The Nature of European Union Law

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SUMMARY

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INTRODUCTION

1. The nature of EU Law after the entry into force of the Treaty of Lisbon

Until the entry into force of the Treaty of Lisbon on 1 December 2009, European Union law (herein, EU law) was different from European Community law (herein EC law). We should remember that the term 'European Community' was probably used for the first time on 20 June 1950 by Jean Monnet at the opening of the conference that resulted in the adoption of the Treaty Establishing the European Coal and Steel Community –ECSC Treaty, as he recounts in his 'Mémoires.'[3] Monnet was the main architect of the Schuman Declaration of 9 May of that year, by which France proposed to Germany –as well as all interested European countries- to 'pool together' the production of coal and steel. Therefore, the organizations designed by the treaties concluded between the six founding states on coal and steel in 1951, on defence in 1952 (EDC), on the economy and atomic energy in 1957 (EEC and Euratom), as well as in the *Statute of the European Community*, submitted in 1953 by the 'ad-hoc' parliamentary assembly based on a joint proposal by the French and Italian governments, were called 'Communities.' Hence, from the beginning, there has been a connection between the concept of 'community' and European integration aimed at the realisation of the 'United States of Europe.' Such a relationship is also present in the consideration of 'EC law' as 'Integration law.'[4]

In contrast, the expression 'European Union' was first officially used in the French government's memorandum of 17 May 1930 'on the organisation of a system of federal union' written by Alexis Léger, then Secretary General of the French Ministry of Foreign Affairs –but better known as a poet awarded the Nobel prize for literature in 1960 under the pseudonym of Saint-John Perse. The term 'Union' has been associated ever since with the idea of a European federation. In the preamble of the EEC Treaty of 1957, the term '*broader and deeper* community *among* peoples,' in the ECSC Treaty of 1951, was replaced by '*an ever closer union among the peoples of Europe.*' The name 'European Union' was later picked up in the '*Report on the European Union*' of 29 December 1975, written by Belgian Prime Minister Leo Tindemans upon the request of the first European Council gathered in Paris on 10 December 10 1974. At that time, the use of this term was an idea shared by governments of nine Member States of the European Communities to extend their joint action to fields related to foreign policy as well as police and judicial cooperation. This consensus is clearly manifested in the '*Solemn Declaration on European Union*' adopted by the European Council in Stuttgart on 19 June 1983. This name was later taken on in the '*Draft Treaty establishing the European Union*' adopted by the European Parliament on 14 February 1984. The rapporteur of the draft treaty was the member of the European Parliament and former European Commissioner Altiero Spinelli, leader of the 'European federalists.' So a return to the origins of the project of 1930 was taking place.

[3] Jean Monnet (1978), 'Memoirs,' London: Collins (translated by Richard Mayne).

[4] V. P. Pescatore (2005), *Le droit de l'intégration. Émergence d'un phénomène nouveau dans les relations internationales selon l'expérience des Communautés européennes*, new edition to the collection. Droit de l'Union européenne, Brussels, Bruylant. See more recent, for example, J.-V. Louis and Th. Ronse (2005), *L'ordre juridique de l'Union européenne*, 3rd ed., Brussels, Bruylant.

During the negotiations of the intergovernmental conference (IGC) of 1991 that prepared what subsequently became the Treaty of Maastricht, the British government rejected the idea of naming the future new treaty 'European Union Treaty,' because such a title was too reminiscent of Altiero Spinelli's federalist project. The IGC reached a consensus to baptise the agreement as '*Treaty on the European Union*' (*Vertrag über die Europäische Union* in German; *Traité sur l'Union européenne* in French; *Trattato sull'Unione europea* in Italian). It must be stressed that this nuance is not found in all the official languages of the Union: the Spanish name is '*Tratado de la Unión Europea*' and in Portuguese, '*Tratado da União Europeia*.' Aware of the ambiguous connotation of the expression 'European Union,' Valéry Giscard d'Estaing, President of the *European Convention*, which was assembled from 28 February 2002 to 18 July 2003, carried out a survey among the members of the Convention and the public regarding preferences on possible names: '*European Community*;' '*United Europe*;' '*United States of Europe*;' '*European Union*.' Giscard said that in his opinion, although he preferred '*United Europe*.' The name '*European Community*' would probably have received the broadest support among scholars of EC law and, more broadly, among those who wanted a closer integration of Europe.[5] The outcome of the survey was clearly in favour of the term '*European Union*' which was included in the '*Draft Treaty establishing a Constitution for Europe*,' submitted to the European Council of Thessaloniki on 20 June 2003. Future developments confirmed the preference of the governments of the Member States for the term '*Union*.' Thus, the merger of the Community with the Union as a result of the Treaty of Lisbon has resulted in the replacement of '*Community*' by '*Union*,' and the name of the Treaty of Rome: '*Treaty establishing the European Community*' by '*Treaty on the functioning of the European Union*.'

From a formal point of view, until 30 November 2009 EC law was constituted by the community treaties (primary legislation) and by secondary legislation deriving from community treaties. It was thus: EEC law from 1958 to 1993, replaced by EC law from 1993; ECSC law from 1952 to 2002; and Euratom law from 1958, still in force. From a substantive point of view, the use of a single term –'*EC law*'- for the three community systems pointed at the unity of their features. It also showed that the principles of EC law apply to the three systems, regardless of what was established in the jurisprudence of the Court of Justice. This is valid for numerous judgments, decided only in relation to the ECSC Treaty, which apply to the other two community systems: for example, the decision of 1958 in *Meroni* (case 9/56)[6] concerning the possibility of delegation of powers of the Commission. And the same rule is also applicable for decisions adopted before the entry into force of the Treaty of Rome: for example, the decision of 1957 in *Algera* (case 7/56-3)[7] on the protection of the Commission's administrative measures and on the general principles common to the Member States; or the

[5] See in this regard E. de Poncins, *Vers une Constitution européenne*, Paris, ed. 10/18, 2003, 82-83.

[6] Judgment of the Court of 13 June 1958. *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community*. Case 9-56. *European Court reports 1958 Page 00133.*

[7] Judgment of the Court of 12 July 1957. *Dineke Algera, Giacomo Cicconardi, Simone Couturaud, Ignazio Genuardi, Félicie Steichen v Common Assembly of the European Coal and Steel Community*. Joined cases 7/56, 3/57 to 7/57. *European Court reports 1957 Page 00039.*

ruling of 1956 in *Fédération charbonnière de Belgique* (case 8/55)[8] on effectiveness and implied powers. Similarly, the decisions adopted in the context of the EEC treaty apply also to the ECSC and the Euratom ones: particularly, the decisions in *Van Gend en Loos* (case 26/62)[9] on the direct effect and in *Costa v. Enel* (case 6 / 64)[10] concerning primacy.

Until 1 December 2009, 'European Union law' had a different meaning than 'EC law.' From a formal point of view, EU law included EC law in the sense explained above –the true law of the so called 'first pillar'- and the law on Common Foreign and Security Policy (CFSP), known as the 'second pillar,' and the law of Justice and Home Affairs Cooperation, called the 'third pillar.' The laws of the second and third pillars were different from the EC law. Judicial review was weaker –even absent in many areas. Typical acts of EC law (directives, regulations, decisions and international treaties) could not be adopted within these areas. In relation to their roles under the EU treaties, the powers of the European Parliament were almost nonexistent and those of the European Commission were very weak. The principles of direct effect and primacy did not apply to the second and third pillar in the same way they did to EC law. And we could continue... Many authors, therefore, use the term, 'EU law,' only for the second and third pillars, as opposed to EC law.

It is still important to understand these differences between ex-EC law –now common EU law- and the laws of the second and third pillars. It is important not only for historical reasons but also because the regime on acts of the 'third pillar' continues to apply on a transitional basis until 30 November 2014, and especially because the law of the CFSP remains somewhat different from the common EU law and therefore subject to principles designed for the EU Law in force before the entry into force of the Treaty of Lisbon.

Before the entry into force of the Treaty of Lisbon there were two separate questions concerning the nature of EC law and EU Law. The first one, as old as the judgement of 1964 in *Costa v. Enel* (case 6/64),[11] was about the nature of EC law: What are the consequences to draw from the fact that the Court of Justice of the European Communities, that had qualified the Community as a '*new legal order of international law*' in the ruling of *Van Gend en Loos* a year and a half before, speaks now of '*own legal system*'? The second question, since the signing of the Single European Act of 1986, with a third part dedicated to 'political cooperation,' was whether there were two legal systems of different nature: the community legal order and the Union legal order, in the sense of the second and third pillar.

Since the entry into force of the Treaty of Lisbon, the common EU Law is equal to the former EC law, and thus Euratom law is also included in it.

From a technical and formal standpoint, that is, the law in force, the word 'community' should always be substituted by 'European Union' or the abbreviation 'EU.' This stems, in relation to primary law, from Art.2, A, a) of the Treaty of Lisbon, according to which '*the*

[8] Judgment of the Court of 29 November 1956. *Fédération Charbonnière de Belgique v High Authority of the European Coal and Steel Community*. Case 8-55. *European Court reports 1956 Page 00292.*

[9] Judgment of the Court of 5 February 1963. *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*. Case 26-62. *European Court reports 1963 Page 00001*.

[10] Judgment of the Court of 15 July 1964. *Flaminio Costa v E.N.E.L.* Case 6-64. *European Court reports 1964 Page 00585.*

[11] See note 8 above.

words "Community" and "European Community" shall be replaced by "Union" and any necessary grammatical changes shall be made, the words "European Communities" shall be replaced by "European Union" [...].' There is an exception to this rule: the Euratom law should continue to be called 'community' law, as Art. 2, A, a) of the Treaty of Lisbon does not apply to the Euratom Treaty and its secondary legislation –except in relation to the name of the institutions where Art. 106 bis and following of the Euratom Treaty refer to the TEU and TFEU. There are many acts of secondary legislation that apply to both the Union and the Euratom community. In these texts the words 'European Union' predominates now instead of 'community.'

From a substantive point of view, all the features of EC law are applicable to 'EU law' understood as common EU law from 1 December 2009. All the case-law on EC law therefore applies to EU law. As a transitional measure, some features of the acts of the former 'third pillar' remain in force for a maximum of five years, that is, until 30 November 2014. The CFSP law retains some specific features but in any case it is a set of rules much closer to the common EU law than to what the 'second pillar' was in relation to EC law. In any case, the merger of the former Community into the Union should encourage the Court to provide the widest possible homogeneity in the jurisprudence applicable not only to the Titles I to IV and VI of the TEU and the entire TFEU –as well as their secondary legislation, but also to Title V of the TEU which refers to the '*general provisions on a common foreign and security policy*.'

Therefore, after the entry into force of the Treaty of Lisbon, the nature of EU Law should be treated in the same way as the nature of EC law was treated before. This answers the first question above regarding the nature of EC law. The second question concerning the nature of the law of the former second and third pillars, has no longer relevance, and therefore will not be examined in this chapter.

2. The impact of the 2000s debates on the question of the legal nature of EU Law

From the 1960s until the mid-1980s the debate on the legal nature of the European Union was primarily a debate between experts of EC law favourable to European integration, such as the former Luxembourg judge of the Court of Justice of the Communities, Pierre Pescatore-[12] and experts in public international law who tended to consider EC law as a subspecies of the law of international organisations. There were also some apparently less militant EC law experts who recognised EC law as part of public international law, despite their important differences. This is the case of Paul Reuter,[13] professor of public international law at the University of Paris and Jureconsulte of the French Ministry of Foreign Affairs, who was the author of the institutional framework of the ECSC Treaty and was in the team who worked with Jean Monnet.

[12] See note 2 above; see also *L'ordre juridique des Communautés européennes. Étude des sources du droit communautaire*, new edition to the collection. Droit de l'Union européenne, Brussels, Bruylant, 2006.

[13] See, among others, Paul Reuter, *La Communauté européenne du charbon et de l'acier. Préface de Robert Schuman*, Paris, LGDJ, 1953, 320; *Organisations européennes*, Paris, Presses Universitaires de France, col. 'Thémis,' 1965, 452; *Droit international Public*, Paris, Presses Universitaires de France, col. 'Thémis,' 1958.

This debate had a two-fold message. From a political point of view, the more the autonomy of EC law is asserted, the more the support possible for innovative solutions by the jurisprudence of the Court of Justice. From the academic point of view, the question was to reinforce the need for specific education on EC law, for which it was not enough to know – even in-depth - public international law. Debates have been intense in the founding European countries of the Communities, notably in France, Germany, Italy and Spain. They have been less intense in other countries that have acceded to the Communities after 1973. Also, the academic debate was less important for the least populated Member States, given their smaller legal academic community.

From the mid-1980s, and particularly after the court ruling of 1986 in *Les Verts v. European Parliament* (case 294/83),[14] the debate about the nature of EC law has shifted. It has gradually become a debate on the 'constitutional' nature of the treaties establishing the European communities, as outlined in the above judgment. This debate also had a two-fold message. From the political point of view, the supporters of a deeper integration were those who spoke of the 'constitutional' nature of primary law, while Eurosceptics were reluctant to use the word 'Constitution' of Europe. From an academic point of view, in some countries – particularly, France and Germany- many experts on constitutional law criticised both the Court and their EC law colleagues for what they considered as improper use of the word 'Constitution' and some categories of constitutional law.

During this period, however, the political debate on the nature of EC law remained limited to politicians and experts in Europe, and the academic debate had probably little impact on political and public opinion. In 2000, the situation changed. On 12 May 2000, the German Minister of Foreign Affairs Joschka Fischer, in a speech at the University of Humboldt of Berlin[15] made a resounding statement in favour of a 'European Constitution.' He stated, among other things, what in his opinion were the three necessary reforms for the Union's future:

> *the solution of the democracy problem and the need for fundamental reordering of competences both horizontally, i.e., among the European institutions, and vertically, i.e., between Europe, the nation-state and the regions—will only be able to succeed if Europe is established a new with a constitution. In other words, through the realisation of the project of a European constitution centred around basic, human and civil rights, an equal division of powers between the European institutions and a precise delineation between European and nation-state level.*

From a political point of view, it meant the support for a wide reform project as a response to the *Declaration on the future of the Union* annexed to the Treaty of Nice. This was also promoted by some participants at the summit in Nice in December 2000 who were disappointed at the way in which the debates of the European Council had developed. Thus the debate over the European Constitution went into the public sphere, with its peak during the campaign for the referendum on the constitutional treaty during the early months of 2005, especially in France, the Netherlands and the United Kingdom. Academics wrote profusely

[14] Judgment of the Court of 25 February 1988. *Parti écologiste "Les Verts" v European Parliament*. Case 190/84. *European Court reports 1988 Page 01017.*

[15] See 'Speech by Joschka Fischer on the ultimate objective of European integration' (Berlin, 12 May 2000).

on the possibility for the European Union to have a Constitution, and especially over the compatibility or opposition between the treaties and the Constitution.[16]

On the political front, the debate reached its close at the European Council meeting on 21 to 22 June 2007, during which the mandate for the intergovernmental conference to establish the Treaty of Lisbon was approved. The mandate[17] begins with the statement that:

> *The constitutional concept, which consisted in repealing all existing Treaties and replacing them by a single text called "Constitution", is abandoned. The Reform Treaty will introduce into the existing Treaties, which remain in force, the innovations resulting from the 2004 IGC, as set out below in a detailed fashion.*

In fact, French and Dutch politicians only took into consideration the phrase '*the constitutional concept is abandoned*' without specifying what it meant. More than three years later, the idea that the project underlying the constitutional treaty has been abandoned has been verified.

In academia, however, the debate is not closed. In fact, the discussion is very much alive. On one side, there are some authors who think it is important to abandon the word 'Constitution,' and the symbols of the Union and expressions such as 'European law.' On the other side, there are others who consider this abandonment quite marginal in relation to the fact that the content of the Treaty of Lisbon, although different in form, is not different in substance from the content of the constitutional treaty of 2004, abandoned at the summit of June 2007. In my opinion, both positions can be held. In any case, this is a debate without major consequences for the positive law of the European Union.

The development of the debate on the European Constitution in the first decade of the twenty-first century hides a second problem that in my opinion is more important than the answer to the question of whether a Constitution can be included in a treaty. I am referring to the absence of new reflections on the consequences that the material EU Constitution is based on international treaties. In fact, as a result of the discussions on the constitutionality of the primary law of the European Union, jurists not specialised in EC law –now EU Law- are induced to apply concepts and categories of constitutional or administrative law in the field of EU Law. Not only that, they are prompted to apply to it the specific mode of reasoning of a particular positive law, the public law of the state in which a researcher, and also a lawyer or a judge, have studied law.

Reflecting on the nature of the EU Law in the beginning of the second decade of the twenty-first century is not, hence, an academic exercise of philosophy of law. Rather, it is an obligation with practical effects to understand the positive law of the European Union.

3. The internationalist nature of the EU Law, with specific features

[16] For an example of simplification of the most difficult questions on this matter, see Dominique Rousseau, 'Traité constitutionnel: un monstre juridique,' Le Monde, 21 October 2002.

[17] Council of the European Union, Brussels, 26 June 2007, 11218/07, POLGEN 74. http://register.consilium.europa.eu/pdf/en/07/st11/st11218.en07.pdf.

EU Law –as EC law until the entry into force of the Treaty of Lisbon on 1 December 2009- is a legal system based on an agreement between sovereign states. This means that the way of reasoning according to the rules of EU Law is different, and often very different, from that of domestic law –especially in relation to constitutional law. Even though it has an internationalist origin, EU Law has special features that make it different from the general public international law in some aspects. EU Law scholars, therefore, must not lose sight of these two aspects to avoid mistakes due to the incorrect application of inadequate modes of reasoning.

In this context, it is useful to remember the words of Giuseppe Tesauro, former Advocate General at the EC Court of Justice, in the preface to the fifth edition of his Handbook on Community Law[18] (XIII-XIV):

> *The literature on the EC experience continues to be enriched not only with inputs from specialists in EC law and international law, as happened until now, but also with contributions by experts in domestic law, who have been attracted for some time by the European ideal. In many cases however, they have not paid the necessary attention to the specificity of the legal phenomenon; [...] the result is that, rather than an EC approach to law that would be necessary and consistent with what is required today we are witnessing more and more frequently flighty attempts of a national approach to EC law, even when it comes to terminology, with results that are technically questionable and which in any event lack a proper connection to the reality of the European Union.**

A reflection on the nature of EU Law should therefore make clear from the beginning, even to those who approach the subject for the first time, the consequences deriving from some fundamental features such as:

a) that the Union is not a state,

b) that it is based on an agreement binding sovereign states, and

c) that the EU law is endowed with effective mechanisms, unusual in international law, so it is possible to define the nature of EU law as 'sui generis.'

I. EUROPEAN UNION LAW IS NOT STATE LAW

EU law is distinguished from constitutional law in that it is not the law of a state, since the Union is not a state. It is not about reflecting on the legal nature of the European Union,[19] but stressing that the European Union does not meet the legal criteria of a state, and therefore EU law cannot be a law of a state.

The legal elements necessary for the existence of a state, according to public international law or the usual definition of constitutional law, consist of a territory, a population and a government exercising effective sovereign control over the territory. The analysis on the

[18] Giuseppe Tesauro, Diritto comunitario, fifth edition, Padova, CEDAM – 2008.
[*] N. of T.: Translation from original Italian version.
[19] See in this regard, the chapter by L. Diez-Picazo, in this volume (TRATADO DE DERECHO DE LA UNIÓN EUROPEA, TOMO IV).

treaties shows that, in fact, none of these three elements exist in the case of the European Union.

1. The EU is not a state because the Union does not have its own territory

The Union does not have a territory of its own, as follows from Arts. 52, par. 2, TEU, and 355, TFEU, related to the 'territorial scope' of the Treaties; Article 52, par. 1, TEU, states the principle according to which the treaties apply to the Member States:

> *The Treaties shall apply to the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland.*

It should be stressed that this is a reference to the official denomination of the Member States, and not a geographical reference.

Article 355, TFEU, specifies the particular application of the treaties to specific regions, as well as exceptions to the general rule. The latter states that the treaties shall apply to the Member States listed in Art. 52, TEU, and Art. 355, pars. 1, 2 first section and 4, TFEU, and specifies the application of the treaties to some specific territories of certain Member States:

> *1. The provisions of the Treaties shall apply to Guadeloupe, French Guiana, Martinique, Réunion, Saint-Barthélemy, Saint-Martin, the Azores, Madeira and the Canary Islands in accordance with Article 349.*
> *2. The special arrangements for association set out in Part Four shall apply to the overseas countries and territories listed in Annex II.*[20]
> *4. The provisions of the Treaties shall apply to the Åland Islands in accordance with the provisions set out in Protocol 2 to the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden*

On the other hand, pars. 3 and 5 of Art. 355, TFEU, establish the following exceptions:

> *3. The provisions of the Treaties shall apply to the European territories for whose external relations a Member State is responsible.*

This refers to Gibraltar, but it should be remembered that this clause was already in the EEC Treaty of 1957 because it would have applied to the Saarland if it had not been integrated to the Federal Republic of Germany before the entry into force of the Treaty.

> *5. Notwithstanding Article 52 of the Treaty on European Union and paragraphs 1 to 4 of this Article:*
> *(a) the Treaties shall not apply to the Faeroe Islands;*

[20] The second section states: '*The Treaties shall not apply to those overseas countries and territories having special relations with the United Kingdom of Great Britain and Northern Ireland which are not included in the aforementioned list.*' Such provision applied until 1999 to Hong Kong and until 2001 to Macao. This is not an exception to the general principle because these territories were not part of the United Kingdom.

(b) the Treaties shall not apply to the United Kingdom Sovereign Base Areas of Akrotiri and Dhekelia in Cyprus except to the extent necessary to ensure the implementation of the arrangements set out in the Protocol on the Sovereign Base Areas of the United Kingdom of Great Britain and Northern Ireland in Cyprus annexed to the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union and in accordance with the terms of that Protocol;
(c) the Treaties shall apply to the Channel Islands and the Isle of Man only to the extent necessary to ensure the implementation of the arrangements for those islands set out in the Treaty concerning the accession of new Member States to the European Economic Community and to the European Atomic Energy Community signed on 22 January 1972.

Article 355, par. 1, refers to Art. 349 for the application of EU law to outermost regions, i.e. to Guadeloupe, Martinique, Saint-Barthélemy, Saint-Martin (part of the lesser West-Indies), French Guiana (on the South-American subcontinent), the Island of Réunion (in the Indian Ocean), all French overseas regions or departments, to the Archipelagos of the Azores and Madeira, which are Portuguese autonomous regions, and the Canary Islands which are Spanish autonomous comunities. The latter three territories are located in the South-eastern part of North Atlantic. Under Art. 355, par. 4, there is also a special regime for the application of EU law to the Åland Islands, an archipelago located between Sweden and Finland, as defined in Protocol no. 2 to the act of accession of Finland.

According to Art. 355, par. 2, so-called overseas countries and territories (OCTs) are governed by a regime of association set out in Part IV, TFEU. The association replaced, in principle, the policies defined in Part III –Union Policies and Internal Actions. These are territories and countries listed in Annex II of the Treaties of Greenland (for Denmark), New Caledonia, French Polynesia, French southern and Antarctic territories, Wallis and Futuna Island, Mayotte, Saint Pierre and Miquelon (for France), Aruba, Bonaire, Curaçao, Saba, Saint Eustatius and Saint Martin (for the Netherlands), Anguilla, Cayman Islands, Falkland Islands (Malvinas), South Georgia and south Sandwich Islands, Montserrat, Pitcairn, Saint Helena and its dependencies, British Antarctic territory, British Indian Ocean territory, Turks and Caicos Islands, British Virgin Islands (for the United Kingdom). Though listed in Annex II, Bermuda has opted for a decoupling from the EU.

Under Art. 355, par. 3, EU law applies also to '*the European territories for whose external relations a Member State is responsible.*' These are not sovereign states –such as Andorra, Monaco, San Marino and the Vatican- but non-sovereign territories. This provision had been envisaged during the negotiations of the Treaty of Rome to apply to the Saarland, by request of the Federal Republic of Germany in 1957. For now, it can be considered applicable to Gibraltar, a territory for which a protocol to the Treaty of accession of the United Kingdom states the governing rules.

On the other hand, the EU law does not apply in principle to the Faroe Islands, part of the Kingdom of Denmark. Neither does it apply to a number of non-sovereign territories in Europe linked to the United Kingdom: specifically, the areas under the sovereignty of the United Kingdom of Akrotiri and Dhekelia in Cyprus –except for some specific provisions of the protocol; the Channel Islands and the Isle of Man, linked to the English Crown –except

for some specific provisions in the protocols annexed to the Treaty of accession of the United Kingdom.

Hence, the Union is not responsible for defining the territory over which its law applies; Member States are. This is confirmed by the fact that the Treaty provides for the specific arrangements, mentioned above. The only specific power of the European Union, under Art. 355, TFEU –which is also the only innovation introduced by the Treaty of Lisbon on the EC Treaty- is the power established in par. 6 to change the mode of application of the treaties on some territories mentioned in par.1 and 2:

> *6. The European Council may, on the initiative of the Member State concerned, adopt a decision amending the status, with regard to the Union, of a Danish, French or Netherlands country or territory referred to in paragraphs 1 and 2. The European Council shall act unanimously after consulting the Commission.*

It should be stressed that the exercise of this power by the European Council is subject in any case to the previous request of the interested Member States. The first instance in which this provision was applied was the *European Council Decision of 29 October 2010 amending the status with regard to the European Union of the island of Saint-Barthélemy*,[21] in force from 1 January 2012. There is a provision in such decision that highlights the limited competences of the Union and the need for (international) agreements:

> *France has undertaken to conclude the agreements necessary to ensure that the interests of the Union are preserved when this change takes place. These agreements should relate firstly to monetary matters, as France intends to retain the euro as the sole currency on Saint-Barthélemy and it must be ensured that the application of the law of the Union in the essential fields of the good functioning of economic and monetary union is maintained. Secondly, such agreements should relate to taxation [...].*

The most important sign of the absence of power of the Community, now European Union, to define the geographical area in which EU law applies is the absence of any act by the European Community both at the time of the independence of Algeria in 1962, that reduced the territory relevant to the implementation of the EEC Treaty by 2,381,741 km² (that is five times the European territory of France), and at the time of the German reunification in 1990, which increased the territory by 108,333 km² -which was added to the 248,713 km² of Western Germany.

It should be also noted that so-called 'external borders' of the Union (Arts. 3 and 21, TEU, and Arts. 67 and 77, TFEU) are in fact external borders of the Member States, as indicated for example in *Protocol (no. 22) on the position of Denmark.* As of 1 January 2011, they are land borders with European countries –Albania, Belarus, Croatia, Liechtenstein, Macedonia, Moldova, Norway, Russia, Serbia, Switzerland, Turkey and Ukraine- and also with non-European countries: Brazil and Surinam (on the border with French Guiana) and Morocco (on the border with the Spanish cities of Ceuta and Melilla). The reference to 'external borders' in community law also includes airports and ports, as entry points into the territory of the Member States.

[21] European Council Decision of 29 October 2010 amending the status with regard to the European Union of the island of Saint-Barthélemy, Official Journal of the European Union 9.12.2010, L 325/4.

The fact that the Union has no competence to determine its territory, and that Member States have, instead, exclusive competence to determine it, does not mean that they are not bound by EU law in the exercise of such power. The above-mentioned provisions of Art. 355, TFEU, are obviously applicable. But beyond these provisions, the obligations of the Member States entail that they cannot use their competences in ways that prevent the application of Union law. The presumption in Art. 52, TEU, implies that Members States are not entitled to decide whether or not the Union law applies in a certain territory, but the institutions are. This is for example the case of the institutions of free zones. This is a regime that does not differ in principle from that usually stated in international treaties. In this regard, the *Vienna Convention on the Law of Treaties* states in Art. 29 on the 'Territorial scope of treaties:'

> *Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.*

2. **The EU is not a state because the Union does not have its own population**

The definition of the citizenship of the European Union is clear. As stated repeatedly in Arts. 9, TEU, and 20, par. 1, TFEU: '*Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship*.' As confirmed by the jurisprudence, it follows from such provision the exclusive competence of Member States in this area and, consequently, the Union's lack of powers to regulate the conditions of acquisition or loss of its citizenship. Thus, it is not equivalent to the citizenship of a sovereign state.

In this respect, the way in which the Court of Justice presents the legal framework of EU Law, in its ruling of 2010 in *Rottmann* (C-135/08) is interesting.[22] It quotes the instruments that recall the exclusive competence of Member States for granting their citizenship and therefore the European Union's citizenship, established in the Treaty of Maastricht, with the introduction of Art. 8 (thereafter Art. 17 EC) in the Treaty of Rome. According to it:

> *Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.*

Before the entry into force of the Treaty of Maastricht, the Court of Justice in its decision of 1992 in *Micheletti* (C-369/90)[23] only referred to international law with respect to such competence:

> *Under international law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality'* (par.10).

However, the Court's reasoning did not define the frame of reference based on which the principle of effectiveness does not apply to the *Micheletti* case.[24] In public international law,

[22] Judgment of the Court of 2 March 2010, *Janko Rottmann v Freistaat Bayern* (Case C-135/08)(unpublished).
[23] Judgment of the Court of 7 July 1992, *Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria*. Case C-369/90. *European Court reports 1992 Page I-04239.*
[24] See note 21 above.

this principle allows a state to deny recognition of the citizenship of a person of that state if this is not effective, as in the International Court of Justice's case of *Nottebohm* of 1954. Following the sentence quoted above the ECJ only states:

> *However, it is not permissible for the legislation of a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty.'*[25]

Therefore it makes an implicit reference to the EC Treaty.

The judgment in *Rottmann* (C-135/08)[26] was adopted in 2010, therefore after the entry into force of the Treaty of Maastricht (and the Treaty of Lisbon which, however, was not in force at the time of the facts of this case), and after the adoption of the '*Decision of the European Council of Edinburgh on Denmark*.' In emphasising the exclusive competence of Member States to confer their citizenship, the Court of Justice referred to:

> *3 Declaration No 2 on nationality of a Member State, annexed by the Member States to the final act of the Treaty on European Union (OJ 1992 C 191, p. 98), is worded as follows:*
> *"The Conference declares that, wherever in the Treaty establishing the European Community reference is made to nationals of the Member States, the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned. […]"*
> *"4 According to a decision of the Heads of State and Government, meeting within the European Council at Edinburgh on 11 and 12 December 1992, concerning certain problems raised by Denmark on the Treaty of European Union (OJ 1992 C 348, p. 1, 'the Edinburgh decision'):*
> *"The provisions of Part Two of the Treaty establishing the European Community relating to citizenship of the Union give nationals of the Member States additional rights and protection as specified in that Part. They do not in any way take the place of national citizenship. The question whether an individual possesses the nationality of a Member State will be settled solely by reference to the national law of the Member State concerned."'* (pars. 3 and 4)

These two instruments explain a position common to all Member States: the first one is a declaration and, therefore, not binding; the second, though, is a binding act of mere declaratory nature, which explicitly restates that which in any case was implicitly stated in the Treaty of Rome, before and after the adoption of the Treaty of Maastricht that amended it. Even more interesting is to follow the reasoning of the Court to assert its competence in the *Rottman* case (C-135/08).[27] It should be remembered that Mr. Janko Rottman, of Austrian citizenship, acquired the German citizenship and consequently lost his first citizenship under the Austrian law on citizenship. Later, he lost his German citizenship in application of the German law on citizenship because he had improperly acquired it by omitting to declare that he had been subject to a legal action for alleged offences in the exercise of his profession in Austria. Therefore, he was stateless, deprived of any citizenship at least temporarily until the Austrian authorities restored his original citizenship. The German court involved in the question, the Federal Administrative Court (Bundesverwaltungsgericht), therefore referred the matter to the Court of Justice, asking whether such a situation was compatible with EU law.

[25] In the *Micheletti* case, see note 21 above.
[26] See note 20 above.
[27] See note 20 above.

The Court of Justice starts its response by reminding:

> *The German and Austrian Governments also argue that when the decision withdrawing the naturalisation of the applicant in the main proceedings was adopted, the latter was a German national, living in Germany, to whom an administrative act by a German authority was addressed. According to those governments, supported by the Commission, this is, therefore, a purely internal situation not in any way concerning European Union law, the latter not being applicable simply because a Member State has adopted a measure in respect of one of its nationals. The fact that, in a situation such as that in the main proceedings, the person concerned exercised his right to freedom of movement before his naturalisation cannot of itself constitute a cross-border element capable of playing a part with regard to the withdrawal of that naturalisation* (par. 38).

The Court does not follow the line of reasoning of the two states concerned and that of the Commission. It begins, though, by recalling the fundamental principle, namely, the lack of competence of the Union to establish the criteria for acquiring and losing the citizenship of the EU:

> *39 It is to be borne in mind here that, according to established case-law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality [...].*

The Court hence refers to public international law as well as the judgment in *Micheletti* (C-369/90),[28] before continuing with its reasoning:

> *40 It is true that Declaration No 2 on nationality of a Member State, [...] and the decision of the Heads of State and Government, meeting within the European Council [...], which were intended to clarify a question of particular importance to the Member States, namely, the definition of the ambit ratione personae of the provisions of European Union law referring to the concept of national, have to be taken into consideration as being instruments for the interpretation of the EC Treaty, especially for the purpose of determining the ambit ratione personae of that Treaty.*
> *41 Nevertheless, the fact that a matter falls within the competence of the Member States does not alter the fact that, in situations covered by European Union law, the national rules concerned must have due regard to the latter (see, to that effect [...]).*
> *42 It is clear that the situation of a citizen of the Union who, like the applicant in the main proceedings, is faced with a decision withdrawing his naturalisation, adopted by the authorities of one Member State, and placing him, after he has lost the nationality of another Member State that he originally possessed, in a position capable of causing him to lose the status conferred by Article 17 EC and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of European Union law.*
> *43 As the Court has several times stated, citizenship of the Union is intended to be the fundamental status of nationals of the Member States [see...].*
> *44 Article 17(2) EC attaches to that status the rights and duties laid down by the Treaty, including the right to rely on Article 12 EC in all situations falling within the scope ratione materiae of Union law (see [...]).*
> *45 Thus, the Member States must, when exercising their powers in the sphere of nationality, have due regard to European Union law [judgements quoted].*
> *46 In those circumstances, it is for the Court to rule on the questions referred by the national court which concern the conditions in which a citizen of the Union may, because he loses his nationality, lose his status of citizen of the Union and thereby be deprived of the rights attaching to that status.*

It is important to do a comprehensive reading of the Court of Justice's reasoning, as evidenced by the many comments written soon after the publication of the ruling. They either

[28] See note 21 above.

welcome the ruling as a step forward towards the recognition of the status of European citizens (referring primarily to paragraphs 43 to 46, quoted above), or criticised the Court for not having the courage to rule on the merits, referring to the following paragraphs, especially paragraph 59. Instead, the Court's reasoning is logical and is entirely predictable for anyone who keeps track of the EU Law as based on the wording of treaties between sovereign Member States that, under public international law, are based on the principle of conferral according to which, as now the TEU reminds (Art. 5, par. 2): '*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.*' Therefore, it is necessary to quote the remaining of the Court of Justice's reasoning in the judgement of *Rottman* (C-135/08).[29]

> *47 In this regard, the national court essentially raises the question of the proviso formulated in the Court's case-law cited in paragraph 45 above, to the effect that the Member States must, when exercising their powers in the sphere of nationality, have due regard to European Union law, and also the question of the consequences of that proviso in a situation such as that in the case in the main proceedings.*
> *48 The proviso that due regard must be had to European Union law does not compromise the principle of international law previously recognised by the Court, and mentioned in paragraph 39 above, that the Member States have the power to lay down the conditions for the acquisition and loss of nationality, but rather enshrines the principle that, in respect of citizens of the Union, the exercise of that power, in so far as it affects the rights conferred and protected by the legal order of the Union, as is in particular the case of a decision withdrawing naturalisation such as that at issue in the main proceedings, is amenable to judicial review carried out in the light of European Union law.*
> *49 Unlike the applicant in the case giving rise to the judgment in Kaur who, not meeting the definition of a national of the United Kingdom of Great Britain and Northern Ireland, could not be deprived of the rights deriving from the status of citizen of the Union, Dr Rottmann has unquestionably held Austrian and then German nationality and has, in consequence, enjoyed that status and the rights attaching thereto.*
> *50 Nevertheless, as several of the governments having submitted observations to the Court have argued, if a decision withdrawing naturalisation such as that at issue in the main proceedings is based on the deception practised by the person concerned in connection with the procedure for acquisition of the nationality in question, such a decision could be compatible with European Union law.*
> *51 A decision withdrawing naturalisation because of deception corresponds to a reason relating to the public interest. In this regard, it is legitimate for a Member State to wish to protect the special relationship of solidarity and good faith between it and its nationals and also the reciprocity of rights and duties, which form the bedrock of the bond of nationality.*
> *52 That conclusion relating to the legitimacy, in principle, of a decision withdrawing naturalisation adopted in circumstances such as those in the main proceedings is borne out by the relevant provisions of the Convention on the reduction of statelessness. Article 8(2) thereof provides that a person may be deprived of the nationality of a Contracting State if he has acquired that nationality by means of misrepresentation or by any other act of fraud. Likewise, Article 7(1) and (3) of the European Convention on nationality does not prohibit a State Party from depriving a person of his nationality, even if he thus becomes stateless, when that nationality was acquired by means of fraudulent conduct, false information or concealment of any relevant fact attributable to that person.*
> *53 That conclusion is, moreover, in keeping with the general principle of international law that no one is arbitrarily to be deprived of his nationality, that principle being reproduced in Article 15(2) of the Universal Declaration of Human Rights and in Article 4(c) of the European Convention on*

[29] See note 20 above.

nationality. When a State deprives a person of his nationality because of his acts of deception, legally established, that deprivation cannot be considered to be an arbitrary act.
54 Those considerations on the legitimacy, in principle, of a decision withdrawing naturalisation on account of deception remain, in theory, valid when the consequence of that withdrawal is that the person in question loses, in addition to the nationality of the Member State of naturalisation, citizenship of the Union.
55 In such a case, it is, however, for the national court to ascertain whether the withdrawal decision at issue in the main proceedings observes the principle of proportionality so far as concerns the consequences it entails for the situation of the person concerned in the light of European Union law, in addition, where appropriate, to examination of the proportionality of the decision in the light of national law.
56 Having regard to the importance which primary law attaches to the status of citizen of the Union, when examining a decision withdrawing naturalisation it is necessary, therefore, to take into account the consequences that the decision entails for the person concerned and, if relevant, for the members of his family with regard to the loss of the rights enjoyed by every citizen of the Union. In this respect it is necessary to establish, in particular, whether that loss is justified in relation to the gravity of the offence committed by that person, to the lapse of time between the naturalisation decision and the withdrawal decision and to whether it is possible for that person to recover his original nationality.
57 With regard, in particular, to that last aspect, a Member State whose nationality has been acquired by deception cannot be considered bound, pursuant to Article 17 EC, to refrain from withdrawing naturalisation merely because the person concerned has not recovered the nationality of his Member State of origin.
58 It is, nevertheless, for the national court to determine whether, before such a decision withdrawing naturalisation takes effect, having regard to all the relevant circumstances, observance of the principle of proportionality requires the person concerned to be afforded a reasonable period of time in order to try to recover the nationality of his Member State of origin.
59 Having regard to the foregoing, the answer to the first question and to the first part of the second question must be that it is not contrary to European Union law, in particular to Article 17 EC, for a Member State to withdraw from a citizen of the Union the nationality of that State acquired by naturalisation when that nationality has been obtained by deception, on condition that the decision to withdraw observes the principle of proportionality.

It is worth reiterating: the fact that the EU Law must be observed by all Member States when they grant or withdraw their citizenship does not alter the fact that Member States have exclusive competence on the matter. They retain full ownership of a competence that the Union does not have. The rules governing the exercise of this exclusive competence, established by Union law, are not different in nature from those established by other international treaties: for example, the obligation to draw the consequences of the prohibition to withdraw citizenship, which means making a person stateless, contained in the instruments mentioned above and which the Court of Justice referred to as the international law framework in the *Rottman* judgment (C-135/08)[30] (paragraphs 14 to 21), namely the Universal Declaration of Human Rights, adopted by the United Nations General Assembly on 10 December 1948, the Convention on the Reduction of Statelessness, adopted at New York on 30 August 1961, and the European Convention on Nationality of 6 November 1997.

[30] See note 20 above.

3. The EU is not a state because the Union does not have a government exercising effective sovereign control over a territory

The European Union does have a system of government formed by institutions with regulatory and decision powers that apply to the territory and population of Member States. However, this is not a sovereign power for all purposes; not even in the case of the exclusive competences of the Union.

From this point of view, it is important to bear in mind that Member States can agree to withdraw these competences through an amendment of the treaties, as stated in Art. 48, par. 2, TEU:

> *The Government of any Member State, the European Parliament or the Commission may submit to the Council proposals for the amendment of the Treaties. These proposals may, inter alia, serve either to increase or to reduce the competences conferred on the Union in the Treaties;*

as well as in the third paragraph of the *Declaration (n.18) in relation to the delimitation of competences*:

> *the representatives of the governments of the Member States, meeting in an Intergovernmental Conference, in accordance with the ordinary revision procedure provided for in Article 48(2) to (5) of the Treaty on European Union, may decide to amend the Treaties upon which the Union is founded, including either to increase or to reduce the competences conferred on the Union in the said Treaties.*

Additionally, the Union totally depends on the authority of the Member States in relation to the control of the territory, which is the geographical scope of the respective law. This is also recognised in some provisions of Art. 299, TFEU (256, TEC) that are particularly relevant [highlights added]:

> *Acts of the Council, the Commission or the European Central Bank which impose a pecuniary obligation on persons other than States, shall be enforceable.*
> ***Enforcement shall be governed by the rules of civil procedure in force in the State in the territory of which it is carried out**. The order for its enforcement shall be appended to the decision, without other formality than verification of the authenticity of the decision, **by the national authority which the government of each Member State shall designate** for this purpose and shall make known to the Commission and to the Court of Justice of the European Union.*
> *When these formalities have been completed on application by the party concerned, the latter may proceed to enforcement in accordance with the national law, by bringing the matter directly before the competent authority.*
> *Enforcement may be suspended only by a decision of the Court. However, **the courts of the country concerned shall have jurisdiction over complaints that enforcement is being carried out in an irregular manner**.*

It should be noted that this is the only provision of the treaties that establishes how to enforce measures from the Institutions, and it is further limited to '*Acts of the Council, the Commission or the European Central Bank which impose a pecuniary obligation on persons other than States.*' This is a double limitation, thus, as Art. 299 does not apply to other institutions and bodies of the Union, and itis only related to pecuniary obligations. For other

cases, the only relevant norm of the Treaty is Art. 4, par. 3 on the principle of sincere cooperation (which will be discussed later).

It may be mentioned as a relevant example that for the management of the Union's customs –the exemplary case of exclusive legislative competence of the European Union, the only provision of the Treaty is Art. 33, TFEU (135, TEC) on customs cooperation:

> *Within the scope of application of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall take measures in order to strengthen customs cooperation between Member States and between the latter and the Commission.*

4. The notion of scope of application as the main consequence of the non-state nature of EU Law

The notion of scope of application of EU Law appears to be one of the most disconcerting concepts for legal scholars who are not experts on the subject, especially for constitutional law scholars.

The EEC Treaty stated already in 1957 in its Art. 7 (now Art. 18, TFEU) that: '*Within the scope of application of the Treaties* [...] *any discrimination on grounds of nationality shall be prohibited*.' This was a clear reference to the '*principle of conferral*.' There were no words such as '*competence of conferral*,' '*conferred competence*,' or '*principle of conferral*' in the founding Treaties before the entry into force of the Treaty of Lisbon. In any case, it was obvious for all experts that the '*principle of conferral*' applied to the Communities. This principle is well-known in international public law, where it applies to international organisations. According to the principles of public international law, sovereign states –and only they- have a general and exclusive power over their territory. Since it is not a state –as it does not have its own territory and population, and it does not have a government exercising sovereign effective control over the territory- the European Union has no general competence similar to the competence of a state.

After the entry into force of the Treaty of Lisbon, Arts. 4 and 5 repeat, with exactly the same words, that '*competences not conferred upon the Union in the Treaties remain with the Member States.*' The same phrase is also repeated in the *Declaration (n.18) in relation to the delimitation of competences*. Additionally, Art. 7, TFEU, confirms that the Union: '[observes] *the principle of conferral of powers.*' Such insistence is explained by the context in which the Treaty of Lisbon has been adopted, after the failure of the *Constitutional Treaty* of 2004. Even before the opening of the *European Convention* of 2002-2003, voices were raised in some Member States requesting the inclusion in the founding treaties of a clause similar to the famous Tenth Amendment of the Constitution of the United States of America of 1787, according to which: '*The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.*' Just as in 1787 in Philadelphia, it was about making explicit a principle that was obvious to legal scholars of good faith.

As prescribed in Art. 5, par. 2, TEU:

Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.

The novelty introduced by the Treaty of Lisbon is limited to including a principle that till then was unwritten, but which has nevertheless always been deemed applicable to the community treaties –including the EDC Treaty of 1952, the draft Statute of the European Political Community of 1953 and the Treaty of Maastricht on the European Union of 1992.

In the original text of the founding treaties the phrase '*principle of conferral*' or the word '*competence*' did not appear. Art. 2, EEC, defined the 'task' of the Community ('*mission*' in French, '*il compito*' in Italian, '*die Aufgabe*' in German), and Art. 3 its 'activities' (*action, azione, Tätigkeit*) to fulfil its 'purpose' (in German, 'im Sinne,' or 'in the sense of'). The word 'competence' was only used to refer to the powers of EU institutions (not the EU itself) and of the Member States. The word 'competence' (*compétence, competenza, Zuständigkeit*) was first used in relation to the powers of the Community in the Single European Act of 1986, in Art. 130R on environmental policy (now Art. 191, TFEU). Probably the legal meaning of the word competence –which means possibility of exercising a power- was easier to understand than the word 'activities,' not much used in legal scholarship, but chosen by the drafters of the Treaty of Rome in 1957 for its dynamic connotation. It should also be stressed that – at least in the first four EC languages i.e. French, German, Italian and Dutch, the word 'activities' better matches the functionalist project of European integration –that is the development of common policies, while the word 'competence' is traditional in constitutional law, and also more consistent with the federalist project.

The real novelty introduced by the Treaty of Lisbon to the founding treaties is not the use of the word 'competence,' but the delimitation of a list of the Union's competences. This was the response of the European Convention of 2002-2003 to those who, as the representatives of the German Länder, had long insisted on the elaboration of a 'catalogue of EU competences' and the introduction of a clause specifying that the remaining competences belong to the Member States. That said, the list of competences compiled by the European Convention was based on the existing powers of the Community and the European Union. These were included in Arts. 2 and 3, EC, as well as in Art. 1, EU, concerning the mission and activities of the Community and the Union, and particularly in the clauses of the treaties which constituted the legal basis for the actions of the Community and the Union.

As previously mentioned, the EEC Treaty already referred in 1957, in its Art. 7, to the notion of scope of application of the Treaty. The Court of Justice has always verified, before passing a judgement, that the dispute or the question asked was '*within the scope of the treaties*' –although it often does not explicitly refer to it when this is obvious. However, the examination of the questions posed to the EU Court of Justice show that many lawyers and judges from the Member States have not internalised the idea that they should first check whether a matter falls *within the scope of the treaties* before attempting to apply the principles or rules of EU law.

The difference between the concept of competence of the Union and that of the scope can be explained as follows: the concept of competence applies to a power of action transferred

by the States to the Union, while the scope defines the applicability of the principles and rules of EU law, even if they are general principles –such as the already mentioned principle of no discrimination based on nationality- not directly linked to a specific sector.

Art. 51 of the *Charter of Fundamental Rights of the European Union* entitled precisely 'Scope' states that:

> *The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.*

The explanation under the authority of the Praesidium of the Convention that drafted the Charter, updated under the responsibility of the Praesidium of the European Convention, states that:

> *The requirement to respect fundamental rights defined in a Union context is only binding on the Member States when they act in the context of Community law*.

The difference between the concepts of competence and scope is quite subtle and therefore often not understood by non-specialists in EU law. This explains, among other things, why some experts on domestic law sometimes accuse the EU Court of Justice for not respecting the principle of conferral. For example, this has frequently occurred in Germany in the context of the ratification of the Constitutional Treaty and then the Treaty of Lisbon, with comments on the ruling of the EU Court of Justice in 2005 in the *Mangold* case (C-144/04),[31] in relation to the principle of no discrimination based on age.

We must remember, as a premise, based either on the rules and principles of public international law, or on common rules and principles of domestic law, that the scope of application of state law is simply determined by the presence of a person (natural or legal) – or by the development of an activity at a distance by a natural or legal person- on the territory of the affected state. Immunity and privilege regimes –such as those for diplomatic and consular staff, as well as for international organisations- are not exceptions to this principle. It only means that if the host state's law applicable to the relevant activity or to certain areas is not applied, this is outside of the jurisdiction of cours and administration of the host state.

As regards the definition of the scope of an international treaty, this is also determined by a geographical criterion, although based on a specific group of people, such as the *United Nations Convention on the Elimination of all forms of Discrimination against Women* (CEDAW) of 1979. Still, the scope of certain principles may be different from the general scope of the treaty. This applies to the territory of the contracting states, but they can limit its scope to some extent by expressing reservations.

In the case of EU Law, it is necessary to add that the situation is slightly different from that of the international law of treaties. First, its scope is determined by *ratione materiae* –with extraterritorial effects as well. Second, the treaties limit the *ratione loci* and *ratione personae* scope of EU law, according to special rules. When there are no further specifications, the word 'scope' used in EU law as a corollary of the principle of conferral,

[31] Judgment of the Court (Grand Chamber), 22 November 2005, *Werner Mangold v Rüdiger Helm*, Case C-144/04. *European Court reports 2005 Page I-09981*.

means scope based on the subject (‘*ratione materiae*’), while there might be further specificity in the case of scope based on the person (‘*ratione personae*’) or on the territory (‘*ratione loci*’). In all three cases the scope of EU law sets limits on the applicability of the principles and rules contained in EU treaties and secondary legislation.

The scope based on the content of the founding treaties, as well as of all EU law, including secondary legislation, is determined by the principle of conferral. However, there is no accurate and comprehensive list in the founding treaties to establish the extent and the exact limits of the scope of application. Instead, these are determined by an examination of the objectives, competences and legal bases for the activities of the European Union. The Treaty of Lisbon has clarified the objectives and competences of the Union, but it remains necessary to consider the precise wording of the legal bases.

As regards the ‘*ratione personae*’ scope of EU Law, in principle, EU law has no impact over the relations between the Member States and their citizens, unless it regulates an activity that is part of its ‘*ratione materiae*’ scope and that the citizen has used –or intends to use- his freedom of movement within the European Union, or unless it is a national of a Member State who is in another Member State different from his state of origin, as in the case of *Chen.*[32] This case concerns an Irish citizen born in Britain who had not travelled outside the territory of the United Kingdom. The situation of Mr. Rottman in the previously mentioned case[33] is quite peculiar, considering that he went from having a citizenship of two Member States to having none.

Instead, and always as a general rule, EU law applies to relations between a Member State and citizens of other EU Member States, unless it is an activity or situation that is outside its ‘*ratione materiae*’ scope. ‘The key point in this matter is the principle of no discrimination between citizens of the host state and citizens of other EU Member States.

Regarding the relations between EU Member States and citizens of third countries, the rule is similar to that applied to relations between Member States and their citizens. An important exception to this rule is that related to family members of nationals of other EU Member States, who enjoy the same rights as the citizens of the European Union. In addition, there are other exceptions due to the existence of secondary legislation aimed at regulating certain aspects of the access to the labour market and certain benefits of the welfare system by citizens of third countries.

All what was just discussed applies to natural persons. In contrast, in regard to legal persons, it should be remembered that, unlike the citizenship of the European Union, there is no nexus of ‘nationality,’ not even indirect, between the Union and private legal persons. There are no rules of Union law on nationality of natural persons, but only rules of the Member States’ laws. In relation to the difficult problem of the effectiveness of the nexus of nationality, public international law applies, but only in the event that this nexus of nationality relates to proprietors or partners of a legal entity located in a Member State, as in the example decided by the International Court of Justice (ICJ) in the case of *Barcelona*

[32] Judgment of the Court (Full Court) of 19 October 2004. *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department*. Case C-200/02. *European Court reports 2004 Page I-09925.*

[33] See note 20 above.

Traction, Light and Power Company, Limited (*Belgium v. Spain*, judgement of 24 July 1964 and 5 February 1970). That said, if the proprietors or partners are nationals of a Member State other than where the headquarters are located, there is an interference – sometimes even an important one – with the prohibition of discrimination on grounds of national origin. This can lead to disapply the ordinary rules of public international law concerning the effectiveness of the nexus of nationality, as it also happens in relation to natural persons, who are European citizens, as demonstrated by the *Micheletti* case (C-369/90) already discussed.[34]

II. EUROPEAN UNION LAW IS BASED ON BINDING AGREEMENTS BETWEEN SOVEREIGN STATES

Since the European Union is not a state, its Constitution –that is, its founding Treaties- cannot be assimilated to that of a federal state, such as for example the Constitution of the United States of America, the Constitution of the Swiss Confederation or the Fundamental Law of the Federal Republic of Germany. Unlike the latter, the EU Constitution remains an agreement between states, or a contract, as indicated by the terminology in German language, which uses the same word '*Vertrag*' both for a treaty of public international law and for a contract of private law. It follows that the nature of EU Law is necessarily different from the nature of the law of a federal state.

First of all, it should be made clear that the adjective 'sovereign' in the following paragraphs is aimed merely at stressing that the concept of state referred to is that typical in public international law. The fact that the units which are part of a federal state are called 'states' (as in the case of the United States of America) or are considered as such by domestic law (as for the cases of Austria and Germany) does not affect the nature of non-state status of those units within the meaning of international law.

The founding Treaties can be divided into three categories: founding treaties, revision treaties and enlargement treaties. Only those treaties constituting the Communities in 1951 and 1957 are genuinely founding treaties. The Single European Act of 1986 and the Treaty of Maastricht of 1992 have been considered as revision treaties of the community treaties, and as founding treaties in relation to monetary union, foreign policy and cooperation on justice and police. The accession treaties (also sometimes called enlargement treaties) are a specific category of treaties that increase the number of Member States of the Union.

Until now, a different form to an international treaty as the basis for European integration has never been considered, although there was some discussion during the European Convention of 2002-2003 on the possibility of a different option. That debate ended at the level of the Praesidium of the Convention with the decision to maintain a treaty amendment mechanism based on an intergovernmental conference for future revisions of the draft *Treaty establishing a Constitution for Europe*, prepared by the Convention. In order to express his

[34] See note 21 above.

disappointment, this option prompted the vice-president of the Convention, Giuliano Amato, to exclaim: 'It's a boy!' He intended to highlight that the text over which the Convention was working would be a Treaty (male word), while Amato would have wanted a Constitution (feminine word).

The Treaty of Lisbon of 2007 is not different from the 2004 Constitutional Treaty. The abandonment of the '*constitutional concept,*' with the adoption of the mandate of the Intergovernmental Conference in charge of drafting what then became the Treaty of Lisbon, does not change the legal nature of the Treaty of Lisbon compared to the Constitutional Treaty. All founding Treaties, including the Constitutional Treaty, the TEU, the TFEU, and the Charter of Fundamental Rights, '*which shall have the same legal value as the Treaties*' under Art. 6, TEU, are agreements between sovereign states. If this pact was considered as the 'Basic Constitutional Charter established by the Treaty' –in the judgement of 1986 in the case *Les Verts v. European Parliament* (C-294/03)[35] (par. 23), or in the Opinion 1/91 of the same Court on the *Creation of the European Economic Area*[36] (par. 21), then the European Council conclusions in which the mandate of 2007 that proclaimed the abandonment the 'constitutional project' was adopted did not change anything of substance.

1. The principle of primacy as a consequence of the international treaty nature of the EU Constitution

The most visible consequence of the fact that the European Union is based on a pact that binds sovereign states is the principle of primacy.

The principle of primacy was formulated by the Court of Justice in its ruling of 15 July 1964 in the case *Costa v. Enel* (6/64).[37] The principle of primacy can be found today in the *Declaration (n.17) concerning primacy*, annexed to the founding treaties, according to which:

> *The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.*

The opinion of the Council Legal Service is part of this declaration, according to which:

> *At the time of the first judgment of this established case law (Costa/ENEL,15 July 1964, Case 6/641 (1)) there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice.*

The note (1) quotes the well-known phrase in the judgement *Costa v Enel* (C-6/64) in which the Court states:

[35] Judgment of the Court of 23 April 1986. *Parti écologiste "Les Verts" v European Parliament*. Case 294/83. *European Court reports 1986 Page 01339.*
[36] Opinion of the Court of 14 December 1991. Opinion 1/91. *European Court reports 1991 Page I-06079.*
[37] See note 8 above.

> *It follows (…) that the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.*

Usually scholarly comments insist on the expression '*law stemming from* [...] *an independent source,*' that precedes the reference of '*special and original nature*' of EC law. It would be wrong, however, to forget the expression '*the law stemming from the treaty*.' Indeed, the reason that '[EC law] *could not* [...] *be overridden by domestic legal provisions, however framed*' is precisely because it '*stem*[s] *from the treaty*' and therefore is '*an independent source*' in relation to domestic law.

Although the judges who formed the Court in 1964 did not consider it appropriate or necessary, they could have cited the rule of international law of treaties related to internal law and observance of treaties, now codified in Art. 27 of the Vienna Convention on the Law of Treaties signed in Vienna on 23 May 1969:

> *A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46* [Provisions of internal law regarding competence to conclude treaties].

In reality, such principle is stated in the judgement of *Costa v. Enel*[38] precisely in its legal reasoning:

> *The integration into the laws of each member state of provisions which derive from the community and more generally the terms and the spirit of the treaty,* ***make it impossible for the states, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity****. Such a measure cannot therefore be inconsistent with that legal system. The law stemming from the treaty, an independent source of law,* ***could not because of its special and original nature, be overridden*** *by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called into question.* [highlights added]

The international treaty nature is the main reason why primacy of EU law differs from the supremacy of the Constitution in the internal legal order of a sovereign state, which is the manifestation of the principle of hierarchy of norms. This distinction often provokes scepticism from a number of scholars, be they EU lawyers or constitutional lawyers. Moreover, English speaking scholars have acquired over time the misleading habit of calling primacy with the word 'supremacy,' that appears as a reference to the Constitution of the United States of America (Art. 6, second paragraph) that states:

> *This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.*

In contrast, the Spanish Constitutional Court in its Declaration 1/2004 of 13 December 2004 on the Treaty establishing a Constitution for Europe signed in Rome on 24 October 2004, has made the distinction between the primacy of EU law and the supremacy of the

[38] See note 8 above.

Constitution. This is a cardinal argument of its reasoning concerning the compatibility of Article I-6 of the Treaty establishing a Constitution for Europe with the Spanish Constitution. Article I-6 is entitled 'Union law' and it reads as follows:

> *The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States.*

A declaration annexed to the Constitutional Treaty on Art. I-6 stated that: '*The Conference notes that Article I-6 reflects existing case-law of the Court of Justice of the European Communities and of the Court of First Instance*.' The Spanish Constitutional Court notes the fact that:

> *the primacy that for the Treaty and its secondary legislation is set out in the controversial Art. I-6 is limited specifically to the exercise of the competences conferred on the European Union. It is not, therefore, a primacy of general application, but restricted to the Union's own competences.*

It then continued:

> *Primacy and supremacy are categories that operate in different orders. The former, in the application of valid norms; the latter, within the normative procedures. The supremacy is based on the hierarchical superiority of a norm. As such it is a source of validity for inferior norms, with the consequence, therefore, that these are invalid if they contravene what is imperatively stated by the superior norm. The primacy, on the other hand, is not necessarily based on the hierarchy, but on the distinction between fields of application of different norms, which are in principle valid. One or more of them, though, are able to displace others by virtue of preferred or prevalent application due to different reasons.**

In other words, it can be stated that in the system of hierarchy of norms the Constitution is at the top of the legal system. Following a descending order, there are laws, regulations and administrative measures subject to it. Any norm or measure contrary to the higher norm should be considered invalid. On the contrary, the primacy of EU Law is not part of a system of formal hierarchy of norms. This is a point that many commentators misunderstand when considering the judgement in 1976 in the *Simmenthal* case,[39] a step forward with respect to the ruling in *Costa v. Enel* of 1964.[40] The question is not where to situate the EU norms of treaties, directives, regulations and decisions in terms of the Constitution, the law, the regulations and the measures of the Member State. The fundamental reason for this difference is that the primacy is the expression of the obligations stemming from the pact signed by the state, which –in accordance with the principles of public international law- cannot justify its contravention based on internal norms, regardless of their rank. This explains why all the norms of EU law prevail over those of domestic law: for example, an EU regulation prevails over the Constitution of a Member State.

Consequently, the effect of the primacy is not based on the invalidity of a norm which is hypothetically inferior, but only on the obligation for the institutions and bodies of the state to make the norms of EU law effective in practice, where there is a contradiction between an internal norm and a norm of EU law. An invalid norm would entail its annulment or the

* N. of T.: non-official translation from Spanish.

39 Judgement of the Court of 15 December 1976. *Simmenthal v Italian Minister for Finance*. Case 35/76. *European Court reports 1976 Page 625.*

40 See note 8 above.

obligation to annul it, while the principle of primacy only mandates the obligation not to apply the domestic norm to the particular case or to similar cases. The Court of Justice has never required more than the non-application of the internal norm that is in contravention with a norm of EU law.

2. **The application of the principles of international state liability as a consequence of the international treaty nature of the EU Constitution**

The application of the principles of international state liability follows from the fact that the EU Constitution is an international treaty. Under the rules of public international law, the state is liable for both acts and omissions of its institutions and bodies, even for those of private entities acting under its control.

This principle has been stated, for example, by the ICJ in '*Case concerning United States Diplomatic and Consular Staff in Tehran*' (judgement of 24 May 1980).

The ICJ indicated in its ruling that the behaviour of the '*Muslim Student Followers of the Imam's Policy*' could be directly attributed to the Iranian State if it were established that they were acting on behalf of the state's bodies. The application of the principles of public international law explains the reason why in EU law the independence of the Member State's institutions and bodies is not decisive.

Therefore, it should not be surprising that the EU Court of Justice recognises the responsibility of a Member State not only for acts of the government –central or decentralised, i.e. local authorities- but also of the Parliament and even the courts.

The responsibility of the Member State for acts of the legislator contrary to EC law was upheld by the Court of Justice in its ruling of 1991 in the case *Francovich* (C-6/90).[41]

In the motivation of its judgment concerning the responsibility of the Member State for acts of its Parliament, the Court begins its reasoning with the classic reference to the special nature of EC law:

> *31 It should be borne in mind at the outset that the EEC Treaty has created its own legal system, which is integrated into the legal systems of the Member States and which their courts are bound to apply. The subjects of that legal system are not only the Member States but also their nationals. Just as it imposes burdens on individuals, Community law is also intended to give rise to rights which become part of their legal patrimony. Those rights arise not only where they are expressly granted by the Treaty but also by virtue of obligations which the Treaty imposes in a clearly defined manner both on individuals and on the Member States and the Community institutions (see the judgments in Case 26/62 Van Gend en Loos [1963] ECR 1 and Case 6/64 Costa v ENEL [1964] ECR 585).*

The Court continues by calling attention to the role of national courts in ensuring the effectiveness of EC law:

[41] Judgment of the Court of 19 November 1991. *Andrea Francovich and Danila Bonifaci and others v Italian Republic*. Joined cases C-6/90 and C-9/90. *European Court reports 1991 Page I-05357.*

32 Furthermore, it has been consistently held that the national courts whose task it is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals (see in particular the judgments in Case 106/77 Amministrazione delle Finanze dello Stato v Simmenthal [1978] ECR 629, paragraph 16, and Case C-213/89 Factortame [1990] ECR I-2433, paragraph 19).
33 The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible.
34 The possibility of obtaining redress from the Member State is particularly indispensable where, as in this case, the full effectiveness of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Community law.
35 It follows that the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty.
36 A further basis for the obligation of Member States to make good such loss and damage is to be found in Article 5 of the Treaty, under which the Member States are required to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under Community law. Among these is the obligation to nullify the unlawful consequences of a breach of Community law [...].
37 It follows from all the foregoing that it is a principle of Community law that the Member States are obliged to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible.

This reasoning has been elucidated in order to remind that EC law, now EU Law, has mechanisms for enforcing the principles governing state responsibility. It should be noted that, as usual, the Court refers to 'the system of the Treaty' (in par. 35) and not to the general principles of law that are not written.

Until that moment, scholars had nothing new to say in relation to the usual case-law on the responsibility of Member States. The novelty in *Francovich* was that the act giving rise to the liability could be attributed to the Parliament –in the particular case, its failure to act. In the national law of most Member States –with the exception of France and the jurisprudence of the Council of State on the *La Fleurette* case[42] (already in 1938)- the Parliament was immune, in principle, to any liability. A reasoning based on concepts of domestic law, thus, at least led to debate on the possibility of a responsibility of the legislature or the scope of the immunity which it normally enjoys. Instead, the Court has not discussed this point, and so it is often criticised. In fact, the sentence continues as follows:

(b) The conditions for State liability
38 Although State liability is thus required by Community law, the conditions under which that liability gives rise to a right to reparation depend on the nature of the breach of Community law giving rise to the loss and damage.
39 Where, as in this case, a Member State fails to fulfil its obligation under the third paragraph of Article 189 of the Treaty to take all the measures necessary to achieve the result prescribed by a directive, the full effectiveness of that rule of Community law requires that there should be a right to reparation provided that three conditions are fulfilled.
40 The first of those conditions is that the result prescribed by the directive should entail the grant of rights to individuals. The second condition is that it should be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, the third condition is the

[42] 14 January 1938, *Société anonyme des produits laitiers 'La Fleurette.'* Publié au Recueil Lebon, 25.

existence of a causal link between the breach of the State' s obligation and the loss and damage suffered by the injured parties.
41 Those conditions are sufficient to give rise to a right on the part of individuals to obtain reparation, a right founded directly on Community law.
42 Subject to that reservation, it is on the basis of the rules of national law on liability that the State must make reparation for the consequences of the loss and damage caused. In the absence of Community legislation, it is for the internal legal order of each Member State to designate the competent courts and lay down the detailed procedural rules for legal proceedings intended fully to safeguard the rights which individuals derive from Community law [...].
43 Further, the substantive and procedural conditions for reparation of loss and damage laid down by the national law of the Member States must not be less favourable than those relating to similar domestic claims and must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation (see [...]).
44 In this case, the breach of Community law by a Member State by virtue of its failure to transpose Directive 80/987 within the prescribed period has been confirmed by a judgment of the Court. The result required by that directive entails the grant to employees of a right to a guarantee of payment of their unpaid wage claims. As is clear from the examination of the first part of the first question, the content of that right can be identified on the basis of the provisions of the directive.
45 Consequently, the national court must, in accordance with the national rules on liability, uphold the right of employees to obtain reparation of loss and damage caused to them as a result of failure to transpose the directive.
46 The answer to be given to the national court must therefore be that a Member State is required to make good loss and damage caused to individuals by failure to transpose Directive 80/987.

The Court's silence on the fact that the act giving rise to liability was the omission of the legislature was not surprising from the perspective of public international law. The Court in the particular case did nothing but apply, albeit implicitly, the aforementioned rule of international law of treaties on internal law and observance of treaties:

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

The jurisdictional immunity of legislators in national law, although based on the fundamental constitutional principle of separation of powers, could not have been invoked as justification for the breach of obligations of Member States arising from Union law. Once reminded about the role of the courts of the Member States to ensure the effectiveness of and compliance with EC law, the Court could not consider this rule of domestic law. This would have resulted in depriving EC law of its effectiveness due to the fact that the legislature of a Member State had not complied with the obligations under the Treaties.

Those who understand the *Francovich*[43] jurisprudence in this way could not be surprised by its continuation, namely, by the case-law of 2003 in *Köbler* (C-224/01)[44] and of 2006 in *Traghetti del Meditterraneo* (C-173/03).[45] In *Köbler*, through a referral for preliminary ruling made by the Civil Court of the Land of Vienna (Austria), the ECJy was called to rule on a potential liability of the Member State for acts of its courts –in this particular case, the

[43] See note 39 above.
[44] Judgment of the Court of 30 September 2003. *Gerhard Köbler v Republik Österreich*. Case C-224/01. *European* Court *reports 2003 Page I-10239*.
[45] Judgment of the Court (Great Chamber) of 13 June 2006. *Traghetti del Mediterraneo SpA in Liquidation v. Italian Republic*. Case C-173/03. *European Court reports 2006 Page I-05177.*

Austrian Supreme Administrative Court (Verwaltungsgerichtshof). More specifically, the first two questions raised by the civil regional court focused on this issue:

> *(1) Is the case-law of the Court of Justice to the effect that it is immaterial as regards State liability for a breach of Community law which institution of a Member State is responsible for that breach (see Joined Cases C-46/93 and C-48/93 Brasserie du pêcheur and Factortame [1996] ECR I-1029) also applicable when the conduct of an institution purportedly contrary to Community law is a decision of a supreme court of a Member State, such as, as in this case, the Verwaltungsgerichtshof?*
> *(2) If the answer to Question 1 is yes: Is the case-law of the Court of Justice according to which it is for the legal system of each Member State to determine which court or tribunal has jurisdiction to hear disputes involving individual rights derived from Community law (see inter alia Case C-54/96 Dorsch Consult [1997] ECR I-4961) also applicable when the conduct of an institution purportedly contrary to Community law is a judgment of a supreme court of a Member State, such as, in this case, the Verwaltungsgerichtshof?*

The reason for the insistence of the national judge was because Austrian law expressly excluded the liability of its Supreme Court for judicial decisions. The reasons for such prohibition lied on the principle of legal certainty, precisely because they are judicial decisions of last instance, and also in the separation of powers. In answering the questions, as in *Francovich,*[46] the Court begins by recalling the bases of state responsibility:

> *30 First, as the Court has repeatedly held, the principle of liability on the part of a Member State for damage caused to individuals as a result of breaches of Community law for which the State is responsible is inherent in the system of the Treaty [case-law quoted].*
> *31 The Court has also held that that principle applies to any case in which a Member State breaches Community law, whichever is the authority of the Member State whose act or omission was responsible for the breach [case-law quoted]. (pars. 30 and 31).*

Once reminded of the principle according to which the responsibility may arise from any act or omission attributable to the state –as it was stressed before in relation to the *Francovich* case,[47] the Court notes that this also applies to the judiciary with a very interesting argument on the nature of EC law.

> *32 In international law a State which incurs liability for breach of an international commitment is viewed as a single entity, irrespective of whether the breach which gave rise to the damage is attributable to the legislature, the judiciary or the executive. That principle must apply a fortiori in the Community legal order since all State authorities, including the legislature, are bound in performing their tasks to comply with the rules laid down by Community law which directly govern the situation of individuals (Brasserie du Pêcheur and Factortame, cited above, paragraph 34).*

There are at least two ways to read this sentence. From the point of view of those who maintain the autonomy of EC law, now EU Law, in relation to international public law, it is remarkable that the Court distinguishes precisely between the international legal order and the community legal order. Instead, from the point of view of those who consider the international treaty nature of EC law as fundamental, it is noteworthy that the Court says in this regard that, if in the international legal order that principle applies, it should apply 'a fortiori' in the community legal order. The expression 'a fortiori' emphasises that a principle of international law is being applied because we are referring to a law based on international

[46] See note 39 above.
[47] See note 39 above.

treaties. In particular, it can be explained in the community legal order, that all state bodies – including the legislature- are bound in the performance of their tasks to comply with the norms imposed by EC law which may directly govern the situation of individuals. This is not different in international law where the state's responsibility extends precisely to the actions of all state bodies, including the legislature. What is different in EC law, as discussed in the third section of this chapter, is that there are a large number of norms in the treaties and secondary legislation which may directly govern the situation of individuals.

Unlike the *Francovich* case,[48] the Court could not but speak explicitly about the problems of the extension of the responsibility of the Member State to other authorities different from the executive, since two of the five questions raised by the Austrian court were drafted as just explained. The following part of the judgement is therefore devoted to this matter through a reasoning which is more closely linked to the specific characteristics of EC law.

> *33 In the light of the essential role played by the judiciary in the protection of the rights derived by individuals from Community rules, the full effectiveness of those rules would be called in question and the protection of those rights would be weakened if individuals were precluded from being able, under certain conditions, to obtain reparation when their rights are affected by an infringement of Community law attributable to a decision of a court of a Member State adjudicating at last instance.*
> *34 It must be stressed, in that context, that a court adjudicating at last instance is by definition the last judicial body before which individuals may assert the rights conferred on them by Community law. Since an infringement of those rights by a final decision of such a court cannot thereafter normally be corrected, individuals cannot be deprived of the possibility of rendering the State liable in order in that way to obtain legal protection of their rights.*
> *35 Moreover, it is, in particular, in order to prevent rights conferred on individuals by Community law from being infringed that under the third paragraph of Article 234 EC a court against whose decisions there is no judicial remedy under national law is required to make a reference to the Court of Justice.*

The Court then responds to the specific observations raised by some Member States:

> *37 Certain of the governments which submitted observations in these proceedings claimed that the principle of State liability for damage caused to individuals by infringements of Community law could not be applied to decisions of a national court adjudicating at last instance. In that connection arguments were put forward based, in particular, on the principle of legal certainty and, more specifically, the principle of res judicata, the independence and authority of the judiciary and the absence of a court competent to determine disputes relating to State liability for such decisions.*

The reasoning with regard to the principle of legal certainty, although interesting, is not directly relevant to the point under consideration –namely, the international treaty nature of EC law- since it is a general principle that applies to all types of legal orders. Instead the response on judicial independence is interesting:

> *42 As to the independence of the judiciary, the principle of liability in question concerns not the personal liability of the judge but that of the State. The possibility that under certain conditions the State may be rendered liable for judicial decisions contrary to Community law does not appear to entail any particular risk that the independence of a court adjudicating at last instance will be called in question.*

[48] See note 39 above.

It is important to insist on the fact that this is about the responsibility of the state. Then the Court proceeds to reject the arguments less relevant for our discussion, namely:

> *the argument based on the risk of a diminution of the authority of a court adjudicating at last instance owing to the fact that its final decisions could by implication be called in question in proceedings in which the State may be rendered liable for such decisions' and the argument on 'difficulty of designating a court competent to determine disputes concerning the reparation of damage resulting from such decisions [decisions of a national court adjudicating at last instance]*.

The fact that the Court is not satisfied with the premise that the state is always liable for the acts and omissions attributable to the courts of any rank is because, unlike what normally happens in international law in which state responsibility is usually solved at the interstate level, under the framework of EU Law, these are problems to be solved via appeal by the victims of the wrongdoing. Relevant to our discussion, instead, is the wording of the last paragraph of this part of the decision:

> *50 It follows from the foregoing that the principle according to which the Member States are liable to afford reparation of damage caused to individuals as a result of infringements of Community law for which they are responsible is also applicable where the alleged infringement stems from a decision of a court adjudicating at last instance. It is for the legal system of each Member State to designate the court competent to adjudicate on disputes relating to such reparation.*

The last sentence is perfectly logical for those who do not lose sight of the international treaty nature of the EU law, based on treaties between Member States. Instead, for those who tend to reason according to premises typical of national law, the phrase '[i]*t is for the legal system of each Member State to designate the court competent*' cannot be understood. This explains why some scholars have referred to the so-called principle of procedural autonomy of Member States.

From a conceptual point of view, the reference to 'autonomy of the Member State' seems to imply that the Union confers the Member State a sphere of autonomy. Rather, what happens in Union law is that Member States have not granted the Union a power to regulate the internal organisation and procedures for their institutions. Only in exceptional cases, a sectorial competence may include organisational or procedural aspects, as for example in the field of telecommunications, in which community legislation requires the existence of an independent regulatory body. The phrase of the *Köbler* ruling,[49] characteristic of a response to preliminary questions, '[i]*t is for the legal system of each Member State to designate the court competent,*' merely reminds the national judge that the Court, as a Union's body, has no jurisdiction to make such an appointment by itself.

Therefore, it should not be surprising that the Court, by recognising the so-called procedural –and organisational- autonomy of the Member State, rejects however the idea that the latter may use the rules or principles of domestic law in order to prevent the implementation of EU law. From the references to the principles of international state liabilityit follows, consequently, that the rules of the Treaty on state aid apply to the operations of local authorities and other autonomous public entities. Art. 107, par. 1, TFEU (87 TEC) states:

[49] See note 42 above.

Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market,

It is undisputed, indeed, that when the words '*State*' and '*State resources*' include all public entities that, in fact, are part of the state from the standpoint of public international law. This simply results from the fact that only the states have the treaty making power that allow them to conclude treaties in the sense of public international law, that is, to cite the Vienna Convention (Art. 2. 'Use of terms'):

(a) "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

3. The presence of Member States' representatives in EU institutions and bodies, and their privileges and immunities, as a consequence of the international treaty nature of the EU Constitution

The presence of Member States' representatives in EU institutions and bodies is derived from the international treaty nature of the EU Constitution. In principle, the founding Treaties do not provide any indication on the origin of such representatives. Art. 15, TEU, on the composition of the European Council states that:

The European Council shall consist of the Heads of State or Government of the Member States, together with its President and the President of the Commission. The High Representative of the Union for Foreign Affairs and Security Policy shall take part in its work.

It does not provide, however, any information about the criteria to appoint the Head of State or Head of Government for the European Council. Art. 16, par. 2, TEU, on the Council, and as amended by the Treaty of Maastricht, only indicates, without any further explanation of the precise meaning of '*ministerial level*':

The Council shall consist of a representative of each Member State at ministerial level, who may commit the government of the Member State in question and cast its vote.

It is known that the objective of the reform by Maastricht on this specific issue was the presence in the Council of representatives of the German Länder and the Belgian autonomies or regions. This was not possible with the earlier formulation of the EEC Treaty which refers to the representatives of the Member States in the Council as members of their government. There was nothing, however, that would prevent a Member State to declare that it has 'ministerial level' those members of the executive of a regional body that does not have any legislative powers –which are precisely different from the Austrian and German Länder or the autonomies or regions in Belgium, Italy and Spain, or the Portuguese autonomous regions.

The provisions of Art. 300, pars. 2 and 3, TFEU, concerning the composition of the Committee of the Regions and the Economic and Social Committee, although more precise on the appointment criteria, also leave a wide discretion to Member States for the selection:

> *2. The Economic and Social Committee shall consist of representatives of organisations of employers, of the employed, and of other parties representative of civil society, notably in socioeconomic, civic, professional and cultural areas. 3. The Committee of the Regions shall consist of representatives of regional and local bodies who either hold a regional or local authority electoral mandate or are politically accountable to an elected assembly.*

The *Protocol (no 7) on the privileges and immunities of the European Union* would not make sense in a national legal order, and would be clearly contrary to the principle of equality in a democratic system. The protocol, referred to not only by Art. 343, TFEU, but by other provisions of the Treaty, has the same legal value as the founding Treaties and the Charter of Fundamental Rights. Indeed, *Chapter III Members of the European Parliament* is similar to many national systems, as an expression of the separation of powers. It is also possible that a certain federal-type system has an equivalent to *Chapter IV Representatives of the Member States taking part in the work of the institutions of the European Union,* especially in relation to Art. 10 according to which:

> *Representatives of Member States taking part in the work of the institutions of the Union, their advisers and technical experts shall, in the performance of their duties and during their travel to and from the place of meeting, enjoy the customary privileges, immunities and facilities.*

However, there is no equivalent in any legal order of a democratic state to *Chapter V Officials and other servants of the Union*. This chapter not only establishes that:

> *In the territory of each Member State and whatever their nationality, officials and other servants of the Union shall: (a) [...] be immune from legal proceedings in respect of acts performed by them in their official capacity [...] They shall continue to enjoy this immunity after they have ceased to hold office' (Art. 11). It also states that: '(b) together with their spouses and dependent members of their families, not be subject to immigration restrictions or to formalities for the registration of aliens; (c) in respect of currency or exchange regulations, be accorded the same facilities as are customarily accorded to officials of international organisations; (d) enjoy the right to import free of duty [...] (e) have the right to import free of duty a motor car for their personal use [...]' (Art. 11).*

It is true that the effect of pars. b) to d) is now very limited due to the realisation of the internal market. Instead, the actual impact of Art. 12 is still very important, according to which:

> *Officials and other servants of the Union shall be liable to a tax, for the benefit of the Union, on salaries, wages and emoluments paid to them by the Union.*

The same is true of Art. 13:

> *officials and other servants of the Union who, solely by reason of the performance of their duties in the service of the Union, establish their residence in the territory of a Member State other than their State of domicile for tax purposes at the time of entering the service of the Union, shall be considered, both in the State of their actual residence and in the State of domicile for tax purposes, as having maintained their domicile in the latter State provided that it is a member of the Union.*

Art. 13 then adds that the latter provision:

shall also apply to a spouse, to the extent that the latter is not separately engaged in a gainful occupation, and to children dependent on and in the care of the persons referred to in this Article.

4. **The control and monitoring system of Member States as a consequence of the treaty nature of the EU Constitution**

A series of rules and principles governing the position of the Member States in the system of judicial review and the system of monitoring of the European Union derives from the international nature of the treaty of the EU Constitution.

When analysing the system of remedies established in the treaties, the particular position of the Member States is apparent. It is no coincidence that the first three articles of the TFEU on the proceedings before the Court of Justice are those establishing the action for infringement, namely Arts. 258, 250 and 260, TFEU (ex 226, 227 and 228, EC). The first role of the Court of Justice in the system of the Treaty of Rome is to ensure compliance by Member States of their obligations.

Along with the institutions and bodies of the Union, Member States are the only subjects that have locus standi, i.e. the ability to appear before the Court of Justice –with the exception of specific actions by individuals related to the contractual or extra-contractual liability of the institutions and bodies of the Union. The action for infringement can be directed only against Member States regardless of the source of the violation of EU law. The action for infringement is therefore the expression of their international responsibility. For this reason, such action can be directed against them either for acts or omissions of its institutions and bodies that constitute a violation of EU law, or for acts or omissions of its institutions and bodies that are attributable to the state within the meaning of public international law, that is, of local authorities or other public entities or entities controlled by the state or by other local authorities, irrespective of their degree of autonomy from the state within the meaning of constitutional law.

Member States also have a special position with regard to the ability to appeal to the Court of Justice. They are the only subjects that always have locus standi, together with the three main institutions, the European Parliament, the Commission and the Council. In fact, in relation to the action of annulment or Art. 260 TFEU (ex 230 EC) the expression 'privileged applicants' is often used in order to indicate their capacity to appear before the Court without having to demonstrate a specific own interest. Member States have this position in common with the European Commission and the Council as well as, since the Treaty of Nice, the European Parliament. This privileged position of the Member States in a system –with regard to the action of annulment- aimed at ensuring respect for Union law by the institutions and bodies of the Union is clearly the result of the international treaty nature of the Constitution of the Union, the founding Treaties. This privileged position can also be understood as a counterpart to the right of the Commission to act before the Court of Justice. It should be remembered that the privileged applicants, that is, the potential authors of appeals without eligibility conditions, are such for both the annulment and the omission actions.

In addition, Member States are the only subjects who –together with the European Commission, can initiate an action for infringement. The wording of Art. 10, par. 1, of the *Protocol (no 36) on the transitional provisions* suggests that, until 1 December 2014, only the Member States, but not the Commission, can bring an action for infringement based on Art. 259, TFEU, for acts adopted before the entry into force of the Treaty of Lisbon in the field of police cooperation and judicial cooperation in criminal matters. According to Art. 10, par. 1 of the Protocol:

> *1. As a transitional measure, and with respect to acts of the Union in the field of police cooperation and judicial cooperation in criminal matters which have been adopted before the entry into force of the Treaty of Lisbon, the powers of the institutions shall be the following at the date of entry into force of that Treaty: the powers of the Commission under Article 258 of the Treaty on the Functioning of the European Union shall not be applicable and the powers of the Court of Justice of the European Union under Title VI of the Treaty on European Union, in the version in force before the entry into force of the Treaty of Lisbon, shall remain the same, including where they have been accepted under Article 35(2) of the said Treaty on European Union.*

Art. 35, par. 2, TEU in its version prior to the Treaty of Lisbon –already mentioned, refers to the declaration through which any Member State may accept the jurisdiction of the Court of Justice to give preliminary rulings. It should be noted that par. 6 provides for the jurisdiction of the Court of Justice to review the legality of framework decisions and decisions in actions brought by a Member State or the Commission, and that par. 7 provides for its jurisdiction to rule on any dispute between Member States regarding the interpretation or the application of acts adopted under the third pillar. The only mention in Art. 10, par. 1 of the Protocol of the possibility for the Commission to bring an action under Art. 258, TFEU, and not for the Member States in Art. 259, should therefore mean that they are able to bring an action for infringement against another Member State, following a model closer to that typical of public international law.

It should be also noted that, based on Art. 40 of the Statute of the Court of Justice –which is a protocol and therefore has the same legal value as the Treaties, Member States (and EU institutions) may intervene in cases before the Court of Justice without the need to be able to prove an interest in the solution of a case before the Court of Justice. Based on Art. 23 of the Statute, not only the parties but also the Member States as well as the Commission and, where appropriate, the institutions or bodies of the Union, which adopted the act whose validity or interpretation is in dispute shall be entitled to submit statements of case or written observations to the Court of Justice.

Besides these elements that are clearly the result of the international treaty nature of the founding treaties, the role of the EU Court of Justice differs from that of constitutional courts or supreme courts of the sovereign states. Its functions include, above all, ensuring compliance with the obligations of Member States. This leads to arguments based on premises which differ from those used in state law for the legal legitimacy of the acts of the sovereign state. This also applies to federal states as well as their constituents, irrespective of how they are called – state, land, region, autonomous unit, etc. The role of the EU Court to ensure compliance with agreements by Member States is the main reason for the existence of asymmetries in the Court’s reasoning in relation to the legitimacy of both acts and omissions,

as they are attributable either to EU institutions or Member States. Due to this reason, for example, the way in which the Court applies the principle of proportionality seems more lenient to many commentators when it is about an assessment of the acts of EU institutions than when it is about infringements by Member States. By forgetting the differences between the two situations, when viewed from the perspective of the judge of the EU, such commentators therefore use a strictly legal critique to pass a moral judgement.

The role of the European Commission cannot be understood solely by comparing it with the government of a parliamentary system –or 'presidential/congressional' system, as that of the United States of America. Because the EU Constitution is based on an agreement between States, the Commission fulfils a supervisory role over the implementation of the obligations they have assumed, based on generally Art. 258, TFEU (ex 226 TEC):

> *If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.*
> *If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.*

This supervisory function is not completely strange to the constitutional law of some Member States. It is found, for example, in the power of the Italian or Spanish governments to appeal before their constitutional courts to control the constitutionality of the laws of the regions or autonomous units. This is, however, a marginal role for the central government, while it is an absolutely fundamental role for the European Commission. The existence of this function, derived from the international treaty nature of the EU Constitution, explains many specific aspects of EU institutional law. An example of this is the fact that the Commission can intervene in an appeal before the Court of Justice, based on Art. 40 of Statute of the Court of Justice, even if it is not a party. Further, it can submit observations in a preliminary proceeding, under Art. 23 of the Statute. This possibility, almost always used by the Commission, allows it to submit to the Court of Justice questions on the interpretation of EU law in any matter, and therefore to contribute to the development of case-law on EU Law.

It should also be noted that the particularity of the supervisory function, which gives the Commission a central role in the context of the action for infringement against a Member State, and also in the context of preliminary proceedings, also explains the asymmetries between the arguments raised by the European Commission within the context of an action for annulment or liability –in which it represents the Union as an EU institution- and those raised in the context of an action for infringement, in which its function is to ensure that agreements between Member States are respected.

5. The application of other rules, principles and reasoning from international treaty law to EU Law as a consequence of the international treaty nature of the EU Constitution

The international treaty nature of the EU Constitution has implications that go beyond the founding treaties themselves. The secondary legislation also contains obligations for Member States. This is particularly clear when the directive is defined in Art. 288, par. 3, TFEU:

> *A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.*

The international treaty nature of the EU Constitution explains why the so-called principle of '*standstill*' applies to the directives that have entered into force but have not yet been transposed. This is a well-known principle in public international law, which is an element of the principle of good faith. A particularly precise expression of this principle is in Art. 18 of the *Vienna Convention on the Law of Treaties*, which deals with the 'obligation not to defeat the object and purpose of a treaty prior to its entry into force:'

> *A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.*

The founding Treaties also contain or have contained *standstill* clauses. For example, we can refer to Art. 12 of the EEC Treaty –at the centre of the dispute in *Van Gend & Loos* (C-26/62), according to which '*Member States shall refrain from introducing, as between themselves, any new customs duties on importation or exportation or charges with equivalent effect and from increasing such duties or charges as they apply in their commercial relations with each other*' during the transitional period for the total elimination of such duties and charges, in force until 1 July 1968. Not surprisingly, therefore, from an internationalist perspective, according to the jurisprudence of the Court of Justice, a state cannot adopt measures contrary to the objectives and provisions of a directive before the deadline for its transposition had expired. Thus, in par. 45 of the judgement of 1997 in the *Inter-Environnement Wallonie* case (C-129/96),[50] the Court had ruled that:

> *Although the Member States are not obliged to adopt those measures before the end of the period prescribed for transposition, it follows from the second paragraph of Article 5 in conjunction with the third paragraph of Article 189 of the Treaty [...] that during that period they must refrain from taking any measures liable seriously to compromise the result prescribed.*

This principle has been recalled later on, including in the judgement of 22 November 2005 in the *Mangold* case (C-144/04).[51] This last sentence has been heavily criticised in Germany, among others in an article published in the *Frankfurter Allgemeine Zeitung* of 8 September 2008, entitled '*Stop the European Court of Justice!'* (*Stoppt den EuGH!*) signed by former

[50] Judgment of the Court of 18 December 1997, *Inter-Environnement Wallonie ASBL v Région Wallonne*, Case C-129/96, *European Court reports 1997 Page I-07411*.
[51] See note 29 above.

president of the Convention of 2000 which drafted the Charter of Fundamental Rights of the European Union, Roman Herzog. The Court has thus been accused of putting upside down the principle of legal certainty. In reality, though, it did nothing but draw on the consequences of the principle of good faith, common in public international law and also enshrined in Art. 18 of the Vienna Convention on the Law of Treaties.

A more general –and particularly clear- correction of the principle of good faith, as understood in public international law, can be found precisely in the definition of the obligation of sincere cooperation in Art. 4, par. 3, TEU (ex Art. 5, TEC), second and third sentence:

> *The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.*
> *The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.*

This wording was already present in Art. 5 of the EC Treaty, as signed in Rome in 1957. It differs, however, from general public international law the wording of the first sentence of Art. 4, par. 3, TEU, adopted by the European Convention in 2002-2003, according to which:

> *Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.*

This wording had a specific meaning within the scope on the work of the Convention. If a Constitution for the European Union, deprived from the usual feature of agreement between states, had been adopted, it would have created an entity, 'European Union,' more similar to a federal state. Instead, as a result of having chosen, already during the Convention, to maintain the form of agreement between states, the wording of the text is somewhat unusual, since it ignores the fact that the Union is composed, precisely, by its Members States. Art. 4, par. 3, TEU, should therefore be understood as if it were drafted: '*the institutions and bodies of the Union and the Member States shall, in full mutual respect, assist each other*.'

It follows, finally, from the international treaty nature of the EU Constitution that the rules of the *Vienna Convention on the Law of Treaties* can apply to the founding treaties in a subsidiary way. An important aspect from a formal point of view should be clarified: the rules of the Convention apply only to the extent that they reflect customary international law, as France, Malta and Romania are not parties to such Convention and other Union's Member States have expressed reservations to it. This feature of expression of customary law, however, applies to most of the provisions of the Vienna Convention.

Many rules of the *Vienna Convention on the Law of Treaties* are also present in the text of the founding Treaties of the EU, like that of Art. 54, TEU, which refers to the constitutional norms of the Member States:

> *This Treaty shall be ratified by the High Contracting Parties in accordance with their respective constitutional requirements.*

Other rules of the Vienna Convention, however, are not applicable because the founding Treaties contain, explicitly or implicitly, different rules. This, moreover, is consistent with

Art. 5 of the *Vienna Convention on the Law of Treaties* regarding the founding treaties of international organisations and treaties adopted within an international organisation:

> *The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization.*

Different views on the political nature of the European Union can be defended, but it is not under discussion that, from a formal legal perspective, the TEU establishes an international intergovernmental organisation within the meaning of public international law, and granted with legal personality.

It is important to emphasise that Arts. 26, 27 and 46 of the *Vienna Convention on the Law of Treaties* applys to the EU. These provisions form the basis of the principles often referred to in this chapter.

> *Article 26 Pacta sunt servanda: Every treaty in force is binding upon the parties to it and must be performed by them in good faith.*
> *Article 27 Internal law and observance of treaties: A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.*
> *Article 46 Provisions of internal law regarding competence to conclude treaties: 1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance. 2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.*

It should be noted that the combination of Arts. 27 and 46 of the *Vienna Convention on the Law of Treaties* has a particularly restricted scope: namely, the validity of a treaty that has not been concluded in accordance with '*a provision of its internal law regarding competence to conclude treaties,*' and establishes that only '*A violation* [...] *objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith*' shall be raised. International law of treaties cannot therefore be the basis for a Member State to disapply a norm of EU Law which had been adopted 'ultra vires' by one of its institutions. This is contrary to what seemed to be affirmed, for example, by the German Constitutional Court in its ruling of 2009 on the Treaty of Lisbon.[52]

There are other norms less relevant but useful in practice, as for example Art. 77 of the *Vienna Convention* on the functions of depositaries –which in relation to the EU treaties is the Republic of Italy (Arts. 54, TEU, 357, TFEU, 225, Euratom, and the respective norms in the different amending and accession treaties).

> *Article 77 Functions of depositaries: 1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States, comprise in particular:*
> *(a) keeping custody of the original text of the treaty and of any full powers delivered to the depositary;*

[52] Judgement of the Federal Constitutional Court of 30 June 2009, available at http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html.

(b) preparing certified copies of the original text and preparing any further text of the treaty in such additional languages as may be required by the treaty and transmitting them to the parties and to the States entitled to become parties to the treaty;
(c) receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it;
(d) examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State in question;
(e) informing the parties and the States entitled to become parties to the treaty of acts, notifications and communications relating to the treaty;
(f) informing the States entitled to become parties to the treaty when the number of signatures or of instruments of ratification, acceptance, approval or accession required for the entry into force of the treaty has been received or deposited;
(g) registering the treaty with the Secretariat of the United Nations;
(h) performing the functions specified in other provisions of the present Convention.
2. In the event of any difference appearing between a State and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of the signatory States and the contracting States or, where appropriate, of the competent organ of the international organization concerned.

The rules set out in Art. 77 of the *Vienna Convention on the Law of Treaties* precisely explain two oddities apparent in the amending procedures to the EU treaties, as was the case with the Treaty of Lisbon. First, the documents devoted to the procedures of ratification of the treaties by the Union's institutions (European Parliament, Commission and Council) do not indicate the date of deposit of the instruments of ratification, which is the most important for determining the entry into force of a treaty. Instead, they indicate the date on which the parliaments have approved the ratification, or the date of a referendum, or the date that the head of state has signed an act of ratification. It is true that the Council is normally informed about the deposit of instruments of ratification by the Italian government, but it does not have the legal competence to publish such news. Second, the 'consolidated versions' of the Treaties, published in the Official Journal of the European Union always include a 'note to the reader' stating: '*This text has been produced for documentary purposes and does not involve the responsibility of the institutions of the European Union.*' In fact, in the absence of a specific treaty provision for that purpose, the Union's institutions would not have the power, in a formal sense, to undertake such a consolidation, since the Treaties are not acts of the Union, but Treaties between Member States.

6. **The specific character of EU Law *vis a vis international treaty* law as a consequence of the international treaty nature of the EU Constitution**

From all that was just explained, it is indispensable to take into account the international treaty nature of the Constitution of the Union –the founding Treaties- and the rules of international law of treaties to understand the nature of EU Law, and thus to avoid errors of reasoning in the context of this law. It is however not correct to simply say that EU Law is a subcategory within the international law of treaties. On the contrary, the content of the founding Treaties, since the Treaty establishing the ECSC of 1951, had characteristics that

distinguished them from the ordinary multilateral treaties in general and also from the treaties establishing international organisations.

The authors of the draft of the founding Treaties of 1951 and 1957 –particularly, Paul Reuter, professor of French public law, who worked for Jean Monnet- had consciously chosen to provide the Community with effectiveness mechanisms unusual in public international law. Jean Monnet wrote in his *Mémoires* in relation to Reuters:

> *as luck would have it, there came to my office at No 18 rue de Martignac a young professor of law, Paul Reuter, whom I had not previously met. I think we were seeking his opinion on French anti-trust legislation, which to my mind needed tightening up. Reuter was a man from eastern France, solid and unexcitable; he used his brilliant powers of reasoning to master concrete problems in politics and law. He taught law at the University of Aix-en-Provence, but came regularly to Paris to deal with practical problems at the Quai d'Orsay in his capacity as legal adviser to the French Foreign Office.*[53]

So Reuter was involved from the outset in the drafting of the Schuman Declaration of 9 May 1950. It was he who designed the institutional framework and who drew the powers of the High Authority of the ECSC, and chose its name, which were reflected in two central sentences of the Declaration:

> *The common High Authority entrusted with the management of the scheme will be composed of independent persons appointed by the governments, giving equal representation. A chairman will be chosen by common agreement between the governments. The Authority's decisions will be enforceable in France, Germany and other member countries. Appropriate measures will be provided for means of appeal against the decisions of the Authority.*

Upon Monnet's request, Reuter gathered during the Summer of 1950 the committee of jurists which supported the intergovernmental conference responsible for the negotiations on the future ECSC Treaty, and also actively participated in the debate on the future EDC Treaty.

In this regard, the experience of Jean Monet in the Secretariat of the League of Nations should be remembered. This experience had convinced him of the need for mechanisms that go beyond those formulated in the period of the Treaty of Versailles. It was not certain whether the Court of Justice established by the founding Treaties would take the steps that it later on chose to take in its famous judgement in *Van Gend en Loos*[54] and *Costa v. Enel*.[55] However such a development was not unexpected. If the nature of EU Law is not limited to a subcategory of the international law of treaties, it should be borne in mind that this derived from nothing other than the actual content of the Treaties, without which the above mentioned case-law could never have been developed.

[53] Jean Monnet (1978), 'Memoirs,' London: Collins (translated by Richard Mayne), p. 294.
[54] See note 7 above.
[55] See note 8 above.

III. EUROPEAN UNION LAW IS ENDOWED WITH EFFECTIVENESS MECHANISMS UNUSUAL IN INTERNATIONAL LAW

EU Law, though based on agreements between sovereign states, has specific characteristics that distinguish it from the rules generally applicable in public international law. There are a number of differences between EU Law and the general law of treaties, and therefore the decision to emphasise one difference over another varies according to the authors. Fully aware of these limits, this chapter proposes four key elements that make EU Law a law endowed with effectiveness mechanisms unusual in international law.

1. The system of sources of EU Law

In noting the differences between EU Law and public international law, it should be considered, above all, that the system of sources of public international law, enshrined in Art. 38 of the *Statute of the International Court of Justice* which reproduces the relevant article of the *Statute of the Permanent Court of International Justice*, does not apply to EU law:

> *1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:*
> *a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;*
> *b. international custom, as evidence of a general practice accepted as law;*
> *c. the general principles of law recognized by civilized nations;*
> *d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.*
> *2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto.*

Art. 38 of the *Statute of the International Court of Justice* reflects several principles.

First, in public international law there is no hierarchy in the sources of law. '[I]*nternational conventions, whether general or particular,*' namely, treaty law which is usually –but not necessarily- written, are placed at the same level as '*international custom, as evidence of a general practice accepted as law,*' namely customary law, and also at the same level as '*the general principles of law,*' taking for granted that the term '*recognized by civilized nations*' referred to, specifically by the Treaty of Versailles in 1919, has lost its relevance. Such an absence of hierarchy among the main sources of public international law has the consequence that in the case of conflict between the norms of international law, the usual rules for legal interpretation apply. In the case of difference in the time of adoption of two norms, the former norm applies and in the case of conflict between a general norm and a special norm, the special norm prevails. It is therefore perfectly acceptable in public international law that a custom is contrary to a written agreement or to general principles of law, and it is also possible that a written agreement is contrary to customary law or to general principles of law. It is not necessary here to analyse the substantive issue concerning the existence and consistency of the so-called *jus cogens* as defined by the *Vienna Convention on*

the Law of Treaties, Art. 53 'Treaties conflicting with a peremptory norm of general international law ("*jus cogens*")' as:

> *a peremptory norm of general international law*' that is '*a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character*.[56]

The situation is completely different in the national legal orders where usually the custom and the general principles of law are only accepted as sources of law if they are not contrary, but complementary to, written law. The very structure of state law means that, often, the constituent power can adopt new norms contrary to customs or to general principles of law. However, the opposite, that is the substitution of written law by customary law or through the recognition of general principles of law, is not admissible.

In EU law, just as it often happens in state law, the custom is a source with a marginal role and is not valid, in principle, if it is contrary to written norms of the treaties or secondary legislation. As regards the general principles of EU Law, it is necessary, however, to make a distinction. Most of those recognised by the Court of Justice as general principles of law are inferred from the founding Treaties themselves and cannot therefore be contrary to them, while they can be modified by the 'masters of the treaties' through a reform of the Treaties. The same applies to the principles 'common to the Member States' which from the start have been referred to by the Treaty of Rome in Art. 340, TFEU (288 TEC), second sentence:

> *In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.*

They also have been referred to by the Treaty of Maastricht in its Art. 6, par. 1, TEU, in the version prior to the Treaty of Lisbon, according to which

> *The 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.*

Such principles cannot be contrary to the Treaties, since they are precisely included in the Treaties themselves. In contrast, other 'general principles of EU Law' formulated in the jurisprudence of the Court of Justice, cannot be contrary to the contents of the Treaties while the 'masters of the treaties' could suppress their effects through a revision of the treaties. It should be noted that the reference to the notion of 'masters of the treaties' does not mean that the unanimity of the governments party to the founding treaties to reform them is sufficient. The procedure prescribed in Art. 48, TEU, gives an important role to the Union's institutions, without, however, granting a veto power to the European Parliament or the Commission. These institutions are not formed by representatives of the governments. This is not, however, a derogation of the international law of treaties: Art. 40, par. 1 of the *Vienna Convention* dedicated to the amendment of multilateral treaties provides:

[56] The opposition to the existence of '*jus cogens*' norms was the main reason for the refusal by France to approve the Vienna Convention at the time of its adoption in 1969 because the French government feared that the prohibition of atmospheric nuclear tests would be upheld as a norm of *jus cogens*.

> ***Unless the treaty otherwise provides**, the amendment of multilateral treaties shall be governed by the following paragraphs* [highlights added].

Second, Art. 38 of the *Statute of the International Court of Justice* grants it possibilities that the Court of Justice of the European Union does not have by virtue of the founding Treaties, that is '*the power of the Court to decide a case ex aequo et bono.*' Less important is the fact that, different from the *Statute of the International Court of Justice,* the possibility to appeal to '*judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law*' was not formally established, even if not necessarily prohibited. It should be reiterated, however, that the ability of the ICJ to decide a case *ex aequo et bono* is limited by the following phase: '*if the parties agree thereto.*' Likewise the eventual appeal to the *judicial decisions and the teachings of the most highly qualified publicists of the various nations* is limited by '*subject to the provisions of Article 59*' which states:

> *The decision of the Court has no binding force except between the parties and in respect of that particular case.*

As it is well known, there is an internal hierarchy of the norms in EU law, in which the founding Treaties are its apex. The treaties concluded between the Union and third countries, and the acts of the institutions of the Union should conform to the founding Treaties, which are therefore to be regarded as the 'EU Constitution.' For the acts of the Union's institutions there is now also a hierarchy that reflects the well-known hierarchy of sources of state law – namely the distinction between legislative acts (Art. 289, TFEU), delegated acts (Art. 290, TFEU) and implementing acts (Art. 291, TFEU). This is not an unknown phenomenon in other international organisations. However, it should be noted that, from a quantitative as well as qualitative point of view, there is an abundance of internal norms of EU law which are not comparable with other international organisations.

There is also another specific feature of EU law, which distinguishes it from traditional public international law. This concerns the fact that the acts or instruments adopted by the institutions enter into force with respect to the Member States and the subjects within the scope of the treaties, without requiring the further adoption, signature and ratification by the states. It should be noted that the ratification of the European Convention on Human Rights (ECHR) has become a condition for joining the Council of Europe. A separate ratification of the ECHR by the Member State of the Council of Europe however, remains necessary. Therefore the ECHR in the context of the Council of Europe cannot be compared to the acts of the Union in the context of the latter. Besides the very specific case of a decision under the founding Treaties themselves, such as the decision under Art. 130 of the EC Treaty on European Parliament elections by universal suffrage, the only exception to the general rule regarding absence of further adoption, signature or ratification by states of the acts of the Communities and Union is represented by the instrument of the *convention* within the so-called third pillar.

Art. 34, par. 2, d) established:

> [acting unanimously on the initiative of any Member State or of the Commission, the Council may:] ***establish conventions which it shall recommend to the Member States for adoption in***

> ***accordance with their respective constitutional requirements***. *Member States shall begin the procedures applicable within a time limit to be set by the Council.*
> *Unless they provide otherwise, conventions shall, once adopted by at least half of the Member States,* ***enter into force for those Member States***. *Measures implementing conventions shall be adopted within the Council by a majority of two thirds of the Contracting Parties* [highlights added].

The third-pillar conventions were therefore subject to the regular regime of international organisations, such as the United Nations, the International Labour Organization or the Council of Europe. Such conventions could be adopted during a period that began with the entry into force of the Treaty of Maastricht (1 November 1993) and concluded with the entry into force of the Treaty of Lisbon (1 December 2009). Since the latter date, it is no longer possible to adopt new conventions, but the conventions already adopted –which were few- remain in force under the *Protocol (no 36) on the transitional provisions*. Art. 9 of the Protocol provides, in fact:

> *The legal effects of the acts of the institutions, bodies, offices and agencies of the Union adopted on the basis of the Treaty on European Union prior to the entry into force of the Treaty of Lisbon shall be preserved until those acts are repealed, annulled or amended in implementation of the Treaties. The same shall apply to* ***agreements concluded between Member States on the basis of the Treaty on European Union***. [highlights added]

A final feature of the sources of EU law over traditional public international law is that the usual rules of international law on reservations do not apply to the founding Treaties of the EU. Under Art. 2 of the Vienna Convention:

> *(d) "reservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State*.

Art. 19 on formulation of reservations states later on:

> *A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:*
> *(a) the reservation is prohibited by the treaty;*
> *(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or*
> *(c) in cases not failing under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty*.

The EU Treaties themselves contain no indication on reservations. But it can be inferred from the constant practice followed from the Treaty of Paris of 1951 onwards, which established the ECSC, that letter *c)* of the article quoted above applies to any possible reservation.

This is illustrated by the fact that every time a state has requested a derogation of the ordinary law of treaties, this was envisaged in the treaty itself –as for example in relation to the territorial scope- or in a specific protocol –such as *Protocol (No. 32) on the acquisition of property in Denmark*. Just by reading the Protocol, it is possible to realise that its content is typical of a reservation to a multilateral treaty:

The HIGH CONTRACTING PARTIES,
DESIRING to settle certain particular problems relating to Denmark,
HAVE AGREED UPON the following provisions, which shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union:

Notwithstanding the provisions of the Treaties, Denmark may maintain the existing legislation on the acquisition of second homes.

Regarding the reservations, the unsatisfactory drafting of Arts. 20 to 23 of the Vienna Convention should be noted, particularly the lack of clarity in relation to the effects of the acceptance of reservations and objections to reservations, regulated by Art. 20:

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.
2. When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.
3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.
4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:
(a) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;
(b) an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State;
(c) an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

Regardless of the acceptance or not by Member States that Art. 20 of the *Vienna Convention on the Law of Treaties* represents existing customary law in force in relation to international treaties, by reading the article cited above it is possible to understand why the government of the United Kingdom and 26 governments of other Member States have chosen to use the instrument of the protocol –i.e., an agreement with the same legal value as the treaties themselves- rather than a simple declaration. The former has been used in relation to the quite twisted position of the United Kingdom on the binding character of the Charter of Fundamental Rights of the European Union once the Treaty of Lisbon is in force. The British government wanted to reassure the Euro-sceptic section of its electorate and its representatives in the House of Commons that the so-called 'red lines' set by the government during the European Convention were respected. Therefore, a declaration from which an acceptance by the other governments could not be inferred, and which was not considered binding for its interpretation according to the practice of the European Union Court was not enough.

But at least 24 governments were not prepared to grant the United Kingdom a so-called 'opt-out' over the Charter, regarding its application to the United Kingdom. It should be remembered that under Art. 51, par. 1 of the Charter:

> ***The provisions of this Charter are addressed to*** *the institutions and bodies of the Union with due regard for the principle of subsidiarity and to* ***the Member States*** *only* ***when they are implementing Union law***. [highlights added]

This explains –even if they are not easy to justify- the at first sight rather odd formulations of the *Protocol (n 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom*. Without considering the Preamble to the Protocol, which only emphasises the applicability of EU Law to both countries, a careful reading of Art. 1 of the Protocol does not give the impression that it is a limitation to the applicability of the Charter with respect to Poland and the United Kingdom:

> *The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.*

In the English and French version, the phrases have been chosen with great care for them to have a less strong impact. The English version of the Protocol states: '*The Charter does* ***not extend the ability*** *of the Court…*' These are different words from those used in Art, 6, par. 1, TEU, which prescribes : '*The provisions of the Charter shall* ***not extend*** *in any way* ***the competences*** *of the Union.'* The French version states in the same way : '*La Charte* ***n'étend pas la faculté*** *de la Cour de justice…*,' while Art. 6, TEU, prescribes: '*Les dispositions de la Charte* ***n'étendent*** *en aucune manière* ***les compétences*** *de l'Union*.' [highlights added]. For other linguistic versions, the translators have not made the effort to avoid the word 'competence.'

Hence, only Art. 1(2) of the Protocol has the potential to change the position of Poland and the United Kingdom compared to other Member States:

> *In particular, and for the avoidance of doubt,* ***nothing*** *in Title IV of the Charter* ***creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has*** *provided* ***for such rights in its national law***. [highlights added]

It is known that the main objective of the British government was to prevent the Court of Justice of the Union, or a British court, from giving the right to strike a broad interpretation, wider than that allowed under British law. In light of this, the *Declaration (n 62) by the Republic of Poland concerning the Protocol on the application of the Charter of Fundamental Rights of the European Union in relation to Poland and the United Kingdom* is particularly strange:

> *Poland declares that, having regard to the tradition of social movement of 'Solidarity' and its significant contribution to the struggle for social and labour rights, it fully respects social and labour rights, as established by European Union law, and in particular those reaffirmed in Title IV of the Charter of Fundamental Rights of the European Union.*

Probably, this Protocol or the Declaration would not merit any comment if it was not precisely because they illustrate the effects of non-acceptance of reservations to founding Treaties of the EU, even though they are not completely excluded formally.

2. **The sanctioning regime included in the system of the founding Treaties of the EU**

Beyond the formal differences concerning the system of sources, the most important, substantial difference between EU Law and general public international law lies in the sanctioning regime which is an integral part of the system of the Treaties establishing the Communities and the Union.

The sanctions in general public international law can be classified into two types of mechanisms –if the possibility of peacekeeping intervention by the United Nations is not considered. First, a state may be ordered to repair the damage caused when its international responsibility is triggered. This situation basically happens when the state accepts its responsibility or at least accepts a judicial or arbitration mechanism which may lead to establish such liability. If the state does not recognise its responsibility, everything is left to a moral condemnation by the international community or an international court or arbitration body. Second, there are general mechanisms of reciprocal sanctions of international public law, namely countermeasures or reprisals. In both cases, the consequences of the rhetorical nature of the principle of equality between sovereign states often manifestly emerge in the field of international relations.

As regards the EU Law it is true that, ultimately, the binding force of the sanctions in practice depends on its acceptance by the Member State. The principle of reciprocity does not apply in the context of relations between Member States within Union law. Thus, countermeasures or reprisals between Member States are prohibited under EU law. This follows from the combination of Arts. 344 and 259, TFEU, which remain unchanged since the Treaty of Rome of 1957. According to Art. 344 (292 TEC):

> *Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.*

It reminds that the only article that applies to a controversy between Member States on the implementation of Union law is Art. 259, TFUE (227 TEC) according to which:

> *A Member State which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union* (first sentence).

Indeed, the action for infringement interposed by a Member State under Art. 259 can be understood as complimentary to that interposed by the Commission under Art. 258, which according to its second and third sentences:

> *Before a Member State brings an action against another Member State for an alleged infringement of an obligation under the Treaties, it shall bring the matter before the Commission.*
> *The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing.*

But the last sentence makes evident that the action in Art. 259 is in fact the proceeding of dispute resolutions between Member States provided in the Treaties themselves:

If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court.

In this respect, the judgement of the Court of Justice of 30 May 2006 in *Commission v Ireland* (C-459/03) is particularly relevant. This was a dispute between Ireland and the United Kingdom concerning the MOX plant, which, based on a permit of the United Kingdom, operates in Sellafield (United Kingdom), on the coast bordering the Irish sea. On several occasions between 1994 and 2001, Ireland questioned the UK authorities in relation to the MOX plant. After a press release of 4 October 2001, the Irish Minister with responsibility for nuclear safety announced that Ireland was considering lodging a complaint pursuant to the Convention for the Protection of the Marine Environment of the North-East Atlantic, signed in Paris on 22 September 1992. On 15 June 2001 Ireland forwarded to the United Kingdom a request for the constitution of an arbitral tribunal and a statement of claim pursuant to Art. 32 of the Convention. The Convention was adopted on behalf of the Community by Council Decision 98/249/EC of 7 October 1997.[57] Without going into details, it is necessary to note that the Court demonstrates in its ruling that the norms of the conventions are part of EC law –in relation to the Member States of the Communities- and that the Convention does not contain a provision that has the effect of transferring to the bodies of the Convention the competences conferred by the community treaties to the Court of Justice of the Communities.

Paragraph 123 of the judgment states:

The Court has already pointed out that an international agreement cannot affect the allocation of responsibilities defined in the Treaties and, consequently, the autonomy of the Community legal system, compliance with which the Court ensures under Article 220 EC. ***That exclusive jurisdiction of the Court is confirmed by Article 292 EC, by which Member States undertake not to submit a dispute concerning the interpretation or application of the EC Treaty to any method of settlement other than those provided for therein*** *(see, [...]).* [highlights added]

The reasoning developed by the Court in paragraphs 136 to 138 of the ruling is particularly interesting as to a logical consequence of Art. 292, EC (now 344 TFEU):

136 ***As the jurisdiction of the Court is exclusive and binding on the Member States, the arguments put forward*** *by Ireland* ***concerning the advantages which arbitration proceedings*** *under Annex VII to the Convention would present in comparison with an action brought before the Court under Article 227 EC cannot be accepted.*

137 Even if they were assumed to have been demonstrated, such advantages ***could not in any event justify a Member State in avoiding its Treaty obligations with regard to judicial proceedings intended to rectify an alleged breach of Community law by another Member State*** *(see* [...]*).*

138 Finally, with regard to the arguments put forward by Ireland concerning urgency and the possibility of obtaining interim measures under Article 290 of the Convention, suffice it to point out that, under Article 243 EC, the Court may prescribe any necessary interim measures in cases before it. It is evident that such measures may therefore be ordered in the context of proceedings brought under Article 227 EC. [highlights added]

The rule in international public law is that the sanctioning regime of state obligations is resolved at the interstate level, with the exceptional intervention of bodies of an international

[57] DO 1998 L 104, p. 1.

organisation. These are generally in any case constituted by representatives of states parties to the relevant multilateral treaty, as for example when the United Nations General Assembly requests an opinion from the International Court of Justice. Access to international justice and to the sanctioning regime by subjects other than states is wholly exceptional, such as for example the application before the European Court of Human Rights provided by the ECHR.

Instead, in EU Law, based on the founding Treaties, institutions and subjects other than states, and which are also not formed by representatives of their governments, are involved in the sanctioning regime. These are the courts of the Member States as well as the individuals who can access them and the EU Court of Justice.

The role of the courts of the Member States is described in Art. 19, par. 1, second sentence, TEU, which states that '*Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law*' and in par. 3, b) according to which '*give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions.*' Similarly, Art. 267, TFEU (234 TEC) establishes the preliminary ruling mechanism, a fundamental piece of the system of actions of the European Union:

> *The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:*
> *(a) the interpretation of the Treaties;*
> *(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;*
> *Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.*
> *Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.*
> *If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.*

Another important difference between EU law and general public international law is that judicial review is mandatory for Member States from the time of their accession to the EU Treaties. In the field of international public law, with the exception of the system of regional treaties on human rights (such as the ECHR) and the system of the World Trade Organization (WTO), it is not usually compulsory for the states to accept the jurisdiction of a court of justice or a arbitration body. However, a number of mechanisms require the prior acceptance by the states, either during the search for a solution to the dispute, or, more generally, with a view to possible future disputes. Also, the participation in treaties establishing international organisations often leaves the states free to join or not the mechanism of dispute resolution affecting them.

In contrast, in the Community version –now the EU one- there are no choices: the accession treaties automatically oblige the Member State to accept the jurisdiction of the Court as defined in the Treaties. In addition to the monopoly of the Court of Justice in relation to disputes between Member States concerning EU Law, there are institutions and mechanisms that make the acceptance of judicial review by the Court of Justice compulsory

for the Member States. The Treaties do not provide the possibility to a state that wants to join the Union of not accepting the jurisdiction of the Court of Justice. There has been only an exception to this principle with the possibility, laid down by the Treaty of Amsterdam, to decide to opt in to the competence to give preliminary rulings in the field of police and judicial cooperation in criminal matters.

Art. 35, TEU, in the version prior to the entry into force of the Treaty of Lisbon provided, in pars. 1, 2 and 3:

> *1. The Court of Justice of the European Communities shall have jurisdiction, subject to the conditions laid down in this Article, to give preliminary rulings on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions established under this Title and on the validity and interpretation of the measures implementing them.*
> *2. By a declaration made at the time of signature of the Treaty of Amsterdam or at any time thereafter, any Member State shall be able to accept the jurisdiction of the Court of Justice to give preliminary rulings as specified in paragraph 1.*
> *3. A Member State making a declaration pursuant to paragraph 2 shall specify that either:*
> *(a) any court or tribunal of that State against whose decisions there is no judicial remedy under national law may request the Court of Justice to give a preliminary ruling on a question raised in a case pending before it and concerning the validity or interpretation of an act referred to in paragraph 1 if that court or tribunal considers that a decision on the question is necessary to enable it to give judgment, or*
> *(b) any court or tribunal of that State may request the Court of Justice to give a preliminary ruling on a question raised in a case pending before it and concerning the validity or interpretation of an act referred to in paragraph 1 if that court or tribunal considers that a decision on the question is necessary to enable it to give judgment.*

The wholly exceptional character of this provision was highlighted by par. 7 of the same article reaffirming the principle of monopoly of the Court of Justice with respect to disputes between Member States regarding EU Law:

> *The Court of Justice shall have jurisdiction to rule on any dispute between Member States regarding the interpretation or the application of acts adopted under Article 34(2) whenever such dispute cannot be settled by the Council within six months of its being referred to the Council by one of its members. The Court shall also have jurisdiction to rule on any dispute between Member States and the Commission regarding the interpretation or the application of conventions established under Article 34(2)(d).*

With the entry into force of the Treaty of Lisbon this option in relation to the competence of the Court of Justice disappeared, even if transitionally until 1 December 2014. Based on Art. 10, par. 1, of the *Protocol (no 36) on the transitional provisions* the system resulting from the acceptance or not of the competence of the Court remains applicable in relation to conventions or framework decisions adopted before 1 December 2009.

It should be also noted that EU Law provides for a type of pecuniary sanction on the Member States in order to ensure the observance of the judgement of the Court of Justice which is far stronger than the traditional international system. The latter relies on the voluntary compliance of the condemned Member State, or at most, on a system of sanctions decided by an international body composed of representatives of governments of state party to a multilateral treaty. This is the case of the United Nations Security Council with regard to the rulings of the International Court of Justice or the Committee of Ministers of the Council

of Europe with respect to the judgments of the ECHR. The sanctioning powers of international judicial bodies are in practice subordinated to the will to comply of the condemned state. In the case of the WTO, the effectiveness of sanctions is reinforced as it legitimises the application of countermeasures or reprisals by the state that wins the dispute. In short, they are less severe mechanisms compared to those laid down in the Treaties to ensure the implementation of EU law, as the mechanism provided in Art. 260, pars. 2 and 3, TFEU shows:

> *2. If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.*
> *If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.*
> *This procedure shall be without prejudice to Article 259.*
> *3. When the Commission brings a case before the Court pursuant to Article 258 on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.*
> *If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation shall take effect on the date set by the Court in its judgment.*

EU law also contains an unusual obligation for the Member States, which is the requirement to establish remedies aimed at ensuring the implementation of EU law in their territories. This duty was already deduced from the system of the Treaties –in the first place, the existence of the mechanism of preliminary ruling- by the jurisprudence of the Court of Justice starting with the judgement of 1987 in *Heylens* (C- 222/86),[58] in pars. 14, 15 and 16 of the judgement:

> *14 Since free access to employment is a fundamental right which the Treaty confers individually on each worker in the Community,* ***the existence of a remedy of a judicial nature against any decision of a national authority refusing the benefit of that right is essential in order to secure for the individual effective protection for his right****. As the Court held in its judgment of 15 May 1986* [...]*, that requirement reflects a general principle of Community law which underlies the constitutional traditions common to the Member States and has been enshrined in articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.*
> *15* ***Effective judicial review****, which must be able to cover the legality of the reasons for the contested decision,* ***presupposes in general that the court to which the matter is referred may require the competent authority to notify its reasons****. But where, as in this case, it is more particularly a question of securing the effective protection of a fundamental right conferred by the Treaty on Community workers, the latter must also be able to defend that right under the best possible conditions and have the possibility of deciding, with a full knowledge of the relevant facts, whether there is any point in their applying to the courts. Consequently, in such circumstances the competent national authority is under a duty to inform them of the reasons on which its refusal is based, either in the decision itself or in a subsequent communication made at their request.*

[58] Judgment of the Court of 15 October 1987. *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Georges Heylens and others.* Case 222/86. *European Court reports 1987 Page 04097.*

16 In view of their aims those requirements of Community law, that is to say, the existence of a judicial remedy and the duty to state reasons, are however limited only to final decisions refusing to recognize equivalence and do not extend to opinions and other measures occurring in the preparation and investigation stage. [highlights added]

The obligation to establish adequate remedies to ensure the implementation of EU law is now prescribed in Art. 19, par. 2, second sentence, TEU:

Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

There are recent international treaties containing norms that are to some extent equivalent, such as Art. 9 of the Aarhus Convention signed on 25 June 1998, namely the *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*. It should be noted, however, that in these conventions there are no enforcement mechanisms equivalent to the supervisory powers conferred on the Commission or the judicial review entrusted to the Court of Justice of the European Union.

EU law also differs from most of the treaties establishing international organisations in that it guarantees the independence of the European Commission, to which the treaties themselves entrust a function to monitor the implementation of EU law by Member States, as recalled in Art. 17, par. 1, TEU:

1. The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. ***It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union****. It shall execute the budget and manage programmes. It shall exercise coordinating, executive and management functions, as laid down in the Treaties. With the exception of the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union's external representation. It shall initiate the Union's annual and multiannual programming with a view to achieving interinstitutional agreements.*' [highlights added]

In addition to the guarantee of independence for the Commission, the ability to initiate an action for infringement is a feature of EU law. This is the infringement procedure under Art. 258, TFEU (226, TEC):

If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.

The monitoring role of the European Commission is also reinforced by a number of powers conferred by the Treaty, as for example the power to decide on the state's system of aids, provided in Art. 108 (88 TEC), which states in its par. 2, second sentence that:

If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 258 and 259, refer the matter to the Court of Justice of the European Union direct.

It is also reinforced by the provisions of the Statute of the Court of Justice referred to in section II 2 of this chapter, which provides the Commission the opportunity to submit its observations in the context of preliminary proceedings. Such a power conferred to a body independent from governments has no equivalent in other treaties establishing international

organisations, with the recent exception of a regional integration treaty, which has imitated the European community system. We refer to the treaty which, since 1 August 1999 has created the *Court of Justice of the Cartagena Agreement* (establishing the *Andean Community*, signed by Bolivia, Colombia, Ecuador, Peru and Venezuela).

The monitoring powers of the European Commission, and especially the ingrigement procedure under Art. 288 TFEU, make effective the compulsory jurisdiction of the Court of Justice, as the Commission, unlike the governments of sovereign states, does not have to balance its duty to ensure respect for the law with diplomatic considerations.

3. The principle of direct applicability of EU Law and the parallelism between obligations of the state and rights of individuals

A third very important difference between EU Law and ordinary international multilateral agreements is the principle of direct applicability.

Certainly, there are already in international treaties called 'self executing' by practice, which contain sufficiently precise norms to be applied to a dispute before a judge in a state party to the treaty. Its 'self-executing' character is, however, recognised only by the national court, and only if the treaty has been incorporated into domestic law (for the orders of dualist systems with respect to the validity of international treaties, such as Germany, Italy and the UK), or at least has been published in the official report (as in the French system since 1946 or the Spanish one). Indeed, Art. 96 par. 1 of the Spanish Constitution of 1978 provides:

> *Validly concluded international treaties once officially published in Spain shall constitute part of the internal legal order. Their provisions may only be abolished, modified, or suspended in the manner provided for in the treaties themselves or in accordance with general norms of international law.**

On the other hand, in the European Union system there are types of norms endowed with direct applicability by virtue of the treaties themselves, that is the regulations defined in Art. 288, TFEU (249 TCE):

> *A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.*

As regards other norms of EU law, only the Court of Justice can rule on their direct applicability in the Member States. This is not a substantive discussion on the possible difference between direct effect, direct applicability and immediate applicability, etc. The 'Glossary'[59] of the institutions of the Union stated until 2010 that:

> *The direct effect (or direct applicability) constitutes, along with the principle of precedence, a fundamental principle of Community law.*

It further stated that:

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* N of T: non-official translation.

[59] See http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/l14547_en.htm. This page was accessed during the fall of 2010. The content of the webpage has been modified since then.

direct effect is different from immediate applicability. Immediate applicability is a principle according to which community law is applied at the national level without the need of introducing or transforming it into national law.

And also that:

in principle, direct effect and immediate applicability go together. This is the case for the community regulations. Nonetheless, some norms can have direct effect without being immediately applicable. This is the case of the directives which, in certain conditions, they entail direct effects but are not immediately applicable because they require a text to transpose them.

The distinction expressed above between direct effect and direct applicability does not correspond with a consistently employed vocabulary in the Court of Justice's case law. The ECJ which uses direct effect, direct applicability and immediate applicability for both concepts. That is, it uses them both to refer to the binding character of the regulations on domestic law from their entry into force, and to indicate their binding character for the courts of the Member States (after the *Van Gend en Loos* case[60] which will be presented here), and their administrations. The latter was established by the ruling of 1989 in the case *Costanzo* (C-103/88)[61] on provisions of the founding Treaties, of the treaties concluded by the European Union and of secondary legislation that meet the requirements of clarity, accuracy and unconditionality required precisely by the jurisprudence of *Van Gend Loos*.

It should also be remembered that the direct applicability of provisions contained in directives, after being established with strict conditions by the Court of Justice in the sentence of 1970, in the case *Franz Grad*,[62] was plainly recognised by the Treaty of Amsterdam, in the wording adopted to define the framework decision on Art. 34, TEU (version before Lisbon):

(b) adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. ***They shall not entail direct effect.*** [highlights added]

The norms of an international treaty can often be recognised as directly applicable in a particular state party to the treaty and not in another, depending on the substantive position taken by their constitution and courts. Instead, the direct applicability of EU norms is necessarily valid for all Member States. This stems precisely from the specific sanctioning system of the European Union from the moment they have ratified a founding treaty and this treaty is in force.

While analysing the decision of the Court of Justice of the European Communities of 5 February 1963 in case *Van Gend en Loos* (C-26/62),[63] it is appreciated that the logic of direct applicability, or direct effect or immediate applicability, is not a purely formal logic. This is inferred from a quick reading of Art. 288, TFEU, and from former Art. 34, TEU, in the version prior to the entry into force of the Treaty of Lisbon.

[60] See note 7 above.
[61] Judgment of the Court of 22 June 1989. *Fratelli Costanzo SpA v Comune di Milano*. Case 103/88. *European Court reports 1989 Page 01839.*
[62] Judgment of the Court of 6 October 1970. *Franz Grad v Finanzamt Traunstein*. Case 9-70. *European Court reports 1970 Page 00825.*
[63] See note 7 above.

First, it is worth remembering that it has been due to a bit of chance that the Court of Justice ruled on the concept of direct applicability sixteen months before deciding on the concept of primacy, that is on 15 July 1964 in *Costa v. Enel* (C-6/64).[64] This was a time when there were few applications for preliminary rulings. The questions concerning the interpretation of Art. 12 of the EEC Treaty came from a court in the Netherlands, the Tariefcommissie, an administrative tax court. The Basic Law of the Kingdom of the Netherlands contained from the 1950s an article 66 (now Art. 94 of the Basic Law) under which the existing laws of the Kingdom '*shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons.*' This provision was included in the Constitution following the signature of the Treaty establishing NATO and the Treaty establishing ECSC, precisely in order to ensure the direct applicability of ECSC regulations and decisions. It was not therefore necessary for the Tariefcommissie to ask the Court whether to apply a provision of the EEC Treaty contrary to a domestic law –as the Giudice Conciliatore of Milan should ask a year later on the *Costa v. Enel* case- since the response was affirmative according to Dutch law.

The first preliminary question of the Tariefcommissie was thus:

> *Whether article 12 of the EEC Treaty has direct application within the territory of a Member State, in other words, whether nationals of such a state can, on the basis of the article in question, lay claim to individual rights which the courts must protect.*

The second questions, not relevant to this chapter, concerned the interpretation of the 'standstill' clause included in Art. 12, to which we referred in part 5 of the second section of this chapter. It seems useful to underline that, as evidenced by the wording of the question of the Dutch judge, the Court of Justice's reasoning is not based on an integrationist or federalist whim of European judges. Rather it responded to a question that might be raised by any court of a Member State that dealt with provisions of the EEC Treaty. In this context, the reasoning of the Court of Luxemburg in response to the substantive aspect of the question by the Dutch judge should be quoted in full:

> *The first question of the Tariefcommissie is whether Article 12 of the Treaty has direct application in national law in the sense that nationals of Member States may on the basis of this Article lay claim to rights which the national court must protect.*

It can be stressed that the use of the words '*direct application in national law*' is directly deduced from the questions that referred to '*application*' and not to 'effect'.

> *To ascertain whether the provisions of an international treaty extend so far in their effects it is necessary to consider the spirit, the general scheme and the wording of those provisions.*

The quote in the *Van Gend en Loos* judgement generally ends here and then refers to the famous phrase according to which:

> *the Community 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 Member States but also their nationals.*

[64] See note 8 above.

It is useful to follow in detail the reasoning of the Court in relation to the spirit, the system and the wording of the provisions of the EEC Treaty. It continues in fact with two paragraphs concerning the spirit of the EEC Treaty:

> *The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens.*

By referring to '*the establishment of institutions endowed with sovereign rights,*' it starts the analysis of the system of the EEC Treaty, which continues with a precise reference to Art. 177 of the EEC Treaty (now 267 TFEU):

> *Furthermore, it must be noted that the nationals of the states brought together in the Community are called upon to cooperate in the functioning of this Community through the intermediary of the European Parliament and the Economic and Social Committee.*
> *In addition the task assigned to the Court of Justice under Article 177, the object of which is to secure uniform interpretation of the Treaty by national courts and tribunals, confirms that the states have acknowledged that Community law has an authority which can be invoked by their nationals before those courts and tribunals.*

And only after this analysis, the Court continues with the famous paragraph:

> *The conclusion to be drawn from this is that the Community 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 Member States but also their nationals.*

The phrase '*the subjects of which comprise not only Member States but also their nationals*' does not fall from the sky. On the contrary, it is necessary in order to respond to the question about the direct application of Art. 12 of the EEC Treaty:

> *Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.*

In this context, the Community Court therefore can examine the wording of Arts. 9 and 12 of the Treaty, concerning customs rights:

> *With regard to the general scheme of the Treaty as it relates to customs duties and charges having equivalent effect it must be emphasized that Article 9, which bases the Community upon a customs union, includes as an essential provision the prohibition of these customs duties and charges. This provision is found at the beginning of the part of the Treaty which defines the 'Foundations of the Community'. It is applied and explained by Article 12.*

It is therefore logical that in the second stage of its reasoning the Court indicates the characteristics of this law that can have direct effects on internal law:

> *The wording of Article 12 contains a clear and unconditional prohibition which is not a positive but a negative obligation. This obligation, moreover, is not qualified by any reservation on the part of states which would make its implementation conditional upon a positive legislative measure enacted under national law. The very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between Member States and their subjects.*

By stating that: '*The implementation of Article 12 does not require any legislative intervention on the part of the states,*' it establishes the necessary characteristics for an EU law's provision to have effect, that is to be directly applicable: it should be clear, precise and unconditional.

It is also particularly interesting for the purpose of this chapter to observe how the Court insists precisely on the parallelism between the obligations of the states and the rights of individuals, and the link with the so-called '*effet utile*', i.e. the practical effectiveness of EC law:

> *The fact that under this Article it is the Member States who are made the subject of the negative obligation does not imply that their nationals cannot benefit from this obligation.*
> *In addition the argument based on Articles 169 and 170 of the Treaty put forward by the three Governments which have submitted observations to the Court in their statements of case is misconceived. The fact that these Articles of the Treaty enable the Commission and the Member States to bring before the Court a State which has not fulfilled its obligations does not mean that individuals cannot plead these obligations, should the occasion arise, before a national court, any more than the fact that the Treaty places at the disposal of the Commission ways of ensuring that obligations imposed upon those subject to the Treaty are observed, precludes the possibility, in actions between individuals before a national court, of pleading infringements of these obligations.*
> *A restriction of the guarantees against an infringement of Article 12 by Member States to the procedures under Article 169 and 170 would remove all direct legal protection of the individual rights of their nationals. There is the risk that recourse to the procedure under these Articles would be ineffective if it were to occur after the implementation of a national decision taken contrary to the provisions of the Treaty.*
> *The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of the Member States.*
> *It follows from the foregoing considerations that, according to the spirit, the general scheme and the wording of the Treaty, Article 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect.*

From the content of the founding Treaties, thus, it can be deduced that EU Law consists not only of obligations undertaken by states but also of rights and duties of individuals. It is true that this is already a feature in an increasing number of international treaties, according also to the concept expressed in Art. 20, par. 2, TFEU, which states that:

> *Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties.*

Still, in traditional international treaties rights are less important compared to the obligations between states.

The existence of rights and duties for individuals in EU law is linked to the specific safeguards of sanction for infringement of obligations undertaken by Member States as well as of the content of the norms of the Treaties. This has been established by the EC Court of Justice in its jurisprudence on the direct applicability of the EEC Treaty, which began with the above quoted ruling of the Court in *Van Gend en Loos*. For other international treaties, the obligations of signatory states may be related to rights of individuals. But this does not mean that the obligations of states have usually as counterparts rights that can be recognised by the courts of the states party to the treaties.

5. The principle of uniform application of EU Law

From the requirement of judicial review, together with the monopoly of the EU Court for the interpretation of EU law as stated in Art. 19, TEU –principles discussed above in section III 2- also follows a principle, generally unknown in international public law, which is called the principle of uniform application of EU law.

This is a fundamental principle of EU law, constantly reiterated by the EU Court's jurisprudence, and which is not explicitly formulated in the Treaties. In this regard, par. 2 of the judgement of the Court of Justice of 1974 in the case *Rheinmühlen* (C-166/73)[65] can be cited:

> *Article 177 [267 TFEU] is essential for the preservation of the Community character of the law established by the Treaty and has the object of ensuring that in all circumstances this law is the same in all States of the Community.*
> *Whilst it thus aims to avoid divergences in the interpretation of Community law which the national courts have to apply, it likewise tends to ensure this application by making available to the national judge a means of eliminating difficulties which may be occasioned by the requirement of giving Community law its full effect within the framework of the judicial systems of the Member States.*
> *Consequently any gap in the system so organized could undermine the effectiveness of the provisions of the Treaty and of the secondary Community law.*
> *The provisions of Article 177, which enable every national court or tribunal without distinction to refer a case to the Court for a preliminary ruling when it considers that a decision on the question is necessary to enable it to give judgment, must be seen in this light.*

The principle of uniform interpretation, which cannot be applied to the usual international treaties in the absence of a mechanism similar to the preliminary procedure of Art. 267, TFEU, is particularly broad in scope, as demonstrated by the case-law that starts with the sentence of 1990 in *Dzodzi*,[66] and was expressed by the Court of Justice in its ruling of 1997 in the *Giloy* case (C-130/95)[67] in paragraphs 22, 23 and 28:

> *22 A reference by a national court can be rejected only if it appears that the procedure laid down by Article 177 of the Treaty has been misused and a ruling from the Court elicited by means of a contrived dispute, or it is obvious that Community law cannot apply, either directly or indirectly, to the circumstances of the case referred to the Court (see, to this effect, Dzodzi and Gmurzynska-Bscher, cited above, paragraphs 40 and 23).*
> *23 Applying that case-law, the Court has repeatedly held that it has jurisdiction to give preliminary rulings on questions concerning Community provisions in situations where the facts of the cases being considered by the national courts were outside the scope of Community law but where those provisions had been rendered applicable either by domestic law or merely by virtue of terms in a contract (see, as regards the application of Community law by domestic law, [...] all those cases being hereinafter referred to as 'the Dzodzi line of cases'). In those cases, the provisions of domestic law and the relevant contractual terms, which incorporated Community provisions, clearly did not limit application of the latter.*

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[65] Judgment of the Court of 16 January 1974. *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*. Case 166-73. *European Court reports 1974 Page 00033.*

[66] Judgment of the Court of 18 October 1990. *Massam Dzodzi v Belgian State*. Joined cases C-297/88 and C-197/89. *European Court reports 1990 Page I-03763.*

[67] Judgment of the Court of 17 July 1997. *Giloy v Hauptzollamt Frankfurt am Main-ost*. Case C-130/95. *European Court reports 1997 Page I-04291*.

28 In those circumstances, where, in regulating internal situations, domestic legislation adopts the same solutions as those adopted in Community law so as to provide for one single procedure in comparable situations, it is clearly in the Community interest that, in order to forestall future differences of interpretation, provisions or concepts taken from Community law should be interpreted uniformly, irrespective of the circumstances in which they are to apply (see, to this effect, the judgment in Dzodzi, cited above, paragraph 37).

Since the entry into force of the Treaty of Lisbon, it is emphasised that while there is no explicit formulation in the Treaties, the principle of uniform interpretation is clearly sanctioned at the EU primary law level. This is as a result of the wording of the abovementioned *Protocol (n 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom.* In a series of recitals, among them in particular in the third, it is said

WHEREAS the aforementioned Article 6 requires the Charter to be applied and interpreted by the courts of Poland and of the United Kingdom strictly in accordance with the explanations referred to in that Article,

This recital is thus recalling that '*the explanations*' must be taken into account by all courts of the Member States –including Poland and the United Kingdom.

The principle of uniform application may also be related to the wording of Art. 4, par. 2, TEU, which states that

The Union shall respect the equality of Member States before the Treaties.

From this follows the obligation for the Commission and the Court of Justice to apply the same standards to all Member States in their role of monitoring and judicial protection. The principle of equality between sovereign states is certainly the core of public international law. However, unlike the EU system, the general international law or law of treaties has no mechanism to ensure the uniform application by the courts, the legislative bodies and the administrations of states. In fact, mechanisms such as the preliminary procedure and the action for infringement are missing.

CONCLUSION: EUROPEAN UNION LAW AS SUI GENERIS TYPE OF LAW?

Quite often in legal scholarship EU law is characterised as '*sui generis law*' or 'mixed' or 'hybrid' law. This summarises in few words what has been exposed in the two preceding sections of this chapter.

The use of such expressions is often linked to the difficulty faced by legal scholars when qualifying the nature of the European Union, different from that of a federal state but at the same time different from that of traditional international organisations. It can be stated, in a political perspective, that the EU is an '*unidentified political object*' in the words attributed to a former President of the European Commission Jacques Delors. It can also be referred to as a 'hybrid' body, as the for example, the former vice-president of the European Convention, Giuliano Amato did. As a particularly clear symptom of this hybrid nature of the Union, the

direct election of the European Parliament stands out, because when there are parliamentary assemblies in the context of international organisations, these are usually composed by delegates from the parliaments of the participating states.

Art. 10, pars. 1 and 2, TEU, reflects the hybrid character of the Union with reference to the double democratic legitimacy: direct legitimacy of the Parliament and indirect legitimacy of the European Council and the Council:

> *1. The functioning of the Union shall be founded on representative democracy.*
> *2. Citizens 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.*

Such categorisations *sui generis*, mixed or hybrid law- may be useful from a legal theory perspective, and understood as part of political philosophy, as considered in the French and American traditions of the Enlightenment and in the more recent approach by English-language scholars. From the standpoint of the positive law in force these are, however, useless classifications. It is not enough to say that EU law is *sui generis* in relation to both public international law and constitutional law. In fact, it is wrong from a technical point of view to put both disciplines at the same level with regard to their relationship with EU Law.

Public international law is a supplementary source of positive law of the European Union, both for the interpretation of the treaties and secondary legislation and for filling any possible gaps in the treaties. This has already been announced in the first section of this chapter in relation to the possibility of applying the *Vienna Convention on the Law of Treaties*. Also general principles of public international law apply in EU law, such as that of good faith.

The category of fundamental rights '*as they result from the constitutional traditions common to the Member States*' mentioned in Art. 6, par. 3, TEU, and in Art. 52, par. 4 of the EU Charter does not mean that the constitutional laws of the Member States apply to EU law, even in a supplementary manner. This is stressed in the same Art. 6, par. 3, which specifies that these '*shall constitute general principles of the Union's law*.'

The internal law of the Member States –and, particularly, constitutional law- has the mission to be a source of inspiration for EU law. This also applies to the jurisprudence, and often leads the EU judge to rely on elements of comparative law in the interpretation of EU law, or to be more precise according to the formulation of Art. 340, TFEU (288 TEC), '*general principles common to the laws of the Member States.*' The EU legislature also often turns to internal law –of the Member States and of other states- to define new principles, such as for example the notion of '*universal service,*' now linked to economic services of general interest. Even the drafters of the founding Treaties frequently refer to concepts of domestic law. For example, the Treaty of Lisbon takes up from the Constitutional Treaty of 2004 both the categorisation of the competences set out in Art. 2, TEU, following a pattern usual in many federal states, and the system of hierarchy of norms in Arts. 289, 290 and 291, TFEU. These are, however, autonomous concepts of EU law, although inspired by the tradition of the Member States, and not constitutional law concepts accepted as such by EU law.

Besides the formal aspect due to the fact that the EU Constitution is based on a pact between sovereign states, the difference between public international law as a supplementary source of positive EU law in force and the domestic law as a source of inspiration has to do with a substantive element.

General public international law is substantively one law. This is not about alluding to the debate within international law scholars between those who argue that public international law is unitary and those who, in contrast, believe that it is broken down into specific systems, the United Nations law, the WTO law, etc. It is about stressing that public international law applied by all Member States of the so-called 'international community' is the same, despite the doctrinal, normative and case-law differences on how to approach certain concepts in some countries.

Instead, the internal state law breaks down into national legal systems which are often very different from each other in terms of the way of reasoning or systematisation, although the solutions to specific problems are often similar in practice. Even if one takes into account only the internal law of the Member States of the Union there are 27 different systems, from 1 January 2007, which cannot be reduced to a few, simple categories. The differences of approach in the constitutional law of the Member States prevent the technical application, without further adaptations, of the categories of constitutional law to EU law.

A first example is given in Art. 2, par. 2, TFEU, on shared competences. The term '*concorrenti*' competences used in the Italian version of the TFEU is almost identical to that used in the Italian Constitution in its Art. 117 (after the constitutional reform of 2001): '*materie di legislazione concorrente.*' The concept of shared competences is very similar to that used since 1949 in the German Fundamental Law in Art. 70. It should be noted, though, that the German version of the TFEU uses the words '*geteilte Zuständigkeit*' better than the words '*konkurrierende Zuständigkeit,*' while the Fundamental Law refers to '*konkurrierende Gesetzgebung*.' The terms of Art. 2, par. 2 that define the notion of shared competence are therefore particularly useful, also for the countries that are familiar with this concept:

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

Another example is the distinction between legislative acts (Art. 289, TFEU), delegated acts (Art. 290) and implementing acts (Art. 291). This distinction reflects well known and developed concepts in Spanish or Italian constitutional law, for example, which are familiar with the concept of legislative decree. The difference between delegated acts and implementing acts is, however, difficult to understand for lawyers of some Member States. The nuance that distinguishes them from each other does not exist in, for example, the German Fundamental Law, which refers only to one concept, that of '*Rechtsverordnung.*' The French Constitution of 1958 makes a distinction between '*ordonnances*' that could be deemed as delegated acts and '*décrets,*' that could be assimilated to implementing acts. But the constitutional and administrative jurisprudence are based only on the distinction between

law –as an act formally adopted by the Parliament- and regulation –as an act formally adopted by the government or public bodies. Therefore the subdivision between delegated acts and implementing acts is difficult to understand for French lawyers. There are many other examples.

From what has been explained above, it follows that the application of categories and ways of reasoning of internal law to EU Law runs the risk of leading –and in fact has often led practitioners and academics- to misconceptions and misunderstandings which are not easily overcome. Too often a commentator, specialised in administrative or constitutional law, or in legal theory or in public international law, criticises what he perceives as a lack of consistency in the reasoning of the EU Court of Justice in a judgement or opinion. Indeed, criticism is part and parcel of the researcher's work. However, it should not be forgotten that the EU Court does not have the mission of building a 'theory' of law from the cases under consideration. Its function is to apply the rules of law –ultimately based on treaties between states- to the case submitted to it, according to specific proceedings of the EU Treaties.

In the debate between experts in different legal disciplines, on the content and the development of EU law, there often is a desire to protect or even expand the scope of their own discipline, as in all branches of science. There is, however, another topic of discussion which is closer to the political dispute, yet very important. It is the question of which legal system is best suited to the development of European integration.

It is not clear that the international law roots of EU law will necessarily limit integration. Neither is it obvious that constitutional law is necessarily more suitable to the development of European integration. What counts is the content of the law.

In this sense, it is necessary to emphasise on the centrality of the principle of effectiveness (or efficiency) or the principle of '*effet utile*' in EU law, with the development of many mechanisms, principles and rules that must guarantee it. These mechanisms, principles and rules are distinguished not only from those of the ordinary public international law –which unfortunately has a rather limited effectiveness. But they are also distinguished from the mechanisms, principles and rules of constitutional law of many sovereign states, including many Members States of the European Union. There are mechanisms and principles deriving from the international treaty nature of the EU Constitution which contribute to the effectiveness of EU law *vis a vis* domestic law of many states. This is because the EU Court monitors Member States' compliance with the Treaties taking into account the commitments undertaken by them.

This is the principle of the '*effet utile*' of EU law which makes it more suitable for the purpose stated in the preambles of the *Treaty on European Union* and the *Treaty on the Functioning of the European Union*, as well as that of the *Charter of Fundamental Rights of the European Union*, and after the entry into force of the Treaty of Lisbon, also in Art. 1 of the *Treaty on European Union*, namely to advance the process of creating '*an ever closer union among the peoples of Europe.*'

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