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A CONSTITUTIONAL PERSPECTIVE

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I. Introduction

In liberal democracies, written constitutions are the 'supreme law of the land' by means of which individuals sharing a common sense of belonging have agreed to establish a government of limited powers, which is entrusted with pursuing the common good, whilst respecting a sphere of individual freedom.[1] At national level, constitutions have thus been called upon to fulfil three basic functions. First, they provide a catalogue of fundamental rights, including political rights, which public authorities (and individuals) are bound to respect. Secondly, they allocate power between the different branches of government. In federal or decentralized systems, they also allocate power between the centre and the periphery. Thirdly, they help to preserve national identity by determining the way in which a particular community of individuals is to interact with the wider world. Accordingly, a national constitution draws the dividing line between the domestic legal order and public international law.

From a foundational perspective, a constitution must be constructed on the basis of a social contract that presupposes the existence of a political entity (ie a 'demos').[2] The argument then goes that if a normative text is not the product of collective self-determination by the people, then that text is not a constitution.[3] That is why, for some scholars, it is very difficult, if not impossible, to detach constitutionalism from the concept of the nation-state. For the

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[1] See eg the definition of a 'written constitution' set out in *Marbury v. Madison*, 5 US (Cranch 1) 137 (1803).

[2] M. A. Wilkinson, 'Political Constitutionalism and the European Union' (2013) 76 *Modern Law Review* 191.

[3] See eg D. Grimm, 'The Achievement of Constitutionalism and its Prospects in a Changed World' in P. Dobner and M. Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford University Press 2010).

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European Union, this would mean that, in the absence of a 'European demos', the founding Treaties are not a constitution.[4]

However, the concept of 'constitutionalism' can be understood more broadly, as relating to any system of norms that enshrines a commonality of values on which a union of sovereign states and their peoples is founded. Understood in this way, constitutionalism may operate even in the absence of a *unitary* 'demos' and outward the confines of the nation-state.[5]

If sovereignty can be divided into different levels of governance, then 'federalism proceeds from the very essence of constitutionalism, which is limited government operating under the rule of law'.[6] It is true that, at the outset of the European integration project, 'federalism' was understood as a synonym of 'centralisation', which is often stigmatized as a threat to the nation-state. However, as Koopmans noted twenty-five years ago, that traditional understanding of 'federalism' was inadequate to explain the European integration project, as it clung excessively to the notion of 'the State'.[7] A discourse that aimed to identify *the* place where sovereign power resided (the centre versus the periphery) gave rise to 'the wrong debate'. As an alternative, Koopmans advocated a broad reading of the notion of 'federalism', according to which that concept provides a dynamic conceptual framework explaining how power is allocated between the different levels of governance. In the context of the EU integration process, Koopmans argued that 'federalism' should thus be linked to the notion of 'legal pluralism'.[8] Where federalism encompasses elements of 'legal pluralism', the constitutional question is then how one should order a plurality of sources of law. As Delmas-Marty observed, 'ordering [legal] pluralism' amounts to devising a method of analysis capable of reconciling 'dispersion and fragmentation' with a 'unified structure'.[9] For Pescatore, in terms of political and legal philosophy, federalism is grounded in two basic principles, namely, 'the search for unity, combined with a genuine respect [for] the autonomy and legitimate interests of the participant[ing] entities'.[10]

Accordingly, the question whether a system of norms, such as the EU legal order, is of a 'constitutional nature' does not depend on its foundational origins, but on its capacity to establish a government with limited powers that is capable of reconciling legal pluralism with a unified structure. The purpose of our contribution is thus to explore that functional understanding of constitutionalism. Accordingly, it is submitted that the EU legal order fulfils the basic functions that national constitutions have been called upon to fulfil. To that end, Section II is devoted to examining the EU legal order from a normative perspective. As the system of norms established by the Treaties is autonomous, self-sufficient, and coherent, EU law may be distinguished from public international law. In Section III, EU constitutionalism is examined from three different perspectives. From an individual's perspective, EU law guarantees to every person a sphere of liberty free from public interference. From a Member State's perspective, EU federal principles define the relations linking the European Union and its Member States, and its Member States with each other. From an EU perspective, EU law allocates powers between the EU institutions in a setting that is different from that of

[4] Ibid 16–17.

[5] R. Schütze, *European Constitutional Law* (Cambridge University Press 2012) 47 ff.

[6] K. Lenaerts, 'Constitutionalism and the Many Faces of Federalism' (1990) 38 *American Journal of Comparative Law* 205.

[7] T. Koopmans, 'Guest Editorial—Federalism: The Wrong Debate' (1992) 29 *Common Market Law Review* 1047.

[8] Ibid 1051.

[9] See generally M. Delmas-Marty, *Ordering Pluralism* (Hart Publishing 2009).

[10] P. Pescatore, 'Preface' in T. Sandalow and E. Stein (eds), *Courts and Free Markets* (Clarendon Press 1982) 3–4.

nation-states. Section IV focuses on the EU principle of democracy as an essential element of EU constitutionalism. In our view, the EU legal order is imbued with that principle, which gives expression to the two sources of constitutional authority in which the EU is grounded, namely the Member States and European citizens. Finally, in Section V, a brief conclusion supports the contention that this functional understanding of EU constitutionalism does not seek to transform the European Union into a fully-fledged federal state. On the contrary, from a functional perspective, EU constitutionalism militates in favour of qualifying the European Union as 'a constitutional order of States and their peoples'.[11] Indeed, it may be considered that, as a constitutional order, the EU seeks to create 'an ever closer union among the peoples of Europe'[12] whilst respecting individual liberties and national identities.

II. An Autonomous, Self-sufficient, and Coherent System of Norms

As is well known, the 'constitutionalisation' of the EU integration project began fifty years ago when the European Court of Justice (ECJ) delivered its ground-breaking judgment in *Van Gend en Loos*.[13] In probably what is the most famous passage ever written by the ECJ, the latter held that:

> [t]he [European Union] constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the Member States but also their nationals.[14]

Contrary to the position in relation to ordinary international treaties, the ECJ held that it is not for the constitutions of the Member States to determine whether an EU Treaty provision may produce direct effect, as that determination is to be found in 'the spirit, the general scheme and the wording' of the EU Treaty provision itself. Questions regarding the normative nature of EU law are to be solved in the light of the Treaties themselves. It follows from *Van Gend en Loos* that the autonomy of EU law is governed by two different, albeit intertwined, dynamics.

The autonomy of EU law is, on the one hand, defined in a negative fashion: EU law is not public international law. Traditionally, public international law has operated on the assumption that actions brought by a contracting party against another contracting party are sufficient to guarantee that any rights that a treaty may vest in individuals are duly protected. That assumption is consistent with the fact that international law leaves to the contracting parties the question whether treaty provisions have direct effect. However, in *Van Gend en Loos*, the ECJ rejected that assumption. In its view, if the judicial protection of EU rights were limited to proceedings brought by the European Commission or a Member State, that limitation 'would remove all direct legal protection of the individual rights of [the Member States'] nationals'. Hence, the judicial protection of EU rights is based on a system of 'dual vigilance': in addition to the supervision carried out by the European Commission and the Member States, individuals are entitled to rely on their EU rights in the national courts.[15]

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[11] The expression 'constitutional order of States' is borrowed from A. Dashwood, 'The Limits of European Community Powers' (1996) 21 *European Law Review* 113. See also W. van Gerven, *The European Union, A Polity of States and Peoples* (Hart Publishing 2005) and Schütze (n 5) 79 (arguing that: '[t]he best way to characterize the nature of the European Union is thus as a Federation of States').

[12] See the preamble to the TEU.

[13] Judgment in Case 26/62 *Van Gend en Loos* EU:C:1963:1. See A. Tizzano, J. Kokott, and S. Prechal (eds), *50th Anniversary of the Judgment in van Gend en Loos* (EU Publications Office 2013).

[14] Judgment in Case 26/62 *Van Gend en Loos* (n 13).

[15] Ibid.

Van Gend en Loos established the autonomy of the EU legal order vis-à-vis international law. In the following years, the ECJ continued to distance itself from international law. For example, whilst in *Van Gend en Loos,* the ECJ wrote 'the [Union] constitutes a new legal order *of international law*',[16] in subsequent judgments, the expression 'of international law' was abandoned by the ECJ. For example, in *Commission v Luxembourg*,[17] decided a year and a half later, the ECJ rejected the contention that the principle of international law according to which 'a party, injured by the failure of another party to perform its obligations, [may] withhold performance of its own' (the so-called *exceptio non adimpleti contractus*) was recognized under EU law. According to the ECJ: '[T]he Treaty is not limited to creating reciprocal obligations between the different natural and legal persons to whom it is applicable' 'but establishes *a new legal order* which governs the powers, rights and obligations of the said persons, as well as the necessary procedures for taking cognizance of and penalizing any breach of it'.[18] In the same way, in *Costa v ENEL*, the ECJ ruled that: '[by] contrast with ordinary international treaties, the EEC Treaty has created its *own legal system* which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply'.[19]

However, that change in the ECJ's legal discourse cannot be read as an attempt to cut the EU loose from its international law origins entirely; autonomy must not be confused with complete detachment. In the light of *Van Gend en Loos* and the cases that followed, the ECJ strives to define the EU constitutional space, but without denying the fact that EU law influences and is influenced by the legal orders that surround it.[20]

On the other hand, EU law is an autonomous legal order, since it has the capacity to operate as a self-sufficient system of norms. In Opinion 2/13,[21] the ECJ undertook what is probably the most detailed and comprehensive analysis of the autonomy of EU law. By giving concrete expression to those passages of *Van Gend en Loos* and *Costa v ENEL*,[22] the ECJ explained that the notion of 'autonomy' relates to the constitutional structure of the EU,[23] the nature of EU law,[24] the principle of mutual trust between the Member States,[25] the system of fundamental rights protection provided for by the Charter of Fundamental Rights of the European Union (the 'Charter'),[26] the substantive law of the EU that directly contributes to the implementation of the process of European integration,[27] the principle of sincere cooperation,[28] and the EU system of judicial protection of which the preliminary reference procedure provided for in Article 267 TFEU is conceived as the keystone.[29]

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16 Ibid (emphasis added).

17 See eg the judgment in Joined Cases 90/63 and 91/63 *Commission v Luxembourg and Belgium* EU:C:1964:80, para 631.

18 Ibid (emphasis added).

19 Judgment in Case 6/64 *Costa v ENEL* EU:C:1964:66.

20 See J. Malenovský, 'La contribution ambivalente de la Cour de justice de l'Union européenne à la saga centenaire de la domestication du droit international public' in V. Kronenberger, M. T. D'Alessio, and V. Placco (eds), *De Rome à Lisbonne: les juridictions de l'Union à la croisée des chemins, Mélanges en l'honneur de Paolo Mengozzi* (Bruylant 2013) 25.

21 Opinion 2/13 EU:C:2014:2454.

22 Ibid paras 157–77.

23 Ibid para 165 (referring to the principle of conferral and to the institutional framework of the EU).

24 Ibid para 166 (referring to the principles of primacy and direct effect).

25 Ibid paras 167 and 168.

26 [2012] OJ C326/02. See Opinion 2/13 (n 21) paras 169–71.

27 Opinion 2/13 (n 21) para 172 (referring to the Treaty provisions 'providing for the free movement of goods, services, capital and persons, citizenship of the Union, the area of freedom, security and justice, and competition policy').

28 Ibid para 173.

29 Ibid paras 174–76.

One may draw four direct implications from that positive understanding of autonomy. First, it is the Treaties themselves that determine whether a norm belongs to the EU legal order. They operate as 'the rule of recognition'.[30] The incorporation of foreign norms into EU law is made conditional upon those norms complying with the fundamental values on which the European Union is founded.[31] If those norms fail to comply with those values, then they cannot form part of EU law.[32] Moreover, as the *Pringle* case shows,[33] changes to the founding Treaties may only be made in accordance with Article 48 TEU. For example, a Treaty amendment adopted under the simplified revision procedure must comply with the requirements laid down in Article 48(6) TEU.[34]

Secondly, it is the EU law provision itself that determines whether it produces direct effect. As *Van Gend en Loos* made clear, it is by interpreting the EU law provision in question that one may determine whether it vests rights in individuals that can be judicially enforced. Thus, the Treaties and EU legislation adopted pursuant to those Treaties are not 'programmatic' norms without legal effects. On the contrary, the very *raison d'être* of EU law is inherently linked to the creation of individual rights that are directly enforceable before national courts. For every EU right, there must be a judicial remedy. It is on this founding postulate that the entire EU system of judicial protection is based.[35]

Thirdly, EU law does not allow normative gaps to appear. Indeed, autonomy could hardly be achieved in a legal system that was not self-sufficient and coherent. For the EU legal order to find its own independent space between national and international law, the fragmentation resulting from constitutional and legislative gaps could not be allowed to persist. Although they may be inspired by the constitutional traditions of the Member States or by international treaties, the solutions adopted to fill any gaps must come from within the Union legal order itself.[36] The essence of EU law calls upon the ECJ to assume its responsibilities for 'finding' the law (*Rechtsfindung*) by fashioning general principles of law. Gap-filling grounded in the 'system of the Treaty' aims to create norms that properly reflect the nature, objectives, and functioning of the European Union.[37]

Fourthly and last, normative conflicts between EU norms (internal conflicts) or conflicts between an EU norm and norms belonging to other legal orders (external conflicts) are to be solved in accordance with primary EU law. Internally, the principle of hierarchy of

[30] The notion of 'the rule of recognition' is borrowed from H. L. A. Hart, *The Concept of the Law* (3rd edn, Oxford University Press 2012). However, in our view, that notion should be understood 'as a shared plan which sets out the constitutional order of a legal system'. See in this regard S. J. Shapiro, 'What is the Rule of Recognition? (and Does It Exist?)' in M. D. Adler and K. E. Himma (eds), *The Rule of Recognition and the US Constitution* (Oxford University Press 2009) 235.

[31] See Opinions 1/00 EU:C:2002:231, paras 21, 23, and 26; 1/09 EU:C:2011:123, para 76; and 2/13 (n 21) para 183. See also to that effect judgment in Joined Cases C-402/05 P and C-415/05 P *Kadi and Al-Barakaat International Foundation v Council and Commission (Kadi I)* EU:C:2008:461, para 282.

[32] Joined Cases C-402/05 P and C-415/05 P *Kadi I* (n 31) para 282 (holding that: 'an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the [EU] legal system').

[33] Judgment in Case C-370/12 *Pringle* EU:C:2012:756.

[34] Ibid paras 70 and 76.

[35] See eg K. Lenaerts, 'The Rule of Law and the Coherence of the Judicial System of the European Union' (2007) 44 *Common Market Law Review* 1625.

[36] P. Pescatore, 'La carence du législateur communautaire et le devoir du juge' in G. Lüke, G. Ress, and M. R. Will (eds), *Rechtsvergleichung, Europarecht und Staatenintegration: Gedächtnisschrift für Léontin—Jean Contantinesco* (Heymanns Verlag 1983) 559–80.

[37] See in this regard K. Lenaerts and J. A. Gutiérrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law' (2010) 47 *Common Market Law Review* 1629, 1631.

norms pervades EU law.[38] Secondary EU law must comply with primary EU law. In the same way, EU administrative measures that are incompatible with EU legislative measures will be annulled or declared invalid. Externally, the ECJ has held that international treaties which have been incorporated into EU law enjoy a 'supra-legislative' status[39] but, as mentioned above, may not prevail over the constitutional tenets on which the EU is founded.[40] Rules of national law, even those of constitutional rank, that conflict with EU law must be set aside.[41] Since EU law indicates how normative conflicts are to be solved, that law establishes a coherent legal order based on the rule of law.

From a normative perspective, the Treaties lay down a 'constitutional order', given that they have established an autonomous, self-sufficient, and coherent system of norms.

III. The Constitutional Features of EU Law

Constitutionalism guarantees individual liberty by limiting public power. Public power may be limited both vertically and horizontally. Vertically, federalism, of which the principle of conferral is part and parcel, guarantees that 'the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States'.[42] Horizontally, in accordance with the principle of institutional balance, '[e]ach institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them'.[43] As Madison famously stated in the *Federalist No 51*, those two principles create a 'double security' that protects individual liberty. Whilst federalism ensures that 'the different governments will control each other', the principle of institutional balance guarantees that 'each [government] will be controlled by itself'.[44]

A. Individual Liberty, the General Interest, and Constitutional Pluralism

The EU legal order is committed to respecting individual liberty. At constitutional level, the Treaties grant rights to individuals that are directly effective and aim to guarantee a sphere of self-determination free from public interference. For example, the Treaty provisions on EU citizenship, on the fundamental freedoms, and on competition law contain rights which may be relied upon with a view to setting aside conflicting national laws. Since EU rights which are enshrined in the Treaties enjoy constitutional status, they can be relied upon not only vis-à-vis the Member States but also vis-à-vis the EU institutions.[45] For public authorities, those rights produce *erga omnes* effects.

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[38] See generally K. Lenaerts and P. Van Nuffel, *European Union Law* (3rd edn, Sweet & Maxwell 2011) 817 ff.

[39] Judgment in Case C-308/06 *The International Association of Independent Tanker Owners and Others* (*Intertanko*) EU:C:2008:312, para 42.

[40] See Joined Cases C-402/05 P and C-415/05 P *Kadi I* (n 31) para 282.

[41] Judgments in Case 6/64 *Costa v ENEL* (n 19) and Case 106/77 *Simmenthal* EU:C:1978:49. See also judgments in Case 11/70 *Internationale Handelsgesellschaft* EU:C:1970:114, para 3; Case C-409/06 *Winner Wetten* EU:C:2010:503, para 61; and Case C-416/10 *Križan and Others* EU:C:2013:8, para 70.

[42] See TEU art 5(2).

[43] Ibid art 13(2).

[44] J. Madison, 'The Federalist No 51' in A. Hamilton, J. Madison, and J. Jay, *The Federalist Papers* (Oxford University Press 2008) 256.

[45] See in relation to the free movement of goods, judgments in Case 15/83 *Denkavit Nederland* EU:C:1984:183, para 15; Case C-51/93 *Meyhui* EU:C:1994:312, para 11; Case C-114/96 *Kieffer and Thill* EU:C:1997:316, para 27; and Case C-210/03 *Swedish Match* EU:C:2004:802, para 59. Regarding the free

Just like national constitutions, EU law is devoted to protecting fundamental rights.[46] Originally recognized as general principles of EU law, fundamental rights are now set out in the Charter. The EU legal order thus has a written and legally binding catalogue of fundamental rights, which stands on an equal footing with the Treaties.[47]

(1) Limitations on Individual Liberty

Needless to say, individual liberty is not absolute, but may be subject to two different types of limitation. First, individual liberty must comply with the constitutional structure set out by the Treaties. The exercise of individual liberty must be compatible with other constitutional principles, such as the principle of conferral. For example, the Treaty provisions on EU citizenship and the fundamental freedoms do not apply to purely internal situations, as that would run counter to the principle of conferral.[48] As to fundamental rights, that principle finds concrete expression in Article 51(1) of the Charter, that states that the provisions of the Charter 'are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing [EU] law'.[49] In the seminal judgment *Åkerberg Fransson*,[50] the ECJ clarified the meaning of the expression 'implementing [EU] law'. It made clear that '[t]he applicability of [EU] law entails [the] applicability of the fundamental rights guaranteed by the Charter'.[51] Conversely, in situations where EU law does not apply, compliance with the principle of conferral blocks the application of the Charter. This does not mean, however, that fundamental rights are left unprotected where EU law does not apply. On the contrary, as the ECJ held in *Dereci*,[52] if '[the national court] takes the view that [the] situation [at issue] is not covered by [EU] law, it must undertake that examination in the light of … the ECHR'.[53]

Secondly, individual liberty may be weighed against objectives of general interest. That limitation applies both to the substantive EU rights, which are directly grounded in the Treaties and to the fundamental rights enshrined in the Charter.[54] Those objectives must be recognized by the EU legal order itself and comply with the principle of proportionality. Regarding

movement of workers see eg the judgment in Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze* EU:C:2009:344, para 33.

[46] See TEU art 6.

[47] K. Lenaerts and J. A. Gutiérrez-Fons, 'The Place of the Charter in the EU Constitutional Edifice' in S. Peers, T. Hervey, J. Kenner, and A. Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 1557.

[48] See in this regard S. O'Leary, 'The Past, Present and Future of the Purely Internal Rule in EU Law' (2009) *Irish Jurist* 13.

[49] Regarding the EU institutions, bodies, offices, and agencies see judgment in Joined Cases C-8/15 P to C-10/15 P *Ledra Advertising and Others v Commission and ECB* EU:C:2016:701, para 67 (holding that 'the Charter is addressed to the EU institutions, including …, when they act outside the EU legal framework').

[50] Judgment in Case C-617/10 *Åkerberg Fransson* EU:C:2013:105.

[51] Ibid para 21.

[52] Judgment in Case C-256/11 *Dereci and Others* EU:C:2011:734.

[53] Ibid para 72.

[54] However, the fundamental rights located under Title I of the Charter are not subject to any limitations. See the explanations relating to the Charter of Fundamental Rights, [2007] OJ C303/17 ('the explanations relating to the Charter'), at 17 (given that 'the dignity of the human person is part of the substance of the rights laid down in this Charter [, it] must therefore be respected, even where a right is restricted'). The same applies in relation to the right to life and to the right to the integrity of the person. In this regard, see judgment in Case C-112/00 *Schmidberger* EU:C:2003:333, para 80 ('unlike other fundamental rights enshrined in [the ECHR], such as the right to life or the prohibition of torture and inhuman or degrading treatment or punishment, which admit of no restriction, neither the freedom of expression nor the freedom of assembly guaranteed by the ECHR appears to be absolute but must be viewed in relation to its social purpose'). See in the same vein judgments in Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* EU:C:2016:198, paras 85–86; and Case C-578/16 PPU *C. K. and Others* EU:C:2017:127, para 59.

fundamental rights, any limitation on the exercise of those rights must also be provided for by law and respect their essence.[55] In addition, limitations on EU rights may also aim to guarantee the rights of third parties. In those cases, the ECJ may thus be called upon to balance a fundamental freedom against a fundamental right,[56] or a fundamental right against another fundamental right.[57]

(2) Individual Liberty, EU Harmonization, and Value Diversity

(a) In the Presence of EU harmonization Where the EU legislator has harmonized the level of protection of a fundamental right—eg the rights of the defence, the right to property, the right to privacy—Member States lack the power to impose either a higher or a lower threshold of protection.[58] The question whether a uniform standard of protection is adopted at EU level is determined through the political process, which enjoys both the necessary democratic legitimacy and the requisite institutional capacity to strike the right balance between the general interest and individual liberty[59] or to solve a conflict between competing individual rights.[60] The role of the ECJ is thus limited to that traditionally reserved to national constitutional courts, ie checking that any such a uniform standard of protection complies with primary EU law.[61]

The ruling of the ECJ in *Melloni* illustrates that point. In that case, the ECJ noted that by adopting Framework Decision 2009/299,[62] which amended Framework Decision 2002/584,[63] the EU legislator sought to improve the principle of mutual recognition by narrowing down the margin of discretion enjoyed by the executing Member State when deciding whether to surrender—and if so, under what conditions—a person convicted *in absentia*. To that end, the EU legislator adopted an exhaustive list of the circumstances in which it should be considered that the procedural rights of a person who has not appeared in person at his trial have not been infringed and that the European arrest warrant may therefore be executed. By adopting such a list, the EU legislator had thus harmonized the level of fundamental rights protection that Member States had to provide to persons convicted *in absentia*. Consequently, where the conditions listed in Framework Decision 2002/584 were fulfilled, the executing Member State was precluded from making the execution of a European arrest

[55] See Charter art 52(1). See also judgments in Case C-407/08 P *Knauf Gips v Commission* EU:C:2010:389, para 91; and Case C-362/14 *Schrems* EU:C:2015:650, para 94.

[56] See eg judgments in *Schmidberger* (n 54); Case C-36/02 *Omega* EU:C:2004:614; Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union (Viking Lines)* EU:C:2007:772; Case C-250/06 *United Pan-Europe Communications Belgium and Others* EU:C:2007:783; and Case C-244/06 *Dynamic Medien* EU:C:2008:85.

[57] See eg judgments in Case C-275/06 *Promusicae* EU:C:2008:54, paras 65 and 66; Case C-544/10 *Deutsches Weintor* EU:C:2012:526, para 47; Case C-283/11 *Sky Österreich* EU:C:2013:28, para 48; and Case C-314/12 *UPC Telekabel Wien* EU:C:2014:192, para 46. See also judgment in Case C-580/13 *Coty Germany* EU:C:2015:485.

[58] See eg regarding the balance between the free movement of personal data and the protection of private life, see judgments in Case C-101/01 *Lindqvist* EU:C:2003:596, para 97 and Joined Cases C-468/10 and C-469/10 *ASNEF* EU:C:2011:777, para 34. See E. Muir, 'The Fundamental Rights Implications of EU Legislation: Some Constitutional Challenges' (2014) 51 *Common Market Law Review* 219.

[59] See eg judgment in Case C-399/11 *Melloni* EU:C:2013:107, paras 61–63.

[60] See eg Case C-283/11 *Sky Österreich* (n 57).

[61] See eg judgments in Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert* EU:C:2010:662; Case C-283/11 *Sky Österreich* (n 57); and Case C-291/12 *Schwarz* EU:C:2013:670.

[62] Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA, and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, [2009] OJ L81/24.

[63] Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States, [2002] OJ L190/1.

warrant issued for the purposes of carrying out a sentence rendered *in absentia* conditional upon the provision of a higher level of protection (eg a guarantee of a retrial in the issuing Member State).

The ECJ then went on to examine whether the uniform level of fundamental rights protection chosen by the EU legislator complied with the Charter. In this regard, it recalled that, 'although the right of the accused to appear in person at his trial is an essential component of the right to a fair trial, that right is not absolute'.[64] This means that '[t]he accused may waive that right of his own free will, either expressly or tacitly, provided that the waiver is established in an unequivocal manner, is attended by minimum safeguards commensurate to its importance and does not run counter to any important public interest'.[65] Accordingly, given that 'Framework Decision 2002/584 lays down the circumstances in which the person concerned must be deemed to have waived, voluntarily and unambiguously, his right to be present at his trial',[66] the ECJ found that that provision was compatible with Articles 47 and 48(2) of the Charter.

(b) In the Absence of EU harmonization In the absence of EU harmonization, and in so far as there are no national measures producing a protectionist effect (or having a protectionist intent), Member States enjoy broad leeway to safeguard national interests that are deemed fundamental to their identity. Beyond a core nucleus of shared values in respect of which the ECJ must ensure uniformity, the substantive law of the EU must not disregard the cultural, historical, and social heritage that is part and parcel of national constitutional traditions. In other words, beyond that core nucleus, the ECJ welcomes 'value diversity'.[67] The rulings of the ECJ in *Omega*[68] and in *Åkerberg Fransson*[69] illustrate this point.

In *Omega*, the Bonn police authority prohibited Omega from offering games involving the simulated killing of human beings on the ground that they infringed human dignity. Given that Omega had entered into a franchise contract with a British company, it argued that the ban was contrary to the freedom to provide services embodied in ex Article 49 EC (now Article 56 TFEU). Thus, the ECJ was called upon to strike a balance between ex Article 49 EC and human dignity, as understood by a national authority. After noting that the ban constituted a restriction on the freedom to provide services which, nevertheless, pursued a legitimate objective—the protection of human dignity—the ECJ ruled that, for the purposes of applying the principle of proportionality, '[i]t is not indispensable … for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected'.[70] Thus, the fact that a Member State other than Germany had chosen a system of protection of human dignity less restrictive of the freedom to provide services did not mean that the German measure was contrary to the EC Treaty. Given that the ban satisfied the level of protection required by the German constitution and did not go beyond what was necessary to that effect, the ECJ considered that it was a justified restriction on the freedom to provide services. Thus, *Omega* demonstrates that the ECJ

[64] See Case C-399/11 *Melloni* (n 59) para 49.
[65] Ibid.
[66] Ibid para 52.
[67] See Lenaerts and Gutiérrez-Fons (n 37) 1663.
[68] See Case C-36/02 *Omega* (n 56). See also the judgment in Case C-208/09 *Sayn-Wittgenstein* EU:C:2010:806. See in this regard K. Lenaerts, 'The Court's Outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice' in M. Adams, H. de Waele, J. Meeusen, and G. Stratmans (eds), *Judging Europe's Judges* (Hart Publishing 2013) 29.
[69] See *Åkerberg Fransson* (n 50).
[70] See Case C-36/02 *Omega* (n 56) para 37.

did not seek to impose a common conception of human dignity. Nor did it embrace the national conception prevailing outside Germany, which was more protective of free movement. Instead, it endorsed a model based on 'value diversity', under which national constitutional traditions are not in competition with the economic freedoms of the Union, but form an integral part of them.[71]

In *Åkerberg Fransson*, after holding that the national legislation at issue constituted implementation of EU law for the purposes of Article 51(1) of the Charter,[72] the ECJ was called upon to determine whether the *ne bis in idem* principle enshrined in Article 50 of the Charter had to be interpreted as precluding criminal proceedings for VAT evasion from being brought against a defendant where a tax penalty had already been imposed upon him for the same acts of providing false information. In this regard, the ECJ noted that the EU legislator had not struck a precise balance between the two conflicting interests at stake, namely the protection of the EU financial interests and the *ne bis in idem* principle. Provided that tax penalties were not criminal in nature (and thus complied with the *ne bis in idem* principle) and that the '*effet utile*' of EU law was guaranteed, ie penalties had to be effective, proportionate, and dissuasive for ensuring the collection of VAT, the ECJ ruled that Member States could apply higher standards of fundamental rights protection when assessing the lawfulness of combining tax and criminal penalties for the same wrongful conduct. According to the ECJ, 'Member States are free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the [ECJ], and the primacy, unity and effectiveness of EU law are not thereby compromised'.[73]

B. Federalism and the EU

(1) The Principle of Conferral

As *Van Gend en Loos* made clear, the Member States 'have limited their sovereign rights, *albeit within limited fields*',[74] for the purpose of establishing an ever closer Union among the peoples of Europe. The principle of conferral is thus an overriding principle that governs the allocation of power between the EU and its Member States in all circumstances. The EU may only act within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein.[75] By virtue of that principle, there are, for example, policy areas, such as education or healthcare, which may not be subject to harmonization.[76]

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[71] T. Tridimas, *The General Principles of EU Law* (2nd edn, Oxford University Press 2006) 341. Moreover, the way in which the ECJ applied the principle of proportionality in *Omega* is not limited to national measures protecting fundamental constitutional principles. The ECJ has equally favoured 'value diversity' where a national measure pursues a legitimate objective in relation to which EU law does not require Member States to adopt the same level of protection. For instance, this is the case where, in the absence of EU harmonization, non-discriminatory national measures constituting obstacles to free movement aim to protect public health or public morality. Needless to say, this approach does not apply where the core values of the Union are put at risk. See in this regard Lenaerts (n 68) 32.

[72] See in this regard Lenaerts and Gutiérrez-Fons (n 47) 1564 ff.

[73] *Åkerberg Fransson* (n 50), para 29 (referring to Case C-399/11 *Melloni* (n 59) para 60). See also the judgment in Case C-168/13 PPU *Jeremy F* EU:C:2013:358. See V. Skouris, 'Développements récents de la protection des droits fondamentaux dans l'Union européenne: les arrêts *Melloni* et *Åkerberg Fransson*' (2013) *Il diritto dell'Unione Europea* 229, 241. See also D. Ritleng, 'De l'articulation des systèmes de protection des droits fondamentaux dans l'Union: les enseignements des arrêts *Åkerberg Fransson* et *Melloni*' (2013) *Revue trimestrielle de droit européen* 267, 283; and D. Sarmiento, 'Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe' (2013) 50 *Common Market Law Review* 1267.

[74] Case 26/62 *Van Gend en Loos* (n 13) 12 (emphasis added).

[75] See generally L. Azoulai (ed), *The Question of Competences* (Oxford University Press 2014).

[76] See eg TFEU arts 165(4) and 168(5).

More particularly, compliance with the principle of conferral requires that the EU may only act in accordance with the type of competences it enjoys;[77] that the EU legislator may only use the legal instruments which are expressly provided for in the relevant Treaty provision, and that the EU act in question may only be adopted pursuant to the decision-making process provided for in the Treaties.[78]

The principle of conferral applies not only to the EU political institutions, but also to the EU judiciary. The EU Courts may not rely on the principle of judicial protection, which is now enshrined in Article 47 of the Charter, so as to extend their jurisdiction to areas that the authors of the Treaties expressly sought to exclude from judicial scrutiny. In this regard, in *Inuit Tapiriit Kanatami*,[79] the ECJ held that Article 47 of the Charter 'is not intended to change the system of judicial review laid down by the Treaties, and particularly the rules relating to the admissibility of direct actions brought before the Courts of the European Union'.[80] In the same way, compliance with the principle of conferral prevents the ECJ from exercising its jurisdiction over EU acts adopted under the Common and Foreign Security Policy (the 'CFSP') that neither encroach upon the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 TFEU, nor impose restrictive measures against natural or legal persons.[81]

That said, in the landmark *ERTA* case,[82] which is now codified in the last clause of Article 3(2) TFEU,[83] the ECJ held that the treaty-making powers of the EU are not limited to the specific cases explicitly provided for in the Treaties, but that they may also derive from the grant of internal powers. In so doing, the ECJ embraced the doctrine of implied powers, which, as Weiler notes, departs from 'the presumptive rule of interpretation typical in international law, that treaties must be interpreted in a manner that minimises encroachment on State sovereignty',[84] in favour of a purpose-driven rule more reminiscent of constitutional law.[85] The principle of conferral must thus be construed in that light: when the Member States transfer a competence to the EU, that transfer includes both the internal and external dimensions of such a competence.

The doctrine of implied powers seeks to 'ensure that the [international] agreement [in question] is not capable of undermining the uniform and consistent application of the [EU] rules

[77] See in this regard TFEU arts 2–6.

[78] In addition, the EU institutions may not create 'secondary legal bases' either for the adoption of legislative acts (see judgment in Case C-133/06 *Parliament v Council* EU:C:2008:257, paras 54–56) or for the adoption of measures for the implementation of EU legislation (see judgment in Joined Cases C-317/13 and C-679/13 *Parliament v Council* EU:C:2015:223, para 43).

[79] Judgment in Case C-583/11 P *Inuit Tapiriit Kanatami and Others v Parliament and Council* EU:C:2013:625.

[80] Ibid para 97.

[81] See TEU arts 24(1), 40 and TFEU art 275. See also Opinion 2/13 (n 21) paras 249 ff. See also judgments in Case C-455/14 P *H v Council and Commission* EU:C:2016:569, and Case C-72/15 *Rosneft* EU:C:2017:236.

[82] Judgment in Case 22/70 *Commission v Council* (*Re European Road Transport Agreement, ERTA*) EU:C:1971:32.

[83] That Treaty provision states that the EU 'shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence [See Opinion 1/76 EU:C:1977:63, para 3], or in so far as *its conclusion may affect common rules or alter their scope*' (emphasis added). See in this regard judgment in Case C-114/12 *Commission v Council* EU:C:2014:2151, para 67.

[84] J. H. H. Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403, 2416.

[85] Cf Opinion of AG Dutheillet de Lamothe in *ERTA* (n 82) 290 (who argued that the doctrine of implied powers would entail 'a judicial interpretation far exceeding the bounds which the [ECJ] has hitherto set regarding its power to interpret the Treaty').

and the proper functioning of the system which they establish'.[86] As Post rightly observes, the doctrine of implied powers demonstrates that 'plurality within [the EU] may require unity in external affairs'.[87] The EU decision-making process would be jeopardized, if Member States 'were free separately to engage with those outside the [EU] in ways that were inconsistent with their mutual commitments'.[88] The *ERTA* and the *Open Skies* judgments[89] show that the ECJ has striven to protect the EU decision-making process, thereby preserving the constitutional autonomy of the EU from external pressure.

Furthermore, where no other Treaty provision gives the EU institutions the necessary powers to act,[90] Article 352 TFEU (known as the 'Flexibility Clause'), which is equivalent to the US 'Necessary and Proper Clause', enables the Council, after obtaining the consent of the European Parliament, to adopt measures which are necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out therein. However, when the Council has recourse to that provision, it must also comply with the principle of conferral. As the ECJ famously held in its Opinion 2/94, '[t]hat provision, being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of [EU] powers beyond the general framework created by the provisions of the Treat[ies] as a whole and, in particular, by those that define the tasks and activities of the [EU]. On any view, Article [352 TFEU] cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaty without following the procedure which it provides for that purpose'.[91] Concretely, the ECJ held that Article 352 TFEU could not serve as a legal basis for the then Community's accession to the ECHR, as such accession 'would … entail a substantial change in the [then] Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the [ECHR] into the Community legal order'.[92] For the ECJ, such a change was of constitutional significance and could only be brought about by a Treaty amendment. The Lisbon Treaty carried out such an amendment. Article 6(2) TEU now states that 'the EU shall accede to the ECHR'. However, as the ECJ ruled in its Opinion 2/13, such accession may not adversely affect the specific characteristics and the autonomy of EU law.[93] Moreover, Article 352 TFEU may not serve to circumvent limitations on the powers of the EU, which are expressly set out in the Treaties. For example, that Treaty provision may not entail harmonization of national laws or regulations in cases where the Treaties exclude such harmonization.[94] Neither may Article 352 TFEU serve as a basis for attaining objectives pertaining to the CFSP.[95]

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[86] Opinion 1/03 EU:C:2006:81, para 133. See also Opinion 3/15 ECLI:EU:C:2017:114.

[87] R. Post, 'Constructing the European Polity: *ERTA* and the *Open Skies Judgments*' in M. Poiares Maduro and L. Azoulai, *The Past and Future of EU Law* (Hart Publishing 2010) 234.

[88] Ibid 238.

[89] See the *Open Skies* judgments: Case C-466/98 *Commission v United Kingdom* EU:C:2002:624; Case C-467/98 *Commission v Denmark* EU:C:2002:625; Case C-468/98 *Commission v Sweden* EU:C:2002:626; Case C-472/98 *Commission v Luxembourg* EU:C:2002:629; Case C-475/98 *Commission v Austria* EU:C:2002:630; and Case C-476/98 *Commission v Germany* EU:C:2002:631.

[90] See eg judgment in Case 45/86 *Commission v Council* EU:C:1987:163.

[91] See Opinion 2/94 EU:C:1996:140, para 30.

[92] Ibid para 34.

[93] Opinion 2/13 (n 21) para 200. See also Protocol (No 8) relating to Article 6(2) TEU on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms. See D. Halberstam, '"It's the Autonomy, Stupid!" A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward' (2015) 16 *German Law Journal* 105.

[94] See TFEU art 352(3).

[95] See also TFEU art 352(4). See also Joined Cases C-402/05 P and C-415/05 P *Kadi I* (n 31) para 201.

The principle of conferral thus maintains the constitutional balance between the EU and its Member States. On the one hand, it reassures the Member States, and in particular their constitutional courts,[96] that every legally binding EU act is based on a grant of power,[97] to which they have consented. If such consensus is missing, then new powers may only be conferred by means of a Treaty reform. On the other hand, the autonomy of the EU legal order precludes the ECJ from interpreting that principle in a way that would neither preserve the internal action of the EU, nor allow room for a certain degree of flexibility, which would provide the necessary means to pursue the objectives set out in the Treaties.[98]

(2) Subsidiarity and Proportionality

Whilst the principle of conferral determines whether the EU enjoys or lacks the competence to act, the principle of subsidiarity and the principle of proportionality operate as 'a second layer of competence control'. Those two principles determine the conditions under which and the way in which an EU competence may be exercised.

(a) The Principle of subsidiarity With the exception of those competences that belong exclusively to the EU,[99] the principle of subsidiarity limits the exercise of EU competences to objectives which cannot be sufficiently achieved at Member State level.[100] Thus, that principle, which is not always present in federal systems,[101] seeks to determine at which level of governance a policy objective may best be achieved.

From a political perspective, scholars have often argued that 'the political safeguards of federalism'[102] set out in the Treaties have failed to protect state autonomy.[103] For example, Young supports the contention that, within the Council, success in obtaining substantive policy outcomes may outweigh constitutional considerations, especially when Member State executives rely on the Council to circumvent political obstacles at national level. Furthermore, the Commission[104] and the European Parliament act mainly in an EU perspective.[105]

In the eyes of some, those political safeguards have not protected federalism to the extent necessary because of the absence of national parliaments from the EU legislative process. The Lisbon Treaty now provides for their active involvement in monitoring compliance

[96] See eg J. Komárek, 'The Place of Constitutional Courts in the EU' (2013) 9 *European Constitutional Law Review* 420. See also Bundesverfassungsgericht (Anti–Terrorism Database) (1 BvR 1215/07) (2013) NJW 1948 (Germany).

[97] K. Bradley, 'Powers and Procedures in the EU Constitution: Legal Bases and the Court' in P. Craig and G. de Búrca (eds), *The Evolution of EU Law* (2nd edn, Oxford University Press 2011) 85, 86.

[98] Judgment in Case C-166/07 *Parliament v Council (International Fund for Ireland)* EU:C:2009:499.

[99] Judgment in Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* EU:C:2002:741, para 179.

[100] See TEU art 5(3). See judgment in Case C-176/09 *Luxembourg v Parliament and Council* EU:C:2011:290, para 76 and the case law cited.

[101] See in this regard J. A. Gutiérrez-Fons, 'Transatlantic Adjudication Techniques: The Commerce Clause and the EU's Internal Market Harmonisation Clause in Perspective' in E. Fahey and D. Curtin (eds), *A Transatlantic Community of Law Legal Perspectives on the Relationship Between the EU and US Legal Orders* (Cambridge University Press 2014).

[102] Expression borrowed from H. Wechsler, 'The Political Safeguards of Federalism: The Role of The States in the Composition and Selection of the National Government' (1954) 54 *Columbia Law Review* 543.

[103] E. Young, 'Protecting Member State Autonomy in the European Union: Some Cautionary Tales From American Federalism' (2002) 77 *New York University Law Review* 1612. See also G. Bermann, 'Taking Subsidiarity Seriously: Federalism in the European Community and the US' (1994) 94 *Columbia Law Review* 331.

[104] TFEU art 245.

[105] S. Hix, A. Noury, and G. Roland, 'Dimensions of Politics in the European Parliament' (2006) 50 *American Journal of Political Science* 494.

with the principle of subsidiarity. It introduces an 'early-warning' mechanism. National parliaments may issue a reasoned opinion against legislative proposals that do not comply with the principle of subsidiarity. If at least one third of the votes allocated to the national parliaments favour the withdrawal of the proposal,[106] the Commission must review it. If a simple majority of negative votes is reached but the Commission decides to maintain the proposal, the EU legislator must, before concluding the first reading, express its opinion by voting.[107]

The early involvement of national parliaments is a welcome development that should not, however, be seen as an alternative to judicial review. Indeed, in accordance with their own constitutional arrangements, Member States may lodge direct actions on behalf of their national parliaments.[108]

To date, the ECJ has not yet annulled or declared invalid an EU measure on the ground that it failed to comply with the principle of subsidiarity. For some scholars, the principle of subsidiarity inevitably raises political questions that are properly reserved to the legislator. Arguably, it is very difficult for the ECJ to ascertain at which level of governance a policy is more efficiently pursued.[109] In that regard, Schütze argues that, with a view to preventing the principle of subsidiarity from becoming mere 'empty formalism', that principle should be re-interpreted as 'federal proportionality' according to which the ECJ should examine whether the EU legislator has 'unnecessarily restricted state autonomy'.[110] Yet this would engage the ECJ in a balancing exercise involving sensitive political choices.[111] Alternatively, the principle of subsidiarity can be understood as a 'procedural principle',[112] enforced by a process-oriented judicial review. The ECJ would then focus solely on making sure that the EU legislator had done its work properly, by checking how it came to the conclusion that the objective of the proposed action could not be sufficiently achieved by the Member States, but would be better achieved at EU level.[113] This means that the preparatory work carried out by the EU legislator (eg the impact assessment report) must be sufficiently thorough and exhaustive to convince the ECJ of the fact that the policy choices at hand are best made at EU level.

(b) The Principle of proportionality Whilst the principle of subsidiarity defines at which level of governance a policy decision must be adopted, the principle of proportionality comes into play at a later stage.[114] That principle focuses on the extent and intensity of EU action, which must only impose limitations on the exercise of the rights of individuals and on the

[106] See art 7 of Protocol (No 2) annexed to the Treaties, which provides that: '[e]ach national Parliament shall have two votes, shared out on the basis of the national Parliamentary system. In the case of a bicameral Parliamentary system, each of the two chambers shall have one vote'.

[107] Ibid.

[108] See Protocol (No 2) art 8.

[109] See Tridimas (n 71) 183; Bermann (n 103) 391; F. Sander, 'Subsidiarity Infringement before the European Court of Justice: Futile Interference with Politics or a Substantial Step Towards EU Federalism?' (2006) 12 *Columbia Journal of European Law* 517, 569.

[110] R. Schütze, 'Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism?' (2009) 68 *Cambridge Law Journal* 525, 533 ff.

[111] T. Horsley, 'Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw?' (2012) 50 *Journal of Common Market Studies* 267, 272.

[112] See in this regard K. Lenaerts, 'The European Court of Justice and Process-Oriented Review' (2012) 31 *Yearbook of European Law* 3.

[113] See in this regard the judgment in Case C-547/14 *Philip Morris Brands and Others* EU:C:2016:325, para 226 (noting that: 'it is undisputed that the Commission's proposal for a directive and its impact assessment include sufficient information showing clearly and unequivocally the advantages of taking action at EU level rather than at Member State level').

[114] See Tridimas (n 71) 176.

prerogatives of the Member States in so far as it 'is necessary to achieve the objectives of the Treaties'.[115] When it comes to fundamental rights, the principle of proportionality finds concrete expression in Article 52(1) of the Charter.

The principle of proportionality pervades all areas of EU law. This means that, unlike the principle of subsidiarity, it also applies where the EU enjoys exclusive competences. When applying that principle, the ECJ follows a three-step analysis.[116] First, it checks whether the EU measure in question is adequate to achieve the objectives it pursues (the so-called 'suitability test'). Secondly, it is necessary to check whether 'there are no less restrictive means capable of producing the same results' (the so-called 'necessity test').[117] Finally, it may also involve a balancing exercise between the objectives pursued by the EU measure in question and the burdens borne by the applicant (whether a Member State or an individual) (the so-called 'proportionality *stricto sensu*'). Nonetheless, the ECJ does not always distinguish between the second and third steps.[118]

When examining whether an EU policy measure complies with the principle of proportionality, the ECJ has consistently stated that 'the EU legislature must be allowed a broad discretion in areas which involve political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. The legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institutions are seeking to pursue'.[119]

That being said, such judicial deference to legislative choices does not apply when the ECJ is called upon to balance the objectives pursued by the EU measure in question against fundamental rights. Cases such as *Schecker and Eifert*,[120] *Melloni*,[121] *Sky Österreich,*[122] *Schwarz*,[123] and *Digital Rights*[124] demonstrate that the ECJ does not limit itself to ascertaining whether the EU measure in question is manifestly inappropriate to attain the objectives it pursues. On the contrary, the ECJ applies a rather strict version of the principle of proportionality. As a matter of fact, a joint reading of *ZZ* and *Kadi II* suggests that the ECJ applies a strict version of that principle regardless of whether the limitation on the exercise of a fundamental right in question is grounded in EU or national law.[125] There are no double-standards when balancing fundamental rights against objectives of general interest.[126]

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115 TEU, art 5(4).

116 See Schütze (n 5) 267. See also T. von Danwitz, 'Thoughts on Proportionality and Coherence in the Jurisprudence of the Court of Justice' in P. Cardonnel, A. Rosas, and N. Wahl (eds), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh* (Hart Publishing 2012) 371.

117 See Tridimas (n 71) 139.

118 Ibid. However, see judgment in Case C-58/08 *Vodafone and Others* EU:C:2010:321, para 51 and Case C-176/09 *Luxembourg v Parliament and Council* EU:C:2011:290, paras 66–72.

119 See judgments in Case C-58/08 *Vodafone and Others* (n 118) paras 51 and 52, and Case C-508/13 *Estonia v Parliament and Coun*cil EU:C:2015:403, para 29.

120 See Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert* (n 61) para 77 (referring to judgment in Case C-73/07 *Satakunnan Markkinapörssi and Satamedia* EU:C:2008:727, para 56, where the ECJ held that: 'derogations and limitations in relation to the protection of personal data must apply only in so far as is strictly necessary').

121 See Case C-399/11 *Melloni* (n 59) paras 51–53.

122 See Case C-283/11 *Sky Österreich* (n 57) paras 54–57.

123 See Case C-291/12 *Schwarz* (n 61).

124 Judgment in Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland* EU:C:2014:238.

125 Judgments in Case C-300/11 *ZZ* EU:C:2013:363 and Joined Cases C-584/10 P, C-593/10 P, and C-595/10 P *Commission and Others v Kadi (Kadi II)* EU:C:2013:518.

126 See also Joined Cases C-293/12 and C-594/12 *Digital Rights* (n 124) and judgment in Joined Cases C-203/15 and C-698/15 *Tele2 Sverige and Watson and Others* EU:C:2016:970.

As the ECJ observed in the *Digital Rights* case, the more extensive and serious an interference with fundamental rights is, the less discretion the EU legislator enjoys and the stricter judicial scrutiny will be.[127] In that case, the ECJ was asked, in essence, to examine whether Directive 2006/24[128] was valid in the light of Articles 7, 8, and 52(1) of the Charter. That Directive sought to 'harmonise Member States' provisions concerning the retention, by providers of publicly available electronic communications services or of public communications networks, of certain data[129] which are generated or processed by them, in order to ensure that the data are available [to the competent national authorities] for the purpose of the prevention, investigation, detection, and prosecution of serious crime, such as organised crime and terrorism, in compliance with the rights laid down in Articles 7 and 8 of the Charter'.[130] At the outset, the ECJ noted that Directive 2006/24 interfered with the fundamental rights laid down in Articles 7 and 8 of the Charter. Next, it concurred with the EU legislator in that Directive 2006/24 pursued two objectives of general interest recognized by the EU, namely 'the fight against international terrorism in order to maintain international peace and security' and 'the fight against serious crime in order to ensure public security'. As to the principle of proportionality, the ECJ found that the retention of data in connection with electronic communications was indeed an appropriate means of attaining the objective pursued by Directive 2006/24, as such retention was indeed a valuable tool for criminal investigations.[131] However, as regards the necessity of the measure, it held that, since Directive 2006/24 entailed a wide-ranging and particularly serious interference with the fundamental rights to private life, 'derogations and limitations in relation to the protection of personal data must apply only in so far as is strictly necessary'.[132] This meant that, when adopting Directive 2006/24, the EU legislator was under 'the obligation to lay down clear and precise rules governing the extent of the interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter'.[133] The ECJ considered that the EU legislator had failed to do so.[134]

(3) The Principle of Sincere Cooperation

In accordance with the principle of sincere cooperation, which is now enshrined in Article 4(3) TEU, 'the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties'. As Halberstam notes, that principle entails that both the EU and its Member States 'must temper [their] political self-interest with a general concern for the [EU] enterprise as a whole'.[135] It can thus be construed as an expression

[127] Joined Cases C-293/12 and C-594/12 *Digital Rights* (n 124) para 47, drawing on *S and Marper v. United Kingdom* (European Court of Human Rights [GC], nos 30562/04 and 30566/04, para 102, ECHR 2008-V). In addition, where an EU measure limits the exercise of a fundamental right with such intensity that it compromises the essence of that right, the ECJ will annul such an EU measure. This is because that measure is, by definition, disproportionate. See Case C-362/14 *Schrems* (n 55) para 94.

[128] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, [2006] OJ L106/54.

[129] See Joined Cases C-293/12 and C-594/12 *Digital Rights* (n 124) para 26. Those data included: 'data necessary to trace and identify the source of a communication and its destination, to identify the date, time, duration and type of a communication, to identify users' communication equipment, and to identify the location of mobile communication equipment, data which consist, inter alia, of the name and address of the subscriber or registered user, the calling telephone number, the number called and an IP address for Internet services'.

[130] Ibid para 24.

[131] Ibid para 49.

[132] Ibid para 52.

[133] Ibid para 65.

[134] Ibid paras 66 ff.

[135] D. Halberstam, 'Of Power and Responsibility: The Political Morality of Federal Systems' (2004) 90 *Virginia Law Review* 731, 736. See generally M. Klamert, *The Principle of Loyalty in the EU* (Oxford University Press 2014).

of 'Union solidarity' or 'federal loyalty',[136] akin to that provided for by certain national constitutions (eg the concept of *Bundestreue*) but different to the public international law principle of good faith.[137]

Whilst also binding upon the EU institutions,[138] the ECJ has mostly relied on the principle of sincere cooperation with a view to imposing positive and negative obligations on the Member States.[139] Positively, that principle imposes a duty of care when Member States are fulfilling their obligations under the Treaties and a duty to cooperate with the EU institutions. It also imposes a duty of mutual assistance between the Member States.[140] Negatively, Member States must refrain from taking any action that might jeopardize the EU's interests.

Notably, the ECJ has had recourse to the principle of sincere cooperation in order to render the decentralized application of EU law by national authorities effective. That principle has given real meaning to the principle of effective judicial protection.[141] It is worth recalling that, in the absence of EU harmonization, it is for EU law to provide the right and for national law to provide the remedy. This is known as the principle of national procedural autonomy. However, by relying on the principle of sincere cooperation, the ECJ has circumscribed the principle of national procedural autonomy in two ways. First, Member States may not discriminate against actions based on EU law (the principle of equivalence). Secondly, they may not render the enforcement of that law 'excessively difficult or virtually impossible' (the principle of effectiveness).[142] In addition, that principle also obliges Member States to remedy lacunae that would run counter to the principle of effective judicial protection.[143] However, it is worth noting that the Lisbon Treaty has introduced a specific Treaty provision, namely paragraph 2 of Article 19 TEU, according to which Member States must 'provide remedies sufficient to ensure effective legal protection in the fields covered by [EU] law'. As with certain other Treaty provisions,[144] Article 19 TEU may be seen as a *lex specialis* by reference to Article 4(3) TEU, since it gives concrete expression to the principle of sincere cooperation in the particular field of judicial remedies.[145] This shows that the ECJ will have recourse to the principle of sincere cooperation as long as the EU law obligation at issue cannot be grounded in another Treaty provision, ie that principle has a residual character.

By making reference to the principle of sincere cooperation, the ECJ has also enhanced the implementation of EU directives. For example, the ECJ referred to that principle when ruling that EU law requires the Member States to which a directive is addressed to refrain, during the period laid down therein for its implementation, from adopting measures liable

[136] See Lenaerts and Van Nuffel (n 38) 148.

[137] G. De Baere and T. Roes, 'EU Loyalty as Good Faith' (2015) 64 *International and Comparative Law Quarterly* 829.

[138] See eg the judgment in Case C-319/97 *Kortas* EU:C:1999:272, paras 35–36.

[139] See TEU, art 4(3) paras 1 and 2.

[140] See eg order in Case C-2/88 IMM *Zwartveld and Others* EU:C:1990:440.

[141] J. Temple Lang, 'The Principle of Loyal Cooperation and the Role of the National Judge in Community, Union and EEA Law' (2006) *ERA Forum* 476.

[142] See the judgments in Case 33/76 *Rewe-Zentralfinanz and Rewe-Zentral* EU:C:1976:188, para 5; and Case 45/76 *Comet* EU:C:1976:191, para 12.

[143] See eg judgments in Joined Cases C-6/90 and C-9/90 *Francovich and Others* EU:C:1991:428, para 35; and Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* EU:C:1996:79. See also judgment in Case C-50/00 P *Unión de Pequeños Agricultores v Council* EU:C:2002:462.

[144] See eg TFEU, art 92 (judgment in Case 195/90 *Commission v Germany* C- EU:C:1992:219, para 36); TFEU, art 325 (judgment in Case C-186/98 *Nunes and de Matos* EU:C:1999:376, para 13); and TFEU, art 344 (judgment in Case C-459/03 *Commission v Ireland (MOX Plant)* EU:C:2006:345, para 169).

[145] Cf Case C-583/11 P *Inuit Tapiriit Kanatami and Others v Parliament and Council* (n 79) paras 100 ff, compared with Case C-50/00 P *UPA v Council* (n 143).

seriously to compromise the result prescribed.[146] In the light of that principle, Member States are also required to interpret, as far as possible, national law in the light of the wording and purpose of EU directives.[147]

Moreover, the principle of sincere cooperation has played an important role in the area of external relations. For example, where the EU and the Member States conclude a mixed agreement, the principle of sincere cooperation prescribes duties of mutual consultation and communication.[148] It also prevents Member States from acting in an international arena where such action would adversely affect the EU's internal decision-making process.[149]

Most importantly, the principle of sincere cooperation has enabled the ECJ to discover principles which are 'inherent in the system of the Treaties on which the European Union is based'.[150] According to Klamert, that principle has thus contributed to the 'constitutionalisation' of the Treaties.[151]

(4) The Principle of National (Constitutional) Identity

Article 4(2) TEU provides that the EU 'shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government'. Some scholars have read that Treaty provision as a limit to the absolute primacy of EU law.[152] This would mean, for example, that where secondary EU legislation is incompatible with a constitutional principle that enshrines the very identity of a Member State, the former would not prevail over the latter. The problem with that reading of Article 4(2) TEU is that it calls into question the uniform application of EU law, as it would give rise to situations where EU law is not uniformly applied to all Member States. Arguably, this would also be at odds with the very wording of Article 4(2) TEU, which states that the EU 'shall respect the equality of Member States before the Treaties'. In this regard, other scholars argue that Article 4(2) TEU refers to the autonomous EU notion of 'statehood', understood as a concrete expression of EU public policy. This would mean that Article 4(2) TEU operates as a limit to the primacy of EU law but rather as a guarantee against a possible competence creep.[153]

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[146] Judgment in Case C-129/96 *Inter-Environnement Wallonie* EU:C:1997:628.

[147] See eg judgments in Case C-106/89 *Marleasing* EU:C:1990:395, para 8; and Joined Cases C-397 to 403/01 *Pfeiffer and Others* EU:C:2004:584, para 115.

[148] See eg Case C-459/03 *Commission v Ireland* (*MOX Plant*) (n 144).

[149] Judgment in Case C-246/07 *Commission v Sweden*(*PFOS*) EU:C:2010:203.

[150] For the principle of primacy see Case 6/64 *Costa v ENEL* (n 19) 594. For the principle of implied powers see Case 22/70 *ERTA* (n 82) para 22. For the EU principle of state liability for breach of EU law see Joined Cases C-6/90 and C-9/90 *Francovich and Others* (n 143) paras 35–36 and Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* (n 143) paras 31 and 39. For the EU principle of consistent interpretation see Joined Cases C-397 to 403/01 *Pfeiffer and Others* (n 147) paras 114–15.

[151] See K. Klamert (n 135) 64 ff.

[152] See generally E. Cloots, *National Identity in EU Law* (Oxford University Press 2015). See also L. Besselink, 'National and Constitutional Identity before and after Lisbon' (2010) 6 *Utrecht Law Review* 36 (who argues that Article 4(2) TEU is an 'exception to the primacy of EU law [that] seem[s] to be restricted to issues of constitutional *identity*, which would suggest that constitutional provisions which are not fundamental and hence do not contribute to the very identity of the constitution do not share in that privileged position *vis-à-vis* EU law'); A. von Bogdandy and S. Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' (2011) 48 *Common Market Law Review* 1417, 1419 (who posit that: 'Article 4(2) TEU …… provides a perspective for overcoming the idea of absolute primacy of EU law and the underlying assumption of a hierarchical model for understanding the relationship between EU law and domestic constitutional law, because this provision endorses a pluralistic vision of the relationship between EU law and domestic constitutional law').

[153] See B. Guastaferro, 'Beyond the *Exceptionalism* of Constitutional Conflicts: The Ordinary Functions of the Identity Clause' (2012) 31 *Yearbook of European Law* 263 (who reads TEU Article 4(2) as a provision that does not limit the primacy of EU law, but seeks to contain the EU 'competence creep'. She also argues

To date, the ECJ has not examined the validity of secondary EU legislation in the light of Article 4(2) TEU. That Article has, however, been relied upon by the Member States when justifying a derogation from the fundamental freedoms and/or the Treaty provisions on EU citizenship.[154] The ECJ has recognized that Article 4(2) TEU includes, for example, the status of a state as a republic, the protection of the official national language, and the protection of regional and local self-government. However, in *O'Brien*, the ECJ ruled that the application of EU social legislation to part-time judges remunerated on a daily fee-paid basis '[could not] have any effect on national identity'.[155] Moreover, cases such as *Runevič-Vardyn and Wardyn* and *Las* show that where a Member State seeks to protect its identity by derogating from the substantive law of the EU, it must comply with the principle of proportionality. The protection of the national identity of the Member States is not an absolute value, but must be weighed against other constitutional interests of the EU.[156]

(5) Within and beyond the Bounds of the Principle of Conferral

The concept of federalism, understood as the balance of power between the EU and its Member States, is broader than the principle of conferral alone. The reason is twofold.

First, federalism operates in areas of EU law that indisputably fall within the competence of the EU. In addition to drawing the line between EU and national competences, federalism defines the relationship between the two levels of governance when they both take action in the same policy field. For instance, when examining whether a national measure conflicts with EU law, the ECJ is, at the same time, determining the extent to which the regulatory competence of the Member States is to be limited. The doctrine of 'pre-emption' plays a key role in this respect.

As Schütze notes, the ECJ has not yet developed a doctrine of pre-emption akin to that of the US Supreme Court, which would provide a theoretical framework capable of identifying and classifying normative conflicts between EU law and national law.[157] In particular, unlike the US Supreme Court, the ECJ has not put forward a set of constitutional presumptions in favour or against 'implied pre-emption' depending on the subject matter involved.[158] However, he rightly observes that three different types of pre-emption can nevertheless be identified in the case law of the ECJ.[159] First, field pre-emption relates to situations where it is not necessary for the ECJ to examine whether there is an actual normative conflict between the national measure at issue and EU law, since it suffices for that measure to fall within a

that the expression 'national identities' laid down in TEU Article 4(2) should not be read as a synonym of 'constitutional identity' as defined by national law. In her view, such expression should be 'coupled' with existing concepts of EU law, such as public policy. Finally, the author supports the contention that normative conflicts between national constitutional law and EU law are rather exceptional. Accordingly, the application of TEU Article 4(2) should not be limited to exceptional cases, but should regulate the 'ordinary functioning of EU law' by helping to improve competence monitoring). See also S. Rodin, 'National Identity and Market Freedoms after the Treaty of Lisbon' (2011) 7 *Croatian Yearbook of European Law and Policy* 11, 41.

[154] See judgments in Case C-208/09 *Sayn-Wittgenstein* (n 68) para 92; Case C-391/09 *Runevič-Vardyn and Wardyn* EU:C:2011:291, para 86; Case C-51/08 *Commission v Luxembourg* EU:C:2011:336, para 124; Case C-202/11 *Las* EU:C:2013:239, para 26; and Case C-156/13 *Digibet and Albers* EU:C:2014:1756, para 34.

[155] Judgment in Case C-393/10 *O'Brien* EU:C:2012:110, para 49.

[156] For a further discussion see M. Safjan, 'Between *Mangold* and *Omega*: Fundamental Rights versus Constitutional Identity' (2012) *Il Diritto dell'Unione Europea* 437.

[157] See Schütze (n 5) 363, and R. Schütze, 'Supremacy without Pre-emption? The Very Slowly Emergent Doctrine of Community Pre-emption' (2006) 43 *Common Market Law Review* 1023.

[158] For a comparative analysis see A. Amedeo, 'The Doctrine of Union Preemption in the EU Internal Market: Between *Sein* and *Sollen*' (2010–2011) 17 *Columbia Journal of European Law* 477.

[159] See Schütze (n 5) 365 (referring to the judgment in Case 148/78 *Ratti* EU:C:1979:110).

regulatory field already occupied by EU law.[160] Secondly, conflict pre-emption describes situations where a national measure 'somehow interferes with the proper functioning or impedes the objectives [sought by the EU legislator]'.[161] Thirdly, and last, rule pre-emption relates to a concrete form of conflict where the national measure at issue 'literally contradicts a *specific* [EU] rule'.[162] Logically, there is a correlation between the type of pre-emption and the type of competences enjoyed by the EU. For example, where the EU enjoys exclusive competences, the ECJ would tend to interpret the EU law provision in question in the light of a 'field pre-emption' rationale. Conversely, in areas where harmonization is excluded or where the Treaty only provides for EU competence to carry out actions to support, coordinate, or supplement the actions of the Member States, without thereby superseding their competence in these areas, strong constitutional arguments militate against interpreting the EU law provision in question as an instance of field pre-emption.

Secondly, federalism also takes place outside the confines of the principle of conferral.[163] Substantive law matters falling within the competence of the Member States may be affected by the Treaty provisions on non-discrimination on grounds of nationality, free movement, EU citizenship, or on competition law.[164] Indeed, regardless of the substantive area of national law involved (eg education, family law, direct taxation), those Treaty provisions operate as limits on the exercise of the regulatory and taxation-powers of the Member States. In that regard, the ECJ has time and again held that, where a given matter falls within the competence of the Member States, EU law does not deprive Member States of that competence. However, in the exercise of such a competence, Member States must comply with EU law. The same applies to national procedural rules which have not been subject to harmonization. Those rules are indeed 'circumscribed' by the EU principles of equivalence and effectiveness. All of this shows that no area of national law—not even areas traditionally reserved to the Member States—remains a safe haven.[165]

(6) Mutual Trust and Mutual Recognition

Moreover, EU federalism is not limited to defining the principles governing the relationship between the EU and its Member States, given that EU law also defines 'interstate' relationships. Notably, in areas where EU law applies, Member States must trust each other.[166] In Opinion 2/13, the ECJ explained the constitutional origins of the principle of mutual trust. It held that the 'essential characteristics of EU law have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other'.[167] That structured network is 'based on the fundamental premis[e] that each Member State shares with all the other Member States, and recognizes that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU',[168] at the heart of which the fundamental rights recognized by the Charter are.[169] According to the ECJ, 'That premis[e] implies and justifies the existence of

[160] See Schütze (n 5) 365 (referring to judgment in Case 31/78 *Bussone* EU:C:1978:217).
[161] See Schütze (n 5) 365, 366 (referring to judgment in Case C-11/92 *Gallaher and Others* EU:C:1993:262).
[162] Ibid.
[163] See generally K. Lenaerts, 'Federalism and the Rule of Law: Perspectives from the European Court of Justice' (2010) 39 *Fordham International Law Journal* 1338.
[164] This is known in French academia as 'la théorie de l'encadrement'. See K. Lenaerts and L. Bernardeau, 'L'encadrement communautaire de la fiscalité directe' (2007) *Cahiers de droit européen* 19.
[165] Opinion of AG Tesauro in Case C-120/95 *Decker* EU:C:1997:399, para 17.
[166] K. Lenaerts, 'The Principle of Mutual Recognition and the Protection of Fundamental Rights in the Area of Freedom, Security and Justice' (2015) *Il Diritto dell'Unione Europea* 525.
[167] See Opinion 2/13 (n 21) para 167.
[168] Ibid para 168.
[169] Ibid para 169.

mutual trust between the Member States that those values will be recognized and, therefore, that the law of the EU that implements them will be respected'.[170]

Drawing on its previous rulings in *NS* and *Melloni*,[171] the ECJ went on to provide a definition of the principle of mutual trust. That passage of the Opinion merits quotation in full: '[t]hat principle requires, particularly with regard to the [AFSJ], each of those states, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law'.[172] In the light of that definition of the principle of mutual trust, the ECJ inferred that the Member States, when implementing EU law, are required to presume that fundamental rights have been observed by the other Member States. That presumption imposes two negative obligations on the Member States. First, they may 'not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law'.[173] Secondly, 'save in exceptional cases', Member States are prevented from 'check[ing] whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU'.[174]

It also follows from Opinion 2/13 that mutual trust must not be confused with 'blind trust'. The principle of mutual trust does not establish a conclusive presumption of compliance with the fundamental rights recognized in the Charter, given that such a presumption may, 'in exceptional cases', be subject to limitations. For example, as the *NS*, *CK,* and *Aranyosi and Căldăraru* judgments illustrate, those exceptional cases may arise where the national measure in question—be it a decision to transfer an asylum seeker to the Member State responsible under the Dublin System or the execution of a European Arrest Warrant—runs the risk of violating Article 4 of the Charter.

For its part, the principle of mutual recognition gives concrete expression to the principle of mutual trust, as it presupposes mutual trust and comity among the national judiciaries.[175] Moreover, there are two versions of that same principle. Whilst in the context of the internal market, the principle of mutual recognition supports individual freedom, in the AFSJ it is often the other way around: that principle limits individual freedom.[176] In order to establish the internal market, the principle of mutual recognition was construed as a legal tool that enabled economic operators to exercise an economic activity in the *host* Member State in accordance with the more advantageous standards of the *home* Member State. By virtue of that principle, economic operators are thus freed from the double burden of having to comply with two different sets of standards.[177] Conversely, in favouring the extraterritorial application of judicial decisions in civil or criminal matters that may involve the application of coercive measures, such as a judicial decision ordering the return of a child or an arrest warrant, the principle of mutual recognition contributes to the effective exercise of public power by the Member States. In so doing, that principle limits individual freedom. That is why

[170] Ibid para 168 (emphasis added).

[171] Judgment in Joined Cases C-411/10 and C-493/10 *NS* EU:C:2011:865, paras 78–80, and Case C-399/11 *Melloni* (n 59) paras 37 and 63.

[172] See Opinion 2/13 (n 21) para 191.

[173] Ibid para 192.

[174] Ibid.

[175] L. Bay Larsen, 'Some Reflections on Mutual Recognition in the Area of Freedom, Security and Justice' in P. Cardonnel, A. Rosas, and N. Wahl (eds), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh* (Hart Publishing 2012) 140, 148.

[176] See M. Möstl, 'Preconditions and Limits of Mutual Recognition' (2010) 47 *Common Market Law Review* 405; and C. Janssens, *The Principle of Mutual Recognition in EU Law* (Oxford University Press 2013).

[177] See C. Barnard, *The Four Freedoms* (4th edn, Oxford University Press 2013) 93 ff.

the principle of mutual recognition in the AFSJ is subject to stricter conditions and limits. Notably, limitations on the exercise of fundamental rights that arise from that principle must comply with Article 52(1) of the Charter.[178]

C. The Principle of Institutional Balance

Unlike the classical nation-state model of separation of powers, at EU level the legislative, executive, and judicial branches of government are not vested in three separate departments.[179] Horizontally, legislative and executive functions are shared between the European Parliament, the Council, and the Commission. Vertically, the executive function is also shared between the EU institutions and the Member States. In addition, unlike the US federal system, the EU relies on an integrated judiciary,[180] in which judicial power to enforce EU law is shared between EU and national courts. Both types of courts must, in the exercise of their respective jurisdiction, ensure that in the interpretation and application of the Treaties the law is observed.[181]

When applied to the EU, the principle of institutional balance does not mean 'a balanced distribution of powers' whereby each EU institution stands on an equal footing.[182] Instead, that principle must be construed in accordance with the carefully calibrated horizontal allocation of powers determined by the authors of the Treaties. That is why that principle is 'dynamic', since the precise details of that balance are subject to change where Treaty amendments grant new powers to one of the EU institutions (notably to the European Parliament). Additionally, the principle of institutional balance must be examined in the context of the particular Treaty provision applicable to the case at hand, since that provision determines the EU political actors involved as well as the decision-making process. Accordingly, that principle and the concept of 'legal basis' go hand-in-hand.

Moreover, unlike the US federal system where the political branches of government must, in principle, settle their disputes outside the federal courtroom, inter-institutional conflicts are, more often than not, resolved before the ECJ. It follows that since political 'checks and balances' do not suffice to ensure compliance with the principle of institutional balance as it operates at EU level, that principle must be protected judicially.

In essence, the role of the ECJ is thus to guarantee that each EU institution enjoys independence when exercising its powers; that each EU institution does not unconditionally transfer its powers to other EU institutions, bodies or agencies, and that it does not encroach upon the powers of the other EU institutions.[183]

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[178] See Case C-399/11 *Melloni* (n 59) paras 47–54. See in this regard K. Lenaerts, 'La vie après l'avis: Exploring the Principle of Mutual (Yet Not Blind) Trust' (2017) 54 *Common Market Law Review* 805.

[179] K. Lenaerts, 'Some Reflections on the Separation of Powers in the European Community' (1991) 28 *Common Market Law Review* 11.

[180] D. Halberstam, 'Comparative Federalism and the Role of the Judiciary' in K. Whittington, D. Kelemen, and G. Caldeira (eds), *The Oxford Handbook of Law and Politics* (Oxford University Press 2008) 142.

[181] See Opinion 1/09 (n 31) para 69.

[182] J.-P. Jacqué, 'The Principle of Institutional Balance' (2004) 41 *Common Market Law Review* 383.

[183] See Lenaerts and Van Nuffel (n 38) 636. For example, in Case C-409/13 *Council v Commission* EU:C:2015:217, paras 76 and 83, the ECJ recognized that the Commission had the power to decide to alter its proposal or even, if need be, withdraw it, as long as the Council has not acted. However, that power cannot confer upon the Commission a right of veto in the conduct of the legislative process, such a right being contrary to the principles of conferral of powers and institutional balance. Accordingly, the ECJ ruled that 'if the Commission, after submitting a proposal under the ordinary legislative procedure, decides to withdraw that proposal, it must state to the Parliament and the Council the grounds for the withdrawal, which, in the event of challenge, have to be supported by cogent evidence or arguments'. For example, the Commission would be entitled to withdraw a proposal for a legislative act 'where an amendment planned by the Parliament and the

(1) The Principle of Institutional Balance and the European Parliament

Historically, the principle of institutional balance has played an important role in the gradual empowerment of the European Parliament. As the European Parliament is the only political institution in the European Union whose members have, since 1979, been 'elected for a term of five years by direct universal suffrage in a free and secret ballot', the judicial protection of its prerogatives is of paramount importance. Indeed, cases such as *Roquette Frères v Council*,[184] *Les Verts*,[185] *Chernobyl*,[186] and *Titanium Dioxide*[187] demonstrate that the ECJ has endeavoured to protect the powers that the Treaties have conferred on the European Parliament. In so doing, the ECJ has not only invoked the principle of institutional balance,[188] but also sought to enhance 'the fundamental democratic principle that the people should take part in the exercise of power through the intermediary of a representative assembly'.[189]

It is worth noting that with each reform of the Treaties on which the Union is founded, the European Parliament has steadily gained legislative power. Conversely, the number of cases in which the European Parliament has brought an action for annulment seeking to protect its prerogatives has diminished.[190] This may be explained by the fact that, since the co-decision procedure — renamed the 'ordinary legislative procedure' in its new form — is now the standard legislative procedure for passing legislation at EU level,[191] there are fewer conflicts regarding the appropriate choice of the legal basis in the Treaties for such legislation since that choice only rarely affects the legislative procedure that must be followed.

Obviously, one cannot assume from this general tendency that the European Parliament no longer ever brings actions for annulment against acts adopted by the Council on the ground that the latter erred in its choice of the legal basis for that act. For example, changes brought about by Treaty amendments that result in the empowerment of the European Parliament in areas in which it previously had no say may occasionally give rise to litigation. By bringing judicial proceedings in such cases, the European Parliament is, in effect, asking the ECJ to define the scope of its new powers.[192]

Council distorts the proposal … in a manner which prevents [it from achieving its] objectives … and which, therefore, deprives it of its raison d'être'.

184 Judgment in Case 138/79 *Roquette Frères v Council* EU:C:1980:249.

185 Judgment in Case 294/83 *Les Verts v Parliament* EU:C:1986:166.

186 Judgment in Case C-70/88 *Parliament v Council* EU:C:1990:217.

187 Judgment in Case C-300/89 *Commission v Council (Titanium Dioxide)* EU:C:1991:244.

188 See TEU art 13(2).

189 *Roquette Frères v Council* (n 184) para 33; *Titanium Dioxide* (n 187) para 20; and judgments in Case C-130/10 *Parliament* v *Council* EU:C:2012:472, para 81, and Case C-263/14 *Parliament v Council* EU:C:2016:435, para 70.

190 See T. Tridimas and G. Gari, 'Winners and Losers in Luxembourg: A Statistical Analysis of Judicial Review before the European Court of Justice and the Court of First Instance (2001–2005)' (2010) 35 *European Law Review* 131, 172 (who point out that: '[i]n the 1990s, the European Parliament was an active litigant following a tactical litigation policy under which it challenged practically any policy measure which allegedly breached its prerogatives even if it agreed with its substantive provisions. But as successive [T]reaty amendments increased its legislative powers, the need to rely on litigation to influence the legislative process steadily declined and the Parliament now finds itself much more often in the role of the defendant than in the role of the applicant').

191 See TFEU art 294.

192 See eg judgments in Case C-130/10 *Parliament v Council* EU:C:2012:472 (new powers of the Parliament under the AFSJ); Case C-490/10 *Parliament v Council* EU:C:2012:525 (new TFEU art 194); Case C-658/11 *Parliament v Council* EU:C:2014:2025 (changes brought about by the Lisbon Treaty concerning the negotiation and conclusion of international agreements); Case C-65/13 *Parliament v Commission* EU:C:2014:2289 (the distinction between 'delegated acts' [TFEU art 290] and 'implementing acts' [TFEU art 291] introduced by the Lisbon Treaty), and Joined Cases C-103/12 and C-165/12 *Parliament and Commission v Council* EU:C:2014:2400; and Joined Cases C-124/13 and C-125/13 *Parliament and Commission v Council* EU:C:2015:790 (new powers of the Parliament under the Common Fisheries Policy).

(2) The Principle of Institutional Balance as Applied to the ECJ

The principle of institutional balance not only applies to the political institutions of the EU but also to the ECJ.[193] By virtue of that principle, the ECJ must draw the dividing line between law and politics given that, in so doing, it is actually drawing the contours of its own legitimacy. The drawing of that line is, by no means, a novel question.[194] As Chief Justice Marshall famously articulated more than 200 years ago, in *Marbury v. Madison*,[195] whilst '[i]t is emphatically the province and duty of the Judicial Department to say what the law is', acts of a political nature 'can never be examinable by the Courts'.[196]

When the ECJ interprets EU legislation, it must ensure that the latter complies with primary EU law. However, it may not replace the choices made by the EU legislature by its own.[197] The ECJ is called upon to uphold simultaneously the principles of hierarchy of norms and of institutional balance. If it is not possible to interpret an act of secondary EU law in a way that accommodates those two principles, then the ECJ will have no choice but to annul that act or to declare it invalid.

In this regard, it is worth noting that the ECJ will first do everything within its jurisdiction to interpret secondary EU law in accordance with primary EU law.[198] It follows that, in so far as the ECJ does not interpret secondary EU law in a way that is *contra legem*,[199] the annulment or declaration of invalidity of an act adopted by the EU legislator operates as the *ultima ratio* in order to uphold the rule of law.[200] However, if the contested provision of secondary EU law not only conflicts with primary EU law but is also inconsistent with the objectives pursued by the EU legislator, then the ECJ will have fewer difficulties in annulling or invalidating that provision.[201] In addition, when the ECJ is called upon to interpret secondary EU law, it must respect the framework laid down by the EU legislator. Hence, contrary to primary EU law, which must be interpreted as a 'living constitution' capable of coping with societal changes, the ECJ must refrain from rewriting secondary EU law, even if the latter is outdated or no longer fulfils the objectives pursued. Indeed, the role of the ECJ is neither to anticipate nor to pre-empt policy choices that fall within the purview of the EU legislator.[202]

Moreover, the intensity of judicial review and the degree of discretion enjoyed by the EU political institutions go hand-in-hand. The wider the margin of discretion enjoyed by an EU institution is, the less intense judicial scrutiny will be. The EU political institutions enjoy discretionary powers where they are called upon to weigh different interests and EU policies; where the adoption of EU measures is based on technical and expert knowledge that the EU Courts lack, and where the policy choices made by the EU political institutions involve

193 See eg Case C-70/88 *European Parliament v Council* (n 186) para 23.
194 See Lenaerts (n 68) 29.
195 See *Marbury v Madison* (n 1).
196 Ibid.
197 See Opinion of AG Tizzano in Case C-12/03 P *Commission v Tetra Laval* EU:C:2004:318, paras 86 and 89.
198 K. Engsig Sorensen, 'Reconciling Secondary Legislation with the Treaty Rights of Free Movement' (2011) 36 *European Law Review* 339, 345 (who considers that reconciliatory interpretation is 'less likely to lead to an inter-institutional conflict and more elegant in resolving the issues without making it necessary to adopt new legislation'). See also K. Lenaerts and J A. Gutierrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice' (2014) *Columbia Journal of European Law* 3.
199 See by analogy judgment in Case C-212/04 *Adeneler and Others* EU:C:2006:443, paras 110–11.
200 See eg *Vatsouras and Koupatantze* (n 45).
201 Judgment in Case C-236/09 *Association belge des Consommateurs Test-Achats and Others* EU:C:2011:100.
202 Judgment in Case C-211/08 *Commission v Spain* EU:C:2010:340.

complex economic assessments.[203] This shows that discretion may arise where the EU Courts recognize the higher institutional capacity of the EU political process to adopt a certain policy decision.

However, as *Kadi I* and *II* demonstrate, no matter that falls within the scope of EU law is immune from judicial review.[204] Otherwise, the very essence of the principle of effective judicial protection would be called into question. This shows that there is no 'EU political question doctrine'.[205] In fact, where in adopting a measure the EU political institutions enjoy discretionary powers as to the assessment of material elements, the EU Courts' role is to ensure that the decision-making process that led to the adoption of that measure incorporated sufficient procedural guarantees to achieve a rational policy outcome and to guarantee that the interests of all stakeholders were duly taken into account.[206]

(3) New Challenges to the EU Institutional Framework

Recent developments in the case law of the ECJ have demonstrated that the principle of institutional balance must be interpreted in a dynamic fashion so as to cope with a changing legal environment. In that regard, we would like to look at two important changes undergone by the EU institutional framework, namely the proliferation of EU agencies and the conclusion of international agreements by some (but not all) Member States that, whilst not forming part of the EU legal order, are closely linked to it.

(a) EU Agencies Over the last decade, the EU institutional framework has witnessed significant change as a result of the proliferation of EU agencies. Whilst most of those agencies have been entrusted with the task of collecting and disseminating information, some agencies have been given decision-making powers.[207] Legal scholars agree that *Meroni*[208]—an ECSC case decided in the late 1950s—is the leading authority determining the powers that can be conferred on EU agencies. This is so in spite of the fact that *Meroni* did not involve the conferral of powers on an EU agency, but on entities governed by private law. In that case, the ECJ drew a distinction between, on the one hand, a delegation of powers that involves clearly defined executive powers whose exercise can consequently be subject to strict review in the light of objective criteria determined by the delegating authority and, on the other hand, a delegation that involves a 'discretionary power implying a wide margin of discretion which may, according to the use which is made of it, make possible the execution of actual economic policy'.[209] Given that a delegation of the first kind cannot appreciably alter the consequences attached to the exercise of the powers concerned, such a delegation does not

[203] See in this regard A. Fritzsche, 'Discretion, Scope of Judicial Review and Institutional Balance in European Law' (2010) 47 *Common Market Law Review* 361.

[204] See Joined Cases C-402/05 P and C-415/05 P *Kadi I* (n 31) para 326. See also judgment in Joined Cases C-584/10 P, C-593/10 P, and C-595/10 P *Commission v Kadi (Kadi II* (n 125), para 97 (holding that: 'the [EU] Courts … must, in accordance with the powers conferred on them by the Treaties, ensure the review, in principle the full review, of the lawfulness of all Union acts in the light of the fundamental rights forming an integral part of the [EU] legal order, including review of such measures as are designed to give effect to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations').

[205] See *Baker v Carr*, 369 US 186 (1962). See also A. M. Bickel, *The Least Dangerous Branch* (2nd edn, Yale University Press 1962).

[206] For further discussion see Lenaerts (n 112). See also I. Bar-Siman-Tov, 'Semiprocedural Judicial Review' (2012) 6 *Legisprudence* 271 and A. Alemanno, 'The Emergence of the Evidence-based Judicial Reflex: A Response to Bar-Siman-Tov's Semiprocedural Review' (2013) 1 *The Theory and Practice of Legislation* 327.

[207] See eg European Union Intellectual Property Office (EUIPO), the European Aviation Safety Agency (EASA), and the European Chemicals Agency (ECHA).

[208] Judgment in Case 9/56 *Meroni v High Authority* EU:C:1958:7.

[209] Ibid 152 and 154.

alter the 'balance of powers' sought by the Treaties. Conversely, where a delegation of the second kind takes place, the choices of the delegator are supplanted by the choices of the delegate which brings about an 'actual transfer of responsibility' that runs counter to that balance. Additionally, in *Romano*—a case decided in the early 1980s[210]—the ECJ ruled that an administrative commission created by a Regulation may not be empowered by the Council to adopt acts 'having the force of law'. The ECJ put forward two objections to such delegation, namely, first, that it was at odds with the Commission's competence to adopt implementing measures under ex Article 155 EEC and, second, that the relevant Treaty provisions in force at that time provided no judicial remedy against decisions adopted by such an administrative commission.[211]

Logically, the question was whether the *Meroni* and *Romano* doctrines could be transposed to EU agencies or whether they had to be abandoned, or at least nuanced, to cope with the EU's ongoing process of 'agencification'. In particular, as part of the package of measures adopted to deal with the 2008 economic crisis, the EU legislator decided, in January 2011, to strengthen supervision of the EU financial system by creating three new European Supervisory Agencies (ESAs), namely the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA), and the European Securities and Markets Authority (ESMA). In this regard, some scholars have argued that the powers vested in the ESAs are too broad to be reconciled with the *Meroni* and *Romano* doctrines.[212] In their view, those powers could indeed encroach upon the powers of the Commission under Articles 290 TFEU or 291 TFEU.[213]

In *UK v Parliament and Council*, the ECJ was confronted with that very question.[214] In that case, the UK brought an action for annulment of Article 28 of Regulation No 236/2012 on short selling and certain aspects of credit default swaps.[215] That provision 'vests [ESMA] with certain powers to intervene, and by way of legally binding acts, in Member State financial markets in the event of a "threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the Union" '.[216] For example, ESMA may impose on natural and legal persons notification and disclosure obligations and prevent those persons from entering into certain transactions or subject such transactions to conditions. The UK argued that those powers were excessively broad and that measures of general application having binding legal effects on third parties could not be delegated to ESMA. However, the ECJ took a different view. It held that *Meroni* remained good law and applied it to the case at hand. It found that the powers available to ESMA under Article 28 of Regulation No 236/2012 complied with the requirements laid down in *Meroni*, since those powers were precisely delineated and amenable to judicial review in the light of the objectives established by the delegating authority.[217] By contrast, the findings of the ECJ in *Romano* had to be nuanced. First, in the light of the constitutional changes brought about by the Lisbon Treaty, notably in the

[210] Judgment in Case 98/80 *Romano* EU:C:1981:104.

[211] Ibid para 20.

[212] See eg M. Chamon, 'EU Agencies between *Meroni* and *Romano* or the Devil and the Deep Blue Sea' (2011) 48 *Common Market Law Review* 1055.

[213] Ibid 1068–70. See also N. Moloney, 'EU Financial Market Regulation after the Global Financial Crisis: "More Europe" or More Risks?' (2010) 47 *Common Market Law Review* 1317.

[214] Judgment in Case C-270/12 *United Kingdom v Council and Parliament* EU:C:2014:18.

[215] Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps, [2012] OJ L86/1.

[216] Opinion of AG Jääskinen in Case C-270/12 *United Kingdom v Council and Parliament* EU:C:2013:562, para 1.

[217] See *UK v European Parliament and Council* (n 214) para 53.

light of the first paragraph of Article 263 TFEU and Article 277 TFEU, EU agencies may adopt acts of general application which are amenable to judicial review.[218] Secondly, the ECJ noted that the Treaties contain no provision to the effect that decision-making powers may be conferred on EU agencies. However, it does not follow from that omission that the authors of the Treaties intended to establish a unique legal framework under which certain delegated and implementing powers may be attributed solely to the Commission. On the contrary, the ECJ reasoned that the EU legislator may sense to delegate powers to EU agencies: since Article 28 of Regulation No 236/2012 vested ESMA with certain decision-making powers in an area which required the deployment of specific technical and professional expertise, the ECJ wrote 'that conferral of powers does not correspond to any of the situations defined in Articles 290 TFEU and 291 TFEU'.[219]

(b) A new form of governance? Again, because of the 2008 economic crisis, a large majority of Member States believed that EU rules on budgetary discipline had to be strengthened so as to prevent future crises. Notably, the Council's determinations regarding excessive deficits should be free from political interference so that its decisions as to the existence of an excessive deficit would be based exclusively on findings of a technical nature. To that effect, the Council should defer to the more extensive institutional capabilities of the Commission. However, the 'streamlining' of the excessive deficit procedure laid down in Article 126 TFEU would arguably have required a reform of the Treaties, to which a minority of Member States was opposed.

As an alternative to that political deadlock, a group of Member States proposed to sign an international agreement whereby they would commit themselves to supporting the Commission's determinations in the framework of the excessive deficit procedure by coordinating their voting behaviour in the Council. In their view, such an alternative would free the scope of application of Article 126 TFEU from political interference, whilst ensuring compliance with the decision-making process laid down in that provision. This was in fact what 25 Member States did when in 2012 they signed the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (SCG Treaty).[220] The latter is an international agreement that seeks to foster budgetary discipline through a fiscal compact, to strengthen the coordination of their economic policies and to improve the governance of the euro area. Regarding Article 126 TFEU, Article 7 of the SCG Treaty provides that the Contracting Parties whose currency is the euro are to support the proposals or recommendations submitted by the Commission where it considers that a Member State of the EU whose currency is the euro is in breach of the deficit criterion in the framework of an excessive deficit procedure, unless a qualified majority of them votes against such proposals or recommendations (so-called 'reverse QMV').

In addition, the Member States whose currency is the euro agreed that it was necessary to create a mechanism that would manage any future financial crises should they arise notwithstanding the preventive action taken by means of new rules on budgetary discipline. To that end, in 2012, those Member States signed the Treaty establishing the European Stability Mechanism (the 'ESM Treaty') that aims to mobilize funding and provide stability support under strict conditions for the benefit of ESM Members that are experiencing, or are threatened by, severe financial problems.

[218] Ibid para 66.
[219] Ibid paras 82 and 83.
[220] The SCG Treaty entered into force 1 January 2013.

From an institutional perspective, those two international agreements, which are closely linked to the EU economic policy, make use of the EU institutions outside the EU legal framework. For example, the SCG Treaty provides that the Commission is invited to draft a report on the question whether a Contracting Party has properly implemented the 'Balanced Budget Rule' set out in Article 3(2) of the SCG Treaty. Where that is not the case, Contracting Parties may institute proceedings before the ECJ against the defaulting Contracting Party. For its part, the ESM Treaty confers new tasks on the Commission and the ECB. It entrusts the Commission with assessing requests for financial assistance. In liaison with the ECB, the tasks of the Commission also consist in assessing the urgency of those requests, negotiating a Memorandum of Understanding (MoU) that sets the conditions attached to the financial assistance granted, and monitoring compliance with the conditions attached to the financial assistance. In addition, those two institutions are to participate in meetings of the board of governors and the board of directors of the ESM as observers.

As Peers notes, the SCG and ESM Treaties can be examined from two 'dramatically conflicting perspectives' that combine both legal and policy considerations.[221] On the one hand, it can be argued that those Treaties 'serve as a means of relaunching European integration' where there is not sufficient political will to modify the Treaties themselves. They have also enabled some Member States to weather the worst economic crisis since the Second World War. In addition, those two Treaties do not seek to enter into a conflict with the EU legal order but to support and enhance it. In particular, they expressly stress the importance of ensuring consistency between their provisions and EU economic policy. Accordingly, the use of the EU institutions contribute to that end.

On the other hand, some scholars posit that those separate Treaties serve as a means of circumventing the legal requirements for amendment of the EU and FEU Treaties.[222] In addition, those two Treaties are said to undermine the 'Community method'. Where the EU political process encounters an opposing minority of Member States, the prevailing majority would, from now on, prefer to rely on this new form of inter-governmentalism, rather than to find a compromise solution. Alternatively, other scholars have observed that the Treaty provisions on enhanced cooperation could have been invoked.[223] In fact, some say that those two Treaties are also problematic from a democratic perspective. [224] First, the European Parliament plays no significant role. Secondly, both the SCG and ESM Treaties entail, for Member States in financial difficulties, the adoption of austerity measures that have a direct impact on European citizens, and in relation to which national parliaments have little say.[225] Additionally, one may criticize the 'borrowing' of the EU institutions on the ground that the principle of institutional balance precludes EU institutions from acting beyond the limits of the powers conferred on them in the Treaties.

In *Pringle*, the ECJ held that an international agreement such as the ESM Treaty was compatible with the EU legal order.[226] The approach of the ECJ was thus based on interpreting the

[221] S. Peers, 'Towards a New Form of EU law? The Use of the EU Institutions outside the EU Legal Framework' (2013) 9 *European Constitutional Law Review* 37, 40–42.

[222] See eg J. Tomkin, 'Contradiction, Circumvention and Conceptual Gymnastics: The Impact of the Adoption of the ESM Treaty on the State of European Democracy' (2013) 14 *German Law Journal* 187.

[223] See eg M. Schwarz, 'A Memorandum of Misunderstanding: The doomed road of the European Stability Mechanism and a possible way out: Enhanced cooperation' (2014) 51 *Common Market Law Review* 389.

[224] See eg K. Nicolaïdis, 'European Demoicracy and Its Crisis' (2013) 51 *Journal of Common Market Studies* 358.

[225] See Tomkin (n 222) 185 ff. See also K. T. Tuori, 'The European Financial Crisis: Constitutional Aspects and Implications' (2012) *EUI Working Papers*, LAW 2012/28, 47.

[226] See Case C-370/12 *Pringle* (n 33).

relevant provisions of the Treaties on which the EU is founded. It did not, however, base its reasoning on 'constitutional policy', ie arguments which focus on the legitimacy of this new form of governance. This was so because it is not for the judiciary but for the political process to determine whether the SCG and ESM Treaties constitute a positive way for European integration to move forward. The role of the ECJ was thus limited to making sure that the ESM Treaty did not undermine the EU *acquis*.

For the purposes of this chapter, we would like to focus on two aspects of that judgment. First, the ECJ found that the conclusion of the ESM Treaty by the Member States whose currency is the euro did not encroach upon the competences of the EU. Consequently, a Treaty amendment such as the new Article 136(3) of the TFEU was not really necessary for the conclusion of the ESM Treaty, as the power to conclude that Treaty remained with the Member States. This also meant that enhanced cooperation was not a valid alternative, since 'the provisions of the Treaties on which the Union is founded do not confer on the Union a specific competence to establish a permanent stability mechanism such as the ESM'.[227]

Secondly, the ECJ ruled that the conferral of new tasks on the Commission and the ECB by the ESM Treaty was compatible with Article 13 TEU. At the outset, it held, referring to its previous case law,[228] that Member States are entitled to entrust tasks to the EU institutions outside the EU framework, provided that the following conditions are fulfilled.[229] First, those institutions must act 'in areas which do not fall under the exclusive competence of the Union'.[230] Secondly, in addition to being compatible with the founding Treaties, 'those tasks [must] not alter the essential character of the powers conferred on those institutions by the EU and FEU Treaties'.[231] Since the activities of the ESM fell within the purview of economic policy, the conferral of new tasks on the Commission and the ECB did not concern the exclusive competences of the EU. The ECJ noted that the activities of those two institutions only committed the ESM. Most importantly, those tasks were in line with the various tasks that EU law confers on those two institutions. By ensuring the financial stability of the euro as a whole, the Commission promotes the general EU interest. In particular, its participation in negotiating the MoU ensures that the latter is consistent with EU law.[232] Regarding the ECB, the same applies. The tasks that the ESM Treaty entrusts to the ECB are consistent with its obligation to support the general economic policies of the Union and with its capacity to establish relations with international organizations.[233] Furthermore, under Article 37(2) of the ESM Treaty, the board of governors is to decide on any dispute arising between an ESM Member and the ESM, or between ESM Members, in connection with the interpretation and application of the ESM Treaty, including any dispute about the compatibility of the decisions adopted by the ESM with that treaty. Article 37(3) of the ESM Treaty provides that if an ESM Member contests the decision of the board of governors, the dispute is, in accordance with Article 273 TFEU, to be submitted to the ECJ. Thus, the question was whether Article 37(3) of the ESM Treaty complied with the requirements set out in Article

[227] Ibid para 168. See in this regard B. de Witte and T. Beukers, 'Case Note on *Pringle*' (2013) 50 *Common Market Law Review* 805, 848 (who note that 'even if a mechanism like the ESM could have been established on the basis of EU law and with funds allocated under the EU budget, this would not have been a sufficient reason to exclude the conclusion of a separate international agreement'). Cf Schwarz (n 223) 408 ff.

[228] See judgments in Joined Cases C-181/91 and C-248/91 *Parliament v Council and Commission* EU:C:1993:271, and Case C-316/91 *Parliament v Council* EU:C:1994:76.

[229] Cf P. Craig, '*Pringle* and Use of the Institutions outside the EU Legal Framework: Foundations, Procedure and Substance' (2013) 9 *European Constitutional Law Review* 263.

[230] See Case C-370/12 *Pringle* (n 33) para 158.

[231] Ibid.

[232] Ibid paras 163 and 164.

[233] Ibid para 165. See also judgment in Case C-62/14 *Gauweiler and Others* EU:C:2015:400, para 59.

273 TFEU.[234] The ECJ replied in the affirmative. First, those disputes related to 'the subject matter of the Treaties', since the conditions attached to the grant of financial assistance were, at least in part, determined by EU law.[235] Secondly, since the members of the ESM are all Member States, the ECJ noted that a dispute to which the ESM is a party was to be considered as 'a dispute between Member States' within the meaning of Article 273 TFEU.[236]

IV. The EU Principle of Democracy

For a legal order to be of a 'constitutional nature', it must not only protect individual liberty, but must also incorporate democratic elements into its fabric.[237] The present Section IV examines the principle of democracy as applied to the EU legal order. It is divided into three sections. In section A, we provide a brief description of the democratic transformation of the EU. Section B provides a theoretical framework setting out the way in which we believe that the principle of democracy should be understood in a supranational context such as the EU. In our view, democracy in a multilevel system of governance must be driven by a mutually-reinforcing relationship, whereby both sources of democratic legitimacy—ie EU citizens and the peoples of Europe organized in and by their national constitutions—complement each other. Finally, in section C, we shall argue that the ECJ has endorsed that understanding of democracy.

A. The Democratic Transformation of the EU

At the beginning of European integration, the Treaties were silent on the democratic legitimacy of the then European Economic Community. For Mancini and Keeling, at least four reasons could explain why no reference was made to the concept of 'democracy'.[238] First, they posited that traditionally international organizations founded on a treaty between states did not provide 'for much direct democracy in their decision-making apparatus'.[239] Secondly, at the outset, the transfer of national powers to the Community needed to remain under the control of the Member States. The setting up of a parliamentary assembly with real legislative powers would have made it much more difficult to control that transfer. Thirdly, in accordance with the European model of parliamentary democracy, the executive may often—de facto—impose its will on the parliament. Given that the original institutional design of the EU made it impossible to ensure that power for the executive, the authors of the Treaty of Rome believed that the role played by the parliamentary assembly needed to be limited to that of a consultative body. And fourth, the early empowerment of the European Parliament would have had a negative impact on the hard-won consensus achieved within the Council.

Unsurprisingly, the absence of any reference to the concept of 'democracy' led some scholars to argue that the Community suffered from a 'democratic deficit'.[240] Those criticisms have

[234] Under that article, the ECJ has jurisdiction in any dispute between Member States which relates to the subject-matter of the Treaties, if that dispute is submitted to it under a special agreement.

[235] See Case C-370/12 *Pringle* (n 33) para 174.

[236] Ibid para 175.

[237] See K. Lenaerts, 'The Principle of Democracy in the Case Law of the European Court of Justice' (2013) 62 *International and Comparative Law Quarterly* 271.

[238] F. Mancini and D. T. Keeling, 'Democracy and the European Court of Justice' (1994) 57 *Modern Law Review* 175, 176–77.

[239] Ibid.

[240] But see A. Moravcsik, 'Is There a "Democratic Deficit" in World Politics? A Framework for Analysis' (2002) 39 *Journal of Common Market Studies* 336 (who argues that the EU does not suffer from a fundamental democratic deficit, given that '[a]bove all, the democratic legitimacy of the EU rests on the fact that

not died down with time. On the contrary, for some scholars, they still hold true.[241] As Craig explains, the 'democratic deficit' argument revolves around four main criticisms.[242] First, there appears to be 'a disjunction between power and electoral accountability', given that electoral preferences are not translated into reshaping the policy agenda: at EU level, neither the European Council nor the Council nor the Commission—all of which play a part in policy-making — can be voted out of office by the people.[243] This allegedly shows that the EU suffers from a lack of 'input legitimacy'. In the same way, the Commission, the European Central Bank, and EU agencies play an important role in the governance of the EU without being subject to 'majoritarian' (ie elective) politics. In other words, they are independent and 'non-majoritarian' entities which do not seem to fit well with the traditional understanding of representative democracy.[244] Secondly, '[t]ransfer of competence to the EU enhances executive power at the expense of national legislatures'.[245] Indeed, a coalition government facing parliamentary opposition may decide to transfer power to the EU so as to push forward its own political preferences. The same strategy can be adopted by any national government when having to take unpopular decisions. Thirdly, until 2009, the expansion of the powers of the European Parliament was not accompanied by an equal role in supervising the way in which the Commission exercised its executive role. Fourthly, complaints were raised in relation to the lack of transparency and to the complexity of the EU decision-making apparatus.

Those criticisms were taken into account by the authors of the successive amendments to the Treaties who started to pay ever more attention to the incorporation of the concept of democracy into the EU legal fabric. Arguably, with the exception of 'the disjunction between power and electoral accountability', these Treaty amendments have significantly countered those criticisms. However, those criticisms were not addressed right away. It was not until the adoption of the Maastricht Treaty that the term 'democracy' found its way into the Treaties.[246] Article F of the 1992 Treaty on the European Union referred to 'democracy' as a principle on which the Union is founded and which is common to the Member States.[247] The Amsterdam Treaty confirmed this role of the principle of democracy in an identically worded Article 6(1) EU.[248] Currently, Articles 9 to 12 TEU give expression to the principle of democracy in the EU legal order. 'These articles are based on the main positions advanced in what is a 20 years old debate.'[249]

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nation-states remain influential, democratic and technically competent'). In a similar vein see also G. Majone, 'Europe's "Democratic Deficit": The Question of Standards' (1998) 4 *European Law Journal* 5.

[241] See A. Follesdal and S. Hix, 'Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik' (2006) 44 *Journal of Common Market Studies* 533.

[242] P. Craig, 'Integration, Democracy, and Legitimacy' in P. Craig and G. de Búrca (n 97) 30–31.

[243] See Follesdal and Hix (n 241) 547.

[244] See S. Bredt, 'Prospects and Limits of Democratic Governance in the EU' (2011) 17 *European Law Journal* 35, 39–41.

[245] See Craig (n 242) 30.

[246] A. von Bogdandy, 'The European Lesson for International Democracy: The Significance of Articles 9 to 12 EU Treaty for International Organizations' (2011) Jean Monnet Working Paper Series No 02/11 www.JeanMonnetProgram.org.

[247] Article F of the 1992 Treaty on the European Union stated that: '[t]he Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States'. There was also a reference to 'democracy' contained in the 5th Recital of the Preamble, which stated that the Member States confirmed 'their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law'.

[248] TEU art 2 largely reproduces EU ex art 6(1), replacing nonetheless the term 'principle' with the term 'value'.

[249] See von Bogdandy (n 246) 6.

In addition to formally recognizing democracy as part and parcel of EU constitutionalism, the authors of the Treaties also sought gradually to empower the European Parliament. As Article 10(2) TEU states, EU democracy rests on developing representative democracy by giving greater powers to the European Parliament. As Craig points out, 'it is not self-evident that the [European Parliament] has less power over legislation than do national parliaments'.[250] Some exceptions notwithstanding, EU law accords the European Parliament co-equal status in the legislative process with the Council. With the entry into force of the Lisbon Treaty, the co-decision procedure, renamed as the ordinary legislative procedure, was extended to new areas such as agriculture, the common commercial policy, services, asylum and immigration, the structural and cohesion funds, and the creation of specialized courts.[251] However, unlike national parliaments, the European Parliament has no right of legislative initiative; nor are its members elected strictly in accordance with the principle of proportional representation. In addition, the Lisbon Treaty sought to strengthen the role of national parliaments so as to prevent national executives from deciding to transfer powers to the EU as a means of avoiding internal opposition. That is why Article 12 TEU provides that national parliaments are entrusted with ensuring that the EU complies with the principle of subsidiarity.[252] That is also why EU law allows room for parliamentary monitoring—when provided for by national constitutions—of national governments when they act as members of the European Council or of the Council.[253]

In relation to executive law-making, it is worth noting that, in 2006, by adopting an amendment to the Secondly Comitology Decision, the Council established the regulatory procedure with scrutiny (RPS).[254] According to that procedure, the European Parliament was empowered to block a draft executive act amending non-essential elements of a basic act adopted pursuant to the co-decision procedure, provided that its decision was justified on one of the following four grounds: the draft executive act was ultra vires; it was incompatible with the aim or the content of the basic act, it failed to comply with the principle of subsidiarity; or it was in breach of the principle of proportionality.[255] Arguably, the supervisory role of the European Parliament amounted to an ex ante control of the legality of the executive act in question,[256] as it had no powers to base its intervention on political considerations. This was an important limitation that did not apply to the Council when endorsing a negative opinion of the RPS committee. That is why the authors of the Lisbon Treaty decided to remove such a limitation by laying down a 'political safeguard of democracy'.[257] Article 290 TFEU now empowers the Commission to adopt 'delegated acts', which are defined as 'non-legislative acts

[250] See Craig (n 242) 31–32.

[251] Ibid.

[252] See Protocol (No 1) on the role of National Parliaments in the European Union and Protocol (No 2) on the application of the principles of subsidiarity and proportionality.

[253] See in this regard TEU art 10(2), which states that: 'Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens'.

[254] See Council Decision 2006/512/EC of 17 July 2006 amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, [2006] OJ L200/11 (the amended 'Second Comitology Decision'). Regulation (EU) No 182/2011 art 12 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, [2011] OJ L55/13, repeals Decision 1999/468/EC.

[255] See Decision 1999/468/EC art 5a.

[256] However, the European Parliament had only three months to exercise its veto. Failing to do so, it had no option but to bring an action for annulment against the executive act in question. See eg judgment in Case C-355/10 *Parliament v Council* EU:C:2012:516, para 22.

[257] See R. Schütze, '"Delegated" Legislation in the (New) European Union: A Constitutional Analysis' (2011) 74 *Modern Law Review* 661, 663.

of general application to *supplement* or *amend* certain non-essential elements of the legislative act'.[258] In relation to those acts, which are to be distinguished from 'implementing acts',[259] the European Parliament plays an important supervisory role. Standing on an equal footing with the Council, it may take back the powers delegated to the Commission or, as the case may be, exercise a 'legislative veto'. Most importantly, in exercising those powers, the European Parliament is not limited to an ex ante control of the legality of the draft delegated act in question, but may veto it for political reasons.[260] As Schütze stresses, '[f]rom a democratic point of view, [that Treaty provision] represents a constitutional revolution'.[261]

Since the 1990s, efforts have been made to incorporate transparency into the EU legal order. This has been done in two ways,[262] namely by granting citizens a right of access to documents held by EU institutions and by shedding some light on the traditionally opaque EU decision-making process. It is worth noting that the right of access to documents not only serves to enhance the principle of democracy, but also operates as a pre-requisite to the effective exercise of the rights of defence in administrative proceedings in fields such as competition law. As a first step, the Amsterdam Treaty modified Article 1 TEU so as to make it clear that the EU institutions are bound to take their decisions 'as openly as possible'. The reaction of the EU political institutions to that Treaty reform was to amend their Rules of Procedure so as to allow outside access to their deliberations.[263] Whilst this improvement was an important step, it nevertheless had a limited impact,[264] since some stages of the decision-making process 'were still shrouded in secrecy'.[265] Even today, the Council is only obliged to meet in public in relation to legislative acts.[266]

The authors of the Lisbon Treaty introduced some changes which foster transparency in relation to the horizontal and vertical allocation of powers.[267] Horizontally, the Lisbon Treaty

[258] Ibid 683. The author notes that TFEU art 290 has codified the 'non-delegation doctrine'. In Case C-355/10 *Parliament v Council* (n 256) paras 64–65, the ECJ explained the rationale underpinning such doctrine. It held that '[t]he essential rules governing the matter in question must be laid down in the basic legislation and may not be delegated', since '[they] require political choices falling within the responsibilities of the European Union legislature'. See also judgment in Case C-88/14 *Commission v Parliament and Council* EU:C:2015:499, para 32 (holding that: 'the lawfulness of the EU legislature's choice to confer a delegated power on the Commission depends solely on whether the acts the Commission is to adopt on the basis of the conferral are of general application and whether they supplement or amend non-essential elements of the legislative act').

[259] See TFEU art 291(2). See also judgments in Case C-427/12 *Commission v Parliament and Council* EU:C:2014:170, para 39 (holding that: 'when the EU legislature confers an implementing power on the Commission on the basis of Article 291(2) TFEU, the Commission is called on to provide further detail in relation to the content of a legislative act, in order to ensure that it is implemented under uniform conditions in all Member States'), and Case C-65/13 *Parliament v Commission* (n 192) para 45 ('in exercising an implementing power, the Commission may neither amend nor supplement the legislative act, even as to its non-essential elements').

[260] Perhaps this is the reason why Craig argues that '[the European Parliament] is accorded an important power that it did not have hitherto'. See P. Craig, 'The Role of the European Parliament under the Lisbon Treaty' in S. Griller and J. Ziller (eds), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* (Springer 2008) 109, 115.

[261] See Schütze (n 257) 685.

[262] See S. Prechal and M. E. De Leeuw, 'Transparency: A General Principle?' in U. Bernitz, J. Nergelius, and C. Cardner (eds), *General Principles of EC Law in a Process of Development*, European Monograph 62 (Kluwer 2008) 201.

[263] This obligation is now laid down in TEU art 15(3).

[264] See M. E. De Leeuw, 'Openness in the Legislative Process in the European Union' (2007) 32 *European Law Review* 295.

[265] See Prechal and De Leeuw (n 262) 207.

[266] See TEU art 16(8).

[267] See K. Lenaerts and N. Cambien, 'The Democratic Legitimacy of the EU after Lisbon' in J. Wouters, L. Verhey, and P. Kiiver (eds), *European Constitutionalism beyond Lisbon* (Intersentia 2009) 185.

streamlines and simplifies the EU decision-making process by harmonizing the way in which legislative acts are adopted. Some exceptions notwithstanding, EU legislative acts are adopted in accordance with the ordinary legislative procedure. Vertically, transparency has been enhanced in three ways. First, the Lisbon Treaty makes an explicit mention of the corollary aspects of the principles of conferral and subsidiarity.[268] Secondly, it includes a clear categorization of the different Union competences (exclusive, shared, and supporting).[269] Thirdly, this categorization is accompanied by a clear enumeration of the different EU competences of the Union and the Member States.[270]

B. Understanding Democracy in a Supranational Context

As Craig notes, the debate over the existence of a democratic deficit can be encapsulated by the following metaphor: 'the different views of the cathedral'.[271] For him, whether one considers that the EU no longer suffers from a democratic deficit will depend on the factors which one prioritizes when assessing the EU's democratic legitimacy. One can give greater importance to 'input democracy' and thus argue that a democratic deficit still exists given that citizens cannot directly influence the EU political agenda; nor are all EU political institutions subject to electoral accountability.[272] Conversely, one may prefer a more limited view of democracy and accordingly posit that the EU has sufficient checks and balances, which prevent the exercise of corrupt and arbitrary power at EU level.[273] One can also give more weight to 'output democracy',[274] according to which democracy at EU level is largely ensured by the effectiveness of its policies which often helps to overcome flaws in the limited representative nature of the decisions taken.

Regardless of where one stands in relation to that old debate, comparisons with national polities should, in any case, be subject to reservations as the EU does not have a *demos* that allows for collective self-determination. It follows from Articles 9 to 12 TEU that the EU rests on a 'dual structure of democratic legitimacy', which comprises the body of all EU citizens collectively, on the one hand, and the various individual peoples of Europe organized in and by their national constitutions, on the other hand. That duality is made explicit by Article 10 TEU which states that, whilst '[c]itizens are directly represented at Union level in the European Parliament', 'Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens'. That dual structure is not intended to replace the democratic structures existing at Member State level, but rather to complement them. That is why the authors of the Lisbon Treaty expressly set out the link between the EU law principle of democracy and EU citizenship: Article 9 TEU and Article 20(1) TFEU both state that EU citizenship 'shall be additional to and not replace national citizenship'.[275] That is also why Article 12 TEU stresses the importance of national parliaments. Their active participation in the legislative process contributes to the proper functioning of the EU, notably by monitoring ex ante that draft EU legislation

[268] See TEU art 5(2), which provides that: '[c]ompetences not conferred upon the Union in the Treaties remain with the Member States'.
[269] See TFEU art 2.
[270] Ibid arts 3–6.
[271] See Craig (n 242) 28–29.
[272] See Follesdal and Hix (n 241).
[273] See Moravcsik (n 240).
[274] See generally F. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press 1999).
[275] That link was made explicit in Case C-650/13 *Delvigne* EU:C:2015:648. See also K. Lenaerts and J. A. Gutiérrez-Fons, 'Epilogue on EU Citizenship: Hopes and Fears' in D. Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017).

complies with the principles of proportionality and subsidiarity.[276] It follows that democracy in a multilevel system of governance must be driven by a mutually reinforcing relationship whereby democracy at EU level does not seek to eliminate national democracies.[277] On the contrary, both sources of democratic legitimacy must complement each other. EU democracy is indeed composite in nature. It has been described as a '*demoi*cracy',[278] a term that Nicolaïdis has defined as 'a Union of peoples, understood both as States and as citizens, who govern together but not as one'.[279] Cheneval and Schimmelfennig add to that definition that '[b]oth the people-centred and citizen-centred idea[s] of representation have … to be upheld at the same time'.[280]

Accordingly, 'a *demoi*cratic system' must constantly strike the balance between those two different ideas of popular representation. This means, in essence, that the transfer of powers from the Member States to the EU must not adversely affect national democracies. Conversely, the latter must not jeopardize the European integration project as a whole. On the contrary, the EU and national decision-making processes must be combined so as to create a system in which there is 'more democracy' overall.

C. The EU Principle of Democracy as Applied by the ECJ

In the EU legal order, the principle of democracy, as interpreted by the ECJ and the European General Court (EGC), ensures ideological continuity with the way in which that principle is interpreted by national constitutional courts. In interpreting and applying that principle, the ECJ and the EGC strive to create a 'jus commune' of democracy, which national and supranational polities are committed to protecting. Thus, the ECJ and the EGC seek, as far as possible, to extrapolate the democratic elements contained in the constitutional traditions common to the Member States to a European context.

First, the ECJ is fully aware of the fact that the prerogatives of the European Parliament, the only institution whose members are elected by direct universal suffrage, must be judicially protected. That is why the ECJ will not hesitate to annul or declare invalid an act of secondary EU legislation whose adoption encroaches upon the powers of the European Parliament. However, the European Parliament may not rely on the principle of democracy with a view to increasing its powers, particularly, in areas, such as the CFSP, where the authors of the Treaties have determined that the European Parliament should only play a minor role.[281]

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[276] See generally Lenaerts and Van Nuffel (n 38) ch 7 at 131–46.

[277] Notably, this means that Member States must remain free to accede to and, as the case may be, to withdraw from the EU. See K. Nicolaïdis, 'European Demoicracy and Its Crisis' (2013) 51 *Journal of Common Market Studies* 351, 362–63.

[278] In a European context, that term was first coined by P. Van Parijs, 'Should the European Union Become More Democratic?' in A. Føllesdal and P. Koslowski (eds), *Democracy and the European Union* (Springer 1997) 287.

[279] See K. Nicolaïdis, 'The Idea of European Demoicracy' in J. Dickson and P. Eleftheriadis (eds), *The Philosophical Foundations of European Union Law* (Oxford University Press 2010) 247. See also K. Nicolaïdis, 'The New Constitution as European 'Demoi-cracy'?' (2004) 7 *Critical Review of International Social and Political Philosophy* 76.

[280] F. Cheneval and F. Schimmelfennig, 'The Case for Demoicracy in the European Union' (2013) 51 *Journal of Common Market Studies* 334, 343.

[281] However, '[w]hile, admittedly, the role conferred on the Parliament in relation to the CFSP remains limited, since the Parliament is excluded from the procedure for negotiating and concluding agreements relating exclusively to the CFSP, the fact remains that the Parliament is not deprived of any right of scrutiny in respect of that European Union policy'. See eg Case C–130/10 *Parliament v Council* (n 192) paras 83 and 84, and Case C-263/14 *Parliament v Council* (n 189) para 69.

Secondly, cases such as *Martinez v Parliament* illustrate that the principle of democracy is a complex multidimensional concept.[282] Individually, the principle of the independent mandate (which can be found in national constitutions) ensures that no interference is to take place between an MEP and his or her constituency. Collectively, in order to guarantee the proper functioning of the European Parliament, the ongoing formation of political groups must be ensured. This means that an incumbent political majority cannot prevent a political minority of MEPs from forming a new political group or from splitting an old one, unless it is obvious that the members of that group share no political affinities. From a supranational perspective, the European Parliament is also an institution which actively contributes to European integration as a forum where political discussions must overcome national bias. Of course, the different facets of democracy in the EU are subject to inherent tensions. Just as disagreements between an MP and his or her political group can be found and are allowed in national constitutions, the same applies for the European Parliament. In the same way, political groups which are created to discuss the European project are naturally permitted to call into question its very existence.

Thirdly, in order to ensure compliance with the rule of law, MEPs may not enjoy unlimited immunity which would amount to impunity for their wrongdoing. This does not mean, however, that MEPs are deprived of their freedom of political speech. In *Patriciello*,[283] the ECJ was called upon to strike a delicate balance between protecting the freedom of political speech of MEPs and the principle of effective judicial protection. In this regard, it held that parliamentary immunity only applies where the action in question has a direct and obvious connection to the parliamentary duties of MEPs.

Moreover, the principle of democracy, as interpreted by the ECJ and the EGC, also applies in cases where the European Parliament or its Members are not directly involved, in particular in relation to new forms of governance. This shows that the Courts are fully aware of the fact that the principle of democracy must adapt to societal changes that take place at national and EU level. In adapting the principle of democracy to alternative methods of policy making, they endeavour to respect national constitutional arrangements. Indeed, cases such as *Commission v Germany* and *UEAPME* show that the EU Courts embrace a conception of the principle of democracy, which is fully consistent with that of national constitutions.[284] Just as national constitutions recognize the importance of insulating some constitutional goods from the political process through the medium of 'non-majoritarian' agencies, the ECJ recognizes that such public bodies, which enjoy a high degree of independence whilst remaining subject to parliamentary influence, do not lack democratic legitimacy. In the same way, in *UEAPME*, the EGC stressed that the EU principle of democracy does not oppose dialogue among social partners. In so far as all stakeholders are sufficiently represented during negotiations between management and labour, the resulting agreement may enjoy general binding force.

Furthermore, the ECJ also endorses a conception of democracy that seeks to enhance the participation of citizens in the adoption of decisions that may affect them. That is why the right of access to documents is an important instrument through which the principle of openness is judicially enforced. *MyTravel*[285] makes clear that the principle of openness applies

[282] See judgment of the EGC in Joined Cases T-222/99, T-327/99, and T-329/99 *Martinez and Others v Parliament* EU:T:2001:242 (as regards the standing of individual MEPs, confirmed on appeal by judgment of the ECJ in Case C-486/01 P *Front national v Parliament* EU:C:2004:394, para 35).

[283] Judgment in Case C-163/10 *Patriciello* EU:C:2011:543.

[284] Judgment in Case C-518/07 *Commission v Germany* EU:C:2010:125 and Case T-135/96 *UEAPME v Council* EU:T:1998:128.

[285] Judgment in Case C-506/08 P *Sweden v MyTravel and Commission* EU:C:2011:496.

in relation to both the legislative decision-making process and the administrative procedure. Moreover, in *Access Info Europe*,[286] the ECJ and the EGC have taken the view that the right of access to documents may be relied upon not only to render the Council as a whole politically accountable, but also the Member States individually. Indeed, if disclosure of the positions of national delegations sitting in the Council is permitted in relation to a Commission proposal, then both individuals and national parliaments may monitor the position defended by their national government. The right of access to EU documents which is, in principle, designed to improve political accountability at EU level, thus also serves to improve transparency in respect of the Member States. It shows the way in which the EU principle of democracy supplements the democratic-control mechanisms laid down by national constitutions. Last but not least, the principle of democracy cannot be understood without ensuring compliance with fundamental rights. As *Commission v Bavarian Lager* shows,[287] the right of access to EU documents must be weighed against the right to respect for a person's private life. That balance must not only take into account Article 8 of the ECHR, which is now largely reproduced by Articles 7 and 8 of the Charter, but also secondary EU legislation on data protection, notably Regulation No 45/2001.

V. Concluding Remarks: A Constitutional Order of States and Their Peoples

In order for 'constitutionalism' to take place beyond the bounds of the nation-state, the foundational paradigm must be set aside. From a functional perspective, the EU is a constitutional order of States and their peoples, in which a unified structure accommodates legal pluralism.

The EU legal order is an autonomous, self-sufficient, and coherent system of norms. As such, it is governed by the rule of law that is composed of substantive and structural principles. As a rights-based legal order, the EU is committed to guaranteeing a sphere of individual liberty free from public interference. This means that the rights that EU law vests in individuals are not 'programmatic' norms. They are norms capable of producing direct effect before national courts. However, individual rights are not absolute but may be subject to limitations, such as structural legal principles, the general interest, and/or the rights of others.

Subject to compliance with primary EU law, the EU legislator may give concrete expression to EU rights. The level of protection to be given to a fundamental right may be harmonized in such a way as to prevent Member States from providing a higher level of protection. Conversely, where the EU legislator has not adopted a uniform standard of protection of a fundamental right, it is for each Member State to decide the level of protection that best reflects its constitutional traditions, provided that such level complies with the Charter and that the primacy, unity, and effectiveness of EU law are not compromised. Hence, the question whether a uniform standard of protection should be adopted at EU level is left to the EU political process, which enjoys the necessary democratic legitimacy and institutional capacity to strike the right balance between the general interest and individual liberty[288] or to solve a conflict between competing individual rights. The role of the ECJ is thus limited to making sure that the choice made by the EU legislator complies with primary EU law, notably

[286] Judgment of the EGC in Case T-233/09 *Access Info Europe v Council* EU:T:2011:105 (confirmed on appeal by judgment of the ECJ in Case C-280/11 P *Council v Access Info Europe* EU:C:2013:671).

[287] Case C-28/08 P *Commission v Bavarian Lager* EU:C:2010:378.

[288] See eg Case C-399/11 *Melloni* (n 59) paras 61–63.

with the Charter. EU constitutionalism requires that the balance between unity and diversity should rest in the hands of the EU political process.

Moreover, federalism and the principle of institutional balance are the two founding principles that define the vertical and horizontal allocation of powers within the EU.

Regarding EU federalism, we would like to make five final remarks. First, the principle of conferral should reassure the Member States that every legally binding EU act is based on a grant of power, to which they have consented. If such consensus is absent, then a change may only be made through Treaty reform. Secondly, the principles of subsidiarity and proportionality operate as a second layer of 'competence control' that determines whether an EU competence may be exercised. The principle of subsidiarity aims to protect national parliaments as the parties most affected by the transfer of competences to the EU. That is why the Lisbon Treaty put in place an early warning mechanism that allows the active involvement of national parliaments in monitoring *ex ante* compliance with that principle. Moreover, it is true that the ECJ has not yet annulled (or nor has it declared invalid) an EU measure on the ground that it fails to comply with the principle of subsidiarity. However, that does not mean that the latter principle is *per se* non-justiciable. Under a process-oriented review, that principle would require that the preparatory work carried out by the EU legislator (eg the impact assessment report) should be sufficiently thorough and exhaustive to convince the ECJ of the fact that the policy choices in question are better adopted at EU level. For its part, the principle of proportionality serves as a tool for balancing the EU's interest against those of the Member States, as well as for balancing the general interest against individual fundamental rights. Accordingly, that principle illustrates that federalism concerns and individual liberty are deeply intertwined. Thirdly, the principle of loyal cooperation guarantees that all Member States must be faithfully committed to the EU enterprise as a whole. That principle gives a gravitational force to the European integration project that helps to preserve the EU as a unified structure. However, that principle is not absolute and may be subject to limitations stemming from other structural principles, such as the principle of conferral and the principle of national (constitutional) identity. In our view, the latter principle is related to the autonomous notion of 'statehood' understood as a concrete expression of EU public policy. By virtue of that principle, the EU is obliged to protect Member States' integrity. This means that the EU may not transform the Member States into the component states of a federation. However, just like the principle of sincere cooperation, the principle of national (constitutional) identity is not absolute, but must be weighed against other EU constitutional interests. Fourthly, federalism cannot be reduced to the principle of conferral alone. The reason is twofold. On the one hand, whilst it has not formally endorsed that approach in its case law, the ECJ has applied three different types of pre-emption to identify the existence of normative conflicts between EU law and national law. On the other hand, in areas where the EU legislator lacks regulatory competences, the ECJ has consistently held that the exercise of the competences retained by the Member States must comply with primary EU law. Those competences are thus 'circumscribed' by EU law. Fifthly and last, the EU is founded on the basic idea that its component Member States share a commonality of values that brings them closer together and enables them to trust each other. However, mutual trust must not be confused with 'blind trust'.

As to the principle of institutional balance, we posit that at EU level the legislative, executive, and judicial branches of government are not vested in three separate departments. Horizontally, legislative and executive functions are shared between the European Parliament, the Council, and the Commission. Vertically, the executive function is also shared between the EU institutions and the Member States. In addition, unlike the US federal system, the EU relies on an integrated judiciary, in which judicial power to enforce EU law is shared between

EU and national courts. This means that the principle of institutional balance must be construed in accordance with the horizontal allocation of powers determined by the authors of the Treaties. Accordingly, that is why the principle of institutional balance and the concept of 'legal basis' go hand-in-hand. In addition, the meaning and scope of that principle may, with every successive Treaty reform, be subject to change. The progressive empowerment of the European Parliament illustrates this point. As to the EU judiciary, the principle of institutional balance implies that the ECJ must draw the line between law and politics: the ECJ must not substitute its own choices with those made by the EU legislator. However, as *Kadi I* and *II* demonstrate, no matter falling within the scope of EU law is immune from judicial review. In our view, where the EU political institutions enjoy discretionary powers to make substantive determinations, the EU Courts must make sure that the decision-making process that led to the adoption of such a measure incorporates sufficient procedural guarantees to secure the rationality of the policy outcome and that the interests of all stakeholders have been taken into account. In addition, the 2008 economic crisis has brought about changes to the EU institutional framework whose compatibility the ECJ has been called upon to determine. The ECJ has endorsed rule-making by EU agencies provided that the executive powers conferred on them are precisely delineated and amenable to judicial review in the light of the objectives established by the delegating authority. In addition, in *Pringle*, the ECJ held that the ESM Treaty was compatible with primary EU law. In particular, it ruled that it is possible for the Member States to 'borrow' the EU institutions outside the EU institutional framework, provided that such borrowing does not take place in an area where the EU enjoys exclusive competences and that the task entrusted to them does not alter the essential character of the powers conferred on those institutions by the EU and FEU Treaties.

Finally, regarding the EU principle of democracy, it is submitted that comparisons with national polities should, in any case, be subject to reservations as the EU does not have a fully formed *demos* that allows for collective self-determination. It follows that the EU model of democracy cannot be measured by reference to traditional nation-state standards. Instead, the EU rests on a 'dual structure of democratic legitimacy', which is composed not only of the body of EU citizens collectively but also of the various individual peoples of Europe organized in and by their national constitutions. Such a dual structure does not seek to replace the democratic structures of the Member States; rather, it attempts to supplement them. Democracy in a multilevel system of governance must be driven by a mutually reinforcing relationship, whereby both sources of democratic legitimacy complement each other. EU democracy is indeed composite in nature, it is a *demoi*cracy. In the EU legal order, the principle of democracy, as interpreted by the ECJ and the EGC, does not seek to compete against the way in which that principle is interpreted by national constitutional courts. The transfer of powers from the Member States to the EU must not adversely affect national democracies. On the contrary, the EU decision-making process must be accommodated so as to create 'more democracy', be that at national or at EU level. Accordingly, the ECJ and the EGC strive to create a *ius commune* of democracy, which national and supranational polities are committed to protecting. Thus, the ECJ and the EGC seek, as far as possible, to transpose the democratic elements contained in the constitutional traditions common to the Member States to a European context.