EUROPEAN UNION

Jan WOUTERS[*]
Hanne CUYCKENS[**]
Thomas RAMOPOULOS[***]

I. OVERVIEW

The EU has been often referred to as a *sui generis* entity situated somewhere between an international organization and a nation state, which displays both intergovernmental and supranational features. The European integration process is one of continuous pulses and it is therefore important to briefly give an overview of the developments which have progressively led to the establishment of the European Union ('EU', 'Union') as it exists today.

The early stages of European integration began after the end of the Second World War with the establishment of the Council of Europe in 1949. But it was not until the six founding Member States decided to establish the European Coal and Steal Community ('ECSC') by a treaty signed in Paris on 18 April 1951 that the process of 'deeper' integration, involving stronger supranational features, was initiated.[1] The initiative of establishing such a community revolving around the production of coal and steel was launched by French Foreign Minister Robert Schuman. He believed that by pooling production of coal and steel under the ECSC war between France and Germany would become practically impossible and he proposed to place the whole Franco-German coal and steel production under one joint High Authority, in an organisation open to the participation of other countries of Europe.[2] Belgium, Italy, Luxembourg and the Netherlands decided to join France and Germany in this organisation. The distinguishing character of the ECSC at that time was that it was much more than a traditional intergovernmental organisation: it operated in a supranational manner, with policies conducted independently from the Member States by the High Authority.

The supranational formula proved to be a success and the Benelux countries in 1955 proposed to their partners in the ECSC to extend this formula towards others sectors and more precisely to move towards the setting-up of a common market and cooperation in the area of atomic energy.[3] This proposal was further discussed at a meeting in Messina the same year and Paul-Henri Spaak, Belgian Foreign Minister at that time, was asked to report on the feasibility of such extension. This was judged to be feasible and the six Member States, gathered in Rome, signed on 25 March 1957 the Treaty establishing the European Economic Community ('EEC') and the Treaty establishing the European Atomic Energy Community ('EAEC'). The three Communities each had their own institutions at the beginning but later on these were progressively merged (the European Parliament and the Court of Justice in 1957 and the Council of Ministers and the Commission in 1967 by the Merger Treaty).

In the early 1960s Member States started to discuss the need to balance the growing importance of the EEC in international economic relations with a common foreign policy.[4] This issue was very contentious and at the beginning it was decided to establish a system of foreign policy cooperation on a purely

[*] Jean Monnet Chair, Professor of International Law and International Organizations, Director of the Leuven Centre for Global Governance Studies and Institute for International Law, Leuven University.
[**] Assistant, Institute for International Law, Research Fellow, Leuven Centre for Global Governance Studies, Leuven University.
[***] Research Fellow, Leuven Centre for Global Governance, Leuven University.
[1] A. Rosas and L. Armati, EU Constitutional Law: An Introduction (Hart Publishing, 2010), 2.
[2] Statement by Robert Schuman, Minister of Foreign Affairs of France, 9 May 1950, in S. Patijn (ed.), Landmarks in European Unity: 22 texts on European Integration (Sijthoff, 1970), 47.
[3] P.S.R.F Mathijsen, A Guide to European Union Law as amended by the Treaty of Lisbon (Sweet & Maxwell, 2010), 15.
[4] C. Bretherton and J. Vogler, The EU as a global actor (Routledge, 2006), 164.

intergovernmental basis, situated entirely outside of the framework of the Communities.[5] Even though the European Political Cooperation ('EPC') and the Communities were kept formally separated, a lot of issues were overlapping and gradually a link grew between the EPC meetings of the Foreign Ministers and the meetings of the Council of the European Communities. Co-operation in the sphere of foreign policy was referred to formally for the first time in the European Single Act adopted in 1986.[6] In 1992, the Treaty on European Union ('TEU', 'EU Treaty' or 'Maastricht Treaty') converted the EPC into the second pillar of the Union, the Common Foreign and Security Policy ('CFSP'). Other areas in which Member States gradually started coordinating their policies outside of the sphere of competence of the Communities were the trans-border aspects of justice, crime and home affairs. Until the entry into force of the Maastricht Treaty on 1 November 1993, these areas were purely intergovernmental and outside the framework of the institutions.[7] With the Maastricht Treaty, intergovernmental cooperation between the Member States in the fields of Justice and Home Affairs ('JHA') was henceforth to be conducted on the basis of Title VI of the EU Treaty, the so-called 'third pillar'. Furthermore, upon the entry into force on 1 May 1999 of the Treaty of Amsterdam the judicial cooperation in civil matters, immigration and asylum policy was transferred from the third to the first pillar, thus narrowing the third pillar to Police and Judicial Cooperation in Criminal Matters. It is important to recall here that even though the CFSP and JHA were transferred into the area of Union law by the Maastricht Treaty, the decision-making remained largely intergovernmental in opposition to the supranational method applied to the areas within the ambit of the Communities (first pillar).

Apart from its introduction of a pillar structure for the EU the Maastricht Treaty considerably extended the sphere of action of the Community pillar, which was no longer confined to the economic sphere. In order to take this extension of competences into account the EEC was renamed the European Community ('EC').[8] The most important change was the decision to gradually establish an economic and monetary union ('EMU') with the ultimate objective to adopt a common currency.[9]

In the meantime, the number of EU Member States was enlarged on six different occasions.[10] Currently, there are 27 Member States and negotiations have been started with other States on their accession to the Union.[11]

On 29 October 2004, the heads of state or government of the Member States assembled in Rome signed the Treaty establishing a Constitution for Europe. However, the process of ratification was blocked after negative referenda in France and the Netherlands, and the idea of establishing a 'European Constitution' was abandoned. In its place came a 'Reform Treaty', the Treaty of Lisbon signed on 13 December 2007,[12] which amended the TEU and EC Treaty. After a long and difficult ratification process it entered into force

[5] Ibid., 164.
[6] The Single Act was signed by the Member States on February 17 and 28, 1986. It conferred new competences on the Community but did not alter the latter's general objectives of the Community: see K. Lenaerts and P. Van Nuffel, European Union Law (Sweet & Maxwell, 2011), p. 36.
[7] S. Peers, EU Justice and Home Affairs Law (non-civil), *in* The Evolution of EU Law (P. Craig and G. De Burca, eds., Oxford Univ. Press, 2011), 269.
[8] C.W.A. Timmermans, The Genesis and Development of the European Communities and the European Union, *in* The Law of the European Union and the European Communities (P.J.G. Kapteyn and V. Van Themaat, eds., Kluwer Law International, 2008), 33.
[9] F. Snyder, EMU – integration and differentiation: metaphor for European Union, *in* The Evolution of EU Law (P. Craig and G. De Burca, eds., Oxford University Press, 2011), 693.
[10] 1951: France, Germany, Italy, Belgium, the Netherlands and Luxemburg; 1973: Denmark, Ireland and the United Kingdom; 1981: Greece; 1986: Portugal and Spain; 1995: Austria, Finland and Sweden; 2004: Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovenia and the Slovak Republic; 2007: Bulgaria and Romania.
[11] The accession negotiations with Croatia have by now been completed and Croatia is set to become the 28th Member State of the EU on 1 July 2013.
[12] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007.

on 1 December 2009. While the TEU kept its name, the EC Treaty was renamed 'Treaty on the Functioning of the European Union' ('TFEU').

The Lisbon Treaty made a number of fundamental changes to the EU's institutional architecture. Among other changes, the EC was replaced and succeeded by the EU, which was also given legal personality explicitly.[13] Moreover, the pillar structure was formally abolished, although the CFSP retains a special place and remains "subject to specific rules and procedures".[14] Of the original three European Communities – the ECSC had lapsed after 50 years in 2002 - only the EAEC remains in place as a distinct organisation.

II. THE FEDERAL DISTRIBUTION AND EXERCISE OF LAWMAKING POWER

1. *Which areas of law are subject to the (legislative) jurisdiction of the central authority?*

According to article 5(2) TEU, "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". This is the so-called principle of conferral. In other words, the EU may act only within the limits of the competences explicitly or implicitly conferred upon it by the constitutive treaties. The competences that have not been conferred upon the EU remain with the Member States.[15] Along the same lines article 13(2) TEU establishes the twin principle of conferred powers of the institutions. It provides that "each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions, and objectives set out in them".

The exercise of these competences is further governed by the principles of subsidiarity and proportionality. The principle of subsidiarity, as laid down in article 5(3) TEU, stipulates that "in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States (…) but rather, by reason of the scale or effects of the proposed action, be better achieved at Union level". The principle of proportionality, laid down in article 5(4) TEU, requires EU action not to exceed what is necessary to achieve the objectives contained in the Treaties. The application of these two principles is further governed by Protocol No. 2 on the application of the principles of subsidiarity and proportionality. The most important innovation brought by the Lisbon Treaty with regard to the principle of subsidiarity is the enhanced role accorded to national parliaments.[16] According to article 6 of the said Protocol No. 2 they indeed have the right to send to the Presidents of the European Parliament, the Council and the Commission, a reasoned opinion stating why they consider that the draft in question does not comply with the principle of subsidiarity. Regrettably, while the Protocol imposes obligations on the Commission to ensure compliance with both the principle of subsidiarity and the principle of proportionality, national parliaments are given a role only in relation to the first principle and not the latter.[17]

It follows from the principle of conferral that every legally binding EU act must be based on a grant of power.[18] In other words every act of the EU must be based on a specific or general treaty provision. The

[13] Respectively Art. 1, third para., TEU and Art. 47 TEU.
[14] Art. 24(1), second para., TEU.
[15] Art. 5(2) in fine TEU; see also Art. 4(1) TEU and Declaration No 18 in relation to the delimitation of competences attached to the Lisbon Treaty.
[16] P. Craig, Institutions, power, and institutional balance, *in* The Evolution of EU Law (P. Craig and G. De Burca, eds., Oxford University Press, 2011), 76.
[17] P. Craig, Institutions, power, and institutional balance, *in* The Evolution of EU Law (P. Craig and G. De Burca, eds., Oxford University Press, 2011), 77.
[18] K.S.C. Bradley, Power and Procedures in the EU Consitution: legal bases and the Court, *in* The Evolution of EU Law (P. Craig and G. De Burca, eds., Oxford university Press, 2011), 86.

determination of the correct legal basis is crucial since this legal basis determines the extent of the competence and the way the EU exercises it, i.e. the procedure to be followed in order to adopt the act in question, and often also the type of instrument that is to be used.[19] In other words, to paraphrase the Court of Justice of the European Union ('ECJ' or 'Court'), "[t]he choice of the appropriate legal basis has constitutional significance".[20] Failing to respect the prescribed procedure results in a violation of the balance of power between EU institutions and/or between the Union and its Members States, and failing to respect the limits of a competence derived from the legal basis in question infringes upon the principle of conferral.[21] Given the importance of a proper legal basis, it follows that "the choice of the legal basis for a measure may not depend simply on an [EU] institution's conviction as to the objective pursued but must be based on objective factors which are amenable to judicial review".[22] With regard to supervision of the choice of the correct legal basis, the ECJ plays an important role. Indeed, "[i]n its legal basis case law, the Court performs two of the principal functions of a Constitutional Court in a federal-type polity, defining the division of powers between the centre and the component states, and regulating the balance of powers between the institutions or branches of government".[23] It is important to note, however, that it is not necessary for a competence to have been *explicitly* established by a treaty provision. Indeed, the ECJ has developed a theory of *implied* competences. This theory is especially important in the area of external relations where it has been used to such an extent that it has become a fundamental part of the EU's external relations constitutional framework.[24] It is not within the ambit of this report to trace back the entire evolution of the ECJ's case law on this matter, but some important elements will be pointed to. In its 1971 *ERTA* judgment, the ECJ established the doctrine of implied external powers of the EU based on the link between these implied external powers and the existence of internal common policy measures in the field in question.[25] The ECJ held that "the Community enjoys the capacity to establish contractual links with third countries over the whole field of objectives defined by the Treaty. This authority arises not only from an express conferment by the Treaty, but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions by the Community institutions".[26] The theory of implied external powers is now well-established in the ECJ's case law.[27] Two rationales for implied powers have been progressively established: the existence of EU rules in the field in question (cf. *ERTA*) or the existence of a Union objective for the attainment of which internal competences need to be complemented by external ones (cf. later case law, such as opinion 2/91).[28]

There are two types of treaty provisions on which EU action can be based: sectoral provisions being the enabling provision for action in a specific policy field or functional provisions allowing for action in different fields in order to pursue specified objectives.[29] The EU institutions most frequently rely on the

[19] K. Lenaerts and P. Van Nuffel, European Union Law (Sweet & Maxwell, 2011), 113-114.
[20] Opinion 2/00 *Cartagena Protocol* [2001] ECR I-9713, para. 5.
[21] K.S.C. Bradley, Power and Procedures in the EU Consitution: legal bases and the Court, *in* The Evolution of EU Law (P. Craig and G. De Burca, eds., Oxford university Press, 2011), 86.
[22] Case 45/86 *Commission v Council* [1987] ECR 1493, para. 11.
[23] K.S.C. Bradley, Power and Procedures in the EU Constitution: legal bases and the Court (P. Craig and G. De Burca, eds., Oxford Univ. Press, 2011), 104.
[24] G. De Baere, Constitutional Principles of EU External Relations (Oxford University Press, 2008), 16.
[25] M. Cremona, External relations and external Competence of the European Union: the emergence of an integrated policy (P. Craig and G. De Burca, eds., Oxford University Press, 2011), 220.
[26] Case 22/70 *Commission v Council* [1971] ECR 263, para. 16.
[27] E.g. Opinion 2/91 *Convention No 170 of the International Labour Organization concerning safety and the use of chemicals at work* [1993] ECR I-1061, para. 7; Opinion 2/94 *Accession by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I-1759, para. 26; Opinion 1/03 *Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* [2006] ECR I-1145, para. 114.
[28] M. Cremona, External relations and external Competence of the European Union: the emergence of an integrated policy (P. Craig and G. De Burca, eds., Oxford University Press, 2011), 221.
[29] K.S.C. Bradley, Power and Procedures in the EU Constitution: legal bases and the Court (P. Craig and G. De Burca, eds., Oxford University Press, 2011), 86.

specific treaty articles which provide for a competence for a particular matter. In the absence of such specific (sectoral) provisions, they may resort to the second category of treaty provisions: the functional provisions. Examples of such provisions are Article 352 TFEU and article Articles 114 and 115 TFEU (*see infra*). Article 352 TFEU, often referred to as the 'flexibility clause', confers upon the Union a supplementary tool to achieve the EU's objectives "[i]f action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers". The objectives pursued by the EU are listed in article 3 TEU. It has been argued by some authors that the reach of the flexibility clause post-Lisbon has been broadened as compared to the flexibility clause pre-Lisbon (former article 308 TEC).[30] Indeed, previously, article 308 TEC referred to the situation in which action should prove necessary to obtain, in the course of the operation of the common market, one of the objectives of the EC, whereas now article 352 TFEU refers to action in the framework of the policies of the treaties in general, that is both the TEU and the TFEU.[31] However, it had already been the practice of EU institutions to interpret and apply article 308 TEC as broadly as possible. This had led the Court to try to circumscribe this pronounced 'competence creep'.[32] Thus, contrary to the view of some commentators, as delineated above, it can be submitted that the new broader but also more detailed wording of article 352 TFEU actually brings the text of the Treaties in line with practice, partly making irrelevant the 'competence creep' debate. This, however, is not the case with article 114 TFEU, which has remained virtually unchanged and gives rise to the same concerns.[33]

Apart from the EU's fundamental principles regarding the existence of competences, it is important to look at the rules with regard to the nature of the competences. Before the entry into force of the Lisbon Treaty, there was no real catalogue listing the competences of the Union. Nowadays, not only is there such a catalogue of competences (see articles 3-6 TFEU) in place, but the Lisbon Treaty also stipulates the nature of these different competences.

The areas is which the EU has exclusive competence are listed in article 3(1) TFEU: customs union; the establishing of the competition rules necessary for the functioning of the internal market; monetary policy for the Member States whose currency is the euro; the conservation of marine biological resources under the common fisheries policy and the common commercial policy. Article 3(2) TFEU further stipulates that "[t]he Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competences, or in so far as its conclusion may affect common rules or alter their scope." Article 3(2) seems to be a codification of the ECJ's case law with regard to the EU's competence to conclude international agreements, notably as developed in the 1971 *ERTA* case (*supra*).[34] When the EU has exclusive competence in a specific area, this means that only the EU is competent to legislate and adopt legally binding acts with regard to this specific area. Consequently, the Member States are only allowed to act in these fields if they are empowered by the Union to do so or in order to implement Union acts.[35]

[30] A. Rosas and L. Armati, EU Constitutional Law: An Introduction (Hart Publishing, 2010), 20.
[31] Ibid., 21. However, see Declaration No 41 on Article 352 of the Treaty on the Functioning of the European Union, which states that Art. 352 refers to the objectives as set out in Art. 3(2), (3) and (5), and not solely for the objectives stated in 3(1). Remarkably, no mention is made of Art. 3(4) TEU. See also Declaration No 42 on Article 352 of the Treaty on the Functioning of the European Union.
[32] Opinion 2/94 *Accession by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I-1759, paras. 27-35.
[33] A. Dashwood, M. Dougan, B. Rodger, E. Spaventa & D. Wyatt, Wyatt and Dashwood's European Union Law (Hart Publishing, 2011), 105-111.
[34] A. Rosas and L. Armati, EU Constitutional Law: An Introduction (Hart Publishing, 2010), 206.
[35] Art. 2(1) TEU.

The second category of Union competences, i.e. the areas in which the Union and the Member States have shared competences, is covered by article 4 TFEU. These areas are: internal market; social policy; economic, social and territorial cohesion; agriculture and fisheries (except for the conservation of marine biological resources, which is an exclusive EU competence); environment; consumer protection; transport; trans-European networks; energy; area of freedom, security and justice and common safety concerns in public health matters. It is important to note that this is a non-exhaustive list since pursuant to article 4(1) TFEU "[t]he Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in article 3 TFEU [exclusive competence] and 6 TFEU [areas in which the EU supports, coordinates or supplements the actions of the Member States]." Shared competences of the EU are thus in the first place defined negatively: every area conferred upon the EU by the TFEU that does not fall under its exclusive competence or under its competence of support, coordination or supplementing is to be considered a shared competence. Article 4(2) TFEU supports this by stating that "[s]hared competence between the Union and the Member States applies in the following *principal* areas" (emphasis added). The fact that shared competence is defined negatively and non-exhaustively seems to suggest that shared competence is the norm with regard to EU competences, even if this could have perhaps been stated more clearly. Article 2(2) TFEU specifies that in areas where the EU and the Member States share competence both the EU and the Member States may legislate and adopt legally binding acts. However, based on the so-called 'principle of pre-emption', Member States can only exercise their competence to the extent that the EU has not exercised its competence and vice versa. Interestingly, it is added that the Member States "shall again exercise their competence to the extent that the Union has decided to cease exercising its competence".

Article 2(4) TFEU creates a special CFSP competence: "The Union shall have competence, in accordance with the provisions of the Treaty on European Union, to define and implement a common foreign and security policy, including the progressive framing of a common defence policy." At first glance, CFSP does not seem to fall within either of the two main categories outlined above: exclusive or shared competences. This also seems to be the case for economic and employment policies (article 2(3) TFEU), which are also dealt with separately. However, as seen above, the category of shared competences is defined negatively and non-exhaustively. It has been rightly deduced from this that "the two non-categorised areas mentioned in articles 2(3) and (4) must constitute a form of shared competence: it appears in any case that the intention was to indicate that the coordination prescribed in those fields is something more than the classic supporting system".[36]

Finally, a third category of competences is laid down in article 6 TFEU: the competence to carry out, in certain areas, actions to support, coordinate or supplement the actions of the Member States. The areas where such action can be undertaken are listed in article 6 TFEU: protection and improvement of human health; industry; culture; tourism; education, vocational training, youth and sport; civil protection and administrative cooperation. Article 2(5) TFEU stipulates that when exercising this kind of competence, the EU may not supersede the Member States' competence in these areas and that "[l]egally binding acts adopted on the basis of the provisions of the Treaties relating to these areas shall not entail harmonization of Member States' laws or regulations".

Thus, this highly complex system of allocation of Union competences has been formed in order to serve the needs of this European polity of States. As has been observed, the "Union as a 'constitutional order of states" has a unique character[37]; it constantly endeavours to strike a delicate balance between the centre and its constituent units while pursuing an integration path.

[36] A. Rosas and L. Armati, EU Constitutional Law: An Introduction (Hart Publishing, 2010), 19-20. See also J.C. Piris, The Lisbon treaty: A Legal and Political Analysis (Cambridge University Press, 2010), 77.
[37] A. Dashwood *et al.*, Wyatt and Dashwood's European Union Law (Hart Publishing, 2011), 131.

2. *Which areas of law remain within the (legislative) jurisdiction of the component states?*

The EU has only those powers which it has received from the Treaties and the Member States hold all residual powers.[38] Consequently, competences not conferred upon the Union by its constitutive treaties remain with the Member States.[39] Thus, the governments of Member States may exercise exclusive or predominant national competence in all those areas in which the Union does not have any competence or in which the Union has only supporting or complementary competence. For example, Member State governments have almost full competence in the areas of education, family law and procedure. More generally, in other than commercial, economic and monetary areas, the Union's decision-making is often limited to occasional measures meant to preserve the EU's basic principles, such as the prohibition of discrimination on the basis of nationality.

In areas where there are shared powers between the Union and the Member States (see *supra*, article 4 TFEU), Member States may exercise that competence as long as the Union does not step in. The power of Member States to act with a view to attaining the objectives of the Treaty ceases to exist once the EU actually exercises its own competence. This is the so-called principle of pre-emption as has already been briefly discussed above. Pre-emption means that when the EU has acted the Member States' power to do so ceases and the existing national rules must give way to the new EU provisions in so far as there is a conflict between them, in accordance with the principle of the supremacy of EU law.[40]

3. *What is the constitutional principle according to which conflicts (if any) between central and component state law are resolved (e.g., supremacy of federal law)?*

Conflicts between EU law and national law of the Member States are solved in accordance with the principle of supremacy or primacy of EU law.[41] This principle did not make it to the text of the Lisbon Treaty although it had been included in Article I-6 of the Constitutional Treaty as one of the fundamental principles of the Union. However, the 2007 Intergovernmental Conference decided to adopt Declaration No. 17 concerning primacy, which recalled 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 the Member States, under conditions laid down by the said case law.*[42]

It was further decided to append an opinion on primacy prepared by the Council's Legal Service which suggested that "[i]t results from the case law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law." According to this principle, laws adopted by the Union within the scope of its powers shall have primacy over the laws of the Member States. It entails duties for legislatures, courts, executives and any public authorities at national, subnational or local level. A national legislature must refrain from adopting laws that are inconsistent with binding rules of EU law and has a duty to modify national laws that are inconsistent with obligations under EU law.[43] With regard to the duties imposed upon the national courts, the ECJ has consistently held that

> *a national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if*

[38] K. Lenaerts, Constitutionalism and the Many Faces of Federalism, *American Journal of Comparative Law*, vol. 38, 1990, 213.
[39] *Supra*, 17.
[40] W. van Gerven, Federalism in the US and Europe, *Vienna Journal on International Constitutional Law*, Vol. 1, 2007, 29.
[41] Ibid., 29.
[42] As aptly stated by Piris, the question in this regard revolves around the possible change this declaration may trigger in the attitude of some supreme courts of Member States that have been traditionally negative to this principle. J.C. Piris, The Lisbon treaty: A Legal and Political Analysis (Cambridge University Press, 2010), 79, footnote 15.
[43] Bruno De Witte, Direct effect, primacy and the nature of the legal order, *in* The Evolution of EU Law (P. Craig and G. De Burca, eds., Oxford University Press, 2011), 340-341.

> *necessary by refusing of its own motion to apply any conflicting provision of national legislation, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means.*[44]

Article 4(3) TEU, referring to the principle of sincere cooperation between the Member States and the Union, is also relevant in this context.[45] This principle obliges "the Union and its Member States [to] assist each other, in full mutual respect, in carrying out the tasks which flow from the Treaties.[46] It also more specifically obliges Member States to take any appropriate measures, 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, to facilitate the achievement of the Union's tasks and to refrain from any measure which could jeopardize the attainment of the Union's objectives.[47] To sum up, the article expresses the duty of Member States to cooperate in good faith in their dealings with the EU and between themselves.[48] This duty rests on all authorities of Member States, at every level.[49] It is also incumbent upon "the Union", consistently with the longstanding case law of the ECJ that the duty of sincere cooperation "imposes on Member States *and the Community institutions* mutual duties to cooperate in good faith" (emphasis added).[50] The EU institutions are thus also bound by the principle of sincere cooperation, both in their relations with the Member States and in their relations with each other.[51] Such a conclusion is only logical given the fact that, as the Court has mentioned, "the duty to cooperate in good faith is, by its very nature, reciprocal".[52] Since the entry into force of the Lisbon Treaty, this duty of mutual cooperation of the EU institutions can be found explicitly in the Treaties. Indeed, article 13(2) TEU states that "[t]he institutions shall practice mutual sincere cooperation".

Finally, it is important to also take into account the principle of consistent interpretation. It has been observed that this principle "applies as a corollary of the principle of primacy to facilitate the application of national law in a manner consistent with Union law".[53] This principle has been derived from the principle of sincere cooperation laid down in article 4(3) TEU and the obligation of result contained in article 288 TFEU as far as directives are concerned. It requires a national court, in cases where the application of a provision of its national law is likely to result in a conflict with a rule of EU law, to determine first whether the national rule can be interpreted and applied in such a way as to avoid a conflict – in other words whether it can be interpreted in such a way that it conforms with EU law.[54] There is an important caveat to this principle: in applying it national authorities should not infringe on general principles of national and EU law, and in particular on the principles of legal certainty and non-

[44] Case C-184/89 *Nimz v City of Hamburg* [1991] ECR 297, para. 19. See also Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585;Case 106/77 *Amministrazione delle Finanze delle Stato v Simmenthal* [1978] ECR 629, para. 24; Opinion of AG Mazák in Case C-375/09 *Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele2 Polska sp. z o.o., devenue Netia SA* [2011] ECR 0000, para 56.

[45] See also W. van Gerven, Federalism in the US and Europe, *Vienna Journal on International Constitutional Law*, Vol. 1, 2007, 25.

[46] Article 4(3), first paragraph, TEU.

[47] Article 4(3), second and third paragraphs, TEU.

[48] K. Lenaerts and P. Van Nuffel, European Union Law (Sweet & Maxwell, 2011), 147.

[49] W. Van Gerven, Federalism in the US and Europe, *Vienna Journal on International Constitutional Law*, Vol. 1, 2007, 25.

[50] Case C-339/00 *Ireland v Commission* [2003] ECR I-11757, para. 71. See also case 230/81 *Luxembourg v European Parliament* [1983] ECR 255, para. 37; order in Case C-2/88 *Imm. Zwart and others* [1990] ECR I-03365, para. 17 and Case C-275/00 *First and Franex* [2002] ECR I-10943, para. 49.

[51] G. Chalmers, G. Davies & G. Monti, European Union Law (Cambridge University Press, 2010), 223-227.

[52] Case C-339/00 *Ireland v Commission* [2003] ECR para. 72.

[53] A. Rosas and L. Armati, EU Constitutional Law: An Introduction (Hart Publishing, 2010), 59.

[54] See Case C-14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891, para. 26; Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, para. 113; Case C-406/08 *Uniplex (UK) Ltd v NHS Business Services Authority* [2010] ECR 0000, para. 45; Case C-555/07 *Seda Kücükdeveci v Swedex GmbH & Co. KG* [2010] ECR 0000, para. 48; Opinion of AG Sharpston in Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg* [2011] ECR 0000, paras 81-84.

retroactivity. Thus, an interpretation *contra legem* of national law is excluded.[55] Rather the national court is required to interpret its national laws "*as far as possible* in the light of the wording and purpose of [EU legislation] [emphasis added]".[56]

III. THE MEANS AND METHODS OF LEGAL UNIFICATION

1. *To what extent is legal unification or harmonization accomplished by the exercise of central power (top down)?*

A. *Via directly applicable constitutional norms?*

This question touches on the issue of the nature of the EU legal order as a constitutional order. This has been established by the ECJ in an incremental manner through the development of its case law.[57] After having established first the principles of direct effect and primacy since the 1960s, the Court only took the further step of pronouncing the constitutional character of the founding Treaties in 1986 in its *Les Verts* judgment.[58] It held that

> *the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty.*[59]

Consequently, the constitutional norms within the EU system are those contained in the provisions of the Treaties, in other words, the norms of primary EU law.[60] After a brief overview of the development of the case law on direct effect – since the principle of primacy has already been analysed above – the issue of constitutionalism will be revisited, concluding with the post-Lisbon reality as illustrated in recent judgments of the ECJ.

The principle of direct effect is of cardinal importance to understand the manner in which norms of EU law affect national law. In the landmark case *Van Gend en Loos*[61] (1963) the ECJ ruled 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. Independently of the legislation of the Member States, Community law therefore not only imposes obligations*

---

[55] Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3986, paras. 13-14; Case C-12/08 *Mono Car Styling SA, in liquidation v Dervis Odemis and Others* [2009] ECR I-06653, para. 61 and case law referred to therein; Case C-168/95 *Criminal Proceedings against Luciano Arcaro* [1996] ECR I-4705, para 42; Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri A/S et. al. v. Commission of the European Communities* [2005] ECR I- *05425*, para 221.

[56] Case C- 106/89 *Marleasing* [1990] ECR I-4135, para. 8; Case C-555/07 *Seda Kücükdeveci v Swedex GmbH & Co. KG* [2010] ECR 0000, para. 48 and case law referred to therein; Case C-109/09 *Deutsche Lufthansa AG v Gertraud Kumpan* [2011] ECR 0000, para. 52.

[57] In this regard Ulrich Haltern has suggested that the case-law of the Court can be generally divided in two periods. During the first period the Court established and solidified the principles that constitute the building blocks of a constitutional order, such as the principles of primacy, direct effect and pre-emption, whereas in the latter period it has been placing its emphasis on constitutionalism. See U. Haltern, Integration Through Law, *in* European Integration Theory (A. Wiener and T. Diez , eds., Oxford University Press, 2004), 179.

[58] J. Wouters, L. Verhey and P. Kiiver, European Constitutionalism Beyond Lisbon: Introductory Remarks, *in* European Constitutionalism beyond Lisbon (J. Wouters, L. Verhey and P. Kiiver, eds., Intersentia, 2009), 4-5.

[59] Case 294/83 *Parti écologiste "Les Verts" v European Parliament* [1986] ECR 1339, para. 23; See also: Opinion 1/91 *EEA Agreement* [1991] ECR 6102, para. 21; Case C-15/00 *Commission v. European Investment Bank* [2003] ECR I-7281, para. 75.

[60] The EU Charter of Fundamental Rights also contains constitutional EU norms since it has the same legal status as the Treaties (article 6(1) TEU).

[61] Case 26/62 *NV Algemene Transporten Expeditie Onderneming Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1.

> *on individuals, but is also intended to confer upon them rights which become part of their legal heritage.* [62]

In the same judgment, the Court set out the criteria under which a Treaty provision should be given direct effect:

> *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 reservations on the part of states which would make its implementation conditional upon a positive legislative measure enacted under national law.* [63]

These criteria were later relaxed by the ECJ. It is clear nowadays that Treaty provisions containing positive obligations can also have direct effect.[64] The ECJ summarized the criteria for granting direct effect as follows in *Hurd* (1986):

> *According to a consistent line of decisions of the Court, a provision produces direct effect in relations between the Member States and their subjects only if it is clear and unconditional and not contingent on any discretionary implementing measure.* [65]

In his opinion in *Banks* Advocate General *Van Gerven* pointed to

> *the eminently practical nature of the "direct effect" test: provided and in so far as a provision of Community law is sufficiently operational in itself to be applied by a court, it has direct effect. The clarity, precision, unconditional nature, completeness or perfection of the rule and its lack of dependence on discretionary implementing measures are in that respect merely aspects of one and the same characteristic feature which that rule must exhibit, namely it must be capable of being applied by a court to a specific case.* [66]

Having established the above principles, the ECJ declared the constitutional nature of the EU legal order in *Les Verts* and has ever since been expanding on the dictum of that case, making sure that both EU secondary and national legislation conforms with EU primary law.[67] The insistence of the ECJ on the constitutional character of the EU legal order is best illustrated in the Kadi saga. There the Court reviewed the legality of international obligations undertaken by EU Member States within the framework of the UN in light of the constitutional legal order of the Union.[68] Thus, "the Kadi judgment seems to have been chosen by the ECJ as the dramatic moment in which to emphatically 'make whole on its promise of an autonomous legal order by clarifying the external dimension of European constitutionalism'".[69] Despite the criticism that the Kadi judgment has accrued over the approach adopted by the Court in its examination of the relation between the EU and international legal orders, the constitutional status of the EU legal order has not been disputed. Thus, it is safe to conclude that the EU legal order is a constitutional order playing an eminent role in the process of unification or harmonisation of national legal provisions.

---

[62] Ibid., 12.
[63] Ibid., 13.
[64] See already Case 57/65 *Lütticke II* [1966] ECR, 210.
[65] Case 44/84 *Hurd v. Jones* [1986] ECR 29, para. 47.
[66] Opinion of AG van Gerven in Case C-128/92 *H.J. Banks v. British Coal Corporation* [1994] ECR I-1209, point 27. Cf. Bruno De Witte, Direct effect, primacy and the nature of the legal order, *in* The Evolution of EU Law (P. Craig and G. De Burca, eds., Oxford University Press, 2011), 324.
[67] See: Opinion of AG Kokott in Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministers* [2011] ECR 0000, para. 26; Case T-299/05 *Shanghai Excell M&E Enterprise Co. Ltd and Shanghai Adeptech Precision Co. Ltd v Council of the European Union* [2009] ECR II-00573 para 57.
[68] Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-06351, para. 281-282, 305-309, 316-317.
[69] G. De Burca, The European Court of Justice and the International Legal Order After *Kadi*, *Harvard International Law Journal*, Vol. 51(1), 2010, 44 (quoting Daniel Halberstam, Local, Global, and Plural Constitutionalism: Europe Meets the World, 26, available at http://ssrn.com/abstract=1521016).

B. *Via central legislation (or executive or administrative rules)?*

a. Union institutions creating directly applicable norms

The EU institutions create directly applicable norms through regulations and decisions, as provided for in article 288 TFEU.[70] The current analytical effort proceeds in discussing the issues of binding effect, general and direct applicability and direct effect of these instruments. Lastly, this section includes a brief discussion of the effect of international agreements of the EU with third states and/or international organisations (article 216(2) TFEU) on the unification or harmonisation of domestic legislation.

According to the second paragraph of article 288 TFEU, regulations are generally applicable, binding in their entirety and directly applicable in all Member States. A regulation is first of all generally applicable, which means that it is applicable "to objectively determined situations and involves legal consequences for categories of persons viewed in a general and abstract manner".[71] In other words, the scope of application of a regulation is not restricted to specific individuals or situations, but extends to a number of undefined cases.[72] A regulation is further binding in its entirety as "it is intended to subject a situation to rules which are all-embracing and, where necessary, precise".[73]

They are also directly applicable in all the Member States. Indeed, "[b]y virtue of the very nature of regulations and of their function in the system of sources of Community law, the provisions of those regulations generally have immediate effect in the national legal systems without it being necessary for the national authorities to adopt measures of application".[74] This however does not entirely exclude the possibility for the Member States to take implementation measures.[75] In some cases, the Member States will even be required to do so or risk being in breach of EU law[76] and some provisions of regulations may "necessitate, for their implementation, the adoption of measures of application by the Member States".[77] In any case, "Member States are under a duty not to obstruct the direct applicability inherent in regulations"[78] and "are precluded from taking steps for the purpose of applying the regulation which are intended to alter its scope or supplement its provisions".[79]

Finally, "by reason of their nature and their function in the system of sources of Community law, regulations have direct effect and are as such, capable of creating individual rights which national courts must protect".[80] It is important to note however that not all regulations will have direct effect. For a regulation to have direct effect the same conditions as for the direct effect of Treaty provisions need to be fulfilled.[81] it needs to be "clear and precise" and "not leave any margin of discretion to the authorities by

[70] Although also binding legislative acts, directives are examined immediately below since they rather constitute a means for EU institutions to commandeer Member States to pass conforming implementing legislation.
[71] Case 6/68 *Zuckerfabrik* [1968] ECR 409, 415; Joined Cases 789/79 and 790/79 *Calpak v. Commission* [1980] ECR 1949, para. 9; Case 307/81 *Alusuisse Italia* v *Council and Commission* [1982] ECR 3463, para. 9; Case C-221/09 *AJD Tuna Ltd v Direttur tal-Agrikoltura u s-Sajd and Avukat Generali* [2011] ECR 0000, para. 51.
[72] K. Lenaerts and P. Van Nuffel, European Union Law (Sweet & Maxwell, 2011), 894.
[73] Ibid., 894.
[74] Case C-278/02 *Handlbauer* [2004] ECR I-6171, para. 25. See also: Opinion of AG Mazák in Case C-434/08 *Arnold und Johann Harms als Gesellschaft bürgerlichen Rechts v Freerk Heidinga* [2010] ECR 0000, para. 26.
[75] Case 230/78 *Eridiana* [1979] ECR 2749, para. 35; Opinion of AG Mazák in Case C-434/08 *Arnold und Johann Harms als Gesellschaft bürgerlichen Rechts v Freerk Heidinga* [2010] ECR 0000, para. 26.
[76] Case 128/78 *Commission v. United Kingdom* [1978] ECR 2429.
[77] Case C-278/02 *Handlbauer* [2004] ECR I-6171, para. 26. See also Case C-403/98 *Azienda Agricola Monte Arcosu* [2001] ECR I-103, para. 26.
[78] Case 34/73 *Variola* [1973] ECR 981, para. 10.
[79] Case 40/69 *Bollman* [1970] ECR 60, para. 4.
[80] Case 43/71 *Politi* [1971] ECR 1039, para. 9. See also Case 93/72 *Leonesio* [1972] ECR 287, para. 5.
[81] K. Lenaerts and P. Van Nuffel, European Union Law (Sweet & Maxwell, 2011), 895.

whom it is to be applied" in order to have direct effect, and thereby entitle individuals to invoke its provisions in front of national courts.[82]

Just like regulations, 'decisions' referred to in article 288 TFEU are binding in their entirety (art. 288, fourth para. TFEU). Depending on their individual or general scope, they are respectively binding on their addressees or the Member States. The ECJ clarified their effects as follows:

> *Decisions are to be binding in their entirety upon those to whom they are addressed. In the case of decisions addressed to the Member States, they are binding on all organs of the State to which they are addressed, including the courts of that State. It follows that, by virtue of the principle of precedence of Community law (…) the national courts must refrain from applying any national provisions (…) the implementation of which would be likely to hinder the implementation of a Community decision.*[83]

Further, unlike regulations, decisions have not been expressly declared to be directly applicable.[84] This is probably a consequence of the fact that a decision can take various forms, since the term 'decision' is for example also used in the context of the CFSP (see Articles 26(1) and (2) and 31(1) TEU). However, according to article 31(1) TEU decisions taken in the context of CFSP are not legislative acts.[85] All other decisions are directly applicable.[86]

As to the direct effect of decisions a distinction needs to be made between decisions addressed to specific legal or natural persons and those addressed to the Member States. The former produce direct effect.[87] As to the latter, the response is not as straightforward but some guidance can be drawn from the case law of the ECJ. Thus, "in certain circumstances, a decision addressed to all Member States could [also] produce direct effect in the sense that an individual could rely on it in a dispute with a public authority".[88] The ECJ explained the rationale for this as follows:

> *Particularly in case where, for example, the Community Authorities by means of a decision have imposed an obligation on a Member State or all the Member States to act in a certain way, the effectiveness ('l'effet utile) of such a measure would be weakened if the national of that State could not invoke it in the courts and the national courts could not take it into consideration as part of Community law.*[89]

The ECJ has further specified that

> *[a]lthough the effects of a decision may not be identical with those of a provision contained in a regulation, this difference does not exclude the possibility that the end result, namely the right of the individual to invoke the measure before the courts, may be the same as that of a directly applicable provision of a regulation.*[90]

In some cases, decisions will thus create directly applicable norms which, given the conditions are fulfilled, could also produce direct effect. The same conditions apply here as for the direct effect of

---

[82] Case 9/73 ***Carl Schlüter v Hauptzollamt Lörrach*** [1973] ECR 1135, para. 32.
[83] Case 249/85 *Albako* [1987] ECR 2345, para. 17; Case C-262/97 *Rijksdienst voor Pensioenen v Robert Engelbrecht* [2000] ECR I-07321, para. 40.
[84] A. Rosas and L. Armati, EU Constitutional Law: An Introduction (Hart Publishing, 2010), 65.
[85] J.C. Piris, The Lisbon Treaty: A Legal and Political Analysis (Cambridge University Press, 2010), 94, footnote 36.
[86] A, Kaczorowska, European Union Law (Routledge-Cavendish, 2009), 296.
[87] Ibid., 325.
[88] Case 249/85 *Albako* [1987] ECR 2345, para. 10.
[89] Case 9/70 *Grad* [1970] ECR 825, para. 5; Case 23/70 *Haselhorst* [1970] ECR 881, para. 5; Case 187/87 *Saarland and Others* [1988] ECR 5013, para. 19; and Case C-223/98 *Adidas* [1999] ECR I-7081, para. 24.
[90] Case 9/70 *Grad* [1970] ECR 825, para. 5; Case 20/70 *Lesage* [1970] ECR 861, para. 5; and Case 23/70 *Haselhorst* [1970] ECR 881, para. 5.

directives (see below): "provisions of a decision may have direct effect only if they are precise and unconditional and the period, if any, within which a Member State had to comply with it has expired".[91]

International agreements between the EU and third states and/or international organisations also form a significant corpus of legal instruments that lead to the unification or harmonisation of domestic legislations in the EU Member States. Since the entry into force of the Lisbon Treaty the procedure to conclude international agreements has been streamlined and there is now a single provision governing the procedure for the conclusion of such agreements: article 218 TFEU.[92] According to Article 216(1) TFEU,

> *[t]he Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.*

It is important to point out that such agreements concluded by the Union are binding both upon the EU institutions and on its Member States (art. 216(2) TFEU). Consequently, "it is incumbent upon the Community institutions, as well as upon the Member States, to ensure compliance with the obligations arising from such agreements".[93] International agreements form an integral part of the EU legal order.[94] With regard to the hierarchy of norms, international agreements rank between the Treaties and secondary law. International agreements thus have primacy over secondary law.[95] Despite the occasional interchangeable use of direct applicability and direct effect by the Court of Justice, some conclusions based on its established case law can be drawn. Thus, international agreements have direct effect

> *when, regard being had to its wording and to the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.*[96]

In implementing these criteria, the Court found that the United Nations Convention on the Law of the Sea does not have direct effect.[97] Further, it has successively adjudicated that the GATT[98] and, subsequently, WTO law also lack direct effect.[99] However, it invariably added that

> *where the Community intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise*

[91] K. Lenaerts and P. Van Nuffel, European Union Law (Sweet & Maxwell, 2011), 918. See also, Case 156/*91Hansa Fleisch Ernst Mund* [1992] ECR I-05567, para. 15.
[92] A. Rosas and L. Armati, EU Constitutional Law: An Introduction (Hart Publishing, 2010), 201. Before the entry into force of the Lisbon Treaty, article 24 TEU used to contain a special procedure for CFSP matters.
[93] Case 104/81 *Kupferberg* [1982] ECR 3641, para. 11.
[94] Case 181-73 *Haegeman* [1974] ECR 449, para. 5; Case 104/81 *Kupferberg* [1982] ECR 3641, para. 13.
[95] Case C-308/06 *Intertanko* [2008] ECR I-4057, para. 42.
[96] Case 12/86 *Demirel v. Stadt Schwäbisch Gmünd* [1987] ECR 3719, para. 14; *Case C-18/90 Kziber* [1991] ECR I-199, para. 15*;* Case C-162/96 *Racke v. Hauptzollamt Mainz* [1998] ECR I-3655, para. 31; Case C-262/96 *Sürül* v *Bundesanstalt für Arbeit* [1999] ECR I-2685, para. 60;Case C-300/98 *Christian Dior* [2000] ECR I-11307, para. 42; Case C-485/07 *Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen v H. Akdas and Others* [2011] ECR 0000, para. 67.
[97] Case C-308/06 *Intertanko* [2008] ECR I-4057, paras. 54-65.
[98] Case 70/87 *Fediol* v *Commission* [1989] ECR 1781, paras. 19-22; Case C-69/89 *Nakajima* v *Council* [1991] ECR I-2069, para. 31.
[99] Case C-149/96 *Portugal v. Council* [1999] ECR I-8395, para. 47; Case C-377/98 *Netherlands v. Parliament and Council ('Biotechnology Directive')* [2001] ECR I-7079, para. 52; Case C-76/00 P *Petrotub and Republica v. Council* [2004] ECR I-79, para. 53; Case C-93/02 P *Biret International v. Council* [2003] ECR I-10497, para. 61; Case C-377/02 *Léon Van Parys* [2005] ECR I-1465, para. 39.

> *provisions of the WTO agreements, […] it is for the Court to review the legality of the Community measure in question in the light of the WTO rules."*[100]

Contrary to this rather restrictive case law, the Court had been much more lenient in the IATA case in ruling that

> *Articles 19, 22 and 29 of the Montreal Convention are among the rules in the light of which the Court reviews the legality of acts of the Community institutions since, first, neither the nature nor the broad logic of the Convention* precludes *this and, second, those three articles appear, as regards their content, to be unconditional and sufficiently precise.*[101] (emphasis added)

However this may be, according to well-established case law international agreements to which the EU is a party "are part of the Community legal order and […] EU law should be interpreted in the light of their provisions."[102] Consequently, and given the primacy of international agreements over secondary EU law and national law, both EU and national legal instruments must be interpreted in conformity with the provisions contained in international agreements.

b. Union institutions commandeering Member States (through e.g., directives) to pass conforming implementing legislation[103]

EU institutions can also adopt directives in order to exercise their competences. This instrument allows them to command Member States to pass conforming legislation. A directive is binding as to the result to be achieved upon each Member State to which it is addressed, but leaves national authorities the choice of forms and methods (art. 288, third para. TFEU). However, the "area of choice left to the Member States regarding 'form and methods" varies greatly and may even disappear, blurring the distinction between directives and regulations in this respect.[104] Directives can be addressed to one or more Member States. Directives addressed to all Member States "enter into force on the date specified in them or, in the absence thereof, on the twentieth day following that of their publication [in the Official Journal of the European Union] (article 297(2) para. 2 TFEU)." Directives "which specify to whom they are addressed, shall be notified to those to whom they are addressed and shall take effect upon such notification (article 297(2) para. 3 TFEU)." Generally, directives will not only specify on which date they enter into force but will also specify the time frame within which Member States have to transpose them, i.e. arrive to the prescribed result.[105] Thus, as a rule and contrary to regulations, directives are not directly applicable since Member States' authorities have the obligation to implement the directive within the period of time prescribed by it. Rather, given its result-based nature the directive becomes fully applicable only when the period prescribed for transposition has come to an end.[106] However, the ECJ has found that directives have binding legal consequences even before the expiry of the transposition period in that by virtue of

[100] Case C-149/96 *Portugal v. Council* [1999] ECR I-8395, para. 49; Case C-76/00 P *Petrotub and Republica v. Council* [2004] ECR I-79, para. 54; Case C-93/02 P *Biret International v. Council* [2003] ECR I-10497, para. 63.
[101] Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, para. 39.
[102] A. Rosas, in J. Wouters, A. Nollkaemper & E. De Wet, 2008. The Europeanisation of International Law: The Status of International Law in the EU and its Member States (TMC Asser Press, 2008), 76.
[103] The EU level commandeering the Member State level is inherent in EU law as opposed to the 'anticommandeering principle' applicable in the U.S. See W. van Gerven, The European Union: A polity of States and Peoples (Hart Publishing, 2005); 21-22. On this issue see also D. Halberstam, Comparative Federalism and the Issue of Commandeering, *in* The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union (K. Nicolaidis and R. Howse, eds., Oxford Univ. Press, 2001), 213-251.
[104] T.C. Hartley, The foundations of European Union Law (Oxford University Press, 2010), 223.
[105] K. Lenaerts and P. Van Nuffel, European Union Law (Sweet & Maxwell, 2011), 895.
[106] A. Rosas and L. Armati, EU Constitutional Law: An Introduction (Hart Publishing, 2010), 64.

articles 4(3) TEU and 288 TFEU Member States "must refrain from taking any measures liable seriously to compromise the result prescribed [by the directive]".[107]

Once the transposition period has expired, any Member State failing to fulfil this obligation of result correctly and in time, will face the possibility to not only be brought by the Commission (or other Member States) before the ECJ, but may also be held liable before a national court in a procedure initiated by a private individual who has suffered damage as a result of that Member State's failure to implement the directive correctly and/or on time.[108] This last point already leads centre stage to the controversial question of the direct effect of directives after the expiry of the transposition period. In this regard the ECJ has accepted that this cannot be excluded *a priori* based on the need to guarantee the effectiveness (*effet utile*) of directives.[109] However, directives can only have vertical direct effect.[110] Thus, directives or provisions thereof have direct effect in the relations between individuals and Member State authorities after the end of the transposition period if the relevant obligations imposed by them are "unconditional and sufficiently precise".[111] This "must be ascertained on a case by case basis, taking into account their nature, background and wording".[112] Lastly, it should be underlined that Member States cannot rely on their lack of or incorrect transposition of a directive against an individual.[113]

c. Inducing Member States to regulate through the allocation of central money in compliance with centrally established standards

Economic, social and territorial cohesion constitutes one of the objectives of the EU (Article 3 TEU). According to article 174 TFEU, "the EU shall aim at reducing disparities between the levels of development of the various European regions and the backwardness of the least-favoured regions." These goals shall be taken into account when formulating and implementing the Union's policies and actions as well as when implementing the internal market. Article 175 TFEU further states that "[t]he Union shall also support the achievement of these objectives by the action it takes through the Structural Fund (European Agricultural Guidance and Guarantee Fund, Guidance Section, European Social Fund, European Regional Development Fund), the European Investment Bank and the other existing Financial Instruments". There is also the Cohesion Fund which provides financial contributions to projects in the field of the environment and trans-European networks in the area of transport infrastructure (Article 177 TFEU). This financial contribution will only be given to Member States which fulfil the criteria set out in Protocol No. 28 on economic and social cohesion, annexed to the Treaties.[114] These different funds induce Member States to regulate in compliance with centrally established standards with regard to the areas concerned.

---

[107] Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, para. para. 45; Case C-157/02 *Rieser Internationale Transporte* [2004] ECR I-1477, para. 66; Case C-316/04 *Stichtung Zuid-Hollandse Milieufederatie* [2005] ECR I-09759, para. 42; Case C-138/05 *Stichtung Zuid-Hollandse Milieufederatie* [2006] ECR I-8339, para. 42.

[108] W. van Gerven, The European Union: A polity of States and Peoples (Hart Publishing, 2005), 21. See Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357.

[109] Case 41/74 *Van Duyn v. Home Office* [1974] ECR 1337, para. 12; Case 8/81 *Becker v. Finanzamt Münster-Innenstadt* [1982] ECR 53, para. 49.

[110] Case 152/84 *Marshall I* [1986] ECR 723, para. 48; Case C-91/92 *Faccini Dori* [1994] ECR I-3325, para. 24; Joined Cases 372-374/85 *Traen* [1987] ECR 2141, para. 24; Case C-224/09 *Nussbaumer* [2010] ECR 0000, para.30.

[111] Case 148/78 *Pubblico Ministero v. Tullio Ratti* [1979] ECR 1629, para. 23; Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, para. 11; Case C-62/00 *Marks & Spencer* [2002] ECR I-6325, para. 25; Joined Cases C-152/07, C-153/07 and 154/07 *Arcor E.A.* [2008] ECR I-5959, para. 40; Case C-184/10 *Mathilde Grasser v Freistaat Bayern* [2011] ECR 0000, para. 19.

[112] P.S.R.F. Mathijsen, A Guide to European Union Law (Sweet & Maxwell, 2010), 32.

[113] See *inter alia* Case 148/78 *Pubblico Ministero v. Tullio Ratti* [1979] ECR 1629, para. 22; Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3986, para. 8.

[114] K. Lenaerts and P. Van Nuffel, European Union Law (Sweet & Maxwell, 2011), 418.

d. Indirectly compelling Member States to regulate by threatening to take over the field in case of state inaction or state action that does not conform to centrally specified standards

In cases of shared competence where Member States refuse to adopt certain provisions in their national legislation, the Union sometimes uses a pre-emptive threat of harmonization. In such cases, the Union poses an ultimatum to the relevant Member State: if the Member State does not legislate accordingly, the Union will adopt harmonization measures in this field. From that moment on, the Member State will lose the possibility to adopt national legislation in these areas (cf. *supra*: pre-emption).

C. *Through the judicial creation of uniform norms by central supreme court(s) or central courts of appeal?*

In the EU legal order, the case law of the Court of Justice, the General Court and the specialised courts forms an important source of law.[115] Based on article 19(1) TEU, their task is to "ensure that in the interpretation and application of the treaties the law is observed". While, in theory, their task is formally limited to ensuring that EU law is observed in its interpretation and application, it is practically uncontested that the European Courts do play an important role in developing the law.[116] The ECJ has, on numerous occasions, held that

> "*[t]he interpretation which the Court gives to a rule of Community law clarifies and defines where necessary the meaning and the scope of that rule as it must be or ought to have been understood and applied from the time of its coming into force. It follows that the rule as thus interpreted may, and must, be applied by the courts even to legal relationships arising and established before the judgment ruling or the request for interpretation provided that in other respects the conditions enabling an action relating to the application of that rule to be brought before the Courts having jurisdiction are satisfied*".[117]

The interpretation given by the EU courts to rules of EU law is thus not merely declaratory, but also contributes to the further development of EU law.[118] Such practices often lead to complaints of judicial activism from Member States that are unhappy with rulings of the EU courts.[119] To meet such criticism, the ECJ will, in exceptional cases, decide to limit the *ex tunc* effect of its judgments on the ground of legal certainty.[120]

D. *Through other centrally controlled means, such as centrally managed coordination or information exchange among the component states?*

According to article 121 TFEU, the economic policies of the Member States are coordinated by means of multilateral surveillance of the economic developments in the several Member States and in the EU, and of the consistency of these policies with broad economic guidelines set out by the Council. For this purpose, Member States are required to inform the Commission about important measures taken by them regarding their economic policy. The Commission reports this information to the Council, which will assess the situation. The results of this surveillance will then be reported to the European Parliament.

[115] Ibid., 932.
[116] Ibid., 932; G. Chalmers, G. Davies & G. Monti, European Union Law (Cambridge University Press, 2010), 157-158; T.C. Hartley, The foundations of European Union Law (Oxford University Press, 2010), 70.
[117] Case 24/86 *Blaizot* [1988] ECR 379, para. 27. See also Joined Cases C-367/93 to C-377/93 *Roders and others* [1995] ECR I-2229, para. 42; Case 269/96 *Sürül* [1999] ECR I-2685, para. 107; Case 347/00 *Angel Barreira Pérez* [2002] ECR I-8191, para. 44; Joined Cases C-453/02 and C-462/02 *Linneweber and Akritidis* [2005] ECR I-1131, para. 41; Case C-292/04 *Wienand Meilicke and Others* [2007] ECR I-01835, para. 34.
[118] K. Lenaerts and P. Van Nuffel, European Union Law (Sweet & Maxwell, 2011), 933.
[119] W. van Gerven, The European Union: A polity of States and Peoples (Hart Publishing, 2005), 150.
[120] K. Lenaerts and P. Van Nuffel, European Union Law (Sweet & Maxwell, 2011), 932.

When the economic policy of a particular Member State is inconsistent with the broad guidelines or when it jeopardizes the functioning of the Economic and Monetary Union, the Council may address recommendations to that Member State. Consequently, even though the economic policy still consists primarily of Member States' measures, it may require direct intervention from the EU whereas the Member States have to regard their economic policies as a matter of common concern, and coordinate them within the Council.

Coordination between the Member States and with the EU also exists in the area of employment. According to article 145 TFEU, the Member States and the EU have to work towards a coordinated strategy for employment and particularly for promoting a skilled, trained and adaptable workforce and labour markets responsive to economic change. Member States shall regard promoting employment as a matter of common concern, having regard to national practices related to the responsibilities of management and labour.[121] To this end, Member States shall coordinate their action within the Council, which will set out social guidelines on an annual basis. On the basis of annual reports delivered by the Member States, the Council examines the implementation of these guidelines in the Member States' employment policies.[122] According to article 147 TFEU, the EU, in order to contribute to a high level of employment, will encourage cooperation between Member States and support and, if necessary, complement their action. The employment policy of the EU thus primarily aims to complement national policies and to encourage cooperation.

At the Lisbon European Council of 23 March 2000 the heads of State or government decided to improve the existing processes by introducing a new instrument: the open method of coordination. This policy approach was first adopted under the Maastricht Treaty with regard to the coordination of national macro-economic policies and was further applied, even if in a somewhat different matter, to employment policy by the Treaty of Amsterdam.[123] The Lisbon Treaty extends this so-called open method for coordination towards social policy (article 156(2) TFEU), public health (article 168(2) TFEU), industrial policy (article 173(2) and research and technological development (article 181(2) TFEU). The open method of coordination leaves a great amount of policy autonomy to the Member States and is based on a system which combines the elaboration of action plans or strategy reports by the Member States and the setting of guidelines or objectives at EU level. The evaluation of these action plans or strategy reports against the guidelines and/or objectives set at EU level creates an interactive process intended to lead to greater coordination and mutual learning in the concerned policy fields.[124]

In the light of the turmoil on the financial markets since 2008 the European Council decided in 2010 to introduce a new system of review of Member States' budgetary and structural policies, the 'European Semester', in order to reinforce coordination. This is a six-month period every year during which the Member States' budgetary and structural policies will be reviewed to detect any inconsistencies and emerging imbalances. In a new monitoring cycle, the European Council each March will identify the main economic challenges facing the EU and give strategic advice on policies. Taking this guidance into account, the Member States will present their medium-term budgetary strategies in their stability and convergence programmes. At the same time, they will draw up national reform programmes setting out the action to be undertaken to strengthen their policies in areas such as employment and social inclusion. All these programmes will be issued simultaneously in April. Each July, on the basis of the programmes

[121] Cf. article 146(2)TFEU.
[122] Cf. Article 148 TFEU.
[123] G. De Burca, The constitutional challenge of new governance in the European Union, *European Law Review*, vol. 28(6), 2003, 824.
[124] See for a more detailed analysis P. Craig, *EU Administrative Law* (Oxford University Press, 2006), 190-233.

submitted in April, the European Council and the Council will provide policy advice before Member States finalise their budgets for the following year.[125]

2. *To what extent is legal unification accomplished through formal or informal voluntary coordination among the component states? (somewhat bottom up, coordinate model)*

As seen above, unification of laws in the EU can be realized through the adoption of regulations or directives (institutionalised legislative process) or can be the result of case law (institutionalised judicial process). Next to these institutionalised processes there is also a more informal process of unification (or approximation), which can be seen as "a growing together of rules through voluntary acts".[126]

The first process worth analysing here is the so-called 'spill-over' process. In the words of Walter van Gerven: "[w]ithin the EU Member States, [this process] refers to the impact which EC law has *indirectly* on the laws of Member States, as a result of legislative, regulatory, or judicial action of national authorities in areas which do not fall within the sphere of EC law – and which therefore remain outside of the framework of the EC's official harmonization process and are not directly affected by it".[127] Indeed, parts of national law affected by EU law often have an impact on other but similar areas of national law which are not affected by EU law but apply to similar situations or transactions.[128] Given the fact that the EU has only been conferred limited competences, it happens that parts or branches of national law, which were coherent before harmonisation, fall, as a result of this harmonisation, into different sets of rules within the same State and within the same area.[129] In other words, different rules will be applied to the trans-border transactions falling under EU law and to the local transactions falling purely under national law, even though both types of transactions fall within the same wider field. In such cases, it seems only normal that the States, in order to restore the coherence within their national legal orders, tend to make both sets of rules converge and this *not* because they are obliged to under EU law but in order to, for instance, improve legal certainty or establish equal treatment.[130] An important example of such a spill-over effect can be found in the area of EU competition law, where the new Member States had, in view of their accession, reformed their national competition legislation replicating almost literally the provisions of EU competition law.[131] Convergence by way of spill-over from one part of the law into another within the same Member State, as described above, can also be the result of judicial action.[132] This occurs most frequently through general principles of law which are applied by the judiciary in any one legal system in many different branches of the law. The development of common principles of law within the EU legal order and the Member States' legal orders leads to cross-fertilization and consequently to even more convergence between the different legal orders.[133] This process plays an important role in the area of

[125] See Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions of 17 June 2011, *Concluding the first European semester of economic policy coordination: Guidance for national policies in 2011-2012* (COM (2011) 400).
[126] W. van Gerven, Bringing (Private) Laws Closer to Each Other at the European Level, *in* The Institutional Framework of European Private Law (F. Cafaggi, ed., Oxford University Press, 2006), 65.
[127] Ibid., 65-66.
[128] A good example is corporate law, where the scope of application of EU harmonization directives is typically restricted to one or several types of companies, whereas Member States have sometimes extended their implementation measures to other types of companies as well: see J. Wouters, 'European Company Law: Quo Vadis?', *Common Market Law Review* 2000, 257-307; Id., 'Towards a European Private Company? A Belgian perspective', in H.J. De Kluiver and W. van Gerven (eds.), *The European Private Company?*, Antwerp, Maklu-Nomos, Ius Commune Europaeum Series No 9, 1995, 161-186.
[129] W. van Gerven, Bringing (Private) Laws Closer to Each Other at the European Level, *in* The Institutional Framework of European Private Law (F. Cafaggi, ed., Oxford University Press, 2006), 66.
[130] Ibid., 66.
[131] J. Schwarze, Enlargement, The European Constitution and Administrative law, *International & Comparative Law Quarterly*, vol. 53(4), 2004, 977.
[132] W. van Gerven, Bringing (Private) Laws Closer to Each Other at the European Level, *in* The Institutional Framework of European Private Law (F. Cafaggi, ed., Oxford University Press, 2006), 66.
[133] Ibid., 67.

administrative law, where, for example, the principle of proportionality has clearly been developing into a common principle within the different administrative law orders of the EU Member States.[134] It is also interesting to note that, while for private law, a spill-over effect resulted from the necessities of trans-border personal or commercial relations, according to Jürgen Schwarze, two very different factors have led to convergence of the administrative legal orders. These factors were the similar living conditions and administrative tasks in the Member States and the existing ties between the Member States and the necessity to safeguard the supremacy of Community law, as well as the need for as uniform Community law as possible.[135]

A second process worth mentioning here is the interplay between the ECJ and the European Court of Human Rights ('ECtHR') and more precisely the mutual learning process between both Courts. Since all EU Member States are also a member of the Council of Europe, an interplay between both Courts is only natural. The Member States are all bound by the provisions of the European Convention on Human Rights and Fundamental Freedoms ('ECHR') and subject to the jurisdiction of the ECtHR. However, the ECtHR has no competence (yet) to examine the compatibility of EU acts with ECHR provisions. This is bound to change in the near future since the Lisbon Treaty expressly foresees the possibility for the EU to accede to the ECHR (cf. art. 6(2) TEU) and relevant negotiations between the Council of Europe and the EU are at the final stages. Since this is not yet the case, the competence to examine the compatibility of EU acts with human rights provisions remains with the ECJ as has been established by the Court itself since 1969.[136] Nevertheless, the ECtHR has competence over the conduct of the individual EU Member States, also when they take part in the preparation of EU legislation as members of the EU Council. Individuals increasingly bring proceedings before the ECtHR against EU Member States when they feel that their rights have been infringed upon by way of action attributable to the EU.[137] There is thus clearly room for concurrent jurisdiction and consequently there is a risk of conflicting decisions. Both Courts are very much aware of this risk and are therefore keen to engage in a mutual learning process and ensure as much convergence as possible when interpreting the ECHR provisions within their respective jurisdictions.[138] In this line article 52(3) of the Charter of Fundamental Rights of the European Union, which according to article 6(1) TEU has the same legal value as primary law in the EU, provides that "[i]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection." Thus, an effort by the two legal regimes can be observed to harmonize the level of human rights protection in their respective fields of competence.

Finally, the process of convergence between judicial decisions through mutual learning can also be found at the level of the national courts.[139] Indeed, the supreme courts of the Member States sometimes use comparative research when deciding on controversial issues.[140] In others words, it happens that a supreme court of a Member State, in order to find a solution for a particular question posed before it, examines whether supreme courts of other Member States have already dealt with a comparable case in the past

[134] J. Schwarze, The Convergence of the Administrative Laws of the EU Member States, *European Public Law*, Volume 4(2), 1998, 196.
[135] Ibid., 209.
[136] See *inter alia* 29/69 *Stauder v. City of Ulm* [1969] ECR 419; 11/70 *Internationale Handelsgesellschaft v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125; 4/73 *Nold v.Commission* [1974] ECR 491; 44/79 *Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727; 265/87 *Schräder HS Kraftfutter GmbH* [1989] ECR 2237.
[137] W. van Gerven, Bringing (Private) Laws Closer to Each Other at the European Level, *in* The Institutional Framework of European Private Law (F. Cafaggi, ed., Oxford University Press, 2006), 68.
[138] Ibid., 69. With regard to the interaction between both Courts, see also S. Douglas-Scott, A tale of two Courts: Luxembourg, Strasbourg and the growing European human rights acquis, *Common Market Law Review*, vol. 43, 2006, 629-665.
[139] W. van Gerven, Bringing (Private) Laws Closer to Each Other at the European Level, *in* The Institutional Framework of European Private Law (F. Cafaggi, ed., Oxford University Press, 2006), 68.
[140] Ibid., 71.

and, if so, which answer was given.[141] Even if it sometimes happens, it is, however, quite rare since there are a lot of divergences in legal culture as well as different languages within the EU Member States judicial systems, which can render comparative research difficult.

3. *To what extent is legal unification accomplished, or promoted, by non-state actors?*

A. *Through restatements*

Direct norm generation by private actors in the EU is more recent but has grown substantially over the last twenty years. It has arisen in the context of pursuing a common private law of Europe. Its origins lie in the *Commission on European Contract Law* set up in the early 1980s and led by Professor Lando. This commission, a private initiative constituted of a body of lawyers drawn from all the Member States of the EU, has developed the *Principles of European Contract Law* (PECL), also called the Lando Principles.[142] The idea behind this project was to produce a statement of the principles which according to the group were underlying the private law of all the individual EU Member States.[143] The principles were compiled in a period of over twenty years in a restatement-like fashion.[144] Article 1:101 of the principles, which concerns their application, specifies that "the principles are intended to be applied as general rules of contract law in the European Union".[145] This project was followed by many other similar initiatives, such as, for example, *The Study Group on a European Civil Code* set up by Professor von Bar, a member of the Lando Group, whose aim was to take the example of what the PECL had done for general contract law and apply the same methodology to the rest of private law.[146] Recently the Lando group and the von Bar group have merged into a larger study group taking care of a variety of issues, such as specific contracts, moveable property, torts, trusts, etc.[147] There are also many other groups working in the vast area of private law on restatements of the common principles of European law: from *the Academy of European Private Lawyers* (the Gandolfi Group), which has produced a code of general contract law, to *the EC Group on Tort and Insurance Law* (the Spier Group) and the *Common Core of European Private Law* (Trento Project), which looks at how typical cases would be resolved in the various national systems, to name a few.[148]

A different approach was taken by Walter van Gerven, who initiated a collection of casebooks each covering a different field of law, the so-called *Ius Commune Casebooks for the Common Law of Europe*. This project applies a bottom-up approach and its purpose is "to uncover common solutions to legal problems in the various legal systems functioning within the territory of the EU Member States (…)".[149] These solutions are to be found in a variety of legal sources (statutory rules, judicial decisions and legal writings) which, when analysed in detail, demonstrate the existence of principles, rules and concepts which different legal systems, even if not all of them, have in common.[150]

---

[141] Ibid., 71.
[142] O. Lando and H. Beale, eds., Principles of European Contract law, Parts I and II (The Hague, 2000); O. Lando, E. Clive, A. Prüm and R. Zimmermann, eds., Principles of European Contract law, Part III (The Hague, 2003)
[143] H. Beale, The Development of European Private Law and the European Commission's Action Plan on Contract Law, *Juridica International*, 2005, 5.
[144] O. Lando, Principles of European Contract Law: An Alternative to or a Precursor of European Legislation, *American Journal of Comparative Law*, vol. 40, 1992, 579.
[145] For an overview of the principles as well as the recent developments, see the Lando's group website: <http://frontpage.cbs.dk/law/commission_on_european_contract_law/index.html> (consulted 24/05/11).
[146] H. Beale, The Development of European Private Law and the European Commission's Action Plan on Contract Law, *Juridica International*, 2005, 5.
[147] Ibid., 5.
[148] Ibid., 5-6.
[149] W. van Gerven, A Common Framework of Reference and Teaching, *European Journal of Legal Education*, 2004, 8.
[150] Ibid., 8.

In addition to these different private initiatives, there are also two "semi-official" projects that should be mentioned: *the EC Consumer Law Compendium* and *the Common Frame of Reference* (CFR). With regard to the first, the Commission established an international research group with the view of starting a research project called the EC Consumer Law Compendium. This Compendium was placed under the leadership of Prof. Hans Schulte-Nölkefor and was asked to comparatively analyze the implementation of eight consumer law directives into the national legal systems of the 27 Member States, including the gathering of information about case law and administrative practice.[151] This study is part of the research the Commission has undertaken in the process of preparing the review of the consumer *acquis*.[152] Secondly, the European Commission also finances a research group to prepare a Common Frame of Reference (CFR) the stated aim of which is to provide non-binding fundamental principles, definitions and model rules in the area of contract law which could serve as a model for legislators, judges and arbitrators working in the EU institutions and the Member States on legislation or adjudication in view of finding common solutions and bringing contract law closer to each other.[153]

It is important to mention that, even though none of these initiatives has, to date, led to the creation of legally binding instruments, these works might constitute a first step towards the creation of a future common private law of Europe.

B. *Through standards and practices of industry, trade organizations or other or private entities?*

European integration has made it possible for trade unions and employer organizations to engage in collective bargaining and collective agreements at the European level, where these were formerly situated only at a national level. From the outset the social partners have been given a role within the European decision-making: they have from the beginning had an advisory role in decision-making as members of the European Economic and Social Committee (EC/EAEC) and of the ECSC Consultative Committee. According to articles 150 and 160 TFEU management and labour also have to be consulted by the Employment Committee as well as the Social Protection Committee. The Union shall further promote and recognise the role of the social partners at its level, taking into account the diversity of national systems (art. 152 TFEU). Even more relevant is the fact that the dialogue between management and labour at the EU level can lead to contractual relations, including agreements (art. 155(1) TFEU). Such agreements are usually referred to as European collective agreements. Such agreements have been concluded on parental leave, part-time work and fixed term work. According to article 155(2) TFEU, agreements concluded at EU level can be implemented by a Council decision if the signatory parties jointly request it and provided that it concerns matters covered by article 152 TFEU, i.e. areas in which the EU is competent to provide support and complement the activities of the Member States. The first agreements concluded by management and labour where implemented at the EU level via directives.[154] Social partners thus now have the possibility to bargain and set standards for employment relations at the EU level, beyond the national borders.

Next to trade unions and employers' associations, private actors, and more specifically corporations, are also playing an important role in EU policy-making, more precisely in regulatory policy making. Private regulation is increasingly seen as an important complement to public regulation and new regulatory

[151] See <http://ec.europa.eu/consumers/rights/cons_acquis_en.htm> (consulted 24/05/11).
[152] Prof. Dr. Hans Schulte-Nölkefor , EC Consumer Law Compendium: Comparative analysis; February 2008, 30, <http://ec.europa.eu/consumers/rights/docs/consumer_law_compendium_comparative_analysis_en_final.pdf> (consulted 24/05/11).
[153] See Action Plan on a more Coherent European Contract Law, COM(2003) 68 final, 12 February 2002, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0068:FIN:EN:PDF> (consulted 24/05/11), in which the CFR was proposed.
[154] K. Lenaerts and P. Van Nuffel, European Union Law (Sweet & Maxwell, 2011), 680-681.

models coordinating public and private regulation have progressively emerged.[155] To this extent, Fabrizio Cafaggi recognises five models of regulation: public regulation, co-regulation, delegated private regulation, ex post recognized private regulation and private regulation.[156] In some areas, especially in the area of human and labour rights, environmental protection and anti-corruption, private self-regulation is becoming a standard practice.[157]

4. *What is the role of legal education and training in the unification of law?*

According to article 6(e) TFEU, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States in the area of education, vocational training, youth and support. Article 165(1) TFEU states that the EU "shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organization of education systems and their cultural and linguistic diversity". It is in this context that several programmes have been adopted since 1986, such as ERASMUS, LINGUA, TEMPUS and SOCRATES.[158] These different programmes aim at enhancing co-operation between institutions of higher education in the EU by promoting links between educational institutions and encourage the mobility of teachers and students. TEMPUS furthermore encourages such exchanges with the EU's neighbouring countries.[159]

Legal education in the EU Member States mainly focuses on component state law. Nevertheless, EU law is also dealt with but not in all universities with the same intensity. In most universities EU law is taught as a separate course, in other universities parts of EU law are taught in combination with related parts of component state law, whereas still other universities in their introductory courses combine EU and international law. Comparative law classes are present in most universities as well. In addition, there are some important post-graduate institutions focusing more specifically on the teaching of EU law. To illustrate this point a few institutions are worth mentioning. First of all, there is the College of Europe.[160] The College has a campus in Bruges and one in Natolin (Warsaw) and is a centre of academic excellence, which focuses on postgraduate European studies in legal, economic, political, international relations and interdisciplinary domains. The College also offers training courses for executives and public sector officials. Second of all, there is the European University Institute (EUI) in Florence founded in 1972 by the six founding EEC Member States.[161] The goal of the Institute is to provide advanced academic training to PhD students and promote high level research in a European perspective in history, law, economics, political and social sciences. Thirdly, the Academy of European Law (ERA), which provides training for lawyers, judges and other legal practitioners and provides for a forum for debate in order to keep up with the developments of EU law is also worth mentioning.[162] Finally, the Joint Research Centre of the European Commission offers temporary jobs to work in one of the EU institutions and offers training courses to new Member States (including their judges) in order to help them with the implementation of EU policies.[163]

With regard to student mobility within the EU student mobility still remains quite marginal, even though, as seen above, the EU has developed programmes, the most important of which is the ERASMUS

[155] F. Cafaggi, Rethinking private regulation in the European regulatory space, *EUI Working Paper LAW*, n° 2006/13, 2-3.
[156] Ibid.
[157] Ibid.
[158] K. Lenaerts and P. Van Nuffel, European Union Law (Sweet & Maxwell, 2011), 405-406.
[159] For more information on these different programs see <http://ec.europa.eu/education/index_en.htm> (consulted 24/05/11)
[160] See < http://www.coleurope.be/> (consulted 24/05/11).
[161] See < http://www.eui.eu/Home.aspx> (consulted 24/05/11).
[162] see its official site <http://www.era.int> (consulted 24/05/11).
[163] see <http://ec.europa.eu/dgs/jrc> (consulted 24/05/11).

programme, to encourage student mobility within Europe.[164] The latest Eurobarometer survey shows that only one in seven (14%) young Europeans said they have been or were abroad at the time of the survey for education or training.[165] This can partly be explained by the high degree of heterogeneity which characterises the European academic landscape.[166] Indeed, universities are primarily organised at national and regional levels and display great differences in terms of their organisation, governance and operating conditions.[167] This heterogeneity also concerns differences on the number of places available, the length of studies, the quality of education, the language and the levels of fees and thus directly affects the students' choice.[168] It is not surprising the UK is by far the most important 'student-importer' and Greece the biggest 'student-exporter'.[169] Students are also often reluctant to spend time abroad given the linguistic and cultural differences as well as the legislative differences and problems of recognition.[170] These problems seem to be even amplified in the area of legal studies given the great diversity of legal cultures and traditions.[171] In any case, the latest Eurobarometer survey seems to indicate that the greatest obstacle to the mobility of students is financial: lack of funding.[172] The EU institutions have always stressed the importance of student mobility and have taken measures to tackle the potential obstacles to such movement (adoption of programmes, establishment of system of financial aid/grants, harmonisation of duration of studies –cf. the Bologna process, etc.) but it seems that additional efforts need to be undertaken in order to stimulate more students to go and study abroad.

With regard more specifically to the testing for the bar exam, this is a competence of the Member States. In theory, admission to the bar is only granted for the Member State in which the bar exam was taken. However, the Council has adopted a certain number of directives in order to stimulate free movement of lawyers, both in terms of freedom to provide services and freedom of establishment. Before analysing these two specific directives it is important to briefly look at Directive 2005/36/EC on the recognition of professional qualifications.[173] This directive is especially relevant with regard to the free movement of lawyers since it applies to "all nationals of a Member State wishing to pursue a regulated profession in a Member State, including those belonging to the liberal professions, other than that in which they obtained their professional qualifications, on either a self-employed or employed basis".[174] With regard to the effects of the recognition the Directive stipulates that "[t]he recognition of professional qualifications by the host Member State allows the beneficiary to gain access in that Member State to the same profession as that for which he is qualified in the home Member State and to pursue it in the host Member State under the same conditions as its nationals".[175] This directive does not affect the application of the specific

[164] Irina Katsirea and Anne Ruff, Free movement of law students and lawyers in the EU: a comparison of English, German and Greek legislation, *International Journal of the Legal Profession*, volume 12(3), 368.
[165] MEMO/11/292, Flash Eurobarometer on Youth on the Move, 13/05/2011, <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/292&format=HTML&aged=0&language=EN&guiLanguage=fr> (consulted 24/05/11).
[166] Ibid., 368.
[167] Commission of the European Communities, Communication on the role of the universities in the Europe of knowledge, COM(2003) 58 final, 5 February 2003, 5.
[168] Irina Katsirea and Anne Ruff, Free movement of law students and lawyers in the EU: a comparison of English, German and Greek legislation, *International Journal of the Legal Profession*, volume 12(3), 368.
[169] A.P. Van der Mei, Free Movement of Persons within the European Community: Cross-border Access to Public Benefits (Hart Publishing, 2003), 392.
[170] Irina Katsirea and Anne Ruff, Free movement of law students and lawyers in the EU: a comparison of English, German and Greek legislation, *International Journal of the Legal Profession*, volume 12(3), 368.
[171] Irina Katsirea and Anne Ruff, Free movement of law students and lawyers in the EU: a comparison of English, German and Greek legislation, *International Journal of the Legal Profession*, volume 12(3), 368.
[172] Press release, Half of young Europeans ready to work abroad, IP/11/567, Brussels, 13 May 2011, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/567&format=HTML&aged=0&language=EN&guiLanguage=fr> (consulted 24/05/11).
[173] Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications,
[174] Ibid., art. 2(1).
[175] Ibid., art. 4(1).

directives concerning provision of services by and establishment of lawyers since these two directives do not concern recognition of professional qualification but the recognition of the right to practice.[176] Directive 2005/36/EC applies to the specific situation of the recognition of professional qualifications for lawyers wishing *immediate* establishment *under* the professional title of the host Member State.[177] The two specific directives concerning provision of services by and establishment of lawyers are directives 77/249/EEC facilitating the effective exercise by lawyers of the freedom to provide services and 98/5/EC facilitating practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained.[178] These two directives complement the possibilities of cross-border legal practice contained in the recognition of diploma's regime, allowing lawyers to exercise their freedom to provide services in another Member State and allowing them to establish themselves in another Member State, in other words, to practice their profession on a permanent basis in another Member State.

Next to the mobility of lawyers in the EU, it is also interesting to look at the mobility of graduates in general. It is interesting to note in this regard that, according to the latest Eurobarometer survey, 53% of young people in Europe are willing or would like to work in another European country.[179] However, the survey also highlights "a huge gap between the widespread desire of young people to work abroad and actual workforce mobility: less than 3% of Europe's working population currently lives outside their home country".[180] EU nationals wishing to work in other Member States benefit from the freedoms granted by the Treaties and EU legislation, more precisely they benefit from the rules regarding the free movement of workers, and its counterpart for self-employed persons, the freedom of establishment.[181] According to these rules, Member States are, in essence, prohibited from restricting nationals of other Member States to take up an employment on their territory. Just as it is the case for the free movement of students, the EU thus also stimulates the free movement of workers, but the number of workers engaging in such mobility is also quite low.

5. *To what extent do external factors, such as international law, influence legal unification?*

The apparent contradictions between EU law and international law arising from the assertion of the Court that the EU is an autonomous constitutional legal order were already analysed above. Likewise, the impact of international agreements between the EU and third States and/or international organisations on legal unification within the EU was given attention above. The present section is confined to the effect of general international law, in particular customary international law, on the same process. The ECJ has held at numerous occasions that the EU "must respect international law in the exercise of its powers and that [EU law] must be interpreted, and its scope limited, in the light of the relevant rules of […] international law".[182] The Court has also declared itself competent to examine whether the validity of EU

[176] K. Lenaerts and P. Van Nuffel, European Union Law (Sweet & Maxwell, 2011), 265.
[177] Ibid., 265-266.
[178] Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services, *Official Journal* L 078, 26/03/1977, 17-18 and Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, *Official Journal* L 077 , 14/03/1998, 36 -43.
[179] MEMO/11/292, Flash Eurobarometer on Youth on the Move, 13/05/2011, <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/292&format=HTML&aged=0&language=EN&guiLanguage=fr> (consulted 24/05/11).
[180] Press release, Half of young Europeans ready to work abroad, IP/11/567, Brussels, 13 May 2011, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/567&format=HTML&aged=0&language=EN&guiLanguage=fr> (consulted 24/05/11).
[181] Irina Katsirea and Anne Ruff, Free movement of law students and lawyers in the EU: a comparison of English, German and Greek legislation, *International Journal of the Legal Profession*, volume 12(3), 368.
[182] Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR I-6019, para. 9. See also Case C-162/96 *Racke* [1998] ECR I-03655, para. 45; Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation* [2008] ECR. I-6351, para. 291; Case C-386/08 *Brita* [2010] ECR 0000, paras. 39-41.

acts "may be affected by reason of the fact that they are contrary to a rule of international law".[183] Thus, it takes into account general international law when interpreting EU law.[184] Finally, the EU must also take into account the undertakings of the United Nations and other international Organisations when exercising its powers.[185] This is even more so since the entry into force of the Lisbon Treaty. Since then an express provision has been added in the EU Treaty stating that "the Union's action on the international scene shall be guided by the (…) respect for the principles of the United Nations Charter and international law".[186]

From all these angles of incidence the multifaceted manner in which international law consolidates the process of legal unification and harmonisation among EU Member States has become clear. Nonetheless, international voluntary coordination also plays a role with regard to such unification in the EU. The EU is, for example, a member of the Hague Conference on Private International law.[187] According to article 1 of its Statute, the purpose of the Hague Conference on Private International law is "to work for the progressive unification of the rules of private international law".[188]

IV. INSTITUTIONAL AND SOCIAL BACKGROUND

1. *The Judicial Branch*

The powerful and successful role played by the ECJ in the process of legal unification within the EU has by now become clear. This section goes into the procedural rules surrounding the function of the Court situated at the central level with the power to police whether the central legislator has exceeded the powers attributed to it. The Member States can, indeed, bring an action for annulment against an act of the European Parliament, the Council, the European Commission and the European Central Bank (article 263 TFEU). In such cases, the ECJ shall review the legality of these acts and has the power to declare the act void if the action is well founded (article 264 TFEU). Member States can also bring an action before the Court if the institutions fail to act (article 265 TFEU). Even individuals can bring an action for annulment before the General Court (before the Lisbon Treaty: the European Court of First Instance), with appeal possible before the ECJ, against binding acts of the aforementioned institutions which are addressed or are of direct and individual concern to them in order to review the legality of EU actions (Article 263 TFEU). There are different possible grounds for annulment, lack of competence being one of them. Indeed, an EU act which falls outside of the EU's competence can be annulled.[189] In most cases, however, the dispute will revolve around the legal basis of the contested act.[190] In such cases, the act is annulled either for lack of legal basis or for use of the wrong legal basis.[191] If the Treaty provision used as

[183] Joined Cases 21–24/72 *International Fruit Company* [1972] ECR 1219, para. 6.
[184] See among others: Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR I-6019, para. 10; Case C-162/96 *Racke v. Hauptzollamt Mainz* [1998] ECR I-3655, paras. 37-60; Case C-308/06 *Intertanko* [2008] ECR I-4057, para. 52; Case C-203/07 P *Greece v. Commission* [2008] ECR I-8161, para.64; Case C-135/08 *Rottmann* [2010] ECR, para. 53.
[185] K. Lenaerts and P. Van Nuffel, European Union Law (Sweet & Maxwell, 2011), 879. See also Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation*
[2008] ECR. I-6351, para. 293.
[186] Cf. Art. 21(1), first paragraph, TEU.
[187] *The European Community became a Member of the Hague Conference on 3 April 2007. With the entry into force of the Treaty of Lisbon on 1 December 2009, the European Union replaces and succeeds the European Community as from that date.* <http://www.hcch.net/index_en.php?act=states.details&sid=220> (consulted 24/05/11).
[188] Statute of the Hague Conference on Private International Law (entered into force on 15 July 1955), <http://www.hcch.net/upload/conventions/txt01en.pdf> (consulted 24/05/11).
[189] See for example Case 294/83, *Les Verts* [1986] ECR 1339, para. 25.
[190] K. Lenaerts and P. Van Nuffel, European Union Law (Sweet & Maxwell, 2011), 115-116.
[191] A. Rosas and L. Armati, EU Constitutional Law: An Introduction (Hart Publishing, 2010), 226. For examples see: Case C-94/03 *Commission v Council* [2006] ECR I-1; Case C-178/03 *Commission v Parliament and Council* [2006] ECR I-107; Joined Cases C-313/04 and C-318/04 *Parliament v Council and Commission* [2006] ECR I-4721; Case C-413/04 *Parliament v Council* [2006] ECR I-11221; Case C-414/04 *Parliament v Council* [2006] ECR I-11279; Case C-403/05 *Parliament v Commission*

legal basis for the concerned act is insufficient to support its content, then the act will be annulled for lack of legal basis.[192]

Another important question is whether there is a court at the central level with the power to interpret component state law. In theory, such a court does not exist at the European level. It is for the Member State judges to interpret their laws in conformity with EU law.[193] However, according to article 267 TFEU, Member States courts can (and in certain circumstances must) refer a question for preliminary ruling to the ECJ with regard to the interpretation of a rule of primary or secondary EU law.

Article 267 states, furthermore, that when a question regarding the interpretation of primary or secondary EU law or the validity of secondary law is raised before a Member State court, this court *may*, if it considers that a decision on the question is necessary to enable it to give judgment, request the ECJ to give a ruling thereon. In the case where such a question is pending in front of a Member State court against whose decisions there is no judicial remedy, the court in question *must* bring the matter before the ECJ. This rule has been interpreted slightly differently by the ECJ. Two points are worth mentioning here. First of all, in line with the text of article 267 TFEU, the 'lower' Member State courts have the choice between referring a question regarding the *interpretation* of rules of EU law to the ECJ or interpreting, though subject to appeal, these rules themselves. Based on a strict reading of the text of article 267 TFEU, this should also be the case with regard to the validity of secondary law in front of 'lower' courts. The ECJ, however, has decided, that when a Member State court, regardless of its level, is faced with a question regarding the *validity* of (secondary) EU law, then it must address a request for preliminary ruling to the ECJ.[194] Indeed, "where the validity of an act is challenged before a national court the power to declare the act invalid must (…) be reserved for the Court of Justice".[195] Consequently, a lower court does not have the power to declare an EU act invalid. Secondly, the ECJ has held that the duty to request a preliminary ruling that lies on the highest Member States courts based on article 267 TFEU is not absolute. Indeed, the ECJ has established four cases in which the higher courts are not obliged to do so: 1) the question is irrelevant for the outcome of the case; 2) the question is materially identical to that of a previous preliminary ruling in a similar case; 3) the question is decided by previous judgement of the ECJ but the proceedings and question were not strictly identical; and 4) the correct application of the EU rule is so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved.[196] It should be noted here that the significance of the preliminary procedure cannot be overestimated. In having become "the principal vehicle for imposition of judiciary driven Community discipline",[197] it guarantees in practice the harmonisation of national rules.

2. *Relations between the Central and Component State Governments*

The EU is governed according to the principle of indirect administration, which itself stems from the principle of subsidiarity (article 4(3), second para. TEU and article 291(1) TFEU; see also article 197(2) TFEU). This has also been referred to as 'executive federalism', a concept drawn from the German Constitution, in which the Länder (the component states) are responsible for the implementation of

---

[2007] ECR I-9045; Case C-133/06 *Parliament v Council* [2008] ECR I-3189; Case C-155/07 *Parliament v Council* [2008] ECR I-8103; Case C-166/07 *Parliament v Council* [2009] ECR I-7135.

[192] See for example Case C-376/98 *Germany v European Parliament and Council* [2000] ECR I-8419; Case C-211/01 *Commission v Council* [2003] ECR I-8913.

[193] On the limits of the duty of Union-conform interpretation of domestic legal provisions see: Case C-106/89 *Marleasing v, La Commercial* [1990] ECR I-4135, paras 7-8; Case C-111/97 *EvoBus Austria GmbH v. Novog* [1998] ECR I-5411, para. 21.

[194] Case 314/85 *Foto-Frost* [1987] ECR 4199.

[195] Ibid., para. 17.

[196] Case 283/81 *CILFIT* [1982] ECR 3415, para. 21. See also K. Lenaerts, D. Arts and I. Maselis, Procedural Law of the European Union (Sweet & Maxwell, 2006), 72-76.

[197] J.H.H. Weiler, Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration, *Journal of Common Market Studies*, 31(4), 421.

federal legislation. In the same manner the implementation of the central law within the EU lies primarily on the shoulders of its Member States.[198] However, there are some significant exceptions to this principle in the fields of competition law (articles 105-106 TFEU) and of the control of aids granted by Member States (article 108 TFEU) as well as the adoption of measures implementing legislative acts, which are directly handled by the European Commission.[199] A strong illustration of 'executive federalism' in the EU is the implementation of the EU directives.[200] Indeed, as seen above, an obligation rests upon the Member States to transpose the directive into their legal order within a certain period of time or they risk being sanctioned (see *supra*).

This leads to another point, that of the control exerted by the the central State on the execution by the component states of their obligations under central state law. If the European Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it may bring the matter before the Court of Justice (article 258 TFEU). If the Court finds that the Member State in question has failed to fulfil its obligations under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court (article 260(1) TFEU). If the State in question fails to comply with the judgment of the Court, the latter may impose penalties (article 260(2) TFEU).

It is also important to mention that EU Member States are strongly represented within the EU institutions. First of all, there is the Council, which consists of "a representative of each Member State at ministerial level, who may commit the government of the Member State in question (…)" (Article 16(2) TEU). Member States themselves determine the person of ministerial rank who will represent them.[201] According to Article 16(1) TEU, the Council exercises legislative and budgetary powers and carries out policy-making and coordination functions. Because it is composed of representatives of Member States, it has a certain number of other important prerogatives which allow it to influence to some extent the functioning of the other institutions (with the exception of the European Parliament): propose candidates for appointment to the Commission, appointment of the members of the Court of auditors, alter the number of Advocates General at the Court of Justice, determine the emoluments of most members of the institutions, etc. Depending on the subject matter the Council shall meet in different configurations (Article 16(6) TEU). Then there is also COREPER (the Committee of Permanent Representatives), which, according to Article 16(7) TEU "shall be responsible for preparing the work of the Council". Each Member State delegates a Permanent Representative to COREPER, who has the status of ambassador based in Brussels and is accompanied by a Deputy Permanent Representative, who has the diplomatic rank of minister. Even though COREPER does not have formal decision-making power, it nonetheless has an important task, since it is responsible for ensuring consistency of the EU's policies and actions, and make sure that the fundamental principles of legality, subsidiarity, proportionality and correct legal basis are respected as well as the rules concerning competences, budget, transparency and the quality of drafting.[202] COREPER is assisted by a large number of working groups, which are partly composed of civil servants of the 27 Member States. Finally, there is the Committee of the Regions, which, according to Article 300(3) TFEU consists 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". These members, who shall not exceed 350, are appointed by the Council acting unanimously on a proposal from the Commission (Article 305 TFEU). It has an advisory task in the areas determined by the Treaties (transport, employment, social policy, etc.), in particular those which concern trans-border cooperation (Article 307 TFEU).

[198] See further: J.C. Piris, The Lisbon treaty: A Legal and Political Analysis (Cambridge University Press, 2010), 97-98.
[199] Ibid.
[200] W. van Gerven, The European Union: A polity of States and Peoples (Hart Publishing, 2005), 20.
[201] K. Lenaerts and P. Van Nuffel, European Union Law (Sweet & Maxwell, 2011), 486.
[202] See for the various dimensions of COREPER including its relation to the other institutions, *Le Coreper dans tous ses Etats* (Presses Universitaires de Strasbourg, 2000).

Taxation is not a competence that has been transferred to the EU and it therefore remains with the Member States. Taxation is traditionally an area important for national sovereignty and this explains why it remains exclusively within the competence of Member States. Taxes are thus levied by the Member States. However, the EU has three sources of revenue with regard to its own resources: 1) levies, premiums, additional or compensatory amounts, additional amounts or factors, Common Customs Tariff duties and other duties established or to be established by the EU institutions in respect of trade with non-member countries, customs duties on products under the expired ECSC Treaty as well as contributions and other duties provided for within the framework of the common organisation of the markets in sugar; 2) the application of a uniform rate valid for all Member States to the harmonised VAT assessment base and 3) the application of a uniform rate to the sum of all the Member States' Gross National Income's (GNI).[203] Member States shall retain, by way of collection costs, 25 % of the amounts referred to with regard to the first source of own revenue.[204] The EU can also impose fines or penalties on undertakings for violation of EU competition rules (article 103(2)(a) TFEU). As the EU has only very limited taxation powers, there is no need to establish general rules governing double taxation between the EU on the one side and the Member States on the other side. Most rules in this field consist of double taxation agreements concluded amongst the Member States. There are, however, a few directives such as, for example, Council Directive 2003/49/EC on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States[205] and Council Directive 69/335/EEC on indirect taxes on the raising of capital.[206] In the words of Giandomenica Majone, the EU remains a "regulatory polity" – a polity with administrative instruments but little fiscal capacity.[207]

3. *The Bureaucracy*

The civil service of the Member States is completely separate from the EU civil service. The institutions and the bodies of the Union are currently employing more than 38,000 officials.[208] They are all subject to the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the European Communities.[209] These rules are based on article 336 TFEU. The EU distinguishes two categories of employees: staff officials and the other servants. Staff officials refers to "any person who has been appointed, as provided for in these Staff Regulations, to an established post on the staff of one of the institutions of the Communities by an instrument issued by the Appointing Authority of that institution",[210] whereas temporary staff, auxiliary staff, contract staff, local staff and special advisers fall under the category 'other servants'.[211] The rules applied to both categories are different. There is some mobility ('detachment') between the national civil service and the EU civil service, but this is quite marginal.

---

[203] Council Decision 2007/436/EC, Euratom of 7 June 2007 on the system of the European Communities' own resources, *Official Journal of the European Union* L 163/17, 23.6.2007, article 2(1).
[204] Ibid., article 2(3).
[205] Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, *Official Journal* L 157, 26.6.2003, 49.
[206] Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital, *Official Journal* L 249, 3.10.1969, 25.
[207] Cited in A. Moravcsik, Federalism in the European Union: Rhetoric or Reality, *in* The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union (K. Nicolaidis and R. Howse, eds., Oxford Univ. Press, 2001), 161, at 170.
[208] K. Lenaerts and P. Van Nuffel, European Union Law (Sweet & Maxwell, 2011), 590.
[209] Règlement (CEE, Euratom, CECA) n 259/68 du Conseil, du 29 février 1968, fixant le statut des fonctionnaires des Communautés européennes ainsi que le régime applicable aux autres agents de ces Communautés, et instituant des mesures particulières temporairement applicables aux fonctionnaires de la Commission, *Journal Official* L 56, 4.3.1968, 1-7.
[210] Staff Regulations of Officials of the European Communities and Conditions of Employment of other Servants of the European Communities, I-4, <http://ec.europa.eu/civil_service/docs/toc100_en.pdf> (consulted 24/05/11).
[211] Ibid., II-3.

4. *Social Factors*

The EU is far from being homogeneous and there are large differences in mentalities and perceptions of European values.[212] It is home to 450 million Europeans from diverse ethnic, cultural and linguistic backgrounds.[213] The question whether one can speak of a common European identity has been a popular subject of discourse amongst scholars and politicians alike. In this regard, it has been argued that there is no *demos* in Europe.[214] Rather, "[c]itizens in the Member States of the EU share little underlying sense of distinct 'European' national identity, derived from a common history, culture or philosophy".[215] This line of argumentation seems at first glance to be further consolidated in light of recent enlargements. The EU now counts 27 Member States, making it all the more heterogeneous. However, this view does not go uncontested. On the contrary, it has been suggested that an approach of "country first, but Europe, too is the dominant outlook in most EU Member States".[216] It is submitted that the latter view is the better one since it seems to capture more accurately the complex European identity formation landscape. It would be epistemologically short-sighted to refuse the existence or significance of a European identity based on the parallel existence of national identities. Besides, the European project has never been about forging a common European identity at the expense of national ones.

It is also important to note that there are a number of minorities in Europe, especially linguistic minorities, like the Roma. The EU awards great importance to minority protection. Minority protection is for example one of the key criteria for accession to the Union.[217]

Finally, there is also a large asymmetry of natural resources within the EU. It is here that the European Social Fund (ESF) steps in. This is one of the EU's Structural Funds, set up to reduce differences in prosperity and living standards across EU Member States and regions, and therefore promoting economic and social cohesion.[218] Most money goes to those Member States and regions where economic development is less advanced. The other main Structural Fund is the European Regional Development Fund. The Fund aims to promote economic and social cohesion by correcting the main regional imbalances and participating in the development and conversion of regions.[219]

V. CONCLUDING REMARKS

The question of unification of laws in federal systems is an inherently complex question. The difficulties in the effort to present in a coherent and consistent manner developments within federal entities are only magnified when the EU becomes the entity under investigation. It has been an intentional choice to leave aside the partly theoretical discussion surrounding the nature of the EU as a federal post-Westphalian political creature. On the contrary the focus was on the actual features of the EU. The latter is a constantly evolving political organism with a declared goal to bring together and integrate the states and peoples of

[212] W. van Gerven, The European Union: A polity of States and Peoples (Hart Publishing, 2005); 47.
[213] Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions - Promoting Language Learning and Linguistic Diversity: an Action Plan 2004 – 2006, COM(2003) 449 final, Brussels, 24.07.2003, 24,
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0449:FIN:EN:PDF> (consulted 24/05/11).
[214] J.H.H. Weiler, Does Europe Need a Constitution? Reflections on Demos, Telos and the German Maastricht Decision, *European Law Journal*, 1/2, 219-258.
[215] A. Moravcsik, Federalism in the European Union: Rhetoric or Reality, *in* The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union (K. Nicolaidis and R. Howse, eds., Oxford Univ. Press, 2001), 178.
[216] T. Risse, Social constructivism and European Integration, *in* European Integration Theory (A. Wiener and T. Diez , eds., Oxford University Press, 2004), 166-167.
[217] For more information on the subject see G. Kinga, Minority Governance in Europe (Open Society Institute, 2002) 378p and G. Toggenburg, Minority Protection and the Enlarged European Union (Open Society Institute, 2004), 181p.
[218] <http://ec.europa.eu/esf/main.jsp?catId=35&langId=en> (consulted 24/05/11).
[219] <http://europa.eu/legislation_summaries/employment_and_social_policy/job_creation_measures/l60015_en.htm> (consulted 24/05/11).

Europe but whose *finalité politique* cannot really be said in public. The EU has a clear-cut, two-level structure of governance: central institutions and national governments. The distribution of competences between these two levels is based on the principles of subsidiarity, proportionality and pre-emption whereas the principle of primacy of EU law applies in cases of conflict between central and national laws. Central EU authorities enjoy a variety of legal and political instruments with which they steer the process of legal unification and harmonization. At the same time Member States often find it opportune to harmonize their legislations with EU legislation even in areas for which this is not mandatory. This legal construct has proven, nonetheless, highly successful and functional primarily thanks to the integrative role of the Court of Justice. Throughout its existence the Court has had a specific policy orientation when giving its judgments and opinions: "the promotion of European integration".[220] Often confronted with accusations of judicial activism, the Court has been tireless in keeping the European project on track. However, the significance of non-legal factors in the process of legal harmonization should not be underrated. Non-state actors within the EU, dense relations and cooperation among legal practitioners and scholars, and in general the constantly deepening interaction among Europeans have profound effects in this process.

[220] T.C. Hartley, The foundations of European Union Law (Oxford University Press, 2010), 72.