–13, 347 billion euros have been budgeted. In the meantime, the funds have become part of an independent sub-branch of law, characterised by a high degree of technicality as well as complex regulatory and decision-making structures. The principle of co-financing increases the financial volume of the measures considerably; the incentive effect of Community promises of financial aid gives the funds a considerable influence on national structural policy. The unclear supervision of achievement is an essential deficiency of the structural funds.

**cc) Employment Policy**

The title ‘employment’ was introduced by the Treaty of Amsterdam (Articles 125–30 EC). Although such policy initiatives had previously existed at the European level, it was because of the Amsterdam amendments in 1999 that this subject was recognised in a Treaty for the first time. These rules were created, above all, under the pressure of growing unemployment figures in the EU. They provide a tool for the fulfilment of the employment goals of Article 2 EC, but are limited to the co-ordination of strategies and supporting measures. The responsibility for employment policy remains in the hands of the Member States, although the promotion of employment is considered a ‘matter of common concern’ (Article 126(2) EC). National strategies are co-ordinated by Employment Policy Guidelines issued by the Council based on a report on the situation in the EU. These guidelines are not legally enforceable, but contain recommendations for measures that must merely be considered by the Member States.

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110 See U Teichmann, Wirtschaftspolitik (2000) 189, for more information on this dual function.
113 See R Priebe, in Schwarze (ed), above n 40, Art 158 EC, paras 1ff, for detailed information on the impact of this instrument.
114 For details, see Steinle, above n 95, 351.
Environmental policy has gained importance through the embedding of environmental protection in Article 2 EC, as well as in the horizontal provision of Article 6 EC. In general, environmental policy can be defined as the sum of all economic measures intended to contribute to the improvement or preservation of environmental quality. Community environmental competences not only include protective measures concerning environmental media, i.e. earth, air and water, or human health for a conscious and rational utilisation of natural resources (Article 175(1) EC), but also consist of important decisions relating to infrastructure, also touching on the choice of a Member State between various forms of energy production or their regional planning (Article 175(2) EC). As central guiding maxims, we find the ‘polluter pays’ principle and the principle of sustainable development.

The competences permit measures of approximation in every form of secondary legislation as stated under Article 249 EC, though in practice the directives dominate. Article 6 EC further strengthens environmental protection. Hence, the EC’s recent practice has rendered the objectives of the horizontal environment protection provision, Article 6 EC, a sufficient basis for decisions in competition law granting exemptions from Article 81 EC. In the CECED Decision of 1999, an agreement between French washing machine manufacturers was released from cartel prohibitions because it created energy-saving production norms; these norms, however, resulted in a limitation of competition on the market and exerted a negative influence on interstate trade. The doubtful benefit for consumers, who were now forced to pay higher prices for the technically superior appliances, was, according to the Commission, compensated by gains in environmental protection. This Decision shows the potential for intrusion of horizontal provisions in the core areas of the European economic constitution, even when evaluated carefully.

The market relevance of direct environmental policy measures should also not be overlooked when lawful limits of certain substances, the introduction of new processing procedures such as the EIA Directive and the authorised admission of industrial plants are made dependent on an integrated examination of their influences on the essential environmental media. The effects on economic freedom and national legal theory can be far-reaching, especially if—as in Germany—precautionary limits, as opposed to the previous legal status, confer subjective rights and can therefore be enforced before the courts by the individual. At the same time, it would be a mistake to assume a quasi-natural antagonism between ecology and economy. Above all, such an antagonism does not exist per se from the European economic constitution’s point of view. Rather, an environmentally compatible rate of growth is one of the major goals of the Community, according to Article 2 EC. Therefore, it is a legitimate concern of European economic policy to internalise particularly the negative external effects of the utilisation of the good ‘environment’.

119 For a detailed view, see M Ruffert, Subjektive Rechte im Umweltrecht der EG (1996).
c) Distribution and Social Policies

The responsibilities of the Community in the area of distribution policy, understood as property, income and social policy, require a more differentiated examination. The ‘social’ aspect of the European market model is anchored in this area. A characteristic of this sector is the division of responsibilities between the Community and the Member States, which is legally established in common goal perspectives and areas of competence that secure the socially binding nature of European economic policy but leave the measures largely in the hands of the Member States.

aa) Distribution Policy Goals of the Community

Among other goals, the Community aspires to reach a ‘high level of social protections’ and an ‘increase in the standard of living and the quality of life’, as set out in Article 2 EC. The commitment of the Treaty to a high level of social protection guarantees the essential elements of a social state without forcing, for example, the German principle of social justice and the welfare state upon the other Member States. Moreover, the Community principle of solidarity, referred to specifically in Article 1 EU as well as in Article 2 EC, is primarily concerned with the relations between Member States, rather than mutual commitments in a community of Union citizens. Nonetheless, the Union citizenship in Articles 17ff EC itself offers a potential that has so far not been made use of. In spite of its derivative character, it forms the basis of a European category of citizens’ rights and equality under law, the consequences of which—as social participatory rights—are becoming increasingly distinct. The Court of Justice has recently decided that Union citizenship in connection with the discrimination prohibition of Article 12 EC stands in opposition to a regulation that makes the granting of financial support for one’s livelihood dependent on nationality. This touches the area of access to national benefit systems, which is at the Member States’ free disposition.

Aside from the question of desirability, the main obstacle for an independent and completely comprehensive European social policy is the fact that the Community does not possess the instruments necessary to achieve such goals, ie providing social benefits, or guaranteeing equal opportunities or a just social order. This is also true for the goal of raising the standard of living, which should be understood in the sense of an increase in the average income level. Above all, the financial autonomy of the Community is too restricted to achieve redistribution effects worth mentioning through its budget policies. The ponderousness of the approximation competences in the area of taxes, which requires a unanimous vote, is another factor limiting Community access to those instruments of just social distribution. Regardless of this, the powers of the Community in these areas have been continually expanded in the last round of reforms and supplemented with instruments that open a new dimension of social interventions at the European level.

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120 See Böckenförde, above n 23, 79, who remains too general on this topic.
121 For more details, see Kingreen, above n 24.
122 Cp eg Kingreen, above n 24; also E-A Maras, ‘Solidarity as an Objective of the European Union and the European Community’ (1994) 2 Legal Issues of European Integration 85.
124 See Art 93 EC (indirect taxation) and Art 94 EC (direct taxation).
125 See also Badura, above n 1, 28, who speaks of the intrinsic necessity of further development towards a ‘Welfare and Distribution Community’.
**bb) Supplementary Social Policy**

According to Article 3(1)(j) EC, the activities of the Community shall include ‘a policy in the social sphere comprising a European Social Fund’. Title XI establishes parity between socio-political rules and other policies of the Community. The emphasis of socio-political competences lies, meanwhile, at the national level. This is especially true for systems providing social services, such as health insurance, annuity insurance and social insurance, but also for the various forms of contribution to the standard of living, e.g. social security benefits.

(1) Co-ordination of the Systems Providing Social Services

The Community has a merely co-ordinating role in this area. Nevertheless, measures have been taken for the realisation of the free movement of persons: mutual recognition of insurance time periods, rights to benefit support payments and so forth. Although they are functionally related to the freedom of movement, they are not an expression of any particular socio-political formative interests of the EC. On the contrary, beginning with the cases of Kohll and Decker, the Court of Justice has emphasised the fundamental importance of internal market regulations for national social insurance, namely health insurance, and only allowed such limitations that assured the efficiency of the service provider involved.

(2) Supplementation of National Activities

The European Social Fund (Articles 146–148 EC) is meant to improve the employment possibilities of the workforce in the internal market and thus contribute to an increase in the standard of living. Its primary duty is to support national measures (supplementary principle). Their socio-political goal is also related to the internal market, thus leaving the guarantees of an open market economy unaffected. At the same time, the fund belongs to the context of economic and social cohesion (Article 159(1) EC), and has the general goal of reducing the differences between the levels of development of the various regions (Articles 3(1)(k) and 158 EC).

**cc) Starting Points for European Employment and Social Order**

The Communities’ competences based on the ‘social provisions’ of Articles 136–45 EC, introduced on the basis of the Treaty of Amsterdam, are much more important for the market-economic orientation of the European economic constitution. The provisions of Articles 137ff EC are concerned with labour law, above all the legal relationship between employer and employee, as well as with matters of collective agreements. Additionally, questions of social welfare law are regulated, whereas special rules are to be observed for social protection (Article 137(3) EC) and social security (Articles 42, 137(3) EC). Socially oriented rules and regulations create an independent competence title for social policy, which has been separated from its functional linkage to internal market policy. In that framework, socio-political questions have been treated under the aspect of unfair competitive practices. This is the first step to an independent European social policy, whose conceptual orientation is still relatively unclear. Subjective rights are merely conferred by the precept of equal pay for equal work for men and

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128 For references, see above n 67.
129 See F Rödl, below chapter 17.
130 R Rebhahn, in Schwarze (ed), above n 40, Art 136 EC, para 5; see also the dissenting work of S Krebber, in Callies and Ruffert (eds), above n 81, Art 136 EC, para 6, who still sees, basically, a competitive policy concept as an important guideline behind European social policy, more precisely the illusion that successful economic policy has a positive effect on social integration.

610
women (Article 141 EC). In addition, the provisions and regulations of Articles 137 to 140 EC place a plenitude of instruments within reach.

d) Freedom of Choice in the Framework of Comprehensive Clauses

Finally, the Community legislator is bestowed a general legislative authority by Article 308 EC and can use this broadly framed power for economically relevant measures. As shown in the application practices of the last decade, the Council has often used Article 308 EC to introduce policies which were later on incorporated into the canon of primary law competences. Environmental and regional policies are examples of this. The restrictive conditions under which the comprehensive clause of Article 308 EC can be mobilised thus do not change their principal meaning for the effective scope of market economy guarantees.

3. Formative Boundaries

Due to a broad tableau of economic policy goals and their corresponding powers, the limits of formation are the core of a ‘leeway doctrine’ of European economic law. The search for crossover principles and rules which determine the relation between guarantees and the Community’s powers of intervention is at its centre. The prohibitions against a system change, as stipulated in Articles 4 and 98 EC, can be simultaneously connected with the typical contents of a ‘general rule exception’ relationship, which makes interventions into economic freedoms and other guarantees of a competitively constituted market economy an exception requiring legal justification. Beyond these general boundaries, further written and unwritten legal guidelines for relating competition and intervention can be inferred from the Treaty.

a) Increased Effectiveness of Market Integrative Instruments

Market integrative guarantees tend to have access to a higher assertiveness than competence titles, which display interventionist tendencies. This can be seen in the graded autonomy of the regulation areas (aa), in procedural safeguards (bb) and, albeit decreasingly, in the available legal instruments.

aa) Levels of Autonomy

One indication of the precedence of competitive market integrative means is the increased independence of market integrative Community policies. Market integration is a task in itself, accomplished mainly with the assistance of the fundamental freedoms, competition rules and approximation of laws. On the other hand, health and consumer policies are confined to a supportive or auxiliary contribution. Even the industrial policy has a complementary character, especially when the Community wants to take specific measures. According to Article 157(3) EC, these must serve to ‘support’ national efforts. The weakest form of these measures is co-ordination, such as in the area of employment policy, which is merely aimed at adjusting basically independent decision-making parties to one another.

131 See, eg the overview by M Rossi, in Calliess and Ruffert (eds), above n 81, Art 308 EC, para 9.
133 See ibid.
bb) Procedural Safeguards

Procedural safeguards are also a way of protecting the choice in favour of an open market economy with free competition from competition-distorting influences. Important progress was made with the introduction of Article 95 EC, which allows a qualified majority vote for measures supporting the establishment and functioning of the internal market. The opposite is true for particularly disputed areas, such as tax policy, in which the conflict potential of the various national economic philosophies is evident to everyone: these areas are kept under control with the requirement of a unanimous vote. The same applies to the general empowering provision of Article 308 EC, which has often served in the past as the legal basis of economic policy measures such as the introduction of a regional policy. Additionally, such bodies as the Economic and Social Committee and the Committee of the Regions must be involved as they can place a burden of justification on the institutions for their measures. As shown by the Reform of Nice, the tendency towards an increase in the usage of the majority decision can be seen in all areas of the Treaty; hence, this indication of a greater capability to enforce the market concept is fading rapidly.\(^{134}\) The same applies to the Treaty of Lisbon. Compared to the Treaty of Nice, the reform of Lisbon extends the scope of qualified majority voting to 21 new and to 23 already existing policy areas.\(^{135}\)

b) Substantive Safeguards

Much more concrete is the range of substantive safeguards for a competitively constituted market economy. In this respect, one can distinguish between subsidiarity, functionality and effectiveness as limiting principles.

aa) Principle of Subsidiarity

The subsidiarity principle of Article 5(2) EC needs to be considered regarding various economic political measures. Although, in previous applications, its effectiveness has proven to be relatively limited, it still directs—if only as a policy maxim—the Community’s activities on the basis of competences that are not exclusive.\(^{136}\) These are economic and social cohesion, and the protection of collective goods and interests.

bb) Reservation Clauses

The efficiency of the internal market and the system of undistorted competition are additionally secured through the reservations that can be found in various provisions.

(1) Provisions Supporting the Establishment and Functioning of the Internal Market

The measures for the approximation of laws must aim to realise the fundamental freedoms or foster the functioning of the internal market.\(^{137}\) At the same time, these substantive requirements contain a command to conformity with reference to the guarantees of an open market.

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\(^{134}\) For an in-depth study, see A Hatje, ‘Die institutionelle Reform der Europäischen Union’ [2001] Europarecht 143, 154.


\(^{136}\) In this regard, neither the fears of the first years (see P Pescatore, ‘Mit der Subsidiarität leben’ in Due et al (eds), above n 132, 1071) nor the hopes have been fulfilled, with the result that contemporary commentary ranges from sober and empty to negative.

The same applies to the case of horizontal provisions loading up harmonisation with objectives to meet the needs of non-economic interests such as health or environmental protection. This is often achieved at the expense of economic freedoms. 138 Although the institutions enjoy a broad margin of discretion pertaining to evaluation and formation, such horizontal clauses do not entitle them to use their harmonisation powers to create new market barriers or even suppress the relevant market. 139 Prohibitions such as the EC ban on certain types of advertising, based on Article 95 EC, are problematic as they set limits on communication and thus interfere with the functional guarantee of the market economic order.

(2) Provisions Ensuring Undistorted Competition

Apart from this, there are several powers limiting Community intervention in market processes to those measures that do not result in a distortion of competition. In particular, the controversial industrial policies of Articles 157ff EC are expressly bound to a ‘system of open and competitive markets’ (Article 157(1) and (2) EC), and block the use of these competences for measures that could lead to a ‘distortion of competition’ (Article 157(2) and (3) EC). Even so, the Community contribution to the expansion of a trans-European network in the areas of traffic, telecommunications and energy infrastructures (Article 154 EC) is integrated into the ‘structure of a system of open and competitive markets’. Thus, at least from a legal viewpoint, the contribution is designed to be compatible with the guarantees of a market economy. Even Community social policies must stop at the point where “the competitiveness of the Community economy” could be negatively influenced. Moreover, the Court has inferred a guarantee from Article 3(g) EC that stipulates a system ensuring undistorted competition which legitimates the further development of judge-made law in this area. 140

As commented on above, this guarantee is not questioned by the Treaty of Lisbon’s solution of compromise.

cc) Effectiveness

The uncertainty of these provisions does not impede their legal effectiveness. As shown in the case law, the ECJ may very well give the internal market clauses, as well as the various phrasings of competition principles, thoroughly effective supervisory outlines.141 The ‘competitiveness’ as a barrier to European social policies implies discretion of the political institutions beyond judicial review. In any case, these barriers substantiate a burden of justification for measures which are objectively capable of preventing certain parts, or the European economy as a whole, from participating in a performance competition in the internal market.142

138 See C Tietje, in E Grabitz and M Hill, Das Recht der EU (looseleaf, last update Jan 2008) Art 95 EC, para 18, for the necessity of co-ordination with the requirements of the common market.
141 The judgment on the ban of tobacco advertising shows that the Court of Justice controls the Community approximation of laws if it intervenes in economic freedoms from the perspective of functional guarantees of a market economy. See also the critical review by J van Scherpenberg, ‘Ordnungspolitische Konflikte im Binnenmarkt’ in M Jachtenfuchs and B Kohler-Koch (eds), Europäische Integration (1996) 345, esp 350, for more information on the approximation of laws.
142 See, eg J Schwarze, European Administrative Law (2005) 1359ff, for more information on the burden of justification institutions with such powers have to meet.
c) Burden of Justification

The burden of justification is integrally connected with the guarantees of an open market with free competition. These create overwhelmingly subjective rights, which only allow proportional interventions.

aa) Subjective Rights and the Necessity of Justification

Above all, the institutions must protect the fundamental rights of affected parties. They form not only the basis of a market economic constitution, but also the negative limits of competences for sovereign interferences with economic freedoms. The connection between constitutional liberties and market economy, emphasised by Walter Eucken,143 also exists under Community law. The fundamental freedoms may allow the institutions a broad scope for formulation; however, they substantiate, together with the choice in favour of an open market economy with free competition, a burden of justification. Free trade activities represent the presumed rule, and sovereign intervention, for whatever purpose, is the exception requiring justification.144 The prohibition of discrimination is in addition to this, and needs to be followed when intervening in subjective rights.145 Its effect, however, is under control as the Court of Justice usually constrains the examination to the question of whether there is a factual reason for the differentiating measure. In this respect, one of the few examples of setting aside a Community regulation in economic law due to a violation of the fundamental rights was based on a violation of the discrimination prohibition.146 In the end, the fundamental freedoms seen as subjective constitutional rights equally create a barrier for Community interventions in the market.

bb) Proportionality or a Minimum of Intervention Rule

The fine-tuning of the impaired guarantees, such as fundamental rights and freedoms or prohibition on cartels as well as legally protected interests of Community measures, is carried out by a review of proportionality.147 This review is provided by the Court of Justice with various degrees of strictness, depending on legislative or administrative interventions. As already mentioned, the Community legislator has a broad scope of evaluation and formation, which in legal terms concerns the choice of the relevant objective as well as the suitability and necessity of an action.148 If the unusual case of an examination of proportionality in a narrow sense occurs, the legally protected interests are directly weighed against each other. Thus, in individual cases, freedom of economy and competition can retreat behind the interests in their limitations.149 Nonetheless, the burden of justification for interventions into economic freedoms leads to a relative minimum of intervention.

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143 Ibid.
144 In general, Cases 46/87 and 227/88 Hoechst v Commission [1989] ECR 2859, para 19, express such a burden of justification for interventions.
4. The Monetary Union in the Economic Constitution

The monetary system is given a special role. Although it is an integral element of primary law, it is separated from the rest of the institutional system on the European as well as the national level due to the independent status of the European Central Bank and the European System of Central Banks. The Treaty further formulates a clear objective preference, with price stability as the leading maxim of the monetary union, which contains a considerable potential for conflict between the goals of both the Community and national economic policies. For this reason, the monetary system cannot be integrated into the remaining economic constitution without friction. It has to be noted that, in relation to the Member States, the latter are still in possession of the competences for the general economic policy. The provisions of Articles 98–104 EC on the economic union only form a framework, within which the Member States can design especially their budgetary policies largely unrestricted.

IV. The Discretionary Power of the Member States in the Field of Economic Policy

The systemic choice of the composite economic constitution in favour of an open market with free competition can be additionally limited, above all, through the economic policies of the Member States. A broad scope of discretion is the starting point from which the theory of vertical relations within the constitutional system can be developed.

1. National Constitutional Law

The European economic constitution forms a link between the fundamental judicial regulations of the Member States, especially such regulations that, as creative elements in the national economic constitution, restrict the possibilities and boundaries of national economic politics from ‘below’. A precise analysis would stretch the limits of this study; the requirements for justiciability of the national economic constitutions cannot be included. Here, only some tendencies and prominent features of substantial economic law are highlighted.

a) Systemic Choices

None of the constitutions of the former 15 Member States makes an express systemic choice comparable to the legal requirements of Articles 4 and 98 EC. Only Article 38 of the Spanish Constitution recognises ‘the freedom of enterprise in the framework of market economy’, which in itself is a remarkable basic statement of regulatory policy. In contrast to this position, several of the constitutions of the new Member States contain explicit choices for a particular economic constitution. For example, the Constitution of the Republic of Poland declares in Article 20 that

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150 See only Arts 107 and 108 EC, and Arts 7 and 14 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank.
151 Art 105(1) EC.
152 For an important contribution to the broader set of questions, see P-C Müller-Graff, ‘Die wettbewerbsverfaßte Marktwirtschaft als gemeineuropäisches Verfassungsprinzip’ [1997] Europarecht 433.
153 However, for the Federal Republic of Germany, Art 1(3) of the Treaty on the Creation of a Monetary, Economic and Social Union of 23 June 1990 between the FRG and the GDR establishes the ‘social market economy’ as binding in the sense of a normative declaration about a the practised economic order. For details, see M Schmidt-Preuß, ‘Soziale Marktwirtschaft und Grundgesetz vor dem Hintergrund des Staatsvertrages zur Währungs-, Wirtschafts- und Sozialunion’ [1993] Deutsches Verwaltungsblatt 236.
a ‘social market economy, resting on the freedoms of economic development, private property, solidarity, dialogue, and cooperation between social partners as well’ is intended to be the basis of the Polish economic constitution. A similar formulation is contained in Article 55(1) of the Slovakian Constitution, which states that the ‘economy of the Slovakian Republic is based on a socially and ecologically oriented market economy’. Moreover, the Slovakian Republic ‘protects and supports economic competition’ according to Article 55(2) of the Constitution. Hungary also acknowledges market economy in Article 9(1) of its Constitution, but adds that ‘public and private property enjoy equal protection and equal rights under the law’.

b) Guarantees of a Market Economy

The constitutions of all Member States contain additional legal guarantees representing a justiciable basis for the protection of market economic order. In this respect, they are compatible with the European market constitution, at least in principle. This is true for the individuals’ or enterprises’ freedom of commercial action, but likewise for the guarantee of private property. The Hungarian Constitution emphasises ‘the right to enterprise’ and the ‘freedom of economic competition’ in Article 9(2)—the latter, as far as can be seen, only as a fundamental objective of the state. The Irish Constitution refers to competition as a protected good, as well. Article 45(2)(iii) states that the policies of the state should be directed in particular towards securing that ‘the operation of free competition shall not be allowed so to develop as to result in the concentration of the ownership or control of essential commodities in a few individuals to the common detriment’. These normative guidelines allow the state institutions a broad economic political scope of activity, which can be limited by contrary state intervention in favour of goals requiring such measures.

c) Interventionist Tendencies

The guarantees of a market economic order and the interventionist goals of state policies and their corresponding powers compete and sometimes conflict. Thus, the previously quoted provision of Article 38 of the Spanish Constitution not only guarantees the freedom of enterprise within the framework of a market economy, but also makes its support dependent on consistency with the ‘requirements of planning’. Furthermore, the constitutions of some Member States warrant social rights and contain catalogues of state objectives, which can justify measures restricting markets and competition.154 An initial review of the national constitutions shows a broad economic–political discretionary power of the national legislator that should obviously include some planning elements, as in the cases of Spain and France.

2. Market Relevant Discretionary Powers

The actual extent these discretionary powers have within the European composite economic constitution is determined by the leeway foreseen in the Treaty. In this respect, one can distinguish whether the area in question falls under the original jurisdiction of the Member States or the power is granted to them through exception clauses in areas that are subject to Community policies. In this matter, they consequently form a counterpart to those areas which the Community has not been allowed to regulate, or which until now have not yet been regulated.

154 For more examples, see Müller-Graff, above n 152, 454.
a) Regulatory Policy Regulations

Regulatory policy provisions of the Community’s economic constitution in favour of the Member States concern above all regulations governing the areas of private property and provisions of elementary requirements.

aa) National Systems of Property Ownership

The guarantee of Article 295 EC, which leaves the national regulations governing private property untouched, secures national prerogatives in the area of property regulations. The wide meaning of the term ‘property’, including, in addition to physical property, above all intellectual property, as stated in the case law of the Court of Justice, opens a principally broad scope of discretion to the Member States, which are not prevented from nationalising enterprises. A practical example of this was the wave of nationalisation in France that occurred after the election of the Socialist Party at the beginning of the 1980s. The opposite is also true, however, as the Member States have not been prevented from privatising public enterprises. In this respect, Article 295 EC guarantees the neutrality of Community as regards those regulatory policy decisions of Member States whose effects can penetrate the centre of guarantees of an open market economy with free competition. It is not the purpose of Article 295 EC to make an ‘opting out’ of the Community’s market constitution possible for the Member States, although it is expressed without reservations. For this reason, at least the practical applications and the effects of public and private ownership laws underlie the general limits of the Treaty. Above all, a comprehensive nationalisation of trade and industry would no longer be covered by Article 295 EC, as it would inevitably involve planning that would not be in accordance with either the fundamental freedoms of the internal market or competition rules.

bb) Guarantees in Favour of Services of General Economic Interest

The lines of conflict between various concepts of national economic policies in the current discussions on the position of services of general economic interest in a competition-controlled economy are drawn together as in a burning-glass. This affects those businesses that have been assigned particular duties by the Member States; in this respect, the Treaty mentions provisions of services of general economic interest. In order to strengthen the Member States’ position, Article 16 EC was introduced by the Treaty reform of Amsterdam, with specific regard to a more restrictive interpretation of Article 86 by the Commission and the Court of Justice. At the same time, inversely from the point of view of such services, Article 36 of the so far non-compulsory European Charter of Fundamental Rights underlines the rights of Union citizens of access to public institutions, etc, ie ‘services of general economic interest’. Regarding these services and undertakings, and according to Article 16 EC, ‘the Community and its Member States, each within their respective powers and within the scope of application of this Treaty, shall take care that such services operate on the basis of principles and conditions which

157 T Kingreen, in Calliess and Ruffert (eds), above n 81, Art 295 EC, para 2.
159 Schwarze, above n 1, gives a good overview of the current discussion on the basic problems of this area; for more information on the creation of Art 16 EC, see F Löwenberg, *Service public und öffentliche Daseinsvorsorge* (2001) 207.
enable them to fulfil their missions’. Yet this is only so ‘without prejudice to Articles 73, 86 and 87’, according to which these kinds of services are subject to a review according to the standards of the Community’s competition law.

The content, as well as the legal effects, of these norms is anything but clear. As shown in previous incidents, the norms are supposed to strengthen economic forms of operating for the good of society in the framework of a Community economic constitution, in opposition to the model of a market economy governed purely by competition. In this regard, Article 16 EC establishes a duty for the Community and the Member States without placing concrete powers at their disposal. The regulation gives no grounds for either citizen’s rights to benefits or rights of affected enterprises to protection against state interference. It makes clear, as shown in the remark regarding ‘the place occupied by services of general economic interest in the shared values of the Union’ and by Article 36 of the Charter, that these economic forms are an independent protected interest of the EC Treaty and not just a tolerated relict of an interference economic policy of some of the Member States. The regulation offers no alternatives to the market concept, as some had claimed, but does show by the reservation of competitive conformity in Articles 73, 86 and 87 EC that the provisions of existence need to be consistent with competition and market, as well. The same applies to Article 36 of the Charter, which places access to services of general economic interest under the provisions of conformity with the EC Treaty.

b) Scope for Procedural Policy Formulation

The Member States have a variety of possibilities to influence the economic process. The instruments of the Community are limited to supplementary or supportive interventions, with the exception of the all-important field of monetary policy. Budgetary policy measures in particular, such as forced public investment and national taxation policies, can have an influence on the business activities or can serve external fiscal interests. The framework conditions of the Community’s economic constitution must be considered, as in the cases of the newly named Eco-Tax or national debt policies. In particular, the budgetary supervision of the Commission under the auspices of Article 104 EC and the Stability and Growth Pact, developed as a supplement to support the prevention of an ‘excessive government deficit’ limit the national scope for policy formulation immensely. This was especially illustrated in the discussion about an ‘official warning’ to the Federal Republic of Germany and to Portugal for accumulating new debt at or beyond the set limits. However, a wide spectrum of instruments remains available, which should be able to affect economic processes in the form of focused employment policy.

c) Scope for Distribution Policy

As the creation of rate scales in the area of direct taxation (ie the income tax) is still in the hands of national legislators, the leeway concerning the distribution policy can be considered to be even more ample. Additionally, in the area of creation of social security systems, the Member States retain a free hand; yet, at the same time, the co-ordination and expansion of claims for

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163 See Steinle, above n 95, 45, provides a careful analysis of employment policy instruments.
164 See above n 124.
services from other Member States created an opening in this sense. The basic policy decisions as to whether and how certain claims for social services (health insurance, annuity insurance, etc) are to be fulfilled, also remain with the Member States. In this respect, the Member States have a broad scope for distribution, with the exception of those—moderate—influences subject to Community social regulations outlined above, which can be filled out by autonomous national political drafts.\textsuperscript{165}

d) The Problem of System Competition

In the above-mentioned sectors, which are subject to an autonomous organisation by the Member States, a ‘system competition’ is taking place whose legal classification in the framework of the EC Treaty is widely disputed. The thesis, primarily represented in economic science, that trade rivalry is supplemented by the competition of national economic policy\textsuperscript{166} stands opposed to the Communities’ goals (see Article 2 EC) of a harmonious, balanced and sustainable development of economic activities and a high degree of social protection and solidarity amongst the Member States. As such, competition between the systems is neither legally commanded nor forbidden; however, this competition is subject to Community controls according to the Treaty objectives and to the specific provisions concerning the coordination of national and European economic policies.

3. Limits of Discretionary Powers

The limits of the Member States’ economic policies are formed, on the one hand, by the market economic orientation of the European economic constitution, which extends the prohibition against system change to the national level. On the other hand, the boundaries are defined by qualitative and quantitative standards of European law.

a) Market Economic Orientation

State economic policy as well as that of the Community must be geared to the basic principles of an open market economy with free competition according to Articles 4 and 98 EC. The decision-making system thus becomes an essential part of the national economic constitution, and must be in agreement with it. Despite the broad margin of discretion, a system change to a planned or centrally administered economy is not possible. A positive influence of this orientation according to this basic principle should be the support of ‘an efficient allocation of resources’, although judicial control regarding such an obligation is difficult to exercise.\textsuperscript{167} Furthermore, the national economic policy under Article 98 EC is bound to the goals of Article 2 EC, and should strive to reach a particularly stable, non-inflationary rate of growth.\textsuperscript{168} With this comparatively general orientation, state activities below the barrier of system change cannot be hindered from causing delicate disturbances in the market mechanism. The Treaty

\textsuperscript{165} See, eg U Becker, 
\textit{Staat und autonome Träger im Sozialleistungsgesetz} (1996) 494, who discusses, in order to give examples, the various ways of providing social security in Europe in their respective constitutional surroundings.

\textsuperscript{166} For more details, see Mussler, above n 26, 77; targeted on taxation competition and its limitations is J Wieland, ‘Steuerwettbewerb in Europa’ [2001] \textit{Europarecht} 119, who, rather restrictively, perceives tax equity as a criterion for permissible competition, also considering Art 23(1) of the German Grundgesetz.

\textsuperscript{167} D Hattenberger, in Schwarze (ed), above n 40, Art 98 EC, para 7, supports a normative commitment, as opposed to an explanation of the characteristics of an open competitive economy.

\textsuperscript{168} As the reference in Art 98(2) EC to Art 4 EC shows, the economic union shall be above all a stability union. This norm provides for stable prices, healthy public finances and basic monetary conditions, as well as a regulated balance of payments. See R Bandilla, in Grabitz and Hilf (eds), above n 138, Art 98 EC, para 6.
therefore contains a series of additional safeguards, which can be considered as a system because of their connection with the objective of market and competition protection. They limit the financial as well as regulatory potential for intervention.

b) Quantitative Limitation of Financial Intervention Potential

The potential for financial intervention is limited above all by budget discipline based on Article 104 EC, according to which the Member States have to avoid ‘excessive government deficits’. It serves the goal of stability of the monetary union, which would be endangered by expansive budget policies of the Member States as compensation for common European monetary policy instruments. The Commission’s supervision of public debt levels installed for this purpose tangibly restricts the scope for economic policy of most of the Member States.

In particular, the 3% reference value for newly incurred indebtedness, relating to the gross domestic product at market prices, as set out in the Protocol on the excessive deficit procedure, proves to be a thoroughly effective boundary to short-term politically motivated market intervention of the Member States.

c) Proportionality as a Limit to Intervention

In the sense of market and competition protection, the basic principle of proportionality limits the financial and regulatory interventions by the state more efficiently. Its application is based on the rule-exception principle, whereby the openness of the market and undistorted competition are the rule and interferences with these guarantees of the European economic constitution require justification. As described many times, the Court of Justice has developed a finely woven inspection programme out of the principle of proportionality that can be used to test the compatibility of state economic policies with the guidelines of Community regulations and the guarantees contained within the system.

aa) Legitimisation Based upon European Standards

State interference with market freedoms and competition must be justified by legitimate purposes. This is just as valid for the fundamental freedoms of the Treaty as it is for the competition rules of Articles 81ff EC. Regardless of whether an expressly protected good included in the list of permitted exceptions from freedoms is written or unwritten, there must be justification for interference. The fundamental freedoms are further limited by the fact that the reasons must be of a non-economic nature.

The granting of national subsidies under Article 87(3) EC is carried out according to the standards of European-defined support goals.\(^{169}\) Solely in the area of services of general economic interest under Article 86 EC, the Member States have certain powers regarding the definition of goals and methods for the execution of public duties, which can demand the exemption of the service providers from the Treaties’ competition regulations. The extent of the exemption is again subject to control regarding Community interests in an internal market with free competition.\(^{170}\)

bb) Aptitude and Necessity as Precept of Minimum Intervention

Interference must be both appropriate and necessary. The appropriateness of a measure taken for legitimate Community purposes opens a certain margin of discretion in the decision-making

\(^{169}\) For more information on the impact on the economic constitution, see eg Müller-Graff, above n 152, 443.

\(^{170}\) F von Burchard, in Schwarze (ed), above n 40, Art 86 EC, para 77.
of Member States. However, the reasons must be made clear why a certain measure will have the desired effect.\textsuperscript{171} The necessity of a measure is the obvious limit to state intervention. In the case of interventions in the fundamental freedoms in particular, the Court of Justice has emphasised that the states’ intervening measures will only be deemed necessary if there are no other, equally efficient but less onerous, means available to serve the Communities’ aim. According to this, a measure will only be allowed, as emphasised by the Court of Justice for free movement of goods, if ‘the same objective cannot be achieved by any measure which restricts the free movement of goods less’.\textsuperscript{172}

The granting of state aids follows a similar test that contains a special comparison with the presumed results of an ‘undistorted self-powered competition’.\textsuperscript{173} Only if a prognostic benefit in favour of state interventions is established can the necessity be confirmed. Furthermore, the relevant means or interventions in freedoms of the Treaty must be the least restrictive measures. Even exceptions to the competition rules of the Treaty, especially for services of general economic interest in the sense of Article 86 EC, can follow only within the boundaries of suitability, necessity and appropriateness. On the other hand, the more recent judgments of the Court of Justice allow the conclusion that, in accordance with general Community policies and the basic principle of Article 16 EC, the Member States will be granted a relatively wide discretion within which they can decide independently on the type and means of such service provisions.\textsuperscript{174} However, these conditions change nothing of the basic requirement for justification of exceptions from the ‘pure’ market principle. In the course of the Treaty of Lisbon, Article 16 EC (Article 14 TFEU) has been widened—as was already envisioned by the Constitutional Treaty—to establish a new legislative competence of the EU in the field of services of general economic interest.\textsuperscript{175} According to this, the EU shapes the principles and conditions, particularly economic and financial conditions, which are necessary for the functioning of such services. Therewith, the EU has a similar role as in competition law, ie it determines the general framework within which the Member States remain responsible. Despite the declarative remark that the setting of these principles and conditions shall take place irrespective of the Member States’ competences, the expansion of Article 16 EC will most likely reduce the wide scope of the Member States’ discretion. However, this restriction is counteracted by the Protocol on Services of General Interest, which emphasises the important role and the wide margin of discretion of national, regional and local authorities with respect to the regulation of these services as common values of the Union in the sense of Article 16. Whether the exceptions from the ‘pure’ market principle will come under an increased pressure of justification in the course of the reform when services of a general economic interest are concerned is yet to be discovered, yet the reform does not contain an extension of the margin of the Member States’ discretion.

Thus, the analysis of the Community, as well as the national potential for intervention, has proven that there is a relatively clear preference in favour of cross-border freedom of competition. This relevant pre-adjustment of economically oriented normative stipulations of Community law becomes clear at two points of the Treaty: Article 86 EC stipulates that undistorted competition may not be obstructed, even in the area of services of general economic interest, unless there are legitimate objectives for such limitations. The Treaty defines all forms of enterprise, whether public or private, as equal to one another and, in this sense, as neutral.

\textsuperscript{171} See Kischel, above n 148, 386ff.
\textsuperscript{173} See Müller-Graff, above n 152, 443.
\textsuperscript{175} See A Kallmayer and C Jung, in Calliess and Ruffert (eds), above n 81, Art 16 EC, para 6.
However, this neutrality finds its limits where commercial activity ‘radiates’ negatively on the competition in the internal market. It only deals with the possibility of justifying forbidden interventions into competition within the framework of proportionality in the interest of the public and does not deal with a relation of equality between activities conforming to or opposing competition. This is equally valid for the freedoms of the Treaty, which can only be limited under the requirements of strict proportionality.

V. Perspectives

To sum up, different conclusions must be drawn. The Community guarantee in favour of an open market economy and free competition is safeguarded by enforceable claims based on the economic freedom as warranted by the fundamental rights, the transnational openness of the markets and undistorted competition. Vice versa, the market economic orientation of the European constitution also protects individual freedom, which is essential for competition. Moreover, for the EU Member States it puts an end to the discussion of planned economic models. However, considerable scopes of discretion are left to the respective institutions of the Union and its Member States, allowing for the pursuit of different regulatory aims. Apparently, the constitutions of the Member States fit into the framework of the European economic constitution. In view of the existing politico-economic scopes of discretion, conflicts obviously cannot be excluded. These margins of discretion are not alien to the economic constitution, but only expressions of its framework character. While the exercise of economic freedom within the market economic system is considered to be legitimate by the Treaty, the exploitation of political scopes of discretions must be democratically justified. Thus, the regulatory competences of the Community that have been broadened at almost every Intergovernmental Conference lead to a constantly growing need for legitimation.\footnote{See C Joerges, ‘Good Governance im Europäischen Binnenmarkt’ [2002] Europarecht 17, regarding conceptual questions.} Not the market as an expression of individual freedom but its restriction and control must be justified and answered for. Thus, the European economic constitution is not neutral at all.
The Labour Constitution

FLORIAN RÖDL

I. Introduction

1. European Constitution and Social Order

The stated aim of this volume is the conceptualisation of European primary law as constitutional law. The project is conceptually a challenging one, as it implies a loosening of the traditionally close link between the concept of a constitution and the notion of the nation state. This move allows conceiving constitutions and constitutional law even beyond the state; at the same time, it signifies that the established dichotomy between confederation (Staatenbund) and federal state (Bundesstaat) has become obsolete as far as constitutional law is concerned. Therefore, the concept of a federal union (Bund) has recently gained renewed attention, as it represents a legal entity that has its very own constitution, besides and above that of the state. The main

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2 C Möllers, above chapter 3.

3 P Kirchhof, below chapter 20.

feature of a federal union is its ability to generate autonomous law, which takes precedence over the laws of its Member States but does not abolish the autonomy of their legal systems. Hence, the European Union conceived as such a federal union can have a constitution that is independent of Member State constitutions but at the same time legally associated with them.\(^5\)

The term ‘constitution’ is here ambitiously defined as the legal justification and constitution of public authority.\(^6\) But the modern conception of constitution does not end with these functions, as a constitution establishes both public authority and social order; it generates a ‘constitution of society’ (\textit{Gesellschaftsverfassung}) or an ‘all-encompassing societal constitution’ (\textit{gesellschaftliche Gesamtverfassung}).\(^7\) In particular, the restriction of public authority by basic rights concomitantly establishes a societal space and provides it with particular normative structures. Being part of classical constitutional doctrine, concepts such as the horizontal effect of constitutional rights\(^8\) or the notion of institutional guarantees of constitutions\(^9\) highlight this social dimension of state constitutions. Hence, the challenge for European constitutional theory and constitutional law is to separate the notion of a constitution also in the sense of a constitution of social order from the established framework of the state and to reformulate it in a multi-level context for a \textit{Verfassungsverbund} (ie a ‘composite constitution’ or ‘association of constitutions’). However, a central idea of the constitution of public authority in Europe, namely the division of sovereignty between the Member State and the European level,\(^10\) cannot be applied to a multi-level constitution of social order, as the implied notion of a societal sphere that is split into a European and Member State part would hardly make sense. Rather, a theory of European constitution has to be able to explain how the interplay of Member State and Union constitutions establishes a single social sphere, and it has to reflect the latter’s particular normative structure.

At present, the idea underlying an all-encompassing societal constitution of the EU represents nothing less than the central problem of the integration process. It appears as an amplified demand for a ‘social Europe’, uttered in the meantime by so many citizens that the persistence of a pro-European majority promoting integration appears to be at risk.\(^11\) This demand rests on the empirically substantiated diagnosis that the economic benefits of market integration come at the expense of an increasing social inequality. Whereas in the era of relatively closed national economies, from the end of World War II until the 1970s, the factors of (domestic) growth and increasing (domestic) earned income were linked, they are now visibly detached through processes of European and global market integration. This ‘golden era’ of modern statehood\(^12\) enabled most old Member States to establish a social compromise between capital and labour, which left economic property rights untouched but gave employees their fair share of the growing wealth in return. From the 1970s onwards, the foundations of these compromises

5 I Pernice, ‘Bestandssicherung der Verfassungen’ in R Bieber and U Widmer (eds), \textit{Der europäische Verfassungsraum} (1995) 225, 261ff; see also Oeter, above chapter 2 (‘composite constitution’).
6 See Möllers, above chapter 5.
9 M Kloepfer, ‘Einrichtungsgarantien’ in ibid, § 43.
10 See S Oeter, above chapter 2.
11 The constitutional treaty failed following the French referendum, as it was not able both to take up these demands visibly and convincingly, and to accommodate them substantively.
were eroded step by step. Hence, for many the positive vision of a ‘social Europe’ is to re-establish such a social compromise at the European level, although its institutional contours remain rather vague. The social acceptance of the Union as a legitimate order, and hence the future of European integration itself, probably depends upon successfully providing the current chiffre of a ‘social Europe’ with a distinct content.¹³

In this respect, the matter of an all-encompassing societal constitution in general and a European labour constitution in particular is part and parcel of a socio-political quest, which aims to reveal the relevant constitutional framework and its realistic potential for future development. The previous edition of this volume made important contributions to this endeavour by including two chapters on the economic constitution of the Union.¹⁴ The present chapter on the form of the European labour constitution takes a further step in that direction. However, such a project immediately faces the objection that the concept of a labour constitution¹⁵ has thus far played only a marginal role in the legal debate.¹⁶ This applies to the disciplines of labour law¹⁷ and of constitutional law¹⁸ alike. Too often ‘labour constitution’ is only used as an ostentatious title or magniloquent catch phrase. Therefore, the term has to be briefly explicated first.

2. The Concept of a Labour Constitution

The term ‘labour constitution’ can be traced back to the Weimar labour lawyer Hugo Sinzheimer. In his view, the labour constitution stands side by side with the contract of employment.¹⁹ While the contract of employment provides the basis for labour performance, the function of the labour constitution is to establish a community of employer and employees that jointly exercises the employer’s property rights.²⁰ Hence, the labour constitution comprises the collective dimensions of labour law, ie participation at the level of establishment and company management and collective bargaining, including the law governing collective agreements, industrial conflicts and mediation.

Thus, Sinzheimer’s reference to a labour constitution primarily has a substantive meaning, even if the foundation for a collective labour law could be found in the Weimar Constitution itself (Article 159; Article 162(1), (2) Weimar Constitution). The collective dimension of labour law is the labour constitution, not because it can be found in the written constitution itself, but because, from a substantive point of view, its formal foundations have a constitutional function. The powerful position of employers is subject to the constitution due to their ownership of the

¹³ See also U Haltern, above chapter 6.
¹⁴ See A Hatje, above chapter 16; J Drexl, below chapter 18.
¹⁵ This approach taken by critical legal studies assumes that the form of a field of law provides a basis for criticising legal reality. For an example focusing on civil law, see F Rödl, ‘Normativität und Kritik des Zivilrechts’ [2007] Archiv für Rechts- und Sozialphilosophie suppl 114, 167.
¹⁶ In the German Grundgesetz, the labour constitution has been discovered significantly later than the economic constitution (Scholz, above n 7, para 24). The first monograph dealing with the labour constitution of the Grundgesetz was published in 1965 (D Conrad, Freiheitsrechte und Arbeitsverfassung). The pertinent volume ‘Die Wirtschafts- und Arbeitsverfassung’ edited by K Bettermann et al as part of a compendium (Die Grundrechte, vol III/1, 1958) only mentioned it in its title.
¹⁷ The exception is R Richardi, Kollektivgewalt und Individualwille bei der Gestaltung des Arbeitsverhältnisses (1968); idem (ed), Arbeitsrecht als Teil freiberichter Ordnung (2002); see also E Picker, Die Tarifautonomie in der deutschen Arbeitsverfassung (2000).
¹⁸ The exception is R Scholz, Die Koalitionsfreiheit als Verfassungsproblem (1971); idem, Pressefreiheit und Arbeitsverfassung (1979); idem, Die Aussperrung im System von Arbeitsverfassung und kolletivem Arbeitsrecht (1980).
¹⁹ H Sinzheimer, Grundzüge des Arbeitsrechts (1927) 107. Both combined constitute the ‘labour association’ (Arbeitsverband).
²⁰ Ibid.
means of production. In Sinzheimer’s understanding, ownership of the means of production not only constitutes a position of control over property but, since it is unequally distributed, also dominion over people.21 The constitutionalisation of the owners’ control over property and people is the functional equivalent of the shaping of public authority.22 Similar to the merely structuring state constitution, which impinges little upon the rule of the sovereign and only limits the exercise of sovereignty through juridification, the labour constitution should also not infringe the status of employers as proprietors, ie as concerns the ownership and use of property; rather, it is only meant to submit the administration of property to the control of a community of employers and employees.23

However, this Sinzheimerian concept turns the labour constitution into a mere conceptual complement of a liberal, free market, economic constitution,24 centring on the guarantee of ownership of the means of production. This perspective changes as soon as one includes, in contrast to Sinzheimer, the constitutional fundamental of individual employment in the definition of the labour constitution, so that the interdependence of both the orders of economy and labour becomes apparent. The labour constitution then not only restrains the power of the private owner-employer, but also constitutes the social actors themselves within the social field of labour and determines their relationship. According to such an understanding, the guarantees of private property and freedom of contract provide not only cornerstones of a liberal economic constitution, but, with the guarantee of ownership of the means of production and freedom of contract of employment25, simultaneously the central element of a liberal labour constitution.26

Given the backdrop of the present question, it further seems appropriate to limit considerations to a formal understanding of the term ‘constitution’. While Sinzheimer’s concern was mainly with the restriction of the power of proprietors, the analysis here is concerned with the constitutionally stabilised (European) order of social conditions. Thus, the concept of labour constitution, as it will be employed in the following, encompasses all norms of constitutional rank that represent fundamental decisions on the make-up of social forces and their interrelation in the societal sphere of employment.

The individual and collective rights of social actors constitute the foundation of the labour constitution. Logically prior are those individual rights that define social actors in their social roles. Under liberal conditions, these are the guarantee of private ownership of the means of production, on the one hand, and freedom of contract of employment, on the other; both constitute the roles of the employer and the employee. In addition, there are collective rights in the sphere of workers’ participation, which restrict the employer’s power of disposal procedurally. Finally, those rights are part of the labour constitution that regulate the collective representation of employees regarding their contractual working conditions, ie the constitutional guarantee of free collective bargaining.

21 Ibid, 22ff.
22 Möllers, above chapter 5.
23 Sinzheimer, above n 19, 208ff.
24 Nevertheless, the popularity the term ‘labour constitution’ enjoyed in national socialist labour law is remarkable—eg AB Krause, Die Arbeitsverfassung im neuen Reich (1934); W Siebert, ‘Die deutsche Arbeitsverfassung’ in ER Huber (ed), Idee und Ordnung des Reichs (1943) vol II. Its application should apparently signify the departure from a liberal paradigm of individual and collective labour law. On this contrast, see M Becker, Arbeitsvertrag und Arbeitsverhältnis während der Weimarer Republik und in der Zeit des Nationalsozialismus (2005) 382ff.
25 The coincidence of private ownership of the means of production with freedom of contract is certainly not imperative. Freedom of contract can be replaced by slavery, peonage and forced labour, as history shows.
26 In Austrian labour law, such a narrow conception of ‘labour constitution’ as the unity of all collective labour law has remained in existence until the present day. See the Austrian labour-constitutional law of 14 December 1973, österr BGBl [Austrian law gazette] No 22/1974, and the definition by the Austrian T Mayer-Maly, entry ‘Arbeitsverfassung’ in A Klose et al (eds), Katholisches Soziallexikon (1980) 126.
Besides these fundamental rights, labour-constitutional ‘guiding norms’ (Leitnormen) exist. The term ‘guiding norms’ encompasses all constitutional norms, which can affect the legal structures of the field of employment and, hence, includes principles as well as norms determining state goals and tasks. The most important example of a guiding norm in the German constitution is the principle of social statehood (Sozialstaatlichkeit) (Article 20(1) German Basic Law).  

Finally, the labour constitution also includes the legislative competences in the area of labour law and judicial competences regarding labour disputes. This is because all constitutional norms, rights and guiding norms of the labour constitution also require ‘articulation’. In the given context, this term shall be understood as the concretisation of fundamental rights and guiding norms in different historical contexts and for specific social constellations, which can be generated by the legislature and courts alike. The term ‘articulation’ hence encompasses both legislative and judicial acts. It is of fundamental importance for the effect and dynamic of a norm to what extent and under what circumstances the legislature and courts are competent to articulate it and to shape, with this, the social field of labour; the respective competence norms are thus part of the labour constitution itself.

To sum up: the concept of a labour constitution, which informs the following, includes the individual and collective fundamental rights of social actors in the field of employment, the constitutional guiding norms governing the contractual relationship between employers and employees and, finally, the competences of the legislature and courts to articulate these constitutional norms.

II. The EEC Labour Constitution and the Social Compromise for Integration

Not only does the original labour constitution of the EEC provide a historical starting point for the following considerations; in addition, the explanation of the concrete shape of the EEC labour constitution allows the reconstruction of the social function of a European labour constitution that remains significant for the present. Accordingly, the essential norms of the EEC labour constitution are at first outlined in the following (1). It is then explained that the norms of the EEC labour constitution can be derived from their function to realise a ‘social compromise for integration’ (2), which enabled the establishment of the European integration process in the first place. On that basis, implications for the form and shape of the current European labour constitution can be developed (3).

27 For a definition that includes principles authoritative for labour law as well, see Scholz, above n 7, para 24.

28 The term ‘articulation’ emphasises the creative moment of the adjudication of fundamental rights, in contrast to a merely deductive approach, yet without abandoning the idea that fundamental rights remain a yardstick for such creative achievements.

29 The concept of a labour constitution contains a blind spot, which cannot be explored here for constraints of time and space. This blind spot is the eminently relevant impact of public administration by way of controlling labour immigration on the constitution of social power relations (for an account of the social function of controlling labour immigration, see K Dohse, Ausländische Arbeiter und bürgerlicher Staat (1981) 412). This topic has become particularly contested in the EU; see, eg C-U Schierup et al, Migration, Citizenship, and the European Welfare State (2006) 48ff.
1. The Basic Norms of the EEC Labour Constitution

The central norm of the EEC labour constitution was Article 117 EEC Treaty (Rome version). It stated:

Member States hereby agree upon the need to promote improved working conditions and an improved standard of living for workers so as to make possible their harmonisation while the improvement is being maintained. They believe that such a development will ensue not only from the functioning of the common market, which will favour the harmonisation of social systems, but also from the procedures provided for in this Treaty and from the approximation of provisions laid down by law, regulation or administrative action.

Primarily, this norm entails a social promise, namely an equalising improvement of living and working conditions for employees ('upward harmonisation'). This is linked to the prediction that such improvements come as a consequence of the Common Market. Additionally, the 'procedures provided for in this Treaty' should play a role which refers to, for example, the European Social Fund (Article 123–128 EEC Treaty) or the European cooperation of Member States (Article 118 EEC Treaty) and which transcends the field of a labour constitution developed here. Finally, the approximation of legal and administrative provisions was meant to come to bear. However, the EEC did not provide any competences for the approximation of Member State labour laws in the subsequent chapter 'Social Provisions' (Articles 117–122 EEC Treaty). Hence, the subset refers to provisions in other parts of the Treaty and especially to the competence under Article 100 EEC, which generally authorises the European level to harmonise legal provisions, provided that the establishing or functioning of the Common Market requires it. The approximation of Member State labour laws was therefore no aim per se; rather, European labour law should only come to the fore sporadically, justified by the functioning of the Market. Consequently, the Common Market and not a comprehensive European labour constitution was meant to function as the actual guarantor of the promised social progress.

Article 117 EEC Treaty can be considered the central norm of the EEC labour constitution, as it represents the basic decision that there is no need for a similarly integrated labour constitution besides the European economic constitution. In addition to this, the EEC only entailed two further norms which can be considered part of its labour constitution and which in essence persist unchanged to date. The first one is the free movement of workers, Article 48 EEC Treaty (Article 39 EC, Article 45 of the Treaty on the Functioning of the European Union (TFEU)). It introduced the fundamental right for all citizens of the Member States to freely exercise their profession community-wide after a transitional period (until end of 1969). This right also touches upon the sphere regulated by the labour constitution, insofar as Article 48(2) EEC Treaty grants protection against direct and indirect discrimination regarding the legislature, the parties of collective agreements and individual employers. The second norm, Article 119 EEC Treaty, demanded provisions guaranteeing equal remuneration of men and women (Article 141 EC, Article 157 TFEU). As its wording addresses the Member States, it did...
The Labour Constitution

not take the European Court of Justice long to interpreted it as a right to equal pay with horizontal effect on private employers.\footnote{33 Case C-43/75 Defrenne II [1976] ECR 455, paras 80ff.}

Out of the large number of possible labour-constitutional provisions, Articles 48 and 119 EEC Treaty alone have found their way into the EEC labour constitution. That, however, is not a coincidence. Rather, they are part of the programme of Article 117 EEC Treaty: Article 48 EEC Treaty served to establish the Common Market, namely a European Market for labour. Article 119 EEC Treaty served to eliminate the competitive advantages of those companies in the European Market that did not offer equal pay to women on account of legal provisions, collective agreements or contracts. The core of the EEC labour constitution thus comprises a coherent ensemble of provisions, including the programmatic principle of Article 117 EEC Treaty, the market-functional rights of Articles 48 and 119 EEC Treaty and the equally market-related competence norm of Article 100 EEC Treaty.

2. The Foundation and Function of the EEC Labour Constitution

a) The Promise of Neoclassical Economics

With its promise of a progressive harmonisation of workers’ living and working conditions, Article 117 EEC took up and condensed an economic narrative common in the prevailing neoclassical variant of the ‘pure theory of international trade’ at the time. It can be found in an expert report of the International Labour Organisation (ILO)\footnote{34 International Labour Office, Social Aspects of European Economic Co-operation: Report of a Group of Experts, Studies and Reports, New Series, No 46, 1956.}—which proved to be highly relevant for the shape of the EEC labour constitution, as will be explained further below.

Even prior to the founding of the EEC, there were concerns that transborder free trade would economically disadvantage those enterprises in Member States with better working conditions and hence would jeopardise those social standards already achieved in these Member States.\footnote{35 Ibid, § 1ff.} The worry was that companies in other Member States could produce the same goods cheaper due to their inferior working conditions, which would render domestic production non-competitive at home and abroad. Neoclassical economics made three fundamental assertions regarding these concerns about the social effects of a common European market. According to the first assertion, existing differences in average nominal labour costs, ie the amount of money to be paid for performed working hours, would cause no competitive advantage for companies in countries with lower costs as the difference of average labour costs would merely mirror the difference of the average productivity of labour, which depended upon available resources, the qualification of employees and the available capital in the respective Member States, whereas the average actual labour costs, in which different levels of productivity are included (‘unit labour costs’), were rather equal in all Member States.\footnote{36 Ibid, § 261ff.} Such an argument would prospectively apply under the assumption that the mobility of capital remained low despite the Common Market.\footnote{37 Ibid, § 261ff.} In case differences in actual labour costs were to arise in exceptional cases due to structural economic change, it would be the task of national central banks to adjust the exchange rate of their own currency according to their long-term goal of an even trade balance (see Article 104 EEC Treaty).\footnote{38 Ibid.}
This first assertion was able to dispel doubts about social regress triggered by the Common Market. However, the neoclassical theory of international trade made a second assertion that seemingly challenged this message. It stated that the real earned income would drop in those countries where wages were higher before the opening of the borders. This prediction was rooted in the neoclassical theory of international trade’s essential theoretical refinement vis-à-vis its classical antecedent; it concerned the explanation of the ‘comparative cost advantages’, which were meant to be central for the increase of welfare by free trade. In Ricardo’s classical theory, domestic labour productivity was the foundation for ‘comparative cost advantages’. Different labour productivity is reflected differently in different products (in Ricardo’s seminal example its impact is higher on English cloth than on Portuguese wine). Thus even a national economy which is overall less productive than its trading partner holds comparative cost advantages, namely with regard to commodities which it produces relatively, ie in relation to other commodities of its overall production, cheaper compared to its partner. As both trading partners will concentrate on commodities where they maintain their comparative advantages to the end to trade the overproduction, free trade turns out advantageous for both: with the same employment of resources, both partners have more products at their disposal. Neoclassical theory additionally argued that even a different supply of production factors (ie land, capital and labour) among states could constitute comparative cost advantages. As the factor supply differs from state to state, their prices differ as well, which is reflected differently in different products depending on their specific composition of factors. However, in these cases the consequence of free trade is that in those countries involved the relative factor prices, ie the relationship of factor prices in one country, would converge (so-called factor price equalisation theorem). To illustrate this for the case of labour: a state where labour costs have been relatively high in relation to capital costs will, under free trade, import labour-intensive products. In consequence, the domestic demand for labour will decrease as will the price of labour. This implies a drop in real income in the involved countries with previously higher wages.

Finally, it was averred that the Common Market would enable an intensified transborder division of labour, the positive economies of scale (ie production growing faster than the amount of resources employed) of which would lead to substantial welfare growth in all economies involved. Due to the social ambitions of the Member State governments and the strength of national trade unions, trade benefits would be redistributed internally in such a way that it would increase the living and working condition of employees. This argument turned the critical implications of the factor price equalisation theorem into the merry promise of Article 117 EEC Treaty: progressive harmonisation as a consequence of the Common Market.

b) The Social Compromise for Integration

The interrelation between the neoclassical predictions regarding the social effects of the Common Market and the actual shape of the EEC labour constitution explicated above is in no way of historical interest only. It represents a social compromise that not only enabled the project of European integration, but also provides an indispensable element of its development and future trajectory.

As has been shown, the exact wording of Article 117 EEC can only be understood against the backdrop of a neoclassical theory of international trade. It follows that these economic

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42 International Labour Office, above n 34, § 210.
43 Ibid.
Theories have been given constitutional relevance by anchoring their prognostic element into the Treaty itself. Nevertheless, this thesis finds support not only in the wording of the Treaty itself but also in the Spaak report of 1956. At the conference of Messina in 1955, the European Coal and Steel Community founding states commissioned Belgian foreign minister Paul-Henri Spaak to chair a committee whose report was meant to become, and indeed became, the foundation for the shape of further economic integration. For this reason, the Spaak report represents something close to the preparatory materials of the EEC, which have to be consulted in order to extract the deeper meaning of its provisions. Concerning the social effects of the Common Market, the Spaak report itself referred to the previously mentioned report of the ILO. In turn, the ILO expert committee was chaired by Bertil Ohlin, who was at this time not only the most prominent proponent of the neoclassical theory of international trade but also the chairman of the Swedish Liberal People’s Party, whose general political orientation was social liberal. The Ohlin report was bound to be highly socially credible and acceptable, given that it was issued by a tripartite organisation, encompassing unions, companies and states, compiled by a committee chaired by a man of the (then) political centre ground and because it met the highest scientific standards. In conjunction with its role as a substantial preliminary work for the Spaak report, which corroborated the founding of the integration project, the Ohlin report did not just represent the opinion of a few random experts, but instead was a legitimising cornerstone of the project of economic integration.

Yet another aspect underlines the constitutional relevance of these neoclassical promises. The shape of the EEC labour constitution is frequently also described as the result of a compromise between the German and French delegations. The French demanded a more comprehensive convergence of the Member States’ labour and social provisions as a precondition for market integration, while the Germans dismissed such claims. In the compromise reached, the French side at least obtained the inclusion of the provision on equal remuneration (Article 119 EEC Treaty), a declaration of intent regarding Member State labour and holiday regulations (Article 120 EEC Treaty) as well as the reference to the general harmonisation competence in Article 100 EEC Treaty. But although, according to this description, this result reflects the outcome of a political bargain, the inclusion of these provisions into the EEC mirrors exactly the position of the Ohlin report. Indeed, the report had argued that the opening up of the market did not require a convergence of labour and social regulations; it had only recommended minimising the gap between working hours, banning gender wage discrimination as distortions of competition and, finally, introducing a harmonisation competence for individual distortions of competition. The Ohlin report therefore provided said compromise, itself being the decisive political breakthrough, with substantive rationality.

At this point, it should be clarified what the exact constitutional significance of the established nexus between the neoclassical predictions and the shape of the EEC labour constitution is; after all, economic predictions are only confirmed or refuted by real-life developments, without their constitutional aspects being able to exert any influence in this respect. Constitutional meaning can, however, be derived from the fact that the project of a comprehensive agreements.
European economic integration could not have been set off without the neoclassical predictions; that this is historically true is indicated by their anchoring in Article 117 EEC, their prominence in the constitutional materials of the Spaak report and their role as a rational foundation for the Franco-German bargain. From such a perspective, the neoclassical promise can and has to take a turn into the normative.

Taken normatively, the neoclassical thesis stating that Member States differences in labour costs constitute no competitive factor implies nothing less than that the competition triggered by the Common Market is not allowed to play out on the basis of labour costs. As labour costs derive from wages and other working conditions, which are themselves the result of social and political struggles which are enabled and pre-shaped by Member State labour constitutions, this implies at a second level that the functioning of Member State labour constitutions is not allowed to be affected by the Common Market. The Member State labour constitution shall thus remain both legally autonomous from the constitution of the Common Market and factually autonomous from its effects. At a third level, the exclusion of labour cost competition and the autonomy of Member State labour constitutions finally imply that the economic integration of Europe is not allowed to shift the social balance of power between labour and capital in a partisan manner in favour of the latter.

This is the normative substance of the historical interrelation between the neoclassical theory of international trade and the EEC labour constitution, and it represents—in a term deliberately referring to the talk of constitutional compromises of the Weimar Republic and the German Grundgesetz in constitutional theory\(^{50}\)—the social compromise for integration underlying the European project.

3. The Form of the European Labour Constitution and Social Change

The social compromise for integration, described above, not only explains the historical shape of the EEC but also provides, as an extralegal, social foundation of the European integration project, the normative yardstick for the present and future labour constitution of the Union. It is the very purpose of the European labour constitution to realise the social compromise for integration, and the concrete shape of the labour constitution can be critically judged by whether and to what extent it is able to realise this goal.

According to neoclassical predictions, the social compromise for integration had to be legally institutionalised in form of the EEC labour constitution. The three essential empirical assertions of these predictions have, however, become completely outdated, provided they were at all valid in the first place:\(^{51}\) the enduring correlation of labour costs and productivity requires a low mobility of capital and a system of fixed adaptable exchange rates. At present, the intra-European freedom of capital is used effectively, both in form of investment capital (Articles 56ff EC, Articles 63ff TFEU) and fixed capital (as a shift of production sites, Articles 43ff EC, Articles 49ff TFEU). The currencies which were once adaptable to the respective levels of productivity ceased to exist in 1999 with the introduction of the euro through the

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\(^{51}\) In this context, criticism of the exuberant promises of the neoclassical foreign trade theory by the neoclassical ‘new theory of international trade’ (PR Krugman and M Obstfeld, International Economics (2008)) has to be omitted; the same applies to the critique of the neoclassical paradigm of international trade in general. For the latter, see M Heine and H Herr, Volkswirtschaftslehre (2003) 615ff.
European Monetary Union. Finally, the domestic redistribution of trade benefits required socially ambitious governments and strong unions, which might have been a justified expectation at the end of the 1950s, at the prime of Keynesian–Fordist macroeconomic governance. But this nexus was valid only for as long as its underlying governance paradigm was, which lost its appeal at the latest from the 1980s onwards.\footnote{52 B Jessop, ‘Die Zukunft des Nationalstaates’ in S Becker et al (eds), Jenseits der Nationalökonomie? (1997) 50, 60ff; AS Milward, above n 48, 439ff.}

The corollary of this, however, is that the EEC labour constitution does not provide the appropriate institutionalisation of the social compromise for integration. Hence, it was and is the task of critical European constitutional law to analyse the change in the European labour constitution and European labour law in light of the social compromise for integration. In this context, it might be empirically established that the compromise cannot be completely realised any more due to the changing socio-economic circumstances. Companies from the Member States are now able to operate on a European level without any substantial problems. The free movement of goods, services and capital enables them to combine high productivity with low labour-costs.\footnote{53 H Flassbeck and F Spieker, ‘Die Irrlehre vom Lohnverzicht’ [2005] Blätter für deutsche und internationale Politik 1071.}

The actual state of mobility for the production factors labour and capital makes it impossible to abolish competition based on labour costs completely, a fact which represents a fundamental shift in the power relation between capital and labour.\footnote{54 As evidenced by, among other things, the growing disparity of income distribution (see U Klammer, ‘Armut und Verteilung in Deutschland und Europa’ [2008] WSI-Mitteilungen 19) and the decrease of the share of labour in national incomes in Europe (see F Breuss, ‘Globalization, EU Enlargement and Income Distribution’, WiFo Working Paper 296 (2007), available at www.wifo.ac.at/wwwa/jsp/index.jsp (accessed on 19 August 2008)—itself arguably based on neoclassical economics).}

However, this state of affairs certainly does not diminish the normative relevance of the social compromise for integration. On the contrary, it strengthens the need to achieve whatever remains possible under given circumstances.

### III. The Current State of the EU Labour Constitution

After portraying the labour-constitutional norms of the EEC as an instantiation of the social compromise for integration, the following offers an overview of the current EU labour constitution (1).\footnote{55 What follows is the state of European constitutional law before a potential entering into force of the Treaty of Lisbon. For the relevant changes, see below section IV.1(a)(dd).}

Thereafter, the central problem of these norms is explicated, namely the lack of congruence between rights and guiding norms on the one hand and competences on the other hand (2).

1. **A Survey of the Relevant Norms**

#### a) Rights

As in the past, the freedom of movement and the abolition of discrimination (Article 39(1), (2) EC)\footnote{56 The freedom of movement and the abolition of discrimination, pursuant to Art 39 EC, is lex specialis both to Art 18 EC (M Hilf, in Grabitz and Hilf, above n 32, Art 18 EC, para 5) and Art 12 EC (Case C-131/96 Romero [1997] ECR I-3659, paras 10–12).} for Member State citizens as well as the legal guarantee of equal pay for men and women (Article 141(1) EC)\footnote{57} belong to the fundamental norms of the EU labour constitution. Other
than that, no further individual or collective legal position has to date been included in the primary law of the Treaties.\(^{58}\) This situation only changed with the EU Charter of Fundamental Rights (the Charter), which in the meantime has been utilised by the Court of Justice as a source for the recognition of fundamental rights as general principles of Community law (Article 6(2) EU, Article 6(3) EUV-Lis).\(^{59}\) Relevant to the labour constitution in particular are the provisions regarding the right to property (Article 17(1) of the Charter), the freedom to choose an occupation (Article 15(1) of the Charter), the protection in the event of unjustified dismissal (Article 30 of the Charter), the right to fair and just working conditions (Article 31(1) of the Charter), the right to industrial co-determination (Article 27 of the Charter) and the right to collective bargaining and collective action (Articles 12(1) and 28 of the Charter).\(^{60}\)

The guarantee of central collective rights (Articles 27 and 28 of the Charter) and of dismissal protection (Article 30 of the Charter), both essential for the social balance of power, is provided ‘in accordance with Union law and national laws and practices’. Thus far, the meaning of this wording has not been clarified. Three positions have emerged. According to the first, the respective rights would be nearly completely deprived of an autonomous substance by the caveat;\(^{61}\) they are watered down to a ‘teleological interpretative directive’\(^{62}\) for other provisions in European law. According to the second position, the caveat signals that the right needs further concretisation (Ausgestaltungsvorbehalt), while such concretisation has to respect the autonomous guarantee of the fundamental right.\(^{63}\) Based on this position, a normative core has to be distilled out of the respective fundamental rights;\(^{64}\) this type of right is well known in

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\(^{57}\) Art 141(3) and (4) EC furthermore assumes a general principle of equal treatment under labour law (S Krebber, in C Calliess and M Rauffert (eds), EUV/EGV (2007) Art 141 EC, paras 75ff). In its ruling in Case C-144/04 Mangold [2005] ECR I-9981, paras 74ff, the European Court of Justice established the general principle (Art 6(2) EU) of the prohibition of age discrimination in Community law.

\(^{58}\) Some studies of European labour law stress social dialogue (Arts 138, 139 EC) under the subheading of collective labour law (M Fuchs and F Marhold, Europäisches Arbeitsrecht (2006) 202ff; D Krimpelov, Europäisches Arbeitsrecht (2001) paras 599ff; E Szyszczak, EC Labour Law (2000) 31ff; R Blanpain, European Labour Law (2006) 643ff). This social dialogue grants European trade unions and employer associations particular privileges within European legislation, among those the remarkable right of negotiated dismissals (art 15(2) of the Charter) and the right to strike and collective rechtsstellung (Art 31(2) of the Charter).\(^{65}\) These rights, however, have no impact on the balance of power between the involved parties, especially as negotiations on legislation cannot be exposed to collective action (E Eichenhofer, in R Streinzel (ed), EUV/EGV (2003) Art 139 EC, paras 9; B Bercusson, European Labour Law (1996) 542; KW Wedderburn, ‘Consultation and Collective Bargaining in Europe: Success or Ideology?’ (1997) 26 Industrial Law Journal 1, 29ff). As to whether Art 139(1) and (2) EC already establishes the freedom to collective bargaining at the European level, see below section IV.3(a)(c).

\(^{59}\) Case C-303/05 Advocaten voor de Wereld [2007] ECR I-3633, para 46; Case C-432/05 Unibet [2007] ECR I-2271, para 37; Case C-540/03 Parliament v Council [2006] ECR I-5769, para 38. For the changed situation due to the fact that the Charter has been formally anchored in the Treaty of Lisbon, see J Kühl, above chapter 13.

\(^{60}\) The Charter includes a number of further concrete, individual rights, eg the right to limitation of maximum working hours (Art 31(2) of the Charter) and the right to paid maternity leave (Art 31(2) of the Charter). With a few exceptions, they reflect subject matters of the current acquis of secondary law in European individual labour law—which can, however, create problems for the normative scope of fundamental rights (for an instructive example, see E Riedel, in J Meyer (ed), Charta der Grundrechte der Europäischen Union (2006) Art 31, paras 19ff).


\(^{63}\) S Rixen, in Tettinger and Stern (eds), ibid, Art 28, para 14; for the extraordinary discretion of the national legislature, see R Rehahn, ‘Überlegungen zur Bedeutung der Charta der Grundrechte der EU für den Streik und die kollektive Rechtsstellung’ in A Söllner et al (eds), Gedächtnisschrift für Meinhard Heinze (2005) 649, 654ff; see also Kühl, above chapter 13.
German constitutional law, not least from Article 9(3) German Basic Law. According to the third position, it is a limiting regulation (Schrankenregelung) that competes with the general limiting provision in Article 52(1) of the Charter, and the competition should be resolved by establishing which limiting regulation offers the superior protection of fundamental rights, as only this would do justice to the coexistence of two limitations.

It seems correct, however, to suggest that the cited reference to Union and national law and practices leaves the normative substance of the respective fundamental right untouched; it rather refers to the distribution of competences between the European and Member State level for the enabling and limiting articulation of those rights. Regarding the sensitive area of collective rights and dismissal protection, it is again stressed—in addition to the already redundant array of references in Article 51(1) and (2) of the Charter (and Article 52(6) of the Charter according to its Lisbon version)—that the new European guarantees of these rights do not overwrite the distribution of competences between the European and the Member State level. According to the justifications significant in the deliberations of the Fundamental Rights Convention, the arrangement of competences was crucial for the inclusion of this reference, while nobody submitted that the rights should only guarantee a core content or even nothing at all. This interpretation as a reiteration of the preservation of competences is also supported by the explanations of the chair of the Fundamental Rights Convention; they contain no indication that the reference to the responsible legal level has a different meaning other than clarifying competences, especially one that would limit its normative substance. Consequently, this means that all restrictions, including those of Member States, must be measured against Article 52(1) of the Charter.

Such scrutiny remains, however, under the significant general precondition that a given case falls within the scope of application of the Charter (Article 51(1) of the Charter). And this, as must be noted with emphasis, constitutes the genuine problem of all labour-constitutional rights in the Charter (see below, subsection 2).

b) Guiding Norms

As stated at the beginning, guiding norms are here conceived as those constitutional norms beyond the constitutive basic rights of social actors that can exert a juridical effect in the field of labour. In current European constitutional law, there is no lack of principles concerned with the social dimension of Europe, yet only a few refer directly to the field of labour relations. In Article 136(1) EC not only the Members States but also the Community commits itself to the improvement of working conditions and to social dialogue. Article 2 EU states as a general aim of the Union the furtherance of social progress, which should also have some impact on labour relations.

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64 For initial indications of such an argument, see C Hilbrandt, in FSM Heselhaus and C Nowak (eds), Handbuch der Europäischen Grundrechte (2006) § 35, para 42ff.
67 Charte 4192/00 CONVENT 18, available at: www.europarl.europa.eu/charta/activities/docs/pdf/convent18_fr.pdf (accessed on 10 March 2008); see also the contribution of the Convention Member Jürgen Meyer, who was instrumental to the inclusion of social rights, arguing that the reference was equivalent to Art 51ff of the Charter and hence redundant (N Berndorff and M Borowsky (eds), Die Charta der Grundrechte der Europäischen Union (2002) 370. See also Riedel, above n 60, paras 9ff.
While the labour-constitutional importance of the German reference norm, the principle of social statehood in Article 20(1) German Basic Law, has ever since possessed clear contours, the normative effect of the European social principles has generally not been unravelled yet. As far as the literature discusses the overarching European legal principle of solidarity, it focuses on characterising the mutual relationship of Member States as solidary but does not consider solidarity as pertains to a European society as a whole.

c) Competences

An overview of the current legal competences of the Union in the field of its labour constitution must differentiate: on the one hand, there are those competences that explicitly concern the field of employment. This includes competences pursuant to Article 137(2)(b), (1) EC. In referring to the aims of the guiding norm contained in Article 136 EC, this provision allows the Union to establish minimum standards in the fields of technical and social occupational health and safety, working conditions, dismissal protection, information and consultation of employees and representation of collective interests. Further competences are established by Article 141(3) EC in the sphere of gender discrimination and by Article 40 EC in the field of freedom of movement within the EU. These competences normally have to go through the co-decision procedure (Article 251 EC). Important exceptions are the competences in the areas of dismissal protection and collective interest representation; in these cases the consultation procedure applies, which requires unanimity in the Council.

Besides such autonomous competences under labour law, other competences of the Treaty can also be employed. In light of previous European legislation, the following competences have to be highlighted: anti-discrimination measures (Article 13 EC), market related legal approximation (Articles 94 and 95(1) EC), regulations concerning the exercise of other market freedoms (Articles 44, 47 and 55 EC) and conflict of labour laws (Article 65(c) EC), and the residual provision (Article 308 EC). Here, the co-decision procedure only applies to market related labour law; all other competences are exercised via the consultation procedure and require unanimous Council decisions.

With these competences in mind, the significance of the exclusionary proviso in Article 137(5) EC has to be discussed in more detail. Article 137(5) EC blocks the competences established in Article 137(2)(b) EC for the issues of remuneration, association and industrial conflict. This prevents, for instance, a unitary European minimum wage from being introduced on the basis of the competence for minimum working conditions (Article 137(1)(b) EC). It remains unclear what effect this norm has for the employment of competences beyond Article 137(2)(b) EC. On the one hand, one could conceive the exclusionary proviso as a negative competence norm prior to all competences, which would, however, contradict its own clear wording (‘The provisions of this article shall not apply . . .’). On the other hand, one can regard the restricting norm merely as a negative criterion of Article 137(2)(b) EC and therefore

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70 In selected cases Art 136 EC has explicitly gained relevance, see eg Case C-43/75, above n 33 (adjustment in the case of wage discrimination).
71 See von Bogdandy, above chapter 1, section V.5, with further references.
72 In addition to Art 141(3) EC, Art 137(1)(i) EC has no autonomous substance and is hence actually redundant: Eichenhofer, above n 58, Art 137 EC, para 21.
73 In a similar vein, CW Hergenröder, in H Oetker and U Preis, Europäisches Arbeits- und Sozialrecht (looseleaf, last update July 2000) B 8400, paras 39, 41, at least in relation to Arts 94, 308 EC.
74 A von Bogdandy and J Bast, in Grabitz and Hilf, above n 32, Art 5 EC, para 27. The suggestion of a European legislation on collective bargaining on the basis of Art 308 EC by R Kowanz rests on a similar position (see R Kowanz, Europäische Kollektivvertragsordnung (1999) 313ff).
deny any impact on other competences. A third position assumes that the exclusion bears on the interpretation of other competences. This can be rendered more precisely as follows: legislation regarding the subject matters of Article 137(5) EC may be based on competences other than Article 137(2)(b) EC if their regulation is necessarily linked to regulations of the actual subject matter which belongs to the competence in question. This understanding of Article 137(5) EC results from a historical and teleological interpretation of the provision. Article 137 EC was intended to extend the competences of the EU in the area of labour legislation, while Article 137(5) EC at the same time excluded certain matters. Both can be explained by the fact that the matters of Article 137 EC were—following the compromise of social integration—not intended to be regulated by the EU at all. Therefore Article 137(5) EC makes explicit a structure of competences underlying the EC as a whole, which had become necessary solely because of the introduction of Article 137 EC. The semantic openness of other competences and of the wording of the proviso itself suggest that Article 137(5) EC does not function as a negative competence norm, but rather affects the other competences in the manner suggested above. Therefore European legislation in the areas of minimum wages, labour relations and collective bargaining is only admissible selectively and as an exception. The Treaty of Lisbon, if in force, will not change this.

2. The Core Problem of Missing Congruence

The labour constitution of the Union encompasses a comprehensive catalogue of labour-constitutional rights, some principles and a range of competences. Therefore, one could assume that it is in no way inferior to the labour constitutions of the Member States. Its central problem, however, is the lack of congruence of the Union’s labour-constitutional norms. The array of constitutional rights and principles in the EU indicates that there is also the content of an EU labour constitution, which is seemingly modelled after Member State labour constitutions—yet the EU constitutional competences contradict such an impression. As explicitly stated at the outset of this chapter, a labour constitution consists not only of its rights and principles, but also of the competences for their articulation. In constitutional nation states, the relevant competences of the national legislature and of the courts are in general unproblematic, which is why their possible congruence is not a critical issue. Matters are different in the case of the Union, where the European level can only become active on the basis of individually granted competences.

This problem shall at first be explicated for the European legislature. The European fundamental rights include essential rights of a modern labour constitution: the individual freedom of exercise of profession, collective participation rights, collective bargaining rights and the freedom of collective action. This collection of rights, which are supposed to appear as European rights due to their anchoring in the Charter, is, however, not represented in a

75 von Bogdandy and Bast, above n 74, arguing that the Treaties do in general not constitute a ‘bipolar’ order of competences; see also idem, above chapter 8, section II.1(e).
76 C Langenfeld and M Benecke, in Grabitz and Hilf, above n 32, Art 137 EC, para 97; R Rebhahn, in J Schwarze (ed), EU-Kommentar (2000) Art 137 EC, para 22.
77 In this vein, see AG Mengozzi in Case C-341/05 Laval [2007] ECR I-11767, para 57.
78 This is the case if the Charter is put on a par with formally binding Community law, which can be justified through the Charter’s role as a source of insight into the basic principles of the Community law (see above section III.1(a)), even though the Charter itself is not legally binding.
79 In the broad frame of the European social model, see also R Blanpain, ‘The EU Competence Regarding Social Policies’ in idem et al (eds), The European Social Model (2006) 57, 82ff.
80 Of course, it could be the same with federal states. However, it is assumingly not a coincidence but rather a result of the intrinsic logic of the development of modern welfare states (such as Germany or the USA) that the competence for labour legislation is located at the union level.
congruent way in the order of competences of the European legislature; rather, Union competences decrease with the increasing social relevance of their subject matters. As to the articulation of the individual freedom of exercising one’s profession, the competence for minimum working requirements together with dismissal protection (Article 137(1)(b) EC) exists, the latter requiring unanimous decisions in the Council. For the collective co-determination of employees a competence exists (Article 137(1)(e)/(f) EC), which also requires a unanimous Council decision. Finally, for the regulative realisation of collective bargaining rights, at most only a competence for selective legislation exists by virtue of a necessary factual connection. In total, a whole range of European labour-constitutional rights can be found, yet essential rights cannot be articulated at all or can only be articulated under qualified conditions by the European legislature.

In addition, it is the ECJ that could, in principle, articulate the norms of the EU labour constitution. This happens, first, in competition with the European legislature to the extent that the Court rules on the interpretation and validity of legislative acts on the basis of labour-constitutional fundamental rights. Although such a constellation can occur, as the past has shown, the ability of the ECJ to expound such rights does not much exceed that of the European legislature. Moreover, the Court of Justice cannot replace the European legislature, which remains without competences, in the way national courts would (have to) replace an inactive national legislature. It is true that, in the course of the preliminary ruling procedure (Article 234 EC), legal disputes might be decided which directly touch upon labour-constitutional rights included in the Charter, but, leaving aside the cases referring to secondary law just mentioned, the Court can only enforce these Charter rights within the scope of application of EC law. This, however, restricts from the outset the potential articulation of labour-constitutional fundamental rights by the ECJ to transnational labour relations. Purely domestic individual and collective labour relations can therefore not be affected by the jurisprudence of the Court due to its limited possibilities of legal particularisation at European level. Thus, the Court will equally not be able to create an integrated European labour constitution.

In conclusion, the labour-constitutional rights and principles give the impression of a fully fledged labour constitution on the European level, which could be comparable to the labour

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81 Here, the individual labour law is conceived of as the concretising articulation of the freedom of contract and the freedom of the exercise of profession. On the classification of the freedom of contract in Art 12 German Basic Law, see Entscheidungen des Bundesverfassungsgerichts 81, 242, 254; see also R Scholz, in T Maunz and G Dürig, Kommentar zum Grundgesetz (looseleaf, last update June 2007) Art 12, para 58.

82 For the scope of the restricting effect of Art 137(5) EC, see above, section III.1(c).

83 Eg the Directive 96/71/EC of the European Parliament and of the Council concerning the posting of workers in the framework of the provision of services ([1997] OJ L18, 1) constitutes an infringement of Member State rights to collective action according to a surprising interpretation by the ECJ (Case C-341/05, above n 77). Therefore, the Court should have taken Art 52(1) of the Charter as a yardstick for this Directive. However, it simply refrained from doing so.

84 This possibility of articulation does not correspond exactly, but has a broader scope since national law that once also served the implementation of an only partially harmonised directive is as a whole subject to European fundamental rights scrutiny (eg Case C-144/04, above n 57, para 75: the unrestricted possibility to conclude without objective justification a fixed-term contract with employees older than 52 years is to be measured against the European standard of equal treatment, because the national law regulating part-time work and fixed-term contracts (Teilzeit- und Befristungsgesetz) once also served to transpose a European directive). Whether or not this expansion of protection by European fundamental rights represents a positive development remains to be seen at this point (for a positive account, see Kühlking, above chapter 13; for a critical account, see T Kingreen, in Calliess and Ruffert (eds), above n 57, Art 11, paras 11 and 16; U Haltern, Europarecht (2007) paras 1090ff; C Franzius, ‘Der Vertrag von Lissabon am Verfassungstag: Erweiterung oder Ersatz der Grundrechte’, ZERP-Diskussionspapiere 4/2008, available at www.zerp.eu). However, this selective control of national legal norms neither paves the way towards a unitary articulation of European rights.

85 The same matter is reconsidered in the debate about the binding effect of Community fundamental rights on Member States; see G de Búrca and P Craig, EU Law (2008) 395. See also Kühlking, above chapter 13.
constitutions framed by Member States’ constitutional law. However, this impression turns out to be false considering the missing congruence between these rights and guiding norms and the possibility of articulating them through the European legislature and the European Court.

IV. The Form of the European Labour Constitution

It now has to be shown how far, and in what respect, the EU labour constitution adequately gives effect to the social compromise for integration. The decline of the main preconditions for the realisation of the social compromise for integration in shape of the EEC labour constitution mentioned earlier is reflected in the legal change culminating in the current EU labour constitution. The latter apparently departs from the market-functional labour constitution of the EEC, yet a clear indication of the shape of the EU labour constitution cannot be recognised. The following section (1) deals with the largely obvious notion that the current EU labour constitution would move towards a unitary European labour constitution, which integrates and corresponds to Member State labour constitutions. Subsequently (2 and 3), alternative concepts are discussed.

1. An Integrated European Labour Constitution ‘in the Making’?

It was just mentioned that the EU labour constitution appears to be an integrated European labour constitution but ultimately fails to make good that promise. One might therefore ask whether this appearance is the harbinger of some future reality or, to put it differently, whether the current EU labour constitution is an integrated European labour constitution in ‘the making’. In addressing this question, a glance at the constitutional development is helpful, as this has played out differently in the three categories of labour-constitutional norms.

a) Milestones in the Development of the EU Labour Constitution


For a long time the European legislature was able to cope with the competence contained in Article 100 EEC Treaty (Article 94 EC, Article 115 TFEU) in the field of labour law legislation. This was until the Single European Act, the motive of which was to revive economic integration. The Act’s central feature was to subject only essential issues of market regulation to qualified majority decisions (Article 100a EEC Treaty, now Article 95 EC, Article 114 TFEU). By that time, it was recognised that such a move would reduce European integration to the Single Market project, which in turn would increase the pressure on workers. This notwith-

86 Strengthening the justificatory basis for restrictions of fundamental freedoms by the Member States has been described as one possible function of social fundamental rights (the same could count for the guiding norms): see JE Fossum and AJ Menéndez, ‘Still Adrift in the Rubicon? The Constitutional Treaty Assessed’ in EO Eriksen et al (eds), The European Constitution (2005) 97, 135ff; O de Schutter, ‘La garantie des droits et principes sociaux dans la Charte des droits fondamentaux de l’Union Européenne’ in JY Carlier and O de Schutter (eds), La Charte des droits fondamentaux de l’Union Européenne (2002) 117, 119ff. A lot of work still needs to be done in this field. Until now the European Court of Justice has been depriving the social fundamental rights of any overshooting potential by deforming them into mere institutions for the realisation of common interests. For an example, see Case C-438/03 Viking [2007] ECR I-10779, para 77.


88 The Single European Act remained a residual project vis-à-vis the more ambitious Treaty on the European Union, then already envisaged by the Parliament. See the so-called Spinelli Plan, [1984] OJ C77, 34. See
standing, Article 100a(2) EEC Treaty excluded the ‘rights and interests of employed persons’ from the newly introduced procedural facilitation of harmonisation based on the functioning of the market; in this respect, the unanimity rule of Article 100 EEC Treaty (Article 94 EC) remained in force. In turn, Article 118a EEC Treaty (Article 137(1)(a) EC) was established as the first formally autonomous labour law Community competence dealing with technical and social aspects of workers’ health and safety. This was actually a counter-exception to the restricting norm of Article 100a(2) EEC Treaty, which is emphasised by the application of the same decision procedures in the case of Articles 100a(1) and 118a EEC Treaty: ‘rights and interests’ of employees were excluded from facilitated harmonisation unless issues of technical or social occupational safety and health were involved. The application of the new competence in Article 118a EEC did indeed not need proof of the market-functionality of the rule; yet it was not based on a new constitutional decision leading towards a gradually integrated labour constitution.\(^{89}\) Rather, the formal validity of the legal foundation derived from Article 100 EEC had been challenged in the past, although the adoption at European level as such remained uncontested.\(^{90}\)

The shape of the labour constitution did not change until the Treaty of Maastricht came into effect. The Treaty deepened economic integration by complementing the Single Market with the Economic and Monetary Union. Previously and during Treaty negotiations much effort was put into strengthening the social dimension materially and making such endeavours public.\(^{91}\) The most important element was meant to be the comprehensive extension of labour law competences, but this plan failed due to a veto by the UK. The initially intended new competence norms could only be put into an agreement between the 11 other Member States, which was then formally linked to the Maastricht Treaty via the ‘Protocol on Social Policy’.\(^{92}\)

Apart from the integration of the European social partners into the process of European legislation,\(^{93}\) the Social Agreement contained two main innovations. The first was the extension of autonomous competences for labour law beyond health and safety at work. According to the Social Agreement, the competences encompassed the subject matters which are also presently covered, and excluded the issues of pay, the right of association, the right to strike and the right to impose lock-outs. The new competences were linked to the same procedures that apply today (Article 2(2) Maastricht Social Agreement; now Article 137(2) EC, Article 153 TFEU). The second innovation was the determination of the form of the possible European regulation as minimum standards.\(^{94}\) Until then, the market-functional regulation of provisions under labour law in Article 100 EEC gave no formal guidance. Therefore, the Article (now Article 95 EC, Article 114 TFEU) still provides for maximum standards and full harmonisation, if the European market so requires. This change assumed, at the level of constitutional law, that national labour standards would need European support given the pressures of the Single Market and the Economic and Monetary Union. This is a very different justification for European labour law than the market-functional one.

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93 See above n 58.
given for the convergence of standards in order to eliminate competitive distortions. In this respect, the insertion of autonomous competences to enact minimum provisions under labour law documents the departure from the market-functional paradigm of the EEC labour constitution, which was again confirmed by the inclusion of the Social Agreement into the text of the Amsterdam Treaty.\footnote{The Treaty of Nice provided the opportunity to move to a procedure of co-decision via qualified majority in the Council (Art 137(2) EC) in the fields of employment protection and the collective interest representation of employees without altering the Treaty. However, the matter remained unchanged.}


Even before the Monetary Union, namely in the run-up to the passing of the Single European Act, many European actors considered the social dimension of European integration to be underdeveloped.\footnote{J Curall and J Pipkorn, in von der Groeben et al, above n 89, pre-Arts 117–28 EEC Treaty, para 38; for a statement by an institution, see Opinion of the Economic and Social Committee on the Social Aspects of the Internal Market (European Social Area), Doc CES(87) 1069.} In this context, the for many still influential notion emerged that the representation of this social dimension should be achieved by constitutionalising social rights.\footnote{Taken up by the Commission in European Commission, ‘Working Paper—Social Dimension of the Internal Market’, SEC(88) 1148, available at http://aei.pitt.edu/1346/01/social_internal_market_SEC_88_1148.pdf. See also W Däubler, ‘Sozialstaat EG? Notwendigkeit und Inhalte einer Europäischen Grundrechtsakte’ in idem (ed), \textit{Sozialstaat EG?} (1983) 35.} This found its first expression in the Community Charter of the Fundamental Social Rights of Workers,\footnote{COM(89) 248. The UK signed the Community Charter of Fundamental Social Rights in 1998.} which was proclaimed by the Member States in 1989, initially excluding the United Kingdom.

Although the Community Charter of Fundamental Social Rights (hereinafter: the Community Charter) possesses no binding effect, it adopts the language of individual and collective rights. In its first part, it enumerates a number of essential rights, especially the individual freedom to choose and engage in an occupation (Article 4 of the Community Charter), and even a right to ‘fair remuneration’ (Article 5 of the Community Charter). Collective rights include participation (Articles 17 and 18 of the Community Charter), as well as the freedom of association and collective bargaining and collective action (Articles 11–13 of the Community Charter). With regard to the articulation of these rights, however, the Community Charter explicitly supported the division of competences under primary law at the time: the guarantee of the fundamental rights in the Community Charter was primarily the task of the Member States (Article 27 of the Community Charter). Irrespective of this matter, the Commission was instructed to submit—with within the competence of the European level—initiatives concerning the effective implementation of the rights of the Community Charter (Article 28 of this Charter).

And this is what happened: the social action programme of the Commission\footnote{Communication from the Commission concerning its Action Programme relating to the implementation of the Community Charter of fundamental social rights for workers, COM(1989) 568.} following the Community Charter sparked an extraordinary phase of legislative activity in the European field of labour law. For the legislative implementation of the programme, however, the European institutions were dependent on those competences provided for in the Single European Act of 1987 (Articles 100a and 118a EEC Treaty), at least until the Maastricht Treaty came into force (1993) together with the Social Agreement.\footnote{M Rhodes, ‘A Regulatory Conundrum: Industrial Relations and the Social Dimension’ in S Leibfried and P Pierson, \textit{European Social Policy} (1995) 78.}
After the implementation of the Commission’s social action programme, the political potential of the legally non-binding Community Charter was exhausted.\textsuperscript{101} This encouraged in particular legal scholars to inquire into different ways to come to legally binding social rights at the European level.\textsuperscript{102} Thereafter social rights became more prominent through the amendment of the old Article 117 EEC Treaty (now Article 136 EC) by the Amsterdam Treaty. The goals of Article 117 EEC Treaty should in future be pursued ‘having in mind fundamental social rights’ following the Council of Europe’s European Social Charter of 1961\textsuperscript{103} as well as the Community Charter. This still did not seem enough, as the aim was and remained to establish a constitutional stockpile of social rights.\textsuperscript{104} This endeavour tied in with a general process intended to give the free-floating fundamental rights jurisprudence of the Court of Justice a positivist legal foundation. Although the ECJ mentioned social rights guaranteed under international law only as a source of inspiration in its case law and had not declared any European social rights as general legal principles of the Community law relevant for decisions,\textsuperscript{105} it remained certain that the EU Charter of Fundamental Rights would contain not only civil and democratic but also social fundamental rights, considering the continuously felt social asymmetry of the integration process.\textsuperscript{106} Many therefore welcomed the proclamation of the EU Charter of Fundamental Rights in 2001 due to its codified social rights. As outlined above, it does indeed list a number of important individual and collective labour-constitutional rights. For many pundits, however, its fault to date lies (solely) in its legally non-binding nature.\textsuperscript{107}


As previously outlined, Article 117 EEC Treaty is the labour-constitutional principle of the founding Treaty. In this respect, the Single European Act involved no changes. The establishment of the EU in Maastricht entailed in Article B EU Treaty the commitment of the Union to foster the harmonious, balanced and sustainable development of social progress. Article 117 EEC Treaty was amended not in the Maastricht Treaty but in the Social Protocol. According to Article 1 Social Protocol, the aims of Article 117 EEC Treaty are conceived not only as a shared concern of the Member States, but also as an aim of the Community itself. In addition, ‘social dialogue’ was introduced as a new, labour-constitutionally significant aim. Since Amsterdam, all subject matters named in Article 136(1) EC are framed as mutual goals of the Community and the Member States. Incidentally, no further amendments were made—either here or in the Nice Treaty.

\textsuperscript{101} Giubboni, above n 94, 102; M Rodríguez-Pinero and E Casas, ‘In Support of a European Social Constitution’ in P Davies et al (eds), above n 94, 23, 35.
\textsuperscript{103} European Social Charter (1961) ETS No 035.
\textsuperscript{104} Giubboni, above n 94, 105ff.
\textsuperscript{105} E Szyračzak, ‘Social Rights as General Principles of Community Law’ in NA Neuwahl and A Rosas (eds), \textit{The European Union and Human Rights} (1995) 211.
dd) Innovations in the Treaty of Lisbon

The labour-constitutional amendments of the Treaty of Lisbon can be outlined quickly. Again, there are no changes at the level of competences, with regard to both subject matter and decision-making procedures. The EU Charter of Fundamental Rights will be incorporated into the written constitutional law of the Union (Article 6(1) of the EU Treaty of Lisbon (TEU-Lis)).\(^\text{108}\) Significant changes can only be found at the level of labour-constitutional guiding norms, the assortment of which will be diversified and extended. Article 136 EC, however, remains unchanged as Article 151 TFEU. Concerning the goals of the Union and combining Article 2 EC und Article 2 EU, Article 3(3) TFEU still includes the aspiration of social progress, which now is qualified by the aim to work towards ‘a highly competitive social market economy’\(^\text{109}\) (Article 3(3)(1) TFEU); moreover, the Union shall now also promote social justice (Article 2(3)(2) TFEU). A new norm concerning the values of the Union (Article 2 TFEU) is introduced, where the principle of ‘solidarity’, although not included in those values fundamental to the Union, is nonetheless listed as one of those principles characterising European society.\(^\text{110}\)

b) A Historically and Politico-economically Hardened Asymmetry

Since the revision of the Amsterdam Treaty, the significance of labour-constitutional rights and principles has continuously increased. In the field of rights, their formal anchoring in the Treaty of Lisbon would arguably conclude the project of their constitutionalisation. Similar observations can be made about labour-constitutional guiding norms. Their extension began with the Social Agreement of Maastricht, continued to a rather modest extent in Amsterdam and experienced a new heyday in the Treaty of Lisbon. Ultimately, the number of similar principles could be increased \textit{ad infinitum}, yet it can also be said that the project to commit the EU to duties, goals and principles that at least correspond with the intention of the welfare state principle has largely been achieved by now. Contrary to the expansion of rights and principles of a European labour constitution, the autonomous competences under labour law stagnated after the Social Agreement of Maastricht.\(^\text{111}\) The Social Agreement is the first and only extension of European legal competences in the field of the labour constitution; and this applies all the more if one takes the Treaty of Lisbon into account. Hence, the labour-constitutional development of the EU since Maastricht can be characterised by the asymmetric development of the expansion of rights and principles on the one hand and the stagnation of competences on the other. The historical trajectory implies that this will hardly change in the future: initiatives for more comprehensive competences under labour law were tabled at all Treaty conferences, but, with the exception of Maastricht, they all failed. Even in the European Convention the extension of competences was beyond reach, even though it probably offered the most fruitful terrain for such fundamental initiatives.\(^\text{112}\)

However, some might have counted on the fact that an integrated European labour constitution can be established on the basis of those competences already in effect since Maastricht. This assertion presupposed that a dynamic European legislator, supported and encouraged even by the social rights of the EU Charter of Fundamental Rights and by the newly introduced

\(^{108}\) For an account of the protocol regarding the application of the Charta on Poland and the UK, see Möllers, above chapter 5, section IV.3(c); Kühling, above chapter 13, section II.2(c).

\(^{109}\) On this curiosity, see F Rödl, ‘Europäisches Verfassungsziel ‘Soziale Marktwirtschaft’’ [2005] Integration 150.


\(^{111}\) This is also the focus of a tartly phrased analysis by W Streeck, ‘Vom Binnenmarkt zum Bundesstaat?’ in S Leibfried and P Pierson (eds), \textit{Standort Europa} (1998) 369.

\(^{112}\) See the final report of the working group ‘Social Europe’: CONV 516/1/3 REV 1, available at www.european-convention.eu.int.
guiding norms, would have interpreted the Union’s competences in a wide sense and in a
creative manner, and thereby transcended the very boundaries intended by the framers of the
Treaties. The prototype for such expectations was the Community Charter of 1989, which
indeed triggered an ambitious legislative programme, thereby using already existing compe-
tences in a creative manner. Factually and in contrast, the social fundamental rights of the EU
Charter did not trigger any comparable legislative activity. Rather, the extent of labour law
legislation has continuously decreased since the Treaty of Amsterdam, and furthermore, the
new autonomous competences of Article 137 EC have hardly been used in this time. The
Commission also plans no relevant legislative activity in the field of labour law for the next
years. Retrospectively, the hopes for a catalytic effect of the social rights of the EU
Charter were in vain.

Both the stagnation of competences per se and their exercise by the legislator are, however,
not (solely) the result of contingent political compromises but rather are caused by
politico-economic factors. For the particularly relevant matter of pure labour costs, it should be
considered that differences in labour costs encompass differences in productivity. For
example, unitary European minimum wages cannot been agreed upon: if they conformed to
the Member State with the lowest wage level, they would be ineffective for all other Member
States; if they conformed to the Member State with the highest wage level, they would turn
into competitive disadvantages for all others; if they assumed a middle position, both effects
would be caused. Therefore, almost all Member States would be concerned to be disadvan-
taged.

Moreover, European welfare states have been characterised as complex systems, which
follow different basic models. As internal regulatory arrangements and their numerous inter-
dependencies are typical for these models, it becomes problematic for the superimposed
European level to intervene in particular areas in order to harmonise standards. The norms of
national individual and collective labour law interact in numerous ways with other social and
public regulations (eg those relating to social insurance, employment promotion, social welfare,
vocational training), and these in turn are linked to the national production regime, so that
extensive European forays into national labour law on account of an integrated European
labour constitution can be expected to have disintegrative and dysfunctional effects.

644

Florian Rödl

113 See also B de Witte, ‘The Trajectory of Fundamental Rights in the EU’ in G de Búrca and B de Witte,
114 See the Green Paper of the European Commission: ‘Modernising Labour Law to Meet the Challenges of
will be the Directive of the European Parliament and of the Council on improving the portability of
supplementary pension rights (COM(2007) 603), which refers to the freedom of movement and competition,
and hence to Arts 42 and 94 EC.
115 This theorem of the Ohlin report remains valid, despite its outdated economic and legal implications
(see above, section II.2/3).
117 The fundamental work by Esping-Andersen identifies three basic models: G Esping-Andersen, The Three
Worlds of Welfare Capitalism (1990), while the critical discussion by Ferrera identifies four models: M
enlargement constitutes at least a fifth model.
118 P Hall and D Soskice, ‘An Introduction to Varieties of Capitalism’ in idem (eds), Varieties of Capitalism
(2001) 1, 38ff. With particular reference to the regime of industrial relations, see T Blanke and J Hoffmann,
Policy 643; C Offe, ‘Demokratie und Wohlfahrtsstaat: Eine europäische Regimeform unter dem Stress der

644
In contrast to the image of a slow but continuous progress, the previous account highlights that there was only one truly dynamic phase in the history of the European labour constitution. Taking into account its antecedent and descendant, it is a phase that stretches from the Single European Act to the inclusion of the Social Agreement in the Amsterdam Treaty, i.e., from 1986 to 1996. This dynamic supported those fundamental changes in European constitutional law brought about by the start of the Single Market project in 1986 and the introduction of the European Monetary Union in 1993. Both steps were quantum leaps in economic integration that required substantial and legitimatory counterbalance in the field of labour and social constitutional law. However, such compensation remained small for politico-economic reasons, and so all attempts failed to remedy the situation in Amsterdam and Nice, and also in the Constitutional Treaty/Treaty of Lisbon. Comparable revolutionary changes in the constitution of economic integration, which could increase political pressure for compensation, cannot be expected for quite some time.

The notion that the EU labour constitution represents an integrated European labour constitution in the making therefore requires an alternative. For this purpose, there are two choices, which will be elaborated here: the notion of a post-regulatory labour constitution of the Union (2) and the new notion of a European association of labour constitutions (3).

2. A Post-regulatory Labour Constitution for the EU?

Apart from the inclusion of the UK into the provisions of the Social Agreement in the fields of labour and social policy, the amendments to the Treaty of Amsterdam entailed above all a new chapter on employment (Articles 125–30 EC, Articles 145–50 TFEU). The chapter contains no labour-constitutional norms in the outlined sense, i.e., rights, principles and competences constituting and shaping the power relations between capital and labour; rather, they relate to the coordination of Member State employment policies (see Article 126(2) EC, Article 146 TFEU) and are therefore not immediately relevant in the present context. Nevertheless, for many, the employment chapter was the first indication that the social dimension of European integration was strengthened in addition to the economic one.

The coordination of employment policy follows a fixed cycle of European employment guidelines, Member States’ annual reports, examination of these reports and legally non-binding recommendations to Member States, as well as a Community employment report (Article 128 EC, Article 148 TFEU). Thereby the European level can foster Member State cooperation through initiatives ‘aimed at developing exchanges of information and best practices, providing comparative analysis and advice as well as promoting innovative approaches and evaluating experiences’ (Article 129 EC, Article 149 TFEU). These two features are seen by many as a new and groundbreaking modus operandi at the European level, raising high normative expectations. With the Lisbon European Council, it was extended to several areas of social policy and acquired the now common label of ‘open method of coordination’.

120 Even more critical is Wolfgang Streeck, above n 100, 377ff, who already identifies this phase as a ‘decline of the social dimension’.
At this point, the open method of coordination in the area of employment and labour law deserves attention because, given the backdrop of socio-political and politico-economic differences between the Member States, it is seen by some as a real alternative to a comprehensive EU labour constitution, as a post-regulatory renewal of the social promise of European integration. One labour law perspective, which is somewhat typical in its style and content, can be summarised as follows: the open method of coordination opens up a space in which the Member States learn from each other in the areas of employment law and employment policies through deliberative debate; this process is normatively guided by the relevant social rights. On the basis of common goals, specific solutions for the Member States are sought that reflect the characteristics of the traditional Member State constitution of industrial relations.

There is, however, much that contradicts the view that this is an accurate description of the present or at least a future reality. First, coordinating procedures, which supposedly constitute the entirely new integration mode of the open method of coordination, have been in place for labour law (even including collective labour law) and employment since the founding of the EEC (Article 118 EEC Treaty), but this coordination mandate has not produced any relevant results that have gained much public attention. In this respect, this begs the question why comparable coordination powers of the European level should today lead to totally different results. The thesis that the open method of coordination documents the lacking willingness of Member States to subject their own systems to changes initiated by the European level seems much more plausible. Secondly, the description is based on the erroneous notion that the main problem in the area of labour law and employment policies is inadequate knowledge, which could be remedied through deliberative learning processes. Instead, both areas are to a large degree shaped by normative conceptions, and at the same time social and political forces pre-structure the ways for their political handling. A real problem therefore emerges, with high ideological potential, if the open method of coordination does not create European arenas for social and political struggle, but only spaces for, at best, a mutual learning of national labour bureaucracies. Finally, the claim that social rights should normatively guide the coordination processes of labour law and employment policy remains completely unfounded. Since such normative guidance is not carried out in a legally binding and controlled manner, such notions are at best wishful thinking.


124 See also Art 137(2)(a) EC, introduced by the Treaty of Nice, the potential of which lags behind Art 140 EC (previously Art 118 EEC Treaty); see Krebber, above n 57, Art 137 EC, para 36.


126 Giubboni, above n 94, 245ff, 266ff and 277ff.


129 The optimistic distortions of the OMC seem to hamper down-to-earth insights: European employment policy is characterised by a turn from the paradigm of ‘full employment’ to the paradigm of ‘employability’ (for an explication of this difference, see R Salais, ‘Reforming the European Social Model and the Politics of Indicators’ in M Jepsen and A Serrano (eds), Unwrapping the European Social Model (2006) 189). This turn is caused by the structures of the European labour and social constitution themselves: the Union provides for almost no instruments for an autonomous full employment policy and the European coordination of Member State full employment policies is unfeasible due to political and socio-economical differences. Hence, it is only individual employability that can be taken up at the European level (Offe, above n 128, 437, 457ff; A Somek, ‘Concordantia Catholica: Exploring the Context of European Anti-Discrimination Law and Policy’ (2005) 15 Transnational Law and Contemporary Problems 959, 982ff).
The notion of a post-regulative labour constitution seems hence to be fundamentally misguided.\textsuperscript{130}

### 3. The EU Labour Constitution in an Association of Labour Constitutions

As indicated in the introduction, the concept of an ‘association of constitutions’ (Verfassungsverbund) developed for the constitution of public authority shall here be applied to the labour constitution. The analysis of the EEC labour constitution shows that the basic function of the Union level of the European association of labour constitutions is to realise the social compromise for integration under changing social and economic conditions. Here, the social compromise for integration consists of the fact that there is no competition in the Single Market on the basis of labour costs that the labour constitutions of the Member States remain autonomous in determining national labour conditions and that European economic integration does not deliberately shift the balance of social power to the side of capital. Against this backdrop, it is argued in the following that the EU labour constitution can today perform three functions: first, it legally supports the autonomy of Member State labour constitutions; secondly, it harmonises national labour laws, if and insofar as their differences constitute labour cost-related competitive distortions in individual cases; and thirdly, it ensures that the scope of social rights of workers in Europe does not fall behind the full spectrum of companies’ activities. Put in labour-constitutional terms, the EU labour constitution legally supports the effective development of Member State competences in the labour-constitutional field (a); it has legal competences for market-functional harmonisation (b); and it guarantees the transnational dimension of the labour-constitutional rights of workers (c).

#### a) Protection of Member State Labour Constitution Autonomy

The social compromise for integration requires that those competences are effectively exercised that have remained with the Member States for good reasons. This means above all that the norms of the Member States generated on a labour-constitutional basis shall not be threatened by restrictions that did not exist before the beginning of the European integration project. What is therefore needed is an effective protection of the autonomy of Member State labour constitutions. This protection of Member State autonomy is required in two directions: in a horizontal direction in relation to other Member States and in a vertical direction in relation to the Union.

##### aa) Horizontal Protection: Conflict of Labour Laws and Fundamental Freedoms

The opening of intra-European borders for goods (Article 28 EC, Article 34 TFEU), persons (Articles 39 and 49 EC, Articles 45 and 56 TFEU) and capital (Articles 43 and 56 EC, Articles 49 and 63 TFEU) raises the question of the transnational scope of application of Member State labour law and of the horizontal range of Member State labour constitutions. Put differently, the matter is whether and to what extent goods, persons and capital can carry over the law of labour relations, by way of exercise of fundamental freedoms, from one Member State to another. Via the fundamental freedoms, a conflict ultimately ensues about the respective scope of Member State labour constitutions in their interrelation.\textsuperscript{131} In the association of labour constitutions, it is

\textsuperscript{130} Ideas of ‘post-regulatory’ politics produce a problematic de-juridification, which undermines the endeavour for constitutional ties beyond the nation state. However, a more detailed discussion of this problem is omitted at this point. For a critical account, see C Joerges, ‘Integration through De-Legalisation’ (2008) 33 European Law Review 291.

the function of the EU level to regulate this horizontal conflict through a superior conflict of laws in a way that does justice to the social compromise for integration.

The European level can indeed cope with this function both with the aid of legal provisions allowing for justified restrictions to fundamental freedoms and the European international law concerning contracts of employment. The integration compromise also specifies the main substance of the European conflict of labour laws: in order to avoid labour cost competition, the law of the place where required labour is performed has to be applied, so that remuneration is the same for the same work at the same place. Article 8 of the new Rome I Regulation\(^ {132} \) (which corresponds to Article 6 Rome Convention\(^ {133} \)) technically implements this principle in the form of the so-called principle of favourability, which guarantees employees the standard of working conditions that exist at the place of habitual performance of the labour contract but allows more favourable working conditions pursuant to a law chosen by the involved parties.

For those national labour law norms that do not belong to the law governing the employment contract, including not only the overriding mandatory provisions (see Article 9(2) Rome I Regulation) but also the norms of collective and public labour law, the law governing the exercise of fundamental freedoms provides the conflict of laws that solves the horizontal conflicts and protects autonomy. It has in fact been argued that the validity of national labour law is excluded \textit{ab initio} from the scope of application of fundamental freedoms;\(^ {134} \) and this suggestion accords to the guarantee of Member State autonomy concerning labour constitutions as averred here. However, the ECJ ruled differently and subjected the norms of national labour law to the usual test for national restrictions of fundamental freedoms. This does not, however, reject the view presented here; rather, the examination according to the test serves only the aim of preventing the abuse of Member State labour law for protectionist purposes. National labour law is subject to the said test, but since the protection of workers, itself the basic function of all labour law, provides an aim which justifies the restriction of fundamental freedoms,\(^ {135} \) the further examination of proportionality and adequacy only ensures that the protection of workers is not used as a pretext. Only in very exceptional cases\(^ {136} \) would the test lead to significant intrusions into national law.

In this context, the posting of workers provides an important illustration. In the case of the temporary posting of workers, the usual place of habitual performance of the contract, significant for the applicable contract law under Article 8 Rome I Regulation, does not lie in the host country but in the home country (Article 8(2) Rome I Regulation), so that the posting of workers provides the opportunity for pure labour cost competition. In the aftermath of the second enlargement of the Union through the accession of Portugal and Spain in 1986, concerned Member States opposed this development in the form of national laws on posted workers and stipulated that their labour laws also apply to posted workers. Beginning with its ruling in \textit{Rush Portuguesa}, the Court of Justice held that these laws are essentially compatible with the freedom to provide services.\(^ {137} \)


\(^{136}\) This concerns mainly cases in which companies carry a double burden that, notably, cannot be justified by the social compromise for integration, eg Cases C-369/96 and C-376/96 \textit{Arblade} [1999] ECR I-8498, para 34, and Case C-165/98 \textit{Mazzoleni}, [2001] ECR I-2213, para 25.

However, at least for a certain period of the legal integration process, the autonomy of national labour constitutions came under pressure due to an instrumentalisation of fundamental freedoms adverse to public labour law. In the area of the free movement of goods, cases of reference are the rulings in *Nachtbackverbot*,\(^{138}\) concerning the German ban on night baking in bakeries and cafés, and *Conforama*,\(^{139}\) concerning the ban on Sunday work under French law. In both cases, the ECJ saw the working time regulations as justified.\(^{140}\) Even the free movement of workers was mobilised in order to restrict Member State autonomy. However, this attempt also failed:\(^{141}\) in the case of *Graf*,\(^{142}\) an Austrian regulation had to be considered, which concerned the deprivation of the claim to a redundancy payment in the case of workers leaving their job voluntarily. Only the deprivation renders the payment an instrument of dismissals protection. To declare it a breach of European law would have overridden this purpose and transformed it into an (as such pointless) termination bonus. Although its compliance with the fundamental freedoms could also have been examined, the Court of Justice found this rule not even apt to restrict the free movement of workers so that it needed no further justification.

Although national labour law was not exempted from the examination of compatibility with the fundamental freedoms, thus far it has survived these particular examinations largely unscathed. Up to this point, it is hence plausible to interpret the function of the compatibility test as a mere control against concealed protectionism. It was the ruling in *Viking*\(^{143}\) that brought a clear break. The Court had to judge upon the question of whether collective action taken by Finnish trade unions, and connected activities by an international trade union federation, against an employer who wanted to lower labour costs by way of re-flagging a vessel from Finland to Estonia violated the freedom of establishment. In its answer, the Court grandiloquently acknowledged the right to strike as a European fundamental right,\(^{144}\) but then, having seemingly dissolved any limits of the horizontal effect of fundamental freedoms,\(^{145}\) the ECJ submitted its exercise to the principle of proportionality with regard to the fundamental freedoms affected. This principle is unknown to many Member State labour constitutions.\(^{146}\) Even in Member States where this principle does exist as a constraint on collective action,\(^{147}\) the reference to the fundamental freedoms plays out as additional support for employers. With this, the social balance of power, constituted by Member States’ labour constitutions, is directly shifted in favour of employers. This is nothing else than open disrespect for the social compromise for integration.

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\(^{139}\) Case C-312/89 *Conforama* [1991] ECR I-1021; see also Case C-332/89 *Merchanide* [1991] ECR I-1027, treating a comparable ban in Belgian law.

\(^{140}\) Before the Maastricht Treaty and the Social Protocol came into force, the Court, referring not to the ‘protection of workers’ but to a more competence-related vocabulary, argued that it was the responsibility of the Member States to regulate working hours. The free movement of goods was also subject to Case C-188/84 *Commission v France* [1986] ECR I-419, which was concerned with technical health and safety regulations as hindrance for the import of goods.


\(^{142}\) Case C-190/98 *Graf* [2000] ECR I-493. For a convincing critical view, from a perspective of the doctrine of fundamental freedoms, see T Kinggreen, in Calliess and Ruffert, above n 57, Arts 28–30 EC, para 55.

\(^{143}\) Case C-438/05, above n 86.

\(^{144}\) The relevant considerations of the ECJ, however, show some problematic reductions of the fundamental right to strike. See C Joerges and F Rödl, ‘Informal Politics, Formalised Law and the ‘Social Deficit’ of European Integration’ (2009) 15 ELJ 1.

\(^{145}\) See Kinggreen, above chapter 14.

\(^{146}\) Eg in the UK, see N Countouris, ‘La Corte di giustizia e il vaso di Pandora del diritto sindacale europeo’ in A Vimercati (ed), *Il conflitto sbilanciato*, (2009) 95.

\(^{147}\) Eg in Germany, see *Bundesarbeitsgericht* (Federal Labour Court), Decision of 21 April 1971, Case GS 1/68.
Vertical Protection: European Competition Law and Internal Market Law

The Member States’ labour constitutions, especially the effective exercise of Member State competences, require not only horizontal protection, but also vertical protection against the substantive secondary law of the Union, including European competition law.\textsuperscript{148} In this context, the systematic problem is caused by the primacy of Community law. Although the primacy of the superior legal level is well known from federal constitutional law,\textsuperscript{149} its unquestioned application to the relation of Member State and Union is precarious where the latter acts upon the basis of limited and diligently chosen competences. Many provisions of primary and secondary EU law affect areas of society for which the EU is not responsible according to the prescribed competences. In these constellations,\textsuperscript{150} the mere enforcement of primacy equals the extension of the societal function logic that underlies Union law and competences (viz competition and Single Market) to the detriment of the function logic which is to be determined by the Member States according to the order of competences.

This fundamental problem has particular repercussions for the labour constitution. Under primary law, it was especially the European competition rules whose range had to be restricted with regard to Member State labour constitutions. Accordingly, the Court of Justice ruled that exemptions in national labour law do not constitute notifiable state aid under Article 88(3) EC (Article 108 TFEU).\textsuperscript{151} The central conflict between European competition law and Member State labour constitutions is exemplified in the \textit{Albany} case.\textsuperscript{152} The dispute concerned statutory membership in an occupational pension fund established by collective bargaining. In this context, the ECJ also had to tackle the question of whether the underlying collective agreement was in breach of Article 81 EC (Article 101 TFEU). This was negated by the Court at a fundamental level: labour agreements that serve the social objectives of the EC are per se not covered by the ban of anticompetitive agreements.\textsuperscript{153} The same applies in case of a declaration of universal applicability of collective agreements.\textsuperscript{154}

The outcome of the \textit{Albany} case could not have been otherwise. It would be unthinkable to interpret national collective agreements as agreements under Article 81 EC, which would then only be valid if they exceptionally did not affect the Common Market. It would have meant a blatant revocation of the social compromise for integration, which would have demolished the European integration project politically, if the Court of Justice had annihilated the foundation of every national labour constitution by way of attacking collective agreements. In doctrinal terms, the Court derived its conclusion solely from the wording of Community law and referred in a methodologically rather loose manner to the principles of Articles 2, 3(j) EC and

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149 See Art 31 German Basic Law: ‘federal law shall take precedence over Land law’—characterised by the Federal Constitutional Court as a fundamental norm of the ‘Grundgesetz’: Entscheidungen des Bundesverfassungsgerichts 36, 342, 365ff.
153 Ibid, para 60.
154 Ibid, para 66.
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More controversial than the primacy of national collective bargaining law over European competition law in *Albany* is the resolution of conflicts between Member State labour constitutions and European secondary law, especially in the form of directives. The situation came close to boiling point in the *Laval* case, in which a Latvian company demanded that Swedish unions pay compensation for damages caused by industrial action. A decisive issue for the outcome of the proceedings was the question what the regulatory content of the Posted Workers Directive 96/71 was. The Directive was adopted on the basis of Articles 55 and 47(2) EC (Articles 62 and 53(1) TFEU), ie on the basis of the competence for the coordination of Member State legal and administrative regulations concerning the provision of services. Referring to the jurisprudence mentioned above beginning with *Rush Portuguesa*, the Directive stated the obligation of Member States to extend minimum working requirements stipulated by law or, for the construction sector, by universally applicable collective agreements to the posting of workers in the construction industry, insofar as they touch upon a core area of working conditions (see Article 3 Posted Workers Directive). In the *Laval* case, the ECJ surprisingly turned the Posted Workers Directive into a Right-to-Strike-Restriction Directive. The Court saw in it a full harmonisation of national laws of cross-border industrial disputes vis-à-vis foreign service providers, which preserves the possibility of collective action only under very restrictive conditions.

The ruling in *Laval* is thus a flagrant breach of the principle of the protection of Member State labour constitutions against European law, which is functionally committed to other objectives and ideas. The damage of the decision in terms of diminishing political legitimacy can still not be fully assessed. In any case, it appears an urgent desideratum of European constitutional law to afford those competence provisions reflecting the social compromise for integration of the Community their justified priority over the technical primacy of European law.

**b) Competences for a Market-functional Substantive Labour Law**

According to the EEC labour constitution, substantive European labour law should be nothing more than market-functional labour law. As the account of its historical development and politico-economic circumstances has shown, it can hardly be otherwise in the current situation. Thus, the second achievement of the EU level in the association of labour constitutions is creating market-functional labour law on the basis of the relevant competences. Four categories can be devised. The first consists of those parts of anti-discrimination law that concern European labour law, the second forms the European harmonisation of standards under labour

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155 At this point, it may be assumed that the ruling in *Albany* fostered the view that the social dimension of Europe could be strengthened with the aid of norms determining values, goals and tasks.
156 Case C-341/05, above n 77.
157 See the reference in n 83 above.
159 The principle of subsidiarity can seemingly not achieve this function—contrary to the view still advanced by Thomas Oppermann in 1999 (idem, *Europarecht* (2nd edn, 1999) para 624). In this context, it appears to be quite helpful to remember a more moderate approach to justify the restricting impact of European directives, as previously held by the ECJ: see A Furrer, *Die Sperrwirkung des sekundären Gemeinschaftsrechts auf die nationalen Rechtsordnungen* (1994) 90ff.
160 See above section II.1.
law required for the functioning of specific markets, the third encompasses health and safety regulations, and the fourth consists of standards in the field of co-determination which are a necessary annex to European company law.

**aa) Anti-discrimination Law**

Anti-discrimination law provides, comparatively speaking, the biggest part of substantive European labour law. The market functionality of anti-discrimination law under labour law has already been explained, as far as it relates to pay discrimination: discrimination implies undervaluation of work and thus provides the basis for a pure labour cost-related and hence unfair competitive advantage. This point of view is therefore the foundation for all European anti-discrimination legislation\(^{161}\) inasmuch as it concerns pay, the costs of social security and other cost-related working conditions. The same applies to the directives concerning part-time work and fixed-term employments, which are also designed to prevent the undervaluation of work in atypical working relations. Compared with the original EEC labour constitution, only the array of prohibited discrimination features has been expanded until today.

Despite the classification of anti-discrimination law as law functional to the market, it is important to be aware of the fact that European anti-discrimination law fulfils another function, which is important with regard to the labour constitution. To put it briefly, anti-discrimination law is a corrective against a dominant culture\(^ {162}\) characterised by the socio-cultural primacy of the national, white and male, which is often supported by Member States’ corporate models. Fulfilling this function, anti-discrimination law serves the employees by preventing segmentation of the workforce along the lines of the dominant culture just mentioned. It can be doubted that many Member States would have implemented comparable anti-discrimination laws under their own steam.\(^ {163}\)

**bb) The Harmonisation of Markets for Machinery, Production Material and Facility Sites**

There are particular markets in which standards set by labour law constitute basic conditions in a different way than for ordinary markets for goods and services. The most important examples are on the one hand the markets for machinery and production materials, and on the other hand for productive capital investments, ie entire companies or production sites, or detachable parts thereof. Technical provisions for occupational health and safety are relevant for facilities, machinery and production materials. The compliance with health and safety regulations is an essential precondition for their marketability. For such goods, machinery and production materials therefore only the European harmonisation of technical safety at work enables genuine European markets.\(^ {164}\) Consequently, the field of technical protection of labour has developed at the European level\(^ {165}\) and has been expanded continuously.\(^ {166}\)

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\(^{162}\) On the concept, see B Rommelspacher, *Dominanzkultur* (1998).

\(^{163}\) This aspect has been overlooked by Somek (above n 129), who has impressively criticised European anti-discrimination politics for functioning as a surrogate for genuine social policies, and fully compatible with neo-liberalism.


\(^{166}\) See the encyclopaedic descriptions by W Kothe et al, in Oetker and Preis, above n 73, B 6100–6400.
In the case of markets for productive capital investments, those provisions of labour law play a role that are concerned with corporate restructurings, such as changes in operations or the transfer of an enterprise. These provisions act as transaction costs of such restructurings. If the social protection of workers and hence the transaction costs among Member States diverge too much, these differences replace economic aspects that should actually be decisive. This is the backdrop for the European provisions on the law of the transfers of undertakings, of collective redundancies and of the insolvency of employers.167


The area of the technical health and safety provisions that cannot be traced back to their functional relevance for particular markets of production materials, facilities and machinery can still be interpreted as market-functional. They prevent competitive advantages based on low health and safety standards.168 Unlike conditions under a contract of employment, standards of health and safety, which concern not the cost but the protection of labour, can be established Europe-wide: this is because it is not the production-related price of labour that is of concern, but rather the costs of the conditions for production and services. Furthermore, the extensive technical protection of labour at the European level can be seen as a case of a true spillover of European regulation, inasmuch as a functional distribution of competences would cause practical difficulties.

The social protection of labour mainly includes the directives on working hours, maternity protection and the protection of minors.169 The individual contractual working hours of employees is a first element for determining labour costs. In this respect, European regulation of regular operational work hours would at first glance be similarly implausible as European regulation of wages. However, maximum working hours and the special working arrangements for mothers and young people are a different case. Excessive working hours threaten both the health of the affected employees and, in many cases, the safety of third parties. Great differences in the Member States’ regular working hours also lead to distortions of competition, even if the wage actually paid is decisive,170 because wages are partly based on the legitimate demands and needs of full-time workers and to a certain extent are independent from the regular working hours of full-time employment. A national culture of excessively long full-time working hours therefore constitutes an unfair competitive advantage, which is ultimately based on undervalued labour similar to the case of discrimination.171

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168 Krimphove, above n 58, para 517.


170 This renders intelligible the inclusion of the provisions of Art 120 into the EEC Treaty (Art 142 EC, Art 158 TFEU), also suggested by the Ohlin report, according to which Member States were interested in maintaining parity as regards the regulations concerning paid spare time.

171 However, the market-functional relation of general and specific maximum working hours is less compelling than in the previous cases. In this respect, it is characteristic that the directives on working hours (originally as Council Dir 93/104, [1993] OJ L307, 18) maternity protection and the protection of minors have all been adopted in the uniquely dynamic phase following the passing of the Community Charter of Fundamental Social Rights and in the context of the Maastricht Treaty (see above, section IV.1(c)).
dd) The Labour Law Annex to European Company Law

The fourth area is workers' participation as a kind of collective labour law annex to European company law. Without European regulation of participation of workers, legislation regarding original European corporate statutes, notably in the shape of the European Company (SE) and the European Cooperative Society (SCE), would not have been politically possible. However, it is symptomatic that the European legislature could not agree on real substantive requirements. Here again the different traditions of Member State labour constitutions, especially in the field of industrial co-determination, showed their effect. Against this backdrop, the quite resourceful idea of 'negotiated co-determination' emerged. Negotiated co-determination is characterised by the fact that the law itself contains no substantive co-determination rules; rather, it is limited to negotiation procedures and minimum contents, provides standard rules for the constitution of workers' bargaining power and prohibits negative repercussions following conversions and mergers.

These are the four categories in which market-functional substantive labour law can be divided, which in turn has to be provided in the European association of labour constitutions by the EU level. As presented, it is this conception and not the notion of a 'social union' with an integrated labour constitution 'in the making' that renders intelligible the existence and the contents of almost all EU labour law legislation. The positive affirmation of this idea, which was already fundamental for the reference in Article 117 EEC Treaty to the market-functional legal harmonisation pursuant to Article 100 EEC Treaty, is therefore of essential use in the reconstruction of the functions of the EU level in the European association of labour constitutions.

c) Transnationalisation of Labour-constitutional Rights

The normative effects of the rights of the Charter should not be overestimated. For the societal sphere of dependent labour, those labour-constitutional rights that have been established at the national level remain authoritative, but these rights are just conceptualised for the national context. They constitute a system of national industrial relations and are not designed as a framework for cross-border industrial relations.

European market integration made cross-border business orientation the central element of its agenda. If, in accordance with the social compromise for integration and taking social forces into account, European law attempts not to be openly biased, it has to compensate for the Europeanisation of the room for manoeuvre of enterprises. As this compensation can actually not lie in a uniform system of European industrial relations, the only remaining alternative is to introduce a transnational dimension in Member State labour constitutions. The transnationalisation primarily aims at the fundamental rights of Member State labour constitutions, ie the individual freedom of exercise of profession, collective participation rights and

174 See above section III.2. The European trade unions seem to agree upon that insight and have recently begun to clamour for a social protocol in addition to the treaty (see B Bercusson, ‘Scope of Action at the European Level’, paper presented at a Symposium of the German Federal Ministry of Labour and Social Affairs, Berlin, 26 June 2008, on file with the author). The aim is to establish the priority of social rights over the fundamental freedoms. However, even the medium-term perspectives of this endeavour seem to be, to put it mildly, uncertain.

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collective bargaining rights, including the right to collective action. As far as the transnationalisation is not provided for in Member States' labour constitutions, this function has to be covered by the Union level. In the following, the relevant European rights connected to this kind of transnationalisation are explicated, as are the associated competences needed for their articulation.

aa) Transnational Freedom of Exercise of Profession

While the need for a transnationalisation of collective rights can easily be understood as a counterweight to the European reach of business opportunities, the systematic inclusion of the transnationalisation of the freedom of exercise of profession requires an additional explanation, because, historically, it started as the free movement of workers (Article 48 EEC) based on the intention to also increase the efficiency of the allocation of labour. Nevertheless, the transnationalisation of the individual freedom of profession at the same time serves to perceive European workers as a unitary, ie not an internally segmented, group. Since, after what has been outlined so far, this cannot be achieved by granting substantive European rights, all Member State labour constitutions have to represent this unity individually in their national legal orders. Consequently, Member State law has to extend its own freedom of exercise of profession to potentially all European workers according to European provisions.

Normally, the freedom of exercise of profession, as a right to exercise an occupation in dependent labour, is granted only for own nationals within particular national borders. Foreign nationals are given entry at the state’s discretion. Within the Union, however, the freedom of exercise of profession has been transnationalised together with the free movement of workers. As Union citizens, all Member State nationals are entitled to work as employees all over the Union. In conjunction with the comprehensive prohibition of discrimination inscribed in the freedom of movement (Article 39(2) EC), workers can at the same time enjoy all those rights that the respective Member State guarantees domestically for individual labour relations.

For this transnationalisation of the freedom of exercise of profession already guaranteed under primary law there also exist legislative competences at the EU level (Article 40 EC, Article 46 TFEU). On this basis, the Regulation on the Free Movement of Workers was adopted; it entailed most important provisions for the given context, especially Articles 7 and 8, which require the equal treatment of domestic and foreign nationals with regard to working and employment conditions as well as individual trade union rights.

bb) Transnational Participation Rights

The current constitutional law of the Treaties includes no provision that could provide a similar function for participation rights as the free movement of workers did for the freedom of exercise of profession. In this respect, the transnationalisation of co-determination rights has not undergone real constitutionalisation. Therefore, the attention immediately turns to the European competence concerning legislative regulation, since, due to its primacy also over national constitutional law, even secondary European law could achieve equivalent results. As already explained, the competences of the Union are narrow. One competence, which can be exercised within the relatively dynamic regular legislative process, exists only for the general information and consultation of workers (Article 137(2)(1)(e) EC), which of course includes the

176 See above section IV.3(b)(aa).
177 See Article 12(1) German Basic Law.
178 Reg 1612/68, above n 32.
179 Due to the dominating competence provisions, Art 27 of the Charter cannot develop much effect. Furthermore, the right to timely information and consultation, promised in the Charter, is not particularly strong (Art 28 of the Charter, however, is different. Its potential is explicated below, IV.3(b)(cc)).
regulation of rights to transnational hearing. Much more relevant for the balance of social power is the existing legislative competence for (transnational) business and operational co-determination, yet its exercise requires unanimity in the Council (Article 137(2)(f) EC).

Accordingly, the results of previous legislation have remained modest. Besides the already mentioned provisions for the participation of workers in original European companies, directives were adopted on the introduction of a European Works Council\textsuperscript{180} and on cross-border mergers\textsuperscript{181}. As in the law of the original European corporate statutes, the legislature could not find a different solution as the one of ‘negotiated co-determination’, in which the bargaining power of the employees is constituted by a default norm, which becomes effective once negotiations remain without result. In the case of cross-border mergers, this default norm is constituted by the most potent concerned Member State co-determination law\textsuperscript{182} in the case of the European Works Councils by the law of the headquarters’ host country, which in turn is not allowed to fall below a substantive threshold set at the EU level.\textsuperscript{183}

In both directives, the default rules correspond to the form of the transnationalisation of labour-constitutional rights which has been developed above: it is not the EU level but Member States that provide the relevant substantive law for the transnational collective labour relations at establishment and company level. The EU level provides only for the respective legal obligations of the Member States. Regarding the European Works Councils, however, there remains the problem of the contents of the default norms. Here, Member State law does not extend domestically effective legal positions to the transnational context; rather, it creates specific standards, which in turn comply with minimum standards prescribed at the EU level.\textsuperscript{184} Although this European standard does not actually represent the lowest common denominator, it settles for a comparably low level.\textsuperscript{185}

Therefore, the bargaining position of workers has to be strengthened by another mechanism, namely by opening the possibility that the agreements concerning the European Works Councils can become the subject of transnational collective action. The transnationalisation of collective bargaining rights within the European association of labour constitutions, to be discussed here subsequently, is therefore of paramount importance.

c) Transnational Collective Bargaining Rights

The Treaties themselves offer no basis for the transnationalisation of collective bargaining rights. The right of the social partners to establish contractual relations and to fulfil them autonomously (Article 139(1)(2) EC) is, however, recognised in the constitution, and some legal attention has therefore focused on the question of whether these relationships could constitute European collective agreements.\textsuperscript{186} The question of a European right to autonomous collective bargaining under Article 139 EC is in itself, however, of no major practical relevance as long as

\textsuperscript{182} Dir 2005/56, above n 181, Art 16.
\textsuperscript{183} Dir 94/45, above n 180, Art 7.
\textsuperscript{184} Dir 94/45, above n 180, Annex: subsidiary requirements referred to in Article 7 of the Directive. The implementation in national laws could have exceeded the minimum standard. But this has only happened in some minor cases. For an overview, see Europäischer Gewerkschaftsbund (ed), Die Umsetzung der EBR-Richtlinie in nationales Recht (1999) Tables 8–14.
\textsuperscript{185} A Höland, Mitbestimmung in Europa (2000) 135.
\textsuperscript{186} An innovative proposal suggests that the European social partners themselves decide about the normative effects of European collective agreements by agreeing on a framework for European collective bargaining (O Schiek, ‘Einleitung’ in W Däubler, Tarifvertragsgesetz (2006) para 790ff; Krimphove, above n 58, para 604). Closer to the wording of the Treaty and hence more convincing is the position that the legal effect of a European collective agreement is determined by national collective bargaining rights and is therefore different from Member State to Member State: O Deinert, Der europäische Kollektivvertrag (1999).
the issue of the right to collective action remains unresolved.\textsuperscript{187} In the long run, no European employers association will conclude European collective agreements voluntarily.\textsuperscript{188} The freedom of collective agreement and the right to collective action constitute a unity; without the latter, the first is of no relevance for social power relations.\textsuperscript{189} The bargaining power of workers, and with this the possibility to achieve transnational collective agreements at all in controversial matters, rests on the right to collective action.

A legislative competence of the Union for an EU-wide transnationalisation of free collective bargaining, including the right to association, collective bargaining rights\textsuperscript{190} and the right to collective action, is explicitly excluded under current constitutional law.\textsuperscript{191} A European order of collective bargaining and collective action rights can therefore not emerge on the basis of European legislation. This means nothing less than that it is the Member State labour constitutions which have to develop the standards providing a legal framework for intra-European transnational labour disputes and transnational collective agreements. Within the European association of labour constitutions, cross-border collective action concerning transnational collective agreements has in principle to be legally permissible, and European collective agreements must be recognised as such. This suggests putting transnational collective labour relations on an equal footing with domestic ones.\textsuperscript{192} Transnational labour disputes should not be subject to more stringent requirements than national labour disputes, and European collective agreements should have the same legal effect as domestic collective agreements.

The constitutional link of the transnationalisation of Member State bargaining can be found in Article 28 of the Charter.\textsuperscript{193} It guarantees the right to negotiate collective agreements ‘at the appropriate levels’. With regard to the function of collective labour relations, it cannot be said that the transnational level is not an appropriate one. The right of industrial action is granted, in turn, even without such reference to appropriate levels. Taken separately, Article 28 of the Charter requires the provision of a legal framework for European labour disputes and collective agreements. As long as the European level cannot step in due to its lack of competences, the transnationalisation of collective bargaining rights has to be an achievement of Member State labour constitutions.\textsuperscript{194} Member State law that would exclude or disproportionately limit cross-border labour disputes and collective agreements (Article 52 of the Charter) therefore constitutes a breach of Article 28 of the Charter.

\textsuperscript{187} See above n 58.

\textsuperscript{188} The autonomous agreements between the social partners established under Art 139 EC impressively confirm this. These are three ‘framework agreements’, concerning telework (2002), work-related stress (2004) and harassment and violence at work (2007), and two ‘frameworks of action’ for the lifelong development of competencies and qualifications (2002) and on gender equality (2005). Even at first glance they do not appear law-like, and the formal monitoring of their implementation also shows no signs that they are legal agreements.

\textsuperscript{189} Bundesarbeitsgericht, Case 1 AZR 822/79 [1980] *Neue Juristische Wochenschrift* 1642.

\textsuperscript{190} This is contested. For a preferable stance, see U Preis and M Gotthardt, in H Oetker and U Preis (eds), above n 73, B 1100, para 43. For a different opinion, see Langenfeld and Benecke, above n 76, Art 137, para 97; Rebhahn, above n 76, Article 137, para 19; and E Högl, in H von der Groeben and J Schwarze (eds), *Kommentar zum EU-/EG-Vertrag* (2003) Art 137 EC, para 43. Apart from the factual interdependence of the three subjects, the major problem for the opposing view is that minimum provisions—which are solely allowed by Article 137(2)(b), as is rightly emphasised by Langenfeld and Benecke, above n 76, Art 137 EC, para 7—are hardly conceivable for the legal effects of collective bargaining agreements.

\textsuperscript{191} See above, section III.1(c).

\textsuperscript{192} First developed for collective bargaining rights by Deinert, above n 186.

\textsuperscript{193} Rixen, above n 63, Art 28, para 14; Fuchs, in Marhold and Fuchs (eds), above n 58, 152 and 158.

\textsuperscript{194} The competence of Member State labour constitutions for the articulation of the right to transnational collective bargaining is confirmed by the statements of the presidency of the Charter Convention, according to which the arrangement and limitations of transborder collective action have to be determined by Member State law. CHARTE 4473/00, CONVENT 49, above n 68, 27.
It is still to be clarified how far civil disputes in the area of transnational industrial struggle or collective agreements open up a field of application for Community law in a way that Article 28 of the Charter gains legal relevance. The solution might be analogous to the jurisprudence of the Court on Union citizenship.195 The general rule might read as follows: insofar as the European constitutional law contains fundamental rights that cannot have an equivalent at the national level, a breach of these positions opens up the scope of application for Community law. This applies to Union citizenship as well as to the guarantee of a Union-wide transborder right to collective bargaining and collective action.

V. Conclusion

The process of European integration is based on a social compromise for integration whose renewal is fundamental to the acceptance and, with this, to the future development of European integration. According to the reconstruction of this compromise against the backdrop of present-day conditions, the EU labour constitution consists of three elements: constitutional figures to support the autonomy of Member State labour constitutions; legislative competences for the harmonisation of labour regulation in the case of labour cost induced competitive distortions; and the transnationalisation of fundamental labour-constitutional rights of workers.

The precise determination of the shape of the EU labour constitution, as constitutional institutionalisation of the social compromise for integration, realises the systemic function of modern labour law in a transnational context. Labour law aims to prevent the antisocial and unfair competition for low labour costs as far as possible, in order not to interfere with fair and productive competition in all other fields concerning ideas, technology and organisation. Applying the same function, however, the shape of labour law changes depending on whether it is concerned with the competition of companies in the same national economy or in different economies, ie whether domestic or supranational labour law is at issue. In the first case, domestic labour law provides unitary general or sectoral minimum working conditions. In the second case, supranational labour law shields from pressure on domestic working conditions. The absolute level of wages and working conditions remains a matter of societal power relations, whose legal framework also in the supranational Union is primarily constituted at the national level and which are not allowed to be shifted in a biased manner by the constitutional law of the Union.

Through the interplay of its Member State and Union levels, the European association of labour constitutions establishes a European social space of dependent labour in which it reflects the economic fragmentation of the European market. However, it prevents this fragmentation from overriding the social contradictions inscribed in this space. Future conflicts about the shape of the European labour constitution will be about overcoming the misleading model of an EU labour constitution modelled after national labour constitutions. This model has had an effect in the dispute about social rights and guiding norms at the European level for a long time. Instead, those who advocate a strengthening of the social dimension of European integration will have to focus even more resolutely on those parts of the EU labour constitution which can actually serve to reconstruct a viable social compromise. This task is intellectually and practically demanding enough.

I. Introduction: Between the Lisbon Treaty and the
Economic Approach

Fifty years after the entry into force of the Rome Treaty, there should be enough reasons to
praise the success story of European competition law. Rather than being in a spirit of
celebration, many competition lawyers, especially in Germany, have developed a sense of disil-
lication and uneasiness about the future. The reasons for this are twofold: on the one hand, the
Lisbon Reform Treaty would exclude the guarantee of ‘undistorted competition’—see the
current Article 3(1)(g) EC—in the catalogue of objectives of the revised Union law and refers to

1 On the history and development of competition law in Europe after World War II, see DJ Gerber, Law and
entry into force, see A Weitbrecht, ‘From Freiburg to Chicago and Beyond—the First 50 Years of European
it only in a Protocol.\(^2\) On the other hand, one has to take into account the fundamental reorientation of European competition policy within the framework of the so-called ‘more economic approach’.\(^3\) In the light of these developments, the question regarding the ‘constitution’ of European competition law requires reconsideration. From a constitutional perspective, the aforementioned developments seem particularly interesting, as at least three tendencies, grounded on different national concepts of the relation between the state and the economy, can be distinguished.

First, the ordoliberal approach, as developed in Germany, must be mentioned. This approach is characterised by protecting both the freedom of economic activity of all market participants and the freedom of competition itself. Consequently, the ordoliberal school does not focus primarily on the protection of the freedom of the undertakings confronted with an administrative action of the competition agency,\(^4\) but, on the contrary, relies on the freedom paradigm to justify the need for state intervention. The ordoliberal state protects competition in reaction to a freedom paradox as described by Karl Popper.\(^5\) Accordingly, a state that grants absolute freedom to the ones restricting competition endangers the economic freedom of other market participants.\(^6\) Hence, a state that seeks to optimise the freedom of all market participants has to ensure that freedom is not destroyed through its own abuse.

Whoever presently refers to the guarantee of economic freedom as an objective of European competition law will easily be criticised by others as being traditionalistic. Those who reject the ordoliberal approach find their own paradigm in the economic theory. Industrial economics, as the school of economics dominating modern competition policy, relies on the objectives of efficiency and consumer welfare. The policy concerning the implementation of the economic approach in European competition law may be culturally allocated to the Anglo-Saxon world. This is not necessarily because of the national origin of its proponents, but because of their ‘socialisation’ in the economic way of thinking deeply rooted in the US.\(^7\)

The exclusion of the protection of ‘undistorted competition’ from the catalogue of objectives of the revised Union law in the Lisbon Treaty coincides with the ‘economic’ reform of European competition law. This exclusion was strongly advocated by the French President

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\(^5\) On the influence of Karl Popper’s idea of the freedom paradox on the ordoliberal Freiburg School, see W Fikentscher, Die Freiheit und ihr Paradox (1997) 25ff.
\(^6\) For Germany, such a risk was actually created by an early decision of the highest civil court, the Reichsgericht; see [1897] 38 Entscheidungen des Reichsgerichts in Zivilsachen 155. The plaintiff sued for breach of a horizontal price-fixing contract. The Reichsgericht accepted the claim by giving more weight to the principle of party autonomy than to the protection of competition. The Court argued that the contract could only be considered void if competition in its entirety or partially was excluded forever (ibid, 158ff).
\(^7\) Some even argue that the more economic approach leads to an ‘Americanisation’ of the law; see Weitbrecht, above n 1, 85.
Nicolas Sarkozy. Hence, many argue that France thereby wanted to transpose its concept of the interventionist state to the European level. This French understanding of the role the state has to play regarding the economy must face resistance, both from the ordoliberals and the proponents of the economic approach. They equally want to utilise competition policy as a means to control the arbitrariness of state intervention. Whilst the ordoliberals rely more on the rationality of legal rules, the proponents of the economic approach prefer to rely on the rationality of the efficiency goal.

In the following, this chapter will analyse the effects of the Lisbon Treaty, in particular the changes flowing from the exclusion of the objective of undistorted competition from the text in the Treaty (II). By weakening this objective, the Lisbon Treaty may create room for a redetermination of the general objectives of European competition law. These objectives may then, of course, include those currently advocated by the economic theory, ie consumer welfare and economic efficiency. Thereafter, the economic approach has to be analysed from the perspective of the EU economic constitution. The more economic approach is a reaction to a ‘problem of application’ (III). It is said not to change substantive law, but to promote better results in its application. However, it has to be acknowledged that the economic argument may not reach any results without taking a stance as to the objectives of competition policy (IV). Such objectives are advocated by the economic theory in the form of an efficiency criterion and consumer welfare. Such objectives will be able to direct the interpretation and application of the rules of European competition law only if it is possible to find a normative justification. At this point, the economic approach definitely becomes an issue of constitutional law. Finally, the chapter will clarify the relationship of the economic objectives to those objectives which can be found in the EU’s constitutional order, namely the freedom paradigm and its integration that have characterised the development of competition law over several decades (V). It is not the aim of the following analysis to reject the economic approach. On the contrary, it wants to contribute to the integration of the economic approach into the European constitutional order by identifying its potential and its limitations.

II. The Effects of the Lisbon Treaty on Competition Law

The current provisions of the EC Treaty’s competition title (Articles 81–9 EC) reappear, in almost identical wording, in Articles 101–9 of the Treaty on the Functioning of the European Union (TFEU). The Lisbon Treaty only replaces the term ‘common market’ with the term ‘internal market’, thereby responding to a deficit that has remained since the adoption of the Single European Act and the introduction of the term ‘internal market’. In the following, changes relating to the two guarantees of ‘undistorted competition in the internal market’ (Article 3(1)(g) EC) and an ‘open market economy with free competition’ (Article 4(1) EC, Article 119(1) TFEU) will be discussed.


9 It is true, however, that industrial policy cannot only be found in France. On trends in German politics promoting national champions, see Monopolkommission, ‘Wettbewerbspolitik im Schatten “Nationaler Champions”: Hauptgutachten XV für den Berichtszeitraum 2002/2003’ [2004] Bundestagsdrucksache 15/3612.
1. Protecting Undistorted Competition in the Internal Market—Still an Objective of Union Law?

According to Article 3(1)(g) EC, the activities of the Community include ‘a system ensuring that competition in the internal market is not distorted’. The Lisbon Treaty, however, provides a new set of rules on the objectives that does not maintain the wording of Article 3(1)(g) EC.


The current provisions on the ‘tasks’ and ‘activities’ of the Community in Articles 2 and 3 EC are partially integrated in the provisions on the ‘aims’ and ‘objectives’ of the new EU Treaty. This is a necessary step as the objectives of the Community itself can no longer exist due to the abolishment of the concept of the Community. The new catalogue of aims in Article 3 of the EU Treaty of Lisbon (TEU-Lis) includes in its third paragraph a provision on the economic objectives. The provision’s first sentence simply states: ‘The Union shall establish an internal market.’ The guarantee of such a system that protects undistorted competition within the internal market has been omitted.

The existence of this new provision can be explained through comparison with the existing regulation on the objectives in the EC Treaty. Article 3(3) TEU-Lis functionally corresponds to Article 2 EC and not to Article 3 EC. In Article 2 EC, the Treaty refers to the establishment of the ‘common market’ without mentioning the protection of competition as one of the Community’s objectives. Article 3(3) TEU-Lis follows this approach but replaces the outmoded term of the ‘common market’ with the term ‘internal market’. Since it had been decided that Article 3 EC in its present form should not reappear in the new Treaty, the reference to the protection of competition had initially been deleted from the Treaty text accidentally and without further consideration. It seems as if the French resistance towards the reintroduction of ‘undistorted competition’ in Article 3(3) TEU-Lis only developed after realising this ‘accident’.

The new TFEU, of course, continues to contain provisions on the internal market and the protection of competition. These provisions, however, cannot fill the gap left by the exclusion of the guarantee of a system of undistorted competition in the catalogue of the aims and objectives of the revised Treaties. The necessity of protecting the ‘internal market’ from restraints of competition is now explicitly stated in Articles 101–9 TFEU. However, these provisions cannot be considered as characterising the internal market in the sense of Article 3(3) TEU-Lis. Articles 101–9 TFEU do not define the understanding of the ‘internal market’. This is done—in conformity with the current Article 14(2) EC—by Article 26(4) TFEU, which refers only to the guarantee of the fundamental freedoms, not to the protection of competition.

The exclusion of the reference to undistorted competition would have a direct impact on the application of Article 352 TFEU (Article 308 EC). According to this provision, the Union can adopt the appropriate measures only if the necessary powers are not already provided for in other provisions, ‘to attain one of the objectives set out in the Treaties’. The current provision of Article 308 EC has been used, inter alia, for the adoption of Merger Control Regulation 139/2004.11

The French attempt to exclude undistorted competition from the catalogue of the Union’s aims and objectives was, of course, not intended to undermine the Union’s competence for merger control law. Such unwanted consequences are avoided by the Protocol on the Internal Market and Competition. The Protocol reads as follows:

10 On the drafting history, see Graupner, above n 8.
THE HIGH CONTRACTING PARTIES, CONSIDERING that the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted, HAVE AGREED that: To this end, the Union shall, if necessary, take action under the provisions of the Treaties, including under Article 352 of the Treaty on the Functioning of the European Union.

The introductory part of the Protocol clarifies in general terms that the concept of the internal market, for the purpose of interpreting the aims of the Union, includes a system of protecting undistorted competition. It thereby goes far beyond merely ensuring power of the Union to legislate in the field of competition policy by reference to Article 352 TFEU. The Protocol obviously aims at guaranteeing that the current legal situation will remain unchanged. Such an understanding is also supported by Article 51 TEU-Lis according to which the protocols form an integral part of the Treaties.\(^\text{12}\)

This view is also shared by the Commissioner for Competition, Neelie Kroes. After approval of the Reform Treaty by the European Council she declared: \(^\text{13}\)

The Internal Market and Competition Protocol is a legally binding confirmation that a system of ensuring undistorted competition is an integral part of the Internal Market. The Protocol paraphrases the current Treaty provisions: competition is not an end in itself—but it is the best means anyone has found to create the conditions for growth and jobs. Integrating competition into the very concept of the ‘Internal Market’ clarifies that the one simply cannot exist without the other—which is a fact.

The French President Sarkozy, however, at a press conference immediately after reaching the agreement of the European Council, argued in favour of a fundamental change regarding the aims of the Union despite the Protocol: \(^\text{14}\)

In substance . . . we managed to achieve a major reorientation of the objectives of the Union. Competition is no longer an objective or an end in itself, but a means serving the internal market. A protocol confirms that the issue of competition is one of the internal market; this is a major point.

Further comments unveil the concept of competition favoured by the French President: \(^\text{15}\)

I believe in competition, I believe in markets, but I do not believe in competition as a means and an end in itself. This may well mean that the Commission will have to change its practice. Namely in the sense of competition that allows the emergence of European champions in order to promote a true industrial policy.

In addition to this plea in favour of an industrial policy, he explicitly criticises liberalism: \(^\text{16}\) ‘[T]he challenge was to prevent a Treaty of the economy or a Treaty of liberalism . . . The challenge was to turn ourselves away from ideology and naivety.’

In the light of such public statements from the French President and his questioning of the virtues of competition, it is not surprising that many are afraid that the Reform Treaty might redefine the role of competition in the European Union and even undermine it. \(^\text{17}\) Therefore, the case law on Article 3(1)(g) EC will be analysed below in order to clarify which principles of

\(^{12}\) In the same sense: R Streinz, Europarecht (2008) para 971a.


\(^{15}\) Ibid (my translation).

\(^{16}\) Ibid (my translation).

European competition law are potentially affected by the transferral of the objective of protecting undistorted competition to the Protocol.

Most important in this context is the Continental Can judgment of the European Court of Justice (ECJ). Here the Court rejected the view that the guarantee of protecting undistorted competition in the common market is merely a general programme lacking any legal effect. In its judgment, the Court preferred to understand the (then) Article 3(f) EEC Treaty as stipulating binding objectives in all its parts which are ‘indispensable’ in fulfilling the tasks of the Community. The Court concluded that the Treaty’s competition rules need to be interpreted in the light of its objective of guaranteeing undistorted competition. The Court relied on Article 3(1)(g) EC in two aspects: first, the principle of protecting undistorted competition limits the possibility to outbalance the competition goal by reference to conflicting goals (below, b); and secondly, the Court accepted ‘structural abuse’ as a category of possible abuses in the sense of Article 82 EC (below, c).

b) The Guarantee of Undistorted Competition as a Limitation to the Possibility to Outbalance the Competition Goal by Reference to Conflicting Goals

In Continental Can the ECJ explicitly states:

But if Article 3(f) [EEC Treaty] provides for the institution of a system ensuring that competition in the common market is not distorted, then it requires a fortiori that competition must not be eliminated. This requirement is so essential that without it numerous provisions of the Treaty would be pointless. Moreover, it corresponds to the precept of Article 2 of the [EEC] Treaty according to which one of the tasks of the Community is ‘to promote throughout the Community a harmonious development of economic activities’. Thus the restraints on competition which the Treaty allows under certain conditions because of the need to harmonize the various objectives, are limited by the requirements of Articles 2 and 3. Going beyond this limit involves the risk that the weakening of competition would conflict with the aims of the common market.

According to the understanding of the ECJ, the provisions of European competition law serve to implement a system of undistorted competition in the internal market. However, this objective does not constitute an end in itself but is an instrument to promote the objectives of Article 2 EC. This latter provision, however, lists objectives that might conflict with undistorted competition. In the light of the goal to achieve a ‘high level of employment’, for instance, the question could arise whether restraints of competition can be justified under Article 81(3) EC with the argument of saving jobs in the EU. Similarly, it may be asked whether guaranteeing a ‘high degree of competitiveness’ of European undertakings in world markets may legitimise restraints of competition. The reliance on Article 3(1)(g) EC as a limitation to the balancing of conflicting goals helps here to avoid such a weakening of competition policy.

Actually, the same principle is also enacted in the wording of Article 81(3) EC (Article 101(3) TFEU), according to which an exemption will not be accorded if it affords the possibility to eliminate competition in a substantial part of the market. In Continental Can, however, the Court had to apply Article 86 EEC Treaty (Article 82 EC). The ECJ relied on the guarantee of undistorted competition, as provided under Article 3(f) EEC Treaty, in order to reach an identical result for the control of market dominance:

The endeavour of the authors of the Treaty to maintain in the market real or potential competition even in cases in which restraints on competition are permitted, was explicitly laid down in Article 85(3)(b) of the [EEC] Treaty . . . [With regard to Article 86 of the EEC Treaty] the obligation to observe

19 Ibid, para 23.
20 Ibid, para 24.
21 Ibid, para 25.
the basic objectives of the [EEC] Treaty, in particular that of Article 3(f), results from the obligatory force of these objectives. In any case Articles 85 and 86 cannot be interpreted in such a way that they contradict each other, because they sever to achieve the same aim.

The question now is whether the obligation to interpret and apply the competition rules in this specific sense will persist even after the introduction of the Lisbon Treaty. The answer to this question must be derived from the new regulatory aims and objectives in Articles 2 and 3 TEU-Lis. The current EU Treaty clearly distinguishes between the general ‘tasks’ of the Community in Article 2 and the ‘activities’ in Article 3, whereby the latter activities serve to promote the fulfilment of the tasks in Article 2. This hierarchy of norms would disappear under the Lisbon Treaty. In contrast to the existing Treaties, Article 2 TEU-Lis highlights the political ‘values’ of the Union, first and foremost the respect of human rights. From a constitutional perspective, this new approach has to be supported. However, in promoting such constitutional values, the new Treaty abolishes the interaction between economic objectives and the policies that are designed to promote these objectives. Putting the internal market at the same level as potentially colliding economic goals, such as ‘a highly competitive social market’ and ‘full employment and social progress’, argues in favour of the possibility of ruling out the goal of protecting undistorted competition, as guaranteed by the Protocol.

Hence, the guarantee of undistorted competition is challenged more by the disappearance of the hierarchy of objectives, which was essential for the development of the case law, than by the transferral of that objective to the Protocol. In the future, one will have to rely more on the wisdom and common sense of the EU institutions and, above all, the European Courts, rather than on the wording of the Treaties. One should always remember that a ‘highly competitive social market’ and ‘full employment’ in the Union cannot be attained without effectively protecting competition.

c) Harming the ‘Structure of Competition’ as an Abuse of Market Dominance

In Continental Can, a case decided before the adoption of the first Merger Control Regulation, the ECJ was asked whether Article 86 EEC Treaty could also be applied and achieve the result of prohibiting a merger of undertakings. The ECJ answered in the affirmative. This interpretation was not at all self-evident. The concerned undertakings relied on three strong counterarguments, all of which were rejected by the Court with reference to Article 3(f) EEC Treaty. Based on the guarantee of a system of undistorted competition, the Court developed remaining principles for the control of market dominance.

The plaintiff undertakings argued that the Member States, by adopting a ban on abuse of market dominance, did not wish to address merger cases. According to the undertakings, this understanding has to be inferred from the older European Coal and Steel Community (ECSC) Treaty, which included specific merger control rules in addition to the provision of control on market dominance. The Court rejected this argument by briefly hinting at the objectives of the EEC Treaty. In deciding the case, the ECJ held that only the spirit, the general scheme and the wording of Article 86, along with the objectives of the Treaty, were relevant for the correct application of Article 86 EEC Treaty—not the comparison with the ECSC Treaty.

Secondly, the plaintiffs relied on the different categories of an abuse, as listed in Article 86(2) EEC Treaty (Article 82(2) EC). They argued that the Treaty only refers to practices that affect the market and also harm consumers or trade partners. After having explained Article 86 of the EEC Treaty as an expression of the general guarantee of undistorted competition in the

22 Ibid, para 19.
23 Ibid, para 22.
internal market, namely in the sense of a limitation to a balancing with conflicting interests, the ECJ clarified:

It is in the light of these considerations that the condition imposed by Article 86 [EEC Treaty] is to be interpreted whereby in order to come within the prohibition a dominant position must have been abused. The provision states a certain number of abusive practices which it prohibits. The list merely gives examples, not an exhaustive enumeration of the sort of abuses of a dominant position prohibited by the Treaty. As may further be seen from letters (c) and (d) of Article 86(2), the provision is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure, such as is mentioned in Article 3(f) of the [EEC] Treaty.

In Continental Can, the ECJ relied on the guarantee of undistorted competition in order to assume an abuse in the case of a mere proof of damaging competition—or, as the Courts put it, of the ‘competition structure’. Even after the adoption of the Merger Control Regulation, this principle has not yet lost its meaning. Moreover, the established case law is based on Continental Can, according to which merely the damaging of the ‘competition structure’ suffices to amount to an abuse in the sense of Article 82 EC. With this argument, and by relying on Continental Can, the Court of Justice in the British Airways judgment of 2007 rejected the argument of the plaintiff airline that it did not violate Article 82 EC since their bonus programme for travel agents did not cause any specific harm to consumers. A similar statement can be found in the somewhat later Microsoft decision made by the Court of First Instance (CFI), although, in this case, the CFI explained thoroughly why the refusal to provide interface information also harmed the interests of consumers. In Microsoft the CFI held: It must be borne in mind that it is settled case law that Article 82 EC covers not only practices which may prejudice consumers directly but also those which indirectly prejudice them by impairing an effective competitive structure.

With their third argument (in Continental Can), the plaintiffs again relied on the wording of Article 86 EEC Treaty and claimed that the provision only prohibits the abuse of market dominance. Hence, an abuse would require the use of a market dominant position to restrain competition. The strengthening of a market dominant position by way of a merger, on the other hand, does not involve the use of an already existing market dominance. By explicitly referring again to Article 3(f) EEC Treaty, the ECJ responded that a causal link is not required. Furthermore, an abuse might also occur irrespective of the applied means, provided that the conduct of the dominant undertaking somehow produces the effect of distorting competition.

Although the guarantee of undistorted competition played a central role in the development of the aforementioned principles, the weakening of this guarantee by the Lisbon Treaty does not necessarily have to affect the interpretation of Article 82 EC (Article 102 TFEU). In the light of current debates, however, it has to be recognised that the economic theory no longer advocates the protection of competition as an end in itself, but much more as a means to promote consumer welfare and economic efficiency. This is why economists criticise the ECJ especially for protecting the ‘structure of competition’. Accordingly, Hellwig argues that this
case law ‘protects the competitor by restraining competition’.\textsuperscript{31} Hellwig is most critical vis-à-vis the judgment in \textit{British Airways}.\textsuperscript{32}

It will not be discussed here whether or not the Court of Justice decided correctly in the case of \textit{British Airways}. What can be seen, though, is that the weakening of the guarantee of undistorted competition might make it even easier for the economic approach to modify the application of Article 82 EC. This analysis is not without irony. By shifting the objective of undistorted competition to the Protocol, President Sarkozy explicitly wanted to act against ‘ideology and liberalism’ but, at the same time, might have promoted an even more ‘liberal’ and more ‘economic’ competition policy.

2. Repositioning the Guarantee of the ‘Open Market Economy with Free Competition’ in the Lisbon Treaty

The guarantee of an open market economy with free competition was adopted as part of the Maastricht Reform Treaty (Article 3a (1) EC Treaty) and explicitly relates to the introduction of an economic policy as an important element in establishing a monetary union. Despite this close relationship between economic and monetary union, the Maastricht Treaty did not integrate the guarantee in the title on Economic and Monetary Policy (Articles 98 to 124 EC) but did so in the introductory provisions on the Community’s objectives (Article 4(1) EC). The functional meaning of Article 4(1) EC is similar to that of Article 3 EC. Both provisions relate to Article 2 EC by describing the tasks and objectives of the Community in more detail.

Regarding the Lisbon Treaty, one would have expected the guarantee on the open market economy with free competition to be placed in the revised EU Treaty. The new EU Treaty actually mentions the introduction of the Economic and Monetary Union in the Preamble\textsuperscript{33} and in Article 3(4) as an objective of the Union.\textsuperscript{34} Consequently, the TEU-Lis lacks any reference to the more specific principles of the Economic and Monetary Union as listed in Article 4 EC. These principles, including the one on the open market economy with free competition, are now listed in Article 119 TFEU. Hence, the question arises whether this relocation will cause a change in the legal interpretation of the guarantee. Just like the guarantee of undistorted competition provided for by Article 3(1)(g) EC, the legal effect on the guarantee of an open market economy with free competition has yet to be clarified.\textsuperscript{35}

The ECJ was confronted with the legal meaning of Article 4(1) EC in the \textit{Échirolles} judgment.\textsuperscript{36} In this case, the question was whether French law, which required publishers to fix the resale prices for books, conflicted with the Community’s guarantee of undistorted competition in the internal market (then still Article 3(f) EC Treaty, now Article 3(1)(g) EC) and with that of an open market economy with free competition (Article 3a(1) EC Treaty, now Article 4(1) EC). The Court of Justice answered the question in the negative. It confirmed that Article 3(f) EC Treaty contained a general principle that can only be applied together with other provisions regarding the implementation of these principles.\textsuperscript{37} By relying on the previous \textit{Leclerc} judgment,\textsuperscript{38} the Court was of the opinion that a purely national system of mandatory price fixing for books does not collide either with the provisions on the internal market or with the

\textsuperscript{31} Hellwig, above n 4, 32.
\textsuperscript{32} The analysis by Hellwig, ibid, 19–28, provides a good example of how economists nowadays analyse specific conduct and their effects and propose new approaches to applying the law.
\textsuperscript{33} 8th recital of the Preamble TEU-Lis.
\textsuperscript{34} Art 3(4) TEU-Lis corresponds to Art 2 EC where the economic and monetary union is also mentioned.
\textsuperscript{35} A Hatje, above chapter 16, section II.1(b).
\textsuperscript{37} Ibid, para 22.
\textsuperscript{38} Case 229/83 \textit{Leclerc} [1985] ECR 1.
competition rules. As to Article 3a(1) EC Treaty, the Court of Justice only stated that this provision did not impose clear and unconditional obligations on the Member States that could be relied on by individuals before the national courts.

However, the *Échirolles* decision remains unclear as to the legal effect of Article 4(1) EC. There should be no doubt whatsoever that the guarantee of the open market economy with free competition as a ‘general principle’ must be taken into account for the interpretation of other Treaty provisions, just like in the case of the guarantee of undistorted competition in the internal market. The question of whether it is only the provisions on the Economic and Monetary Union that have to be interpreted in the light of this guarantee or also other provisions of the Treaty, including the competition rules, as well remains unanswered. According to Hatje, who also argues along these lines, the guarantee of an open market economy with free competition has to be taken into account for the interpretation of all economically relevant provisions of primary Community law and the measures taken under secondary Community law.

With regard to the Lisbon Treaty, the question is whether such a view can still be upheld, considering the transfer of the guarantee to the provisions on the Economic and Monetary Union. This question should be answered positively. The provision of Article 119(1) TFEU would lose an essential part of its meaning if one limited its legal effect to the interpretation of the following provisions on the Economic and Monetary Union. Moreover, the provision continues to obligate the Union to include the guarantee in its own economic policy. The provisions on the economic policy, as contained in Articles 120–6 TFEU, on the other hand, are designed to streamline the economic policies of the Member States. The Union contributes to this through its institutions by supervising national policies. A common economic policy, however, also requires the Union to respect the general principles set out in Article 119(1) TFEU in its own economic policy. Yet the most important provisions that the Union has to consider for its economic policy, including the competition law rules, are placed outside the title on the Economic and Monetary Policy. Hence, for the future interpretation of competition rules, one needs to take Article 119(1) TFEU into consideration.

This conclusion is of great importance if read together with the revision concerning the guarantee of undistorted competition in the internal market. Even if the Lisbon Treaty had completely deleted this other guarantee, a European competition policy that, for instance, consequently promoted European champions in the field of merger control would collide with the principle of an open market economy with free competition (Article 119(1) TFEU). Hence, the fear that the transferral of the objective of undistorted competition to the Protocol may weaken the principle of free competition does not take into account that the competition principle will continue to be ensured by Article 119(1) TFEU. What has to be regretted, however, is the relocation of the guarantee of an open market economy with free competition into the title of the Economic and Monetary Union; this makes a correct legal understanding of the Treaty provisions even more difficult.

Ensuring free competition as an objective of Union law should be distinguished from the question of the meaning of this guarantee for the economic approach to competition law. The term ‘free competition’ is not precise enough to mandate any conclusions about the concept of competition itself. Hence, the term does not oppose the economic approach. A limitation of the economic approach results, however, if one accepts the paradigms of economic freedom and free market entry as emanations of the guarantee of an open market economy with free

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39 Case C-9/99, above n 36, para 24.
40 The ECJ considers the guarantee of the open market economy with free competition as a ‘general principle’ just like the guarantee of undistorted competition; see Case C-9/99, above n 36, para 25.
41 In *Échirolles* (ibid, para 25) the ECJ only mentions the guarantee in relation to the economic policy and not to the competition rules.
42 Hatje, above n 35, 596.
competition. Yet such an understanding of the guarantee presupposes an ordoliberal understanding of competition, which is largely rejected by modern economists.

Consequently, the following discussion has to concentrate on the economic approach itself. From a constitutional perspective, it will be essential to separate the economic argument from the normative judgment in order to open up ways for the integration of a necessary economic approach into the European constitutional system.

III. The Economic Approach to Competition Law as a Response to an Application Problem

Especially those economists who work in the Commission on the implementation of the more economic approach consider this approach to be a response to an application problem. Accordingly, the more economic approach would not raise any constitutional concerns as it is only designed to provide a better analytical framework to enable lawyers to reach economically more consistent results. Therefore, it is not surprising that the existing economic literature on the more economic approach and competition policy is application-oriented. In conformity with their education, industrial organisation economists analyse various types of conduct without taking into account the limitation of their own theories and the legal constraints of the system.

The more economic approach causes a number of concerns for lawyers. In the following, the analysis will concentrate on the historic development and the characterisation of the more economic approach (1) and those aspects that, on a mere application level, make this approach appear to be problematic from an economic and legal perspective (2–5).

1. Historic Development and Characterisation of the More Economic Approach

The implementation of the more economic approach started almost 10 years ago and is still in progress. With this policy, the Commission intends to evaluate all different sectors of competition law and practice in the light of economic conformity and to reform them accordingly.

a) The Block Exemption Regulation on Vertical Agreements of 1999: The New ‘Effects-Based’ Approach

The initiative for the implementation of the more economic approach is very much associated with the name of former Competition Commissioner Mario Monti. He described the leitmotiv of the more economic approach in the following words: ‘In making this revision, we have shifted from a legalistic based approach to an interpretation of the rules based on sound economic principles.’

A more concrete characterisation of its policy was given by the Commission with the adoption of the Block Exemption Regulation on Vertical Agreements in 1999, when the

43 In favour of this is Hatje, ibid, 595.
44 See, eg the contributions in P Buccirossi (ed), Handbook of Antitrust Economics (2008).
45 Such sectors also include state aid, which because of page limitations will not be discussed in the following; see, however, Commission, State Aid action plan, COM(2005) 107.
Commission, for the first time, implemented its more economic approach. In the Guidelines on Vertical Agreements, the Commission states: 48 "In applying the EC competition rules, the Commission will adopt an economic approach which is based on the effects on the market; vertical agreements have to be analysed in their legal and economic context."

Thus, the evaluation of anti-competitiveness should no longer be based primarily on the wording of an agreement, but on how specific agreements affect the relevant market. Accordingly, the more economic approach is also characterised as an ‘effects-based’ approach, in contrast to the earlier ‘form-based’ approach.

For the application of competition law, this marks a real shift in paradigms. According to this new approach, lawyers can no longer judge the lawfulness of a given agreement by simply relying on its wording; now they also have to consider the specific effects on the relevant market. This means that a given agreement might be illegal in situation ‘X’ but could be legal in situation ‘Y’. The economic reason for this shift is based on the idea that vertical agreements are usually of an ambivalent character. On the one hand, they are capable of excluding competition between dealers of the same product (so-called intrabrand competition), for example, when dealers are prohibited to sell outside their guaranteed territory. Whether these agreements are capable of harming competition regarding other goods and services as well depends largely on whether the undertaking that prohibits its customers from buying from competitors holds sufficient market power. Only if this were the case would there be a risk that the relevant market would be foreclosed for competing goods or services. 49

These considerations have important effects on the requirements for the group exemption. According to the new Vertical Agreements Regulation, the group exemption is only granted if the market share of the binding undertaking does not exceed 30% (Article 3 of the Regulation). Lower market shares indicate that the undertaking most likely lacks sufficient market power to damage competition. What remains from previous regulations, characterised by lists of legal and illegal clauses in the new Regulation, is a blacklist (hard-core restrictions) that leads to the exclusion of the exemption whenever such clauses are included into the agreement. The adoption of the Vertical Agreements Regulation in 1999 triggered a general shift to the market-share approach resulting in the creation of a new generation of block exemption regulations.

The new approach to the block exemption benefits undertakings below the market-share thresholds as they do not have to worry about the illegality of their agreements as long as they do not include clauses from the blacklist. Undertakings above the market-share thresholds, in contrast, fall outside the block exemption regulation; they have to rely directly on Article 81(3) EC. In applying these provisions, one has to take into account both the substance of the agreement and its effects on the relevant market, depending on the undertakings’ market power. Undertakings that, according to Article 81(3) EC, which is directly applicable as a result of the new Implementation Regulation 1/2003, 50 have to evaluate the legality of their contractual arrangements are naturally confronted with a particular difficult task. The same is true for courts that have to judge the legality of an agreement under Article 81(3) EC.

In order to promote legal certainty, the Commission publishes guidelines that accompany the adoption of block exemption regulations. These guidelines provide authentic indications from the Commission as the European legislature on how to interpret the provisions of the Regulation; in addition, the Commission explains how Article 81(3) EC will be applied by the Commission itself and how this provision is recommended to be applied by other institutions in

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the Member States above the market-share thresholds. The style of these guidelines differs considerably from traditional legal rules. They provide an analytical framework on how to proceed and they thereby instruct the competition lawyer, from an economic perspective, on how to apply Article 81(3) EC.

b) Direct Application of Article 81(3) EC

The ‘modernisation and decentralisation’ project, based on the adoption of the Implementation Regulation 1/2003, can be regarded as an integral part of the economic approach. Economists consider Article 81 EC to contain a crucial systematic error as paragraph 1 prohibits anti-competitive agreements while paragraph 3 provides an exemption. This does not make any sense to economists because most agreements are of an ambivalent nature, producing both pro- and anti-competitive effects, and should therefore be considered anticompetitive only after applying paragraph 3. For such cases, US practice has developed the so-called ‘rule of reason’, according to which an agreement can only be considered as ‘restrictive’ after it is established that the anti-competitive effects cannot be outweighed by its pro-competitive ones. There is no doubt, however, that under EC law such a balancing can only be effectuated under Article 81(3) EC after it has been concluded that there is a restraint of competition in the sense of Article 81(1) EC. Taking the pro-competitive effects into account in the context of Article 81(1) EC would take away any practical meaning from Article 81(3) EC.

Hence, the distinction between the two paragraphs creates particular problems in assessing a restraint of competition under European law. This is especially true if, according to the freedom paradigm, such a restraint is argued whenever there is interference with the economic freedom of action. Consequently, all vertical distribution agreements would fall under Article 81(1) EC, although most of them may turn out to be pro-competitive after an economically required balancing. The Court of Justice recognised at an early stage that such an interpretation would go too far. In Société Technique Minière, the Court had already acknowledged that, for the purpose of applying Article 81(1) EC, one has ‘to consider the precise purpose of the agreement, in the economic context in which it is to be applied’.

From the very beginning, the approach of the Court of Justice could be described as cautious. Yet the Court did not offer any uniform paradigm to define a restraint of competition.

Without changing the normative structure of Article 81 EC, the Implementation Regulation 1/2003 brought the legal situation in conformity with the economic approach. This was effectuated in two steps: first, the Regulation abolishes the exclusive competence of the Commission to grant an individual exemption and declared Article 81(3) EC to be directly applicable (Article 1(2) Regulation 1/2003). Secondly, the domestic competition authorities and the domestic courts acquired the competence to apply Article 81 EC, including its third paragraph (Articles 5 and 6 Regulation 1/2003). This had the important effect that both Article 81(1) EC and Article 81(3) EC are applied by the same institution at the same point in time. From an economic perspective, it no longer matters whether the balancing of different effects of an agreement

51 Ibid.
53 Some economists argue that, according to the ordoliberal and traditional approach in Germany, all such agreements are considered to be restrictive; see, eg Motta, above n 49, 24. Yet this is not the case. On the contrary, German law before the harmonisation with European law in 2005 was very generous regarding vertical agreements in particular. Only vertical price fixing and the vertical fixing of the terms of contract were considered to be illegal per se, whereas other clauses were considered to be legal as long as the competition agency did not nullify an agreement by an individual decision (so-called abuse principle).
takes place in the context of the first or the third paragraph of Article 81 EC. What matters is that the balancing takes place at all. However, the distinction between the two paragraphs is still relevant for the burden of proof. According to Article 2 Regulation 1/2003, the party claiming the restraint of competition has only to prove the requirement of Article 81(1) EC.\footnote{One has to take into account, however, that competition agencies have to assess all facts that are relevant for both paragraphs, ie including the pro-competitive effects of a specific behaviour.}

With the entry into force of Regulation 1/2003, the Commission also published Guidelines\footnote{Guidelines on the application of Article 81(3) of the Treaty, \citeyear{OJ C101, 97}.} that are designed to inform the authorities and the courts of the Member States on how the Commission would like Article 81(3) EC to be applied in the light of the more economic approach. The ‘procedural merger’ of the two paragraphs of Article 81(1) and (3) EC enables the Commission to propose a new test that relies on the distinction and balancing of the pro- and anti-competitive effects of a given agreement. The Commission thereby acknowledges, in conformity with the case law of the European Courts, that the balancing can only take place within the framework of Article 81(3) EC.\footnote{Ibid, para 11.}

**c) Reform of Merger Control Law**

The economic approach plays an important role in the framework of merger control law.\footnote{See, eg A Christiansen, ‘Der “More Economic Approach” in der EU-Fusionskontrolle’ \citeyear{Zeitschrift für Wirtschaftspolitik 150}.} Whereas for the application of Article 81 EC competition agencies and courts can often assess the effects of an agreement ex post by analysing the impact a given agreement had on the market, merger control has no alternative to making assumptions on the future effects of a concentration. Such assumptions must be made on the basis of economic models.

The reform of the Merger Control Regulation\footnote{Council Reg 139/2004, above n 11.} was significantly influenced by the decisions of the Court of First Instance. In 2002, in the Commission’s *annus horribilis*, the Court annulled three merger prohibitions of the Commission.\footnote{Case T-342/99 *Airtours v Commission* \citeyear{ECR II-2585}; Case T-5/02 *Tetra Laval v Commission* \citeyear{ECR II-4382}; Case T-77/02 *Schneider Electric v Commission* \citeyear{ECR II-4201}.} In reaction to this, the Commission created the position of a Chief Economist who now has to test each Commission decision on its economic rationality. At the same time, the Commission managed to implement a new merger criterion in the revised Merger Control Regulation. European merger control law shifted from the market-dominance test to the criterion of a ‘significant impediment of effective competition’ (the so-called SIEC test), whereby the creation or strengthening of a market dominant position is only maintained as an example of such an impediment (Article 2(3) Regulation 139/2004).

With the new SIEC test, European law moves closer to the US SLC (substantial lessening of competition) test. It is, however, most important to note that by shifting to the new criterion, European law gains more flexibility in both directions. In this sense, it is possible that the SIEC test justifies the prohibition of a merger even without the creation or the strengthening of a market dominant position and vice versa.

In the first scenario, it is intended to capture non-coordinated (unilateral) effects.\footnote{See recital 25 of the Merger Control Reg 139/2004; see also U Böge, ‘Reform der Europäischen Fusionskontrolle’ \citeyear{Wirtschaft und Wettbewerb 138, 144}; J Schmidt, ‘The New ECMR: “Significant Impediment” or “Significant Improvement”?\’ \citeyear{Common Market Law Review 1555, 1568ff.} Non-coordinated (unilateral) effects describe the phenomenon of rising prices as a consequence of a reduction of competitive pressure in the aftermath of a merger, although the merger does not create a market dominant position.} The Commission had a strong interest in lowering the requirements for a prohibition in this regard,
since it had not managed to convince the CFI in any of the three aforementioned cases that the merger in the oligopolistic market would have led to a co-ordination of the conduct of the remaining undertakings in the sense of collective dominance. The recognition of an efficiency defence, on the other hand, is expected to save a merger, even though the merger would create or strengthen a market dominant position. The possibility of an efficiency defence is only mentioned explicitly in the recitals of the Merger Control Regulation. With the recognition of the efficiency defence, European law follows the example of US law and accepts the economic argument that anti-competitive disadvantages, resulting from the reduction of the intensity of competition, can generally be balanced by the advantages of efficiency as the new and larger undertaking is able to produce at lower cost. Above all, the European legislature, in this context, demonstrates its willingness to depart from a concept of protecting competition as an end in itself in favour of an efficiency-oriented economic model.

Guidelines play a major role in the field of merger control. Immediately after the enforcement of the new Merger Control Regulation, the Commission published Guidelines on horizontal mergers, which explain the application of the Regulation to non-coordinated effects and establish the requirements of the European efficiency defence. In the meantime, the Commission has also published Guidelines on non-horizontal mergers. However, guidelines in the field of merger control have a different function than those in the field of restrictive agreements. This is because the Commission maintains its monopoly in applying European merger control law. Although the Guidelines do not have any legally binding effect, the Commission creates a self-binding effect by applying the Guidelines. None the less, all Guidelines share the same economics orientation. They all belong to the instruments that serve to implement the more economic approach.

d) Reform of the Application of Article 82 EC

So far, the Commission has not been as successful in implementing the more economic approach in the framework of Article 82 EC. The Commission took a first step in this direction by publishing a Discussion Paper on the application of Article 82 EC on exclusionary practices in December 2005. Whilst drafting the Paper, the Commission was advised by the Economic Advisory Group for Competition Policy (EAGCP) that, in a report preceding the publication of the Discussion Paper, explicitly argued in favour of transferring the ‘effects-based’ approach to

62 Case T-342/99, above n 60.
63 Recital 29.
65 Ibid, paras 24–38. These requirements are comparatively high. Efficiency gains will only be considered if they are merger-specific and verifiable, and if consumers are not worse off than without the merger. US experience in the past has demonstrated that undertakings often only argue efficiency gains without being concerned about future development; see also the critical analysis by TL Greaney, ‘Efficiencies in Merger Analysis: Alchemy in the Age of Empiricism?’ in J Drexel et al (eds), Economic Theory and Competition Law (2009) 191. Arguing against the consideration of efficiencies: D Zimmer, ‘Efficiency in Merger Law: Appropriateness of Efficiency Analysis in Ex-ante Assessment?’, in ibid, 206.
The Discussion Paper is limited to exclusionary practices but emphasises that European law also covers exploitative and discriminatory practices. The Discussion Paper does not contain any significant information as to why the more economic approach should also be implemented for exclusionary practices. In contrast, the report by the EAGCP forcefully states:

An economic approach to Article 82 focuses on improved consumer welfare. In so doing, it avoids confusing the protection of competition with the protection of competitors and it stresses that the ultimate yardstick of competition policy is in the satisfaction of consumer needs. Indeed, an economic approach achieves two complementary goals. First, it ensures that anticompetitive behaviour does not outweigh legal provisions. Second, an effects-based analysis takes fully into consideration that many business practices may have different effects in different circumstances: distorting competition in some cases and promoting efficiencies and innovation in others. A competition policy approach that directly confronts this duality will ensure that consumers are protected (through the prevention of behaviour that harms them) while promoting overall increased productivity and growth (since firms will not be discouraged in their search for efficiency).

In fact, the risk of protecting only the competitor is particularly imminent when applying Article 82 EC to exclusionary practices. The pursuit of combating competitors—and of even excluding them from the market—constitutes the very essence of competition and, therefore, has to be considered legal, also for dominant undertakings. Through the prohibition of exclusionary practices, however, the law addresses exactly this exclusionary effect. Yet in order to avoid protection of the less successful competitor, it cannot suffice to categorise unilateral conduct as an abuse in the sense of Article 82 EC. Hence, the question is how to separate legal unilateral conduct from illegal abuse.

The EAGCP’s report provides criteria in order to define abuse in the light of the interaction of the ‘effects-based’ approach with the economic objectives of competition law:

An economics-based approach to the application of Article 82 implies that the assessment of each specific case will not be undertaken on the basis of the form that a particular business practice takes (for example, exclusive dealing, tying, etc.) but rather will be based on the assessment of the anticompetitive effects generated by business behaviour. This implies that competition authorities will need to identify a competitive harm, and assess the extent to which such negative effect on consumers is potentially outweighed by efficiency gains. The identification of competitive harm requires spelling out a consistent business behaviour based on sound economics and supported by the facts and empirical evidence. Similarly, efficiencies—and how they are passed on to consumers—should be properly justified on the basis of economic analysis on the facts of each case.

Thus the EAGCP suggests that unilateral conduct should only be considered abusive if consumer harm is shown in the individual case. At the same time, it is argued that efficiency gains are to be taken into account—at least as long as consumers have a share. Here, one should recall that in 2007 both the ECJ, in British Airways, and the CFI, in Microsoft, rejected the view that Article 82 EC requires a showing of consumer harm and reaffirmed the Continental Can case law according to which European law protects consumers indirectly by protecting the structure of competition. It seems almost as if the European Courts took advantage of the first cases to confront the proposal of the EAGCP, without, however, providing any explanation for their view.

70 Discussion paper, above n 68, para 3.
71 EAGCP, above n 69, 2ff.
72 See above section II.1(c).
In fact, the EAGCP seems to criticise this very case law of the European Courts by arguing that a concept that only requires a showing of damage for competition would not be very helpful. Since there are no criteria to identify damage to competition, one would ultimately have to rely solely on the effects on consumers. As suppliers compete for consumers on the other side of the market, the benefits accruing to consumers from competition are held by the EAGCP to be the best measure to identify whether competition is working. Consequently, the EAGCP is most critical on the protection of the ‘competition structure’ as advocated by the courts:

If the assessment of competitive harm and the protection of ‘competition’ are assessed with reference to consumer welfare, it is incumbent upon the competition authority in each case to examine the actual working of competition in the particular market without prejudice and to explain the harm for consumers from the practice in question. Without the discipline provided by this routine, the authority may be tempted to identify the ‘protection of competition’ with the preservation of a particular market structure, eg one that involves actual competition by a given company. Its policy intervention may then merely have the effect of protecting the other companies in the market from competition. This would enable them to maintain their presence in the market even though their offerings do not provide consumers with the best choices in terms of price, quality, or variety.

It is surprising to see how scarcely the arguments conveyed by the EAGCP were included into the Commission’s Discussion Paper. One would expect the Commission to explain, under the heading ‘framework for analysis’, how the ‘effects-based’ approach must be implemented with regard to Article 82 EC. However, rather than relying on the effects on consumers, as proposed by the economists, the Commission chooses a different emphasis. Principally, the Commission accepts the goals of consumer welfare and efficiency and stresses that it is most important to guarantee free entry of newcomers to a market dominated by an undertaking:

The essential objective of Article 82 when analysing exclusionary conduct is the protection of competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. The concern is to prevent exclusionary conduct of the dominant firm which is likely to limit the remaining competitive constraints on the dominant company, including entry of newcomers, so as to avoid that consumers are harmed. This means that it is competition, and not competitors as such, that is to be protected. Furthermore, the purpose of Article 82 is not to protect competitors from dominant firms’ genuine competition based on factors such as higher quality, novel products, opportune innovation or otherwise better performance, but to ensure that these competitors are also able to expand in or enter the market and compete therein on the merits, without facing competition conditions which are distorted or impaired by the dominant firm.

Consequently, if the Commission bases its ‘effects-based’ approach on ‘foreclosure effects’ and not on ‘direct consumer harm’, then this should be explained by the goal of keeping the dominated market open. Whether the potential competitor will offer better products to consumers cannot be verified, unless, of course, the law ensures that this competitor has a chance to enter the market. In comparison to the position of the EAGCP, the analysis of the Commission is characterised by a long-term perspective and a dynamic concept of competition. Whereas the EAGCP would allow the more efficient competitor to exclude others, the Commission is afraid that successful exclusion would reduce competitive pressure to the disadvantage of consumers. In other words, protecting residual competition in dominated markets and the openness of markets will ensure more effectively that, in the long run, consumers will not be harmed.

73 EAGCP, above n 69, 8.
74 Ibid, 8ff.
75 Discussion paper, above n 68, paras 51–60.
76 Ibid, para 54.
This is why, in the final analysis, the Commission prefers a concept that relies on the protection of competition. Therefore, it suffices to show foreclosure effects for the application of Article 82 EC.\footnote{77}{Ibid, para 55.}

Article 82 prohibits exclusionary conduct which produces actual or likely anticompetitive effects in the market and which can harm consumers in a direct or indirect way. The longer the conduct has already been going on, the more weight will in general be given to actual effects. Harm to intermediate buyers is generally presumed to create harm to final consumers. Furthermore, not only short term harm, but also medium and long term harm arising from foreclosure is taken into account. According to this statement, the demonstration of actual consumer harm is sufficient to prove abuse. Nevertheless, this is not a necessary requirement due to the long-term perspective, focusing on the openness of the market. The Commission considers its approach to conform with the classical definition of an abuse by the ECJ in Hoffmann-La Roche, where the Court focused on damage to the structure of the market.\footnote{78}{Ibid, para 57, referring to summary no 6 of Case 85/76, above n 28.}

The Commission also has to clarify how to identify foreclosure effects. Generally, the Commission assumes foreclosure in the case of complete or partial denial of market access to potential competitors. Accordingly, foreclosures may discourage the entry or expansion of rivals or encourage their exit. It would suffice that rivals are consequently disadvantaged or led to compete more vigorously. Such an artificial creation of disadvantages for rivals may consist in directly raising rivals’ costs or in reducing the demand for rivals’ products.\footnote{79}{Discussion paper, above n 68, para 58.}

A comparison with the position of the EAGCP shows that there is no unique analytical framework for the more economic approach. The differences between the EAGCP and the Commission can be traced back to fundamentally diverse concepts of competition. The economists of the EAGCP argue on the basis of a static competition model that only takes into account short-term effects on consumers. The Commission, on the other hand, advocates a dynamic model of competition based on a long-term perspective. Consequently, the Commission focuses on the protection of competition and refrains from requiring direct consumer harm. The Commission’s position is in conformity with the case law of the European Courts, which, after the publication of the Discussion Paper, continued to decide accordingly.\footnote{80}{See above section II.1(c).}

The position of the EAGCP, in contrast, is in line with the practice of US law, which requires consumer harm to be shown for the violation of Section 2 of the Sherman Act to be confirmed.\footnote{81}{See the most recent decision in Rambus Inc v FTC (DC Cir 2008), available at http://pacer.caed.uscourts.gov/common/opinions/200804/07-1086-1112217.pdf (accessed on 20 November 2008).}

It must be emphasised, however, that the positions of both the EAGCP and the Commission are in line with the general characteristics of the more economic approach. Both reject the ‘form-based’ approach and assess the lawfulness of conduct in the light of its effect on the market. The EAGCP and the Commission differ in regard to the kind of effects they consider relevant.

c) Reforming Competition Law Enforcement and Strengthening Private Enforcement

Finally, the economic approach has an important impact in the field of law enforcement. Here, the economic way of thinking encounters the principle of full effectiveness (effet utile), a fundamental principle of Community law. From an economic perspective, the primary goal of
enforcement measures does not consist in punishment and compensation, but in preventing the individual from violating the law. Only if and when the individual abstains from the violation under the impression of the foreseeable sanction can the law achieve its ultimate goal of economic efficiency. Although Community law does not necessarily argue by using the categories of efficiency, the principle of full effectiveness, which obliges Member States to take enforcement measures, ensures the respect of Community law and aims to guarantee that violations do not occur. From the perspective of both economic theory and Community law, therefore, deterrence is the goal of any enforcement measure. Due to the principle of full effectiveness, Community law is ideally placed to integrate an economic approach, also in the field of enforcement.

The three areas of enforcement of competition law which have been addressed so far for an economic-orientated reform are the system of fines,82 the introduction of a European leniency programme83 that, under specified conditions, grants immunity to cartel members and, finally, private enforcement. The following analysis will concentrate on the strengthening of private damage claims as the most discussed topic currently.

The recognition of private damage claims as a consequence of a violation of Community competition law goes back to the 2001 Courage decision of the ECJ.84 Although Article 81(2) EC only provides for the nullity of restrictive agreements as a measure of private enforcement, the Court stated in this decision that domestic courts must grant a damage claim to all victims of anti-competitive agreements. The principles for such a claim were further developed in the Manfredi judgment.85 From both a constitutional and an economic point of view, two aspects seem to be especially important: first, the Court of Justice recognises a private damage claim as the individual right of all victims; and secondly, the claim is explicitly designed to contribute to deterrence. Both aspects are closely linked with the Community principle of full effectiveness.86

For the justification of a private damage claim as an individual right, the Court87 was able to rely on its van Gend judgment of 1963. In this decision, though in an obiter dictum, the Court stated that individual rights arise not only from clearly defined obligations imposed by the Treaty on the Member States or on the Community institutions, but also from such obligations of private individuals.88 Of course, the latter is very relevant for the Treaty rules on competition, which create obligations for undertakings. In Courage, the Court of Justice provides European competition law with a constitutional dimension by recognising private damage

82 See Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Reg 1/2003, [2006] OJ C210, 2. These guidelines were fully formulated in light of the goal of prevention and deterrence. On the optimal measuring of fines and the Guidelines, see WPJ Wils, Efficiency and Justice in European Antitrust Enforcement (2008) 49–75.
83 See Commission Notice on immunity from fines and reduction of fines in cartel cases, [2006] OJ 298, 17. In general on this leniency policy, see Wils, ibid, 113–53.
86 Case C-453/99, above n 84, paras 23–7.
87 Ibid, para 19.
claims as the individual right of the victim. This is equally done in view of ensuring the full effectiveness of European competition law aiming at deterrence.

After the adoption of the Implementation Regulation 1/2003, the Commission started to show interest in private damage claims as well. In the process of decentralisation of enforcement, the strengthening of such claims appears to be a necessary step in order to ensure that private parties increasingly bring their cases to the courts. In preparation of a legal instrument on private damage claims, in the case of a violation of European competition rules, the Commission presented a Green Paper in 2005 and a White Paper in April 2008.

The jurisprudence of the ECJ, the goal of deterrence and, finally, the economic approach to damage claims for the breach of competition rules in general cause problems as to the entitlement to such a claim. In Courage, the Court had held, in the light of the principle of full effectiveness, that ‘any individual’ suffering loss as a consequence of an anti-competitive agreement would be entitled to such a claim. In Manfredi, the ECJ confirmed that a claim has to be recognised for any individual proving a causal link between the illegal conduct and the loss suffered. In the case of a horizontal agreement—and in regard to price cartels in particular—this leads to the question of which purchaser qualifies for the claim. The loss incurred will often—though not necessarily—be passed on from the direct purchaser to lower distribution levels until the final consumer is reached. If the defendant cartel member were allowed to rely on the defence that the loss has been passed on to indirect purchasers, the deterrent effect of the damage claim would potentially be undermined since indirect purchasers and ultimately the final consumers incur less individual loss and, therefore, feel little incentive to go to court. Conversely, there is the risk that the defendant has to face claims of multiple plaintiffs if the passing-on defence is not allowed since, according to the case law of the ECJ, it is not possible to exclude claims of indirect purchasers with the argument that the direct purchaser also has a claim.

From an economic perspective, it is surprising that, in its White Paper, the Commission tends to allow the passing-on defence. In this regard, it is argued that the damage claim only serves the purpose of compensation and should not lead to an unjustified enrichment of the direct purchaser. The Commission thereby seems to depart from the economic goal of deterrence and to return to the goal of compensation as part of the classic concept of tort claims.

The approach preferred by the Commission possibly expresses a somewhat different economic consideration. If one accepts that competition law is ultimately designed to promote consumer welfare, the law has to grant actions especially to the final consumer as a consequence. Thus, in its White Paper, the Commission intends to promote consumer actions by

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90 In a similar way Komninos, above n 85, 141.
93 Case C-295/04–C-298/04, above n 85, paras 60–4.
94 Likewise Drexl, above n 85, 1352ff (with regard to German law). This is also the position of the Commission; see White Paper, above n 92, 4 (s 2.1).
95 White Paper, above n 92, 9 (s 2.6).
96 Ibid.
97 The solution preferred by the Commission also differs from the legal situation in the US. There, courts do not accept the passing-on defence, thereby enabling direct purchasers to go to court; see Hanover Shoe, Inc v United Shoe Machinery Corp, 392 US 481 (1968). In addition, the Supreme Court excludes actions by indirect purchasers; see Illinois Brick Co v Illinois, 431 US 720 (1977). On the US situation in general, see Bulst, above n 84, 59–100.
presuming that higher prices have actually been passed on to the consumers\textsuperscript{99} and by introducing opt-in class actions.\textsuperscript{100}

At the intersection of economic theory and the economic constitution, this discussion on the entitlement for damage claims reveals fundamental differences in the judgments of economists and of lawyers. From an economic perspective, consumer welfare is only promoted in the public interest; it is not the purpose of private damage claims to protect private interests in the constitutional sense of economic freedom of action. Therefore, the entitlement to such claims depends only on the effectiveness of enforcement in the light of the overall goal of deterrence, not on who is protected by the competition rules. From an economic perspective, private law here serves the public goal.\textsuperscript{101}

For a lawyer trained in German law in particular, the economic argument causes a fundamental conflict of values.\textsuperscript{102} According to the traditional German approach, only a person who is to be protected by competition law as part of the legislative programme can be entitled to claim damages.\textsuperscript{103} The Commission seems to place itself between the extremes of, first, limiting claims to a selected group of victims as a matter of compensation and, second, granting claims to ‘any individual’ as a matter of deterrence by identifying the final consumer as the person primarily protected by competition law. Simultaneously, the Commission accepts the passing-on defence granted to direct purchasers and thereby reduces the deterrent effect of private enforcement.

f) Conclusion

The preceding analysis of the more economic approach in different sectors of competition law is remarkably complex. The Commission primarily aims at optimising the application of law to individual types of conduct through focusing on the effects on the relevant markets. Thereby, the assessment is significantly influenced by the objectives promoted by economic theory. In the following, however, I will not immediately discuss these objectives and the potential conflicts that may arise regarding values and principles of the European economic constitution but, rather, will concentrate on the problems with the economic approach if one accepts the economic objectives. Such problems are the loss of legal certainty (below, subsection 2), an increasing need to make economic predictions (3), an excessive claim of knowledge (4) and, finally, the disregard of the institutional dimension of competition law (5).

2. Lack of Legal Certainty

In comparison to the earlier practice, the more economic approach creates problems of legal certainty when trying to reach economically consistent results in each individual case. By focusing on the concrete effects of a given behaviour on the relevant market, this approach tends to reduce competition law, with its diverse provisions, almost to a single legal norm prohibiting restrictions of competition. In implementing its policy, the Commission does not

\textsuperscript{99} White Paper, above n 92, 9 (s 2.6).
\textsuperscript{100} Ibid, 5 (s 2.1).
\textsuperscript{101} See also M-A Frison-Roche, ‘Efficient and/or Effective Enforcement’ in Drexl et al (eds), above n 66, 211.
\textsuperscript{102} See Drexl, above n 85, 1359–62.
\textsuperscript{103} Accordingly, former § 33 of the German Act against Restraints of Competition required that the claimant falls within the ‘purpose of protection’ (\textit{Schutzzweck}) of the violated provision. This requirement was interpreted in the sense that only a person who suffered loss as a consequence of a violation directed against him or herself individually was allowed to claim damages. Hence, it was much easier to justify damage claims of competitors, like in the case of exclusion, than of purchasers or even consumers who were only generally confronted with higher market prices.
sufficiently take into account that such an approach goes along with a considerable reduction of legal certainty.

This reduction of legal certainty can be best described with the working of the new block exemption regulations. Block exemption regulations are meant to create a ‘safe harbour’ for undertakings. With the entry into force of the Implementation Regulation 1/2003, the undertakings are, however, obliged to assess the legality of agreements themselves. Whether they are right or wrong will, in most cases, only be clarified when one of the parties brings the case to court. The first generation of block exemption regulations with their lists of non-restrictive, exempted and non-exemptible clauses served the purpose of legal certainty but forced undertakings to refrain from agreements that might have been pro-competitive (the so-called straitjacket effect). Under the second generation of block exemption regulations, which rely on market-share thresholds to identify the scope of the exemption, lawyers frequently have to consult an economist in order to assess whether or not a given agreement is covered by the block exemption. Whether the courts and competition agencies will later accept the self-assessment of undertakings cannot be foreseen with certainty at the time of the agreement’s conclusion. Of course, the same is true for the market-share thresholds. The Guidelines on Article 81(3) EC are thought to promote legal certainty. However, they do not formulate clear-cut legal rules allowing or banning certain behaviour, but only provide an analytical framework that requires the undertakings to take specific criteria, such as market power, into account for the balancing of pro- and anti-competitive effects.

Legal certainty is even more reduced through the requirement to assess the ‘future’ effects of the conduct. In the case of the conclusion of an agreement, the undertakings are then forced to make predictions. These predictions again have to be based on economic considerations and theories, which are not always accepted by all economists.

Agreements in the sense of Article 81 EC are mostly intended to regulate the relationship of the contracting parties for a longer period of time. The ‘effects-based’ approach here may even lead to a change in the legal assessment after the conclusion of the agreement. Undertakings may lose the advantage of the block exemption when market shares grow and finally cross the market-share threshold. Similarly, the exemption under the directly applicable Article 81(3) EC may become less likely when market power increases after the conclusion of the contract. The possibility of such changes obliges undertakings to monitor and eventually cancel or renegotiate their agreements.

The argument of legal certainty is not only relevant from a legal perspective: it should also be recognised from an economics perspective. The reasons for this are basically twofold: first, the ‘effects-based’ approach causes considerable transaction costs. Those who criticise the more economic approach consider this approach to be a job-creation programme for economists, who can now find employment in law firms and in the legal departments of large undertakings. Secondly, the risk of erroneous assessment under Articles 81 and 82 EC might deter undertakings from their initially intended and potentially pro-competitive conduct and agreements. Hence, the objective of an economically more adequate legal assessment in individual cases is achieved but the law still produces economically inefficient results.

In the light of these two arguments, the more economic approach does not yet seem sufficiently ‘economic’. The reason for this is that the approach is biased towards the theories of

104 See above section III.1(a).
105 Above n 56.
106 Such changes are of particular importance in the field of technology-transfer agreements; see A del Tiempo, Kartellrechtliche Beurteilung horizontaler technologietransfer-Vereinbarungen nach Europäischem Recht (2008) 201–22.
107 Accordingly Christiansen, above n 58, 156ff (referring to the procedural complications in merger control cases); Immenga, above n 3, 364ff (questioning whether the effects-based approach can be made operational within existing procedures).
industrial organisation and neglects considerations of institutional economics, particularly regarding the argument of legal certainty.

3. Making Predictions on Future Effects

This analysis has shown just how important predictions are under the more economic approach. The need to make predictions is not a novelty either for the law in general or for competition law in particular. In the framework of merger control, predictions on the future effects of a concentration have always formed a central part of the assessment. The more economic approach, however, by generally making the legality of an individual conduct dependent on its effects on the market, requires predictions on the future for all forms of potentially anti-competitive behaviour, at least from the perspective of an undertaking that has to know whether it is allowed to act or not. This is particularly a problem in the field of Article 81 EC. Whereas the prohibition of merger control law to implement the concentration prior to the decision of the authority usually prevents undertakings from anti-competitive transactions, under Article 81 EC undertakings have often to decide whether to enter into and apply a potentially restrictive agreement or to abstain from the very conclusion of such an agreement.

Making predictions about the future is also a problem for the authorities and the courts. They necessarily have to apply economic considerations and models in order to assess the future effects of a given conduct on the relevant market. For the courts, the preliminary question in this regard is how to qualify economic theories. Assessing the future effects of a conduct appears, at first sight, to be an issue of facts, not of law. However, economic models and theories can only produce an approximation to reality and therefore should not be equated with the reality itself.

It is not surprising that the CFI became a promoter of the economic approach to merger control law when the Court started to take its task of judicially controlling Commission decisions more seriously. As a result, the CFI nullified the aforementioned Commission decisions in 2002, due to the lack of sufficient economic justification of the expected future effects of the mergers. However, the need of sufficient economic justification works in both directions. If competitors sue against the clearing of a merger, the CFI nowadays also requires a sufficient justification for the clearance decision. Apparently, the need for predictions makes the enforcement generally more difficult—yet it may also make it more difficult for authorities not to intervene because European law grants judicial protection to third parties.

However, advances in economics can be helpful in improving predictions on the future effects. This is why, nowadays, the Commission will also apply merger simulation models when assessing the future effects of a concentration. Such models are designed to mathematically calculate the effects of a merger on prices and the interests of a multitude of market participants, including consumers. Even if one were to accept the relevance of the concrete market results for the question of whether a given merger is pro- or anti-competitive, the very use of

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108 One has to take into account, however, that the preparation and negotiation of a merger prior to the decision of the control authority already involves a great amount of effort and financial investment. Hence, foreseeability of the application of the law is also an argument in merger control. In addition, the need for a divestiture is not completely excluded in the system of pre-merger notification, namely in those cases in which the control authority revokes the earlier clearance decision, for instance as a consequence of a successful action of an interested party against the clearance.

109 See above section III.1(c).

110 See Case T-464/04 Impala v Commission [2006] ECR II-2289; the judgment was set aside by the ECJ, see Case C-413/06 P Bertelsmann et al v Impala, [2008] ECR I-0000.

such models may again cause legal dispute as to what kind of a model should be used and whether the relevant data has been adequately selected, collected and taken into account.\textsuperscript{112}

The extent of the difficulties concerning predictions depends on what kinds of effects are considered to be relevant for the assessment of a conduct’s legality. Predictions are made easier in Europe, where current practice only requires the demonstration of the effects on competition, whereas US law requires evidence of direct consumer harm, which makes it more difficult to bring in an antitrust claim. This explains why, in the EU, undertakings that recently faced allegations of anti-competitive behaviour tried to claim that a showing of consumer harm was required under EC competition law in order to prove a restraint of competition.\textsuperscript{113}

Considering these problems, it is advisable that, under the more economic approach, authorities and courts equally avoid predictions on future effects based on economic theories and models and rely to a greater extent on the facts of the relevant case. This will often be possible when applying Articles 81 and 82 EC, and when the authorities and courts are asked to assess the effects of a given conduct on the market ex post.\textsuperscript{114} Finally, it is easier to predict the effects on the competitive process than on the final consumers. Those who favour the requirement of a demonstration of consumer harm, beyond the mere damage to the competitive process, make it more difficult to effectively protect competition and ultimately the consumers.

4. The Excessive Claim of Knowledge

Due to the necessity of making predictions on the economic effects of a given conduct in the future, there is equally a need of knowledge on such effects.

On the one hand, competition lawyers are not allowed to refrain from a decision; on the other hand, economists have to face clear limits as to what they can predict. This is because economic theories can only achieve an approximation to the economic reality and the potentials of economic theory to solve competition law problems are often inherently limited. The latter is true particularly in regard to innovation markets. Industrial economics’ performance is at its best when making statements on price competition and—to put it in economic terms—allocative efficiency. It is relatively common practice for economists to assess and measure available resources. Regarding competition for better products in the sense of dynamic efficiency, industrial economics reaches the limits of predictability since nobody can know which products might eventually not be offered to consumers.\textsuperscript{115}

Those who criticise the more economic approach often refer to Hayek’s concept of ‘competition as a discovery procedure’.\textsuperscript{116} According to this concept, competition has to be understood as a procedure that generates knowledge about the preferences of consumers. Hence, if competition is the way to find out about such preferences, consumer harm cannot be the yardstick for a restraint on competition. A competition policy based on the consumer-harm approach would necessarily fail, since it would pretend to have knowledge which is, in fact, often unavailable.

\textsuperscript{112} As to these problems, see Monopolkommission, \textit{Mehr Wettbewerb auch im Dienstleistungssektor, 16th Hauptgutachten 2004/2005} (2006) paras 115ff (in principle in support of the use of such models). See also Immenga, above n 3, 360.

\textsuperscript{113} See Case T-168/01 GlaxoSmithKline v Commission [2006] ECR II-2969, para 172; Case C-95/04 P, above n 26, paras 103–25.

\textsuperscript{114} In such cases, however, the question will often be whether changes in the market can be traced back to the conduct under review; see accordingly Immenga, above n 3, 358.

\textsuperscript{115} On the lack of usefulness of the static competition model of industrial economics with regard to dynamic efficiency, see U Schalbe and D Zimmer, \textit{Kartellrecht und Ökonomie} (2006) 18ff.

Industrial economists, however, admit their limited knowledge about the future effects of behaviour on the relevant market. Some of them take recourse to an error analysis. Rather than getting lost in the hopeless effort to identify the effects of the conduct of undertakings, they turn to the conduct of the competition law enforcers and assess the effects of this conduct in the light of two types of error: on the one hand, there are so-called false positives (‘type I errors’), which occur when enforcers erroneously ban efficient behaviour; on the other hand, in the case of ‘false negatives’ (‘type II errors’), enforcers do not intervene, although the given conduct of the undertaking damages competition. Economists advise enforcers to assess the consequences of these different errors and, indeed, the probability that they occur before making a decision.

This analysis is recommended particularly regarding the application of competition law to intellectual property. Especially in these cases, however, this approach produces very imprecise and unsatisfactory results. Some economists even argue that enforcers should completely refrain from applying competition law to intellectual property. Since intellectual property creates incentives for innovation, intervention would always risk reducing dynamic efficiency. Advantages in the sense of enhanced price competition could not outweigh the loss in dynamic efficiency.

This view has to be rejected for a number of reasons:

First, the error analysis promotes an equation with only unknown variables. It is not possible to assess the effects of a specific behaviour on innovation; neither is it possible to assess the loss in dynamic efficiency as a consequence of the intervention of the competition law enforcer. The same is true for the impossibility of assessing the probability of different errors. Secondly, the error analysis assumes that intellectual property always enhances innovation. Nowadays, however, intellectual property protection is increasingly criticised for its expansionist tendencies, with the effect of hampering innovation stemming from competitors and of reducing the right-holder’s own incentives to invest in innovation. Thirdly, it is not true that intervention by competition law enforcers can only promote price competition: the Commission and the CFI in Microsoft aimed to maintain incentives for better products within the standardised technology controlled by Microsoft.

The error analysis has to face an additional objection. Under competition law, an assessment has to be made as to whether an undertaking’s conduct restricts competition. In contrast, the error analysis turns around the perspective and assesses the impact of the enforcer’s behaviour on efficiency. In the light of economic theory, such an approach does not create any problems since, in both scenarios, the assessment takes place in the light of the efficiency criterion. From a legal perspective, however, this would presuppose what is not even a consensus among economists, that efficiency is actually the ‘sole’ criterion and goal of competition law. If one generally questions the efficiency criterion or argues that there are at least additional objectives to be promoted by competition law, the error analysis needs to be rejected from the outset. Additionally, the shift of perspective effectuated in the context of the error analysis considers

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117 These types of errors were first developed for the field of medical treatment. In that context, false positives occur when a disease is diagnosed although it is not existent.


120 Case T-201/04, above n 27, paras 647–65, especially para 653.
the enforcing body to be a potential violator of competition, which contradicts the statutorily fixed task of the authority and the courts to ensure and protect competition.

Finally, the discussion on the application of competition law to intellectual property demonstrates that it is better to prefer a policy based on an evolutionary concept of competition designed to protect dynamic competitive processes over a static competition model that relies on efficiency analyses. The evolutionary model does not have to refrain from using modern findings of industrial economics. In combining the two, it is essential for the ‘effects-based’ approach to take into account the effects of the given conduct on the incentives to innovate in the sense of dynamic competition. In order to promote this approach, competition law is definitely in need of more economic research on the processes of innovation in competitive markets.

5. The Disregard of the Institutional Dimension

In the preceding analysis it was stressed that industrial economics, which dominates the more economic approach, tends to ignore the institutional dimension of competition law. This is true, for instance, in regard to the impact a lack of legal certainty has on the behaviour of undertakings.

Above all, industrial organisation economists often refuse to acknowledge fundamental differences between national competition laws. The rules and theories of industrial economics, based on the ‘universal’ efficiency criterion, are developed without due regard to the national system and are advocated to be implemented equally in all systems. Since the economic argument is mostly only used with the intention of reaching an economically more adequate application of existing substantive rules, the more economic approach tends to overlook that, for the creation of an ‘efficient’ competition system, it would be necessary to take into account the whole institutional structure of competition law in the given legal system. Therefore, it is very likely that, in the light of diverging institutional settings, such as in the US and EU, a given economic consideration might have a completely different effect applied in the respective system. Above all, procedures are often characterised by national peculiarities and may even be unchangeable as far as they are based on constitutional guarantees, for instance relating to judicial protection. This is why the guidelines of the Commission could not achieve uniform application of the decentralised European competition law even if they were fully respected by the domestic authorities and courts while the institutional framework in the Member State still differs.

6. Plea for an ‘Even More Economic Approach’

This third part of the chapter has analysed how the Commission and also the European legislature implemented the more economic approach in the different areas of competition law. Additionally, it has discussed whether this policy can contribute to improve the application of the law in the light of modern findings of economics. In this regard, it was possible to identify several problems (above 2–5). Above all, the more economic approach needs to be criticised for its strong methodological focus on industrial organisation theories and for ignoring the institutional framework in the Member State still differs.

121 For an analysis based on evolutionary economics that goes beyond industrial economics, see eg W Kerber and S Vezzoso, ‘EU Competition Policy, Vertical Restraints, and Innovation: An Analysis from an Evolutionary Perspective’ (2005) 28 World Competition 507.

122 In contrast, see DJ Gerber, ‘Competition Law and the Institutional Embeddedness of Economics’ in Drexl et al (eds), above n 66, 20, who warns against the adoption of economic rules developed for US antitrust law for Europe since such rules sometimes only make sense in the US institutional context.
tional dimension. Industrial organisation theories place the pursuit of efficiency gains at the centre of their analysis. This kind of analysis reaches its limits, in particular, in the context of dynamic competitive processes.

These deficiencies of industrial economics do not automatically have to lead to a rejection of its findings. It seems that a much broader theoretical approach that integrates findings of institutional economics, evolutionary competition models, and empirical and experimental research could enrich the more economic approach. Hence, there is an obvious need for an ‘even more economic approach’.

IV. The Objectives of Competition Law from an Economic Perspective

The more economic approach is based on its own economic objectives of promoting consumer welfare and economic efficiency. The following part of this chapter will discuss these objectives. Three levels of the problem will be distinguished: the recognition of consumer welfare as a goal as such (1); the decision made under European law in favour of the so-called consumer surplus standard (2); and the question of whether the goal of consumer welfare needs to be integrated in the legal definition of a restraint of competition (3). The fundamental question from a constitutional perspective is whether economics can in this context replace normative values and objectives.

1. Consumer Welfare as an Objective of European Competition Law

a) The Recognition of Consumer Welfare as an Objective by Community Institutions

Nowadays, it seems almost undisputed among economists that competition law should aim to promote consumer welfare in the sense of economic efficiency. The reason for this, however, does not lie in a particular consumer policy motivation. Consumer welfare is only advocated on the basis of the neoclassical (static) model of price competition, according to which the welfare not only of consumers but of society in general reaches its maximum at the competition equilibrium. Hence, consumers are not protected in the sense of an ultimate goal but merely because the overall benefit for society is largest when markets produce a maximum of goods at the lowest prices. This is actually the description of allocative efficiency according to the neoclassical model.

Industrial economics also recognises the dynamic component of consumer welfare. Accordingly, it is also important that available resources are best employed in view of the development of new products (dynamic efficiency).

b) The Objective of Consumer Welfare in European Competition Policy

The Commission explicitly recognises the goal of consumer welfare in its statements on the more economic approach. For instance, the Discussion Paper on Article 82 EC states:

With regard to exclusionary abuses the objective of Article 82 is the protection of competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources.

123 See, eg Motta, above n 49, 18.
124 Ibid, 19.
125 Discussion paper, above n 68, para 4. See also the similar, though somewhat shorter formulation in the Guidelines on Art 81(3) EC, above n 56, paras 13 and 33.
Effective competition brings benefits to consumers, such as low prices, high quality products, a wide selection of goods and services, and innovation. Competition and market integration serve these ends since the creation and preservation of an open single market promotes an efficient allocation of resources throughout the Community for the benefit of consumers.

In this citation, the Commission mentions the promotion of consumer welfare as just one goal of protecting competition next to economic efficiency. Protection of competition is thereby dealt with not as an end in itself but as a means to promote the economic goals of consumer welfare and efficiency. Here, the Commission does not answer the question whether it is required to show actual harm to the consumer in order to prove a restraint of competition. By listing concrete benefits of competition for consumers, it seems as if the Commission expresses a specific consumer orientation of European competition law.

Consumer welfare as an objective of competition law has recently entered the case law of the European Courts. In GlaxoSmithKline, the CFI states:

In effect, the objective assigned to Article 81(1) EC, which constitutes a fundamental provision indispensable for the achievement of the missions entrusted to the Community, in particular for the functioning of the internal market . . . is to prevent undertakings, by restricting competition between themselves or with third parties, from reducing the welfare of the final consumer of the products in question . . .

c) Consumer Welfare as an Objective from the Perspective of the European Constitutional Order

Recognition of consumer welfare, as the goal of European competition law, cannot easily be derived from the Treaty provisions. From the wording of Articles 3(1)(g) and 4(1) EC, it would be more convincing to rely on a concept of institutional protection of competition as an end in itself. As was shown in section II of this chapter, the entry into force of the Lisbon Treaty would not fundamentally alter this situation.

European competition law refers to consumer interests in several provisions. According to Article 81(3) EC, an exemption requires that a fair share of the benefits resulting from the agreement is passed on to the consumer. Article 82(b) EC mentions the consumer for the definition of one category of an abuse. Finally, Article 2(1)(b) Merger Control Regulation takes the interests of ‘intermediate and ultimate consumers’ into account within the framework of assessing mergers. This latter provision also implements the requirements known from the exemption provision of Article 81(3) EC. Accordingly, in merger review cases the Commission has to consider whether the development of technical and economic progress is promoted, provided that it is to the advantage of consumers and does not form an obstacle to competition. None of these provisions refers to the consumer in the sense of an objective of competition law—only for the purpose of defining anti-competitive behaviour better and of ensuring that competition is not undermined by too extensive exemptions.

Article 153 EC, the general provision on consumer policy, does not suggest that consumer welfare is a priority goal of competition law in the EU. Article 153(3)(a) EC only refers to Article 95 EC, the provision on the internal market, as a proper legislative basis for European consumer policy. Article 153(2) EC stipulates that consumer protection requirements are ‘to be taken into account’ in defining and implementing other Community policies and activities. This reference, of course, also includes competition policy. From a normative perspective, it is

127 Case T-168/01, above n 113, para 118.
128 The Lisbon Treaty would move this obligation to Art 12 TFEU.

686
therefore only possible to justify consumer welfare as one goal of European competition law without any exclusivity or any priority in relation to other potential goals.

It has to be added that the term of the consumer, as used by the competition law provisions in the Treaty, is open to interpretation. According to the general view, the consumer, in the sense of Article 81(3) EC, is not to be understood as the ‘ultimate consumer’. In the light of the meaning of the provision, it is held that customers on all levels of production and distribution can be considered as consumers; the provision does not require that efficiency gains are actually passed on to the ultimate consumer.129

Accordingly, the statements of the Commission and the CFI on consumer welfare as a goal of European competition law are therefore problematic from a legal point of view. The constitutional order of Community law argues more in favour of the view that all market participants are equally protected by the competition rules. Such a conclusion does not change the final outcome that protection of competition against restraints will serve the interests of consumers in particular. These positive effects on consumers and, hence, on all citizens can be considered as an important political argument in favour of having competition law. Competition ensures that consumers have to spend less for the same goods and services and can satisfy their needs with increasingly innovative products. Competition distributes wealth in society more equally than monopolistic markets; this, in turn, corresponds to the goal of ensuring a high level of social protection as mentioned in Article 2 EC. From a constitutional perspective, consumer welfare is to be recognised as a goal of European competition policy, but it is not necessarily the only goal.

2. The Consumer Surplus Standard in European Competition Law

One of the most difficult and disputed questions of competition policy is whether a total welfare standard or a consumer surplus standard should be applied. As explained above, consumer welfare in the sense of maximising the benefits of consumers usually coincides with general welfare. There are, however, deviations.130 If, for example, the suppliers of goods and services gain more than consumers lose, then the relevant conduct would be held to be legal under the total welfare standard, even though consumers are disadvantaged.

a) The Economic View

Economists usually prefer the total welfare standard. This can be explained by the simple fact that only this standard corresponds to the efficiency criterion.131 The dispute is only relevant for the application of merger control laws.132 Concentrations can lead to a loss in allocative efficiency by reducing the intensity of competition but, at the same time, they may increase the productivity of the new and larger entity (so-called productive efficiency). If the gains in productive efficiency outbalance what is lost on the side of allocative efficiency, the new entity

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130 See Motta, above n 49, 19.

131 See Motta, above n 56, 20. Motta, ibid, 21ff, supports the total welfare standard.

132 Motta, above n 49, 19, also mentions the only additional theoretical case of perfect price discrimination. In that case, the undertaking manages to charge each individual consumer with exactly the price that this consumer is willing to pay. In such a case, the market works efficiently. However, all efficiency gains go to the undertaking.
may easily compensate consumers by charging lower prices. Because of the reduction in competition, however, there is no guarantee that such efficiencies will actually be passed on to consumers. Under the total welfare standard, such a concentration would still be cleared. In contrast, the consumer surplus standard does not exclude the efficiency defence as such but requires that consumers are no worse off than without the concentration.

Despite the efficiency argument, some economists favour the consumer surplus approach. Besanko and Spulber, for instance, rely on institutional arguments. They argue that in the case of a merger there is an information asymmetry regarding potential efficiencies, which favours the merging undertakings. This asymmetry creates incentives for the undertakings to exaggerate the efficiency gains. The consumer surplus standard would here create a counterweight that could prevent clearance of a merger solely based on the efficiency information of the merging companies. Motta, on the other hand, defends the total welfare standard. He argues that the conflict between undertakings and consumers is not a real one since, nowadays, normal citizens hold large portions of the shares in big corporations. Additionally, efficiency gains that go to the undertakings would help them to further invest in research and development. Consequently, the consumer surplus standard would only privilege current consumers and would disadvantage the next generation of consumers.

b) The Legal Situation under European competition law

Without any further discussion, it is generally assumed that European competition law applies the consumer surplus approach. In fact, this result seems self-evident from the wording of Article 81(3) EC. According to this provision, consumers only have to accept restrictions of competition to the extent that the advantages accruing to them from the agreement at least outbalance the disadvantages. The model of Article 81(3) EC has also been transferred by the Commission to merger control law. According to the Guidelines on horizontal mergers, the Commission will only recognise an efficiency defence under the condition that consumers are not disadvantaged.

The introduction of an efficiency defence in accordance to the example of Article 81(3) EC for the application of Article 82 EC was also discussed by the Commission in its 2005 Discussion Paper. A little more than a year later, the ECJ went ahead without any obvious constraints and accepted an efficiency defence in line with the Discussion paper in British Airways. The ECJ states:

It has to be determined whether the exclusionary effect arising from such a system, which is disadvantageous for competition, may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer. If the exclusionary effect of that system bears no relation to advantages for the market and consumers, or if it goes beyond what is necessary in order to attain those advantages, that system must be regarded as an abuse.


\[134\] Motta, above n 56, 20. Against Motta’s second argument, it has to be stated that reinvestment of the efficiency gains is by no means guaranteed. Such profits may as easily be transferred to the shareholders. Finally, Motta does not consider that incentives for innovation arise in particular from competitive pressure.

\[135\] Likewise also Motta, above n 49, 19ff.

\[136\] Equally the Guidelines on Art 81(3) EC, above n 56, para 85.

\[137\] Horizontal Merger Guidelines, above n 64, paras 79–84. See also Schwalbe and Zimmer, above n 115, 367–72.

\[138\] Discussion paper, above n 68, para 84.

\[139\] Case C-95/04 P, above n 26, para 86.
In the US to date, it has remained unclear whether the law follows a total welfare standard or the consumer surplus standard. The US Merger Guidelines are less explicit in this regard than the European ones.\footnote{Horizontal Merger Guidelines, revised 8 April 1997, 4, available at http://www.usdoj.gov/atr/public/guidelines/hmg.htm#4 (accessed on 20 November 2008); siehe auch F Alese, \textit{Federal Antitrust and EC Competition Law Analysis} (2008) 477ff.}

c) The Consumer Surplus Approach and the Efficiency Defence from the Perspective of the European Constitutional Order

From the perspective of the European Constitutional Order, the rejection of the total surplus standard is not surprising. Its recognition would actually conflict with the decision taken within the framework of Article 81(3) EC. However, Article 81(3) EC does not automatically justify a general application of the consumer surplus standard. This standard is likewise based on an efficiency analysis and therefore requires legal justification. Hence, the more essential question is whether the goal of economic efficiency is also supported by the European Constitutional Order. In fact, it is the efficiency criterion in general, as used by the more economic approach,\footnote{See E-J Mestmäcker, ‘Die Interdependenz von Recht und Ökonomie in der Wettbewerbspolitik’ in Monopolkommission (ed), \textit{Zukunftsperspektiven der Wettbewerbspolitik} (2005) 19.} and the efficiency defence in particular that attract most criticism. Zimmer, for instance, rejects any justification of mergers based on efficient gains.\footnote{Zimmer, above n 66.}

Some economists agree that the legal relevance of the efficiency goal cannot be explained easily. This is demonstrated by Hellwig, who refers to the definition of the efficiency criterion. According to him, efficiency can be justified without further legal recognition only in the sense of the Pareto criterion. According to this criterion, a situation is more efficient than another when all interested parties are better off. Hellwig argues that in the field of competition law the Pareto criterion is never fulfilled. Even in the case of most serious violations, like a price cartel, will a fine without any compensation be imposed on the cartel member. This is why, according to Hellwig, economists behave in an intellectually dishonest way when they argue that considerations of distribution are irrelevant for competition policy. The pure efficiency criterion cannot explain competition law.\footnote{Hellwig, above n 4, 29ff.} With these arguments, Hellwig criticises not the efficiency defence but the criterion of efficiency as a justification for state intervention. Competition policy, as he explains, not only serves the efficiency goal, it also leads to redistribution.\footnote{See also M Hellwig, ‘Effizienz oder Wettbewerbsfreiheit? Zur normativen Grundlegung der Wettbewerbspolitik’ in C Engel and W Möschel (eds), \textit{Recht und spontane Ordnung} (2006) 231, 238ff.} Consequently, Hellwig stresses the need for additional criteria that can justify such redistribution.

A solution would consist in justifying the intervention in the light of the freedom paradigm.\footnote{On these lines, see Mestmäcker, above n 141.} Competition policy would, accordingly, have to be considered an instrument to protect the freedom of competition. Indeed, Hellwig accepts this goal. Yet this goal is hardly able to provide criteria to identify a restraint of competition. For this purpose, Hellwig suggests an analysis in the light of positive and negative effects on competition\footnote{Hellwig, above n 144, 264.} and, herewith, meets the more economic approach. Since undertakings compete with regard to the other market side, a restraint of competition has to be defined from the perspective of consumers.\footnote{Ibid, 264ff.} Hence, according to Hellwig, it is not the total welfare as defined by the efficiency criterion but solely the consumer welfare approach that should be applied as an indicator for the positive and negative effects on competition.\footnote{Ibid, 264.}
Hellwig’s view provokes great fascination, as he seems to identify a theory that can justify the ‘effects-based’ analysis of the more economic approach with the freedom paradigm. Hellwig requires a demonstration of consumer harm not because he wants to protect consumers in particular, but because he thinks that this is the only way of avoiding the protection of competitors instead of competition. At the same time, he provides an economic explanation as to why competition law has to rely on consumer welfare, which, however, he does not define in the sense of efficiency.

Hellwig’s ideas seem consistent, yet his assumption that an enforcement action cannot be explained in the light of efficiency has to face criticism. Like many economists, he focuses his analysis on the behaviour of the competition enforcer rather than the conduct of the concerned undertaking. If one were to focus on the undertakings’ conduct, then one would have to acknowledge that a cartel moves the market away from the most efficient situation. Of course, the cartel also produces distributive effects as it transfers income from the other market side to the cartel members. Thus, it reduces both consumer surplus and total welfare. According to Hellwig, there is still a necessity to justify why the authority can intervene and prohibit the cartel without compensating the cartel members. This can obviously be explained by efficiency considerations. If the law were to grant compensation, it would further incite the undertakings to enter into the inefficient cartel agreement, since there would be no risk of losing anything. The efficiency goal even argues in favour of imposing an additional sanction to deter the undertakings from departing from the efficient result.

Thus, the efficiency criterion can explain the existence of a restraint of competition and justify state intervention. However, this still does not explain why economic efficiency has to be recognised as an objective or even as the exclusive objective of competition law. Efficiency, in the sense of a guarantee of the most optimal use of resources, does not raise any concerns from a legal or constitutional perspective, but it is nevertheless impossible to justify efficiency as an exclusive goal of competition law.

3. Consumer Harm as a Requirement for a Restraint of Competition

The question of whether to require a demonstration of consumer harm when assessing a restraint of competition is most relevant for the application of Article 82 EC, yet in the GlaxoSmithKline judgment of the CFI, the discussion has also reached the concept of a restraint of competition under Article 81(1) EC.

a) The Economic View

From the perspective of industrial economics, there are obvious arguments in favour of the requirement to demonstrate consumer harm. First, the logic of the efficiency analysis argues for a thorough assessment of all effects of the specific conduct on the relevant market. Secondly, since economic efficiency is defined in relation to the preferences of the market participants, it seems almost mandatory to go beyond protecting the ‘structure of the market’—in contrast to the European Courts’ view—and to rely on the concrete effects on consumer interests. These general arguments apply to all rules of competition law, including Article 81(1) EC.

149 Ibid, 266.
150 Likewise Basedow, above n 126, 713–15, by also referring to the institutional protection of undistorted competition as guaranteed by Art 3(1)(g) EC.
151 See above section II.1(c).
Of course, the question is most important for the identification of an abuse in the sense of Article 82 EC. Since the wording of this provision makes clear that not every unilateral conduct of a market dominant undertaking is prohibited, the challenge consists in finding criteria to distinguish legal from illegal conduct. Economists tend to require the demonstration of consumer harm just like the EAGCP\textsuperscript{153} or Hellwig,\textsuperscript{154} who is a member of the EAGCP, does. This is explained by the fact that undertakings have to compete for consumers and that only by requiring consumer harm is it possible to prevent enforcers from protecting competitors instead of competition.

b) Practice of European Competition Policy

With the judgment of the CFI in \textit{GlaxoSmithKline}, it seems that the view according to which there is a need to demonstrate consumer harm has gained a first and important victory in the field of Article 81(1) EC. The Court had to decide on the legality of a contractual system that aimed at preventing wholesalers from selling pharmaceuticals to another Member State. The CFI not only considered the restriction of the economic freedom of the wholesalers to be a requirement for a restraint of competition but, in addition, required a demonstration of consumer harm. In this regard, the decision marks a clear paradigm shift.\textsuperscript{155} Still, the explanation of the Court remains very superficial:\textsuperscript{156}

However, as the objective of the Community competition rules is to prevent undertakings, by restricting competition between themselves or with third parties, from reducing the welfare of the final consumer of the products in question... it is still necessary to demonstrate that the limitation in question restricts competition, to the detriment of the final consumer.

This explanation can in no way be satisfactory. Even if one accepted the promotion of consumer welfare as the objective of the European competition law, this would not automatically require the demonstration of consumer harm as the legal test for a restraint of competition.\textsuperscript{157} Many legal provisions prohibit conduct with the objective of protecting specific interests, without requiring immediate harm to these interests. Law often intervenes before the actual harm has occurred and bans conduct that merely jeopardises such protected interests.\textsuperscript{158} Nevertheless, the existence of such rules does not exclude, in essence, that there are good reasons to require a demonstration of consumer harm. In \textit{GlaxoSmithKline}, however, the CFI did not provide any reasons; rather, it concluded automatically from the consumer welfare objective to require consumer harm as part of the legal test.

Both the ECJ, in \textit{British Airways}, and the CFI itself, in the later \textit{Microsoft} judgment, rejected the demonstration of consumer harm as a requirement for an abuse in the sense of Article 82 EC and reaffirmed the concept of ‘indirect protection of the consumer’ by protecting the ‘structure of competition’.\textsuperscript{159} However, in these decisions the Courts, apart from citing early decisions like \textit{Continental Can}, did not provide any explanation either.

\textsuperscript{153} See above section III.1(d).
\textsuperscript{154} See above section IV.2(c).
\textsuperscript{155} Equally Behrens, above n 152, 37.
\textsuperscript{156} Case T-168/01, above n 113, para 172.
\textsuperscript{157} Also opposing such a view is R Zäch, ‘Competition Law Should Promote Economic and Social Welfare by Ensuring the Freedom to Compete’ in Drexl et al (eds), above n 66, 121.
\textsuperscript{158} Such rules can also be found in competition law. For instance, § 21(1) of the German Act against Restraints of Competition bans the mere call on others to participate in a boycott. The call only jeopardises competition, whereas competition would only be restricted once the person called upon joins or agrees to join the boycott. On the dogmatic characterisation of the provision, see S Rixen, in H von Hahn et al (eds), \textit{Frankfurter Kommentar zum Kartellecht} (2002) § 21, para 3.
\textsuperscript{159} Case C-95/04 P, above n 26, para 106; Case T-201/04, above n 27, para 664.
c) The Consumer Harm Requirement from the Perspective of the European Constitutional Order

At first sight, the wording of the EC Treaty does not seem to provide any clear indication as to whether the consumer harm requirement should be accepted for the assessment of a competition restraint. However, an analysis of those provisions that explicitly mention the consumer still turns out to be quite fruitful.

Rather than defining the requirements for a restraint of competition, Article 81(3) EC refers to the interests of the consumer in the context of defining limits to the granting of exemptions. Thereby, the provision puts the requirement of consumer participation in the benefits at the same level as the one according to which an exemption must not substantially eliminate competition. In accordance with the principle of coherent interpretation of the Treaty, this latter requirement of Article 81(3) EC is generally understood in the sense that it prohibits the conclusion of agreements that would constitute an abuse in the sense of Article 82 EC.\(^\text{160}\)

It has to be emphasised that both the aforementioned requirements of Article 81(3) EC share the same protective character. After the assessment of all pro- and anti-competitive effects, the two requirements aim at ensuring that the exception does not harm consumers or substantially eliminate competition. If one already required consumer harm for a restraint of competition in the sense of Article 81(1) EC, the requirement of consumer participation in the benefits of the agreement in Article 81(3) EC would lose all its relevance. If, in a given case, harm to consumers could be demonstrated as a requirement of Article 81(1) EC, then an exemption of Article 81(3) EC would be excluded from the beginning, as consumer participation in the benefits is a cumulative requirement for the exemption.\(^\text{161}\)

This structure of Article 81 EC already explains why it is better to limit the test, under Article 81(1) EC, to the assessment of anti-competitive effects on the competitive process. This is also the Commission’s approach. In its Guidelines on Article 81(3) EC, the Commission only suggests an assessment and balancing of the positive and negative effects on intra- and inter-brand competition.\(^\text{162}\) Hereby, the Commission refers to effects on prices, output, innovation or the variety or quality of goods and services that can be expected with a reasonable degree of probability.\(^\text{163}\) Such effects, of course, interest consumers most. However, the Commission’s approach falls short of a clear consumer-harm approach by not requiring actual harm to the consumer.

In general, the more economic approach in Article 81(3) EC is implemented in a process-oriented way. This corresponds to the legal structure of Article 81(3) EC. Pro-competitive effects can, in principle, outbalance the disadvantages accruing from a restrictive agreement. If, however, competition were eliminated in the long run, it would no longer be guaranteed that efficiency gains, in the sense of the provision, would be passed on to the consumer. In conformity with this concept, the Commission formulates in the Guidelines on Article 81(3) EC:\(^\text{164}\)

Ultimately the protection of rivalry and the competitive process is given priority over potentially pro-competitive efficiency gains which could result from restrictive agreements. The last condition of Article 81(3) recognises the fact that rivalry between undertakings is an essential driver of economic

\(^\text{160}\) See Guidelines on Art 81(3) EC, above n 56, para 106.

\(^\text{161}\) The CFI in *GlaxoSmithKline* seems to have overlooked this inconsistency in its interpretation of Art 81 EC. After affirming a restraint of competition in the sense of Art 81(1) EC based on consumer harm, the Court nullified the decision since the Commission had wrongfully rejected prevailing pro-competitive effects. Therefore, the Court was not really required to clarify the question of whether the agreement creates benefits for consumers; see Case T-168/01, above 113, paras 309ff (on the issue of consumer benefits).

\(^\text{162}\) Guidelines on Art 81(3) EC, above n 56, paras 11 and 17.

\(^\text{163}\) Ibid, para 24.

\(^\text{164}\) Ibid, para 105.
efficiency, including dynamic efficiencies in the shape of innovation. In other words, the ultimate aim of Article 81 is to protect the competitive process. When competition is eliminated the competitive process is brought to an end and short-term efficiency gains are outweighed by longer-term losses stemming inter alia from expenditures incurred by the incumbent to maintain its position (rent seeking), misallocation of resources, reduced innovation and higher prices.

This dynamic understanding of competition protected by Article 81 EC is of fundamental importance for the test to be applied. An analysis, in the light of the efficiency criterion, which originates from the static equilibrium model of competition constantly runs the risk of ignoring the dynamic dimension of competition. The concept of protecting the ‘competitive process’ is enacted in Article 81(3) EC in the form of the two requirements: the consumer has to participate in the efficiency gains and competition may not be substantially eliminated. The requirement of demonstrating consumer harm, already in the context of Article 81(1) EC, introduces an additional requirement for the application of Article 81(3) EC and thereby makes it more difficult to protect the competitive process.

The Commission seems to favour such a concept of protecting the competitive process in its Discussion Paper, in opposition to the EAGCP. Thus, for the application of Article 82 EC, the Commission does not link the ‘effects-based’ approach to the immediate interests of consumers and only requires foreclosure effects. This requirement has to be strictly distinguished from the mere exclusion of competitors. Excluding less efficient competitors from the market is also legal according to the approach advocated by the Commission, provided that such exclusion is not based on the creation of artificial market entry barriers.

4. Conclusion

The preceding analysis showed that current Community law does not support consumer welfare either as an exclusive objective of competition law or as a criterion of efficiency. Furthermore, the legal analysis of the Treaty provisions only support indirect protection of consumer interests by effective protection of the competitive process as an expression of a concept of dynamic competition. The promotion of the effective allocation of resources can be integrated in this concept since this goal is best ensured by effective protection of the competitive process, which equally serves consumer interests.

The ‘effects-based’ (more economic) approach can easily be combined with the protection of the competitive process. In the framework of the competition law analysis, it suffices to assess the effects on competition; the demonstration of consumer harm should not be required. The concept of protecting the competitive process reduces the problem of legal uncertainty and the necessity to make predictions on future effects, thus avoiding the requirement of obtaining knowledge that is not actually available.

On the other hand, the foregoing analysis also indicates that European competition policy has become increasingly uncertain as to these fundamental principles. This can be seen in many statements from the Commission in recent years where it explicitly acknowledges the objectives of consumer welfare and efficiency without any practical need. GlaxoSmithKline provides the first decision in which the European Courts required a demonstration of consumer harm for a restraint of competition, yet both the Courts and the Commission resisted the temptation to also require consumer harm for an abuse in the sense of Article 82 EC. The Courts attract criticism in this regard for only justifying their approach with the citation of the early decision in Continental Can and reference to the idea of indirect protection of the consumer by protecting the ‘structure of competition’. This concept of protecting the competition structure, which is only explained by the specific facts of Continental Can, should be replaced—in

165 See above section III.1(d).
particular regarding exclusionary practices—with the term of protecting the 'competitive process'. Unfortunately, the position of the Commission to protect the competitive process does not seem to be firmly established as long as the implementation of the more economic approach does not make substantial progress.

V. The Economic Approach in the Light of Constitutional Objectives

Whereas the preceding part of this chapter discussed the objectives promoted by economic theory from the Community legal system’s perspective, the following part will ask to what extent specific objectives of the European Constitution may still be relevant in the framework of the implementation of the more economic approach. The analysis will concentrate on the freedom paradigm with its human rights dimension and the objective of integration. Both have significantly contributed to the development of European competition law and, as principles of competition law, have equally attracted criticism from legal theory.

1. The Freedom Paradigm

In the light of the freedom paradigm, the relationship between the more economic approach and the two concepts of the economic freedom of action and of the freedom of competition is in need of clarification.

a) The Economic Freedom of Action of Individual Market Participants

From a human and civil rights perspective, the following analysis puts a first focus on the protection of the market participants' individual freedom. In Community law, this freedom is especially protected as an individual right by the fundamental freedoms.\(^{166}\) In addition, the *Courage* judgment of the ECJ on damage claims provides clear indications as to the recognition of a material understanding of the freedom of market participants.\(^{167}\) The Court states, in this regard, that the damage claim has to be granted to a party of a restrictive agreement provided that the party

found himself in a markedly weaker position than the other party, such as seriously to compromise or even eliminate his freedom to negotiate the terms of the contract and his capacity to avoid the loss or reduce its extent, in particular by availing himself in good time of all the legal remedies available to him.\(^{168}\)

The protection of economic freedom of action will be strengthened by the Lisbon Treaty, which places the protection of the freedom to conduct a business, in Article 16 of the Charter of Fundamental Rights, on the level of legally binding Union law (Article 6(1) TEU-Lis).

The Community guarantee of economic freedom has to be taken into account when undertakings are addressees of enforcement measures of competition law.\(^{169}\) In the future, Article 16 of the Charter will play an important role in this regard. The freedoms of Community and Union law, however, protect not only the alleged violator of competition law but all market participants. This has to be recognised for the implementation of the more economic approach.

\(^{166}\) See the first edition; see also Drexl, above 89, 646ff.
\(^{167}\) Ibid, 653ff.
\(^{168}\) Case C-453/99, above n 84, para 33.
In the light of the constitutional guarantees of individual freedom in the Treaty, the critique expressed by many economists vis-à-vis the freedom paradigm, according to which competition law should only protect competition but not competitors, has to be particularly scrutinised. From a constitutional perspective, such a general critique cannot be supported. However, in the context of human and civil rights protection, competition law reacts to the problem of co-ordinating conflicting individual rights. The delimitation of individual spheres of freedom is especially needed in the context of economic competition. In this sense, economic freedom in the market cannot be understood either as absolute freedom of the dominant undertaking from state intervention or as the protection of weaker and less efficient competitors from failing in the market.

b) Protecting the Freedom of Competition

The solution of the problem of co-ordinating colliding freedoms of the market participants from a constitutional perspective has to be found in the protection of the freedom of competition. The law should primarily consider the market as a decentralised system in which individual freedoms are co-ordinated. It is only when they restrain competition that undertakings cross the limits of their constitutionally protected freedom. These arguments correspond to the classical ordoliberal thinking. The freedom paradigm argues in favour of protecting competition as an institution. Through the protection of competition, the law at the same time protects the underlying individual freedoms.

The question remains whether the freedom paradigm can also provide guidance for the practical application of competition law. The freedom paradigm is not capable of bringing clarity to the concept of a restraint of competition. Individual freedom forms the basis of free competition. If it is the task of competition to delineate spheres of individual freedoms, as shown above, the freedom paradigm will not be able to define a restraint of competition. This is in fact why one has to take recourse to the economic effects of a given conduct on the relevant market. This also means that there is no inherent conflict between the more economic approach and the freedom paradigm.

The freedom paradigm, however, promotes a concept that focuses on the protection of competition as an institution. Thereby, the dynamic dimension of competition should adequately be taken into account and the exclusive use of static and efficiency-oriented economic considerations should be avoided.

The freedom paradigm is undermined if efficiencies are accepted as a justification for a restraint of competition. Efficiencies should only be taken into account insofar as, in the long run, the competitive process is effectively protected. In contrast, the freedom paradigm argues in favour of protecting the openness of markets. Undertakings should be able to enter markets based on their own performance.

In this context, the consumer also plays an important role. Whether an undertaking is more successful in competition than in others can only be determined in the light of consumer preferences. However, as knowledge about such preferences is limited and only undistorted competition can produce such knowledge, it is essential to protect consumer choice.

A policy that requires the demonstration of consumer harm for a restraint of competition does not correspond with the principle of free competition. This can be explained in the light of the Standard-Spundfass decision of the German Federal Supreme Court (Bundes-

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170 More cautious is W Möschel, 'Wettbewerb zwischen Handlungsfreiheiten und Effizienzzieilen' in Engel and Möschel (eds), above n 144, 355, 366.
171 Similarly in favour of a competition policy based on the freedom paradigm is D Zimmer, 'Der rechtliche Rahmen für die Implementierung moderner ökonomischer Ansätze' [2007] Wirtschaft und Wettbewerb 1198.
In this case, the Court assumed that the patent holder for a barrel used in the chemical industry had a duty to license the patent to all interested parties. This duty to license was justified by the fact that the patent controlled access to a technology that the industry had selected as a standard. In the process of standardisation, the later patentee had agreed to grant a licence for free to all manufacturers of barrels who had competed for the standard. Later on, another manufacturer appeared to whom the patentee refused the licence. In its decision, the court did not consider whether consumers would suffer harm because of the refusal. Indeed, such harm could hardly be expected. In a market with a number of producers who offer standardised products based on the same patent, the entry of an additional competitor will have hardly any beneficial effects on prices and quality. Still, the protection of the freedom of competition argues for intervention in this case. Generally all competitors should have the same opportunity to enter the market.

Apart from the Commission’s reference to consumer welfare and economic efficiency as the goals of competition policy, the case law of the European Courts and the policy declarations of the Commission on the more economic approach are largely in line with the aforementioned principles. It can be seen that the more economic approach can be brought into conformity with the freedom paradigm.

2. Economic Integration

European competition law differs from other competition laws due to the additional goal of ‘market integration’. The Commission continues to support this goal in its statements on the more economic approach. On the one hand, the Commission seems to be of the opinion that market integration is in conformity with the goal of allocative efficiency and that market integration simply implements a system of efficient allocation of resources at the higher European level. On the other hand, Motta describes market integration as a political goal, which is not necessarily in conformity with the goal of economic welfare.

Indeed, the goal of market integration is encountering growing criticism. Most importantly, it is pointed out that dividing markets may well react to different conditions in local markets and therefore enable efficient price discrimination. It seems that in such scenarios different objectives actually collide with each other. Market integration is certainly an ‘economic’ objective, though one which is not always in conformity with the findings of industrial economics.

Territorial restrictions provide the manufacturer of goods or provider of services with the possibility to sell goods or services at different prices in different markets. This usually serves the interests of consumers in countries with a low income level. Conversely, a ban on territorial restrictions incites the manufacturer or service provider to charge identical or more similar prices in different countries. The strict European ban on vertical restraints, especially those excluding passive sales of retailers to customers domiciled outside the protected territory, serves the purpose of gradually harmonising the living standard in the Member States.

It is not possible to argue that integration has attained such a high level by now that it is no longer necessary to maintain integration as a proper goal of competition law. Such an argument

\begin{footnotes}
173 See, eg the Guidelines on Art 81(3) EC, above n 56, para 13.
174 Ibid.
175 Motta, above 49, 23.
177 See, above all, Art 4(b) Vertical Agreements Block Exemption Reg 2790/1999.
\end{footnotes}
may be justified regarding some Member States, whereas the most recent rounds of enlargement have aggravated economic disparity within the EU. In the framework of Article 81 EC, the Commission was obviously willing to make an exception from the standard economic assessment known from the more economic approach with respect to territorial restraints by including the prohibition of passive sales in the list of hard-core restrictions.

VI. Conclusion

The analysis of the provisions of the Lisbon Treaty demonstrate that the guarantees of undistorted competition in the internal market and of an open market economy with free competition still belong to the fundamental principles of the European economic constitution. In comparison to the current Treaty provisions, it cannot be excluded that the goals promoted by the economic approach, namely consumer welfare and efficiency, might enter the European economic constitution more easily.

In its more economic approach the Commission advocates a competition policy that essentially focuses on the economic effects of a given conduct on the relevant market. In order to identify these effects, the Commission relies on modern findings of industrial economics. The more economic approach creates problems when seeking to achieve optimal economic results in each individual case without taking into account the loss of legal certainty. Moreover, the more economic approach requires difficult predictions on future effects, whereas knowledge, especially with regard to future consumer preferences and future innovation, is usually not available.

From the perspective of the Community’s constitutional order, a policy orientated solely towards the economic goals of consumer welfare and efficiency is highly problematic. The Commission adopts the terminology of such goals but largely continues to focus on the effects on the competitive process, without requiring a demonstration of consumer harm. This approach is supported by the case law of the European Courts, which, based on the guarantee of undistorted competition in the internal market, requires no more for a restraint of competition than harm to the ‘competition structure’.

The Commission would be well advised to resist the temptation to require consumer harm for a restraint of competition. European competition prefers, and should continue to prefer, a dynamic concept of competition focused on keeping markets open and on sustainable protection of the competitive process. Even in the framework of Article 82 EC, proof of consumer harm should not be required. In order to safeguard against the risk of protecting competitors, instead of protecting competition, it suffices to identify market-foreclosing effects of a given unilateral conduct. Requiring proof of actual consumer harm would hamper effective protection of competition, lead to the problem of unavailable knowledge, especially in innovation markets, and make a most difficult balancing of interests necessary when consumers do not share the same interest.

A competition policy that focuses on the protection of the competitive process conforms with the objectives of the Union’s constitutional order. Despite the critique expressed by economists regarding the ordoliberal way of thinking, there is no fundamental conflict between the ‘effects-based’ approach and the freedom paradigm in competition law. The objective of economic integration, which can collide with a purely economic approach, is correctly maintained by the Commission even in the context of the economic approach.

It can be concluded that the economic approach can be brought into conformity with the constitutional order of the EC and the future EU. Nevertheless, the general feeling of uneasiness indicated at the beginning of this chapter is created by serious concerns. The analysis identified a number of developments which, in the future, may lead to an integration of
doubtful economic objectives in different regards. The citation of consumer welfare and allocative efficiency as the objectives of competition law by the Commission, the recognition of a nevertheless ‘mitigated’ efficiency defence—mitigated by the consumer surplus standard—in the field of merger control and of Article 82 EC, the requirement to show consumer harm for a restraint of competition in Article 81(1) EC by the Court of Justice in GlaxoSmithKline and, finally, the growing criticism on maintaining the objective of integration should be mentioned here. Hence, the future of European competition law remains uncertain.
Part V

Contending Visions of European Integration
I. Introduction

The institutionalised European integration realised by the European Union and Community is one of the most significant and remarkable evolutions in the history of the last century. After a gradual start, almost all of the states in Central and Western Europe, as well as in Central Eastern Europe, are presently united in a comprehensive organisation with far-reaching sovereign rights, exercised independently by its own institutions. The few states that are not included are mostly connected by comprehensive agreements.

The Union was agreed to freely by treaty and, unlike historical precedents, did not come about by use of force, dictatorship or hegemony. It first united the victorious powers of World War II with a defeated and proscribed Germany. Germany was not, as after World War I, suppressed in perpetuity by requirements and supervision, which could not have succeeded, but was instead accepted into the circle of states as an equally entitled member.\(^1\)

On this basis, over nearly six decades a European order has gradually emerged that more or less intensely covers, or at least touches upon, most areas of the public and private life of the Member States and their citizens. On one hand, the Member States support this order as founders and central actors, while, on the other hand, they are subject to this order as members and addressees of the law. The citizens of the Member States are immediately connected to the Union and its law by direct rights and obligations, yet the Member States are not fully integrated into the Union but rather subsist as subjects of international public law and hold responsibility for the future of their peoples.

Hopes to give new impulses to the Union were connected to the Treaty establishing a Constitution for Europe but they turned out to be illusory, at least after the failure of referendums in France and the Netherlands. The parties to the Treaty therefore adopted a more modest method in the Treaty of Lisbon, signed on 13 December 2007. This Treaty amended the existing Treaties by including the dispositions of the Constitutional Treaty, a move that strengthens the functions of the Union but avoids constitutional pathos. Since the Treaty will only enter into force if ratified by all Member States, which remains unsure after the recently failed referendum in Ireland, the following considerations must be based on actual Community law as last determined by the Treaty of Nice. The new direction given by discussions on the Treaty of Lisbon, however, will no doubt effect the development of the Union and must therefore be included in the considerations that follow.

As a member of the war generation, the present author sees European integration, and the diminishing of the disastrous role of the classical nation-state associated with it, as a historical response to dictatorship, war and genocide. During the first decades of the Union, he was a member of the German administration active at the intersection of the Union and its Member States. The services constantly strived to balance the demands and pretensions of common policies and the manifold requirements of the German, federally organised constitution state. This experience forms the foundation of my personal view of the present state of the Union, which is presented in this contribution. It will begin with the origin of the Union and its political and economic vocation.

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2 As a rule and in the interest of simplification, provided the context does not require otherwise, this article will refer to the Union and Union law as including the Community and Community law respectively, although the latter remains, as before, its own legal entity.


4 These experiences have been reflected in the following volumes of selected articles: Das Europäische Gemeinschaftsrecht im Spannungsfeld von Politik und Wirtschaft (1985) and Unterwegs zur Europäischen Union (2001). The present text is largely based on the views set out there in more detail.

5 The author presumes that the course of events in the development of the Union and Community is known and therefore is not supplying references in this regard.
II. Foundations of the European Union

1. Goals of the Union

a) Establishment of the Union

The European Union can, as already observed, only be seen against the background of the catastrophes of the preceding century.\(^6\) After war, despotism, and genocide, Europe was largely destroyed and discordant. The states liberated after the end of the war intended to restore their constitutional order, to overcome the destructions caused by the war, and to ameliorate their citizen’s quality of life. They must now find a new orientation in the ensuing confrontation between East and West.

Germany was divided, after the total collapse, into zones governed by the occupying powers and only gradually began to take its own shape. Whilst the eastern part remained within the frame of the socialist states of the East, the western part organised itself as a federal state and succeeded in starting a steady economic rise. It made two fundamental political decisions aimed at permanently excluding repetitions of warlike and dictatorial developments. First, with the Grundgesetz (German Basic Law) and founding of the Bundesverfassungsgericht (Federal Constitutional Court), it established conditions for a free, Western-oriented, democratic constitutional state. Secondly, it decided to participate in a supranational union of European states.

This short summary simplifies what were in retrospect year-long, hard and difficult struggles and discussions. They were complicated by the fact that both processes mutually affected each other and also soon collided, since democracy and the rule of law in the young Federal Republic were exposed to supranational influences which could overrule the decisions of the national institutions. The conflicts which arose out of this situation became evident most recently in the well-known Solange and Maastricht decisions of the Bundesverfassungsgericht.

The opening up of the Federal Republic vis-à-vis the unification of Europe corresponded to comparable efforts in the other states of Western Europe that had suffered under war and occupation. The roots of these efforts reach back far into the past, but failed at the outset, especially in the 1920s and 1930s, due to the exaggerated nationalism of the pre-war era. Only under the influence of the devastating results of the war did the call for a union of European states and their peoples have a chance of being realised. Survivors of the war generation on all sides rose up, in the face of considerable resistance, to make the recurrence of such a catastrophe impossible.\(^7\)

The concrete impetus for the integration institutionalised in the Union was the well-known declaration by the French Foreign Minister Schuman, which proposed uniting the coal and steel industry of the core states of Europe, calling this a ‘first concrete foundation for a European federation’. The future-oriented significance of this initiative was that all participating states were to subject themselves in the same manner to the Community regime. This basic principle, which barred discrimination and hegemony on the part of individual Member States, was and is today the foundation for all further steps towards integration.

This offer gave the newly created Federal Republic of Germany the opportunity to emerge from outlaw status and isolation after the war and to return as an equally entitled member of

\(^6\) This aspect is little considered by many authors, especially Anglo-Saxon authors; see, eg the much-heeded book by L Siedentop, *Democracy in Europe* (2000).

the community of states. This led to the lifting of the Ruhr statute and, later on, also of the occupation statute. A fundamental orientation of the new Federal Republic towards the West accompanied this move, which destined the future of the Republic. Alignment with Western democracies strengthened internal stability and, at the start of the cold war, guaranteed external security within the framework of the Western Alliance.

The motives of the partner states were nearly the opposite, but the end result corresponded with the German motives as both sought to avoid a recurrence of inner-European military hostility. The Allies wanted to bind West Germany, which was once again economically strengthening itself and whose rearmament was being discussed, firmly to a supranational context. By grasping at coal and steel, which at the time was seen as the basis for armaments, they wanted to preclude Germany from acting unilaterally in the future.\(^8\)

In addition to political motives, economic motives aimed at bundling the resources of the Member States in order to restore the destroyed regions appeared and became equally important or, in the eyes of some historians, even more important.\(^9\) With the common market for coal and steel, the partners wanted to obtain access to such resources, especially of the Ruhr region, which were needed for reconstruction.\(^10\) For Germany, this opened up the opportunity to commute the limits and requirements imposed by the occupying power. Nevertheless, it was the economic effects that were vehemently debated, since the rules were seen as comprising dirigisme and discriminations; industry and unions mainly rejected them. In the end, the German Parliament, because of the political expectations knitted to it, accepted the ECSC Treaty.\(^11\)

b) Development of the Original Goals

As is known, efforts to continue integration in the political arena were unsuccessful at first. Acceptance of the Treaty on the European Defence Community and of the Statute of the European Political Community, which had been drafted by an ad hoc Assembly of the Council of Europe, would have been a downright revolutionary leap into a constituted Europe. It has become apparent, however, that all of the necessary political and economic conditions were lacking at that time. In any event, after the failure of genuine political impetus, the EEC, with the Common Market as its core, pushed the economic goal of ameliorating and securing the standard of living of the citizens to the forefront of political discourse and the practice of the acting persons.\(^12\)

In the consciousness of the post-war generations, the original impetus directed at securing peace and liberty and at overcoming the mental and material effects of the war receded more and more into the background, since the relations between Member States and their citizens were normalised in daily life. Integration nowadays is based initially on the perception that the individual Member States are not capable of defending their interests and securing the survival and welfare of their citizens in the open world.

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10 This problem is discussed in detail in the introduction to P Reuter, *La Communauté européenne du charbon et de l’acier* (1953); see also J Gillingham, *Coal, Steel, and the Rebirth of Europe* (1991).


Nevertheless, the original political aims which arose in the aftermath of the war seemed to persist subliminally, in spite of such transformations. This was especially evidenced in the process of Germany’s reunification, which was regarded by some neighbour states with distrust. It was soon cleared up, however, that a united Germany would remain a member of the Union and the Western Alliance and thereby still be bound in their context, and that the Union should develop into an Economic and Monetary Union. It seems that for this reason the partners in the Union took a favourable attitude and the negotiations with the four Allied Powers soon resulted in the termination of certain prerogatives over Germany as a whole.

The form that the desired political unity should assume, in particular the degree to which the Member States should be incorporated, remained unclear from the beginning. The political declarations of the governments and parties fluctuated but the organisational vision of the Union remained open. The Union’s development is a continual process, following a direction that is difficult to predetermine. There is no consensus as to its final legal form; the Union will remain, for the present, undecided and in abeyance.

2. The European Union as a Political Union

a) The Political Core of the Economic Integration

After the failure of the Defence Community and the founding of the EEC, the economic goals of growth, employment and welfare came to the centre of the Community’s activities; the political aims and contents of the integration process remained present, albeit in the background. The merger of markets and economies should initiate an ever-closer network between Member States, enterprises and citizens. This interlacing of the Member States’ societies should contribute to overcoming the existing tensions and give the integration a base in the consciousness of the citizens.

Economic policy is also expressed in the wording of the policy and often determines the fate of the states and individual citizens more strongly than genuine political actions. Scholars interested in economic aspects of European law often reduce the comprehension of politique to the wielding of power and matters of foreign and defence policy. But however the notion politique be defined, it includes arguments concerning regulatory competences in economy and society, the fundaments of the public affairs and the participation of the citizens. These were and are the subject matter of the Union.

13 Since the beginning of the Community it was discussed by the Germans acting in Community matters whether the incorporation of Western Germany into the Community would prevent reunification. That these scruples finally were proved unfounded and that, on the contrary, the membership in the Community has been helpful, satisfied all concerned persons.


15 The procedural character of integration in the Union is shown in the anthology by R Hrbek et al (eds), Die Europäische Union als Prozess (1998); see also P Craig and G de Búrca (eds), The Evolution of EU Law (1999).


17 This function of the Common Market was essential from the beginning: see K Carstens, ‘Das politische Element in den Europäischen Gemeinschaften’ in E von Caemmerer, H-J Schlochauer and E Steindorff (eds), Probleme des Europäischen Rechts (1966) 96.

18 The political significance has been emphasised especially by Walter Hallstein in many lectures and publications: see idem, Die Europäische Gemeinschaft (5th edn, 1979) 27.
In all Member States, the measures to establish the Common Market led repeatedly to considerable encroachments into existing structures, traditions and gained assets. As a rule, they could be enforced in the face of the internal opposition of those affected, not in reference to technical rationality of market integration, but rather only by political decision overruling domestic resistance.\(^\text{19}\) For that reason, even in Brussels regulations concerning measures of a seemingly technical character had to, and still must, be disputed and fought over again and again, in order to find political compromises and decisions, often after difficult consultations with the groups concerned in the Member States.\(^\text{20}\)

The connection between economic measures and political effects is especially obvious in the commercial policy of the Union. Commercial policy is always simultaneously part of foreign policy, which mainly remains in the domain of the Member States. Treaties and agreements of the Union with third countries always concern the political relations of the Member States to these countries. This was seen especially clearly in the frequently discussed economic sanctions against third countries\(^\text{21}\) and, to cite an early example, in the association agreements concluded with the former colonies of some Member States that became independent countries.\(^\text{22}\)

Hence, the widespread thesis that, during the first decades, the Union was merely an economic community that only later gradually grew into a political union, namely after the Single European Act and the Treaties of Maastricht and Amsterdam, does not correspond with its actual development. From the outset, in its goals and also its subject matters, the Union was a political union, albeit at first incompletely and rudimentally,\(^\text{23}\) that was progressively built up by the joining of national policies.

**b) Connection to the Politics of the Member States**

The Member States, or at least some of them, recognised these interrelations early on and attempted, from the 1960s, to lay down political framework conditions for the European institutions in order to control and direct them. Most efforts concerned the Council as the organ of states, in which the influence of the individual Member States was diminishing due to the majority vote principle and the increasing activities of the Community. On this point, it suffices to name the catchwords Fouchet Plan, the proceedings surrounding the so-called Luxembourg Protocol, the summit conferences in The Hague and Paris, and the European Council.

However, since the enlargements of the Communities in the 1970s and 980s, the limits of these approaches have become evident. The principle of unanimity and the decision-making structure of that period could not be retained in the face of the increasing scope of activities of the enlarged Community. The direct election and gradual strengthening of the European Parliament initiated the development of a singular political structure for the Union. The interdependence of the Union’s activities and the politics of the Member States necessarily lead in

\(^{19}\) For this reason, the attempt, by HP Ipsen in *Europäisches Gemeinschaftsrecht* (1972) and other authors following him, to conceptualise the EEC based on its subject matter orientation and economic rationality (*Zweckverband*) could not be proved true to reality because decisions in the Community always depend on political consensus building. See U Everling, ‘Vom Zweckverband zur Europäischen Union’ in R Stödter and W Thieme (eds), *Hamburg, Deutschland, Europa* (1977) 595.


\(^{23}\) This opinion was strongly promoted by Hallstein, above n 18.
the direction of the Member States co-ordinating the core of their policies and introducing them step-by-step into the Treaty.

The 1969 summit conference in The Hague had set the course for a common foreign policy by creating the so-called European Political Co-operation. In the beginning, it rested only on informal deliberations and was first anchored in the Treaties with the Single European Act. Then, in the Treaty of Maastricht, the Common Foreign and Security Policy became part of the Union Treaty. In the Treaty of Amsterdam its defence components were extended, and in the last few years a supplementary organisational structure external to the Treaties, with the pretentious name of the European Defence and Security Policy, has been built up. These rules are still not formally subject to Community law, but they affect it in many ways. The increasingly active role of the European Council in these policies reinforces the collective influence of the Member States on the Union but also binds them within the framework of the Union.

At the same time, essential domains of co-operation in the fields of justice and home affairs were drawn into the Treaties. The Maastricht Treaty incorporated them into the EU Treaty largely in the form of co-ordination, but in the Treaty of Amsterdam essential provisions on the movement of persons, including the Schengen acquis and the asylum law, were transferred into the EC Treaty, albeit with certain special rules. This was also true for judicial co-operation in civil matters, so that only co-operation in criminal matters is still carried out in the largely co-operative form of the EU Treaty.

The aforementioned foreign and domestic policy regulations encroach considerably into the substance of national policy, even if they are not yet subject to Community law to the same extent and in the same manner as Community matters. The Member States are thus dependent upon resolutions of European bodies, or upon co-ordination and at least consultation with them, in decisions concerning their political relations with third countries or their peace-keeping missions, as well as regulations on the immigration of third country nationals or measures combating international criminality. This development will be further reinforced by the Treaty of Lisbon. Consequently, the Member States will lose an essential part of their independence to act unilaterally.

True, the Member States are anyway largely subject to international obligations, for example as United Nations and NATO signatories, and co-operation mechanisms have also existed within the Union since the 1970s. However, the developments of the last decade contain a new dimension, and it is generally acknowledged that additional measures must be taken after the experiences in the Balkans. The cautious manner in which progress is made in this area and in

which legal obligations are initially being avoided shows to what extent the Member States are essentially affected.

To summarise, the Union is, at least in this field, about to return to the beginnings of integration. In the 1950s, the European Defence Community should have pointed the way to a common political future, but the time was not ripe. After more than 50 years, the Union, under the pressures of international conflict, is approaching a state of integration that once had been sought in vain. The core difficulty, which was evident even at that time, lies in the transfer of existential decisions from the Member States to the Union. It leads to constant tensions between the Union and the Member States, which exist just as much today and must continuously be overcome in practical politics. As demonstrated above, according to this author’s view, the Community constituted a rudimentary political entity from the very beginning. Nowadays, it can no longer be contested, at least seriously, that the Union is a political union, albeit still a partial and incomplete one.

3. The European Union as an Economic Union

a) Opening of the National Markets

Economic integration, with the Common Market as its core, has always stood and still stands at the centre of Union policy. The gradual abolition of the Community’s internal barriers for persons, goods, services and capital opens up a vast economic area in favour of enterprises, independent professionals and workers, which stimulated the growth of the economy and general welfare. This functional proceeding was successful in its result even if it did not lead automatically, as some advocates believed it would, to a ‘spill-over’ effect and thus to further integration. In fact, a new decision was necessary for each further step of integration, but it was provoked by the inherent consequences of the steps already completed. Often, though, no such decisions are needed since the enterprises have taken the initiative within the open market.

In the beginning, the transition from sectoral integration of coal and steel to a union encompassing the entire economy within the EEC was vehemently controversial, in contrast to the retrospective estimation that is common today. German economists supporting liberal principles feared a continuation of the assumed elements of dirigisme and control of authorities inherent in the ECSC Treaty and, in addition, a locking in and closing off effect of the customs union. In the early years of the EEC, a fundamentally liberal economic and competition policy, with rejection of a planification according to the French model and of an open trade policy with low levels of external protection within the framework of a large free economic area, was heavily debated.

In the long run, a liberal approach was essentially able to prevail. The principle formulated in the Maastricht Treaty, of an ‘open market economy with free competition’ (now Article 4 EC), largely influences the economic policy of the Union and Member States.

31 On different theories of integration, see JHH Weiler, I Begg and J Peterson (eds), Integration in an Expanding European Union (2003); C Giering, Europa zwischen Zweckverband und Superstaat (1997); for a foundational work, see EB Haas, TheUniting of Europe (1958).
32 Cf Küsters, above n 12; among the early critics, see eg W Röpke, ‘Gemeinsamer Markt und Freihandelszone’ [1958] ORDO 31.
markets of the 27 Member States, and additionally those of the members of the EEA and the partenaires of the other European countries connected by agreements with the Union, are fundamentally open, and the trade barriers with third countries have been considerably lowered within the framework of GATT and WTO. This market-based system has been questioned recently by the flood of measures taken by Member States in order to fight the financial crisis and economic decline. The consequences for the Union’s economic order cannot yet be estimated.

The fundamental freedoms of the Common Market, which subsequently developed into the Internal Market, have first been understood as interdictions of discrimination, with the consequence that the manifold regulations of economic law of the Member States were applied in the same manner as for national persons, goods and services, ie equally to such coming from other Member States. The barriers within the Common Market which persisted in practise through the application of national regulations have been abolished by the European Court of Justice. It gradually developed fundamental freedoms of the internal market from prohibitions of discrimination to prohibitions of restrictions. National regulations which limit economic transactions between Member States may only be applied to the extent that they are justified by a public order reservation or by other reasons of general public interest provided that they are applied in a non-discriminatory fashion and in respect of the principle of proportionality. The obstacles thus remaining can only be eliminated by mutual recognition of the national regulations or, since this often seems difficult in such matters, by the approximation of laws.

Such harmonisation of laws has already been taking place to a considerable degree for a long time and is constantly being expanded, in spite of all confessions to subsidiarity and to regional multitudes of regulation. It already includes many areas of economic law to a greater or lesser extent. Thus, it limits the latitude for action of the Member States and their sub-national entities, such as regions or Länder, which cannot regulate the harmonised matters. Harmonisation of laws is not a technical process that can be left to experts to search for the best of existing solutions, but rather is truly material legislation and inherently leads to encroachments into the various traditions, structures, interests and assets of those affected in the Member States. Consequently, there are often considerable difficulties in reaching consensus within the law-making institutions.


35 J van Scherpenberg, Ordnungspolitik im EG-Binnenmarkt (1992); see also A Hatje, above chapter 16.
b) Competition Policy and Other Economic Policies

The Common Market can only work if there is undistorted competition, thus competition policy has always been an indispensable part of the Community economic order. In the last few years, the Commission has intensified and reformed the application of competition rules, including merger and state aid rules. The regulations on state aid strongly interfere with the national capacity to act. They impose limits on the Member States’ possibility of using financial means for aims of industrial policy and subject them to strict controls, all in the interest of equal competition. The Member States view this as a serious limitation on their margin for economic-political actions. In this context, one must refer once more to the measures taken by Member States under the pressure of the present crises in the financial and industrial markets. They involve comprehensive state aids that may distort competition within the Union’s economy. The Commission nevertheless has the responsibility of ensuring that the economic order based on open markets and free competition will not be overruled.

This is also true with regard to the application of competition rules to services of general economic interest, which are somewhat simplistically labelled as measures of Daseinsvorsorge or service public, vividly disputed especially by regions or Länder and by cities and municipalities. This clearly shows the tensions that continue to exist between the common interest in the opening of the markets with undistorted competition and the national exigencies of general public welfare.

Neither this topic nor specialised areas of economic policy, such as agricultural, transport, environmental, consumer, labour and social, regional, tax or industrial policies, can be pursued in more depth here. In these policy areas, the Union is more or less intensely active and conflicts of interest constantly arise with the Member States, which continue to feel responsible for the common weal and collide repeatedly with the rules fixed by Union law.

These conflicts are especially evident with regard to Common Commercial Policy, which falls under the exclusive competence of the Union. It comprises issues which affect foreign policy as well as industrial policy, i.e., areas which mostly fall under the competences of the Member States, whose influence is nevertheless limited. Since the introduction of the euro, monetary policy has been the task of the European Central Bank, the Union’s organ created for that purpose. With this, yet another essential area of economic politics has been taken away from those Member States which adopted the euro.

General economic policy as such, however, has not yet been fully conferred upon the Union and this will not principally change with the Treaty of Lisbon. In particular, financial, tax, employment, social, education, and cultural policies remain essentially within the jurisdiction of the Member States, even if the Union is entitled to take supporting actions. Yet all these areas are also connected in many respects to the policy and law of the Union. In particular, the goal of stability and the stability pact, in the framework of the currency union, exert considerable

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40 See E-J Mestmäcker and H Schweizer, Europäisches Wettbewerbsrecht (2004); P Roth and V Rose (eds), European Law of Competition (2007); see also the authors named above in nn 34 and 35, as well as J Drexl, above chapter 18.


43 From the extensive literature, see S Boysen and M Neukirchen, Europäisches Beihilferecht und mitgliedsstaatliche Daseinsvorsorge (2006); T Prosser, ‘Competition Law and Public Services’ (2005) 11 European Public Law 543; A Lyon-Caen and V Champel-Desplats (eds), Services publics et droits fondamentaux dans la construction européenne (2000); M Andenas and WH Roth (eds), Services and Free Movement in EU Law (2002).
pressure on financial policy and thus on the overall policy of the Member States. Therefore, an intensive co-ordination in all fields of economic policy is unavoidable.

In conclusion, it can be stated that policy and law of the Union and the Member States dovetail closely with each other in all areas. The Member States’ actions are limited to a considerable degree by Community law or are dependent on the agreement or assistance of the Union. At the same time, the Union often cannot act without the participation of the Member States. The danger of a mutual blockage is evident. The tension between the Union and the Member States must be constantly resolved within the Union’s institutions by co-operation and compromise.

III. The Institutions in the System of the European Union

1. Peculiarities of the Institutional System

a) Pluralism of the Political Parties

The chosen method of integration combined functional and discretionary elements: the Treaty itself determined the opening of the internal markets with undistorted competition, and it transferred the necessary powers to Community institutions in order to execute and complete this objective. This conception demands an institutional system that meets the requirements of effectiveness and is able to resolve the tense relations between national and Community concerns sketched out above. The organs foreseen for this purpose in the Treaty are well known: the European Parliament (EP), as elected representation of the peoples; the European Council of the Heads of State or Government, giving orientations; the Council, as a decision-making organ formed by members of the governments; the Commission, as an independent organ for proposing and enforcing regulations; and the Court of Justice, guaranteeing legality and legal protection. They do not need further explanation in this chapter.

Worthy of discussion, however, are the particularities which distinguish this system from those of the Member States, so that democracy cannot be realised on the supranational level in the same manner as in the Member States. At the level of the Union, unlike in the Member States, no majorities and coalitions are formed on the basis of elections by parties, who attempt to enact their programmes and ideas and who face an opposition that is pursuing other goals. Rather, the representatives of different political systems and ideas existing in the Member States co-operate at the Community level in concrete material questions, united less in political convictions than in the interest of common goals. However, in doing so they are burdened by the respective domestic political disputes and the expectations of their electors.

This is especially evident in the Council. There, majorities are not formed on the basis of common political party programmes, or at least on basic political consensus like conservative,

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liberal or socialist, but rather according to the interests in concrete substantive areas, which in each Member State are influenced by the domestic political constellation. In the EP there are at least parliamentary groups formed between the representatives of various national parties, but these pursue only partly common orientations so that they resemble party alliances more than actual parties.\textsuperscript{48}

The Commission is also not homogeneous with respect to party politics. Usually, the nomination of its members is determined by different domestic political considerations, with the consequence that homogeneous political orientation does not exist at the Union level. Under these conditions, the proposals of the Commission for legislative acts are based more on the rationality of the subject matter or the ambitions of the personalities concerned, rather than on a programmatic policy which has a political base in the Member States. As a consequence, compromises are made in the Parliament and Council which often do not correspond with the political inclination of the involved individual deputies or governments.

The system may be labelled as polycentric\textsuperscript{49} or compared with a government of all parties.\textsuperscript{50} It is not caused by an imperfect organisation, which could be changed simply by procedural amendments, but rather by the imperfect federal structure of the Union. The essential political orientations are still decided in the 27 different national party-based democracies and must be combined on the European level without the existence of a central organ, as in federal states, that is able to decide on the general political direction. The European Council, which seems to claim this role for itself, according to its mandate to provide the Union with the necessary impetus for its development and to define the general political guidelines thereof, faces serious difficulties. Each of the 27 Heads of State or Government is limited in his participation by the dominant tendencies in the respective capitals. The beginnings of common democratic orientations exist in the EP’s election, but this is also determined nationally to a remarkable degree. Therefore, the elections may legitimate the EP’s role in the co-decision procedure, but they hardly determine general political principles.

b) Participation of the Administrations in the Decision-making Process

Another particularity of the Union’s institutional system is the remarkable influence on decision-making the services of the Commission and the administrations of the Member States possess. Given the detailed and technical nature of most of the Commission’s proposals, the necessary balance between different national interests and the common interests may only be reached in a Council of 27 Ministers with great difficulty and requires intensive preparation. The discussions mostly begin even before a formal proposal of the Commission is presented. In any case, after its presentation the negotiations firstly occur at the level of the civil servants. The working groups of the Council, composed of representatives from national administrations and of the services of the Commission, and finally the Committee of Permanent Representatives of the Member States attempt to reach a broad consensus in order to present the Council with


\textsuperscript{50} In this context, Switzerland should be mentioned. In the Swiss system, which is orientated on consent (\textit{Konkordanzdemokratie}), the Bundesrat, which serves as the government, is traditionally composed of representatives of the main parties; see W Linder, § 64, para 27, and L Mader, § 67, paras 11ff in D Thürer, J-F Aubert and JP Müller (eds), Verfassungsrecht der Schweiz (2001). The system is based on Switzerland’s historical and structural particularities, so it may not simply be compared with the Union; on this point, see S Oeter, ‘Souveränität und Demokratie als Probleme in der “Verfassungsentwicklung” der Europäischen Union’ (1995) 55 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 659, 699.
drafts in which only a few politically significant points remain open to be decided and co-ordinated with the EP.\footnote{See A Dashwood, ‘The Role of the Council of the European Union’ in D Curtin and T Heukels (eds), \textit{Institutional Dynamics of European Integration} (1994) vol 2, 117, 126.}

Through this process, the services of the Commission and the national administrations take centre stage in the decision-making process. This has strengthened criticisms of the system as ‘bureaucratic’ and ‘far from the citizen’ and has contributed to the notion that consensus building in the Union is essentially a task of civil servants. But notwithstanding the fact that the administration’s influence on law-making is also considerable in the Member States,\footnote{Cf A von Bogdandy, \textit{Gubernative Rechtsetzung} (2000).} so that some criticism sounds somewhat self-righteous, it must be acknowledged that effective decision-making in the Council is only possible with the assistance of civil servants. This was especially true in times in which decision-making processes in the Council were largely blocked due to differences of opinion over fundamental questions.\footnote{Thus in the 1960s and 1970s it was mostly due to the collaboration of the administrations of all levels that the integration could progress even when decision-making was blocked by far-reaching differences.}

Finally, one must note that ministers, who are politically responsible to their parliaments, mostly determine the conduct of the national representatives in the committees, usually after consulting national parliaments and the regions or \textit{Länder} as well as the associations of the affected economic groups.\footnote{To the internal forming of intent in the Member States, see J Grünhage, \textit{Entscheidungsprozesse in der Europapolitik Deutschlands} (2007); R Morawitz and W Kaiser, \textit{Die Zusammenarbeit von Bund und Ländern bei Vorhaben der Europäischen Union} (2004); H Kassim, G Peters and V Wright, \textit{The National Co-ordination of EU Policy} (2000).} The minister also then votes in the Council, often after discussion within his own government. When one takes the negotiating situation and the general interest in integration into consideration, the widespread preconception that the decision-making must be regarded as ‘executive legislation by civil servants’ is at least exaggerated.

In addition, the increased role of the EP must be taken into account. The EP has a mostly active role in the decision-making process by means of the far-reaching procedure of co-decision, which will be reaffirmed again in the Treaty of Lisbon. Its decisions are prepared by Committees of deputies with assistance from their own services and those of the Commission. The influence of the national administrations is felt only indirectly, insofar as it is incorporated in the common position presented by the Council to Parliament.

Accordingly, the explained particularities of the institutional system of the Union may complicate the decision-making procedure. Several proposals have been made with the aim of strengthening their efficiency, which will now be discussed.

### 2. The Union’s Decision-making Process

#### a) Majority Decisions

The decision-making process characterised by the mentioned interactions between the institutions of the Union and the Member States is criticised above all as too cumbersome and ineffective. An improvement is expected mostly through increased admissibility and energetic use of the majority principle in the Council.\footnote{See G Tsebelis and X Giataganas, ‘Veto Players and Decision-making in the EU after Nice’ (2002) 40 \textit{JCMS} 283; A Maurer, ‘Entscheidungseffizienz und Handlungsfähigkeit nach Nizza’ in M Jopp, B Lippert and H Schneider (eds), \textit{Das Vertragswerk von Nizza und die Zukunft der Europäischen Union} (2001) 79.} However, the majority principle is valid already, with few exceptions, in nearly all important economic areas, and it will be strengthened by the Treaty of Lisbon, which establishes it as the regular standard. It is in practice often applied if no
consensus between the ministers in the Council can be reached. However, such a consensus is first sought in the interest of Community cohesion before the majority overrules those opposed. In pursuit of compromise, the pressure for agreement exercised by the threat of a majority decision is often beneficial.

The list of remaining exceptions that require unanimity will be further diminished by the Treaty of Lisbon; some exceptions in important areas will be maintained, however. These domains are concerned primarily with the dispositions by which the bases of the Union or the core of the policy of the Member States are affected, such as deliberations of the European Council, certain decisions in the CFSP and in justice and home affairs, further questions of fiscal and tax policy, and certain special decisions. Contrary to an often voiced popular opinion, this reduces the list of exceptions to a minimum and seems perfectly justified. It is true that the broad application of majority voting is necessary to secure the Union’s capacity to act. But regarding the distribution of the responsibilities between Union and Member States it is exceptionally necessary that all governments agree to elementary and essential decisions which they have to present to their citizens. Besides, experience has shown that Member States are generally unable to uphold isolated positions in the long run and finally cave in.

The requirement of unanimity is indispensable as far as Treaty amendments are concerned, despite the fact that it was heavily criticised by the public in view of the struggles between the Member States in the negotiations on the Treaty of Nice. However, at the present state of integration a majority rule in regards to the Treaties is out of the question. The often used formula that the Member States are ‘Masters of the Treaty’ is expressed in Article 48 EU, according to which Treaty amendments are required to be ratified by all Member States. Even the simplified revision procedures foreseen in Article 48 EU under the Treaty of Lisbon make sure that Treaty amendments are not available without the consent of the national parliaments or at least not against the express opposition of anyone of them.

This is due to the fact that amendments of the Treaty regularly lead to transfers of power from the Member States to the Union or influence the bearing of transferred powers. If this could be decided without the consent or even against the will of a Member State, the substance of its statehood would be injured. Such a possibility of the Union to self-authorisation would affect the difficult balance between Union and Member States and push the Union in the direction of a federal state. But the pre-conditions necessary for such a step, particularly the foundation in the consciousness of the European peoples to legitimise such a unit, might neither at present nor in the foreseeable future be realised.

On the other hand, the notion that a single Member State of the expanded Union could block the further development of the Treaties is startling. In such a case, the only choice would be to attempt to proceed according to the mechanisms of ‘enhanced co-operation’ or to change the intentions. After the failed attempt to pass the referendums to the Constitutional Treaty in France and the Netherlands, the simplified Treaty of Lisbon was concluded. Now, the method of the single Member State to block further changes in the Treaties has become even more pertinent.


57 Everling, above n 20; see also P Dann, above chapter 7.

58 Majority decisions are foreseen as a rule in Art 16(3) TEU-Lis; for a survey of the exceptions in which unanimity remains applicable, see Hofmann and Wessels, above n 3.


60 See Entscheidungen des Bundesverfassungsgerichts 89, 155, 190 (Maastricht).

61 Such a result had been threatened owing to the failure of the first Irish referendum on the Treaty of Nice, which was later overruled by a second vote. This has happened once again with the failed Irish referendum to the Treaty of Lisbon.
after the negative vote of the Irish people to this Treaty, the Treaty parties are looking for new solutions.

b) Delegation of Implementing Measures

A change promoted since long in order to make decision-making more effective is the increased delegation of legislative powers to the Commission. This is provided for in Article 202 EC with regard to enforcement measures of Community rules, since they are often not suitable to be discussed by ministers in the Council due to their technical character. With regard to the principles of separation of powers and democratic legitimacy, however, the EP and Council are not entitled to withdraw totally from their legislative functions by transferring them to the Commission. As the ECJ has held, the legislature must sufficiently circumscribe the main features of the envisaged regulation and the transferred competences. While this surely must not be understood too narrowly, it constitutes one of the reasons why the extension of delegated powers is not generally possible in order to strengthen EU decision-making.

Furthermore, as the so-called implementing measures often contain the most important provisions for the practice of enterprises and affect national traditions and interests, the Council is generally not ready to transfer them to the Commission without reservation. Thus, since the first negotiations on agricultural market regulation at the start of the sixties, delegation of implementing powers to the Commission has been tied to the obligation to involve committees of experts from the national administrations. The Commission must take into account the deliberations of the committees in accordance with certain pre-determined models, whereby in particular cases the decision may fall back to the Council. This process of so-called comitology, now codified in Article 202 EC and the Comitology Decision of the Council adopted on its basis, has been criticised by the public in particular for lack of transparency and the lack of participation by the EP. In the meantime, the comitology procedures repeatedly have been revised. Transparency concerns have been ameliorated by rules concerning the publication of documents, and the Parliament now has the right to intervene under certain circumstances.

Through this process, the expert knowledge of the national administrations, which have to apply the regulations in practice, participates in forming the opinions of the Commission. At the same time, mutual interests are asserted and solutions sought in order to find the widest possible consensus. To some extent, the committees replace the Council, without reducing the efficiency of decision-making by the Commission, which is normally able to find adequate solutions in the committees. The procedure corresponds to a high degree to the requirements of the institutional system of the Union because it moderates the centralised, hierarchical law-making imposed upon the Member States and contributes to balancing the tensions

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64 See the diverging assessments in the articles in M Adenas and A Türk (eds), Delegated Legislation and the Role of Committees in the EC (2000); see further K Bradley, ‘Comitology and the Law’ (1992) 29 CML Rev 693.


between the Union and the Member States, as well as those between the Member States themselves.  

3. Competences and Legitimation of Law-making in the Union

a) Distribution of Competences

A key problem in the Union, as in any system with several levels of decision-making, is the vertical distribution of competences. The competences are transferred to the Union according to the principle of conferral pursuant to Article 5(1) EC, also called the principle of attributed powers, or Einzelermächtigungen in German. The corresponding provisions are scattered throughout the Treaties. From the beginning, Member States and institutions of the Union disagreed as to their interpretation, which was primarily carried out in the Council. In the end of the discussions, the representatives of the Member States or at least their majority often agreed to a broad understanding of the competences of the Union, as proposed by the Commission. By limiting their own competences, they frequently expected a more effective protection of their interests, and hesitant Member States often abandoned their resistance in the general interest of integration. This result was mostly accepted by the Court of Justice. Therefore, it seems unjustified for the Member States to complain of an extensive application of competences by the ECJ which they themselves mostly had accepted.

In practice, the harmonisation of laws with an aim towards realising the internal market is the most important back door in the jurisdiction of the Member States, as it encroaches extensively into public and private economic law. But harmonisation of laws, as already discussed, is necessary in order to eliminate restrictions on the fundamental freedoms which the Member States may still undertake by rules in the interest of the common weal. Whoever wants to limit harmonisation of laws also has to understand the fundamental freedoms more narrowly than they have been developed in long-established practice and case law. They still belong, however, to the core of the Union and may therefore not be placed in question. Hence, the latitude for restrictive formulations is rather small.

On the contrary, the often criticised general authorisation in Article 308 EC (former Article 235 EEC Treaty) to supplement incomplete competences nowadays does scarcely lead to the extension of competences, as it occurred during former stages of the integration process. Since in the meantime the specific competences have been considerably widened, the recourse to this provision is necessary only in marginal questions. Its abolition would not protect the national competences, but rather limit flexibility in such marginal questions.

Yet the expansion of Community competences is above all the result of the Treaty amendments of the last decade decided by the Member States, the consequences of which they now

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70 See above n 36.

71 C Calliess, ‘Optionen zur Demokratisierung der Europäischen Union’ in H Bauer, PM Huber and KP Sommermann (eds), Demokratie in Europa (2005) 281, 301.

72 See M Bungenberg, ‘Dynamische Integration, Art 308 und die Forderung nach einem Kompetenzkatalog’ [2000] Europarecht 879. Consequently, the Treaty of Lisbon in Art 332 TFEU accepts this disposition, but provides amendments, especially regarding the consent of the European Parliament and the consultation of the national parliaments, according to Art 5(3) TEU-Lis. In the interest of enhanced legitimacy, this is to be appreciated.
complain. Nevertheless, their criticisms, including those of their constitutional courts, are addressed primarily to the ECJ. The ECJ interprets the competence norms, as it does the Treaty as a whole, not restrictively in order to preserve the rights of the Member States, but objectively and teleologically according to the goals of the Treaty. It orients itself at the meaning and systematic location of the dispositions in the Treaty and at the \textit{effet utile}, the ‘practical effectiveness’, of the provisions affected. This means an interpretation in which the provision can fulfil the function for which it is inserted in the Treaty.

The ECJ does not decide abstractly on competences but on legal acts which are accepted by at least the majority of the European Parliament and the Member States. Evidently, the ECJ hesitates to interpret the norms narrower than the institutions and the Member States who are burdened by them. Consequently, it has seldom declared legal provisions of the Community legislator void for exceeding competences. This is dubious, as review by the ECJ has special significance for the protection of the rights of Member States outvoted by the majority rule and of citizens affected by measures. But this position does not justify the general critique that it is the jurisprudence of the ECJ which leads to a creeping extension of competences.

In light of interlacing Union and Member State policy and their diverse, often opposing, interests, there is no easy solution for a clearer order of competences, something which has been long called for. This is shown by the attempt to establish a catalogue of competences in the Treaty of Lisbon. Articles 3ff of the Treaty on the Functioning of the European Union (TFEU) enumerate the domains for which the Union shall have competences of different forms such as exclusive competences, shared competences as well as competences to co-ordinate, promote or support some policies of the Member States. It may foster transparency and therefore be useful, but this alone cannot solve the problem.

The fields in which the Union shall be authorised to act are globally enlisted. The delimitations of the competence provisions are unclear, and annexed competences are not excluded. Their concrete significance must be clarified specifically, as with any other text, by way of interpretation. This is the more difficult as they are written in 23 languages in which the notions often have different meanings. For this reason, the demand of sharply defined compe-
tences as steadily called for in the public must be seen as illusionary. Clearness may only be achieved by uniform interpretation through a central instance, namely through the ECJ.80

Since the Treaty of Maastricht, hopes are directed to the application of the principle of subsidiarity. It is, according to Article 5(3) EC, not a rule for attribution of competences but for exercising them.81 This means that the Union shall only take action if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and therefore better achieved by the Union. For the evaluation of this condition the institution concerned disposes of a broad discretion in light of the indeterminate criteria, which can only marginally be controlled.82 The decision is difficult due to the different dimensions and capacities of the Member States. What may be possible to achieve for the bigger Member States, or even their regions or Länder, might not be manageable by smaller Member States.83 The condition, however, must be judged according to the capacity of all Member States, or at least their majority. This may be the reason that the principle, though it is often implored like a magic word, has been relatively rarely applied by the Union’s organs, and especially by the ECJ.84

The significance of the subsidiarity principle is therefore shown overall in the attitude of the institutions in the presenting of and deciding on legal acts. It must not be interpreted in view of the narrow text of the Treaty, but on its meaning to secure federal balance in the Union.85 In any case, this requires a high degree of moderation and restraint on the part of political actors, as well as a readiness to co-ordinate and compromise. It must be admitted that this is not always found in the struggle for political power, which is always an issue when competences are concerned.

b) Legitimacy of Law-making

Considering the extended activities of the Union in policy and law-making, the democratic legitimation of the institutions is of central importance.86 It is true that their authorisations in the Treaty are agreed upon by the national parliaments in the ratification process, but this seems insufficient to justify all their widespread applications in concrete cases. In the dominant German constitutional understanding, the institutions are legitimated by the chain which binds them to the citizens. In the Union, this connection is doubly established. It is indirectly mediated in part by the Council through its members, who are responsible to their parliaments. It is also directly mediated in part through the representatives in the EP, who are directly elected by the citizens.87

80 See von Bogdandy and Bast, above n 69, 227.
82 On justiciability, see D Wyatt, ‘Subsidiarity and Judicial Review’ in O’Keeffe and Bavasso (eds), above n 36, 505.
83 For a sceptical view, see D Garneth, ‘Subsidiarity: the Wrong Idea, in the Wrong Place, at the Wrong Time’ (2006) 43 CML Rev 63; for a better use of the principle, see Papier, above n 81.
85 On this, see U Everling, ‘Rechtsschutz in der Europäischen Union nach dem Vertrag von Lissabon’ [2009] Europarecht suppl 1, 71, 76; on federal balance as a structural principle of the Union, see A von Bogdandy, above chapter 1.
peoples of the Member States.\footnote{87} The chain of legitimacy from the national parliaments and their electors to the Union, which the Bundesverfassungsgericht has placed in the foreground,\footnote{88} is indeed relatively long and does not appear overly robust. The national parliaments can merely express opinions to the ministers sitting in the Council and only afterwards call them to account. It remains to be seen as to whether the consultative participation of the national parliaments in the legislative process, foreseen in the Treaty of Lisbon, will further legitimation.\footnote{89}

Thus, hopes are directed towards the EP as the second bearer of legitimacy. Its competences have been gradually expanded since the introduction of direct elections, especially through participation in the composition of the Commission and through co-decision in legislation, which will be strengthened by the Lisbon Treaty.\footnote{90} Public discussion has called for additional strengthening measures, but as desirable as this might be, the possibility is currently limited. First, the weight of the votes of the citizens of the individual Member States in the election is not equal, due to the fact that the distribution of the representatives’ seats among the individual Member States does not fully correspond to the population, even if taking into account a base for the smaller Member States.\footnote{91} Secondly, in order to take a full role in the decision-making process, the Parliament needs grounding in a transnational European public sphere that includes all parts of the society’s social groups, media, and citizens. Presently, such a public is lacking to a large degree, even if there may exist remarkable developments in the consciousness of the citizens.\footnote{92} For these reasons the Parliament may for now only be strengthened insofar as participating equally with the Council in the Union’s legislative process.\footnote{93}

From the perspective of democratic legitimacy this is unsatisfactory. But it is rightly pointed out that, in the international and supranational area, parliamentary democracy can only be incompletely realised.\footnote{94} In the Member States, it also comprises more than just the central position of the parliaments, but also is realised by elements such as the rule of law, separation of powers, human rights, legal protection, and the participation of societal groups, which are broadly developed in the Union and may partly compensate for the incompleteness of its democratic parliamentary system.

The consequence of the Union’s imperfect system of law-making is the tendency to shift common actions into special forms and procedures outside of its institutions. This corresponds to comparable developments in the Member States. In this context, a first example would be the steadily increasing number of agencies and other public bodies. They are quite different with regard to legal form, internal organisation, functions to decide, investigate or advise, and relations to the institutions of the Union, and they tend to evade political and legal controls.\footnote{95}

\begin{footnotes}
\footnote{88} See the Maastricht judgment of the Federal Constitutional Court, above n 60, 209.
\footnote{89} See the Protocol (No 1) on the role of the national parliaments and Protocol (No 2) on the application of the principles of subsidiarity and proportionality.
\footnote{90} See Hofmann and Wessels, above n 3, 17.
\footnote{91} Cf T Schmitz, Integration in der Supranationalen Union (2001) 496.
\footnote{92} See D Curtin, Postnational Democracy (1997); CD Classen, ‘Europäische Integration und demokratische Legitimation’ (1994) 119 Archiv des öffentlichen Rechts 238, 257, who refers to remarkable beginnings.
\footnote{95} D Fischer-Appelt, Agenturen der Europäischen Gemeinschaft (1999); R Uerpmann, ‘Mittelbare Gemeinschaftsverwaltung durch gemeinschaftsgeschaffene juristische Personen’ (2000) 125 Archiv des öffentlichen Rechts 551; D Gerardin, R Muñoz and N Petit (eds), Regulations through Agencies in the EU (2005). The legal control will be strengthened by the Treaty of Lisbon; see Everling, above n 85, 77.
\end{footnotes}
Also, the shift of discussions out of the institutions and into informal reunions of ministers should be noted, as well as the so-called open method of co-ordination (OMC). This method is characterised by co-operation between the Member States and the Commission outside of the rules of the Treaty and mostly eludes the influence and control of Parliament and the ECJ.96

In sum, what follows from this survey of the decision-making processes of the Union, with its manifold forms, particularities, and imperfections, is that the system can only function if the persons acting on all levels loyally work together to solve the tensions resulting from different structures and interests, endeavouring to find compromises and build consensus.

IV. The Constitutional and Legal Order of the European Union

1. The Constitutional Structure of the Union

a) Discussion on the Constitution of the Union

For years it has been discussed whether the Union should be invested by a constitution, and the EP in particular has presented such propositions, the sense and advantages of which are controversial and often discussed.97 This debate is unsatisfactory since politicians and scholars use the term constitution differently. Traditionally, a constitution is related to the state and comprehensively characterised as its fundamental legal order.98 However, according to a broader understanding, the notion ‘constitution’ can also be applied to an independent inter-state or supra-state entity, which is fully equipped both organisationally and legally. It must be made clear, though, that no state-like quality is thereby attributed to it.100 In this technical sense, the Union has long possessed, in the Treaties and in the general legal principles developed by the ECJ, a widely drawn-out constitution, which serves as a legal order for its organisation and institutions, for its instruments and procedures of decision-making, for its relationship to the Member States and citizens, as well as to third countries, and for its system of legal protection through jurisdiction. It is applied and confirmed daily in practice.101 The ECJ rightly characterised the Treaty as the ‘constitutional charter of a community based on the rule of law’.102

97 Cf the summary of important proposals in W Loth, Entwürfe einer europäischen Verfassung: Eine historische Bilanz (2002).
99 Cf the well-known formula of W Kägi, Die rechtliche Grundordnung des Staates (1945).

720
Calls for a constitution for the Union are often the result of broader interpretations of the term. In the tradition of the Enlightenment and the American Convention or the French Revolution, a material sense is tied to the constitution, namely the expression of the will of a group of people to integrate itself as a nation or a similarly established human entity for action, giving itself an identity determined by common values. The Union is still very far from a constitution in this meaning. For this reason, the European Convention established by the Member States proposed a Treaty establishing the Constitution of Europe, meaning an agreement of the Member States based on public international law, not a constituent act that emanated from the peoples.

In the public debate this basic decision has receded into the background. The media and even parts of the legal literature soon mentioned only the Constitution and not the Constitutional Treaty. Apparently, the public partly interpreted the notion in the traditional and broader political sense, directed at an entity similar to a state, which would lead to the limitation or abolition of the Member States’ own statehood. This may be seen as one of the reasons for the rejection of the Constitutional Treaty by the people of France and the Netherlands and the hesitating positions of some other Member States which did not even seek confirmation of the Treaty by their peoples.

Such a development is not intended at present by the politicians responsible therefore, nor by the majority of citizens. It was an erroneous policy assessment to put the notion of Constitution in the forefront and thus burden the Treaty with emotional elements. Consequently, in the Treaty of Lisbon all constitutional pathos is evaded and is instead presented as an amendment Treaty to the existing Treaties. Further developments presuppose a common consciousness which may, if at all, only build up over the long run.

b) Organisational Structure of the Union

Such a consciousness can only arise from impressions given to citizens by a homogeneous form and activity of the Union. The actual structure of the Union and the Communities is scarcely appropriate to promote such hopes because it presents a confusing picture. The relations of these organisations to each other are hardly comprehensible, even for experts, and create a barrier to citizens’ acceptance of the Union. The three Communities have existed as separate legal personalities since their founding; only their institutions were merged and since then act according to different rules in the Treaties, the application of which has in practice been approximated to a certain extent. This still-manageable legal situation was made more unclear by the already mentioned investiture of the European Council and the European Political Co-operation. It became completely opaque with the adoption of the Maastricht Treaty. It placed the additionally established Union above the Communities, with the European Council at its core, as well as the special areas of external and security policy and cooperation in the areas


107 See U Everling, ‘From European Communities to European Union’ in A von Bogdandy, PC Mavroidis and Y Mény (eds), European Integration and International Co-ordination (2002) 139.
of justice and home affairs.\footnote{108}{Through the Amsterdam Treaty, essential parts of the cited areas of legal co-operation were taken over from the EU Treaty into the EC Treaty, so that it is limited to provisions on police and judicial co-operation in criminal matters. The EESC Treaty expired on 23 July 2002.} The Treaty recognises the Communities as the ‘foundation’ of the Union, and the Union uses their institutions. The institutions do not apply Community law when acting within the Union, but special rules mostly co-operative in character.

Union and Communities are additionally surrounded by countless binding Protocols and interpretative Declarations annexed to the Treaties, as well as by informal deliberations of the Council or the Member States, inter-institutional agreements, and various joint or individual declarations.\footnote{109}{L Senden, \textit{Soft Law in European Community Law} (2004) 127; U Everling, ‘Zur rechtlichen Wirkung von Beschlüssen, Entschließungen und Vereinbarungen des Rates oder der Mitgliedstaaten der Europäischen Gemeinschaften’ in Lüke et al (eds), above n 37, 133.} Also, one must mention the EU Charter of Fundamental Rights, which has been accepted by the Council as non-obligatory, but gives the institutions orientation regarding interpretation of the Treaty.\footnote{110}{C Grabenwarter, ‘Charta der Grundrechte der Europäischen Union’ [2001] \textit{Deutsches Versalungsblatt} 1; K Lennaerts and E de Smijter, ‘A “Bill of Rights” for the European Union’ (2001) 38 \textit{CML Rev} 238. On its unsatisfactory position in the Lisbon Treaty, see FC Mayer, ‘Der Vertrag von Lissabon und die Grundrechte’ [2009] \textit{Europarecht} suppl 1, 87; see also J Kühling, above chapter 13.}

The idiosyncratic construction of the Treaties is often explained by use of the popular image of a ‘temple’ with three ‘pillars’, whereby the Union is understood in a double sense, namely as the structure that encompasses all parts, on the one hand, and as the roof over the Communities, the CFSP and the cooperation in justice and home affairs, on the other hand. As accessible as this metaphor is, it obscures legal certainty more than it fosters understanding, and veils the many links and relationships that exist between the mentioned policies and the Communities.\footnote{111}{For different constructions, see the contributions in A von Bogdandy and C-D Ehlermann (eds), \textit{Konsolidierung und Kohärenz des Primärrechts nach Amsterdam}, [1998] \textit{Europarecht} suppl 2; also Schmitz, above n 91, 14.}

How the construction is to be understood legally is the topic of intense discussion.\footnote{112}{See ibid; T Heukels and J de Zwaan, ‘The Configuration of the European Union’ in Curtin and Heukels, above n 51, vol 2, 195; JC Wichard, ‘Wer ist Herr im europäischen Haus?’ [1999] \textit{Europarecht} 170.} Practice has long surpassed theoretical debate and treats the Union and the Communities to a large degree as a uniform association. This is justified in light of the common goals and institutions, as well as their mutual inter-weaving. Therefore, the whole complex of rules is seen in practical policy and public opinion as a political and economic unit to which the principles of the law of integration are to be applied insofar as they are not expressly excluded by special dispositions.\footnote{113}{For more detail, see Everling, above n 107; see further Wichard, above n 112.}

In face of such disorderly confusion it will be a welcome change when the Treaty of Lisbon eliminates the artificial ‘temple’ construction and combines the Union and Communities into a legal unit. The separation of the basic EU Treaty and the Treaty on Functioning will result in greater transparency, albeit still limited by numerous protocols and other acts.

2. The Union as a Community of Law

a) Principles of the Rule of Law

The described constitutional order is an embodiment of, as well as a framework for, the Union’s legal order. The Community is, in the dictum of Walter Hallstein, a community of law,\footnote{114}{Hallstein, above n 18, 53ff; see M Zuleeg, ‘Die Europäische Gemeinschaft als Rechtsgemeinschaft’ [1994] \textit{Neue Juristische Wochenschrift} 545.} and
the same is true now for the Union as a whole. Community and Union are created by the Treaties, which are instruments of law and have served as their foundation up until now. A special expression of the Community of law is the rule of law (Rechtsstaatlichkeit), which is conceived of in Article 6 EU as one of the foundations of the Union together with the principles of liberty, democracy, and respect for human rights and fundamental freedoms. Law regulates the institutions’ composition, powers, and forms of action, their relations to each other and to the Member States and citizens, the rights of those vis-à-vis the Community, and finally legal protection. Law possesses special significance because it acts to a great extent as an integrating factor. It harmonises national laws, requires convergent conduct and creates a framework for common policy. These principles and institutional problems have already been discussed in another section of this paper and by other authors in this volume.

The principle of separation of powers, however, should especially be mentioned because it is frequently brought to question in public debates regarding the Union. It is an essential element of the rule of law in the continental understanding (Rechtsstaat, Etat de droit). In the modern constitutional state, it cannot simply be assigned in its original understanding of Montesquieu as the separation of the state powers, which can never be purely enforced. It is rather understood as a balance between the functions of the state institutions in order to restrain their exercise of power, and at the same time should also serve the proper allocation of functions to the institutions. In the Union, due to its special form of organisation, it is important that the functions are distributed so that a one-sided accumulation of the power to make decisions is not possible. This is true horizontally between the institutions of the Union as well as vertically between these institutions and the Member States.

Thus, the legislative powers rest with the Council and the European Parliament, acting upon proposals of the Commission, for whom rules have been laid down regarding their co-operation. None of these institutions can prevail on its own, and the Member States participate in the Council and have the possibility to pursue their interests and opinions there. On the other hand, they are under a duty to implement in their countries the legal acts rendered by the institutions. Governmental functions, to the extent they even accrue to the Union, are carried out by the Council or the Commission, but also in part by the European Council or the Member States acting jointly. The system is organised in a pluralistic form. Administration is assigned to the Commission as far as it is executed at the Community level, but the administrations of the Member States participate in part in the context of comitology. As a rule, the administrative enforcement lies with the authorities of the Member States, who act in this capacity on the basis of the law made by the Union institutions. The judicial function is entrusted to the ECJ and the CFI, but at the same time, the national courts are called upon in the context of proceedings pending before them to apply Community law, whereby they may or, in the final instance must, obtain a preliminary ruling of the ECJ.

As a whole, this system can secure a balance between the various bearers of functions. It is characterised by the Court primarily as a system of institutional balance. Its performance as laid down in the Treaties can only be shifted by formal amendment to the Treaties. Thus, the balancing of those who carry out functions in the Union is circumscribed in the sense of the

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115 See M Cappelletti, M Secombe and JHH Weiler (eds), Integration through Law (1986); R Dehousse and JHH Weiler, ‘The Legal Dimension’ in Wallace (ed), above n 47, 242; T Möllers, Die Rolle des Rechts im Rahmen der europäischen Integration (1999).


118 See the text above at n 63ff.

separation of powers as required by the rule of law in the continental understanding. The system demands the collaboration of the different bearers of responsibility. Each of the actors must understand that their own aims can only be reached if they act together with others.\textsuperscript{120}

This may in case facilitate compromises and common solutions, in the process of consensual forming of a common will, upon which the Union is based.

\textbf{b) General Principles of Law}

The Community of law is especially based on the general principles of law. The ECJ has developed such principles according to its general task laid down in Article 220 EC. Its function is to ensure, together with the CFI, ‘that in the interpretation and application of [the] Treaty the law is observed’. It is to be underlined that this basic text distinguishes between the law and the Treaty, which means that the law of the Union is not limited to the provisions written in the Treaty.\textsuperscript{121}

The ECJ has accordingly derived general principles of law from concurring convictions, upon which the constitutions of the Member States and the international treaties to which they adhere are based.\textsuperscript{122} Later, these principles often have been in essence inserted in the Treaty, particularly in Article 6 EU.

These principles have frequently been set forth and documented. Here a few keywords suffice.\textsuperscript{123} The most important is the principle of the primacy of Community law over national law, which has in essence been accepted in all Member States, mostly under reservation of essential rules of the Constitutions. It ensures the uniform application of Community law and prevents unilateral actions by the Member States that are not admitted under Community law.\textsuperscript{124}

The primacy has been explicitly provided for in the Constitutional Treaty but has not been taken up in the Lisbon Treaty. This will not, however, change its obligatory force.

The principle of direct effect of Community law has already been mentioned previously. It creates a direct connection from the Union to the individuals, whose position is consolidated by the adjudication of citizenship.\textsuperscript{125} Individuals can invoke Community law before national courts, and not only for regulations that are characterised as generally valid, but also for provisions of primary Community law and those provisions in the directives to the Member States which are clear and unconditional and require no measures for their implementation. Both of these principles are the supporting pillars of Community legal order and significantly curtail the Member States’ latitude for action.

In this context it is also to be mentioned that the directly applicable fundamental freedoms of the internal market must be understood not only as a prohibition of discriminations but also of restraints. This understanding must furthermore encompass principles such as those of


\textsuperscript{121} On this, see M Schmidt, ‘Die vorpositive Bedeutung des Rechts in Art 164 EGV, 136 EAV und 31 EGKSV’ (1996) \textit{60 Rabels Zeitschrift für ausländisches und internationales Privatrecht} 616. This text is comparable to the formula of Art 20(3) Grundgesetz, according to which executive power and jurisdiction are bound to \textit{Gesetz und Recht} (statute and law); cf R Dreier, ‘Der Rechtsstaat im Spannungsverhältnis zwischen Gesetz und Recht’ [1985] \textit{Juristen-Zeitung} 353.


\textsuperscript{123} On the following, see the overviews in PJG Kapteyn, P VerLoren van Themaat and LW Gormley, \textit{Introduction to the Law of the European Communities} (1998) 77ff; Oppermann, above n 117, § 6, paras 17ff.

\textsuperscript{124} For an extensive treatment, see Peters, above n 49, 315; K Lenaerts and T Courthaut, ‘Of Birds and Hedges: the Role of Primacy in Invoking Norms of EU Law’ (2006) 31 \textit{EL Rev} 287.

\textsuperscript{125} M Nettesheim, ‘Subjektive Rechte im Unionsrecht’ (2007) 132 \textit{Archiv des öffentlichen Rechts} 333; N Reich, \textit{Bürgerrechte in der Europäischen Union} (1999).
proportionality, protection of legitimate expectations, transparency, right to be heard, protection against double punishment, good administration, and finally, subsidiarity. To be underlined is also the principle of non-discrimination on grounds of nationality according to Article 12 EC, as well as of race and comparable motives, which is now confirmed in Article 13 EC.126 Also noteworthy in this context is Union citizenship according to Article 17 EC, which has served as a source of individual rights.127

The protection of the fundamental rights of citizens in Community law is at the heart of the general legal principles set forth by the ECJ. Through development of law the ECJ has expanded these principles into a comprehensive system.128 The Charter of Fundamental Rights spells out this system, albeit if only as non-binding guidelines. This is extensively dealt with in this volume and requires no further remark.129

Finally, the ECJ decided that every person whose rights are violated must have the possibility to appeal to a court, on national or Union level. This rule is central to the Union’s legal order and must be seen as part of the system of legal protection which will now be dealt with.

3. System of Judicial Protection

a) The European Judiciary

The ECJ is the central reference point of the rule of law in the Union.130 It assures, as already mentioned, that the law is observed in the interpretation and application of the Treaty according to Article 220 EC. Additionally, the jurisdiction is also confided in the Court of First Instance, founded in 1990. A completion of the system by instituting so-called judicial panels is provided for in Article 220(2) EC; however, it has up until now only been realised once for establishing the Civil Service Tribunal. Starting from a point where the ECJ was the single, universally competent Community court, a fully equipped judiciary has step by step been realised.

The partition of competences between the Courts was revised by the Treaty of Nice. The CFI now decides, with some exceptions, on all direct actions brought by individuals against institutions and bodies of the Union and also by Member States against the Commission, but not against the EP and Council. The latter cases as well as actions against Member States concerning infringements of their obligations under Union law remain with the ECJ, as do appeals against CFI judgments. But appeals against the judgments of the Civil Service Tribunal and other judicial panels, if they are established, fall under the competence of the CFI. Such appeals are limited on points of law.131


128 For an overview, see eg HW Rengeling and P Szczekalla, Grundrechte in der Europäischen Union (2004); P Oliver, ‘Fundamental Rights in European Union Law after the Treaty of Amsterdam’ in O’Keeffe and Bavasso (eds), above n 36, 319.

129 See Kühling, above chapter 13.

130 Regarding the ECJ, see the relevant commentaries; see further R Lecourt, L’Europe des Juges (1976); A Arnulf, The European Union and its Court of Justice (2006); J Schwarze (ed), Der Europäische Gerichtshof als Verfassungsgericht und Rechtsschutzinstanz (1983); K Lasen, The European Court of Justice (1994); J Gündisch and S Wienhues, Rechtsschutz in der Europäischen Gemeinschaft (2003).

The ECJ is presently, according to Article 234 EC, solely competent to issue preliminary rulings on questions of Union law submitted by national courts. This function, however, may be conferred in specific areas to the CFI, according to Article 225(3) EC. The ECJ understands the procedure as a relationship of collaboration between itself and the national courts. The national judges, in deciding on acts of the national authorities regarding the application of directly effective provisions of Union law, are judges of the Union, certainly not in a formal, but in a functional sense. In this function they must decide on the interpretation and validity of provisions of the Union’s law in conformity with the rules generally binding within the Union. In answering to questions of national courts on those rules, the ECJ contributes to a uniform and correct application of the Union’s law in all Member States. It acts not as a sort of ‘supra-court’, hierarchically placed over all national courts in the Union, but as a special court deciding in a specific sphere in order to support the national Courts.

As a result, the preliminary ruling procedure highly corresponds to the structure of the Union because it distributes the functions of the courts adequately between the levels of the Union and the Member States. The ECJ only decides on questions of Union law posed by national courts and leaves the final decision on the cases to them. In this manner, the ECJ intervenes in national competences only to the degree that is necessitated by its role as a special court for Union questions.

The European Courts decide independently of the Member States and their Courts, yet are still connected to them in many ways. The national governments can participate in all procedures before the European Courts, partly as intervenent, partly by giving opinions. In this way they have the ability to influence the forming of the Court’s decision with arguments, as well as the national courts in presenting and motivating preliminary questions to the ECJ. This is often efficient, and professional critiques of former judgments may also lead to corrections in future cases. The Member States can escape the consequences of ECJ judgments only by changing the applied provision of law, which mostly is difficult. Usually they only have the possibility of arguing in new procedures provided that they arise.

Demands of some scholars to establish a special Court of Competences composed of European and active national judges to decide on cases in which conflicts of competences between Union and Member States are involved, were rightly not complied with. It could not give any greater guarantee than the ECJ to respect national competences, and it could not function effectively in practice, but it would confound the ECJ’s jurisdiction.

The relations between the Union and the Member States are considerably affected by infringement procedures. The actions introduced by the Commission mostly concern the Member States which did not transfer directives into national law during the prescribed period. In such cases the ECJ does not accept the Member States’ objection that internal constitutional or procedural difficulties caused the delays, and declares the infringement quasi automati-
But since Member States frequently ignored the judgments and did not take the necessary measures as required in Article 228(1) EC, this provision was amended by authorisation of the Court to impose, on proposal by the Commission, a lump sum or penalty payment on the non-compliant Member State.

The lump sum is appropriate because it is aimed at deterring infringement in the future. On the contrary, the penalty payment may be disputed since it is a reprisal of the prior infringement, even if it has already been remedied. Therefore, despite the opposite assertion of some Advocate Generals, it is a measure of punishment. This seems to be a new element in the Union’s internal relations and influences the position and self-understanding of the Member States. In view of this importance, the enforcement provided for in the Treaty of Lisbon is astonishing. According to Article 260(3) TFEU the application of the sanction procedure in cases concerning the transposition of directives shall be admissible even if a judgment stating the infringement had not yet been rendered. In view of the importance of the reproofs of the Member States it seems adequate that the competence to decide these procedures is not given, as most of other direct actions, to the CFI but remains the exclusive domain of the ECJ. The provisions calls for a moderate and balanced application by the Commission and the Court.

**b) Judicial Protection and Procedural Rules**

A central aspect of the rule of law in the Union is the legal protection of the rights of citizens, enterprises, and Member States against illegal measures taken on the basis of Union law. Legal protection of individuals is not mentioned in the text of Article 220 EC. According to its wording, the ECJ rather has to ensure respect of objective legality, following a pattern of French administration law applicable at the time of the EEC’s founding. This approach was soon complemented by the jurisprudence on the directly applicable law of the Union, which attributed subjective rights to the persons concerned. Today, the protection of citizen rights against illegal measures of the Union is one of the main tasks of the ECJ. Reviewing the legality of the Union’s legal acts, protecting the subjective rights of natural and legal persons, and ensuring the uniform and correct application of the Union’s law in all Member States are the essential functions of the Union’s judiciary.

The ECJ has declared several times that it ensures a complete system of legal protection, and has frequently interpreted procedural rules extensively to realise this aim. Details must not be mentioned here, only the heavily disputed question of actions of individuals against generally applicable Union acts shall be discussed. They are admissible only to a limited degree.

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137 This procedure is not suitable in the view of the ECJ; see JP Puissochet, ‘L’action en manquement peut-elle encore se parer de ses justes vertus?’ in N Colneric, D Edward, JP Puissochet and RJ Colomer (eds), *Une communauté de droit* (2003) 569; see also FC Mayer, above chapter 11.


139 Everling, above n 85.


141 In the meantime, French administrative law has been changed in many ways, but this has not influenced the procedures of the ECJ; see U Everling, ‘Das Verfahren der Gerichte der EG im Spiegel der verwaltungsgerichtlichen Verfahren der Mitgliedstaaten’ in R Grote et al (eds), *Die Ordnung der Freiheit* (2007) 535, with references.

as is the case in most Member States regarding direct actions against legislative acts. In this regard, legal protection normally is only granted before the ECJ against enforcement acts by Union’s institutions which are directed to natural or legal persons and concern them directly and individually. If the enforcement acts are issued by national authorities which apply directly effective Union law, the actions may be brought before the competent national courts. As already explained, the latter are courts of Union law in a functional sense. If necessary, they can, or in the case of a court of last instance must, submit questions on Union law to the ECJ. Legal protection thus is granted either on Union or on national level. But rightly criticised is the lacuna of this system that does arise if Union legal acts directly encroach upon rights of natural or legal persons, without the mediation of a contestable enforcement act. The Treaty of Lisbon will bring about a solution for this case in Article 263(4) TFEU, in declaring actions of applicants admissible that are directed against a regulatory act ‘which is of direct concern to them and does not entail implementing measures’.

The courts’ procedures are of vital importance for the realisation of the rule of law. The Member States as parties to the Treaty have revised them several times, most recently in the Treaty of Nice, to guarantee fair and effective adjudication in due time. The steadily growing number of cases pending before the ECJ had lengthened the average time of a procedure to such a degree that it became especially difficult for the national courts to submit questions, as the main proceeding pending before the national courts had to be suspended until the ECJ issued a ruling. Therefore, it is most welcome that the rules decided upon in Nice and the numerous additional measures taken by the ECJ itself successfully accelerated the proceedings. However, these endeavours encounter limits because an exaggerated tendency to limit the number and length of hearings and written pleadings could injure the right to be heard.

Nevertheless, proceedings remain lengthy and their duration might increase in the future. In addition to the mentioned possibility of establishing judicial panels, the Treaty of Nice therefore has authorised the institutions in Article 225(3) EC to confide the CFI to decide preliminary procedures in specific areas. The case-load transfer to the CFI would give it authority to decide direct actions and preliminary questions which concern equal subjects within the same chamber. Thus, chambers of the CFI could be specialised by subject, which would facilitate jurisprudence and render the establishment of the so-called judicial panels under the CFI unnecessary. The utility of such a measure is vehemently disputed in the concerned professional circles. At present, the ECJ sees no need to use this possibility. In the long run, however, it is imaginable that all cases of direct actions and questions presented by national courts will be regularly decided by specialised chambers of the CFI, while cases of fundamental and constitutional character are decided by the ECJ which will mainly serve as the constitutional and appeals court of the Union.

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144 See Everling, above n 85; Bast, above chapter 10.
146 See the different opinions in I Pernice, J Kokott and C Saunders (eds), The Future of the European Judicial System in a Comparative Perspective (2006).
V. The Legal Nature and Future of the European Union

1. The Position of the Member States in the Union

a) The Identity of the Member States

This study may have set forth the difficult relationship between the Union, the Member States, and their citizens. In conclusion, it seems appropriate to summarise the ambiguous position of the Member States within the Union, in which they form a part of a composite, as well as constitute its ‘masters’, in order to establish a foundation for final considerations on the legal nature of the Union.

The hope often expressed after the war, that the states would have exhausted their central status, quickly proved to be an illusion. The allied states which won the war acted with strengthened self-consciousness, and the Federal Republic established a new constitutional order as a democratic state based on law. Both were in the practical political life, in spite of all rhetoric confessing to a ‘European Federal State’ or ‘United States of Europe’, not ready to confer limitless sovereign rights on the Union and were careful to retain their substance.

Granted, nation-states in the classic mould, with their claims to power and exclusivity, have largely been overtaken by globalisation and trans-national co-operation. But in any event, states remain present, at least for now, as a framework for order and an object of identification for citizens. In states, citizens vote on decisions of political orientation and states continue to feel responsible for the existence of a politically-formed society with a basis in freedom, peace, and welfare corresponding to the expectations of their citizens. The Treaty recognised in Article 6(3) EU that the Union respects the identity of the Member States, and the EU Treaty of Lisbon (TEU-Lis) will confirm this more broadly in its Article 4(2).

The Member States are central actors in the Union. They participate through their representatives in the decision-making processes of the institutions, and they are largely responsible for the execution of Community law. Especially in the Council they influence, in dialogue with EP and Commission, the direction of Union policy and the building up of Union law. They determine, jointly with the EP, the nomination of the members of Union institutions and they participate in the external policy of the Union. They can commonly amend the Treaties through the procedure provided for this purpose.

Recently the European Council has intensified its activity, and the Treaty of Lisbon will consolidate its position as an ‘institution’ of the Union. It is true that regularly it still takes its decisions by consensus; on the other hand, it is vested with certain decision-making powers, and a president elected for a longer period will strengthen its influence, as foreseen in Article 15 TEU-Lis. It seems that the Member States acting inside the European Council and also outside by formless co-operation intend to play a more and more decisive role and seek to establish a common ‘leadership’ of the Union. Whether or not they will succeed is doubtful, not only because of the great number of Member States with different interests, aims, and opinions. In any case, the usual metaphor of calling the Member States the ‘Masters of the
Treaties’, which was mostly the expression of the rule that they are competent for changing the Treaties, may get a new, expanded meaning by this development.

b) Restrictions Imposed on the Member States

The Member States are not only ‘actors’, but also ‘limbs’ of the Union in the sense that they are subject to its policies and legal order and must give it primacy over national policies and law. If they violate Union law, they may not only be called before the ECJ but can also be punished by considerable fines, as already explained. In many areas of public life they are not any more competent to act; in others they need the consent or participation of the Union institutions, as has been demonstrated.

Union law also determines framework conditions for their constitutional and legal orders. Article 6 EU declares not only that the Union rests on the principles of freedom, democracy, regard for human rights and fundamental freedoms, as well as the rule of law, but it also states that these principles are common to all Member States. Thus it establishes for the Union as well as for the Member States the obligation to organise their constitutional and legal orders according to these principles and to make them the foundation of their policies. Similarly, the prohibitions of discrimination in Articles 12 and 13 EC are also to be considered as giving orientation to national legislation.

Furthermore, Article 4 EC determines that the activity of the Member States and of the Community in the economic field encompasses co-ordination of economic policy, which is bound to the principle of an open market economy with free competition. This sets narrow boundaries for the Member States’ economic policy in the domains which are still within their competence; especially the EU monetary policy limits the room for action in the fiscal and budgetary areas.

Also, the direct connection of the Union to the citizens beyond the Member States and without their mediation shows the transformation of the Member State’s position. In this regard, the Union limits the exercise of Member States’ power on their citizens to a certain degree, an area which is traditionally claimed by the states. Union law provides subjective rights, upon which everyone may rely, but also imposes duties on them that are overseen by local authorities. The inclusion of the citizens is expressed by the Union citizenship according to Article 17 EC, which has increasingly become of substantial importance as a result of the ECJ’s interpretation. All these developments continually influence the Member States constitutions in an evolutionary process. It is described as the Europeanisation of the national constitutions, what means a long-term European assimilation of fundamental principles by the Member States, what still leaves plenty of latitude for national traits, however.

It appears highly questionable whether the Member States can still be characterised as sovereign under these circumstances. To the extent that sovereignty can still be spoken of in
the sense of an unlimited legal capacity to act in a modern, internationally interwoven world, the Member States can at best be regarded as possessing a 'divided' or 'amputated' sovereignty. In face of substantial concerns raised about this construction, the picture of a commonly exercised or 'mixed' sovereignty is more fitting. The discussion shows that the traditional understanding of sovereignty cannot contribute to the clarification of the relationship between the Union and Member States. In France, where national sovereignty is anchored in the constitution, the question of sovereignty has not yet had the effect of hindering the progress of integration, thanks to a flexible jurisprudence of the Conseil constitutionnel and various constitutional amendments.

In the foregoing context, only the extent to which Member States have retained the ability to decide existential questions of the polity is determinative. Significant in this regard is the state of emergency clause in Article 297 EC. According to this author’s view, this clause can be understood as a residual of the Member States’ sovereignty. According to Article 298 EC, however, they are thereby subject to Community law commitments, especially review by the ECJ.

2. Grouping the Views on the Union’s Legal Nature

a) An Attempt at Interpretation

Politicians and scholars have held lively discussions on the legal nature of the Union and its law since the beginning of the integration process. Considering the ambivalent relationship between the Union and its Member States, it is not astonishing that no common opinion could be found up until now. Since inception, an agreement existed that the traditional notions of connections of states as a federal state (Bundesstaat) or federation of states (Staatenbund) are not appropriate, as they corresponded to special historical situations. It is also common opinion that the eventual solution must be found between such extremes. In the scientific debate many theories to understand the Union have been proposed. Their main characteristics shall be presented now in a schematic and simplified form, in order to give a short overview of the different opinions.

In the first decades the theory was most dominant in Germany that the former EC must be understood as a special association oriented towards functional integration (Zweckverband funktionaler Integration), which was apolitically determined by technical rationality and the inherent economic dynamic of Community law. This theory was doubtful from the outset because of its lack of a clear constitutional basis.


157 See Bellamy and Castiglione, above n 155, 111.

158 See Frowein, above n 154, 219; Peters, above n 49, 148.


160 See S Oeter, ‘Vertrag oder Verfassung?’ in Bruha et al (eds), above n 100, 243.


163 See the surveys of A von Bogdandy, ‘A Bird’s Eye View on the Science of European Law’ (2006) 6 ELJ 208; Peters, above n 49, 203; see also P Craig, ‘The Nature of the Community’ in idem and de Burca (eds), above n 15, 1. From a political science perspective, see W Loth and W Wessels (eds), Theorien europäischer Integration (2001).

164 The main proponent of this thesis was Hans Peter Ipsen, above n 19.
since the Community was always politically based, but it has certainly at least been disproved by the activities of the Union in the CFSP and defence policy.

A similar objection is to bring up a special approach based on economic functionalism, which attempts to justify and legitimise the Union and Community through the expanding of the freedoms of the citizens which is effected by the economic dynamic and rationality of the open markets with undistorted competition.\textsuperscript{165} As important and indispensable as the foundation of Community and Union on market and competition was and still is, its influences alone cannot explain the construction and core of the current political entity, which is capable of acting in fields such as foreign and defence policy.

A second group of views seeks to preserve the integrity of the states by deriving the Union from the Member States.\textsuperscript{166} The designation of the Union as a \textit{Staatenverbund} (‘composite of states’ or ‘union of states’), adopted by the Bundesverfassungsgericht, rightly highlights that the core of the Union consists of Member States, whose organs are founders of and actors in the Union. But in suggesting the dominance of the states over the Union, this thesis conceals that the states are also members of the Union and in many regards dependent and influenced by it, and also, that the citizens are directly engaged by the Union.\textsuperscript{167}

This theory corresponds, if not literally, than in substance, to opinions expressed in other Member States by politicians or scholars. One might recall the famous French slogan of ‘Europe des patries’ and the attempts to insist on the sovereignty of the states.\textsuperscript{168} In the British doctrine, the opinion that the Member States are dominant in the Union which is understood as a mere ‘Common Market’ is also widespread.\textsuperscript{169}

Some authors answer objections against this theory by explaining the Union from the perspective of the open constitutional state.\textsuperscript{170} As correct as this understanding of the modern state is, and as much as it is suited to loosen the thesis of the \textit{Staatenverbund}, it still cannot explain the particularities of the Union, as this is not understood for its own value but rather as a reflection of the states which constitute it.

A third group of views does not start with the states but with their constitutions. To a certain degree as a counter-notion to the \textit{Staatenverbund}, the Union is seen as \textit{Verfassungsverbund} (‘constitutional compound’ or ‘composite of constitutions’).\textsuperscript{171} This expresses the idea that within the Union, the Member States interlace between each other and within the institutions of the Union on all levels of policy, economy, law, and society and mutually permeate, or at least influence, each other. But it is to ask whether this opinion goes too far by collectively


\textsuperscript{166} See P Kirchhof, ‘Der deutsche Staat im Prozess der europäischen Integration’ in J Isensee and P Kirchhof (eds), \textit{Handbuch des Staatsrechts} (1993) vol VII, § 183, para 50; see also idem, below chapter 20; further, see particularly the well-known \textit{Maastricht} judgment of the Federal Constitutional Court, \textit{Entscheidungen des Bundesverfassungsgerichts} 89, 155, 188.


\textsuperscript{168} Cf Luchaire and Favret, both above n 159.


seizing the Member States and assuming their complete inclusion into the Union. This seems near to understanding the Union as a *Bundesstaat* (federal state), which is not realistic in the foreseeable future and certainly not intended by the protagonists of this theory.\textsuperscript{172}

For this reason other authors more cautiously speak of the ‘Europeanisation’ of the national constitutions in order to clarify the connection between the organisational structures of the Union and the organisations and societies of the Member States, without completely receiving them.\textsuperscript{173} In the same vein, other authors call attention to the polycentric network character of the institutional and legal system of the Union and its ‘composite constitution’ (*Verbundverfassung*)\textsuperscript{174}, or the ‘commonwealth of nations’.\textsuperscript{175} The national constitutions, which are partly superposed by Union regulations, are even called ‘partial constitutions’ (*Teilverfassungen*).\textsuperscript{176} That certainly does not correspond to the understanding of most Member States. Widely accepted in the field of political science and also usual in legal discussions is the popular metaphor of the Union as a ‘multi-level system’.\textsuperscript{177} It vividly shows the vertical construction of the Union but gives the impression of a hierarchy between the levels and does not express their interlacing. Finally, the well-known designation of the Union as a ‘process of constitutionalisation’ should be mentioned.\textsuperscript{178} This process currently seems to be interrupted following the failure of the Treaty establishing a Constitution for Europe.

\textbf{b) Summing up the Different Views in the Federal Principle}

These views on the nature of the Union, briefly and incompletely reprised here, are all in essence apposite, however they all individually fail to grasp the reality of the Union in its entirety. In the opinion of this author they can convincingly be brought into the federal principle, which reflects the assemblage of local and regional corporations and states, as well as their citizens, to a political entity capable of acting. It is appropriate to express the interlacing between the different levels of action as well as the limited power of the central instance to take measures effective for all levels, and the corresponding limitation of those levels to act. Inherent in this principle is the relationship of tensions between the policies and law of the corporations of the different levels, which were demonstrated in this study in the relationship between the Union and Member States.\textsuperscript{179} The Union has been organised following federal models to a considerable degree.\textsuperscript{180} This is especially true for the Council, which is far-reaching constructed like the German *Bundesrat*, the chamber of the representatives of the *Länder*. This is true even for specific rules like the

\textsuperscript{172} See von Bogdandy, above n 163, 27.
\textsuperscript{173} Cf J Schwarze (ed), *Die Entstehung einer europäischen Verfassungsordnung* (2000); see also Frowein and Berranger, both above n 154.
\textsuperscript{174} Keohane and Hoffmann, above n 47; Peters, above n 49, 218.
\textsuperscript{175} See N MacCormick, ‘Democracy, Subsidiarity, and Citizenship in the “European Commonwealth”’ in idem (ed), above n 155, 1; Craig, above n 163.
\textsuperscript{178} See, eg Oeter, above n 160; Peters, above n 49, 360.
preparation of decisions by groups of civil servants, the limited influences of the regional parliaments, and the execution of policies typically occurring at the level of national administrations. But the functioning rules are modified according to the particularities of the supranational system, as e.g., for the relations between Council and European Parliament, and the Commission as an organ for initiatives and proposals. The judicial system, especially the procedure of preliminary rulings on questions of national courts to the ECJ, corresponds to the need of distributing the judicial power between the Union level and that of the Member State.  

Calling the Union a federal system refers to models of double-floor organisations and, in accordance with the concrete situation, accepts some, but not necessarily all of the structural elements of such a system. This is frequently misunderstood by politicians and scholars of Member States who, unlike Germany, do not have a federal tradition and believe that the tendency to the federal state is inherent in this system. Historical experience shows that federalism is not directed on centralism but rather on the strengthening of smaller units against the central powers. The distribution of powers between several levels in a federal entity is open and variable. The explanation of the Union as federally organised opened up the possibility of variably distributing the powers according to present and future requirements and to place it in a field between statehood and a simple assembly of states.

After all, the Union can be described as a federally constituted compound of states and their citizens, destined to achieve common goals. This formula, however, should not be understood as a definition but rather as an effort to approach the reality of the Union.

3. Conclusions and Outlook

It is difficult to predict whether the Union can exist long-term in the peculiar situation as a federally constituted political entity beneath the quality of a state. Further development will to a large degree depend upon whether, beyond policy and economy, the societies of the Member States will integrate. Early on, it was emphasised that European integration would require an intellectual development process. Similarly as the state is confirmed by the daily plebiscite of its citizens and realised by the integration of the citizens, the Union must also find its basis in the consciousness of the citizens in the long term. Up until now, the loyalty of the citizens is mainly directed towards the states. This does not, however, preclude a future simultaneous orientation towards a larger entity.

This process of consciousness has begun at all levels of society, but its achievement seems presently to be a mere illusion and, in any case, will require patience, perhaps extending over generations. Under these circumstances it is difficult to foresee the development of the Union. But as result of the analysis presented in this paper it may be concluded that the EU in its present state as a federally constituted union of states and citizens, undecided between a state and an mere organisation of States, will be able to fulfil its mission also in the near future. Perhaps it is true that the Union has now reached its zenith of development, especially with regard to the intensity and deepening of its powers. In the time to come, it will be necessary to preserve and improve the attained standard. The Treaty of Lisbon goes in this direction and may be, after ratification, a confirming element. If the Union can succeed in maintaining its present standard it will further contribute to peace, liberty, and welfare in Europe.

181 See above text at n 133.
The European Union of States

PAUL KIRCHHOF

I. The Rejection of the Treaty Establishing a Constitution for Europe

1. The European Community of Law as a Community of Measurement

2. The Integration’s Reality and Aspiration

3. Constitution—a Uniform Text or the Basic Structure of a State?

4. A Perpetualising Constitution and the Dynamic Order of Development

II. The Relationship between Constitutional Law and European Law

1. The Constitutional Requirements for the Application of European Law

2. The European Union as a Union of States

3. The Europeanisation of Constitutional Law

4. A Multi-level Model?

III. The State

1. Statehood and Openness to Europe

2. The People Encountered in Liberty

3. Sovereignty

4. New Challenges for the State

IV. The State in a Union

1. Development of a Common Constitutional Law in the Aftermath of the Maastricht Treaty

2. Supranationality

3. The Vitality of the State Declared Dead

4. The Mandate of Co-operation

5. Modern Forms of Balance of Powers

6. A Europe of States as an Opportunity for Peace and Freedom

I. The Rejection of the Treaty Establishing a Constitution for Europe

1. The European Community of Law as a Community of Measurement

‘The European integration process is anything but plain sailing’,\(^1\) like a ship the course of which cannot yet be clearly identified. The European Union and European law are steadily moving, but so far have not defined their final destination, or at least their next stop. Even the draft Reform Treaty of Lisbon\(^2\) introduces a development with never-ending dynamics as it speaks of


a ‘process of creating an even closer union among the peoples of Europe’ (Article 1(2) TEU-Lis). In this tendency to limitlessness lies the problem of the European community based on the rule of law (Rechtsgemeinschaft). Law usually passes down established institutions, approved values and reliable political experiences to the next generation and fits new instruments of reform, particularly the decision-making competences of the parliament and government, into this legal framework. Hence, law sets a measure and moderates. Despite the success of the European integration, the new Treaty on European Union and the Treaty on the Functioning of the European Union still evade specifying the final destination of the integration process.

The Treaty of Lisbon has been questioned by the negative vote of the Irish, which has so far been the only referendum on the Reform Treaty. Earlier there had been some more democratic signals of disapproval, especially the rejection of the Maastricht Treaty by Denmark in 1992 and the rejection by the Netherlands and France of a ‘Treaty Establishing a Constitution for Europe’ in 2005.4

In this phase, where it is more the EU institutions asking for reforms and the peoples (Staatsvölker) resisting, the Treaty of Lisbon shows two reform objectives that must determine the path of further integration: the demand for more democracy and refraining from a European constitution-making process which would lead to a United States of Europe.

a) The Demand for More Democracy

In 1961, when Adenauer and de Gaulle shook hands at the castle of Raststatt in Southern Germany and proclaimed a Europe without war and border controls, a large crowd of young people cheered and waved European flags, filled with excitement. I was amongst them and shared the joint moment of happiness. This Europe of peace and openness was our Europe.

Even now, Europe is our business. Yet the European Union appears to convey an image, or rather a caricature, of itself and comes across as an alien power. European laws seem to crush the people with their plenitude instead of conveying security and liberty. Furthermore, the European institutions less often appear to grant openness of encounter, exchange and freedom of travel but rather pressure us with observation, sanctions and prohibitions through an increasingly larger and more anonymous bureaucracy. The European budget appears to provide the fiduciary money for subsidiary funds rather than returning it to the taxpayer. A Europe that is understood and misunderstood in this way should not push for more competences but preferably determine the final stopping point of European integration. During the founding years, increasing competences were necessary for the Union. Now it is time to clearly and permanently define the competences between the Union and the Member States. A sensitive area of constitutional statehood (Verfassungsstaatlichkeit) is touched if, due to the Treaty of Lisbon, the Member States really lose essential competences in the field of justice and home affairs. However, if more sovereign rights, such as energy policy, space, sports, tourism and civil protection, are transferred to the Union, then this must go hand in hand with the empowerment of democratic participation rights for the national and European parliaments.

Union citizens are very sensitive when their individual rights—fundamental freedoms and fundamental rights—are not equally guaranteed vis-à-vis the European institutions and the Member States with regard to intensity and commitment. This is especially true when these rights and freedoms are not only considered as a restriction for the exercise of competences but are treated as if conferring further competences to the Union and consequently undermining the Member States’ competences. Moreover, if the right of initiative continues to remain exclu-

4 European Parliament, above n 1, 16.
sively with the Commission, then neither the Member States nor the European Parliament can set a legislative project on the Council’s agenda. Hence the separation of powers is in danger of being annulled by the Commission’s dominance and by the law-making of the executive branch. Judicial control of EC legislation cannot solely rest in the hands of the European Union, at least when it comes to disputes on competences between a Member State and the European Union. As a result, the enlargement of the Union is much more an issue of the EU institutions than of the Union citizens.

If this Europe is deemed to be alienated from the people and should become theirs again, the question of democracy arises. In a democracy the free citizen determines the decisions of the community. He or she is equally a ruler and not just a subject within the community of the people. Any exercise of public authority has to be traced back to the will of the citizens. In this requirement for democracy the exercise of public authority finds measure and objective.

b) No Constitution-Making

This idea of democracy under public law cannot be translated directly to the European Union as the Union is no state and no single European people (Staatsvolk) exists. The British, French, Italian, Spanish, Czech, Polish and German peoples will not abdicate the culture of their own state. Thus the European Union needs the culture of the Member States’ constitutions and constitutional courts in times of legal upheaval. The European Union is a community of states in close connection—a union of states (Staatenverbund)—where the Member States partially fulfil tasks and exercise public authority jointly.

The draft of a ‘Constitutional Treaty’ failed due to the negative referendums in France and the Netherlands and could have failed in three other Member States—Great Britain, Poland and the Czech Republic.5 The Treaty of Lisbon refrains from the idea of a constitution.6 The Member States avoid any legal signal pointing in the direction of the development of a European state and the end of nation-states by objecting to Union symbols laid down in the Treaty (flag, anthem, maxim, euro and Europe Day7), and refraining from referring to the ‘High Representative for the Union in Foreign Affairs and Security Policy’ as the ‘Foreign Minister of the European Union’. Additionally, the restructuring of European legislation was not called ‘law’ and the idea of granting the primacy of Union law over national law in the Treaties was dismissed.8 Hence, the Member States rejected the ‘constitutionalisation’9 of European law as far as the term ‘constitution’ suggests the emergence of statehood—the ultimate source of a legal order, absolute primacy, the authority of constitution-making of the people (pouvoir constituant), and the presence of an exclusive and basic political structure.

At the same time, the European Parliament emphasises in its decision regarding the Treaty of Lisbon10 that the Union ‘effectively’ already has its constitution and that a ‘fundamental act governing the exercise of power in a political entity’ can be derived from the previous contracts. Such a ‘constitution’ could even give a formal guarantee to the Member States and citizens against potential lapses of Union activity. The European Parliament, however, which

6 European Parliament, above n 1, 18.
7 Ibid, 19ff; Rabe, above n 5; on the other hand, the German Federal Government, above n 3, stresses that the symbols remain an essential element of European integration.
8 See intergovernmental conference, in CO Lenz and K-D Borchardt (eds), EU-Verträge (2008) 430, No 17, especially referring to the jurisdiction of the ECJ, according to which the primacy of EC law is one of the founding pillars of Community law.
10 European Parliament, above n 1, 17ff.
always promoted the Union’s ‘constitutionalisation’, now regrets having to give up the constitutional approach. This unveils contradictory concepts: the Treaty of Lisbon regulates the restricted powers attributed to the Union, whereas the European Parliament tries to moderate a barely regulated Union power.

The democratic decision against the ‘Constitutional Treaty’ would be ignored if one still continued to speak of an EU constitution. It is not self-evident, however, that the Member States’ constitutions will continue to develop the power to form and mitigate all political sovereignty. Yet if the European Union does not have a constitution and the Member States’ constitutions only cover some parts of political activities, the risk exists that a wide range of law will fall outside the scope of the domestic constitution and the domestic constitution will degenerate since it is no longer the state’s foundation but merely its system of development.

The Treaty of Lisbon substantiates the constitutions’ role in the Member States as the foundation of the national community of law and as the source for the applicability of European law in the Member States. The basic values clause of Article 2 TEU-Lis must certainly remain a political requirement for membership in the EU. It is not allowed—despite the enlarged competency of the ECJ—to become an instrument of judicial correction to the constitutions of the Member States.

2. The Integration’s Reality and Aspiration

Presently, the European Union is living legally on the ‘charisma of the unfinished’. It has now enlarged to 27 Member States and, in the version signed in Strasbourg on 12 December 2007, according to Article 6 of the Treaty on the EU of Lisbon, accepted the Charter of Fundamental Rights of the European Union as coequal with European primary law. The European Union consciously keeps itself open to further members and to the development of its tasks, institutions and decision-making process.

Thus, the drafts of the treaties stress this openness to development and the mandate of reformation. ‘Passarelle clauses’ (Brückenklauseln), flexibility clauses, integration progress of all or only some Member States, the mandate to join the European Convention on Human Rights (ECHR), the overcoming of the concept of ‘pillars’, and citizens’ initiatives all keep the Union going. The drafts try to promote a development of law beyond the scope of the contractually agreed by using anticipated legal terms to achieve the presently unachievable. By referring to the European assembly, which has no real legislative or budgetary power, as the ‘Parliament’, by determining those entitled to liberty without affiliation to a European people as ‘European Citizens’, by qualifying a partially European community as ‘European Union’ and by giving the experiment of the monetary union without a preceding economic union the title ‘Economic and Monetary Politics’, these terms of the Treaties suggest something that might exist in the

11 Consider especially ibid, 19. As far as it refers to the Founding Treaties of the International Labour Organisation, the World Health Organisation and the Universal Postal Union as ‘constitution’, this term degenerates to a technical organisational statute and consequently a discussion on words is not worthwhile.
13 Ibid, 565.
16 With certain reservations for the UK and Poland according to Protocol No 30 to the Treaty of Lisbon, [2008] C 115, 201, 313ff, on this European Parliament, above n 1, 23.
future but does not exist at present. The thesis of an already existing European constitution and
the regret of having to give up ‘constitutionalisation’ both focus on a future which has been
rejected by the Treaty-founding institutions. This terminological generosity recognises that the
Union has not yet reached its final stage and tries to achieve more through the application of
dynamic law, i.e. by using the alienation of terms as revolutionary policy, rather than through
formal Treaty amendments of the governments, parliaments and peoples of the Member States.

3. Constitution—a Uniform Text or the Basic Structure of a State?

The European Parliament, in its report on the treaty of Lisbon, considers the rejection of the
Constitutional Treaty and the amendment of the existing Treaties to be the renouncement of the
idea of uniting the previous Treaties into one uniform, systematic and comprehensive Treaty.
Such an interpretation of the ‘constitution’ merely being a ‘uniform and consolidated Treaty’
misses the idea that is delivered in the tradition of European public law with the term ‘constitution’.

In public law, the existence of a constitution is fundamentally attributed only to the basic
order of a state. However, it would not do conceptual justice to the reality of the European
Union because the Union’s legal foundation can only be changed by way of Treaty supplement
and Treaty amendment through the Member States, not through a constitution-making
authority. Rather, the Member States confer competences to the European Union in order to
attain objectives they have in common. This creation of competences is based on an act of
transferral by the Member States and not on an act of constitution-making. Consequently, the
Union competences are governed by the principle of conferral; it is obliged to respect the
national identity of the Member States and their essential state functions and it is dependent on
their financial and enforcement powers. Due to its limited power to organise and shape policy
and, more importantly, due to its indirect legitimation through the peoples of its members
(Staatsvölker) and not through a European people (Staatsvolk), the European Union cannot lay
claim to the legitimation, the universal nature and the power of re-innovation of a constitu-
tional state.

The strong support among politicians and scholars for the term European ‘constitution’, or
at least ‘Constitutional Treaty’, pursues the goal of bringing an end to the legal uncertainty
regarding the compound of public authority of the European Union by means of a termino-
logical promise of unity and democracy. The ‘constitution’ advocates a comprehensive
public—i.e. state-based—political power to act and a legal responsibility that admittedly does
not attribute the quality of a state to the EU. It does, however, attempt to loosen the clear
opposite character of ultimately responsible states and a Union that is empowered by exactly
these states. This term even occasionally operates under a ‘post-national’ constitutional
understanding. A ‘constitution’ thus renders the constituted community independent with
respect to the authorising Member States, weakens the democratic–parliamentarian link of the
EU vis-à-vis the peoples (Staatsvölker), and appears to call into question their function as
‘Masters of the Treaties’. Consequently, the term ‘constitution’ intimates a basic order constitu-
ted and legitimated by a democratic people and thus seeks to mask the as yet unsolved

18 European Parliament, above n 1, 19ff.
19 Ibid, 18ff.
20 See Entscheidungen des Bundesverfassungsgerichts 89, 155, 181, 191ff (Maastricht); English trans in
23 See Entscheidungen des Bundesverfassungsgerichts 89, 155, 190 (Maastricht); German Federal Foreign
Office, above n 17, 5.
problem of a weak and, for increasingly expanded competences, insufficiently democratically legitimated EU without a European Union people (Unionsvolk). A constitution rests on itself, has duration and continuity as its object, and constitutes a corporation that is secure and immutable in its core content. A European constitution could only guarantee an in-between status for a European community based on the rule of law (Article 1 (2) TEU-Lis), which is grounded in an ongoing development and dynamic, and could only codify an acquis communautaire, serving as a legal basis for the further development of the Union. On the other hand, only a ‘constitution’ seems to be able to regulate and bind the EU’s ‘public authority’ sufficiently for the protection of the citizens and their fundamental rights. Above all, the term ‘constitution’ includes the claim to stipulate a comprehensive basic order of public life, which renews itself from within, takes on new tasks independently and empowers the corporation that it constitutes for further autonomous development. With this terminology, the principle of conferral and the prohibition of Treaty expansion by the Treaty institutions is loosened or even lifted. The more the Union gains a constitutional foundation, the stronger its independence gets and the weaker the Member States’ power to determinate the Union, its organisational statute and its material commitment becomes.

The strict legal significance of a European Constitution lies in its claim to validity, most likely pushing aside the validity of the Member State’s constitutions though including an article resembling Article 23 of the Basic Law (Grundgesetz)—the norm that authorises the individual state to participate in the European Union in accordance to constitutional laws. Finally, the term ‘constitution’ carries its own legitimating and sympathy-inducing value that is supposed to invest the organisational statutes of the EU Treaty and the Treaty on the Functioning of the European Union with more of the lustre of democratic legitimation and rule of law’s completeness.

4. A Perpetualising Constitution and the Dynamic Order of Development

A constitution is a democracy’s memory. A constitution keeps a record of the assured and recognised status of traditional public law in a document, shapes it into the rationality of a text and generalises it through a general comprehensive rule. At the same time, it provides the spokesman of constitutional law—the jurisprudence—and the procedure of constitutional amendment to develop the organisational statute and fundamental rights according to the present necessities. Since it is future oriented, however, the European Union is only an organisation in progress, with a poorly established legal tradition. The dynamics of integration, already laid down in the founding Treaties and renewed in the current enlargement phase, subjects the communitisation to a development process which is not aimed at shaping a federal state by enlargement but rather loosens and downgrades the composite entity. In this enlargement phase of integration, which is at the same time graduated and partially reduced in intensity, there is neither the task nor the urge for European constitution-making.

24 See Entscheidungen des Bundesverfassungsgerichts 89, 155, 181 (Maastricht); see also M Kaufmann, Europäische Integration und Demokratieprinzip (1997).

740
In the end, the status of the EU’s legal basis is too complex and novel, and can therefore not be classified in the traditional legal categories. The Treaties are legal documents that presume to perpetuate the EU’s legal fundament and protect it against ad hoc infringement.\(^{28}\) The Treaties constitute the basic order of the community, which maintains the *acquis communautaire*, supports its development, and is partially superior to the Member States’ constitutions. Furthermore, the Treaties, without obtaining the competence to decide freely on its own competences (*Kompetenz-Kompetenz*), still bring about new courses of action and, as a result, clarify the Member State’s sovereignty in their openness to Europe.\(^{29}\) It also seeks an interwoven and successively referential co-operation with the constitutional orders of the Member States. The European Union is a union of states with an independent basic order that is able to carry, stabilise and develop this union. The union of states is not a union of constitutions,\(^{30}\) although the European basic order and the Member States’ constitutions, along with the ECHR, try to establish a common European legal order where different sources of origin and knowledge of this law support, strengthen and develop one another. Nonetheless, this composite legal order is supposed to allocate tasks, competences and power, and thereby legal responsibilities, according to the constitutions, the EU Treaty, the EC Treaty and the ECHR, as well as legitimise the exercise of public authority and substantiate responsibilities to control. Consequently, the states are compounded by their independent—and in this regard non-connected—state of being constituted.

II. The Relationship between Constitutional Law and European Law

The legal concept of the European Union is without precedent and instead calls for the reconsideration of statehood open to the world and a sovereignty open to Europe. Furthermore, the EU’s legal concept pushes for political responsibilities, a legitimation basis and accountabilities. Thus it is necessary to create a new legal framework for this two-tiered political power and public authority with an organisational statute that clearly allocates tasks, competences and powers and, as a result, legally forms and mitigates responsibilities. At the same time, this new legal framework would clarify the status of the Union citizen in the European community of values determined by fundamental rights. It would release him from legal anonymity and rebalance the relationship between well-organised large associations and an individual citizen in Europe.

1. The Constitutional Requirements for the Application of European Law

European law is applicable only in the respective Member States if the Member State has ratified the Treaty according to its constitution (Article 52(1) EU, Article 54(1) TEU-Lis and Article 357(1) of the Treaty on the Functioning of the European Union (TFEU)). Acts of parliament approving the Treaty or a referendum are the bridge between European law and the Member State’s territorial scope of application. In the event that parliament or the peoples do not agree

\(^{28}\) In this respect, the ECJ speaks of a ‘basic constitutional charter’ of ‘a Community based on the rule of law’: Case 294/83 *Les Verts v Parliament* [1986] ECR 1339, para 23; Opinion 1/91 *EEA I* [1991] ECR I-1679, para 1.


to the Treaty, then one requirement for application is lacking and European law remains non-binding. Hence the starting point and objective of European law are the Member States. The European Union respects the respective national identity of the Member States (Article 6(3) EU, Article 4(2), 1st sentence TEU-Lis); the Member States' constitutions maintain the constitutional state's identity within the European integration.31

Many Member States' constitutions have been explicitly adjusted to the continuing process of integration—especially regarding the ratification of the Maastricht Treaty. The participation of the respective Member State in the EU partially depends on the legal structure of the constitution in the sense of a constitutional norm containing a structural guarantee clause (Struktursicherungsklausel).32 Additionally, the constitution ensures the remaining constitutional and public, ie state-based, structure of the Member States, which is not affected by the integration process, ie a guarantee of identity.33 Finally, the constitution may require a special procedure for further transfer of public authority to the EU, usually by means of a constitutional amendment or a referendum.34 These constitutional rules have a binding effect on the constitutional state regarding the decision whether or not the state wants and is allowed to give the order of application for European law within its territory. If that decision were in breach of constitutional requirements, it would be unconstitutional and could be revoked by the responsible institution—in Germany, the Federal Constitutional Court (Bundesverfassungsgericht). Thus, European law lacks a basis for applicability within the respective states. The authorisation of the Member States to participate in the European Union is at the same time a restriction to act within the framework sketched out by the constitution.35 These constitutional

31 Regarding Germany, see Art 23 (1), 1st sentence Grundgesetz and below n 32.
32 Constitutional norms containing a structural guarantee clause directly related to the European Union are Art 23(1), 1st sentence Grundgesetz (a Union that is obligated to the democratic, rule of law, social and federative principles and the principle of subsidiarity and guarantees protection of fundamental rights essentially comparable to the Grundgesetz); ch 10, § 5(1) RF of the Swedish Constitution (freedoms and legal protections corresponding to the constitution and the ECHR); in more abstract form, see also Arts 88-1ff of the French Constitution (voluntary common exercise of competences, condition of mutuality). Art 7(6) of the Portuguese Constitution authorises the transfer of sovereignty under the condition of mutuality, while observing the principle of subsidiarity and with the goal of realising the economic and social cohesion; Art 7(5) continues that Portugal supports the process of European unification for democracy, peace, economic progress and justice between peoples. Art 20(1) of the Danish Constitution generally foresees the transfer of sovereign rights only to organisations for the promotion of interstate legal order and co-operation.
34 Procedural requirements for the transfer of competences to the European Communities are found, in addition to those in Art 23(1), 2nd and 3rd sentences Grundgesetz (approval by the Bundesrat majority required for constitutional amendment), in Art 168 of the Belgian Constitution (participation of the chambers) and ch 10, § 5(1) RF of the Swedish Constitution (a three-quarters majority of the votes cast or the majority required for constitutional amendment). For any kind of transfers of public authority, Art 93, 1st sentence of the Spanish Constitution requires a constitutional implementing law and Art 20(2) of the Danish Constitution requires a five-sixths majority of the members of the Folketing. See also the corresponding provision in Art 90(2)–(4) of the Polish Constitution (majority requirements, plebiscite).
35 In addition to Art 23(1) Grundgesetz, the Constitutions of France (Arts 88-1 to 88-4 Ireland (Art 29(4)) and Sweden (ch 10, § 5(1) RF) specifically authorise the transfer of public authority to the European Communities. The Constitutions of Spain (Art 93, 1st sentence), the Netherlands (Art 92), Denmark (Art 20(1)) and Belgium (Art 34) authorise the transfer of public authority to suprastate organisations more generally. See also the corresponding provision in the Polish Constitution (Art 90(1)).
The norms of the respective Member States establish certain requirements for the application of European law and its order of application within the Member State. Consequently, European law encounters insurmountable boundaries in those constitutional law provisions, and these provisions require primacy over European law.\(^{36}\)

The assumption that European law has primacy over even national constitutional law thus seems to be incorrect, though the respective constitutions do open up to European law as long and insofar as the constitutional state makes use of its opening clause. European law, however, is subordinate to the opening clause as the latter is a precondition for the application of European law within the respective constitutional state.

2. The European Union as a Union of States

The European Union was founded, enlarged and renewed by its Member States. The European Union is a union of states\(^{37}\) that exceeds a confederation (Staatenbund) because of the intensity of commitment resulting from the means of uniting. However, this intensity does not reach as far as the statehood of a federal state (Bundesstaat). The roots of the European Union lay within the Member States, but it cannot and does not want to fulfil their universal functions, nor does it require the competence to decide freely on its own competences (Kompetenz-Kompetenz)\(^{38}\) by assuming new and other functions out of its own jurisdiction, without assignment from the Member States.\(^{39}\) When still-young democratic constitutional states in Central and Eastern Europe have just recently joined the European Union, the Union should not suggest wanting to impose a legal system on those states which would repress their young constitutions by using the term ‘European constitution’. Europe is more ambitious: the community based on the rule of law lives on the overlapping and complementary spheres of European law and Member States’ constitutional law. In this cohesion of multi-level law-enforcement and determination, it develops a legal culture that would not be possible in a merely euro-centric legal system. The people (Staatsvolk) are—according to a democratic understanding of the constitution—the pouvoir constituant.\(^{40}\) Such a constitution-making process does not bring about new legal structures in a Europe open to people and international public law, but rather develops and specifies general legal principles. The constitution-making power is, more likely, a power passed on. Such constitution-making could not be proclaimed through a Treaty-amending process, but would have to be accounted for by the people. However, no such European people (Staatsvolk) exist. At present, the idea of a European constitution-making process reaches too far into the future—maybe even into Utopia. If a European people (Staatsvolk) should ever come to exist, aware of its cultural cohesion and willing to jointly make and enforce law, that wants to establish an economic and political community at risk and action that, at least with one common and general second language, is aimed at exchange, then the European institutions would have to start working in that direction today. The institutions would have to set up Europe-wide political parties, support media reports that put this European affiliation and Euro-capability into a common language, into a market, a more natural cultural and scientific exchange.

\(^{36}\) See Entscheidungen des Bundesverfassungsgerichts 89, 155, 181ff (Maastricht).

\(^{37}\) See ibid, 156, 181 (Maastricht) et passim; see also P Kirchhof, in J Isensee and P Kirchhof (eds), Handbuch des Staatsrechts (1992) vol VII, § 183, para 38 et passim.


\(^{40}\) U Steiner, Verfassunggebung und Verfassunggebende Gewalt des Volkes (1966); D Murswiek, Die verfassunggebende Gewalt nach dem Grundgesetz für die Bundesrepublik Deutschland (1978); E-W Böckenförde, Die verfassunggebende Gewalt des Volkes: ein Grenzbegriff des Verfassungsrechts (1986); H-P Schneider, in Isensee and Kirchhof (eds), above n 37, § 158.
Furthermore, the decisions and decision-making process of the European institutions would have to become more transparent and comprehensible to all Union citizens. Therefore, whoever presently speaks about a European Constitution conceals the efforts that are still missing and endangers any further integration.

The concept of European integration does not encompass the founding or making of a democratic state but rather the existing union of states acting through its Member States’ governments and legitimating itself democratically through their national parliaments. The original structure of the European Communities’ functions was rather administrative-technocratic and follows the dominion of the experts. The Council is legitimated by the national sources of Member States’ parliaments and governments, which themselves are again legitimated in the necessary social and institutional cohesion. The European Parliament currently has an increasing but, nonetheless, merely supportive role within the context of democratic legitimation.

A ‘European’ constitution would also claim to be binding for the public institutions of the Member States. Hence, the constitutional states’ independence, the characteristics of their constitutions and the achievements of their constitutional history would get pulled into the vortex of a European constitution and would eventually become lost within it. The European Union cannot presently, however, do without the diversity of the European constitutional culture, which supports Europe-wide constitutional statehood through the parallel existence of written and unwritten constitutions, centuries-long constitutional traditions and young constitutional awakenings, organisational constitutions, substantive constitutions of values, and court-oriented and appellative constitutions.

The Member States’ constitutional law gives the European Union an objective and defines its scope of development. This is also confirmed in the Treaty of Lisbon: according to Article 1 TEU-Lis, the contracting parties establish amongst themselves a European Union ‘on which the Member States confer competences to attain objectives they have in common’. The Union derives its competences and powers from the Member States. It obtains its legitimation from the Member States and not—as the ‘Constitutional Treaty’ suggested—from the people. As stated in Article 3(6) TEU-Lis, the Union’s objectives, as well as its measures, are restricted by the competences ‘which are conferred upon it in the Treaties’. The Union does not have the right to take on its own competences (Kompetenz-Kompetenz); the principal of conferral is effective in this regard (2nd and 3rd sentences of Article 5(1) TEU-Lis). The Protocol on the application of the principles of subsidiarity and proportionality intensifies these principles: the Member States’ parliaments obtain the right to information in due time on all of the Commission’s legislative proposals. These proposals are to be reasoned regarding subsidiarity and commensurability. The parliaments can directly approach the EU institutions and notify them that the proposal is not workable under the subsidiarity clause. This ‘system of early warning’ provokes rechecking and can finally—in co-operation with the European Parliament and the European Council—terminate the law-making process. Additionally, the protocol offers the Member States the possibility of filing a complaint to the Court of Justice against an act of legislation thought to breach the principle of subsidiarity. The claim’s addressee is a Union institution—the ECJ. The draft of a law amending the German Basic Law (Grundgesetz) provides a right for the Federal Parliament (Bundestag) and the Federal...
Council (Bundesrat, the Länder’s representation) to file a claim of subsidiarity and a minority right for one-quarter of the members of the Parliament. The question remains to what extent the European institutions will put competence claims of European institutions into perspective, ie show them their limits.

3. The Europeanisation of Constitutional Law

The Member States’ constitutions in their provisions for participation in the European Union require validity and primacy over European law, but are subjected to Europeanisation due to their openness to European integration. Whenever the pouvoir constituant’s order of application through its parliament or via a referendum validates the European Treaties and the subsequent secondary law, competences and powers descend from the Member States’ parliaments to the European law-making institutions and from the Member States’ governments to the Council and Commission. Jurisdiction is aimed at co-operation.46 Regarding constitutional law, the Member States’ constitutional courts are the ultimate interpreters of the constitution and consequently of the national scope of participation within the European Union. On the other hand, the ECJ is the ultimate interpreter of European law and, as a result, interprets the Union institutions’ competences and powers at the expense of the domestic constitutional institutions. Therefore, constitutional law exercises its will in European law when co-operating with various state institutions while participating in the Union’s institutions and executing European legal acts. Yet rights to information, participation and co-decision making, and also the right to establish their own institutions—in Germany, the Committee of the Parliament on the Affairs of the European Union (Europaausschuss des Bundestages) and the Chamber of European Affairs of the Federal Council (Europakammer des Bundesrates)—change the decision-making structures of the constitutional institutions.

Furthermore, the development of substantive constitutional law is strongly influenced by European law.47 German fundamental rights come under the influence of the Union citizen’s liberty and equality rights. The constitutional order as limitation for freedom of action and personal rights takes on European law regarding its requirements. The law on asylum and the right to extradition obtain a new point of reference within in the Union’s territory and equality rights gain a broader perspective of comparison. The right for Union citizens to vote in municipal elections determines the constitutional norm on electoral and municipal law, and can be traced back to a constitutional impulse.48 The railroad’s privatisation and restructuring has its background in European law. The ‘co-operative relationship’ (Kooperationsverhältnis) between the constitutional courts and the ECJ49 mutually influences their legal understanding and interpretation.50

4. A Multi-level Model?

The European Union is understood correctly when considered a union of states: independent states commit themselves strongly to the Union and transfer competences to the Union to achieve their common objectives. This result does not appear as clearly in the prevalent term

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46 See Entscheidungen des Bundesverfassungsgerichts 89, 155, 175 (Maastricht).
47 Robbers, above n 12, 560 ff.
49 See Entscheidungen des Bundesverfassungsgerichts 89, 155, 175, 178 (Maastricht).
50 See Entscheidungen des Bundesverfassungsgerichts 113, 273, 295 (Europäischer Haftbefehl).
‘multi-level model’. The European Union can be seen as the European house where the
Member States form the ground floor and, consequently, carry the European Union as their
upper floor and support the values and well-being of the peoples living on the ground floor
united under the same rooftop of peace. When transferring this image of a house to an abstract
system of different levels, the differences between ground floor and second floor based on the
first start to fade. Then the different stories even seem to be exchangeable and the entire system
looses its foundation. Additionally, the multi-level system suggests a hierarchy which appears to
superordinate European law over the Member States’ law and hints at the idea of a federal
state—the upper floor’s law precedes the law of the lower floor.52

However, the reality of the union of states is somewhat different. The Member States are
the ‘Masters of the Treaties’,53 determine the development of European law by ratification, and
can now even withdraw from the Union as expressly54 recognised in Article 50(1) TEU-Lis.
Their constitutional law concerning Europe has primacy over European law regarding validity
and application; European law has limited primacy over the Member States’ constitutional law
according to the Member States’ order of application. The principle of conferral, the dictate of
subsidiarity and commensurability when making use of competences, the guarantee of national
identity, and especially the allocation of competences and the legitimation of the Union
through the Member States establish a Union where the Member States commit themselves to
one another.

The constitution that founds, stabilises and binds a state is not allowed to change into an
accompanying system of development55 by ‘constitutionalisation’ and the idea of collective
European values should not eclipse the fact that these values arose out of the states.56 Up until
the sixteenth century Europe lived under the unity and universality of Christianity, and since
then has developed the order of politics in states and under human rights. Now Europe hopes
to establish a collective European value system whose content emerges from Europe itself.
Denationalisation should not lead one to question fundamentally the effect of this uplifting
development. It would endanger Europe’s unifying accomplishments—states and human
rights—and, accordingly, the basis of the European Union.

III. The State

1. Statehood and Openness to Europe

The constitutional state is an organisational form in which citizens and their representatives are
politically active and establish the legal order. The state provides common living conditions
through the instrument of law, conditions which offer peace and security to the individual and
secure economic, cultural and legal means of existence. These conditions convey individual
affiliation on the beneficiary, allow democratic participation, organise division of labour and
establish, through the succession of generations, a constant legal and general culture. Today,
human beings develops their personality, language, abilities to exchange and interact, recre-
ational activities and democratic participation, professional life and long-term provisions according to their affiliation with a single state.

A state constitution which allocates yet equally restricts the power of sovereignty, organisation and legal instruments to the state is based on the democratic cohesion of the people: the people, aware of their solidarity, become capable of law-making and enforcement, and organise themselves within a certain territory as a sovereign alliance, establishing institutions capable of decision-making with effective legal instruments. In this concrete condition of being constituted, the constitutional state shapes universal human rights and the general principles of state organisation to a historically developed system that is able to meet the necessities of the respective community based on the rule of law: the welfare state ensures the population’s needs in different ways. In one state, this guarantee can be a bowl of rice; in another, modern mobility and access to media. In one state the guarantee of peace can be mainly based on military power of defence and in another on a system of settlement under public international law. The right to property and the freedom of profession is reduced to agriculture in one state and is based on highly developed industrialisation, education and global economic activity in another.

Every state demands sovereignty, the ultimate and final power to ensure domestic law and peace, in order to preserve independence from other states and to represent the state community in relationships with third parties. Sovereignty protects the state’s cohesion when groups within the state try to endanger the state’s unity or authority of law and by that the domestic peace. Externally, the state claims sovereignty towards other states by speaking with the only relevant voice for its people, to decide upon the territory and legal relations with other states.

These states’ functions have always exceeded the individual state’s capacity. Universal human rights are rooted in a cross-border community of values and push for international warranty and control systems. Universal peace can only be granted through a universal system of collective security. Globally active companies and commercial enterprises have long since passed the borders of a ‘political’ and ‘national’ economy. Environmental protection requires common and cross-generational provisions of all states. Information and news systems do not take state borders into consideration. Mass migration of immigrants and refugees affect many continents. Science and technology have cultivated co-operation throughout the world for centuries. Media, sports and tourism can find sufficient norms only in international law. Hence, states depend on co-operation in overarching organisations.

2. The People Encountered in Liberty

The democratic constitutional state is built upon people who have come together in liberty to found a state to which they feel affiliated. Democracy’s starting point—the people—is predetermined and is the result of free culture and the establishment of communities, not of organisation or legal mandate by the authorities. This principle of liberty is the basis for the emergence of democratic states and the definition of citizenship. Since the end of the fifteenth century an understanding of statehood has developed which found its focus in the concept of the nation and later—since the end of the eighteenth century—in the people. Nation and people describe human beings who live together in a cultural, linguistic and political community. Since the
early romantic period the terms ‘nation’ and ‘people’ have described a community of human beings that, through co-operation, develop or already have developed a common culture (Kulturgemeinschaft);59 who through common political activity form a unit and live together in an autonomous common entity (political community); who speak a common language as the reflection of a common way of thinking and ideology (linguistic community); who live in the same area and, due to geographic and especially climatic circumstances, experience similar physiological, dispositional and intellectual characteristics and abilities (geographic community); and who are related to each another by descent (community of descent). People and nation always form a historically developed community, which finds its cohesion in common objectives, mutual activity and corresponding values and experiences.61

Regardless of some specifications of the romantic period62 and later misinterpretations of these ideas, the actual core of this development remains determinant even today:63 the cultural nation and likewise the nation which is held together by the will to a common state (Willensnation) build on the community already existing in liberty that then develops a will for statehood.

In this respect, European integration can only originate under these conditions. Even if the will to a common state is basically founded on the will for common politics, voluntary affiliation and inner cohesion remain requirements for democracy. Even today the people—the citizens—determine the state. The Bundesverfassungsgericht has explicitly recognised that under the democracy of the German Basic Law (Grundgesetz) the state authority is legitimatized by the encountered community of citizens, the Germans that are united by cultural and political similarities. The German people (Volk) from which all state authority emanates (1st sentence of Article 20(2) Grundgesetz) are the responsible and legitimating community for the German state.64 For this process of legitimation and participation in the formation of a political will, citizens are to be distinguished from others who are entitled to human rights and also live in the state. Although they have a status of guaranteed welcome and the possibility to develop their lives within the German state, they do not belong to the legitimising and democratically participating citizenry. The EU Treaty of Lisbon mistakes these findings when it sees the European Parliament as ‘composed of representatives of the Union’s citizens’, that is, when it appears to regulate a change of the subject of democracy contractually.

3. Sovereignty

The membership of a state in the European Union’s union of states affects its sovereignty,65 which is conceived as an absolute and lasting power and final responsibility of the state.66 This

60 Ibid, 336.
61 Bär, above n 58, 444ff.
62 See Schlegel, above n 59, 533.
64 Entscheidungen des Bundesverfassungsgerichts 83, 37 Schleswig-Holsteinisches Gemeinde- und Kreiswahlgesetz; Entscheidungen des Bundesverfassungsgerichts 83, 60 (Hamburgische Bezirksversammlungen).
sovereignty has nevertheless continually been constrained in three ways: 67 the highest and lasting state authority does not establish an arbitrary dominion, but is rather a power for the preservation of law and peace. Although sovereignty defends its own state against the influence of other states, this does not release it from obligations in the international legal order that bind all states 68 and, for the modern constitutional state, obligations arising from national constitutional law. Traditionally the sovereign was to observe divine law and natural law, later the customary principles of the monarchy, the leges imperii, 69 and then found legitimation and limits in the fundamental state objective of security 70 and, according to the concept of social contract, became a partner to this contract and its obligations. 71 In the end, sovereignty has been transferred to the people, which created concrete legal grounds for justification and responsibilities in the state it legitimated. 72 It pursues a just reign that proves itself in the observation of the law—of that which is God-given, naturally existing, legitimated through state goals, agreed upon through binding social contract (by the state as well), and delivered within the limits of the constitution of democratic majority decision-making. 73 This sovereignty is the expression of unity and cohesion. When society threatens to break up through religious wars, when the opposition between nobility, classes and farmers appears to be growing irreconcilable or when the power of industrial capital, labour organisation or the military seeks to gain the upper hand, the state maintains internal cohesion in that it keeps open certain controversial questions—of religion, class legitimation or the economic constitution—and thus secures the peaceableness within the state in spite of the disagreement.

The openness of the sovereign to supranational influences is seen, especially in the centuries-long competence of the Catholic Church, to be involved in the development of governing associations and citizens, in a European economic community established by the Roman law, in co-operation with individual political territories such as the Hanseatic cities, in family associations of European nobility with governing effect for various political communities, and in the development of modern public international law and universal human rights.

Secondly, sovereign state authority is limited territorially, thus it has as its object—and is dependent upon—co-operation with other, equally sovereign states. In addition, sovereignty encompasses the ability to enter into a treaty and the readiness to reach agreement in the international community. It recognises legal commitments within this community and currently seeks to obligate the states in particular to universal human rights and a constitution-making authority reserved for the people.

Thirdly, the sovereign state builds upon a division of labour, leaving essential areas of life in the hands of the society of those entitled to liberty. The modern conception of the state distinguishes between the state obligated to respect freedoms and the society entitled to those freedoms. Today that conception must organise a triangle of state, economy and cultural society corresponding to actual power relationships, placing in non-state hands essential functions of significance to the community, such as provision of goods, together with

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72 See Di Fabio, above n 70, 18.
73 See Schulze, above n 69.
employment, cultural society and religion, family and parental responsibility, and diversity of opinion, limiting the range of functions afforded the sovereignty.

Membership in the European Union leaves the Member States’ sovereignty with them, in the sense of final responsibility for the public authority exercised by the European Community and its present responsibility vis-à-vis its people. The question regarding sovereignty does not remain open: the democratic responsibility vis-à-vis the addressee of responsibility strengthens sovereignty while European integration gives it a binding effect in the name of peace, a single European market, state co-operation and a concrete human rights policy in the form of Union citizens’ rights. The democratic state keeps the internal and external sovereignty together and accounts for its recognition within the European Union vis-à-vis the people. The union of states is a distinctive expression of the fact that sovereign states depend on co-operation due to their limited territory and that this co-operation takes place in intense solidarity. The starting point and objective of this bond remains the states, the peoples’ democratic instruments, and the individual person’s dignity and liberty.

The Union is based on principles that are common to all Member States: liberty, democracy, respect for human rights and fundamental freedoms, as well as the rule of law, and therefore must preserve this common foundation under public law of direct and always available responsibility for democracy and the rule of law. Furthermore, it has to confront all risk of unclear responsibilities, flexible limitations for competences and authorities, and the avoidable deparlamentarisation of the Union, which exhibits a necessary governmental function in using its powers for legislative and budgetary action.

4. New Challenges for the State

As a result, the constitutional state currently faces a major challenge. Its functions, ie establishing and maintaining a peacekeeping political order, guaranteeing and developing human rights and, in this more open world, providing a cultural, legal and political starting-point and goal of steady reliability for each individual, is more important then ever. The direction of this provision, however, is different. Where the state used to find it’s mandate, organisation and identity in the debate with religion and the church, the secularised state finds its condition of being constituted in the understanding of being a state neutral to religion, in giving religions space for their own development by guaranteeing religious liberty, but refusing any religion access to public institutions and functions. Nowadays the state has to stand up to the immense power of globally active enterprises and capital funds. The current problem plaguing society and politics is not the state but capital, which barely cares for a culture of measurement. When global corporations determine what we eat, how we dress and move, what information we get, and which recreational necessities we develop, and when doing so these corporations always practice the principle of profit maximisation—a principle of excess—then the constitutional state has to counter with a culture of measurement. Thus, when the corporations are organised in the anonymity of changing investors, which is a form of organisation that does not comply with the constitutional type of a free association, and does not provide efficient control to the holders of the company’s executive board and management, then the state, guaranteeing funda-

74 According to C Schmitt, Verfassungslehre (1954, 4th edn) 371, 373 it belongs to the nature of the union to leave that question open.
78 See Entscheidungen des Bundesverfassungsgerichts 50, 290, 358ff (Mitbestimmungsgesetz).
mental rights, has to restructure the relation between practicing liberty and acting responsible towards the same.

However, when the modern individual is gaining his return less from work but rather from stocks, where his fund manager brokers the rate of return without the investor knowing whether his money has been invested into the production of wheat or weapons and consequently not accounting for the same, the democratic state has to push to more forms of transparency and information so that the holder may once again become an aware and responsible investor. An abstract, yet sometimes virtual, financial system has to be led back to the real economy, which can be achieved through liability provisions. If these almost deserted factories only produce with the help of robots and computers and not with human beings, and the factory’s financier demands the entire profit for himself, while people cannot obtain returns through labour, then the state has to develop new instruments of shareholding, organisational structures similar to co-operative societies or even tax-based community shares to ensure the universality of law, the equality of chances and market demand. The power of law shall not give way to the power of money, the state’s authority shall not evade the power of the market’s seduction and the culture of measurement shall not give way to the excess of profit maximisation. Furthermore, the state is confronted with the challenge of communicating law that comes from various sources, in their respective languages, as a uniform order of law to the people.

IV. The State in a Union

1. Development of a Common Constitutional Law in the Aftermath of the Maastricht Treaty

The Treaty of Maastricht on the European Union of 18 December 1992 provoked constitutional amendments and court decisions in the Member States. As a result, certain approaches to a common Treaty understanding of the European union of states started to develop. The Bundesverfassungsgericht, in its Maastricht Decision of 12 October 1993, had to examine whether the European legislative acts, especially the introduction of the euro, were still within the limits of integration set by the constitution and the conferred competences of the Treaty or if they exceeded those limits. According to the ruling of the Bundesverfassungsgericht, over-reaching European legislative acts (ausbrechende Akte) are not binding on the German territory. The complainants claimed an infringement of their right to democratic participation in public authority and its practice if the German legislature approved of the Maastricht Treaty and made it applicable by constitutional amendment. Furthermore, in adopting the Treaty the inviolable principle of democracy would be infringed upon, as too many tasks and competences of the German Parliament (Bundestag) would be conferred to European Community institutions. In the end, the Bundesverfassungsgericht rejected the constitutional complaint and emphasised that Germany’s membership in the European Union corresponds to the principle of democracy. At the same time, however, the Bundesverfassungsgericht asked for sufficient legitimation and influence within the union of states through the people and required that some
\(\text{Paul Kirchhof}\)

\begin{quote}

‘state functions and responsibilities of substantive importance’ remain with the Bundestag. The Court also focused on the law of approval (Zustimmungsgesetz) as the legal basis and scale of Germany’s participation in the European integration:

if European institutions or agencies were to treat or develop the Union Treaty in a way that was no longer covered by the Treaty in the form that was the basis for the Law on Accession, the resulting legislative instruments would not be legally binding within the sphere of German sovereignty. The German state organs would be prevented, for constitutional reasons, from applying them in Germany.\(^83\)

The Swedish Parliament (Riksdagen), in its government proposal regarding the amendment of the Swedish constitution due to Sweden’s accession,\(^84\) together with the Swedish Committee on the Constitution in its report of the constitutional amendment,\(^85\) referred to the decision of the Bundesverfassungsgericht and literally quoted the essential statements regarding the functions and competences of substantial importance remaining with the Member States’ parliament and the non-binding nature of over-reaching legal acts.

The Danish High Court (Højesteret),\(^86\) in its decision on the compatibility of the Danish law of accession to the European Communities of 11 October 1972\(^87\) with the Danish constitution, held that Danish courts were obligated to declare the European Community’s legal acts inapplicable in Denmark if, with the required certainty, the European Community’s legal acts—which might have been declared legally valid by the ECJ—could be considered to be based on an application of the Treaty which went beyond the transfer of sovereign powers by the accession law.\(^88\)

The Italian Corte Costituzionale accepts that the Italian constitution permits the conferral of sovereignty, but notes that this permission again encounters certain limitations, as only the restriction of sovereignty but not its renouncement is acceptable under constitutional law.\(^89\) Furthermore, EC law only has primacy over national constitutional law insofar as it does not touch fundamental constitutional principles and human rights.\(^90\) The Corte Costituzionale demands the competence of ultimate interpretation even for EC legal acts, examines their compatibility with fundamental constitution law and provides its own interpretation of EC law according to the Italian constitution.\(^91\)

\(^{83}\) Entscheidungen des Bundesverfassungsgerichts 89, 155, 188 (Maastricht); more cautious as to the practical consequences Entscheidung 102, 147, 160ff (Bananenmarkordnung); Entscheidung 118, 79, 94ff (Treibhausgas-Emissionsberechtigungen).


\(^{87}\) Law No 447 of 11 October 1972.

\(^{88}\) Højesteret, Case No I 361/1997, above n 86, 52; see FC Mayer, Kompetenzüberschreitung und Letztentscheidung (2000) 213ff; W Schroeder, Das Gemeinschaftsrechtssystem (2002) 171ff; I Pernice, Das Verhältnis europäischer zu nationalen Gerichten im europäischen Verfassungsverband (2006) 37, each with further references; see also Ring and Olsen-Ring, above n 33, 591, with remarks on the differences due to the singularity of this case and the co-operation between constitutional courts and ECJ.

\(^{89}\) See Mayer, above n 88, 171.

\(^{90}\) Corte Costituzionale, Decision No 170/84, Spa Granital c Ministro delle Finanze, 5 June 1994, German trans in [1985] Europäische Grundrechte-Zeitschrift 98, esp 100; Decision No 232/89, Fragd v Amministrazione delle Finanze dello Stato, passages in English trans in A Oppenheimer (eds), The Relationship between European Community law and national law (1994) vol I, 653ff, especially, 657; see Schroeder, above n 88, 183.

\(^{91}\) Corte Costituzionale, Decision No 183/73, Frontini e altro c Ministro delle Finanze, 27 December 1973, German trans in [1975] Europäische Grundrechte-Zeitschrift 311, especially, 315; Mayer, above n 88, 175.

752
The French Conseil d’Etat claims the competence of ultimate decision regarding EC legal acts but does not base its claim on an explicit constitutional limitation due to its special functions and measures of decision, instead interpreting EC law independently according to evidence and obviousness.\(^92\)

The Spanish Tribunal Constitucional\(^93\) considers itself the ‘final guardian of constitutional basic values and principles vis-à-vis EC law’.\(^94\) Even after ratification, the Court has the right to examine treaties in accordance with the constitution.\(^95\) In a new statement it also emphasised the predominance of the constitution in cases of conflict between fundamental principles and fundamental rights of the Spanish constitution and the Treaty Establishing a European Constitution.\(^96\) The Polish Constitutional Court, in its decision of 11 May 2005,\(^97\) also rejected the primacy of EC law in cases of conflict between an EC legal norm and a Polish constitutional norm.\(^98\) Concerning this question, the Polish Constitutional Court explicitly agreed with the Maastricht Decision of the Bundesverfassungsgericht and mostly agreed with the decision of the High Court of the Kingdom of Denmark.\(^99\) In such a case of conflict, Poland’s only way out would be a constitutional amendment, working towards the amendment of EC law, or withdrawal from the European Union.\(^100\)

In Belgium,\(^101\) Portugal,\(^102\) Greece\(^103\) and even Ireland\(^104\) it seems possible and, regarding present jurisdiction, also a consequent conclusion that the Member States’ constitutions can be applied as the standard for European primary law and that certain challenges to jurisdiction are developed therefrom.\(^105\) To this day, the development that the respective Member States’ constitutional law regarding Europe demands primacy over European Treaty law and that the

\(^{92}\) On this, see the first comparable decision of the Conseil d’Etat, Ass 22 December 1978, Ministre de L’Intérieur c Sieur Cohn-Bendit, German trans in [1979] Europäische Grundrechte-Zeitschrift 252; for a detailed analysis, see Mayer, above n 88, 151; see also the more cautious Conseil Constitutionnel, Decision 2004-496 DC, 10 June 2004, German trans in [2004] Europäisches Recht 921, recognizing the primacy of Community law, but stressing the possibility of a restriction in the case of an explicitly contradicting norm of the constitution, 922; Pernice, above n 88, 38ff.


\(^{95}\) Tribunal Constitucional, [1993] Europäische Grundrechte-Zeitschrift 285, 286; Mayer, above n 88, 222ff; Schroeder, above n 88, 191ff; Barnes and Sarmiento, above n 94.


\(^{97}\) Polish Constitutional Court, Decision 11 May 2005, K 18/04, German trans in [2006] Europäisches Recht 236.

\(^{98}\) Ibid.

\(^{99}\) Ibid.

\(^{100}\) Ibid; Pernice, above n 88, 41ff; B Banaszkiewicz, ‘Landesbericht Polen’ in Kluth, above n 94, 199; regarding the necessary constitutional amendment due to the European Arrest Warrant, see Polish Constitutional Court, decision of 27 April 2005, P1/05, German trans in [2005] Europäisches Recht 494; further Pernice, above n 88, 42.

\(^{101}\) Cour d’arbitrage, Decision 12/94 3 February 1994, Ecole européenne, passages in English trans in Oppenheimer, above n 90, 2003 vol II, 155ff; cf Mayer, above n 88, 176ff; Schröder, above n 88, 170ff.


\(^{104}\) Supreme Court, Society for Protection of Unborn Children (Ireland) Ltd v Grogan, 19 December 1989, [1989] Irish Reports 753; Mayer, above n 88, 206ff; Schroeder, above n 88, 180ff.

\(^{105}\) Mayer, above n 88, 270ff.
Member States’ courts can be obliged to not apply European law, or at least to interpret it individually and differently than the ECJ, has been intensified. Currently, this constitutional culture is quite essential. It supports integration within the constitutional standard developed by the Member States and intensifies the Member States’ steadiness regarding their openness to Europe and, indirectly, the steadiness of the European Union as regards its responsibility for fundamental constitutional principles. Furthermore, it establishes some sort of balance of powers, especially between the Member States’ constitutional courts and the ECJ, and brings the European jurisdiction into a culture of measure. To date, it seems as if the European Union is developing a universal principle that the Member States’ constitutions support cross-border co-operation and political integration into a union of constitutional states, while at the same time looking for a gentle way to maintain the cohesion within the European Union and preserve national identity and statehood within a uniform European legal order.

2. Supranationality

The special characteristic of this Community intimated in the codeword ‘supranationality’ lies in its considerable yet limited body of autonomous responsibilities, in the progressively stronger Community authority and in immediate obligations of Community legislation in the Member States. The political and legal weight of the Community can be seen in the scale of its tasks, in its commitment to common political basic values (political Union), in the autonomous and intensive law-making power with competence to make law that is of direct effect in the Member States, in the autonomy of the Community institutions, which can form a European common will, in the financial—albeit dependent on the Member States—autonomy of the Community, in extensive and effective legal protection, and in a lasting but incomplete Union.

State-like characteristics are recognisable in this structure of the Community, but without the Community being a state or having reached only the preliminary stages of statehood. The Union lacks the essential characteristics of a modern state. The European Union possesses no comprehensive territorial sovereignty, but rather exercises selectively the individual competences granted to it in the territorial ‘scope’ of the Treaties (Article 299 EC, Article 355 TFEU). It has no comprehensive personal sovereignty over citizens of the Union (Article 17 EC, Article 20 TFEU), but rather includes the nationals of its Member States through the Community to the extent foreseen by Treaty. It is an association of the peoples of Europe (Article 1 TEU-Lis), not a state born of a European people. The Community authority is restricted in principle by conferral (Article 5 TEU-Lis); it lacks the comprehensive tasks and competences typical of a state, and the competence to decide freely on its own competences (Kompetenz-Kompetenz) in order to open up for itself new tasks, competences and powers. As a community based on the

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106 See Entscheidungen des Bundesverfassungsgerichts 113, 273, 292ff (Europäischer Haftbefehl); see on the Human Rights Convention Entscheidungen des Bundesverfassungsgerichts 111, 307, 315ff (Görgülü).
107 Entscheidungen des Bundesverfassungsgerichts 111, 307, 319 (Görgülü).
110 Ibid, paras 7ff.
112 See Oppermann, above n 109, paras 15ff.
rule of law, the Community does not have at its disposal ‘the sovereignty reserve of its own political power’.\textsuperscript{113}

Moreover, the Community has currently solidified into a corporate body that permanently brings together the Member States in an association legally rendered independent, performs a portion of their functions in a legally binding manner, makes law and Europeanises the law of the Member States, and accomplishes a portion of the tasks that have become transnational better than the Member States themselves could have.

3. The Vitality of the State Declared Dead

Some observers of this development tend to predict the end of statehood. Even as critics write ‘obituaries’—nation and nation-state, sovereignty and territorial state, even history is declared dead—the state is developing surprising vitality.\textsuperscript{114} It seems as if constitutional patriotism and cosmopolitanism have replaced nations and national consciousness.\textsuperscript{115} Though, without the safety of a state, the human being remains without peace, reliable liberty under the rule of law, the secure frame of professional and personal development, future provisions and existential safety.

Especially in view of Europe, the nation state was declared to be at its end; a ‘post-national’ notion of constitution leaves the state and nation behind.\textsuperscript{116} However, the earliest experiences of the European Union show that the constitutional states as Member States of the European Union give the Union content and objectives which transfer competences and powers to the European Union and yet can also cancel the transfer. Furthermore, the Member States as constitutional states can contribute in such a way that Europe is no threat to other states, does not demand any territorial power and also bans military dispute between the Member States as something merely impossible.\textsuperscript{117}

Thus, the end of territorality—which had been predicted in view of the internet and information highways, broadcasting and television—has been announced too early. Political and especially democratic legitimation through a common culture (\textit{Kulturgemeinschaft}) of an encountered people cannot be established without a legally palpable territorial relation.\textsuperscript{118} Liberty and security of development also require settledness, cultural roots and a bond to the concrete territory in a globally open market and a mobile society.

The end of history was proclaimed,\textsuperscript{119} but that, finally, led to the insight of founding states so that the preconditions of a free development of the people would be established.\textsuperscript{120}

\begin{footnotes}
\item[113] Ibid, para 19.  
\item[114] Voigt, above n 76, 41ff.  
\item[117] On the type of unions of states, see Hobe, above n 71; Schmitz, above n 67; Schlesky, above n 67.  
\item[118] Voigt, above n 76, 42.  
\item[119] F Fukuyama, \textit{The End of History and the Last Man} (1992).  
\end{footnotes}
4. The Mandate of Co-operation

The reality of European integration is calming. The European house is a house of states, which aims for co-operation and is experienced in mutual completion. The Community Treaties establish a ‘relationship of co-operation’\textsuperscript{121} between Community institutions and Member States, but also among these institutions.\textsuperscript{122}

The Member States are responsible for Treaty amendments by ratifying them ‘according to their constitutional provisions’. On the other hand, the Community institutions are fundamentally responsible for interpretation and application of the Treaty, for which the ECJ has the final responsibility. Development of law in the internal area of the Treaty is a matter for the ECJ;\textsuperscript{123} creation of law through expansion of the Treaty is for the Member States. Correspondingly, the constitutions of the Member States set the appropriate constitutional conditions for amendments to the founding Treaties and similar regulations.\textsuperscript{124} Therefore the participation of the states in the European Union does not mean submission to every additional development in integration urged by the Union institutions, but is bound and conditioned much more by constitutional law.\textsuperscript{125} The German Bundesverfassungsgericht took this division of functions between development and amendment of the Treaty as the opportunity to clarify the limits of legal development by interpretation.\textsuperscript{126} In the future the Community institutions must observe the fact that the Union Treaty distinguishes fundamentally between the exercise of powers granted by the Treaty and Treaty amendments in their interpretation of competences and empowering provisions, and may not allow an interpretation that results in an expansion of the Treaty—or, as Article 23(1), 3rd sentence Grundgesetz says, in a regulation comparable to a Treaty amendment. Such an interpretation of competences and empowering clauses, the Court adds,\textsuperscript{127} would not give rise to any binding effect for Germany.

This distinction between Treaty interpretation and amendment requires a clear and sufficient allocation of tasks and competences. This is one of the essential goals of the Treaty of Lisbon, a task that has not, however, been achieved. An elucidation of the responsibilities also clarifies the functions of the ECJ and the Bundesverfassungsgericht. The Grundgesetz ‘entrusted’ the Bundesverfassungsgericht with the task (Article 92) of watching over the constitutional law limits of the act of sanctioning that gives effect to European law in Germany. The Bundesverfassungsgericht must guarantee that German competences are transferred to the Union only through Treaty amendments by virtue of the ratification statute. The Court thereby assumes a competence and responsibility for the constitutionality of primary Community law in Germany. A constitutional court cannot dispose of this duty and this constitutional obligation; and it especially cannot renounce this mandate that has been entrusted to it.

The ECJ is bound in the same way by the Union Treaty, which alone legitimates its jurisprudence and additionally is the only legal basis for its competence to decide cases. For this reason, the ECJ, a Treaty institution, cannot amend the Treaty. The adjudication of the ECJ has authority if, and only to the extent that, the Member States assign it such.

Whereas co-operation lies in the mutual interaction of Treaty application and supervision of Treaty limits, and thus securing these basic limits is not entrusted exclusively to a Community institution or a Member State, the area of co-operation is broader for secondary Community

\footnotesize{121} See Entscheidungen des Bundesverfassungsgerichts 89, 155, 175 (Maastricht).
123 See Entscheidungen des Bundesverfassungsgerichts 75, 223, 240ff (Kloppenburg).
124 See above section II.1.
125 See above n 32ff.
126 See Entscheidungen des Bundesverfassungsgerichts 89, 155, 210 (Maastricht).
127 Ibid.

756
law produced on a sure Treaty basis. The constitutional limits of a Treaty amendment can only be guaranteed by the Member State’s constitutional court; the ECJ may not even base its decisions on this constitutional standard. In the interpretation of secondary Community law, the ECJ may only confirm obligations for all Member States. The decisive competence to guarantee and further develop the law belongs to the ECJ. Therefore the German Bundesverfassungsgericht exercises this competence in a relationship of co-operation,128 in principle recognising the respective initial interpretation of norms given by the ECJ. The latter guarantees the protection of fundamental rights in each individual case for the entire territory of the European Union; to this extent, the Bundesverfassungsgericht can limit itself to the general guarantee of inalienable fundamental rights standards.

In contrast, a constitution for the Union would also transform the ECJ into a constitutional court, thereby granting it terminologically the competence to supervise standards of this comprehensive constitution, all institutions and all exercises of public authority constituted under it. This would include the power to judge—to this extent—the encroachment of European law into national constitutional law, and possibly also to determine the final standards for the actions of state organs in the Member States and to supplant the national constitutional courts. A topical part of European legal culture would be lost through such centralisation.

Lastly, every institution has as its objective a continuity-preserving co-operation with other organs. Here, too, the Union Treaty requires a collaboration that goes beyond traditional co-operation between government, parliament and judiciary: the policy instruments held by the European Community as a bearer of public power rest on means of coercion by the Member States. The power to enforce and the responsibility to implement the law, including European law, lies fundamentally with the Member States, not with the European Union. Tax sovereignty lies exclusively with the Member States. Competence for financial and economic distribution in the Member States comes close to 50% of gross domestic product, whereas the European Union distributes significantly less than 2% of the national product generated in the Union. But, above all, the Community institutions are supported by the foundation of a statehood guaranteed in the Member States, in which state and Union citizens find peaceful order, security of subsistence, educational and vocational training, protection of health, and a local and professional infrastructure. If the Community were to seek to take over these functions, it would be entirely overburdened in its institutions, bodies, and legal standards. For this reason, European public authority is ancillary to state authority, which grows out of and rests upon the state foundation.

5. Modern Forms of Balance of Powers

Modern constitutional law confirms an essential element of the balance of powers when it expressly opens the respective state to the international community and the European Union.129 State authority is joined by a European authority, which finds its legitimation, its partition and its standards for action not only in the constitutional law of the Member States, but also in European Treaty law and especially in the independence of Community institutions vis-à-vis state organs. This opens up a new scope of application for the concept of separation of powers.

128 Ibid, 175.
a) The Legal Sources

Whereas the constitutional state rests on a homogeneous state constitution and the constitution-making authority of the people, the European Union builds upon a power-sharing genesis and renewal of European law. Both legal circles, of European law and state constitutional law, are so tied to each other that the Member State constitutions are the basis for the genesis and development of the Union Treaties, the European institutions initiate and promote such development, and the interaction of constitutional and European law stakes out the standard for the area of development of European law. This gradated and reciprocally balanced guarantee of fundamental legal culture would be threatened if the development of the Treaty were centralised under European law. The openness of the states to Europe and the state foundation of the European Union would be displaced by a legal partitioning off of the Union in spite of actual dependence on the states. The element of separation of powers that is the object of the co-operation between Member State and European Union gains an even greater significance since the traditional separation of powers in a parliamentary system of political parties appears weakened and threatened in a parliament-poor European Union.

b) The Liberty-ensuring Balance of Powers

In its human rights origins, the separation of powers serves to protect the human being, who is entitled to fundamental rights vis-à-vis state authority. If public authority is divided between legislation and enforcement, between government and administration, and between regulatory and fiscal sovereignty, and if the person entitled to fundamental rights has available a separate, third power for the enforcement of his rights, then the protection of fundamental rights especially rests on the principle of separation of powers.

In the relationship between European Union and Member State, it is above all the state that guarantees this liberty-securing balance of powers, that offers the citizen the conditions for liberty of his tried and trusted legal order, proffers him the foundations of liberty of his own language, of customary legal principles, of social participation in the appropriate and expected gross national product of his own national economy, of cultural community thanks to similar education in school and university, of influence through religion, art, science and life habits. The state, always the guarantor and opponent of liberty, also assumes the task of continually guaranteeing the conditions of free development as the mediator of understanding in a concrete order. The state must reliably form the world of sovereignty and law, the diversity of jurisdictions and legal standards that have become unintelligible by virtue of the European Union, and convey them in clear responsibilities. The state must also win back for its citizens in a res publica the certitude of life that has been weakened in part by a global economy, by the dominion of the media, and by progress in medicine, information technology and data processing. The democratic cohesion of a people and its cultural commonality expects a comprehensive responsibility for the guaranteeing of existence and peace, for cultural community and economy, and for fostering the capability and readiness to be bound long term.

On the other hand, the European Union has the task of opening the state borders, guaranteeing cross-border freedom of the market, conveying by means of a common currency the

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European minted freedom,132 and maintaining and further developing the Union ‘as an area of freedom, security and justice’ (Article 2 EU, 3(2) TEU-Lis).

Such a division of tasks and powers expects legal conflicts that should be resolved institutionally in this balance of powers, but not suppressed by a central competence for dispute resolution. For this reason, the Commission, the Council, the Member States, the ECJ and the national constitutional courts must balance and assign powers so that the Member States’ and Community’s legal orders ‘are not abruptly juxtaposed in a state of insulation but are in numerous ways related to each other, inter connected and open to reciprocal effects’.133 Neither the fact that constitutional law is the final standard for the application of European law in the respective Member State nor the cohesion of the European community based on the rule of law in European Treaty law and its final responsibility for interpretation by the ECJ must be reinterpreted in one hierarchy or another. The judiciary fosters the culture of standards, equalisation and co-operation, not of predominance, submission, and rejection. To this extent, Europe offers the chance to discover anew the classic legal ideal of balance of powers.

c) Correctness of and Responsibility for Decisions

In its function of appropriate division of labour and responsibility, the principle of separation of powers seeks to reserve for each branch a core area of tasks that this institution can best fulfil with its personnel, equipment and procedures.134 This separation of powers requires a clear allocation of tasks, competences and powers between Union and Member States, but is also supplemented by the principle of subsidiarity (Article 5(2) EC; 5(3) TEU-Lis; Article 23(1), 1st sentence Grundgesetz), which the institutions must observe in carrying out135 their competences.136

This subsidiarity principle cautions, in the original concern of its intellectual history,137 against an overburdening of the state that, in an impoverishment of the forms of social society, sees itself directly and exclusively juxtaposed to the individual person and cannot alone do him justice. The individual is not sufficient for himself and therefore requires the *subsidiarium*, or assistance, that is expected in the first instance from his more immediate social surroundings and then from the larger societal institutions, and thereafter from the state.

In transferring these concepts to the relation between the European Union and the Member States, the principle of subsidiarity finds a concrete starting point in the idea of a union of states, the principle of conferral, the legal instrument of the directive, the dependence of the Union on Member State enforcement and financial power. The Union sees itself less as juxtaposed with the individual than as meeting him through the respective Member State and its conveyance of European law and European action.

This concept of separation of powers does not contradict the concept of state sovereignty. The highest and most lasting public authority does not establish an arbitrary rule, but rather establishes a power for the preservation of law and peace.138 Sovereignty was imparted to the

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134 See Entscheidungen des Bundesverfassungsgerichts 68, 1, 86 (Atomwaffenstationierung); P Badura, in J Isensee and P Kirchhof (eds), Handbuch des Staatsrechts (2004) vol II, § 25, para 6; more clearly subjecting the principle to the principle of democracy is E-W Böckenförde, in ibid, § 24, paras 87ff.
135 See Entscheidungen des Bundesverfassungsgerichts 89, 155, 193 (Maastricht).
136 On the Community law principle of subsidiarity, see C Calliess, Subsidiaritäts- und Solidaritätsprinzip in der Europäischen Union (1999).
137 See Enzyklopaedia quadragesimo anno (1931); on this point, see J Isensee, Subsidiaritätsprinzip und Verfassungsrecht (1968) 18ff.
138 See above section II.2(c)(aa).
state in order to put an end to civil war and to establish perpetual peace.\textsuperscript{139} Today this legal openness is in particular openness to Europe.

d) Organisations for the Future and the Present

In an ongoing, continuity-preserving constitution, the principle of separation of powers also contains a chronological plan.\textsuperscript{140} The legislator anticipates the future, the administration is occupied with the present and the judiciary judges the past. These responsibilities for time do not find conventional framework conditions in the European Union. The European Union is a future-oriented authority in its entire organisational structure, and thus needs the Member States as an authority for the present.

\textit{aa) The Future-oriented European Power}

The European Union has as its objective, according to Articles 1(2), 2 and 3(1) EU (Article 3 TEU-Lis), a constant, dynamic development. The Grundgesetz assigns the German state organs the task of participating ‘in the development of the European Union’ (Article 23(1), 1st sentence Grundgesetz). For this reason, the Union preserves what already exists even less. The Union Treaty ensures not only—similar to a constitution as the memory of a democracy—proven organisational structures and tested values, but rather lives in the constantly incomplete, in the development towards a better condition, in the approaching of the not-yet-accomplished completion. This is especially the case in the current phase of clear expansion of the European Union.

After all, in its basic structure the European Union occasionally appears to be an organisation forging into the future without a present. The executive produces laws. The enforcing power lies essentially with the Member States, so that the Community has hardly any institution at its disposal that is affiliated with the present. The ECJ traditionally views itself as the ‘engine of integration’ and is likewise less occupied with the past than with the future. The Union appears trapped in a continual striving toward the constant growth of competences, but in its current profusion of competences—different from those of earlier years—must effectively secure the stability of a community based on the rule of law. For this reason, the chronological balancing of powers—the condition for openness to development in the continuity and consciousness of history—appears to be not yet reached. The balance between an inviolable law and its ability to develop are not yet assured.

Of course, the forward-moving European Union develops its own institutions for perpetuating and guaranteeing continuity—especially the European Central Bank, the European Court of Auditors and, increasingly, a European judiciary that emphasises its judicial character. Here, too, the European Community—as a community based on the rule of law—faces the task of gaining structures of constancy and, as a result, predictability and trustworthiness.

\textit{bb) The Present-oriented Power of the Member States}

A European Union that is currently conceived of more as a future-oriented power is linked back in its actions to the jurisdiction and responsibility of the Member States and, in particular, is significantly legitimised democratically through the Member States and their parliaments.\textsuperscript{141} The separation of powers between European law-making and Member State execution of laws, European financial requirements and Member State financial foundations, but above all a European ‘communitising’ on the basis of a statehood that guarantees a citizen-friendly basis of

\textsuperscript{139} See J Bodin, above n 66.
\textsuperscript{140} See G Husserl, Recht und Zeit (1955) 42ff.
\textsuperscript{141} See Entscheidungen des Bundesverfassungsgerichts 89, 155, 185 (Maastricht).
existence, substantiates a new balance between stability and the shaping of the future. The continuity of the constitutional state forming the basis of the European Union also offers the Union an institutionalised responsibility for the present, and thus ‘planability’ and predictability.

e) Co-operation between Powers

Finally, separation of powers is the foundation for a continuous co-operation in which the separate powers combine in the constancy of law into a mutually complementary and completing unit of action.

European co-operation is more than a co-operation between state organs. It is rooted in two autonomous legal orders that are related to each other but have different content. These two orders are partially influenced by different legislative, administrative and judicial cultures, must overcome movement in the opposite direction of a broad central organisation that is mindful of the expansion of its competences and a grown Member Statehood that preserves democratic–cultural autonomy, and especially must mediate between governmental structures of organisation and parliamentary democracy. Thus it involves more than the fact that separate state functions have co-operation as their object. European co-operation means above all co-operation in preserving time-tested cultural differences and in overcoming others.

Presently we do not have any secured and complete constitutional understanding of individual liberty and equality rights, which would have to be generalised under European law. However, the Treaty of Lisbon tries to understand the developed fundamental rights of the Charter of Fundamental Rights in a modern way and to declare these fundamental rights as they have emerged from the Member States’ constitutional tradition as binding. Whether this approach will succeed depends on the ECJ’s ability to grasp the constitutional tradition of the Member States in this comparison of constitutions and to look for solutions to be generalised within this framework. If the European Union were to set its foundation of values—specific European fundamental rights, apart from the Member States’ culture of fundamental rights—in an act of fundamental reforms and modernisation, it would endanger itself. A Europe of short steps and big visions must not become an experimental field for fundamental rights.

6. A Europe of States as an Opportunity for Peace and Freedom

The current development of European states substantiates the traditional foundation of European law: statehood, democracy, community based on the rule of law, and fundamental rights. With each new constitutional state, the chance for peace and human rights in Europe increases. The danger of conflict and human rights violations has always been present where peoples and nations were not yet united in a constitutional state. For the project of community among states, the European Union has developed the new legal form of a union of states, with independent, democratic constitutional states open to Europe. In the collaboration of organisational principles of constitutional states and unions of states, the European Union establishes a basic order that co-ordinates and partially regulates its Member States’ actions, but especially organises the joint exercise of authority. Through this cohesion, Europe provides the contractual basis for a union of states that defines its tasks, competences and powers in legal terms, and that can pass the test as a community based on the rule of law relying on constitutional states open to co-operation.
The European Union is an international organisation with its own legal personality. Its heart, the European Community, exercises sovereign powers. As a result, Member States and individuals are required to comply with orders that were made without their express consent. In short, the EU makes law. It is empowered to adopt and implement administrative measures. A European judiciary renders judgments and other decisions that are binding on the parties. The European Court of Justice (ECJ) creates judge-made law which the Member States and individuals must obey. The Member States must transpose European law into their legal order. They must apply European law through their administrative bodies and courts. The European legal order creates individual’s rights and imposes duties on them. The EU/EC interacts internationally with other subjects of international law. It is thus not very far from being a state.

Considering the literature on European integration, one still encounters the notion of governance without a constitution. In Germany, the view is still quite common that constitutions are reserved for states alone. It is alleged that only states are equipped with the legal rules and principles that give them such a position of prominence. This view is often based on the idea that only sovereign entities can have constitutions. If this is the case, however, then sub-national states, such as the German and Austrian Länder, the individual states of the US and the Swiss cantons, could not be said to have constitutions, which is incorrect. Nevertheless, many observers perceive no inconsistency although both the above-named sub-national entities and the EU are not sovereign. Even the sovereignty of the EU Member States is eroding. In view of the powers of the Union, they are no longer omnipotent. The differentiating criterion of sovereignty is thus becoming increasingly blurred. Therefore a constitution is no longer consistently considered to be exclusively an attribute of sovereign states, but rather a network of relations between various subjects and a form of social self-organisation. Hence the EU may have a constitution.

Other authors tie constitutions to democracy, yet even states that are under a dictatorship have basic rules and principles. The concept of constitution is meaningful in order to recognise, sort and compare these basic rules and principles. However, proponents of the nation-state distance themselves from a neutral conception of a constitution. They conceive of the state as being composed of a homogeneous people, the nation. Democracy, then, is derived from this kind of nation, which is a necessary element of a constitution. Under such a premise, the state and the constitution presuppose one another. Homogeneity brings with it the danger of deforming a free society and hindering the association of states, especially when the other states have members of an ethnic or religious group that are considered to be potential enemies. On the basis of such a conception of democracy, one can reserve the constitution to the state—yet democracy is not dependent on homogeneity. Democratic rights and freedoms preclude such conformity. The US is an outstanding example of a multi-ethnic, multi-cultural and multi-religious democracy.

The failure of the Treaty establishing a Constitution for Europe, which was commonly referred to as the

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3 See P Kirchhof, above chapter 20.
6 See, eg C Möllers, above chapter 5.
European Constitution, cannot affect this conclusion because the constitutional elements of the current Treaties were not called into question.

One must still ascertain wherein the constitution of the European integration lies. In 1967 the Federal Constitutional Court of Germany held that the European Economic Community (EEC) constituted a new public power and that this power was autonomous and independent from the powers of the Member States. According to the Court, the EEC Treaty effectively (gewissermaßen) represents the Community’s constitution.\(^\text{12}\) According to the ECJ,

the EEC Treaty, albeit concluded in the form of an international agreement, nonetheless constitutes the constitutional charter of a Community based on the rule of law. The Community treaties established a new legal order for the benefit of which the states have limited their sovereign rights and the subjects of which comprise not only Member States but also their nationals.\(^\text{13}\)

For the Court, the fact that the EU is based on international treaties does not prevent the conclusion that a constitution is present: it is not the legal form but rather the content that is decisive.\(^\text{14}\)

The Community Treaties incorporated elements of the Member States’ constitutions into the European legal order, but basic constitutional principles, such as democracy, the rule of law and fundamental rights, were still missing. The ECJ closed these loopholes by developing principles on the basis of its own case law. These constitutional principles are now found in Article 6(1) EU. There, respect for human rights is explicitly mentioned. In addition, Article 6(2) EU requires the Union to respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and common constitutional traditions of the Member States, as general principles of law. Though a provision of the EU Treaty, its content is also valid for the Communities due to the unity of the Union and the Communities.\(^\text{15}\) The Treaties do not, however, represent a complete constitution. There are still elements that are only secured by judge-made law. An example is the Community’s obligation to co-operate with the Member States, the so-called loyalty clause.\(^\text{16}\) In other areas interplay between treaty formulation and judge-made law takes place, above all in the field of fundamental rights.\(^\text{17}\) In sum, the European constitution is composed of treaty law and judge-made law. The numerous elements of this constitution exert influence on the EU itself, its Member States and the individuals.\(^\text{18}\) Thus, the European constitution is not a phantom but rather a fact.

II. The Advantages in Detail

1. The Advantages of the European Institutions

a) The European Community as a Community Based on the Rule of Law

In order to avoid exposing human beings to arbitrary oppression, any sovereign entity needs to be legally bounded. The experiences of two World Wars have shown that the complete deprivation of fundamental rights will inevitably lead to the killing, mutilation and oppression of a

\(^{12}\) See Entscheidungen des Bundesverfassungsgerichts 22, 293, 296 (EWG-Verordnungen).
\(^{14}\) See Pernice, above n 5, 168ff.
\(^{15}\) See von Bogdandy, above n 1.
vast number of people. Such injustice even occurred during the cold war, during which many
individuals suffered persecution.

Against this background, it was an enormous deed to establish rules governing the behaviour
of states and citizens in Europe on the basis of law. An illuminating example is the Basic Law,
the constitution of the Federal Republic of Germany, which contains both procedural rights and
substantial elements of justice. In a similar way, the European Communities emerged as legally
defined communities of different states and their citizens. In other words, from the very
beginning of their existence the European Communities were founded on law. They are
products of law, sources of law and a particular legal system. 19

Today the EU Treaty contains the essential principles, amongst others the rule of law (Article
6(1) EU). Therefore, the precedence of statutes and the reservation of statutory powers, the
separation of powers and the compliance with procedural rules are established within the EU.
Every individual enjoys comprehensive remedies—be it as individuals or part of a particular
group. In *Les Verts*, the ECJ, as the highest Court in the European Union, made it clear that it
is both willing and capable of protecting individual rights even if those rights are not laid down
explicitly in the primary law of the Union. 20 That the Court is held in high esteem is due in
large part to this jurisprudence. The question of whether European law is ‘good’ or ‘bad’
largely depends on the particular quality of the co-operation between the ECJ and the courts of
the Member States. In this regard, Article 234 EC provides an appropriate instrument. This
 provision lays down the preliminary rulings procedure, whereby the courts of the Member
States refer questions of Community law to the ECJ. Any cases that depend on an aspect of
Community law for a judgment may be referred to the ECJ. Furthermore, in the case that any
such question is raised before a court or tribunal where there is no judicial remedy under
national law, that court is obliged to bring the matter before the ECJ.

b) The Treaties as the Foundation of the European Constitution

Three treaties are the basis of the European construction which is now composed of 27 Member
States. The Treaty establishing the European (originally Economic) Community and the Treaty
establishing the European Atomic Energy Community were brought into force on 1 January
1958. In 1992 the Treaty on European Union was added. A fourth treaty, the Treaty establishing
the European Coal and Steel Community of 1951/52, expired on 23 July 2002. Legislative
procedures as well as the functions of the respective institutions are laid down in these treaties,
which also contain a list of legal bases. These competences are voluntarily conferred on the
Union by its Member States. Hence, they are responsible for the arrangement of the respective
duties of the EU on the one hand and the Member States on the other. Laid down in Article 5(1)
EC, this fundamental principle of EU law is called the principle of conferral. 21 This core
principle informs our understanding of the treaties as the foundation of the European Consti-
tution.

c) The Organisational Structure

A sovereign entity’s constitution must set forth who exercises sovereign powers, according to
which procedures and the manner in which this power is to be exercised. A statute of organi-
sation is therefore a *sine qua non*. The founding treaties of the EU and the two Communities,
together with the amendments, annexes and protocols, create institutions and secondary organs.
They lay out these bodies’ composition and procedures, as well as their relationships to each

21 For further details, see A von Bogdandy and J Bast, above chapter 8.
The EU’s statute of organisation is notable for its creation of a plethora of institutions. The object of this essay is not to qualify each of them, but rather to make clear what characterises the EU as an autonomous organisation.

The Commission—an institution that finds no parallel in the Member States—must be mentioned first. The Commission is a supranational institution, which means that it exercises powers and independently fulfils its tasks throughout the entire Union and, in the case of international relations, even beyond. Not only the individuals within the Member States, but also the states themselves are subject to the Commission’s powers. Its 27 members are independent during their period of office. The European Parliament (EP) checks the policy of the Commission. If necessary, the EP is able to remove the Commission from office, a procedure that has thus far never been used, although the threat of this procedure did once move the Commission under President Jacques Santer to resign. The Commission monitors compliance with Community law, in particular with respect to the Member States. In legislation it usually has the sole right of initiative; the Council cannot act without a corresponding proposal by the Commission. Only with rare exception is the Commission empowered to make law by itself. One example of such an exception is the ability of the Commission to supervise public undertakings to which the Member States have granted special or exclusive rights (Article 86(3) EC). The Commission may make delegated law upon authorisation by the Council. Hence, it is empowered to apply the law on the basis of a specific delegation. It also has broad competence to engage in administrative activities. This position is suitable for an authority of a governance that has not yet reached the level of statehood but nonetheless is equipped with numerous sovereign powers. The Commission deserves the title of a ‘motor of integration’. Its role is not comparable to that of governments in a parliamentary democracy because its success largely depends on the Council. This institution decides at first instance whether the Commission’s proposals are to be accepted. However, as a monitoring institution it is able to influence the behaviour of the Member States toward integration.

The Council of the EU is composed of representatives of the Member States. The rotating presidency is taken by each Member State in turn for a period of six months. The work of the Council is supported by the General Secretariat of the Council, which is composed of European civil servants. The Council’s main task is legislating, a task which it must, in certain fields, share with the EP. In other fields it decides alone. Transparency of the procedures within the Council is deficient. As compensation, though, the Member States carry the responsibility for the important decisions made at the European level. If this were not guaranteed, such an infringement on the rights of the sovereign state would bring integration to a standstill.

The European Parliament is composed of representatives from each of the Member States (Article 189(1) EC). The Members of the Parliament (MEPs) are elected every five years by general and direct ballot. Step by step, the EP has won greater influence, yet it still does not possess a comprehensive right of co-decision for all legislation. Insofar as it is involved, the influence of the EP does not measure up to that enjoyed by the Member States’ parliaments. This is largely due to the fact that the Council is not, as a partner, dependent on the EP. The public perceives the role of the EP rather as a brake, or at the very least as an unimportant actor in legislation. A fundamental change in the EP’s sphere of influence could only be brought about by reducing the powers of the Member States. This, however, would jeopardise

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23 For a more detailed account, see P Dann, above chapter 7; see also M Hilf, *Die Organisationsstruktur der Europäischen Gemeinschaften* (1982).
further integration.\textsuperscript{26} The MEPs usually do not vote according to their nationality but rather with respect to political allegiance. Additionally, the fact that the EP rejects only a few initiatives of the Commission is not a result of parliamentarian negligence. Instead, the Commission’s initiatives almost always receive the support of a majority of MEPs due to the high quality of the commissioners’ previous work.

Article 220 EC assigns a clear task to the ECJ: The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed. It is assisted in this regard by the Court of First Instance. As a result of their jurisprudence, these courts are considerable forces for integration. Therefore the ECJ is also considered a ‘motor of integration’. The European courts are bound by legal norms and principles. In developing unwritten law, however, the courts loosen the connection to the explicitly written legal order to a certain degree but do not sever it. The ECJ takes recourse to the Member States’ common constitutional principles as well as to international treaties to which the Members belong.\textsuperscript{27}

Finally, the European Council must once again be mentioned. It brings together the heads of state or government of the Member States and the President of the Commission (Article 4(2) EU). According to Article 4(1) EU, the task of the European Council is to provide the Union with the necessary impetus for its development and to define the general political outlines thereof. The European Council is organised in the EU Treaty, whereas other institutions are defined in the EC Treaty. As a complex but united organisation the EU has the ability, however, to distribute institutions throughout its constitutive texts.

While the EU’s and Communities’ statutes of organisation are extensively prescribed in the Treaties, there is still room for the development of law by courts in this area. Above all, the ECJ has stressed that a balanced relationship between the institutions is important. This institutional balance requires every institution to respect the competencies of the other institutions when exercising power. It also demands that violations of this principle be sanctioned.\textsuperscript{28} As a result of this principle, the institutions themselves are placed in the best position to realise the respective interests they represent.

It is my hope that this brief overview is sufficient to demonstrate that the EU’s statute of organisation is tailored to a sovereign supranational entity. In this form it is able to further European integration.

d) The Legislative Process of the European Union

As mentioned above, in legislative matters the Commission has the sole right of initiative in almost all areas and procedures.\textsuperscript{29} Neither the Council nor the EP has the right to initiate legislation alone. Nevertheless they can call on the Commission to propose particular bills. However, Article 190(4) EC presents an exception insofar as it requires the EP to draw up a proposal regarding electoral law for the EP. In practice, civil servants of the Commission elaborate a proposal and, at least in the initial stage, ask independent experts for advice. In this phase of the legislative process special interest groups can bring forward their arguments and can thus exert influence over the content of the bill. The lack of personal involvement on the part of Commission parliamentarians is often criticised. This model has advantages, however, as the Commission relies on the specific knowledge of the parties involved in crafting the legislation, particularly where technical regulations are concerned. Pursuant to procedural rules, the


\textsuperscript{27} GG Sander, Der Europäische Gerichtshof als Förderer und Hüter der Integration (1998); see, eg Case 44/79 Hauer [1979] ECR 3727, paras 13ff.


Council of the European Union and the EP participate in the legislative process after the Commission has completed its proposal. In most of the cases the co-decision procedure laid down in Article 251 EC is the main legislative procedure. Pursuant to Article 251 EC, the Council and the EP jointly adopt legislation based on a proposal from the Commission.

If the assent procedure is applicable, no legislation can be adopted without the approval of the EP. Thus the EP has the legal power to accept or reject any proposal, but no legal mechanism exists for it to propose or influence amendments. The assent procedure applies in instances of the accession of new Member States (Article 49 EU), establishment of enhanced cooperation where the co-decision procedure normally applies (Article 11(2) EC), conferment of additional tasks upon the European Central Bank (Article 105(6) EC, certain amendments of the Statute of the European System of Central Banks (Article 107(5) EC), tasks of the Structural Funds and Cohesion Funds (Article 161 EC) and the approval of the President of the Commission (Article 214(2) EC). Under the cooperation procedure outlined in Article 252 EC, the Council is required to consult the EP, although the proposed bill is adopted by the Council alone. Since the Treaty of Amsterdam took effect, however, the cooperation procedure is applied only in the areas of multilateral monitoring of economic policy (Article 102(2) EC), certain aspects of borrowing and liability with regard to the Community and the Member States (Article 103(2) EC), and, finally, the issuing of banknotes and coins (Article 106(2) EC).

A unique procedure for the conclusion of international agreements is laid down in Article 300 EC. According to this provision, the Commission makes recommendations to the Council, which authorises the Commission to open the necessary negotiations. The negotiation mandate can include concrete directives for the negotiations. If this is the case, the Commission conducts the negotiations within the framework of the directives issued by the Council. Such agreements are thus concluded by the Council in the name of the Community. The participation of the EP depends on the area affected by the international treaty.

In certain cases of delegated legislation (so-called comitology procedures) the Commission can issue legal acts. In this respect, one can distinguish four categories of committees according to how they operate: advisory committees, management committees, regulatory committees, and so-called regulatory committees with scrutiny.30

With regard to all of the above-mentioned procedures, a unique aspect of the European legal order deserves special attention. Article 253 EC and Article 162 Euratom Treaty (EA) oblige the Community institutions to provide reasons for all legal acts (regulations, directives and decisions). As a result, the object and purpose of a legal norm may be ascertained from its reasons. The courts are not required to take recourse to the statements made during the legislative process. Such statements do not reliably reflect legislative intent, since one cannot know whether the final version is based on those statements. Moreover, law-making in the Council is not exposed to the public. The legal text often permits several interpretations. Therefore, as a result of the obligation to provide reasons for all legal acts of the Community, the courts are enabled to determine the authentic motives.31

e) Legal Acts

The European Union provides for a variety of legal instruments. The central provision for the system of instruments is Article 249 EC.32 EC regulations constitute the law of the entire Union.

32 See J Bast, above chapter 10.
This legal instrument most directly infringes upon the legal systems of the Member States. Regulations have a general scope, are obligatory in all their elements and directly applicable in all Member States. In contrast, directives aim at the approximation of laws. They are designed to eradicate contradictions between the national legal and administrative regulations, or to incrementally dismantle differences between the Member States. A directive requires the Member State to achieve a particular result without dictating the form and means of achieving that result. The legislative realisation of a directive entails a two-stage procedure. In the first stage, ie the supranational one, the obligatory goal of the directive is formulated for the Member States to whom the directive is addressed. In the second stage, ie the national one, the Member States are required to make changes to their domestic laws in order for the directive to be implemented correctly. Many observers do not realise that domestic provisions can often be traced back to a superior European legislative act. In addition, there are binding decisions, which are not of general application, but only apply to the explicit addressee of the respective decision, recommendations and opinions. European legislation has also brought out another type of act—the addresseeless decision—which serves as a legal instrument for the obligatory regulation of the relationships between or within the Union’s institutions.  

2. Tasks and Objectives

In national constitutions one rarely encounters tasks and objectives. However, one can increasingly observe that, even at the national level, constitutions are incorporating basic principles of government. This is shown not only by the inclusion of a governmental obligation to protect animals in Article 20a of the German constitution but also by considerations which emphasise sports or culture as being constitutionally protected. The Community Treaties are replete with such obligations. They oblige the Union’s institutions to realise the founders’ aims. Tasks and objectives determine the object and purpose of legislation and administrative activity. The Community’s objectives restrict its regulatory competence with respect to the Member States. The principle of enumerated powers in Article 5(1) EC provides that the Community’s activity remain not only within the scope of the competence provided by the Treaty but also within the scope of the enumerated objectives. Article 2 EC establishes very broad tasks. The list of activities in Article 3 EC obliges the Community’s institutions to be active in the listed sectors. Within the individual fields there are more concretised objectives, eg Article 14 EC for the internal market and Article 33 EC for agriculture.  

3. The Distribution of Powers

In a federative association the larger entity must decide how powers are to be distributed, otherwise chaos will ensue. The danger lies either in an area’s being left unregulated despite the need for regulation or in the emergence or persistence of contradictory regulations. The fundamental decision is found in Article 5 EC, according to which the EC may exercise only  

33 For details on the addresseeless decision, see J Bast, Grundbegriffe der Handlungsformen der EU (2006) 109ff.  
34 For further details, see PC Müller-Graff, ‘Verfassungsziele der EG/EU’ in MA Dauses (ed), Handbuch des EU-Wirtschaftsrechts (looseleaf, last update Oct 2007) s A 1; M Zuleeg, in H von der Groeben and J Schwarze (eds), Kommentar zum EU-/EG-Vertrag (2003) on Arts 2 and 3 EC.  
35 The terms ‘powers’ and ‘competences’ are used interchangeably in this contribution since the Treaties do so and no difference is to be seen. The importance of the distribution of competences is shown by von Bogdandy and Bast, above chapter 8.
those powers conferred upon it by the Treaty. These may be conferred exclusively on the EC, but this is a rare occurrence. Usually the EC’s powers are concurrent or parallel with those of the Member States. Generally the EC is granted the competence to regulate a certain sector. There are, however, also competences based on the Community’s aims. These types of competences are limited to the harmonisation necessary for the construction and design of the internal market (Articles 94, 95 EC) and to the complementary clause of Article 308 EC. These provisions are criticised by some as being arbitrary because of their imprecise wording.\textsuperscript{36} Admittedly, they are broad, but it must be borne in mind that these competences are not only goal oriented: the exigencies of the internal market must be fulfilled. The European legal order also comprises competences based on a close connection to an explicit competence, the so-called implied powers. In all other cases, the Member States retain their powers. The exercise of supranational competences is furthermore limited by the exercise of the principle of subsidiarity. An appropriate distribution of powers is thus achieved.

It must be noted that the distribution of powers may differ according to the function of a specific power. A large proportion of law-making has been transferred to the European level. The Communities are tied to the Member States if directives are issued. The Member States must transform the directives into their respective national law. The EC is entrusted with the administration of certain sectors. On the whole, however, the administrative enforcement of Community law lies in the hands of the Member States. The European courts decide upon litigation within the European legal order. The ECJ controls whether the Member States observe European law. Although institutionally the Member States’ courts are not Community courts, functionally they are.\textsuperscript{37} The procedure of preliminary references pursuant to Article 234 EC creates a co-operative relationship between the ECJ and the Member States’ courts.\textsuperscript{38}

Despite the division of powers described above, a collision between European and Member State law can still occur. The ECJ has therefore developed a rule on the collision of laws, namely the principle of primacy of Community law. This primacy does not lead to the invalidity of conflicting national law but only to the inapplicability of this law. Intervention in the Member State’s legal order is thus reduced to a minimum.\textsuperscript{39} Furthermore, certain strategies have been developed to avoid collisions. First, the interpretation of domestic law in conformity with EC law and legal development through the judiciary must be mentioned.\textsuperscript{40} Friction does not occur when the EU adopts elements from the Member States’ legal orders. This has happened on a broad scale. It also works the other way around: the Member States must observe their obligations arising from Community law and integrate European provisions into their legal orders. This has also occurred on a broad scale. Both the EU and the Member States can avoid collisions by adjusting their legal orders to the other’s. Co-operation between the institutions helps to avert clashes of law. Finally, supervision and sanctions help to prevent or remedy collisions. Nevertheless, specific structural elements of the European constitution intensify the danger of conflicts, namely the principle of effectiveness, the rights granted to

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\item[38] Case C-50/00 P UPA v Council [2000] ECR I-6677, paras 38ff. For further details, see Zuleeg, above n 34, Art 5 EC, para 16. See also idem, ‘Die Aufteilung der Hoheitsgewalt zwischen der Europäischen Union und ihren Mitgliedstaaten aus Sicht der deutschen Verfasung’ in Walter Hallstein-Institut für Europäisches Verfassungsrecht (ed), Grundfragen der europäischen Verfassungsentwicklung (2000) 91ff.
\item[39] See M Zuleeg, Das Recht der Europäischen Gemeinschaften im innerstaatlichen Bereich (1969) 136ff. See also idem, Der rechtliche Zusammenhalt, above n 10, 104ff.
\item[40] See M Zuleeg, ‘Die gemeinschaftskonforme Auslegung und Fortbildung mitgliedstaatlichen Rechts’ in R Schulze (ed), Auslegung europäischen Privatrechts und angegliederten Rechts (1999) 163.
\end{itemize}
individuals and the unity of Community law.\textsuperscript{41} Notwithstanding possible conflicts, the European legal order needs such instruments to uphold its binding force.

4. Constitutional Principles

a) Democracy

The EU’s constitution is based on the principle of democracy. For the ECJ, the EP’s participation in the Community’s legislative process reflects a fundamental democratic principle: the peoples’ participation in the exercise of sovereign powers through an assembly of their representatives.\textsuperscript{42} The preambles of the Single European Act and of the Treaty of Maastricht proclaim democracy as the basis of the Community. The Treaty of Amsterdam introduced this principle into the Treaty on European Union (Article 6(1) EU). The specific democratic characteristics of European governance have become more pronounced over the course of time.\textsuperscript{43} European governance is based on the will of the Union’s peoples (Article 189(1) EC) and on the Union’s citizens’ right to self-determination.\textsuperscript{44} The EU’s legitimacy also flows from the Member States’ participation in the exercise of the EU’s powers.\textsuperscript{45}

There are still complaints about a democratic deficit in the EU. The Treaties of Amsterdam and Nice once again increased the EP’s powers. Nonetheless, in important areas it does not have a right to co-decision, eg in agriculture (Article 37(2)(3) EC) and pursuant to Article 308 EC, where the EP only needs to be consulted. In such areas the legitimacy is derived from Member States’ decision-making power. The principle of democracy is thus respected, yet some observers deny that European governance can be democratic. The lack of a common language, so it is claimed, hinders political forces in their struggle over the best concepts. It is alleged that European parties and interest groups do not exist, nor is a European public perceptible. The EP is not in a position to take speedy or effective action. In short, Europe lacks a living democracy.\textsuperscript{46} However, thus far the EP has made use of and asserted its competences. It has matured into a real power in the European Union. Public awareness of European politics has grown with the enlargement of decision-making powers. There is certainly a need to expand democratic rule at the European level. The inadequacies that still remain, however, are insufficient to call European democracy into question.\textsuperscript{47}

The German Federal Constitutional Court, the Bundesverfassungsgericht, assumes two different conceptions of democracy in its judgment on the Treaty of Maastricht. The Court held that, on the European level, a living democracy must exist—a proposition that the Court found doubtful. On the national level, a homogeneous people is required that expresses its will

\textsuperscript{41} See, in detail, M Zuleeg, ‘Deutsches und europäisches Verwaltungsrecht’ (1994) 53 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 153. For the structural characteristics of the European legal order, see below, s 5.


\textsuperscript{44} See W Kluth, Die demokratische Legitimation der Europäischen Union (1995) 30ff; Zuleeg, ‘Demokratie’, above n 10, 1069.

\textsuperscript{45} Entscheidungen des Bundesverfassungsgerichts 89, 155, 186 (Maastricht).


in uniformity intellectually, socially and politically. Intellectual and political homogeneity means that the people think and decide in the same way. This is a caricature of democracy and the reverse of a living democracy. The transfer of sovereign powers to the EU allegedly threatens the Member States’ statehood without the possibility of establishing an adequate democracy at the European level owing to the lack of a single people. The Bundesverfassungsgericht had previously enunciated a different conception of democracy. In an earlier judgment it placed the free self-determination of every person at the centre of its reasoning. Democracy is centred on the individual. Such a conception of democracy can be applied to the European level.

Another objection is brought forward against the thesis that the EU is capable of supporting a democracy. Democracy is also based on the principle of equality. From this, one concludes that, without equal weighting of votes in the election to the EP, a fundamental democratic right is injured, thus violating a determinative element of true representation of the people.

Equality in weighting of votes would transform the EP into a bloated assembly unable to make decisions if even the smallest Member States had to be proportionally represented. On the other hand, a parliament with no or only marginal representation of the individual peoples would be a political absurdity. The solution to this dilemma is to recognise that a federation permits—and may even require—derogation from the strict principle of equality to satisfy the need to grant a certain independence and protection to smaller entities. It is a permissible derogation to integrate states or other public entities into a federation without threatening their existence. The EU is a federative democracy sui generis, one that is not based on a single people, but rather on peoples.

b) The Rule of Law

Both the English and the German texts of Article 6(1) EU employ well-known terminology for another basic principle: the rule of law, or Rechtsstaatlichkeit in German. The rule of law characterises a state-like entity, meaning that the European Communities were obliged to observe the requirements of the rule of law even before the Treaty of Maastricht. The ECJ characterised the European Community as a community based on the rule of law, or Rechtsgemeinschaft in German. The protection of fundamental rights is one of its most important features. Various general principles that form an integral part of Community law are derived from the notion of respecting the rule of law. Of particular importance is the principle of proportionality, which is now explicitly expressed in Article 5(3) EC even though the wording is not aimed at the Member States. The Court has decoupled this principle from fundamental rights and introduced it comprehensively into Community law. Thus, infringements of the rights of citizens are only lawful when they are both suitable and limited to what is

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48 See Entscheidungen des Bundesverfassungsgerichts 89, 155, 185ff (Maastricht).
49 See Kirchhof, above n 8, in particular paras 57ff. For criticism, see R Bieber, ‘Steigerungsform der europäischen Union’ in J Ipsen (ed), Verfassungsrecht im Wandel (1995) 291, 299ff; Bryde, above n 8, 305ff; Pernice, above n 8, 100; Weiler, above n 8, 91; Zuleeg, above n 47, 12ff.
50 See Entscheidungen des Bundesverfassungsgerichts 44, 125, 142 (Öffentlichkeitsarbeit).
52 See PM Huber and C Grewe, both in Drexl et al (eds), above n 47, 27 and 59; Pernice, above n 46, 481ff.

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necessary to achieve the relevant objective. When various forms of intervention are available, the acting institution must, where the effect is the same, opt for the less severe means of achieving the objective. Furthermore, the means and the end have to be weighed against each other in the sense that the means are only lawful if they bear an appropriate relation to the aim pursued.\footnote{57} With this definition, the principle of proportionality can be extended to the Union’s entire legal order.

The principles of legal certainty and legitimate expectations are also valid in European law.\footnote{58} According to the principle of legal certainty, individuals must be able to rely upon the clear wording of the provisions of the Community and the Member States so that they can foresee the legal consequences of their actions. The principle of legitimate expectations requires the Union institutions and bodies, as well as the public authorities of the Member States, when acting within the scope of Community law, to refrain from adverse actions when the individuals affected infringe upon European regulations in good faith.\footnote{59} When certain interventions endanger the existence of undertakings, transitional arrangements have to be provided. However, this principle is not absolutely valid; rather, it is open for consideration.

The administration is bound by law. Administrative measures that impose a burden on individuals require a legal basis.\footnote{60} Administrative procedures that comply with the requirements of the rule of law must be guaranteed.\footnote{61} Insofar as European law is applicable, legal protection before an independent court must be granted not only against the powers of the Community but also against those of the Member States.\footnote{62} The Member States are required to effectively enforce Community law in their respective jurisdictions.\footnote{63} While the principle of the separation of powers as it is known in the German Constitution is not comprehensively applicable to the Union, at the very least the requirement of an independent judiciary must be respected.\footnote{64}

c) Federative Principles

The German Constitution assumes that the EU will follow federative principles (Article 23(1) Basic Law). Although this concept is not explicitly mentioned in the European legal order, it characterises important elements of the Union’s constitution.\footnote{65} The loyalty clause deserves to be mentioned first. Article 10 EC obliges the Member States to fulfil their obligations arising out of the Treaty, to facilitate the achievement of the Union’s tasks and to abstain from any measure which could jeopardise the Treaty’s objectives. The ECJ emphasises the duty to co-operate and...
has found that it is an independent obligation. Undoubtedly this applies also to the law adopted under the Treaty on European Union. If the Member States’ obligation is formulated in a specific provision of European law, then the obligation to co-operate is of auxiliary character. The effectiveness of European law is closely related to the obligation to co-operate. The ECJ increases the effectiveness of European law by extending the obligations of the Member States to subordinate corporations and agencies. The loyalty clause imposes a duty on the Member States to co-operate with the EU’s institutions, to eliminate obstacles to the effective application and enforcement of European law and to provide the Union with assistance. Member States cannot rely on provisions or practices of their internal legal or financial orders to justify breaches of Community law. Practical difficulties cannot serve as a justification for not applying Community law.

Through development of the law by judicial interpretation, the ECJ has extended the application of the loyalty clause to the EU. Hence, the Union’s institutions are obliged to co-operate with the Member States. According to the ECJ, however, these obligations do not generally protect elements of the national legal order from the influence of European law simply because they belong to Member States’ constitutional law. The Union’s institutions must nevertheless take the legitimate interests of the Member States into account. In practice, the principle of proportionality is a means of finding an appropriate balance of interests. Furthermore, the loyalty clause extends to the relationship of the Member States to each other and requires them to co-operate.

The division of powers between the EU and its Member States also embodies federative principles. The European legal order is intertwined with the Member States’ legal orders. The Member States adopt legislative and administrative measures induced by the Union. These actions may be categorised as execution of European law. The EU impacts the Member States’ legislation. In exceptional circumstances, however, Member States may be empowered to derogate from European law. Conversely, the EU also can obligate the Member States to enact legislation. The transposition of directives as required by Article 249(3) EC is the best example of this duty, although other legal acts of the EU may also impact Member States’ legislation. Law created in this way belongs to the Member States’ legal orders and is subject to their requirements, yet it must nonetheless be consistent with European law.

If an organ of a Member State attributes legal effect to European law in any particular case, then the application of Community law is concerned. The question then arises whether the Community norm at hand has direct effect. Provisions of European law may be insufficient to

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67 For further references concerning the older case law, see R Söllner, Artikel 5 EWG Vertrag in der Rechtsprechung des Europäischen Gerichtshofes (1985) 49ff; for recent cases, see A von Bogdandy, in E Grabitz and M Hilf, Das Recht der EU (looseleaf, last update Jan 2008) on Art 10 EC.
70 On the duties of the Member States, see above Zuleeg, ‘Verwaltungsrecht’, above n 41, 184–90.
75 See Case 2/88 Imm, above n 16, paras 22ff.
77 See the opposite view in A Epiney, ‘Gemeinschaftsrecht und Föderalismus’ [1994] Europarecht 301.
80 See Bitter, above n 4.
82 Already formulated in Zuleeg, above n 39, 48 and 225–339.
be applied in an efficient and direct way because they do not provide for procedural rules. Therefore the Member States’ administrative bodies must apply their national law to fill the gaps. However, the Member States’ administration must observe the primacy of Community law and fulfil the obligations arising from membership in the EU. The Europeanisation of the Member States’ administrative law has thus been set into motion.

The equivalence and effectiveness of administrative execution based on European law must be guaranteed. Furthermore, because European law is superimposed on Member State law, equality before the law must be uniform throughout the Union. It cannot be expected that a single administrative system will develop in the foreseeable future. Consequently, the Member States must accept the fact that there will continue to be two systems of administrative law: one adjusted to European law and the other purely national.

The Member States are also subject to Community monitoring. This supervisory capacity permits the EU to ensure that the Member States comply with Community law. This began with the now-expired Treaty on the European Coal and Steel Community. Article 88 of this Treaty provided for sanctions in case of violations against Community law, but they hardly appeared promising. The Rome Treaties originally contented themselves with a finding of a breach by the Member States (currently Article 226 EC, Article 141 EA). The Commission prosecutes the case and the ECJ makes the finding of a breach of the Treaty. Exceptionally, the Commission may make the finding itself, eg in the law of state aids under the EC Treaty. Since the Treaty of Maastricht, the ECJ can impose a lump sum or penalty payment pursuant to the Commission’s proposal (Article 228(2) EC, Article 143(2) EA).

The Treaty of Amsterdam introduced a type of constitutional monitoring concerning respect of constitutional principles (Article 7 EU). On a proposal by one-third of the Member States or by the Commission, and after obtaining the consent of the EP, the Council may determine the existence of a serious and persistent breach by a Member State of the principles mentioned in Article 6(1) EU. The EP and the Council, meeting in the composition of the Heads of State or Government, thus have the power to make determinations on freedom, democracy, respect

90 The first time this happened was in Case C-387/97 Commission v Greece [2000] ECR 5047, para 99. On the infringement procedure, see K-D Borchardt, ‘Vertragsverletzungsverfahren’ in Dauses (ed), above n 34, s P 11.
91 See, in greater detail, von Bogdandy, above n 2, 14ff.
for human rights and fundamental freedoms, as well as the rule of law. The Council may suspend certain rights of the respective Member State, including its voting rights in the Council.

d) Protection of Fundamental Rights

The ECJ has developed European fundamental rights through its jurisprudence. At first, the ECJ found the basis for this jurisprudence in the constitutional traditions common to the Member States. Later, it also referred to international human rights treaties. Furthermore, a basis for fundamental freedoms may be found in the Treaties themselves, even if the relevant provisions do not explicitly determine such rights. Article 6(2) EU now provides that the Union shall respect fundamental rights, as guaranteed by the European Convention of Human Rights (ECHR) and as they result from the constitutional traditions common to the Member States, as general principles of Community law. The material provisions of the ECHR are thus an integral part of European law. The supplementary protocols, though not explicitly mentioned, are also incorporated. Article 3(1) EU stipulates the consistency and continuity of activities exerted by the EU’s institutional framework. This challenge includes the fundamental rights as guaranteed by Article 6(2) EU. While the fundamental rights are conceived as a protection against acts taken by the EU, they are also applicable to the Member States to the extent that European law is applicable. The EU Charter of Fundamental Rights is capable of bringing the standards of protection of fundamental rights within the EU and the Member States closer together even if it remains non-binding. It can strengthen the effective protection of individuals and create greater public awareness of fundamental freedoms. In addition, European courts are able to take the Charter as a confirmation of the existence of constitutional rights and they increasingly make use of this opportunity.

5. The European Legal Order’s Structural Characteristics

Structural characteristics are requirements that must be respected throughout the European legal order. The unity of the legal order is important to the ECJ. For the operability of the EU as a community based on the rule of law the uniform application of European law is essential. The claim of uniform application is derived by the Court from Article 10 EC.

From the unity of the legal order, it follows that contradictions within the legal order must be eliminated. Rules of collision serve this purpose. Furthermore, the unity of the legal order demands that the Member States’ laws do not interfere with the equal application and effect

92 See B Beutler, in von der Groeben and Schwarze (eds), above n 34, Art 6 EU paras 39 and 51ff; H-W Rengeling and P Szczekalla, Grundrechte in der Europäischen Union (2004); for further details, see J Kühling, above chapter 13.
93 For further evidence, see M Zuleeg, ‘Der Schutz der Menschenrechte im Gemeinschaftsrecht’ [1992] Die Öffentliche Verwaltung 937, 940ff. A highly disputed case regarding this issue is Case C-144/04 Mangold [2005], ECR I-9981, paras 74ff.
95 [2007] OJ C303, 1 and 17.
98 See Case 106/77 Simmenthal [1978] ECR 629, paras 14ff; Case C-213/89, above n 76, paras 18ff.
99 See Case 294/83, above n 20, paras 23ff.
100 See Case 6/64 Costa [1964] ECR 585, 615.
of European law, as otherwise the rights of individuals could be undermined and equality before the law could not be guaranteed. Additionally, competition within the single market would be distorted. Finally, legal protection would be inadequate if the Member States’ courts were able to judge the validity of a legal act by the Community differently. Therefore only the European courts are capable of declaring a European act inapplicable or null and void.

The unity of the legal order is closely connected to the effectiveness of European law. Early in its jurisprudence, the ECJ emphasised the practical effectiveness (effet utile) of Community law to ensure that the Community’s institutions are able to fulfil their tasks. The effectiveness of European law is an essential pillar for the European integration. First and foremost, the beneficiaries of effectiveness are the citizens as rights-holders. However, the principle of effectiveness is not restricted to such a subjective understanding. In fact, the principle contributes to the development and the full implementation of European legal norms.

In every Member State it must be guaranteed that the administrative and judicial proceedings are organised in a way that Community law can be effectively applied. The procedural rules of Member States must not be less favourable in matters determined by Community law than in those resolved entirely domestically (principle of equivalence). The application of Member State law must not compromise the scope and effectiveness of Community law; it must not make the execution of Community law practically impossible or exceedingly difficult (principle of effectiveness). Provisional remedies must ensure that it remains the reserved right of the ECJ to declare a European act null and void.

The Member States cannot plead internal provisions, practices or circumstances of their legal or financial orders to justify non-compliance with their obligations resulting from Community law. Practical difficulties are not to prevent the application of Community law. If a Member State frustrates the implementation of a Community measure granting an individual rights and the Member State is at fault, it is liable to the individual for damages. This can include criminal sanctions as well.

That the Member State and all its subdivisions are obliged to comply with the European law, even if an infringement procedure may be directed only against this Member State, contributes to the effectiveness of the Community law. Every regional authority is bound to Community law: the federal states (the Länder) in Germany, as well as the regions in other Member States, and the municipalities and local authorities in all Member States. In addition, all public bodies,
public institutions, dependent carriers of administration as well as private entities which are subject to state supervision or provided with particular competences are required to comply with Community law.¹¹³

Considering the state and its horizontal division of powers, it is not only the legislature that is required to enforce Community law but also the executive branch and the judiciary. For the executive branch, this raises the problem about what happens in the case of a contradiction between Community law on the one hand and an administrative provision or administrative instruction in a single case on the other. In such cases, the effectiveness of Community law requires that the duty to obey the national provisions is no longer binding. According to the ECJ’s case law, a Member State’s authorities are duty bound not to apply Member State law if there is any conflict or inconsistency between the law of the Community and that of the Member State.¹¹⁴ This may involve a certain legal uncertainty, but it does not constitute undue strain on the part of the authorities.¹¹⁵

The ECJ emphasises that the founding Treaties, which serve as the constitutional basis of a community of law, have created a new legal order, the legal subjects of which are not only the Member States but also its citizens.¹¹⁶ The ECJ was already concerned with providing protection of individuals’ rights arising from Community law in 1963.¹¹⁷ Such rights do not only arise when Community law explicitly grants rights to the individuals; rather, it is sufficient that a legal provision allocates a benefit to individuals if the provision is clear and exact, is neither subject to any exception or condition nor subject to deferment, and does not require the intervention of any act of either the Community’s institutions or the Member States.¹¹⁸ In other words, the Community measure must impose a clear, precise and complete obligation on the Member States in favour of the individuals.¹¹⁹ The Member States, in their realm, must protect the rights arising from European law.¹²⁰ This has met with resistance in Germany because this case law allegedly endangers the administrative legal system.¹²¹ These objections may not weaken the effect of individuals’ rights arising from European law.¹²²

6. The Constitution’s Scope

The EU’s constitution is composed of treaty law and judge-made law and is thus quite extensive. By comparison, the Member States’ constitutions are relatively short, though, in interpreting constitutional law, high courts or constitutional courts usually produce an impressive case law concretising the provisions of the constitution. Such a development is necessary in order to maintain a living constitution, do justice to new developments and challenges, increase the protection it offers, and define more precisely broadly formulated wording. Nevertheless, the EU’s constitution is much more complicated. The broad scope of the treaties is the first problem: two Communities each have a founding treaty that covers a vast array of material. Furthermore, one must take into account the annexes, protocols and declarations. Overarching all this is the EU Treaty, which also contains addenda, many parts of which are incorporated into

¹¹³ For an example with regard to the German States, see Case 8/88, above n 60, para 13.
¹¹⁶ See Opinion 1/91, above n 13, para 21.
¹²² For references, see M Zuleeg, ‘Beschränkung gerichtlicher Kontrolldichte durch das Gemeinschaftsrecht’ in S Magiera and KP Sommermann (eds), Verwaltung in der Europäischen Union (2001) 223.
the Community Treaties, while others remain only in the EU Treaty. One speaks of ‘pillars’ in order to achieve at least a minimal overview. To this one must also add some ‘independent’ agreements among the Member States that cover subject matter under the jurisdiction of the ECJ and are thus part of the European legal order. It is not surprising that the complicated European constitution is not popular.

There are, however, good reasons to maintain such a constitution for the EU. With every leap of European integration there is the danger that a new treaty will fail, as the planned European Defence Community Treaty or more recently the Constitutional Treaty have demonstrated. If an earlier treaty were to be incorporated into a later one in order to have a single text, then the earlier treaty may be endangered if the latter one is rejected. The separate ratification of the two Treaties of Rome had the advantage that at least one of them could come into effect even if the other one were rejected. The explanation for the Single European Act’s complicated structure and later that of the EU Treaty is that the Member States wanted to tackle some subject matters at the European level without granting the supranational authorities competences over them. The future may hold further occasions for such a proceeding. As creators of the EU’s constitution, the Member States have thus far been anxious to retain control over certain subject matters. To protect these matters from legislation by the Union’s institutions, the Member States regulate the subject matter in question themselves through the Treaties. The Treaties are thus replete with detailed provisions of this kind. Member States may have reservations as to one or another part of the European Treaties. Exceptions, derogations or supplements are introduced into the Treaties to satisfy the concerns of the Members. This attitude further swells the European constitution. For these reasons, it is doubtful that the European constitution will ever meet the expectation of being composed of a single and concise constitutional document.

### III. Recent Developments

#### 1. The Need for a Constitution

The call for a European constitution resonated particularly loudly in Germany. In other Member States the public reacted somewhat hesitantly in this respect. As Europe’s politicians gradually warmed to this proposal, though, European citizens began to follow suit. The tables turned, however, following referenda in France and the Netherlands; a constitution for Europe, so-called, was no longer feasible. Rather, the governments of the Member States have now chosen to reform the founding Treaties through the Treaty of Lisbon.

One therefore still encounters the view that the EU currently does not have a constitution. This attitude is usually linked to the assumption that the EU simply cannot have a constitution, as mentioned at the beginning of this essay. Others continue to advocate an EU constitution. Some bemoan the absence of sufficient democratisation. Others yet again demand the endorsement of a constitution through the peoples of the Community. It is further contended that the EU must fortify into a federation to be capable of having a constitution. There may be other reasons still to call for a constitution.

To all of this one could reply that the EU already has a constitution. However, the decreed deficits could favour the tailoring of a new constitution for Europe. Whoever desires a new European constitution does so in the hope of rectifying defects and closing gaps that currently

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plague the EU. In doing so, the current constitutional set-up is either openly or covertly portrayed as being awkward. This attitude is seemingly irreconcilable with the adduced advantages of a European constitution. These advantages, however, do not preclude identifying the disadvantages, which could be eradicated through a new constitution. At the same time, one should take care that the merits of the existing constitution are not thereby lost. In any event, the renewed constitutional endeavours appear for the time being to have become a distant possibility following the failure of the Constitutional Treaty.

2. The Manageability of the European Constitution

The existing constitution is confusing, bulky, labyrinthine and complicated; there is no point denying that. It is this reality that has given rise to the demand to replace the present tangled mass with a brief and readily comprehensible constitutional text. In 2000 a group of experts had designed a slim constitution as a basic treaty on behalf of the European Commission, which served as a suitable starting point for discussion. Of greater practical relevance was the summoning of a convention to work out a novel constitution. Its draft failed in 2005 at the ratification stage. In neither of these cases was it intended to abolish the material content of the European treaties. In the first case, this would have meant that the new constitution and the remaining treaty provisions would then have existed side by side. Should the new constitution prevail over the rest of the treaties? The upshot of that would have been a need to introduce another conflict rule. While the lower-ranking treaty provisions would have remained mandatory, they would have had to subordinate themselves vis-à-vis the ‘super constitution’. As a result, a construct all the more complicated and impenetrable would have been created. The alternative might have been to afford the new constitution the same rank as the remaining treaty regime. That would not have produced clarity. The best solution to this dilemma would be a further reduction of the complexity of the current constitutional conglomerate. For example, one could introduce the co-decision procedure of Article 251 for all legislative procedures in the EC, which would achieve a net gain of independent legitimacy of supranational sovereignty. For the EC’s ability to act it would be advantageous if majority voting were considered the ‘constitutional standard case’. The Constitutional Treaty would have made an important step in that direction. The Treaty of Lisbon, however, preserves that achievement, so that it is possible to speak of a further constitutionalisation of the Union in this regard.

3. The Lisbon Treaty and the Further Constitutionalisation of the Union

a) Adjustment to Future Challenges

The EU has only recently concluded a gigantic round of enlargement. It is unanimously accepted that the Union’s constitution needs to be reformed in order to ensure the Union’s continued ability to operate, given the now 27 Member States. The Treaty of Nice, signed by the Member States, was supposed to accomplish that feat. Although the Nice Treaty disappointed as far as the strengthening of integration and democracy through far-reaching innovations is concerned, it

128 Pernice, above n 123, 875.
proved useful in facilitating the accession of a number of states.\textsuperscript{130} The Treaty of Lisbon makes further progress in this direction, in particular with respect to the voting system as concerns qualified majority decisions.

\textbf{b) Form and Content of the Treaties after Lisbon}

Following the Treaty of Lisbon, the question of the Union’s legal personality will be unequivocally settled in Article 47 TEU-Lis. The new Union replaces and succeeds the European Community as a whole and the present partitioning into various treaties will remain. The Constitutional Treaty’s achievement of creating of a unitary document was not carried over. Instead, there is still a Treaty on European Union and a ‘Treaty on the Functioning of the European Union’. Although it is understandable that after the subsumption of the Community into the Union a new title was required for the Treaty establishing the European Community, the new title on ‘Functioning’ does not seem to accurately convey the treaty’s contents. A strict delimitation between the Union treaty and the treaty on the ‘Functioning’ thereof based on material contents is not possible.

Contrary to the present situation, the possibility of a Member State’s unilateral withdrawal from the Union is foreseen by Article 50 TEU-Lis. Since a state cannot in any event be forced to remain in an organisation, this provision is innocuous. However, as Germany is constitutionally committed by virtue of Article 23 of its Basic Law, the Federal Republic’s exit from the Union would only be conceivable after a constitutional amendment.\textsuperscript{131}

What is remarkable is that the Treaty of Lisbon in principle retains the material contents of the Constitutional Treaty but discards many characteristics that might suggest the Union’s likeness to a state. The anthem, flag, motto, ‘Europe Day’ and reference to the euro pursuant to Article I-8 of the Constitutional Treaty are hence omitted.\textsuperscript{132} The existing terminology of the legislative acts of Article 249 EC is also here to stay—there will be no ‘European laws’ or ‘European framework laws’. However, according to Articles 14(1) and 16(1) TEU-Lis, the European Parliament and Council are joint ‘legislators’ of the Union, who according to Article 289 of the Treaty on the Functioning of the European Union (TFEU) adopt legal acts by ordinary or special ‘legislative procedures’ constituting ‘legislative acts’.

c) The Institutional Structure of the Union post-Lisbon

The Lisbon Treaty leaves the institutional structure of the Union largely untouched. The inclusion of the European Council and European Central Bank in the institutional framework through Article 13(1) TEU-Lis is remarkable. Even after the Lisbon Treaty, however, the EU lacks an actual government. The Commission’s competences are too limited in that respect. Indeed, it would be possible to install a European government through another treaty amendment, which would assume the functions of a government in a parliamentary democracy. That would involve the exercise of sovereignty, in particular legislation, emanating from the European government together with the Parliament. The Council would thereby lose its pre-eminence. The Member States would be reduced to dependent units.

The Treaty of Lisbon does, however, adopt the pertinent idea contained in the Constitutional Treaty insofar as it envisages a fixed presidency for the European Council—although regulation of who is to preside over the Council is reserved for future decision. Moreover, the

\textsuperscript{130} See \textit{Das Vertragswerk von Nizza und die Verfassungsdiskussion in der Europäischen Union} [2001] integration no 2, with numerous contributions.

\textsuperscript{131} See Zuleeg, above n 2, para 9; D König, \textit{Die Übertragung von Hoheitsrechten im Rahmen des europäischen Integrationsprozesses} (2000) 265ff.

\textsuperscript{132} See the Declaration (No 52) of 16 Member States on the symbols of the European Union, [2007] OJ C306, 267.
Commission President shall explicitly be ‘elected’ by the European Parliament, and the Commission as a body is dependent on the Parliament’s approval.

d) The Strengthening of Democracy and the Rule of Law in the EU

The core of a constitutional change or, alternatively, a fundamental modification of the Treaties should be the strengthening of democracy and the rule of law in the EU. As many legislative procedures as possible should require co-decision by the Parliament. The supplementary clause in Article 308 EC exemplifies that an increase in democratic legitimation on the European level can ameliorate concerns about far-reaching legal bases. The lack of participation of representatives of the Member States’ peoples as regards the current procedure could be compensated through the European Parliament’s involvement. It is in this respect also that the Lisbon Treaty carries over innovative alterations that the Constitutional Treaty had already provided for. Accordingly, not only is the applicability of the co-decision procedure expanded, but the role of national parliaments in policing the subsidiarity principle is also strengthened. Pursuant to the second sentence of Article 352(1) TFEU, the Parliament’s consent is now required for a proposal based on such extensive authorisation, where it previously simply had to be consulted.

The Treaty of Lisbon also makes important steps as far as the rule of law is concerned. These steps were already envisaged in the Constitutional Treaty, in that it extended the ordinary legal protection regime starting at Article 226 EC (Article 258 TFEU) in its entirety to police and judicial co-operation in criminal matters.

c) Fundamental Rights

The Charter of Fundamental Rights of the EU is seen as a further step in elaborating the European constitution. However, until now it has only been solemnly proclaimed, not enacted as binding law. That does not preclude the ECJ from considering the Charter as an expression of the general understanding of the Member States and the political organs of the Union, namely the Council, Parliament and Commission. With the Lisbon Treaty the Charter will finally have legal effect—with the exceptions of Poland and the UK, where it is not justiciable (see Article 6(1) TEU-Lis and the respective Protocol). Conflicts with the ECHR—which is not entirely convergent with the fundamental rights of the EU Charter—are avoided through the Union’s projected accession to the ECHR in Article 6(2) TEU-Lis. The need for fundamental rights based on judge-made law, however, still remains because the founders of the Charter were not aiming for comprehensive fundamental rights protection. It is for that reason also that the importance of other subjective rights—namely, the fundamental freedoms of the internal market—should not be left out of sight. This is all the more true for Union citizenship and its incidental rights, which have a large effect on the social sphere in particular.

f) The Distribution of Competences between Member States and Union

The Member States are keen to affirm their status within the Union. Article 6(3) EU (substantiated in Article 4(2) TEU-Lis), whereby the Union respects the national identity of its Member States, is a testament to this. On the other hand, they commit themselves to the realisation of an ever-closer union among the peoples (Article 1(2) EU, same in the Lisbon version). The vertical division of powers lies between these two poles. Demands are made from different sides to

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133 Case C-540/03, above 97, paras 38 and 58; see also Zuleeg, above n 17, 514.
replace the present distribution with a new one. The motivations are diverse. In this respect, two schools of thought need to be singled out. Some would like a more distinct delimitation than is currently the case, without stalling integration. The German Basic Law appears to serve as a paradigm in this respect. Others would like to wrestle competences from the EU in order to return them to the Member States. The call for such upheaval has many supporters.

At first glance, it might seem strange that the order of competences of the German federation is preferred to the European one. The competences afforded to the federal government are expressed diffusely. They are to be interpreted widely. Specification of an objective is not obligatory. The EU, however, has objectives and tasks placed upon it in its exercise of sovereignty. Its powers are limited considerably in nearly all areas. Contrary to the Federal Republic of Germany, the EU usually invokes its authorisation selectively, while the federal government in Germany by and large makes use of its powers in a broad-brush manner. One explanation for this paradoxical situation is that the desire to curb the competences of the EU concerns certain enabling powers, namely those functional competences that allegedly allow the Union to pull the rug from under the democratic decision-making power of the Member States. It is not true that these provisions can be used to set up an almighty central executive: they are subject to certain requirements, which can, however, be interpreted broadly.

The process of integration could be upset significantly if the competences of the EU were to be amputated for the sake of functional competences (ie competences defined by certain policy objectives rather than policy fields); many obstacles of the internal market and other achievements of the EU can only be removed if there is legal harmonisation and supplementation at the European level. A solution might be a wide interpretation of the remaining or newly formulated powers—but what would be gained by such a remodelled order of competences? Consequently, the Treaty of Lisbon leaves Article 308 EC intact. The sphere of applicability of Article 352 TFEU is extended beyond measures concerning the common market to all areas of political activity, excluding those pertaining to common foreign and security policy.

Many groups in Germany demand the introduction of a more precise delimitation of competences between the EC and the Member States, as has been the case up until now. This demand was a feature of the Nice Declaration. There is, however, no federal constitution that has such a clear demarcation of competences as the constitution of the EU. This is all the more true after the categorisation of powers of the Union in the new Articles 2ff TFEU. Accordingly, there must be another reason to put further hindrances in the way of European integration. Whichever motive might be behind that, one should bear in mind that a uniform legal order promotes welfare in Europe and facilitates living together.

Be that as it may, fears of a ‘de-nationalisation’ of Germany are unwarranted.

4. Differentiated Co-operation Instead of Renunciating Integration

Further efforts are underway, both in the literature and the jurisprudence of the courts, to push back European integration by legal means, to deny legal acts of Community recognition and

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136 Pernice, above n 123, 867.
137 Critical on the German model is Pernice, ibid, 873.
139 For details, see above section II.3.
142 In this sense, see Kirchhof, above n 8, paras 52ff.
even to leave the Union. Attempts to use the subsidiarity principle as a lever to switch off the disagreeable components of the supranational sovereign powers characterise this movement.\textsuperscript{143} Member State courts lay claim to policing the four corners of the Community’s competences, supported by voices in the juridical literature.\textsuperscript{144} People are looking for ways out of the Union.\textsuperscript{145} This is reflected in the novel Article 50 TEU-Lis, which grants Member States the right to withdraw from the Union. Similarly, there are ‘opt-out’ possibilities in areas of politics considered particularly sensitive as regards national identity, such as criminal law, which ultimately facilitates enhanced co-operation between participating states (see Articles 82(3), 83(3) and 86(1) TFEU). Concerning family law, Article 81(3) TFEU provides for a special legislative procedure with the Council acting unanimously after mere consultation of the Parliament. Both are examples of significant deviation from the ‘constitutional standard case’,\textsuperscript{146} which seems suitable as a gentler measure to protect national identity than withdrawal.\textsuperscript{147}

IV. Forecast

The critical remarks in this piece on the future of the European constitution are not to imply that no further steps should be taken in the long run that would bring about a state-like constitution. Instead, the cross-linkages to the Member States’ constitutions should be cultivated in order to reinforce the constitutional interconnection in Europe.\textsuperscript{148} Discussion on the future of the EU should proceed without inhibition.\textsuperscript{149} The shape of the future Union is indeed a popular topic.\textsuperscript{150} The question of finality, in particular, plays a fundamental role. Possible schemes are considered that set themselves apart from the current architecture of the EU. One cannot help but notice the trend towards strengthening integration. There is talk of a confederation and a federation.\textsuperscript{151} Special attention is paid to democracy in Europe.\textsuperscript{152} These suggestions are formi-

\textsuperscript{143} M Heinze, ‘Europäische Einflüsse auf das nationale Arbeitsrecht’ [1994] Recht der Arbeit 1. Against this view is M Zuleeg, ‘Subsidiaritätsprinzip’ in GC Rodríguez Iglesias et al (eds), Melanges en hommage à Fernand Schockweiler (1999) 636ff.


\textsuperscript{145} See A Weber, in von der Groeben and Schwarze (eds), above n 34, Art 312 EC, paras 7ff; A Waltemathe, Austritt aus der EU (2000).

\textsuperscript{146} See Bast, above n 129.


\textsuperscript{148} See Pernice, above 5, 164; P-C Müller-Graff and E Riedel (eds), Gemeinsames Verfassungsrecht in der EU (1998).


dable, but they are vastly divergent. The proposal concerning the Constitutional Treaty of the Convention has run aground. Nevertheless, the merits of the current constitution appear to have emerged unscathed, as they remain largely unaffected by the Treaty of Lisbon. In fact, the relevant material contents of the Constitutional Treaty have been preserved in the Treaty of Lisbon. The demand to curtail the EU’s competences persists all the same. Integration would, however, suffer a severe blow if this were to happen.\textsuperscript{153} The delineation of competences as foreseen by the Treaty of Lisbon is sufficient to assuage the Member States’ concerns about their sovereignty. Perhaps it was precisely this circumstance, the non-adoption of provisions of the Constitutional Treaty that suggested an already existing statehood, that was important for the conservation of the Union’s constitution.

The road ahead is predetermined. In the preamble to the Treaty on European Union the Member States demonstrated their resolve to raise the process initiated with the founding of the European Communities to a new level. Further steps must be taken to spur European integration.\textsuperscript{154}

\textsuperscript{152} For a detailed analysis, see G Lübbe-Wolff, ‘Europäisches und nationales Verfassungsrecht’ (2001) 60 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 246.


\textsuperscript{154} See Recitals 1 and 13 of the Preamble of the EU. On this, see Zuleeg, above 34, Preamble EU, paras 4ff.
Introductory Note

References such as ‘138–9’ indicate (not necessarily continuous) discussion of a topic across a range of pages. Wherever possible in the case of topics with many references, these have either been divided into sub-topics or only the most significant discussions of the topic are listed.

Because the entire volume is about ‘European constitutional law’, the use of this term (and certain others occurring throughout the work) as an entry point has been minimised. Information will be found under the corresponding detailed topics.
arrest warrant, European, 26, 93, 406, 415, 418–19, 470, 513
assent, act of, 145, 410, 412, 415
association agreements, 44, 134, 142, 323, 418, 572–3, 706
association of constitutions, 128, 624, 647
asylum, 122–3, 156, 553, 553–5, 563, 573–4, 578
asymmetry, 75, 431–2, 434, 527–8, 565, 688
attributed powers, 298, 301, 375, 716
scope of principle, 280–3
attribution of competences, 81, 346, 421, 718
atypical acts/instruments, 375–7
Augustin, A, 48, 67, 70, 185–7, 444, 470
Austria, 2, 101, 103–5, 107, 127–8, 132, 400–1
authenticity, 210, 216–19, 370
autonomous competences, 285, 636, 640–1, 643–4
autonomous legal order, 12, 32, 34, 39, 161, 298, 368
autonomy, 17–18, 29–30, 160–1, 182–4, 298–9, 318, 320–2
of European law, 24, 29, 36, 94, 160, 176, 320–2
private, 44, 596, 599
Badura, R, 6, 59, 74, 103, 199, 239, 427–8
balance of power(s), 123, 285, 321, 634, 647, 656, 759
bargaining power, 654, 656–7
basic constitutional charter, 189, 409, 741
basic principles, 85, 424, 552, 596, 619–21, 637, 703
basic rights, 40, 45, 132–3, 454, 468, 624
Belgium, 25, 33, 103–4, 107–9, 229–30, 400–1, 540
beliefs, 18, 207, 209–11, 216, 221, 234, 473
Bieber, R, 60, 70, 128, 240–1, 378–9, 428–9, 785–6
binding acts, 93, 380, 565
binding effect, 104–5, 117, 112, 138, 158, 371, 496–7
Bitter, S, 30, 44, 288, 302, 461, 764, 775
block exemption regulations, 669–70, 680
Böckenförde, E-W, 28, 64, 68, 79, 171, 178, 186
border controls, 97, 447, 553, 556, 558, 563–4, 736
borders, 43, 100, 525, 536, 557–8, 569–70, 579
internal, 553, 555, 558, 569, 572, 578–80, 584
Bunke, C, 15, 17, 197, 283, 381–2, 385, 389–90
bureaucracies, 72–3, 79, 220, 250
Burgess, M, 55–61, 66, 81, 701
cartels, 614, 677–8, 689–90
categorisation, 185, 194, 305–6, 492, 549, 784
CFI (Court of First Instance), 137, 154–5, 157–9, 565–6, 581–3, 690–2, 723–8
Charter of Fundamental Rights, 197, 484–9
and Area of Freedom, Security and Justice (AFSJ), 379, 641, 655
choice of legal instrument, 375–6, 379, 385
choice, systemic, 5, 589–90, 594–5, 615
citizen status, 461, 464, 473, 476
European, 117–18, 185–6, 225, 230, 453, 557–8, 578
national, 34, 121–2, 444, 453, 466
citizenship, 221–3, 225–32, 444–5, 447–8, 450–2, 466–9, 471–6
active, 444, 459, 467, 470, 475–7
INDEX=S = European, 79, 227, 444–6, 450, 453, 470–2, 474–5, 553–4, 573
Union see Union citizenship
civil rights, 148, 172, 177, 181–2, 196–7, 200, 446
civil servants, 250, 332, 484, 508, 712–13, 734, 768
civil society, 77, 179, 214, 476, 528
civilisation, 233–4
Classen, CD, 60, 112, 119, 133, 302, 367, 776
co-decision, 50, 75, 264, 300, 379, 568, 570
powers, 565, 568
procedure, 27, 255, 325, 379–80, 383, 636, 769
co-operation, 106–7, 243–4, 253–7, 573–9, 747–50, 756–9, 761
differentiated see differentiated co-operation
enhanced, 206, 333, 563, 569, 571–2, 585, 714
horizontal see horizontal co-operation
intergovernmental, 77, 79, 556
international, 74, 77, 80–1, 526
judicial, 42, 553, 555–6, 559–63, 567–8, 575, 584–5
police, 554, 556, 563
principle, 41, 574, 576–7
rationale, 574, 578–9
relationship of, 413, 426, 756–7
vertical see vertical co-operation
co-ordination, 106–7, 111, 264, 294, 299, 610–11, 707
codification, 12, 86, 132, 165–6, 197, 199, 318–20
codified grounds of justification, 538–41
codified legal instruments, 374–6, 379
coeexistence, 73, 138, 310, 341, 343, 513, 526–7
coherence, 14, 26, 41, 359, 557
foreign affairs, 338–42
ideological, 257–8
cohesion, 33, 77, 218, 607, 743, 748–9, 754
social, 101, 294, 416, 603, 610, 612, 742
collective action, 480–1, 599–600, 634, 637–8, 641, 649, 655–8
collective agreements, 480, 610, 625, 628–9, 650, 657–8
European, 656–7
collective bargaining, 487–8, 496, 625, 634, 636–7, 641, 657–8
rights, 637–8, 655–7
collective labour law, 625–6, 634, 646
collective labour relations, 638, 656–7
collective rights, 626, 634–5, 641, 655
comitology, 187–8, 197, 212, 380, 715, 723
commercial policy see Common Commercial Policy

788
Commission, 250–4, 368–72, 375–81, 558–66, 669–73, 767–9
as agenda-setter, 259
and Area of Freedom, Security and Justice (AFSJ), 575–8
and European Council, 266
as federal guardian, 260
functions, 259–60
institutional framework, 257–61
leadership problem, 257–8, 260–1
as mediator, 259–60
organisational structure, 258–9
as political institution, 239–40
Committee of Permanent Representatives see COREPER
common European constitutional law, 196
Common Foreign and Security Policy see CFSP
common language, 13, 70, 224, 270, 490, 492, 743
communitarisation, 291, 362, 556, 563, 569–70, 574–5, 578
Community competences, 81, 136, 282, 292, 334, 401
supranational external relations, 317–20
Community institutions see institutional structure; institutions
Community method, 26–7, 278, 310, 313, 330–1, 333, 556
community of law, 29–31, 39, 160, 410, 722–5, 779
community of measurement, 715–8
compensation, 103, 108–9, 142–3, 347, 361, 645, 677–9
competence norms/provisions, 35–6, 283, 286, 305, 422, 636–7, 717
competence requirement, 278, 280–1, 365
see also order of competences
allocation of, 22, 78, 88, 91, 425, 601, 746
attribution of, 81, 346, 421, 718
autonomous, 285, 636, 640–1, 643–4
basis for competence, 298–9
catalogue of, 305, 717
Community, 81, 136, 282, 292, 317–20, 334, 401
competence requirement as evolutionary achievement, 278–80
concurrent, 290–4, 304
Council, 245–7
court of, 301–2, 422, 435
distribution of, 68, 284, 292, 604, 635, 770
empowering provisions and substantive standards of legality, 283
European, 278, 311, 317, 338, 413–14, 424, 635
exclusive, 15, 107, 276, 289–92, 306–7, 318–20, 338
exercise of powers rules, 287
federal, 284, 287, 293–4
see also federal order of competences
types of, 287–97
functional, 287–8, 784
harmonisation, 293, 302, 631
horizontal, 284–5, 288, 296
interwoven, 243, 245, 247, 272
legislative, 194, 255, 288, 391, 621, 627, 655–8
and legitimation of law-making, 716–20
Member State, 285–7
narrow concept of competence, 299
national, 99, 289, 307, 319, 559, 563, 726
non-regulatory, 296–7
parallel, 291, 294–5, 306
regulatory, 291, 600, 622, 705, 770
scope of attributed powers principle, 280–3
shared, 289, 291, 305–6, 339, 717
transfer of, 102, 151, 337, 418, 574, 742, 745
Union, 36, 276–7, 285–9, 301–7, 338–9
see also Community competences
vertical, 273, 284–5, 287–8
see also vertical order of competences
vertical delimitation/distribution of, 286, 317, 327, 508, 716
competition, 600–3, 618–22, 658–64, 666–70, 674–7, 682–93, 695
agencies/authorities, 660, 671–2, 674–5, 680
free see free competition policy, 391, 661, 663–4, 669–70, 686–7, 689, 695–7
protection of, 660, 662, 665–6, 673–6, 685–7, 695, 697
restraint of, 671–2, 682, 685–6, 689–93, 695, 697–8
rules, 92, 602–3, 617, 620–1, 665, 668, 678–9
see also competition law
structure of, 665–6, 691, 693
undistorted, 601–3, 613, 620–2, 659–65, 667–8, 690, 710–11
competition law, 601–2, 659–98
application of, 670, 683–4, 695
conclusion, 697–8
and consumer harm, 690–4
consumer surplus standard, 687–90
and consumer welfare, 685–7
and consumer surplus, 687–90
and (more) economic approach, 669–85, 694–7
and economic integration, 696–7
enforcement of, 393, 676–7
European, 601–2, 650, 659–61, 664, 677–8, 685–8, 690–1
and freedom paradigm, 694–6
and institutional dimension, 679, 684
and Lisbon Treaty, 661–9
objectives from economic perspective, 685–94
competitive process, 682, 692–5, 697
competitiveness, 603, 607, 613
complementarity, 310, 338–43, 452
complexity, 51, 184, 191, 305, 346, 490, 530
composite constitution, 78, 82, 430, 592, 624, 733
composite economic constitution, 593, 604, 615–16
composite of Union and Member States:
  composite as new perspective, 38–9
  loyalty and the federal balance, 41–2
  principles, 38–42
structural compatibility or homogeneity, 39–41
comprehensive fundamental rights protection, 514, 783
comprehensive powers, 401, 422–3
comprehensive powers, 401, 422–3
compromise, 26, 37, 65–6, 249–50, 268, 631, 711–12
constitutional, 304, 360, 632
social, 624–5, 627, 630, 632–3, 639, 647–51, 658
confederal, 59, 61, 69, 78, 206, 623, 743
conferral, 31, 35–6, 98, 276, 280–1, 380, 739–40
confidentiality, 75, 248–9, 268, 458–9
conflict of laws, 295, 409, 648, 650
conflicts, 16–17, 31–2, 93–4, 114, 408–9, 480–1, 513–14
Congress (US), 251, 254–5, 270, 317
consensual government, 77–8, 256–60
democracy, 249–50, 268
resilience of, 247–50
consensus-building and European Parliament, 255–7
consent, 24, 67, 76, 107, 325–6, 459–60, 714
constitution:
  see also constitutions; Introductory Note
  composite, 78, 82, 430, 592, 624, 733
  European economic, 5, 589–90, 592–4, 599, 604–5, 608, 619–20
  formal, 64, 70, 189, 192, 194, 346
  labour, 627–34, 637–9, 641, 645, 647, 651–2, 658
  constitutional adjudication, 178, 193, 399, 401, 430–1, 435–8
  constitutional amendments, 81, 93, 98, 101–2, 418–19, 742, 751–3
  constitutional arrangements, 40, 61, 65–6, 313, 328, 337
  constitutional bases, 29, 53, 96–7, 297, 316, 361, 455
  constitutional change, 90, 175, 264, 292, 553, 576, 783
  constitutional charter, 2, 189, 191, 322, 409, 720, 765
  basic, 189, 409, 741
  constitutional compromises, 304, 360, 632
  constitutional concept, 1, 3, 25, 178, 180–2, 190–1, 200
  constitutional courts, 87–8, 91–4, 116–18, 123–4, 400–1, 418–22, 431–2
  national, 36, 154, 361, 420, 427, 513, 757
  constitutional development, 34, 51, 90, 103, 108, 127, 531–2
  constitutional dichotomy, 310, 336, 341–2
constitutional discourse, 12, 58, 62, 230, 234, 290, 346
constitutional discussion, 178–84
constitutional doctrine, 3–4, 14, 16, 22, 43, 64, 313
constitutional elements, 180–2
constitutional foundations, 310–11, 313, 320, 322, 329–30, 334–5, 343
constitutional foundations of foreign affairs, 309, 311, 314, 323, 343
constitutional framework, 297, 375, 565, 567, 584, 625
constitutional functions, 133, 178, 180–2, 549, 625
constitutional guarantees, 2, 62, 92, 123, 190, 366, 626
constitutional honesty, 203–4
constitutional identity, national, 420, 424–5, 431, 434, 438
constitutional jurisdiction, multilevel, 399–439
European, 3–4, 13, 199–200, 392–3, 399, 434–5, 438–9
  and European law, 741–6
Europeanisation of, 745
national see national constitutional law
constitutional legislator, 86, 101, 109, 119, 122–4, 126
constitutional legitimacy, 232, 553
constitutional moments, 202–3
constitutional nominalism, 203–4
constitutional norms, 23, 140, 176, 312, 627, 635, 742
constitutional order, 34–5, 123, 131–2, 134–5, 243, 381, 697
  of competences see order of competences
  European, 58, 60, 86, 161, 661, 686, 689
  national, 42, 143, 161, 417, 420, 562
constitutional principles, 11–13, 15–16, 18–19, 22–5, 42, 98–100, 346
European Constitution, 772–7
constitutional principles of the Member States, 24–6
constitutional reform, 76, 103, 249, 280, 382, 432
constitutional regimes, 34, 316–17, 321–2, 336, 579
constitutional rhetoric, 169–70, 427
constitutional role of international law, 131–67
constitutional rules, 88, 313, 315, 323, 335, 742
constitutional standard case, 290, 306–7, 354, 360, 394–5, 781, 785
constitutional states, 52, 128, 742–4, 746–7, 750, 754–5, 761
constitutional structure, 16, 32, 50, 120, 190, 520, 720–2
constitutional theory, 1, 35, 64, 80, 176–7, 200–1, 203–4
constitutional traditions, 169–78, 181, 184–5, 190, 195–200, 483, 488–9
constitutional treaties, 176
democracy – continued
semi-parliamentary, 59, 238, 252, 267, 271–2
and transparency, 51–2
and Union citizenship, 475–6
democratic deficit, 72, 75, 79, 190, 200, 210, 232
democratic equality, 172, 186–7, 468
democratic legitimacy, 47–8, 50, 69, 74, 147, 177,
433
democratic legitimation, 27, 66–7, 69, 77, 99, 476,
755
democratic principles, 3, 47, 51–2, 108, 128, 185,
241–2
democratic responsibility,, 72–7
democratisation, 70–2, 176–7, 184, 195, 232, 780
Denmark, 85, 109–10, 112, 114, 400–2, 416–17,
569–70
derivative social rights, 462–3
deterrence, 677–9
di Fabio, U, 66, 71, 128, 179, 183, 277, 749
dichotomy, constitutional, 310, 336, 341–2
differentiated co-operation, 784–5
differentiated participation and AFSJ, 569–73
differentiation, 52, 287, 322, 383, 385–6, 569,
571–2
dignity, human, 31, 44, 208, 468, 479, 507–8
diplomatic protection, 151, 159, 448, 460–1, 467
direct actions, 348–9, 395, 397, 725, 727–8
direct applicability, 193, 385, 395, 397, 420, 430–8,
725, 727–8
direct effect, 29, 133–6, 138–43, 145–7, 337,
355–6, 360–1
horizontal, 517, 545–8
direct elections, 58, 60, 66, 241, 253, 265, 363
direct legal protection, 370–3
directives and protection of rights, 355–9
direct applicability, 193, 385, 395, 397, 420, 430–8,
601
discrimination, 118, 121–2, 461, 463–4, 521–4,
532–8, 546–9
domestic, 121–2, 453–4, 468
open, 540–1
prohibition of, 446, 451, 461–2, 468, 495, 547,
614
reverse, 121, 428, 521
domestic markets, 533, 536–7
dominant positions, 601–2, 666, 672–3
Dougan, M, 2, 27, 291, 295, 300, 304, 393
Dreier, H, 21, 103, 121–2, 126, 129, 174, 182
DSB (Dispute Settlement Body), 141–3
DSU (Dispute Settlement Understanding), 140,
142–3
dual federalism, 183, 244, 285, 289
dual legitimacy, 39, 50, 53
duties: positive, 489, 493–4, 512
Union citizenship, 466–7
dynamic efficiency, 682–3, 685, 693
ECB (European Central Bank), 238, 290, 315, 374,
378, 380, 615
ECH (European Convention of Human Rights),
147–9
see also ECHR, fundamental rights
increasing reference to, 161–2
and legal succession, 150–3
ECJ (European Court of Justice), 136–48, 153–64,
349–58, 430–8, 488–515, 531–42
and Area of Freedom, Security and Justice
(AFSJ), 573–8
cautious beginnings, 222–7
duty to make preliminary references, 401–7
and European legislator, 519–25
evolving Union citizenship, 227–31
and fundamental rights, 483–4
and highest national courts, 400–21, 435–8
and international law, 320–3
and Lisbon Treaty, 301–2
and national legislators, 530–52
and order of competences, 301–2
and post-politics, 222–31
procedural perspective, 401–7
substantive law perspective, 407–20
and supranational external relations, 320–3
Economic and Monetary Union, 364, 523, 554,
640, 667–8, 705
economic constitution, 5, 44, 625–6
composite, 593, 604, 615–16
discretionary power of Member States, 615–22
European, 5, 589–90, 592–2, 599, 604–5, 608,
619–20
formative scope of the Community, 604–15
and integration, 589–93
and internal market, 589–622
perspectives, 622
relevance of subject, 589–90
scope for economic policy formation, 594
systemic choice and legal guarantees, 594–604
terminology and functions, 590–2
economic efficiency, 525, 661, 666, 677, 685–6,
689–90, 696
economic freedom of action, 596, 671, 679, 694
economic freedoms, 121, 223, 454, 613–14, 622,
660, 694–5
economic integration, 127, 231, 528, 574, 631–2,
645
and competition law, 696–7
### Index

**economic law**, 195, 225, 614–15, 709  
**economic objectives**, 228, 661–2, 665, 674, 679, 685, 698  
**economic order**, 604, 613, 615–16, 709–10  
**economic policy**, 591, 593–4, 667–8, 710–11  
areas of Community economic policies, 605–11  
discretionary power of Member States, 615–22  
formative boundaries, 611–14  
formative scope of the Community, 604–15  
instruments, 604–5  
limits of discretionary powers, 619–22  
market relevant discretionary powers, 616–19  
and Monetary Union, 615  
and national constitutional law, 615–16  
**economic theory**, 660–1, 666, 677, 679, 682–3, 694  
**economic union**, 228, 615, 619, 738  
see also Economic and Monetary Union  
**EEA** (European Economic Area), 2, 13, 105, 134, 148, 192, 556  
**EEC** (European Economic Community):  
see also Introductory Note  
labour constitution see European labour constitution  
as administrative union, 348–50  
**ECtHR** (European Court of Human Rights),  
147–9, 151–3, 437, 482–4, 491–5, 505–7, 509–14  
education, 118, 215, 220, 296, 339, 518, 669  
**EEC** (European Economic Community):  
see also Introductory Note  
labour constitution see European labour constitution  
as legislative union, 350–4  
**Eckhout, P** , 6, 139–40, 143, 316–17, 319–20, 323, 337  
effective judicial protection, 358–9, 366, 395, 493, 583  
principle of, 29–32, 771, 778  
effects-based approach, 669–70, 673–5, 680, 684, 693, 697  
effet utile, 29, 465, 676, 717, 778  
efficiency, 76–7, 506, 673–5, 677, 683, 688–90, 693  
allocation, 682, 685, 687, 696, 698  
criterion, 661, 683, 687, 689–90, 693  
defence, 673, 688–9  
dynamic, 682–3, 685, 693  
economic, 525, 661, 666, 677, 685–6, 689–90, 696  
goal, 661, 689–90  
**Ehlers, D** , 155, 490, 502, 516–17, 539, 542, 783  
elections, 47, 50–1, 116–18, 120, 202–3, 251–3, 456–7  
direct, 58, 60, 66, 241, 253, 265, 363  
European, 270–1, 452, 455–7  
**employees**, 446–7, 453, 610, 624–30, 638, 640–1, 652–6  
employers, 610, 625–9, 649, 653  
employment, 462, 546–7, 607, 625–7, 636, 645–6, 652–3  
policies, 599, 607, 611, 618, 645–6  
empowering provisions, 278, 280, 282–4, 288, 294–6, 378, 393–4  
enforcement, 30, 143, 193, 243, 677–9, 727–8, 758  
of competition law, 393, 676–7  
**England** see United Kingdom  
enhanced co-operation, 206, 333, 563, 569, 571–2, 585, 714  
entrepreneurial freedom, 596–7  
environmental protection, 295, 312, 437, 487, 494, 605–6, 608  
**EP** see European Parliament  
**EPC** (European Political Cooperation), 313, 331  
equal freedom and pouvoir constituant, 185–8  
equal liberty, 43–5, 54  
equal rights, 177, 197, 452, 455, 466, 511, 616  
etreatment, 46, 118, 227, 461, 526–7, 532, 652  
principle(s) of, 46, 118–19, 476, 495, 500, 511, 602  
equality, 21, 25, 186–7, 207–8, 476, 597, 773  
democratic, 172, 186–7, 468  
principle of, 26, 121–2, 461, 468, 502, 511, 596–7  
**Eros**, 67, 225, 233–4  
**ESDP** (European Security and Defence Policy), 311, 334–6, 707  
esential state functions, 300–1, 553, 739  
establishment, freedom of, 446, 515–16, 520, 538, 597, 599–600, 649  
**EU citizens**, 117–18, 557–8, 572, 578, 580, 585  
see also Union citizenship  
**EU citizenship**, 553–4, 573  
see also Union citizenship  
**EU labour constitution** see European labour constitution  
**Europe of/for citizens**, 446–7  
**Europe of States**, 761  
**European arrest warrant**, 26, 93, 406, 415, 418–19, 470, 513  
**European association of labour constitutions**, 645, 647, 654, 656–8  
**European Central Bank** see ECB  
**European citizens**, 117–18, 185–6, 225, 230, 453, 557–8, 578  
**European citizenship**, 79, 227, 444–6, 450, 453, 470–2, 474–5  
see also Union citizenship  
**European Coal and Steel Community** see ECSC  
**European collective agreements**, 656–7  
**European Commission** see Commission  
**European community of law** see community of law  
**European competences**, 278, 311, 317, 338, 413–14, 424, 655  
**European constitution**, 178, 181–2, 428, 444–5, 739–40, 743–4  
see also Introductory Note  
advantages, 763–86
Index

European constitution – continued
conventional principles, 772–7
distribution of powers, 770–2
as fact, 763–5
forecast, 785–6
manageability, 781
need for, 780–1
recent developments, 780–5
scope, 779–80
and social order, 623–5
structural characteristics, 777–9
task and objectives, 770
European constitutional adjudication see constitutional adjudication
European constitutional law, 3–4, 392–3, 399, 434–5, 438–9
see also Introductory Note
academia, 199–201
definition of field, 11–234
founding principles, 11–54
as legal field, 199–201
European constitutional order, 58, 60, 86, 161, 661, 686, 689
European constitutionalism, 12, 22, 24–5, 27, 43, 53, 429
European Convention, 201–2, Constitutional Convention, 243, 468
European Council, 1, 237–8, 257–8, 558–9, 561–3, 572
and Commission, 266
composition and form, 261–3
conclusions, 265–6
and executive federalism, 265
as final arbiter and co-ordinator, 263–4
functions, 263–5
institutional framework, 261–7
as steering committee, 263
as treaty negotiator and constitutional motor, 264–5
European Court of Human Rights see ECtHR
European Court of Justice see ECJ
European Defence Agency, 334–5
European Defence Community, 57, 239, 312, 330, 704, 708
European doctrine of principles: constitutional character of founding principles, 21–3
constitutional principles of the Member States, 24–6
principles in European law, 20–1
principles of public international law, 23–4
subject matter, 20–4
in view of heterogeneous primary law, 26–8
European Economic Area see EEA
European economic constitution, 5, 589–90, 592–4, 599, 604–5, 608, 619–20
European elections, 270–1, 452, 455–7
European External Action Service, 266, 333, 342
European fundamental rights, 412, 637–8, 761, 777
European governance, 198, 214, 232, 267, 474, 718–19, 772
European identity, 160–1, 207–9, 214–15, 218, 221–2, 227, 474
European integration see integration
European labour constitution: association of labour constitutions, 647–58
basic norms, 628–9
current state, 633–9
form, 639–58
foundation and function, 629–32
integrated European labour constitution ‘in the making’, 639–45
missing congruence, 637–9
post-regulatory labour constitution, 645–7
and social compromise for integration, 627–33
and social change, 632–3
survey of relevant norms, 633–7
European law: see also Introductory Note
autonomy of, 176, 178, 182, 185, 320–2, 327, 410
primacy of, 89, 95, 409–11, 413, 415, 423–5, 431
unconditional primacy of, 419–20
European Parliament: appointment power, 251–3
as co-elector, 251–3
as co-legislator, 255–7
and consensus-building, 255–7
institutional framework, 250–7
negative competence, 251–3
oversight function, 253–5
as political institution, 241
representational limits, 269–71
European Political Cooperation see EPC
European polity, 25, 68–9, 202, 227
European Security and Defence Policy see ESDP
European Security Strategy, 312, 333
European social model, 53–4, 637
European System of Central Banks, 374, 599, 615, 769
European Treaties: see also founding treaties; Introductory Note
as formal constitution for the Union, 189–95
supremacy, 192–5
in written form, 190–2
European Union see Introductory Note
European Union of States see union of states
Europeanisation, 303, 471, 519, 530, 560, 654, 730
of constitutional law, 745
and fundamental freedoms, 519–32
Europol, 556, 574–5, 578, 584
evolutionary constitutionalisation, 200
legitimacy, 198–9
exclusionary conduct/practices, 673–6
exclusive competences/powers, 15, 107, 276, 289–92, 306–7, 318–20, 338
exclusivity, 80, 225, 290–1, 295, 318–20, 337, 369
executive branch, 195, 252, 265, 271–2, 381, 737, 779


institutional logic, 259, 261, 265, 268

executive functions, 247, 252, 288–9, 341

executive powers, 307, 317, 724

exercise of powers, rules, 287

exercise of public authority and judicial control, 345–7

exit protocol, 479, 488–9

expectations, legitimate, 196, 387, 725, 774

expertise, 73, 112, 200, 212, 221, 246, 254–5

external action, 166, 208, 267, 310–11, 320, 323, 340–2

see also foreign affairs

External Action Service, European, 266, 333, 342


implied, 291, 309, 318, 343

external relations, 282, 291, 312, 332, 337, 339–42

see also foreign policy

supranational, 316–30

external representation, uniform, 310, 319, 331, 339, 341–2

fair hearing, 566, 581–2

family members, 162, 379, 447, 461, 491, 609

federal and decentralised entities, 149–53

national constitutional law, 102–8

federal association of states, 701–34

constitutional and legal order of the Union, 720–9

economic union, 708–11

foundations of the Union, 703–11

goals of the Union, 703–5

institutions, 711–20

legal nature and future of the Union, 729–34

political union, 705–8

federal balance, 41–2

federal competences, 284

concurrent, 290–4

exclusive, 289–90

non-regulatory, 293–7

parallel, 294–5

types of, 287–97

federal constitutions, 36, 39, 50, 56, 81, 85, 105

federal construction, 65, 77, 80–2

federal entities, 103–4, 107–8, 125, 128, 734

federal order of competences, 275–307

see also order of competences

federal polity, 53, 70, 80, 82, 279

EU as, 55–7

Federal Republic of Germany see Germany

federal risk zones, 526–7, 532, 543

federal statehood, 37, 77–8, 103, 107, 423

federal structures, 61, 68, 184, 193, 199, 243–4, 253

federal systems, democratic responsibility, 72–7

federalism, 3, 243–4, 423, 429

benefit of federal analogies, 62–8

conclusions, 78–82

democracy and, 3, 55–82

discourses, 57–9

dual, 183, 244, 285, 289

EU as federal polity, 55–7

EU as mixed system of federative character, 59–62

executive see executive federalism

federative principles, 742, 774–5

role of democracy principle in a federal commonwealth, 68–72

federation, 54–5, 59, 61–5, 69, 79–80, 103–5, 773

final consumers, 676, 678–9, 682, 686–7, 691

finality, 187, 205–34, 585

tenagted discourses on, 205–10

Union’s, 205, 208–9, 211

Finland, 109–10, 112, 400–1, 416, 507, 573, 649

first pillar, 37, 313, 332, 480–1, 556, 562–3, 566–7

flexibility, 51–2

flexibility clause, 300, 393, 738

foreclosure, 372, 675–6, 693

foreign affairs, 4, 309–43

see also external relations; external representation

coherence, 338–42

complementarity, 338–42

conclusion, 343

constitution, 315, 326–8, 340–1, 343

constitutional foundations, 310–16

constitutional law of, 309, 311, 314–15, 323, 343

horizontal co-operation, 339–41

intergovernmental foreign policy, 330–8

particularity, 311–14

substantive constraints, 326–30

supranational external relations, 316–30

transformation of international context, 314–16

unity of external representation, 341–2

unmitigated federalisation of European, 336, 343

vertical co-operation, 338–9

foreign policy, 40, 166–7, 312–14, 316, 333–4, 340–1, 343

see also foreign affairs

European, 309–16, 320, 328–30, 332, 335–6, 340, 342–3

formal constitution, 64, 189, 192, 194, 346

formal constitutionalism, 185, 190

founding principles, 1, 11–54

aims, theses and premises, 11–13

composite of Union and Member States, 38–42

constitutional character, 21–3

and constitutional scholarship, 13–14

creation of unity under the rule of law, 28–33

European doctrine of principles, 20–8

legal doctrine of principles, 14–18

perspectives of legal and integration policy, 18–20

principles of the political process, 33–8

795
catalogues of, 125, 479, 482, 486, 489, 510
Charter of Fundamental Rights, 197, 484–9
community, 46, 164, 436, 481
development of protection, 482–9
and ECJ, 483–4
effective protection of, 153, 411, 479
European, 412, 637–8, 761, 777
interpreters of, 481, 485, 513–14
legal doctrine, 489–512
national, 116, 464, 481, 491, 544
and national constitutional law, 116–23
persons who may assert, 501
and proportionality test, 543–5
protection, 45–7, 100–1, 152–3, 410–13, 481–6, 488–90, 512–14
reach, 496–501
review, 164, 485–6, 490, 493, 497–501
social, 639, 642, 644
standards, 45, 164, 479–82, 484–5, 491, 576, 757
structure of examination, 501–12
and Union citizenship, 464–6
Fundamental Rights Agency (FRA), 46, 481, 485
general applicability, 351–2, 371–2
general application, 352, 354–5, 385, 689, 770
acts of, 384, 396–7
general clause of direct legal protection, 370–3
general clause of judicial control, 368–70
general economic interest, 487, 495, 499, 602, 617–18, 620–1, 710
services, 487, 495, 589, 617–18, 620–1, 710

general interest, 260, 504, 506, 528–9, 538, 589, 621
objectives of, 504, 506
general principles:
of Community law, 11, 322, 328, 483, 488–9, 497, 597
of law, 11, 132, 156–7, 160–1, 488–9, 499, 724
Germany, 103–5, 116–20, 123–4, 152–3, 173–6, 703–5, 784
constitutional law, 61–2, 101, 119, 132, 197, 239, 412–13
globalisation, 54, 56, 207, 218, 220–1, 437–8, 729
governance, 24, 212, 232, 241, 243, 556–7
and administrative constitutionalisation, 197–8
European, 198, 214, 232, 267, 474, 718–19, 772
Grabitz, E, 12, 29, 32, 43, 94, 141, 241
Great Britain see United Kingdom
Greece, 90, 93, 97, 112–13, 400–1, 533, 536–7
grounds of justification, 538–41
constitutional, 2, 62, 92, 123, 190, 366, 626
justiciable, 596, 601
national, 116, 120
of undistorted competition, 590, 664–8, 697

Index
Index

guardians, 147, 162–3, 198, 407, 420, 431–2, 435–6
guiding norms, 627, 633, 635–6, 639, 642–4, 658
Gundel, J, 90, 96, 101, 112, 123, 132, 367
Habermas, J, 14, 16, 19, 43, 49–51, 179–80, 471–2
habilitated acts, 380–1, 390–1, 393
Hallstein, W, 29–31, 43, 57–8, 260, 525, 705–6, 722
harmonisation, 291–3, 295–6, 387, 520–2, 575, 577, 628
competences, 293, 302, 631
of laws, 357, 387, 521–2, 524, 527, 531, 716
Hellwig, M, 660, 666–7, 689–91
heterogeneity, 26–8, 40, 70, 72, 74, 248, 431
heteronomy, 182–4
hierarchies, 32, 37, 192, 246–7, 362–3, 377–82, 428–30
of norms, 2, 363, 378, 382, 390–1, 429, 528
partial, 381–2, 391
hierarchisation, 364, 388–9
high level of security, 555–6, 579
High Representative, 266–7, 331–3, 341–2, 737
highest national courts, 4, 425–6, 430–4
duty to make preliminary references, 401–7
and ECJ, 400–21, 435–8
Hilf, M, 11–12, 40, 133, 141–2, 150–2, 155, 458
Hobsbawm, E, 71, 213, 624
Hoffmann-Riem, W, 29, 39, 197, 245, 347, 363–4, 382
home affairs, 111, 360, 552, 554, 568–9, 571, 722
homogeneity, 47, 75, 549, 755, 764
principle of, 39–41
horizontal co-operation, foreign affairs, 339–41
horizontal competences, 284–5, 288, 296
horizontal effect, 493, 496, 543, 545, 547–8, 624, 628–9
direct, 517, 545–8
fundamental freedoms, 519, 545–9, 649
and right to protection, 547–9
horizontal order of competences, 297, 360, 378, 382
Howse, R, 25, 31, 38, 59, 61, 71, 74
human dignity, 31, 44, 208, 468, 479, 507–8
see also fundamental rights
clauses, 330
integration through, 161–3
protection, 88, 101, 132, 148, 150–2, 154–5, 165
Hungary, 91–2, 98–102, 109–10, 112, 126, 418, 616
Iceland, 572–3
iconography, 214–16
European, 160–1, 207–9, 214–15, 218, 221–2, 227, 474
national, 40, 80, 97, 208, 301, 424, 785
ideological coherence, 257–8
ICGs (Intergovernmental Conferences), 1, 208, 249, 298, 300, 303–4, 363–4
imagined community, 2, 213–16, 230
immigration, 71, 553, 555–6, 558, 563–4, 575, 578, 707
implementation, 91–2, 118, 139–41, 497–8, 572–3, 669–70, 694
implementing acts, 91, 113, 134, 337, 378, 380–1, 386
national, 328, 503–4
implementing powers, 380–1, 715, 769
implied external powers, 291, 309, 318, 343
implied powers, 81, 281–2, 317, 319, 375–6, 606, 771
incentives, 296–7, 490, 678, 683–4, 688
incompatibility rule, 251–2, 260, 270
incorporation by primary law, 153–7
incorporation by secondary law, 157–9
independence, 65, 133, 153, 157, 160–1, 171, 253
indirect judicial protection, 330–4
individual freedoms, 24, 172, 180–1, 622, 637–8, 654–5, 694–5
individual liberty, 43–4, 761
individual rights, 45, 163–4, 229–30, 354–6, 358–9, 385–6, 580–2
individuality, 216–17, 225
individuals:
and Area of Freedom, Security and Justice (AFSJ), 578–84
legal position, 443–585
industrial economics, 660, 682, 684–5, 690, 696–7
industrial policy, 294, 607, 611, 661, 663, 710
informal acts, 370–1, 395
innovations, 28, 33, 355–6, 388–9, 640, 683–6, 692–3
institutional balance, 36, 76, 196, 265, 288, 377, 723–4
institutional framework, 56, 72, 245, 262, 265, 338, 476
institutional issues, 237–441
institutional structure, 50, 58, 60, 67, 74–5, 304, 711–20, 782
and democracy, 50
peculiarities, 711–13
institutions, 144, 146–7, 151, 159–60, 408, 498, 756–7
advantages, 765–70
law-making, 348, 358, 374–7, 379, 385–7, 709
political see political institutions
integrated European labour constitution, 628, 654
integration, 184–9, 519–23, 632–3, 647–51, 702–5, 780–6
and Area of Freedom, Security and Justice (AFSJ), 573–8
defence, 310–11, 331, 334, 341
797
integration – continued

economic, 127, 231, 528, 574, 631–2, 645, 696–7
and economic constitution, 589–93
functional, 58, 530, 731
market, 314, 624, 631, 686, 696, 706
motors of, 436, 767–8
negative, 527–8, 593
positive, 294, 527–8, 593
process, 28, 40, 100, 184, 188, 326, 435
reality and aspiration, 738–9
renunciating, 784–5
social dimension of, 641, 645, 658
through human rights, 161–3
transnational, 232, 526, 530–4, 537–8, 543–4, 549
visions of, 701–86
intellectual property, 319, 561, 598, 617, 683–4
intentions, 80, 90, 99, 139, 166–7, 207, 369
interdependence, 57, 285, 312, 338, 527, 626
interference, 162–3, 166, 480–1, 492–3, 502–6, 509–10, 620
intergovernmental co-operation, 77, 79, 556
intergovernmental Conferences see IGCs
intergovernmental decision-making, 331–4
intergovernmental foreign policy, 330–8
characteristics, 336–8
executive authority in military matters, 334–6
intergovernmental decision-making, 331–4
intergovernmental politicisation, 194–5
intergovernmental Union law, 336–8
intergovernmentalism, 201–2
interinstitutional agreements, 255, 324, 364, 375, 722
internal borders, 553, 555, 558, 569, 572, 578–80, 584
internal effect, 136, 138–9, 141–2, 144–6, 157–60
internal law, 133, 135, 137–9, 141–2, 144–6, 410
internal market, 293, 524–5, 527–8, 599–603, 605–7, 609–13, 660–8
internal organisation, 243, 247, 257–8, 281–2, 719
internal security, 80, 552–3, 559–60, 562–3, 573–4, 578–9, 584–5
international agreements, 26, 90, 98–9, 317–18, 320–4, 326–7, 419–20
international co-operation, 74, 77, 80–1, 526
international community, 131, 133, 159–61, 749, 757
international custom, automatic implementation, 135–7
international law, 211–12, 314–16, 326–7
see also public international law
accession to international organisations, 137–49
automatic implementation, 135–7
constitutional role, 131–67
direct effect within EC law, 135–53
and ECJ, 320–3
European integration through human rights, 161–3
functional succession, 149–53
incorporation by primary law, 153–7
incorporation by secondary law, 157–9
incorporation of, 134–5
functional succession, 149–53
and Lisbon Treaty, 165–7
obligations, 160, 193, 289, 418
reasons for different ways of implementation, 159–64
transformation into Union law, 153–8
of treaties, 137, 323–6
international norms, 134, 139–40, 143, 323
international obligations, 86, 90, 98, 144–5, 158, 160, 419
international organisations, 13, 34, 60, 102, 151, 239, 279
international relations, 60, 133, 310–14, 316, 329–30, 332–3, 338–9
see also external relations
international supplementary constitutions, 132–4, 137, 155
international trade, 218, 312, 341
neoclassical theory of, 630–2
interpreters of fundamental rights, 481, 485, 513–14
intervention, state, 591, 616, 621, 660–1, 689–90, 695
intervened competences, 243, 245, 247, 272
intra-Community trade, 520, 525, 535
Ipsen, HP, 13, 16, 66–7, 176, 240, 375, 445
Ireland, 88–9, 109, 400–1, 416–17, 480, 569–71, 573–4
Isensee, J, 38, 723, 743–4, 747, 749, 756–9, 764
Italy, 85–6, 97, 109–10, 112–13, 404, 417, 490
JHA (justice and home affairs), 111, 360, 552–8, 563–4, 567–9, 571–3, 722
Joerges, C, 52, 75, 187–8, 197–8, 294, 649–50, 715–16
judicial co-operation, 42, 553, 555–6, 559–63, 567–8, 575, 584–5
judicial constitutionalisation, 362
judicial control, 32–3, 159, 314–15, 326–30, 337, 353–4, 368
and exercise of public authority, 345–7
general clause of, 368–70
judicial development of the law, 18–19, 31, 468, 483
judicial protection, 158
discourses on, 348–67
effective, 358–9, 366, 395, 493, 583
exercise of public authority, 345–7
indirect, 350–4
and legal instruments, 345–97
and Lisbon Treaty, 388–97
road to formal neutrality, 368–73
system, 725–9
judicial review, 32, 143–4, 153, 370, 392, 415–16, 431
judicial scrutiny, 302, 323, 328–9, 343, 360, 369, 393
reduced, 326, 329–30
Index

Lenaerts, K, 14, 26–7, 189, 243–4, 258–9, 393, 723–4
lex posterior rule, 378–9
liability, state, 30, 323, 361, 403
liberal constitutionalism, 1–2, 22, 63–4
liberalism, 211–12, 214, 230, 232–3, 473, 663
liberty, 2, 22, 42–4, 88, 145, 747–51, 758
limitation of power, 174–5
limited powers, 68, 314, 522, 733, 739
Lisbon Treaty:
  and Area of Freedom, Security and Justice (AFSJ), 578
  and competition law, 661–9
  and constitutionalisation, 781–4
  and ECJ, 301–2
  and economic approach, 659–61
  flexibility clause, 300
  and High Representative, 266–7
  innovations for legal protection of individuals, 394–7
  and international law, 165–7
  and pillar divide, 567–8
  and primacy, 95
  protection of essential state functions and fundamental structures, 300–1
  restructuring of legal instruments, 388–94
  and revocability of Union legal acts, 304
  and sovereignty, 297–302
  and subsidiarity, 302–3
  and Union citizenship, 468–9
  Lithuania, 93, 109–11, 113, 400, 418–19
  loyalty, 33, 41–2, 196, 210, 212, 225–7, 467
  clause, 765, 774–5
  principle of, 41–2
  Luxembourg, 31, 35, 109, 161–2, 234, 400–1, 774–5
Maduro, M, 189, 191, 194, 202, 537–8
Magnette, P, 52, 187, 252, 267, 271–2, 446, 450
maintenance of law and order, 394, 559, 563, 574, 578
majority votes, 125, 247–50, 509, 706
  qualified majority
margin of discretion, 290, 300, 357, 494–5, 508, 594, 620
market access, 533, 536, 543, 676
market economic order, 604, 613, 616
market economy, 2, 5, 40, 590, 594–7, 613–16
  guarantees, 596–603
  social, 528, 592, 595, 615–16
market freedoms, 43, 45, 293, 605, 620, 636, 640
market-functional labour law, 651, 654
market integration, 314, 624, 631, 686, 696, 706
market power, 670, 680, 683
market-share thresholds, 670–1, 680
markets:
  national, 525, 546, 599, 708
  open, 595, 597, 612, 614–15, 708, 710, 732
  relevant, 613, 670, 679, 681, 683, 690, 695
  ‘Masters of the Treaties’, 35, 67–8, 415, 714, 739, 746
Mauderer, S, 140, 142–5
Maurer, H, 40, 68, 109, 113, 201, 252, 254–5
Meng, W, 138–9, 141–2, 190, 192, 706
merger control, 494, 602, 668, 672–3, 681, 698
  law, 662, 672, 681, 687–8
military operations, 334–5, 338, 340
minimum standards, 156, 291, 295, 387, 574, 636, 640
mixed agreements, 319, 338–9
modernity, 212–13, 220, 231, 233
monarchical sovereignty, 63–5
monetary union, 364, 523, 554, 603–4, 615, 640–1, 667–8
see also Economic and Monetary Union
morality, 206, 212, 226, 424, 507
motors of integration, 436, 767–8
Motta, M, 670–1, 685, 687–8, 696
multilevel constitutional jurisdiction, 399–439
  analytical and theoretical perspective, 421–35
  conclusion, 438–9
  ECJ and highest national courts, 400–21
  stock-taking, 400–21
multilevel model, 745–6
multilevel norms, 525–7, 531, 549
multilevel systems, 56–7, 72, 181, 423, 429–30, 473–4, 549
mutual recognition, 291, 447, 521, 553, 560–1, 575, 577
nation-states, 30–1, 71–2, 80–1, 178–80, 183–4, 212–14, 231–2
modern, 231–2, 552
national authorities, 33–4, 121, 153, 162, 247, 574–5, 578–9
national citizens, 54, 121–2, 444, 453, 466
national competences, 99, 289, 307, 319, 559, 563, 726
national constitutional courts see constitutional courts, national
national constitutional identity see constitutional courts, national
national constitutional law, 3, 24–5, 83–129
  bodies acting under the constitutional order, 123–5
  contents relating to EU, 95–123
  development towards reciprocal linking of constitutions, 127–9
  and economic policy, 615–16
  federal and decentralised entities, 102–8
  and fundamental rights, 116–23

800
interdependencies between constitutional orders, 125–6
and national parliaments, 108–16
receptiveness to integration, 126–7
relationship with Union law, 84–95, 123–9
and sovereignty, 95–100
structural safeguard clauses, 100–2
and transfer of sovereign rights, 95–100
national constitutional orders, 42, 143, 161, 417, 420, 562
national constitutions, 2, 39–40, 127–8, 409–10, 427, 592–3, 733
national courts, 139–41, 352–4, 399–403, 406–8, 423–6, 434–8, 726
see also constitutional courts, national; domestic courts; highest national courts
national fundamental rights, 116, 464, 481, 491, 494
protection, 46, 485, 501, 514, 783
national guarantees, 116, 120
national identity, 40, 80, 97, 208, 301, 424, 785
national implementing acts, 328, 503–4
national interests, 37, 69, 77, 542, 712
national labour constitutions, 649–50, 658
national labour law, 644, 647–30
national legal orders, 24, 51, 135, 165, 213, 293, 321–2
national legal systems, 110, 181, 183, 321–2, 375, 527, 584–5
national level, 5, 69, 73–4, 128, 303–4, 475, 658
national markets, 525, 546, 599, 708
national parliaments, 66–7, 252–3, 718–19
national policies, 575, 606, 668, 706–7, 730
national sovereignty, 64, 67, 70, 87, 93–6, 98, 297
see also sovereignty
nationalism, 61–2, 214, 225, 444
nationality, 116, 464, 481, 491, 544
protection, 46, 485, 501, 514, 783
national guarantees, 116, 120
national identity, 40, 80, 97, 208, 301, 424, 785
national implementing acts, 328, 503–4
national interests, 37, 69, 77, 542, 712
national labour constitutions, 649–50, 658
national labour law, 644, 647–30
national legal orders, 24, 51, 135, 165, 213, 293, 321–2
national legal systems, 110, 181, 183, 321–2, 375, 527, 584–5
national level, 5, 69, 73–4, 128, 303–4, 475, 658
national markets, 525, 546, 599, 708
national parliaments, 66–7, 252–3, 718–19
legitimacy dilemma, 267–9
and Lisbon Treaty, 303–4
and national constitutional law, 108–16
national policies, 575, 606, 668, 706–7, 730
national sovereignty, 64, 67, 70, 87, 93–6, 98, 297
see also sovereignty
nationalism, 61–2, 214, 225, 444
and Union citizenship, 449–50
natural persons, 501, 596–7
negative competences, 231, 253, 283, 286, 301, 636–7
negative integration, 527–8, 593
negative legality, 33–5, 278–80, 283
negotiations, 106, 111–12, 142–3, 245–9, 324–5, 714–15, 769
neoclassical theories, 629–33, 685
Netherlands, 85, 109, 112, 202–3, 400–1, 416–17, 736–7
Nettesheim, M, 30, 52, 278–90, 357–8, 375–6, 378–9, 428–9
new political order, foundation of, 171–2
Nicolaïdis, K, 59, 61, 71, 74, 78, 82, 183
 Nicolaysen, G, 282, 445, 592, 594–5, 601, 701, 704
non-discrimination, principle of, 223, 229–30, 327, 526, 628, 725
non-legislative acts, 288, 389–91, 393–4
non-regulatory competences, 295–7
non-regulatory powers see non-regulatory competences
normativity, 22, 30, 35, 37, 172–3, 177, 190
restricted, 175
competence, 35–6, 283, 629, 636–7, 640, 717
constitutional, 23, 140, 176, 312, 627, 635, 742
guiding, 627, 633, 635–6, 639, 642–4, 658
hierarchy of, 2, 363, 378, 382, 390–1, 429, 528
international, 134, 139–40, 143, 323
labour-constitutional, 633, 637, 639, 645
Norway, 572–3
Nowak, C, 41, 45–6, 354, 359, 367, 529, 540
Nugent, N, 250, 257–60
objectives of general interest, 504, 506
obligations, 142–4, 149–50, 154, 386–7, 402–4, 491, 774–6
international, 86, 90, 98, 144–5, 158, 160, 419
positive, 492–3, 495, 501–2, 511
Ohlin report, 630–1, 644, 653
O’Keeffe, D, 289, 291, 339, 709, 717–18, 725
Ombudsman, 347, 457–8
open discrimination, 540–1
open market economy, 5, 589, 594–6, 601, 603, 605
repositioning of guarantee, 667–9
open markets, 595, 597, 612, 614–15, 708, 710, 732
open system of legal instruments, 373–5, 377, 385, 388
openness, 7, 16, 32, 322, 599–601, 745–6, 760
Oppermann, T, 84, 87, 375, 384, 445, 723–4, 754
opt-in possibilities, 570–1
opt-outs, 191, 421, 363, 369–73, 585, 785
order of competences, 35–7
current, 278–97
and ECJ, 301–2
federal, 275–307
under Lisbon Treaty, 297–307
new presentation, 305–7
persistent entanglement of Union and member states, 307
terminological and theoretical foundations, 278–87
transparency, 305–7
ordinary legislative procedure, 27, 255, 300, 325, 390, 568, 572
organisational structures, 72, 189, 196, 240, 246, 258, 760
ownership, 122, 285, 616, 625–6
private, 598, 626
parallel competences/powers, 291, 294–5, 306
parallelism, 293, 310, 317, 321–3, 325, 336, 379–80
principle of, 316–18
Parliament, European see European Parliament
parliamentary control, 34, 73, 109, 113, 324, 332, 356
parliamentary deficit, 323–6
parliamentary democracy, 62, 77, 242, 267, 719, 761, 767
parliamentary involvement/participation, 60, 96, 324–6, 332, 393, 433
parliamentary legitimacy, 269, 379
parliamentary scrutiny, 109–10, 269
parliamentary system, 62, 69, 73, 78, 241, 251–3, 271–2
parliaments, national see national parliaments
partial hierarchies, 381–2, 391
participation, 51–3, 103–5, 107, 109–10, 112–13, 127–8, 459
rights, 103, 105–12, 114, 199, 487, 637, 654–5
pathos, 201, 211, 215, 702, 721
peace, 25, 101, 206–8, 746–7, 749–50, 758–9, 761
people’s sovereignty, 62–72
Pernice, I, 67, 128–9, 179–81, 428–9, 752–3, 764–5, 784–5
personal data, 459, 487, 493, 553, 567, 580, 584
personal freedom, 86, 229–30
personal fundamental freedoms, 451–2, 462, 465
personal rights, 446, 453, 459, 465, 467, 745
personality, legal, 174, 319, 336, 596–7, 721, 763, 782
persons: natural, 501, 596–7
private, 275, 349, 386, 493, 545–8, 677
Pescatore, P, 19, 45, 135, 150–1, 179, 312, 316–17
Peters, A, 67–8, 70–2, 75, 122, 256, 270, 404, 711–12
political organs, 4, 37, 202, 238, 250, 295, 783
political participation, 31, 118, 456, 475, 526
political parties, 69, 75, 122, 256, 270, 404, 711–12
political power, 42, 174, 181, 203, 718, 739, 755
political process, principles, 33–8
political responsibility, 34, 73–4, 304, 342, 741
political rhetoric, 222, 230–1, 234
political rights, 42, 45, 450, 452, 466–8, 472–3, 477–8
political systems, 38, 48, 126, 173, 175, 177–8, 203
political theory, 3, 62, 71, 187, 213, 220, 234
political union, 58, 312, 330, 475
EU as, 705–8
political unity, 25, 49, 52, 184, 705
politicisation of law, 171–3
politics, 1–2, 44, 177–8, 206, 527–8
middle ground, 217–22
and post-politics, 231–4
Portugal, 101, 109, 126–7, 141–2, 416, 456, 753
post-politics: and ECJ, 222–31
and law, 210–17
and politics, 231–4
post-post-politics, 222–31
post-regulatory labour constitution, 628, 645, 647
pouvoir constituant, 3, 171, 173, 175, 177, 179, 185–8
power shaping, 22, 173–8, 195–7, 200
and constitutional treaties, 176
powers: attributed, 280, 282, 298, 301, 375, 716
balance of, 123, 285, 521, 634, 754, 757, 759
bargaining, 634, 656–7
comprehensive, 401, 422–3
concurrent see concurrent competences
decision-making, 107, 263, 430, 729, 772, 784
distribution of, 65, 734, 770–2
exclusive see exclusive competences
exercise of see exercise of powers
external, 4, 194, 296, 318–19, 338
implementing, 380–1, 715, 769
implied, 81, 281–2, 317, 319, 375–6, 606, 771
implied external, 291, 309, 318, 343
limitation of, 174
limited, 68, 314, 522, 733, 739
non-regulatory see non-regulatory competences
parallel see parallel competences
sovereign, 68, 100, 123, 171–2, 174, 176, 772–3
state, 97, 117, 285, 723
statutory, 532, 541–3, 766
vetoes, 79, 257, 272

802


principle of, 32, 35, 38, 87, 95, 410, 417 similarities and differences in justifications, 93–4 of politics, 527–8


principles of, 22–3, 30

private autonomy, 44, 596, 599

private interests, 506–7, 593, 679

private persons, 275, 349, 386, 493, 545–8, 677

private property, 597–8, 616–17, 626

pro-competitive effects, 671–2, 692

procedural law, 146, 346, 349, 367, 369, 371, 499

procedural rights, 30, 260, 372, 495, 499, 766, 778

procedural safeguards, 494, 611–12

property, 15, 327, 460, 493, 510, 542, 626

private, 597–8, 616–17, 626

proportionality, 36–7, 114, 287–8, 505–6, 509–10, 543–5, 614

principle of, 45, 115, 196, 385, 502, 504–6, 773–5

test, 455, 499, 505–8, 510, 543

PSC see Political and Security Committee

public authority, 23–6, 41–3, 67–8, 345–7, 624, 737, 739–41

transfer of, 411, 742

public goods, 541, 553, 557–9, 579, 584–5


see also international law

public power, 39, 92, 171–2, 180, 280, 428–30, 432

public scrutiny, 73–4, 393

QMV see qualified majority voting

quaintness, 218–20

qualified majority voting (QMV), 81, 97, 284–5, 304, 333, 436, 564

ratification, 51, 90, 98–9, 107, 120, 124–5, 324

rationality, 198, 211, 216, 221, 226, 436, 661

reciprocity, 96, 101, 117–18, 127, 141–2, 323, 329

recognition, mutual, 291, 447, 521, 553, 560–1, 575, 577

reconstruction, 59, 187, 197, 199, 214, 286, 289

recourse, principle of, 334–5

reduced judicial scrutiny, 326, 329–30

referenda/referendums, 25, 51, 70, 98–9, 125, 201–3, 258, 363, 381, 438, 469, 741–2

reform, 201–4, 246–8, 268–9, 316, 333–4, 341–2, 358–9, 672–3

constitutional, 76, 103, 249, 280, 382, 432

and courts, 435–6

deficits in judicial protection, 359–67

proliferation of instruments, 359–67

regulatory acts, 392, 395–6, 584, 728

regulatory competences, 291, 600, 622, 705, 770

relevant market, 613, 670, 679, 681, 683, 690, 695

religion, 207, 214, 223, 231, 424, 474, 749–50

representation, 54, 67, 75, 103–4, 186, 209, 270

reservation of statutory powers, 532, 542–3, 766

residence, 162–3, 446–7, 455–7, 462, 466–8, 472, 564


restraint of competition, 671–2, 682, 685–6, 689–93, 695, 697–8

restricted normativity, 175

restrictive agreements, 673, 677, 681, 692, 694

reverse discrimination, 121, 428, 521

review:

constitutional, 97, 419

fundamental rights, 164, 485–6, 490, 493, 497–501

judicial, 32, 143–4, 153, 370, 392, 415–16, 431

of Member States’ actions, 162–3

reviewable acts, 368–70

revocability, 146, 192, 304

rhetoric:

constitutional, 169, 427

political, 222, 230–1, 234

rights:

basic, 40, 45, 132–3, 454, 468, 624


civil, 148, 172, 177, 181–2, 196–7, 200, 446

collective, 626, 634–5, 641, 655

collective bargaining, 637–8, 646, 651, 616

free movement, 223, 455, 462–3, 477, 582

of freedom, 521–3, 532, 542

fundamental see fundamental rights

human see human rights

individual, 45, 163–4, 229–30, 354–6, 358–9, 385–6, 580–2

labour-constitutional, 635, 637–8, 642–3, 647, 654, 656, 658

participation, 103, 105–12, 114, 199, 487, 637, 654–5

personal, 446, 453, 459, 465, 467, 745

political, 42, 45, 450, 452, 466–8, 472–3, 477–8

private property, 597–8

procedural, 30, 260, 372, 495, 499, 766, 778

of residence, 162–3, 447, 462, 468, 472

social, 444, 448, 450, 472, 489, 641–4, 646–7

sovereign, 64, 95–9, 101–2, 123, 150, 411, 420

subjective, 15, 172, 195, 471–2, 525, 549, 614

Union citizenship, 445, 454–61, 461–4, 617

risk zones, federal, 526–7, 532, 543

Ruffert, M, 66, 287, 358, 363–4, 460–1, 488, 498–9

803
rule of Community law, 29, 228
rule of international law, 137, 157
and comprehensive legal protection, 32–3
creation of unity under, 28–33
and effectiveness principle, 29–32
and legality principle, 33–5
principle, 27–33, 37, 42–3, 47, 362, 385, 394
and supranational law, 28–9
Rules of Procedure (RoP), 246, 248–9, 254, 290, 300, 376, 383
safeguard clauses, structural, 95, 97, 99–102
safeguards, procedural, 494, 611–12
safety, 329, 555, 574, 636, 640, 652–3, 755
sanctions, UN see UN sanctions
Scharpf, FW, 74–5, 79, 187, 198, 244, 260, 470–1
Schengen:
acquis, 451, 569–73, 707
‘associates’, 572–3
system, 123, 552, 569, 571–3
Schmidt-Aßmann, E, 24, 29, 39, 183, 197, 243, 776
Schmitt, C, 40, 52, 54, 169, 175, 177, 271
Schmitz, T, 40, 486–7, 719, 722, 731, 748–9, 755
Scholz, R, 59, 111–12, 119, 413–14, 426, 479, 624–5
Schorkopf, F, 11, 40, 141–2, 146, 159, 192, 196
Schroeder, W, 142–3, 145–6, 149, 170, 360–1, 372–3, 752–3
Schuppert, GF, 15, 24, 80, 197, 206, 283, 429
scope of application/applicability, 39, 162, 165, 293, 300, 499, 524, 532, 538–9, 543–4
scrutiny, 31, 46, 110–11, 114, 187, 254–6, 315–17
judicial, 302, 323, 328–9, 343, 360, 369, 393
parliamentary, 109–10, 269
public, 73–4, 393
scrutiny reserve system, 112
second pillar, 135, 330–1, 336, 339, 360
secondary law, 137–9, 157–9, 193–4, 199–200, 291–3, 377–81, 452–5
security, 311–14, 334–5, 340, 360, 467–8, 552–9, 561–2
high level of, 555–6, 579
internal, 80, 552–3, 559–60, 562–3, 573–4, 578–9, 584–5
Security Council (UN), 34, 134, 157, 159–60, 164, 279
security policy, 53, 98, 127, 266–7, 294, 330–2, 334
selling arrangements, 163, 293, 500, 534–5, 599
Selmayr, M, 145–6, 149, 367, 378
semi-parliamentary democracy, 59, 238, 252, 267, 271–2
separation of powers, 27, 45, 64, 88, 107, 196, 756–61
discipline, 239, 241, 288, 348, 350, 381, 758–60
services of general economic interest, 487, 495, 589, 617–18, 620–1, 710
shared competences, 289, 291, 305–6, 339, 717
shared sovereignty, 64–5, 69
Shaw, J, 77, 198, 222–4, 229, 233–4, 466–7, 475–6
simplification, 246, 299, 305, 362–4, 388–9, 702
single market, 329, 528, 639–40, 645, 647, 650, 778
Slovakia, 93, 102, 110–11, 113, 400, 418–19, 616
Slovenia, 101–2, 109–10, 112, 400, 418–19
social balance of power, 632, 634, 640, 652–3
state, 63, 98–9, 125, 183, 759
and the union of states, 748–50
Spain, 87–8, 106, 118, 450–1, 466, 615–16, 742
stability, 54, 259, 748, 530, 599, 603, 760–1
state-addressed decisions, 352, 361, 364–5, 386–7, 391
state authority, 63–4, 66, 117, 450, 492–3, 748–9, 757–8
state constitutions, 103, 108, 377, 466, 624, 747
state functions, essential, 301, 553, 739
state intervention, 591, 616, 621, 660–1, 689–90, 695
state liability, 30, 323, 356, 361, 403
state powers, 97, 117, 285, 723
state sovereignty, 63, 98–9, 125, 183, 759
state succession, 149–51, 746
see also succession
statehood, 71–2, 79–82, 179, 275–6, 746–8, 754–5, 760–1
states, 746–51

dev elopment of a common constitutional law, 751–4
mandate of co-operation, 756–7
modern forms of balance of powers, 757–61
new challenges, 750–1
as opportunity for peace and freedom, 761
the people encountered in liberty, 747–8
and sovereignty, 748–50
statehood, 746–7
and supranationality, 754–5
vitality, 755

statutory powers, 532, 766
reservation of, 542–3
Streinz, R, 26–7, 29, 75, 114–15, 280–1, 517, 548
structural characteristics, 423, 772, 777
structural choice, 4, 346–7, 352, 373, 376–7, 382, 385
structural compatibility, 22, 39–41
structural safeguard/guarantee clauses, 95, 97, 99–102, 108, 127–8, 742
style and Europe, 212–13
subjective rights, 15, 172, 195, 471–2, 525, 549, 614
subsidiarity, 287, 560–1, 612, 718, 744–6
and Lisbon Treaty, 302–3
principle of, 37, 114–15, 269, 302–4, 560–1, 718–19, 759
revised principle, 302–3
substantial stability, 54
substantive law, 302, 407, 516, 656, 661
substantive standards of legality, 283
succession:
functional, 149–50, 153–4
legal, 135, 149–51, 153–4, 158, 160
state, 149–51
suitability, 122, 351, 363, 433, 505–6, 508, 614
supranational decision-making, 323–6
supranational democracy, 52–3
supranational external relations, 316–30
Community competences, 317–20
and ECJ, 320–3
substantive constraints of foreign affairs, 326–30
supranational legitimacy, 523, 530–2, 543–4
supranational organisations, 80, 99, 152, 331, 411, 452, 471
supranational over-juridification, 194–5
supranationality, 26, 61, 74, 99, 310, 320, 754–5
supremacy, 88–9, 93, 172–3, 321, 408, 431
of the Treaties, 192–3
Sweden, 32, 88, 96, 101, 109–10, 125–6, 742
Switzerland, 56, 61, 65, 71, 258–9, 572–3, 712
systematisation, 16, 27, 305, 362, 386, 519
systemic choice, 5, 589–90, 594–604, 615
market economy guarantees, 596–603
open market economy and free competition, 594–6
third states/countries, 192, 330, 333–4, 336–7, 460–1, 601–2, 706–7
Tomuschat, C, 86, 132, 135–6, 144–5, 149–50, 158, 325–6
trade:
see also WTO
cross-border, 219, 521, 532, 602
international, 218, 312, 341, 630–2
intra-Community, 520, 525, 535
transactions, cross-border, 522–3, 528, 532–3, 542–3
transfer:
of competences, 102, 151, 337, 418, 574, 742, 745
of public authority, 411, 742
of sovereign powers, 123, 337, 752, 773
of sovereign rights, 87, 95–102, 150, 411, 420
transnational integration, 232, 526, 530–4, 537–8, 543–4, 549
transnationalisation, 654–8
transparency, 18, 51–2, 77–9, 247–9, 305–7, 476, 715
transposition, 143, 296, 356–8, 386, 388, 456, 503
Treaty amendments, 160, 183, 186, 324, 378–9, 714, 756–7
Treaty establishing a Constitution for Europe, 735–41
Treaty of Lisbon see Lisbon Treaty
Turkey, 44, 325, 418, 420, 446
ultimate consumers see final consumers
ultimate jurisdiction, 421–5, 427
ultra vires acts, 100, 412–15, 421, 426, 434
UN sanctions, 134, 164–3, 193, 327
implementation, 157–9
unanimity, 27, 97, 114, 247, 263, 304, 714
uncertainty, legal, 140, 305, 516, 693, 739, 779
undistorted competition, 601–3, 613, 620–2, 659–68, 690, 710–11
guarantee of, 590, 664–8, 697
protection of, 662–7
system of, 601–2, 612, 662, 664–5
uniform application, 30, 309, 318, 351, 483, 498, 777
uniform external representation, 310, 319, 331, 339, 341–2
uniform founding principles, 26–8
Union citizens, 48–9, 229, 444–7, 451–4, 456–7, 461–9, 474–6
rights see Union citizenship, rights
Union citizenship, 4, 228–30, 443–78, 725
and Area of Freedom, Security and Justice (AFSJ), 579–80
concluding remarks, 477–8

805
Index

Union citizenship – continued
  and constitution-making, 477
  and democracy, 475–6
  duties, 466–7
  and ECJ, 227–31
  elements in positive law, 452–68
  in European multilevel system, 469–75
  and fundamental rights, 464–6
  future, 469–77
  history, 445–9
  individual rights based on EC law, 452–3
  legal concept, 449–52
  and Lisbon Treaty, 468–9
  and nationality, 449–50
  notion, 445–52
  prohibition of discrimination, 461–4
  rights, 445, 452–61, 617
Union competences, 36, 276–7, 285–7, 301–2, 305–7, 338–9
  irregular exercise of, 302–4
Union of states, 735–61
  constitutional law and European law, 741–6
  EU as, 743–5
  rejection of the Treaty establishing a Constitution for Europe, 735–41
  the state, 746–61
United Kingdom, 27, 89, 109, 120, 132, 173–7, 488
  unity, 26, 28, 38–9, 41–2, 54, 339–40, 777–8
  universality, 212, 231, 330, 472, 746, 751
  unjustified dismissal, 487–8, 634
Verband see composite of Union and Member States
vertical agreements, 669–71, 696
vertical co-operation, 244, 310, 338–9
vertical competences, 275, 284–5, 287–8
vertical delimitation/distribution of competences, 286, 317, 327, 508, 716
vertical order of competences, 284, 297, 301, 305
veto powers, 79, 257, 272
von Danwitz, T, 24, 31, 94, 141–2, 144–6, 159–60, 287–8
von der Groeben, H, 11, 22, 28, 58, 374, 595, 640–1
Wallace, W, 31, 76, 80, 244–7, 260, 263–4, 711
Weber, Max, 18, 72–4, 77, 250
Weiler, J, 30, 46, 193–7, 225–6, 270, 484–5, 497
welfare, 220, 229, 630, 645–6, 685–7, 691, 704–5
  consumer see consumer welfare
  welfare state, 261, 529, 590, 593, 609, 643, 747
  women, 118–19, 148, 150–2, 154
  workers:
    free movement of, 44, 454, 515, 520, 628, 649, 655
    protection of, 648–9
    working hours, 631, 634, 649, 653
World Trade Organisation see WTO
WTO (World Trade Organisation), 137–47, 157–60, 163, 166, 319, 329, 549
Wyrzykowski, M, 98–9, 102, 126
Zuleeg, M, 31–2, 287–8, 349, 763–5, 770–5, 777–9, 785–6