**Between compliance and particularism: Member State interests in European Union law**

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# Between compliance and particularism: Member State interests in European Union law

The European Union is a collective enterprise in which the Member States are united by shared interests and pursue common policies expecting to achieve goals and to avoid policy failures which acting on their own they would not be able to attain. That joint action is necessary to address cross-border economic, social, environmental and other interdependencies in Europe and to keep the negative domestic and cross-border consequences of nation state unilateralism is expressed in the names given to EU policies, such as the '*common* market' or the 'economic and monetary *union*'. These policies are operated on the basis of legal obligations imposed by the Member States on themselves which demand equal and effective compliance at all levels of state action in every Member State. Although equal and effective compliance is a creation of EU law which in individual instances may contradict Member State interests, the Member States – having been persuaded that their own interest of ensuring the success of common EU policies is best served by the members following the same rules in the same effective manner – have all embraced this idea and the relevant legal principles. It is fundamental to the understanding of the EU and its legal order to realize that essentially it is in the interest of the Member States to sustain their collective undertakings EU by confining their and the other Member States' autonomy and conduct by enforceable legal rules.

Because the European Union is an incomplete polity with policy deficits and with policies open to contestation, and because it has been facing constant pressures to reconcile within its policies competing European and national policy priorities, compliance alone cannot offer a satisfactory treatment of Member State interests. Although it seems to contradict the collective nature of Member State undertakings which confine their conduct, and it is guaranteed to jeopardize the outcomes expected from common policies, Member State particularism is recognized and often actively fostered in the EU legal framework. This is particularly true when the policy basis of EU obligations is contradictory or insufficient, and recognizing the political discretion of the Member States to depart from their Treaty obligations is justified by exceptional circumstances highlighting these policy contradictions or insufficiencies. Allowing Member State autonomy and particular Member State interests to prevail may also follow from rational choices made under the principle of subsidiarity regarding the appropriate territorial level of governing EU policies. These choices could legitimize autonomous Member State policy conduct capable of compensating the policy deficits of the Union, or, in the appropriate circumstances, of supplanting the efforts of the EU to satisfy its policy objectives stated in the Treaties. Finally, the imperative of equal and effective Member State compliance needs to accept that the Union is a collective *and* diverse polity, in which supressing every form of diversity cannot be an aim and in which sustaining that diversity requires a flexible treatment – potentially, the accommodation of – particular Member State interests.

Under these premises, the location of Member State interests in EU law must be sought between the imperative of compliance and the possibilities offered by Member State particularism. In this article, we examine first whether this positioning of Member State interests is supported by conceptual and theoretical understandings of national interests under the EU political framework. It is then followed by the connected discussions concerning the treatment of Member State interests under the principles of the EU constitutional framework, which on the one hand promote the

integration of European states and which on the other aim to preserve the positions of the Member States. Finally, we look at the treatment and the transformations of Member State interests in the law of the EU as influenced by the particular logic of the mutual commitments undertaken by the Member States in the EU Treaties.

## Member State interests and EU integration

The kick off to European economic and political integration after World War II suggested an end to the damaging unilateralism that had dominated state conduct on the continent.[1] The treaties signed and the governance structures created were influenced by the determination to eliminate the negative consequences of 'beggar-thy-neighbour' politics and policies, and to bring European states closer to delivering policies and realising benefits which – because of cross-border interdependencies and other cross-border pressures – require cooperation or other forms of collective action. The commitment of the Member States to the collective enterprise that has eventually developed into the European Union was, and their subsequent actions and inactions within the EU framework have been based on interests formulated at the national level in regards the advantages and costs of European cooperation. Having realized that they have interest in common and those interests can only be achieved by joint action, it was in their own volition that the Member States imposed on themselves mutual legal obligations confining their conduct, which they expected all members – voluntarily or under legal coercion – to fulfil.

Because of the collective nature of the EU enterprise, the mutual legal obligations undertaken will only enable achieving the common objectives in case all Member States – in operating their administrative, judicial etc. systems – equally effectively comply. Equal and effective compliance by the Member States not only excludes profiteering by unlawful conduct or by freeriding, but it should also prevent the undesired outcomes of unilateral action by the Member States damaging the shared and the individual interests of the Member States. This expectation from the Member States should avoid the reinvention of unilateral retaliatory measures in relations among the EU Member States. Although it may be highly inconvenient in instances when EU policy undermines the particular interest of an individual Member State, the interests of the Member States in the collective EU polity are most effectively supported by effective legal or other instruments which make every Member State comply. Agreeing to a construction of equal and effective compliance and refraining from denouncing the legal principles developed by the EU Court of Justice in support of that construction (i.e., direct effect, supremacy, the duty of interpretation, effective domestic remedies) indicate that the Member States have in fact understood their membership in the collective arrangement of the European Union as being in their explicit and well-considered interest.

Nevertheless, the commitments of the Member States to each other and to the Union under the collective EU framework do not exclude them entirely from realising and pursuing the interests

[1] See the discussion on European multilateralism by Moravcsik in A. Moravcsik, 'Conservative Idealism and International Institutions', (2000) 1(2) *Chicago Journal of International Law* 291-314.

of their own. In the EU context, national interests have conventionally been raised by the Member States as a justification for departing from their Treaty obligations, and as factor – for example, in the form of the national identity clause and of the subsidiarity principle recognized in Articles 4(2) and 5(3) TEU – capable of determining the boundaries of EU interference with Member State policy and legal autonomy and the choice between European and national locations of governance. Such dialectic applications of the national interest have enabled the Member States – contrary to their commitment to act loyally under Article 4(3) TEU – to secure themselves preferential political – and subsequently constitutional – treatment at the EU level, or to gain legitimate exceptions from the application of individual European rules. In political rhetoric and in policy making at the national level, Member State interests have been associated with non-compliance and particularism arguing for national legal and policy leeway from under EU policies. Member State governments have always had a tendency to present their EU commitments as burdensome confines of sovereign and autonomous policy making, which prevents them fulfilling their duties as nation states to safeguard their own citizens, economies, values, cultures etc. The pressures and crises of globalisation and regionalisation – certainly since 2008 – have offered an inexhaustible source for the Member States to argue for increased freedom in addressing economic and social problems at the national level, as – so goes the argument – borderless economic and social pressures developments can be managed effectively within the bounds of the nation state.

Recognising in EU law the ability of the Member States to pursue their particular interests is justified on a number of different grounds. Firstly, EU policies are not absolute policies. Their realisation can undermine equally valid parallel policy aims, which aims could in fact be acknowledged in the list of shared objectives in the Treaties. The law, therefore, needs to include exceptions from the rules regulating EU policies enabling the Member States to exempt national policies and regulation from the requirements of EU law. Secondly, the policy basis of EU policies can be contestable, and when they deliver more risks than benefits, or they fail to deliver the promised outcomes, the law should enable the Member States to regain control over their implementation. In a similar vein, when the uniform implementation of EU policies would lead to contestable outcomes in different local environments, the Member States should be allowed the legal opportunity to take charge of the local implementation of common policy objectives. These could manifest in the law developing constructions in which the legal obligations of the Member States can, in certain circumstances, become subjected to their political discretion (e.g., under Article 108(2) TFEU or Article 65(4) TFEU), or in the law – based on the principle of subsidiarity – recognizing Member State discretion on matters of policy substance. Thirdly, the EU pursuing a broad and ambitious policy agenda could find itself lacking the instruments and the resources to develop and execute policies. This is particularly problematic when the policy area was introduced into the Treaties in order to compensate previously existing policy deficits, and there is a pressing need for the new policy to counterbalance the negative outcomes of existing EU policies. In such circumstances, the law – influenced again by the principle of subsidiarity – could provide immunity to corresponding areas of policy action at the national level from the application of general Treaty rules so as to invite Member State action to fill the EU policy gap (e.g., under Article 106(2) TFEU).

Since the Member States have made legally binding commitments to pursue shared interests in a collective arrangement, where the equal and effective compliance of all members with their

commitments is indispensable for the realization of benefits the members alone cannot achieve,[2] allowing in EU law the Member States to demand recognition of their particular interests cannot be unlimited and uncontrolled. In order to preserve the Union as a collective enterprise, Member State particularism is, therefore, subjected to a test of legal scrutiny and justification, and the conduct of the Member State is confined by the ultimate legal benchmark of observing the equal treatment principle and avoiding the violation of the fundamental freedoms of the Treaties. Under these constraints, Member State interests are placed under a pressure of transformation by EU law, and the Member States are required to follow certain legal and argumentative patterns when they select, regulate and realize the national interests pursued. The transformative impact of EU law on the national interest reinforces the idea that in the law of the European Union Member State preferences must be sought between the two endpoints of compliance and particularism, the impact of neither of which they are able to avoid.

The position of Member State interests under the EU framework between compliance and particularism – i.e. that on the one hand, they are committed to participate in the EU and observe individual legal obligations, and on the other, they are also inclined to pursue and protect their own interests within and, possibly, outside the framework of permitted Member State conduct – has been touched upon by political science scholarship in the EU. Liberal intergovernmentalism accepted that national preferences exist and they are formulated at the national level with the local and international interests of the Member State in question in mind, and that they bind and allow rather limited flexibility for national governments in their negotiations with other Member State government in the EU framework.[3] It also argued that within the narrower EU context national preferences are determined by the assessment of the costs and benefits of EU cooperation, which indicates that individual Member States can achieve advantages in the collective setting of the Union and that the common interests of the Member States can undermine particular national interests.[4] Other analyses saw a similar relevance for national preferences in the EU but interpreted their actual impact on individual decisions differently. It was claimed that Member State decisions to reconsider, reorder or abandon their interests in EU negotiations dependent not only on the circumstances of the ongoing negotiation process but also on their past experiences with choices and processes in the EU framework.[5] The lack of strict boundaries between the interests of the Member States and the interests of the European Union also appeared in the analysis of the political understandings of the virtues and shortcomings of EU integration in the national political arenas, where national preferences are continuously constructed and reconstructed.[6]

The potential for the national interest to occupy contradictory positions in the EU framework may also follow from its fragility and diversity as a concept. There is a long-standing

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[2] See the jurisprudence discussed *infra* at note 42 *et seq*.

[3] A. Moravcsik, 'Preferences and Power in the European Community: a Liberal Intergovernmentalist Approach', (1993) 31 *Journal of Common Market Studies* 473-479, at 483.

[4] *Ibid*, at 485-486 and 507-517, and P. Craig, 'Competence and Member State Autonomy: Casualty, Consequence and Legitimacy', in H. Micklitz and B. de Witte (eds), *The ECJ and the Autonomy of the Member States* (Intersentia, 2012), 11-34, at 26-34.

[5] D. G. Dimitrakopoulos and H. Kassim, (2004) 'Deciding the Future of the European Union: Preference Formation and Treaty Reform', (2004) 2(3) *Comparative European Politics* 241-260, at 248-249.

[6] M. Aspinwall, 'Government Preferences on European Integration: an Empirical Test of Five Theories', (2007) 37(2) *British Journal of Political Science* 89-114, at 91-96.

conceptual and analytical disagreement in political science concerning the meanings, uses and relevance of the national interest.[7][8] The dead ends of the political science analysis present the national interest as an elusive and changeable combination of heterogeneous political, economic, social, and cultural-ideological considerations, which have a variety of applications and which are not at all free from contradictions. In the different analyses, the national interest has been equated with the common good or with what is best for societies, it has been held to be an instrument for political action to justify, denounce, or propose policies, and, most sceptically, the national interest has been regarded as a mere analytical tool for examining the objects of reality which are recognisable for political actors (objectivism) and for exploring subjective political preferences and judgements (subjectivism).[9] Perhaps, the main conclusions to be drawn from these conceptual debates are that both components of the concept – national and interest – depend in their definition on the selection of criteria accepted as valid and authoritative in the given context, and that the difficult and contested[10] concept of the national interest can be viewed from different locations and be placed in different positions in the course of national, regional or global decision making processes.

Quantitatively, it is nearly impossible to identify the – economic, military, ideological, political, cultural etc. – values, collective goods, preferences, or considerations which compete for recognition within the conceptual category of the national interest.[11] The potential components of the national interest may differ in the intensity of their social embedment, political and economic weight, or in their emotional attachment.[12] They may have objective (physical/rational) or subjective (metaphysical/emotive) interpretations,[13] and they may focus on internal affairs representing the principles of domestic order, or on external affairs denoting a specific claim made by a state over another state.[14] Their catalogue varies in space and in time, and their scope and their categorisation

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[7] For an early overview, see J.N. Rosenau, 'National interest', in D.L. Sills (ed), *International Encyclopaedia of the Social Sciences* (Macmillan, 1968), 34-40, at 34. For an overview of the use of the concept in IR theory, see S. Burchill, *The National Interest in International Relations Theory* (Palgrave, 2005), especially at 206-211.

[8] Realists insist that the national interest is a valid and rational concept with identifiable objective meanings, see H. Morgenthau, *In Defense of the National Interest: a Critical Examination of American Foreign Policy* (Knopf, 1951) and *Politics among Nations: Struggle for Power and Peace* (Knopf, 1978). For less certain realists, seeing the national interest as a checklist, a pointer, or a signpost for policy makers instead of representing objective reality, see K.W. Thompson, *Traditions and Values in Politics and Diplomacy: Theory and Practice* (Louisiana State University Press, 1992). Their main opposition, constructivists, regard the national interest as not being found by rational actors but being developed in processes of social interaction, *inter alia*, P.J. Katzenstein, *The Culture of National Security* (Columbia University Press, 1996) and M. Finnemore, *National Interests in International Society* (Cornell University Press, 1996). Liberalism contends that state conduct is at least minimally rational in the sense that it is directed towards the achievement of ordered objectives, and these objectives, goals and interests are 'formulated through domestic political conflict as societal groups compete for political influence, national and transnational coalitions for, and new policy alternatives are recognized by governments.' National preferences are, therefore, an aggregation by governments of preferences articulated by social groups in the given temporal and policy context, Moravcsik, *op cit supra* note 3, at 481, 483-484.

[9] Rosenau, *op cit supra* note 7, at 34.

[10] J.S. Nye, 'Redefining the National Interest', (1999) 78 *Foreign Affairs* 22-35.

[11] See the theories of state/centre-formation which describe the multitude of factors/ private and public goods which are locked in/circumscribed/confined within the boundaries of nation states, in S. Bartolini, *Restructuring Europe* (OUP, 2005), at 12-31.

[12] Realists struggle with the subjective, culturally and socially defined components of the national interest, Thompson, *op cit supra* note 8, at 87-88.

[13] C.A. Beard, *The Idea of the National Interest* (Quadrangle, 1934).

[14] D.W. Clinton, *The Two Faces of National Interest* (Louisiana University Press, 1994).

of being vital or non-vital interests is also context dependent.[15] Their relevance for law and governance is also varied. For instance, territorial integrity as a very 'real' interest of states attracts more robust legal and governance frameworks than the less concrete 'ideational' interests of political communities.[16] Conceptual variability and uncertainty may also follow from the overlap of actors and of processes of interest formation at the national and the transnational level.[17] In multi-layered governance settings, it may be difficult to distinguish the interests of actors located at different layers of governance, and it may be equally difficult to establish that their interests are exclusively contradictory and not, for instance, shared and commonly expressed.

Conceptual diversity also characterizes the national interest under the law and governance framework of the EU. The meanings and applications of Member State interest range from the political and the operational, and they present the national interest both as the driving force behind European integration and as a constant threat to the operation of the EU polity. In its most obvious political applications, the national interest, on the one hand, seems to have provided the fundamental impetus for establishing and maintaining European economic and political integration, and, on the other, it represents the main constitutionally recognized limitation of European integration.[18] It appears in the Treaty provisions giving expression to the shared national interests elevated to the European level as common objectives and policy aspirations of the EU polity, and – parallel to this – it manifests in the Treaties recognising the diversity of Member State identities and allowing – within bounds – the promotion of their diverse economic, political and social interests.

In its operational capacity, the national interest takes the form of the 'national position' produced in the institutional and procedural confines of EU decision making procedures.[19] The national position is a substantively reduced and professionally represented expression of the national interest which emerges from structured expert and political negotiations and bargaining both at the national and the European level.[20] As a norm, it is based on justified and assessed legal and policy expert opinions, and it may be subjected to administrative and managerial considerations, such as measuring the costs and benefits of representing certain interests before the EU, assessing the adequate use of national resources in interest formation and representation at EU level, or deciding

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[15] For concepts in transition and being the product of their time, distinguish as concepts the US 'national interest' from the French '*raison d'état*' and from the German '*Realpolitik*'.

[16] On this ground, we need to distinguish the policy and rhetorical/lexical applications, the aspirational, operational, and explanatory/polemic purposes of the national interest, J. Frankel, *National Interest*, (Pall Mall, 1970), at 31-38.

[17] See, in this connection, the discussion concerning the EU setting in Bartolini, *op cit supra* note 11, at 109. See, in this connection, the discussion in the national context in Rosenau, *op cit supra* note 7, at 37-38.

[18] Other political expressions of the national interest under the EU framework include forms of differentiation allowed among the Member States driven by politics, such as opt-outs negotiated at Treaty-level, Treaty reforms driven by the politics of the national interest (e.g., the SEA), instances of politically driven legal non-compliance, the choice of voting systems in the Council, such as the choice between unanimity and QMV and the availability of veto in decision-making, or the political challenges against the EU competences system.

[19] Contrast with Moravcsik, *op cit supra* note 3 and compare with Dimitrakopoulos and Kassim, *op cit supra* note 5.

[20] See also the national interests as a distinguishable 'European' profile developed by the Member States overtaking the task of the Council Presidency. It could combine domestic and EU priorities and it could bear the stamp of a political identity constructed for this particular purpose. The pressure to perform successfully in this role may also have an impact on the nationally picked priorities of the Presidency. Because of the inevitable mixing of national and Union interests and because of the opportunity offered by the Council Presidency for symbolic politics, it is unclear whether the Presidency profile would actually overlap with preferences formulated at the national level and whether the Presidency is used to pursue local interests or to promote European policies.

on the development of a distinguishable Member State profile in areas of EU law and policy where government agents have special expertise. The 'national position' as an operationalized manifestation of the national interest entails making choices concerning the range of potentially effective conducts in the EU domain, designing positions having regard to the inertia of individual EU political and legal procedures, or determining positions having considered the workload of government agents and the particular tasks assigned by the 'client' – the Member State concerned – to them. In these circumstances, the 'national position' as a manifestation of Member State interests is not bound solely to considerations deemed relevant at the national level, but it is likely to internalize considerations intrinsic to the EU polity as a whole.

The dynamics of inter-governmental negotiations and bargaining in the EU indicate a similar treatment of Member State interests. The demands of political tactics, especially in the case of package deals, 'threats of non-agreements', or 'threats of exclusion' among the Member States,[21] could mean that interests will be dropped and picked up, and that they will be shifted upwards to the EU and downwards to the national level. The relative power of individual Member States, the practice of political side-payments and concessions, temporary *quid pro quo* political arrangements between Member States, the potential political success of representing a particular interest, or the potential communications value of the defeat or success of certain interests in domestic politics could all influence the promotion or the dismissal of certain considerations as Member State interests. The constant availability of choices in this fluid, unpredictable and rather blurred setting of 'fragmented' and 'divided' European government[22] makes the national interest, especially *vis-á-vis* the interests of the Union, rather loosely circumscribed and equally loosely positioned. For instance, incentives from the European Union, such as the tying of the outpayment of EU regional development monies to meeting the deficit rules of the Stability and Growth Pact,[23] may distort interest generation and creation in the Member States hungry for EU funds, and may supress 'objective', non-fiscal national interest considerations. Furthermore, while some local interests could be represented against the interests of the Union, others will be set against the interests of other Member States or the interests of both the Union and other Member States.[24] Intergovernmental

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[21] See the overview of negotiation and bargaining strategies and of factors determining the success of those processes by Moravcsik, *op cit supra* note 3, at 497-507. The quoted terms are from 499. See the discussion on the structural and other factors determining the bargaining power of the Member States in J. Tallberg, 'Bargaining power in the European Council', (2008) 46 *Journal of Common Market Studies* 685.

[22] Y. Mény, 'National squares European circles: the challenge of adjustment', in A. Menon *et al* (eds), *From the Nation State to Europe* (OUP, 2001), 29-45, at 33-34.

[23] Article 23 of Regulation 1303/2013/EU of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006, OJ L 2013 347/320.

[24] See, for instance, the 'underlying dynamic' of EU enlargement as provided by asymmetric interdependencies among European states, which means that candidate states might have hoped to gain more from joining the EU than existing Member States did, in A. Moravcsik and M. Vaduchova, 'National interests, state power and EU enlargement', (2003) 17 *East European Politics and Societies* 42. See also the discussion by Craig concerning the legal possibility of a Member State left in minority in QMV voting to challenge the EU measure concerned on account of its incompatibility with national values, and to oppose the other Member States which found that the EU measure in question had established an adequate balance between EU and Member State interests and that it does not represent an unacceptable violation of their values, P. Craig, 'Subsidiarity: a Political and Legal Analysis', (2012) 50 *Journal of Common Market Studies* 72-87, at 83.

bargaining could also entail that the Member States internalize, for indirect, mainly strategic political reasons, the interests of other Member States or of constituents located externally. This necessarily questions in the EU context the geographical and social confines of considerations treasured as national interests. Allowing the entry of interests of other Member States into the national political domain, especially in the implementation phase of EU policies, could also follow from EU legal obligations, such as the application of the principle of mutual recognition in EU economic law.

The (constitutional, political and functional) overlap between national and Union interests could be so significant and the boundaries between them could become so negligible that they may be impossible to distinguish.[25] Member State interests seem to be floating with the ebbs and the tides of European and national politics in an interconnected political and governance space. The only relative distinctness and the dynamic interconnectedness of national and European levels of interest formation and representation are not novel for theoretical writing on European integration. They have suggested that developments at the European level cannot be viewed separately from preferences, constraints and opportunities at the national level,[26] and that understandings of Member State preferences and autonomy must be constructed on the basis of a relationship of mutuality between the national and the European.[27] Mutuality and mutual dependence as a possible descriptor of EU-Member State interest relations may also follow from general analyses of relationships between nation states and transnational governance. In Goldin's phrasing, bearing in mind the nearly impossible choice between the benefits of national and transnational governance, nation states and transnational governance are locked in a relationship of mutual dependence, where national governance requires transnational governance for enhancing its effectiveness and transnational governance – because its legitimacy and effectiveness depend on their participation and commitment – cannot dispense with nation states.[28]

Similar conclusions can be drawn from analyses of the EU legal and governance framework which emphasize its fluidity and dynamism,[29] and which recognize the complexity of the EU polity and its polycentric constitutional design, or work with open, diffuse and fragmented models of European integration.[30] Indeed, when European integration is analysed as a complex phenomenon of spatial shifts of power from state level to the European level, because of the changeability and dynamics of these processes it is difficult to imagine EU-Member State interest relations and interest

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[25] The inseparability of national and Union interests is analysed eloquently and somewhat controversially by Bartolini who argued that the EU is a self-imposed regime of legal and political controls over Member State conduct and Member State claims against their EU obligations must be viewed in light of the fact that 'the national-European political elites are victims of the constraints they have imposed on themselves, on their countries, and on their citizens' 'to force exogenous discipline on respective national communities', which followed from their original intention to use European integration to 'bypass the constraints of national political production' (i.e., national parliaments, transparency and accountability requirements etc.) for the benefit of political and policy efficiency, Bartolini, *op cit supra* note 11, at 405. He continued that national political elites are the 'architects, enterpreneurs, and financiers' of the new centre that is the EU, therefore, conflicts between the interests of the Member States and the EU 'should not be seen from the perspective of the 'realist' opposition between selfish state interest and idealistic supranational project, *ibid*.

[26] Moravcsik, *op cit supra* note 3, at 480-483; Craig, *op cit supra* note 4, at 11-12; Mény, *op cit supra* note 22, at 31-32.

[27] See Craig, *op cit supra* note 4, at 11-12 and Mény, *op cit supra* note 22, at 31-32.

[28] I. Goldin, *Divided Nation*s (OUP, 2013), at 48-50. For a similar discussion, see A. Dashwood, 'States in the European Union', (1998) 23 European Law Review 201-216, at 202.

[29] See the dynamism described by Bartolini, which affects actor preferences, the relevant actors and the institutional set up, Bartolini, *op cit supra* note 11, at xvi.

[30] See the overview by Bartolini, *ibid* at 282-284.

formation in the Member States in static, unilocational and unidirectional terms.[31] When European integration is interpreted as a dynamic process of legal, economic, cultural and social boundary redefinition,[32] the strict separability of national and Union interests seems untenable. This process of 'rescaling' of European states,[33] where the changes affecting state functions take place without sealing or separating the different spatial scales (e.g., the national and the Union levels of governance), indicates a floating and constantly evolving position for Member State interests between individual locations of national governance and the locations of collective European governance.[34]

When European commonness and local distinctiveness are entangled to such an extent in the diverse theoretical and conceptual manifestations of Member State positions under the EU framework, neither absolute compliance, nor complete freedom for the Member States offer an adequate positioning of Member State interests. Instead, they must be sought in the area in between these extremes. Of course, the malleability of the dividing line between the national and the European, and the overlap between interests formulated and represented at the national and the European level should not come as a surprise. The implementation of EU policies has always depended on law and administration at the national level, and it has long been clear that in areas where sufficient competences, instruments and means have not been made available at the EU level there is a supplementary relationship between EU objectives and Member State policy action. Treaty provisions, such as Articles 14 and 106(2) TFEU on services of general economic interest – especially, when interpreted to together with the principle of subsidiarity under Article 5(3) TEU – give clear evidence of synergies between European and national interests.

In this conceptual framework, the obsession of the Member States with securing further legal and policy leeway from their EU obligations is difficult to interpret on a number of levels. Firstly, the Member States must search for the desired leeway in the EU policies already available. Their possibilities as individual policy actors are confined most fundamentally by their inability to escape cross-border interdependencies or other cross-border pressures, or to create sufficient

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[31] See Bartolini's overview of 'rationalist' and 'constructivist' approaches – divided along these lines – on EU-Member State relations, *ibid* at 188 and 197-200. Contrast with the literature seeing a neat 'division of labour' between EU and domestic policy making and regulation, in which both domains are responsible for their respective autonomous policy areas free from the intrusion of the other, *ibid*, at 406-407, strongly criticising these balanced positions as EU legal obligations 'have largely reduced the adaptation elasticity offered to Member States', *ibid* at 407.

[32] In this environment, where the conduct and autonomy of states is defined by simultaneous and mutual processes of internal boundary removal within the European Union and external boundary building at the European level, the locations of interest differentiation and of the formation of conflict lines between different interests are no longer found exclusively at the national level, *ibid* at xii-xiv and 178. From a broader perspective, he also argued that European integration enables a 'progressive disjoining and lack of coincidence of the previously highly coterminous economic, cultural, coercion and politico-administrative boundaries of the nation-states.', *ibid* at 243.

[33] M. Keating, *Rescaling the European State* (OUP, 2013), at 6 and 8. Rescaling is understood as the functionally driven 'migration of economic, social and political systems of action and of regulation to new spatial levels', *ibid*.

[34] See also Lindhal's treatment of power and sovereignty in the EU arguing that while there are compelling (functional) reasons to move power beyond the nation state, European integration – even though it is able to generate its own sources of legitimacy – will necessarily find its constitutional (and political) limits in the ultimate formal and substantive legitimacy of power at the national level. He continued that this is responsible for a construction of constitutional and political interdependence between Europe and the Member States in which power and sovereignty are not divided but are available simultaneously at different locations (they are sovereign 'from different points of view'), H. Lindhal, 'The purposiveness of law. Two concepts of representation in the EU', (1998) 17 *Law and Philosophy* 481, at 482 and 501.

economies of scale,[35] and not by their legal obligations in the EU. The constraints imposed on them by themselves in the form of common European policies offer them the chance to secure policy outputs (benefits) and avoid policy failures, which they acting on their own would not be able to achieve. Unless European policy deficiencies or failures, or legitimate priority conflicts need to be addressed, demands for enhanced Member State particularism need to be rejected as undermining the effective perusal of the opportunities offered by the collective EU framework. Secondly, the constraints following from EU law on the legal and policy leeway available to the Member States in fact operate in the interest of individual Member States by monitoring and excluding non-compliance by other Member States, and by preventing freeriding by other Member States, both of which are capable of putting the advantages of collective action and cooperation under the EU framework to jeopardy. Leverage by the Union, even though it reduces the opportunities for both legitimate and illegitimate Member State particularism, is indispensable for the realisation of common policies for the benefit of the Member States, securing which requires effective equal and mutual compliance by all participating States. Thirdly, demanding legal and policy leeway from EU obligations is fairly close in its appreciation to traditional nation state based unilateralism. The Member States need to accept that by imposing limitations on national discretion EU law aims to prevent the Member States reproducing the mistakes of unilateralism. Engaging in the related conduct of protectionism, exclusionarism, or economic or social chauvinism – even under a thin veil of legitimate policy considerations – damages not only the mutual interests of the Member States in the Union, and the interest of other Member States and their citizens, but also the interests and the welfare of their own economic operators and other individuals. It is not particularly difficult to understand that other Member States can introduce the same kind of measures, and the resulting spiral of retaliation and counter-retaliation could be more damaging than the negative consequences of integrated open European markets on particular national social or economic interests.

Intellectually, it seems rather attractive to interpret Member State interests under the EU framework as determined by calculations of costs and benefits, and also by rational assessments of policy expectations and policy failures at the national and the European level. It is certainly reassuring to view EU obligations as having been imposed by the Member States on themselves on their own volition, and as reflecting their determination to secure the otherwise unattainable benefits of common policies and avoid the failures encoded in nation states acting alone. It is similarly comforting to understand the avenues available in the EU for the Member States to pursue their particular interests as having been constructed accepting the possibility that European policies may suffer from deficits and failures, and that the emerging conflicts at the European level between policy and other priorities need to be resolved. On this basis, the exceptions, immunities and other instruments in EU law enabling the Member States to promote their interests operate as an escape route when the policy costs of membership surpass its benefits, or when the promised mutual benefits of common policies fail to manifest. They also make giving due recognition to Member State diversity possible, and enable – according to the principle of subsidiarity – choosing between the Member States and the EU as the appropriate geographical location of governance in Europe.

[35] And other benefits, such as effective allocative potential, simplified regulatory and administrative environment for economic activities, or concentrated and coordinated responses to regional and global problems.

**Member State interests in the EU constitutional framework**

The position of Member State interests as placed between compliance and particularism is also reflected in the balanced arrangements of the EU constitutional framework.[36] Besides the fundamental commitment of the Member States to act collectively in pursuance of shared interests in Article 1(1) TEU, the EU Treaties and EU legal doctrine have been peppered with provisions and principles which give way to Member States pursuing their particular interests. In regulating the legal obligations of the Member States, Member State interests are given recognition as the specific legal issue of Member State discretion and autonomy, the principle of neutrality (of national ownership regimes) offering partial immunity to fundamental choices made at national level, the principle protecting the integrity of Member State identities, the legal ability of the Member States to promote public interest and public policy considerations which compete with those promoted by EU policies, the principle laying down the equality of the rights and obligations of the Member States, the principles and the rules introduced to observe Member State competences (e.g., subsidiarity and proportionality), the rules, strategies and mechanisms allowing differentiation among the Member States, or as the principles and provisions allowing some degree of immunity for Member State policies from Treaty prohibitions (e.g., in the protection of services of general (economic) interest).

The legal provisions and principles regulating Member State commitments under the Treaties, such as the principle of loyalty as laid down in Article 4(3) TEU and the principle of supremacy as established in *Costa*,[37] make it clear that effective compliance is at the heart of the collective arrangement of the EU. The Treaties offer a broader ideological basis for this in the common roots and aspirations and the common values and objectives of the Member States, and in the explicit program of continuing 'the process of creating an ever closer union among the peoples of Europe' and of taking further steps to 'in order to advance European integration'. Legal constraint (leverage) and compliance are among the main functional offerings of the EU for the Member States,[38] and law has traditionally been associated with the promotion of the European integration process by enabling interferences with Member State legal and policy autonomy and discretion, and by offering solutions for conflicts between the national and the European.[39] EU law has been seen as conveying an 'ideology of obedience', and as exploiting the basic instincts of the Member States under the rule of law to effectively deliver EU policies through legal regulation.[40]

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[36] J. Schwarze, 'Die Abwägung von Zielen der europäischen Integration und mitgliedstaatliche Interessen in der Rechtsprechung des EUGH', (2013) *Europarecht*, 253, at 273, arguing that the national interests is being balanced perpetually against Member State obligations of compliance, and that all conflicts are capable of being resolved by the EU Court of Justice for the benefit of European integration under its general jurisdiction by creating a 'fair and reasonable' relationship (balance) between the requirements of EU membership and the interests of the Member States.

[37] Case 6/64, *Costa v ENEL* [1964] ECR 1141.

[38] Bartolini, *op cit supra* note 11, at 305-306. The other is offering opportunities for the Member States to seek EU policy tools to address national policy concerns.

[39] See the discussion by Walker on the purpose bestowed on law in European integration which is to keep the economically, socially, politically, culturally, ideologically etc. complex and controversial questions of transnational policy making and governance within the 'formal and technical' bounds defined by law, N. Walker, 'The place of European law', in J.H.H. Weiler and G. de Búrca (eds), *The Worlds of European Constitutionalism* (CUP, 2011), 57-104, at 98.

[40] As discussed in, J. Shaw, 'European Union studies in crisis? Towards a new dynamic', (1996) 16 *Oxford Journal of Legal Studies* 231-253, at 237. 'Integration is what is natural for the EU and equally what is natural for the law', *ibid.*

Nevertheless, these – what could be called as – 'constitutionalising' elements of the EU constitutional order are matched with 'conservatory' elements introduced to preserve the position of the Member States.[41] As mentioned earlier, Treaty provisions delineate the areas of EU action (competences) from those of the Member States (Article 4(1) TEU), maintain that all Member States will be treated equally (Article 4(2) TEU), and guarantee that that EU membership will not affect the 'national identities' and the 'essential State functions' of the Member States (Article 4(2) TEU). The TEU confines the exercise of the competences available to the EU by demanding that the objectives of the proposed action need to be 'better achieved' at the European rather than at the national level, and that the 'content and form' of EU action must not exceed what is necessary to achieve the Treaty objectives (Articles 5(3) and 5(4) TEU). The Treaties also contain the right for the member States to revise or to withdraw from their Treaty commitments (Articles 48 and 50).

Compliance and the relevant 'constitutionalising', or 'gravitational' principles of the EU constitutional framework find their origin in the Member States committing together in the Treaties to the realization of their shared interests as announced in Article 1(1) TEU. This expression of solidarity and commonality among the Member States is based on an understanding of an 'equilibrium between the advantages and obligations' of EU membership,[42] and means that the Member States are prevented in law from pursuing unilateral conducts with the aim of securing individual advantages as that would jeopardize their shared interest and undermine the mutual advantages hoped to be gained from EU integration. The legal efforts to bring the Member States in line have, therefore, been based on understanding the very real disintegrative effects of particularist Member State action under the EU framework, which damages not only the shared interests of the Member States in the Union, but also the individual interests of other Member States.[43] The very real threat of Member State particularism to the collective arrangement established in the Treaties may support the visible bias in the application of these principles in favour of the Union, and explain why – faithful to the ethos of compliance – they tend to resolve conflicts between the EU and the Member States to the benefit of European integration.[44]

The Treaties make it clear – in Article 1(1) TEU, especially – that the interests of the Union correspond with the interests of the Member States; the EU was established to enable the Member States to realize interests 'they have in common'. Article 4(3) TEU regulating the principle of loyalty as a central norm governing Member State conduct indicates that in case the Member States take their fundamental commitment in Article 1(1) TEU seriously they need to cooperate, comply with their legal obligations and refrain from frustrating the Treaty objectives. The fundamental principle of non-discrimination, which applies to Member State conduct even in the absence of explicit legal provisions,[45] signals that in realising the Treaty objectives the Member States are dependent on each

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[41] Dashwood, *op cit supra* note 28, at 203 ('conservatory elements' ensure that 'Members' survival as States in a full sense is a basic assumption of the constitutional order'). It could also be referred to as principles of 'system maintenance' for the EU as used by Klamert for the principle of loyalty, M. Klamert, *The Principle of Loyalty in EU Law* (OUP, 2014). See the overview of the various principles and instruments available to safeguard the status of the Member States within the EU in Dashwood, *op cit supra* note 28, at 206-213.

[42] See Klamert, *op cit supra* note 41, at 37, and para. 24, Case 39/72 *Commission v Italy* [1973] ECR 101.

[43] While they seem to capture all relevant Member State conduct, it is not excluded that on the fringes of EU policies particularist Member State policies may survive the levelling-out force of EU law.

[44] See Klamert, *op cit supra* note 41, at 211.

[45] Para. 36, Joined Cases C-105/12 to C-107/12 *Essent* ECLI:EU:C:2014:2192 and the case law cited.

other. In particular, without every Member State offering the same treatment to home and foreign goods, services, capital, persons, economic operators etc. equally effectively the expectations of the Member States – individually and collectively – could be jeopardized. Reciprocating the treatment given by one Member State acting under its EU obligations is fundamental to the logic of the law governing this collective enterprise, which finds its ultimate technical expression in Article 197 TFEU holding that the effective implementation of EU law throughout the Union is a 'matter of common interest' for the Member States.

The Court of Justice has made this understanding of Member State commitments under the collective EU framework visible for a while. In the relatively early *Premium for Slaughtering Cows* judgment,[46] Italy claimed that compliance with EU law was made impossible by the 'special characteristics' of the national economy, the lack of adequate administrative capacities to implement EU market regulation, and by the EU measures in questions contradicting 'the needs of the Italian economy'.[47] It also added that since these difficulties had been made known in the negotiations before the Council and that Italy had objected the adoption of the EU measures in question, 'complaint ought not to be made against the Italian Republic'.[48] The Court of Justice commenced its ruling by emphasizing that because of the legal nature of regulations as measures of EU law non-compliance with them by a Member State 'so as to render abortive certain aspects of Community legislation which it has opposed or which it considers contrary to its national interests' cannot be accepted.[49] More importantly, it argued that the failure to comply with EU legislation executing EU economic policy – 'within the requisite time limits and simultaneously with the other Member States' – not only undermines the effectiveness of common policies agreed upon by the Member States, but at the same time it also enables 'taking an undue advantage to the detriment of its partners' in cross-border dimensions.[50] Finally, the Court of Justice held that unilateral opt outs by Member States from observing their obligations subsequent to determining those common obligations are not permitted, and that the EU institutional systems offers the necessary means for securing the reasonable consideration of legitimate Member State objections against EU action 'within the framework and principles of the Common Market and the legitimate interests of other Member States'.[51]

The argument that Member State particularism finds its limits in the objectives shared by the Member States and in the interests of the other Member States, and that the collective arrangements of the EU polity may give recognition of individual Member State interest only to the extent that it does not undermine the collective nature of the EU polity, was also visible in the foundational constitutional jurisprudence of the Court of Justice concerning Member State compliance with their

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[46] Case 39/72 *Commission v Italy*, *op cit supra* note 45.
[47] Para. 19, Case 39/72 *Commission v Italy* [1973] ECR 101.
[48] *Ibid.*
[49] Para. 20, *ibid.* See also the *Recording Equipment in Road Transport* ruling, para. 9, Case 128/78 *Commission v UK* [1979] ECR 429.
[50] Para. 21, Case 39/72 *Commission v Italy op cit supra* note 47, and para. 9, Case 128/78 *Commission v UK op cit supra* note 49 holding that Member State non-compliance 'undermines Community solidarity by imposing (…) on the other Member States the necessity of remedying the effects of its own omissions, while at the same time taking an undue advantage to the detriment of its partners'.
[51] Para. 22, Case 39/72 *Commission v Italy op cit supra* note 47. In para. 23, the Court of Justice indicated that the particular difficulties of Italy had been taken into account by means of special clauses in the contested measures. See also para. 9, Case 128/78 *Commission v UK op cit supra* note 49.

obligations. In *van Gend*, the Court having emphasized that common policies are 'of direct concern to interested parties in the Community' suggested in the often quoted passage that the Union is a collective enterprise based on the mutual delimitation by the Member States of their 'sovereign rights'.[52] The Court's reasoning could be read also as implying that the constraint from EU law on Member State sovereignty and autonomy was made necessary by the purpose of realizing for the mutual benefit of the Member States the shared objectives laid down in the Treaties.

The judgment in *Costa* confirmed *van Gend* on the argument that the limitations on Member State sovereignty were self-imposed[53] for the benefit of the mutual undertaking to pursue common policies within the Union, and suggested that it is a natural consequence of the collective nature of the Union that the Member States are excluded to depart from their shared obligations unilaterally subsequent to them joining the Union as its members.[54] The Court of Justice indicated that the legal obligations of the Member States were accepted by them 'on a basis of reciprocity', and also that the failure to observe those obligations[55] undermines the basic pillars of the collective enterprise that is the EU polity, namely, the attainment of the common objectives set out in the Treaty and the prohibition of discriminatory treatment among the Member States. The *ERTA* ruling of the Court moved along similar lines when it emphasized that common policies assume the Member States acting jointly 'in defence of the interests of the Community.'[56]

In a couple of early infringement cases dealing directly with Member State compliance, these points were made out even more clearly and explicitly. The *Preferential Rediscount Rate* case from 10 December 1969 dealt with France giving through the *Banque de France* substantive subsidies to French exports to the other Member States of the European Economic Community. France claimed – among others – that the measure was taken in the sphere of monetary policy, which then belonged to the exclusive competence of the Member States, and therefore EU action against France lacked a legal basis. The Court of Justice ruled, however, that while monetary policy was indeed a matter reserved for the Member States, the provisions of the Treaty on national economic policies prevented the Member States from unilaterally derogating – 'on the pretext that their action related only to monetary policy' – from their Treaty obligations and from avoiding the control of the EU institutions.[57] Finally, it argued that unilateral Member State conduct in breach of EU law would undermine solidarity among the Member States, which provides the basis of the EU obligations of the Member States and 'of the whole of the Community system' as laid down in the principle of loyalty (now regulated under Article 4(3) TEU).[58]

In the *Premium for Slaughtering Cows* ruling, the Court of Justice continuing on its previously mentioned assessment of Member State particularism in the collective EU polity offered a broader

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[52] Case 26/62 *van Gend* [1963] ECR 3.
[53] It also introduced the idea of the voluntary 'transfer of powers from the States to the Community' as a further indication of the collective character of the EU polity.
[54] Case 6/64, *Costa op cit supra* note 37. 'The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure' over the Union legal order, *ibid.*
[55] Allowing 'the executive force of Community law' to 'vary from one State to another in deference to subsequent domestic laws', *ibid.*
[56] Paras. 77 and 90, Case 22/70 *Commission v Council* [1971] ECR 0263.
[57] Paras. 14-15, Case 6 and 11/69 *France v Commission* [1969] ECR 523.
[58] Paras. 16-17, *ibid.* See also paras. 41-43, Case C-105/03 *Pupino* [2005] ECR I-5285.

rationale for the legal obligations of the Member States.[59] It suggested that EU law operates under the assumption that the advantages following from EU integration for the Member States come with obligations, especially, that the Member States respect EU rules.[60] With this, it implied that securing the benefits of common action by the Member States under shared objectives depends on the Member States meeting – without exception – the legal obligations which set out the means and modes of achieving those benefits. In supporting this point, the Court continued that unilateral Member State action breaking 'the equilibrium between advantages and obligations' flowing from EU membership in pursuance 'its own conception of national interest' undermines the equality of the Member States under EU law and 'creates discriminations at the expense of their nationals, and above all of the nationals if the State itself which places itself outside the Community rules.'[61] Member State particularism breaching EU legal obligations was declared ultimately as a violating the 'duty of solidarity' among the Member States undertaken by their EU membership and as undermining the 'fundamental basis' of the EU legal order.[62] The judgment left no doubt that according the Court of Justice following and enforcing EU obligations is in fact in the interest of the Member States, and that only equal compliance by the Member States as demanded by EU legal doctrine can enable equal access to the mutual benefits of European integration for the Member States and their citizens. Illegitimate Member State particularism was, therefore, declared in EU law as damaging the interests of other Member States and their citizens, and as offering undeserved advantages to the non-compliant Member State and also to its citizens.

The Advocate Generals have also discussed the broader foundations of Member State compliance in the EU. In *Commission v France*, Advocate General Geelhoed argued that beyond a formal legal interpretation of the enforcement of EU law against the Member States, the rationale for policing and enforcing compliance must also be sought in systemic considerations affecting the functioning of the EU.[63] The Advocate General indicated, in particular, that unilateral Member State conduct in breach of their EU obligations jeopardizes the uniform and effective implementation of EU policies, undermines the attainment of the common objectives sought by the Member States, distorts market conditions in various parts of the Union, and 'disturbs the balance of rights and obligations of the Member States under the Treat'.[64] Finally, it was claimed that illegitimate Member State particularism violates the legal presumption – expressed in what in now Article 4(3) TEU – that the Member States comply loyally and in solidarity with each other with their Treaty obligations, and that it interferes with mutual trust among the Member States, which is essential for the

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[59] Reinforced in the *Recording Equipment in Road Transport* ruling, para. 12, Case 128/78 *Commission v UK op cit supra* note 49.
[60] Para. 24, Case 39/72 *Commission v Italy op cit supra* note 47.
[61] *Ibid.*
[62] Para. 25, *ibid.* See to that effect, para. 9, Case 128/78 *Commission v UK op cit supra* note 49. In that case, the Court of Justice was unwilling to take on board the reasoning from the UK (para. 8) that non-compliance in purely domestic situtations, provided that in cross-border relations (i.e., road transports from the UK to the continent) the EU measures are complied with, should not matter from the perspective of the EU. This indicates that the implications following from Member State solidarity and from the collective nature of the EU polity reach beyond the actual circumstances (i.e., cross-border transaction or cross-border interdependencies), which directly necessitate cooperation among the Member States.
[63] Paras. 5 and 8, Opinion of Advocate General Geelhoed in Case C-304/02 *Commission v France* [2005] ECR I-6263.
[64] Para. 8, *ibid.*

operation of the EU as a collective polity and also for the effective implementation of common policies.[65]

The interpretation of Article 125 TFEU in *Pringle* by Advocate General Kokott offered a similar understanding of Member State commitments in the EU. While the view recognized the sovereignty of the Member States as a founding constitutional principle of the Union and as the foundation for the ability of the Member States to conclude international agreements outside their Treaty commitments,[66] solidarity among the Member States was also identified as the principle driving Member State conduct within and outside the Treaty framework.[67] Solidarity for taking responsibility and taking action unilaterally, and assumedly jointly impact of developments affecting other Member States and the Member State in question, as required by the 'very purpose and objective of *a* Union'.[68] The judgment of the Court of Justice adopted, unfortunately, a close reading of the relevant legal provisions leaving these issues unaddressed.[69]

In defending the autonomy and the specific characteristics of the EU legal order, the Court of Justice in *Opinion 2/13* reconfirmed with force the foundations of the commitments of the Member State in the Union. It argued that the legal structure linking the EU and the member States 'is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values', which 'premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected.'[70] It also discussed that the legal provisions adopted for the realization of the EU's objectives 'are structured in such a way so as to contribute (…) to the implementation of the process of integration that is the *raison d'être* of the EU itself.'[71] Having clarified these bases of the legal obligations of the Member States, the Court of Justice emphasized – following existing jurisprudence – the imperative of full and effective compliance of all the Member States – especially, at the national level – with the EU legal order.[72]

With the inclusion in Article 4(2) TEU of the principle on the protection of Member State identities into the Treaties, the EU constitutional framework seems to have reached a saturation point in the enumeration of 'conservatory' principles designed to safeguard the position of the

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[65] *Ibid.*

[66] Paras. 137-141, View of Advocate General Kokott in Case C-370/12 *Pringle* ECLI:EU:C:2012:675. Interestingly, the Advocate General argued in support of sovereign action by the Member States unrestrained by Article 125 TFEU in order to avoid the 'the negative effects of the bankruptcy of another Member State on their own economic and financial situation' in an environment characterized by mutual interdependencies of national economies, 'which is encouraged and intended under European Union law', para. 139, *ibid.* This indicates that in certain circumstances (i.e., outside the scope of EU law or not affecting EU obligations) unilateral (or multilateral) conduct by the Member States to preserve and protect their interests from negative external effects can indeed be supported.

[67] Paras. 142-143, *ibid.*

[68] Para. 143, *ibid*, emphasis added by author.

[69] Paras. 129-147, Case C-370/12 *Pringle* ECLI:EU:C:2012:756.

[70] Paras. 167-16, Opinion 2/2013 of 18 December 2014.

[71] Para. 172, *ibid.*

[72] Paras. 173-176, *ibid.* The discussions on the 'intrinsic nature of the EU' and on the acceptance by the Member States that relations between them are governed solely by them (paras. 191-194 and 201-212) could be interpreted that any break between EU law and the obligations of the Member States could undermine the collective arrangement (the Union) established between them.

Member States in the Union. The Member State identities clause is perhaps the most robust indication that Member State commitments under the collective framework established by the Treaties are not absolute, although its actual constitutional bite is far from certain.[73] It is difficult to predict whether and how it would influence the traditional legal remits of scrutinizing Member States justifications for departing from their EU obligations, and whether it will provide hard rules instead of judicially determined soft reservations affecting the power of the Union. As in case of the other 'conservatory' principles, it is not excluded that its promised constitutional strength will gradually be weakened by interpretations and applications favoring European integration instead of claims for Member State particularism.

The constitutional principles available to preserve Member State positions and interests in the EU have indeed been softened down in their interpretation and application. The principles limiting EU action and confining legislative discretion – the principle of conferral and the principles of subsidiarity and proportionality – are notoriously weak in safeguarding areas of Member State competences.[74] The applicable legal rules – as discussed most extensively in connection with the competence made available for legal harmonisation in the single market (Article 114 and 352 TFEU) – allow a broad discretion for the EU, delimiting which is not helped by the impreciseness and the heavily qualified character of the relevant judicial formulas.[75] The formalized separation of Union and Member State competences is further undermined by the practice of judicial deference to Union legislative discretion and also by the low intensity of the judicial control of the use of Treaty powers.[76]

The high hopes of the Member States for the principle of subsidiarity to constrain the discretion of the EU legislator and to introduce a principled system for the separation of responsibility between the EU and its Member States in regulation were rapidly dissolved by its actual application.[77] Subsidiarity has failed to designate reserved areas of Member State regulatory autonomy, and it has always been interpreted and applied *in support of* EU level regulatory action.[78]

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[73] It offers a strong counterbalance to supremacy and loyalty as it lacks the element of balancing opposing considerations, Klamert, *op cit supra* note 41, at 20. It offers a perspective for overcoming the absolute supremacy of EU law and challenges the hierarchical understanding of constitutional compliance in EU-Member State relations by offering an institutional framework for determining the constitutional limits of supremacy, A. von Bogdandy and S. Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty', (2011) 48 *Common Market Law Review* 1-38, at 3. It merely 'repackages' pre-Lisbon case law concerning the protection of Member State legitimate interests under EU economic law, T. Konstadinides, 'Constitutional identity as a shield and as a sword: the European legal order within the framework of national constitutional settlement, (2011) 13 Cambridge Yearbook of European Legal Studies 195-218.

[74] Bartolini criticized the vertical distribution of competences in the EU as being contingent upon changing preferences among the Member States, and he talked about the failure of the EU Treaties to 'institutionalize any clear-cut division of competences between the EU and the nation-states', Bartolini, *op cit supra* note 11, at 148-149.

[75] See paras. 83-86, Case C-376/98, *Germany v Parliament and Council* [2000] ECR I-8419 and paras. 60-62, Case C-491/01 *BAT* [2002] ECR I-11453.

[76] See S. Weatherill, 'The limits of legislative harmonisation ten years after *Tobacco Advertising*: how the Court's case law has become a "Drafting Guide"', (2011) 12 *German Law Journal* 827-684, at 833-837. See the acceptance by the Court of Justice of legislative discretion when an area 'entails political, economic and social choices' which require complex assessments, in paras. 68-73 and 123, *BAT*, *op cit supra* note 75.

[77] Weatherill, *op cit supra* note 76, at 844-847 and the literature cited there.

[78] *Ibid*, at 846. G. Davies, 'Subsidiarity: the wrong idea in the wrong place at the wrong time', (2006) 43 *Common Market Law Review* 63-84, at 66-68, arguing that it does not allow a meaningful demarcation of respective competences and calling for balancing between EU and Member State interests to be introduced through proportionality. For a more

The limited utility of constitutional principles in 'conserving' Member State competences has been weakened further by the gradual expansion of EU internal competences in the phenomenon what has become known as 'competence creep'.[79] Coupled with the coercive impact of the principles supporting equal and effective compliance in the Member States (i.e., supremacy), the extension by the EU legislator of its influence over new areas of regulation in the name of pursuing core EU policies – which, for instance, uses conceptual ambiguities to rely on constitutionally only very lightly controlled market building competences for purposes of non-market (social or market correcting) regulation)[80] – has severely restricted Member State capabilities for autonomous conduct.

The location assigned for Member State interests in EU law between compliance and particularism raises considerable doubts as to its appropriateness when the contestability of EU rules – which demand equal and effective compliance from the Member States – is considered. The legal rules defining Member State commitments can be contested because they are available for the realisation of a *certain* kind of – mainly economic – policies reflecting a certain kind of socio-economic arrangements.[81] Despite sustained attempts to address its policy deficits, the EU has remained an asymmetric polity (a legally engineered 'lop-sided structure'[82]) open to challenges on the ground that the discriminate use of law for the promotion of European economic integration has been threatening and subduing equally important social policy objectives, which are pursued – ironically – both at the European and the national level.[83] On this basis, especially in times of reinvigorated European economic integration or in times of deepening economic crisis,[84] the Member States should be able to assume discretion to contest their obligations, and to argue for increased opportunities for particularism in an attempt to counteract or rebalance the narrower and broader social implications of European integration.[85] The balance created under the current legal framework between compliance and particularism could be contested by claiming that the severe restrictions imposed on policy action at the national level in economic and social domains, which have been caught by EU market building, have not been compensated by the creation of common

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rounded analysis, see P. Craig, 'Subsidiarity: a Political and Legal Analysis', (2012) 50 *Journal of Common Market Studies* 72-87. See also the criticism formulated in A. Estella, *The EU Principle of Subsidiarity and its Critique* (OUP, 2002), at 95.

[79] Weatherilll, *op cit supra* note 76; M.A. Pollack, 'Creeping Competence: the Expanding Agenda of the European Community', (1994) 14 *Journal of Public Policy* 95-145; C. Joerges, 'Taking the Law Seriously: on Political Science and the Role of Law in the Process of European Integration', (1996) 2 *European Law Journal* 105-135.

[80] See S. Weatherill, 'Why harmonise?', in T. Tridimas and P. Nebbia (eds), *European Union Law for the Twenty-First Century: Rethinking the New Legal Order* (Hart 2004) 11-32 and R. Dehousse, 'Integration v. regulation? On the dynamics of regulation in the European Community', (1992) 30 *Journal of Common Market Studies* 383-402.

[81] Bartolini, *op cit supra* note 11, at 410-411.

[82] Walker, *op cit supra* note 39, at 95.

[83] See, *inter alia*, F. Scharpf, 'The European social model', (2002) 40 *Journal of Common Market Studies* 645-970; F. Scharpf, *Governing in Europe: Effective and Democratic?* (OUP, 1999); Keating, *op cit supra* note 33, arguing at 16 that 'welfare is less institutionalized than market competition but not entirely absent' and 'the battle for a social Europe is still being fought'.

[84] See the much earlier discussion on economic difficulties and the resulting social and political pressures on key EU policies presenting a dilemma for EU actors (here the Court of Justice) to 'decide whether it is possible to maintain rules and views, reasonably well established in more prosperous times, which have lately come under great pressure' in J. Mertens de Wilmars and J. Steenberge, 'The Court of Justice of the European Communities and Governance in an Economic Crisis', (1984) 82 *Michigan Law Review* 1377-1398, at 1380.

[85] See J.H.H. Weiler, 'The Transformation of Europe', (1991) 100 *Yale Law Journal* 2403-2483, at 2478 discussing the illegitimate promotion of the market to the position of an ethos, ideology and culture in Europe.

European policies for (transnational) solidarity and by the generation of genuinely European public goods.[86]

In case it is accepted, as Bartolini argued, that the EU as a polity has remained within the secure bounds of 'specific goal attainment' and of promoting 'anti-infringement rules in the field of common market creation', and that the legal principles governing the commitments of the Member States prevent the EU from becoming a polity in which the enforcement of law has a more universal application and which does not limit the Member States to fostering their interests in a common political and legal framework,[87] the very rationale for the self-imposed obligations of the Member States and their equal and effective enforcement may come into question from the perspective of conscious and socially sensitive Member States. The same conclusion can be drawn when the argument by Walker is considered as valid. He claimed that the value inflation of the 'law brand' in the EU has led to the 'special structural condition' of the European construction being incapable to address its fundamental policy deficits and being unable to settle the conflicts between Europe's legally safeguarded economic agenda and the competing individual and collective goods, preventing the EU from establishing a proper balance between goods, values and interests and from sponsoring its own properly defined collective goods.[88] When the costs of integration thus become higher than its benefits, and when the obligations of membership are not matched by attainable advantages, Member State acceptance of compliance and of confined particularism seems to stand on shaky grounds.

**Compliance, particularism and transformations of Member State interests in EU law**

The position allocated for Member State interests between compliance and particularism by EU law brings with itself the consequence that Member State positions and interests are subjected to a considerable legal pressure of transformation. The original commitment to pursuing shared interests within the framework of common policies offering mutual benefits to the Member States, and the related imperative of equal and effective compliance by every Member State postulate that when the Member States are allowed to pursue their particular interests in the EU their actions fall under strict scrutiny by EU law and meet certain requirements, which emerge in the process of their reconciliation with the collective commitments laid down in the Treaties.[89] The limited availability of and the limited accepted rationales for avenues to depart from the common obligations, and the substantive and procedural legal confines within which the Member States can promote their interests suggest that with EU membership Member State particularism has been placed

[86] Bartolini, *op cit supra* note 11, at 239-241 and 244-245, and M. Ross, 'Promoting solidarity: from public services to a European model of competition?', (2007) 44 *Common Market Law Review* 1057-1080, especially, the discussion on transnational solidarity.
[87] Bartolini, *op cit supra* note 11, at 245-246.
[88] Walker, *op cit supra* note 39, at 93-99.
[89] See also the control by EU law extending to policy areas reserved for the Member States in the formula that 'although direct taxation falls within the competence of the Member States, they must nonetheless exercise that competence in accordance with European Union law', para. 14, Joined Cases C-338/11 to C-347/11 *Santander Asset Management SGIIC and Others* ECLI:EU:C:2012:286.

permanently in the close embrace of European collective arrangements. Similar conclusions follow from EU law distinguishing between legitimate and illegitimate interests of the Member States, whereby Member States are told which national considerations can be pursued by way of derogating from the mutual commitments of the Member States and which interests can only be pursued within the available EU policy frameworks.[90]

From a purely technical perspective, the transformative impact of EU law on Member State interests is based on requirements that national policies competing with those of the EU are pursued in well-governed and well-regulated frameworks, and that they correspond with recognized hiatuses of EU policies, or with explicit intentions to rely on Member State action to deliver policy outcomes also desired by the EU (e.g., the provision of accessible and effective public services). The transformation of Member State interests under EU law is less certain when the measurement of the predicted costs and advantages of common policies enable Member States to rely on legal constructions which redirect the assessment of Member State obligations to the political discretion of the Member States, as regulated in Article 108(2) TFEU or in Article 65(4) TFEU. Similarly, leaving explicit Treaty commitments dormant as a result of political opposition by the Member States indicates that there is room for unrefined expressions of Member State interests under EU law. Nevertheless, in order to avoid Member States returning to comforting practices of unilateralism, for instance, through economic protectionism and exclusionarism EU law needs to ensure that Member States are allowed to depart from their common obligations only in instances when policy deficits, the unavailability of policy instruments and resources, or the lack of robust structures for the reconciliation of competing policy objectives at the European level need to be remedied by Member State action. Having the necessary mechanisms in place to scrutinize and test Member State interests could be particularly important when the earlier discussed imbalances and the asymmetries of the EU polity prompts the Member States to question the fundamentals of core EU policies.

Transformations of Member State interests under the EU legal framework can be conceived as a filtering process declaring only those interests admissible which can be translated into the functional language and categories applied by EU law in determining lawful and unlawful Member State behaviour. The Member States, therefore, need to frame their interests following a standard set of expert (legal and policy) terminology and arguments, especially, as it follows from the application of the proportionality principle. The treatment of Member State interests will, however, not be uniform. Especially before the Court of Justice, the prospective treatment of the national interest will depend on the legal procedure at issue, the institutional priorities pursued in individual legal procedures, the circumstances of individual cases, the Court's assessment of judicial involvement in matters of government, the Court's willingness to substitute the complex policy assessment by expert agencies with its own, the amount and sophistication of applicable EU law available, the possibility of judicial deference to national courts and national governments, or on the particular legal test applied in determining the limits of EU obligations.[91]

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[90] Disallowing the subjective economic interests of the Member States as legitimate exceptions from EU obligations means that the primary location for the Member States to pursue their economic interests is the economic policies of the Union created for the mutual benefit of the Member States.

[91] Compare, for instance, the judgment in Joined Cases C-105/12 to C-107/12 *Essent op cit supra* note 45, where EU legislation on electricity markets provided a rather convenient and fitting background for the decision approving national

In the following, we will look at examples of how Member State interests are approached and treated in EU law. Firstly, we examine how Treaty provisions and the related EU policies can be left dormant as a result of the Member States jealously safeguarding national positions and considering EU policies as too risky or costly. Secondly, we analyze the legal distinction between legitimate and illegitimate Member State interests as dictated by the collective arrangements of the EU polity. In case the interests of the Member States are recognized as legitimate, they are subjected to moderation under EU law. The purpose of moderation is to exclude inappropriately regulated and governed Member State policies pursuing national interests. They are considered to represent unjustifiable, unnecessary and excessive interferences with common policies at the expense of the Union and of the other Member States. Essentially, the Member States are required to act in accordance with the expectations of certainty, foreseeability and transparency, and to confine excessive discretion in the realization of exempted national policies and provide sufficient legal safeguards and remedies to the individuals affected.

*Treaty provisions left dormant*

The history of post-World War II European policy making has shown us that the interests of the Member States can give way to keeping Treaty provisions formulating obligations for the Member States and envisaging the development of common policies dormant for decades.[92] In such instances, while the Treaties would express a joint commitment of the Member States to attain legally specified objectives, because of the sensitive nature of the national interest affected, and often because of the entrenched political and legal position of national structures and national policies, the relevant legal obligations remain unenforced and the mandate for developing EU policies – for instance, through legislation – unused. The muted silence of the law indicates not only the explicitly political character of certain EU obligations, but also the dynamics of how shared national interests expressed in common EU policies interact with the particular interests of the Member States, and of national economic and political stakeholders. The subsequent reactivation in law of the slumbering Treaty provisions indicates a revised understanding of where Member State interests lie and how those could be pursued through joint action at the European level.[93]

EU energy law, apart from the specific arrangements established for coal and steel in the ECSC and for nuclear energy in the EURATOM Treaty, had lain dormant for at least three decades. This occurred despite the rapidly growing importance of affordable and sustainable energy for the European economy and the emergence of the global environmental and climate change agenda. The

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policy, and the judgment in Case C-271/09 *Commission v Poland* [2011] ECR I-13613, where a much lesser limitation serving a public interest aim on capital movements was found incompatible with the Treaties.

[92] Discussed together with other factors and consequences influencing Member State political conduct in the *process* of European integration in P. Pierson, 'The Path to European Integration: A Historical Institutionalist Analysis', (1996) 29 *Comparative Political Studies* 123-163.

[93] See also the development of the law under the free movement of capital where change in national positions towards capital movements seems to have provided the impetus for a more robust regulation and application of the relevant Treaty provisions, J. Snell, 'Free Movement of Capital: Evolution as a Non-linear Process', in P. Craig and G. de Búrca (eds), *The Evolution of EU Law* (OUP, 2012), 547-574, at 548-554.

causes of paralytic EU action in (the single market for) energy must be sought at the national level. The Member States – jealously safeguarding their 'energy sovereignty' – were reluctant to endow the Union with the necessary competences, and there were significant structural differences between national energy regulations, policies and institutional arrangements for the Member States – which had been enjoying a close and cosy relationship with their national energy monopolies – to convince themselves about the futility of including energy in the construction of the single European market.[94] Paradoxically, the drive for common European energy law and policy came – in part – from the national level. The experiences with competitive energy markets in certain Member States, growing dissatisfaction with national energy monopolies and with their 'symbiosis' with national political elites, and economic and policy arguments that competitive markets will provide affordable and sustainable energy without compromising the delivery of public service obligations gradually persuaded the Member States to seek their interest in joint action with other Member States at the European level.[95]

Similar developments driven by Member State interests characterized the development of Union law and policy in the transportation sector. The European policy for transport is one of the original policies of the EU which was kept out of action for at least 30 years by the Member States. Not until the condemning judgment by the Court of Justice following the action of the European Parliament establishing the failure of the Council to act upon the competences provided in the Treaties has EU transport policy commenced its actual operation.[96] The preparedness of the Member States to safeguard their 'sovereignty' in matters of transport is clearly reflected in the early legal squabble between the Council and the Commission regarding the applicability of EU competition rules in the transport sector. While the Council driven by the interest of the Member States to keep national transport policies immune from interferences by EU economic law argued for the inapplicability of EU competition law in matters of transport,[97] the Commission was reluctant to accept a sector specific, non-universal application of the competition provisions of the Treaties.[98] The ruling 20 years later by the Court of Justice in *Nouvelles Frontières* ultimately accepting the Commission's position[99] coincided more or less with the renewed interest of the Member States in developing a common transport policy.[100] The current legal and policy framework of EU transport policy makes it clear that because of the complexities of the transport sector the Member

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[94] K. Talus, *EU Energy Law and Policy* (OUP, 2013), 17-19.

[95] *Ibid.* The developments surrounding the three EU energy market packages reflect a similar dynamics in Member States gradually agreeing to reduce their discretion in energy policy and regulation in the interest of the benefits offered by a common EU energy policy, see L. Hancher and P. Larouche, 'The Coming of Age of EU Regulation of Network Industries and Services of General Economic Interest', in P. Craig and G. de Búrca (eds), *The Evolution of EU Law* (OUP, 2012), 743-782, at 752-756.

[96] Case 13/83 *Parliament v Council* [1985] ECR 1513.

[97] As expressed in Regulation No 141 of the Council exempting transport from the application of Council Regulation No 17, OJ 1962 124/2751 and Regulation (EEC) No 1017/68 of the Council applying rules of competition to transport by rail, road and inland waterway, OJ L 1968 175/1. See also the current legislative framework in Council Regulation (EC) No 169/2009 applying rules of competition to transport by rail, road and inland waterway, OJ L 2009 61/1.

[98] L. Ortiz Blanco and B. van Houtte, *EC Competition Law in the Transport Sector* (OUP, 1996), at 30.

[99] Joined Cases 209/84-213/84 *Lucas Asjes* [1986] ECR 1425. See also the more restrained ruling concerning the applicability of the fundamental freedoms of the single market in the transport sector in paras. 21-26, Case 167/73 *Commission v France* [1974] ECR 359, which is also the product of its time.

[100] White Paper: Completing the Internal Market, COM(85) 310 final; White Paper: On the Future Development of the Common Transport Policy, COM(1992) 494 final.

States are prepared to pursue their shared interest – where necessary – in joint European action and to constrain national policy discretion accordingly.[101]

*Distinguishing legitimate and illegitimate Member State interests*

The ability of the Member States to pursue their particular interests as members of the European Union is perhaps most directly confined by EU law scrutinising the choices of Member State interest and declaring those choices legitimate or illegitimate in light of the common commitments of the Member States. With this intervention, EU law keeps reminding the Member States that certain categories of local interests – because of cross-border interdependencies and other cross-border pressures – are most effectively realized within the framework of common policies and not by acting individually, and that unilateral conduct by individual Member States pursing the same interests puts the shared interests and the mutual benefits available to the Member States to jeopardy. Conversely, when Member State interests point towards deficits in EU policies, or highlight the economic or social imbalances of the EU polity, EU law is likely declare them as legitimate. The choice under EU law is more uncertain when Member State interests represent a diffuse fusion of economic and other, for instance, industrial and trade policy, social and consumer policy[102] considerations. In this connection, EU law must not forget that for reasons based on the principle of subsidiarity, or because the EU may lack the necessary competences, instruments or resources the national level may be the more appropriate location of governance.

Generally, the 'national interest' – as a term relied upon to offer a blanket justification for Member State policies – is received with considerable suspicion in EU law. Its use is not considered as illegitimate *per se*. Its rejection will be based on the traditional grounds applied in EU law in moderating interests raised by the Member States, such as transparency, legal certainty and non-discrimination.[103] The scepticism of the Court of Justice is understandable as sweeping claims by the Member States that domestic policies are justified by the general interest are seen as enabling the application of inadequately targeted and circumscribed national measures, and also as validating economic and non-economic considerations which extend beyond what may be deemed legitimate for the Member States to pursue under the particular EU policy framework. Even in disputes of great significance for the Member State concerned, such as the *Volkswagen* 'golden-shares' case, the Court of Justice would be very reluctant to accept overly broad general considerations raised to justify restrictions on the fundamental freedoms.[104] For the 'national interest' to stand as an admissible justification for individual Member State action, it must represent valid and objective

[101] See White Paper: European Transport Policy for 2010, COM (2001) 370 final and White Paper: Roadmap for a Single European Transport Area, COM (2011) 144 final.
[102] See, for instance, the Treaty regulation of State aid compatible with the internal market in Article 107 TFEU.
[103] Point 8, Commission Communication on certain legal aspects concerning intra-EU investment, OJ C 1997 220/15. They are also found in general legislative instruments consolidating previous legal developments, such as Regulation 764/2008/EC laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State, OJ L 2008 218/21; Directive 2006/123/EC on services in the internal market, OJ L 2006 376/36; Regulation 614/2014/EU declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 2014 187/1.
[104] See paras. 79-80, Case C-112/05 *Commission v Germany* [2007] ECR I-8995.

considerations which raise no doubts how the Member State will exercise its discretion and which allow Member State conduct to be challenged by the individuals affected.[105]

The collective arrangements of the EU polity and the related legal principles concretising the commitments of the Member States are likely to be contradicted by Member State interests which enable the Member States to profiteer to the disadvantage of other Member States and upset the assumed 'competitive' equality of the Member States within the European Union. The law, therefore, will exclude purely political or purely economic (e.g., explicitly protectionist) national interests, and it will accept interests the link of which with Member State competitive positions is only indirect and a specific policy dimension is particularly prevalent (e.g., public health, public security, media plurality etc.).[106] National interests coinciding with EU priorities and policies (e.g., protecting public service values, promoting regional development, or strengthening innovation) are also likely to be supported. In the same vein, the Member States – when interfering with the operation of competitive markets – cannot rely on considerations of expediency following from the general state of a given economic sector.[107] Conversely, general economic considerations, such as the limited capacities offered by the market to provide market-based solutions of sufficient quality and effectiveness could be accepted in case they are indispensable for the achievement of the relevant EU policy aim (e.g., the delivery of public services or the correction of market failures through state aid).[108]

There are a number of categorisations of legitimate and illegitimate national interests available. The differentiation literature – although the actual practices are less clearly defined – distinguished between the categories of legitimate socio-economic differences between the Member States and illegitimate subjective political preferences represented by national governments (e.g., domestic partisanship, political obstructionism, national profiteering).[109] A further distinction could be drawn between local interests which undermine core EU policies (i.e., protectionism, economic exclusionarism) and interests which are compatible with EU policy priorities (i.e., structural reforms to increase competitiveness in sector, active promotion of research and development, or the provision of state aid for environmental protection as a common European interest). This distinction is reflected in the exclusion of interests of purely economic nature, for example, those relating to the financial interests of the Member States or to the development of the national economy, from the legal justification of Member State conduct violating EU obligations.[110] The

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[105] Paras. 33-35, Joined Cases C-282/04 & 283/04 *Commission v the Netherlands* [2006] ECR I-9141. See also the Greek crisis management judgment, paras. 76-77, Case C-244/11 *Commission v Greece* ECLI:EU:C:2012:694, and the Italian helicopter procurement judgment, paras. 42-54 Case C-337/05 *Commission v Italy* [2008] ECR I-2173.

[106] For instance, 'unorthodox' state measures aiming to channel legitimate incomes gained in the market into the state budget to meet politically driven fiscal policy objectives, or the renationalisation of economic operators or the redistribution of concessions under protectionist premises are likely to be declared as serving illegitimate interests.

[107] Paras. 41-42, Case C-162/06 *International Mail Spain* [2007] ECR I-9911.

[108] Paras. 78-80, Case C-209/98 *Entreprenørforeningens Affalds* [2000] ECR I-3743. See also paras. 20-22, 36/73 *NV Nederlandse Spoorwegen* [1973] ECR 1299.

[109] G. de Búrca, 'Differentiation within the Core: the Case of the Common Market', in G. de Búrca and J. Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility?* (Hart, 2000), 133-171, at 135-136.

[110] Para. 52, Case C-367/98 *Commission v Portugal* [2002] ECR I-4731; para. 47, Case C-35/98 *Verkooijen* [2000] ECR I-4071. Regarding the free movement of goods, para. 62, Case C-265/95 *Commission v France* [1997] ECR I-6959, and the free movement of services, para. 23, Case C-398/95 *SETTG* [1997] ECR I-3113 and para. 52, Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1177. Purely (national) economic interests may also fail the requirements imposed during the

jurisprudence of the Court of Justice has consistently denied that aims, such as reinforcing the structure and operation of competitive markets at national level, or to modernize markets and increase the effectiveness of their operation in a single Member State,[111] could be legitimately raised in EU law in protection of Member State policies. The accommodation of national economic interests under the EU framework may have better opportunities when they are compatible with the priorities of an EU policy area, which priorities may be expressly recognized in the relevant piece of EU legislation (e.g., the economic considerations applicable in a competitive public services market, such as distortion of competition, information-deficit, or the lack of transparency in the market).[112] In case the economic interests raised are compatible with EU policies, their legitimacy depends primarily on whether they violate the principle of non-discrimination and whether they aim to put domestic economic operators – the national economy – at an advantage with regards the economic operators and the economies of other Member States. Their assessment under EU law may also be more favourable if they are recognized as valid considerations by the applicable EU sectoral legislation, and when they form part of a complex agenda for policy reform at national level following practices of good economic governance and adhering to the rule of law considerations applicable to economic regulation.

As suggested earlier, the distinction between legitimate and illegitimate Member State interests is not devoid of controversies. The EU's involvement in making these choices is compromised by questions of legitimacy and accountability, by doubts about EU actors having sufficient expert knowledge, and by issues of actors having to follow agendas specific to the EU polity, which may not make sense in the domestic context.[113] More evidently, clear-cut categorisation could be prevented by the usage of uncertain and 'slippery' terms, or by dressing up national preferences, policy priorities and commercial advantages as objective interests.[114] There is a particularly fine line between the Member States being unwilling to sacrifice domestic resources for the implementation of EU policies on the grounds of national economic interests and claiming that the departure from EU obligations is justified by the interests of administrative economy and efficiency.[115] Doubts about the delineation of legitimate and illegitimate interest may follow from the practice of the Court of Justice which in certain instances may be inclined to overlook the significant commercial implications of non-economic interests (e.g., the protection of national cinematographic

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moderation of the national interest as they may be extremely broad as a matter of substance, they reduce the transparency and accessibility of policy-making, or they offer uncontrollably broad discretion at the national level.

[111] Para. 52, Case C-367/98 *Commission v Portugal op cit supra* note 110; para. 37, Case C-174/04 *Commission v Italy* [2005] ECR I-4933; para. 44, Case C-274/06 *Commission v Spain* [2008] ECR I-0026, in which the strengthening of the structure of competition meant reinforcing the ability of the market to resist anti-competitive practices.

[112] Paras. 49-52, *Essent op cit supra* note 45.

[113] See, especially, the dilemmas faced by the EU Court of Justice whether to defer to the assessment of national governments or to impose judicially developed controls over national policy and regulation.

[114] See W. Wallace and H. Wallace, *Flying Together in a Larger and More Diverse EU*, (The Hague: Netherlands Scientific Council for Government, Working Documents, No. W 87, 1995). In this regard, see also the possibility of 'creative' compliance with EU law and Member States testing under the threat of non-compliance the boundaries of grey areas in EU law in order to secure advantages by regulation and policy making over other Member States, or to generate local social and economic changes which may be impossible to reverse when non-compliance is eventually established.

[115] See, for example, Joined Cases C-501/12 to C-506/12, C-540/12 & C-541/12 *Specht* ECLI:EU:C:2014:2005. See also the case law confirming as legitimate the protection of the financial equilibrium of national public services, *inter alia*, Joined Cases C-11/06 & C-12/06 *Morgan* [2007] ECR I-9761; Case C-8/02 *Leichtle* [2004] ECR I-2641; Case C-303/02 *Haackert* [2004] ECR I-2195.

culture or the protection of small printed media),[116] and in other cases it would be reluctant to acknowledge the recognisable social and industrial implications of economic activities (e.g., the protection of small traders).[117] Judicially constructed formulas, such as the 'sufficient link' clause,[118] could authorize Member State practices which could otherwise be seen as driven by Member State particularism, or by protectionist intentions.

The assessment under EU law may be equally uncertain in case of Member State interests granted Treaty-level immunity. The exclusive competence available for the Member States under Article 345 TFEU[119] to make policy choices relating to the privatisation or the nationalisation of economic sectors and industries – which latter could involve the regulation of state ownership or the securing of state administrative supervision over the operation of private economic operators in legislation[120] – could be deemed as pursuing illegitimate objectives when Member State conduct fails to meet the fundamental Treaty freedoms and the basic requirement of non-discrimination.[121] Distinctions between legitimate and illegitimate interests could be further blurred by the fact that some otherwise ineligible political interests may be given recognition under political duress at the level of EU primary law (i.e., individual Member State opt outs or exemptions tailored to fit individual Member States).[122] The use of primary law in making Member States to acknowledge the particular interests of an individual Member State is particularly problematic as the national interest escapes the jurisdiction available to the Court of Justice to legitimate, moderate and ask for the justification of interests formulated at the national level.[123]

*Moderating Member State interests*

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[116] Case 60/84 *Cinéthèque* [1985] ECR 2605 and Case C-368/95 *Familiapress* [1997] ECR I-3689. See also the judgment in Case C-452/01 *Ospelt* [2003] ECR I-9743, where it was unclear whether both the economic and the non-economic aspects of maintaining a distribution of law ownership, 'which allows the development of viable farms and sympathetic management of green spaces and the countryside as well as encouraging a reasonable use of the available land by resisting pressure on land, and preventing natural disasters are social objectives', were adequately taken into account. See, in contrast, Case C-202/11 *Las* ECLI:EU:C:2013:239, concerning the diffuse national interest of protecting national languages in the domain of employment contracts, and Case C-197/11 *Libert* ECLI:EU:C:2013:288 where housing policy addressing local housing shortages was considered in the context of the free movement of capital.

[117] See the order in Case C-343/12 *Euronics Belgium* ECLI:EU:C:2013:154, in which the protection of consumers triumphed the protection of the interests of small traders banning commercial practices which would enable small traders to compete with retail giants.

[118] *Inter alia*, Case C-103/08 *Gottwald* [2009] ECR I-9117; Case C -213/05 *Geven* [2008] ECR I-6347; Case C-158/07 *Förster* [2008] ECRI-8507.

[119] Regarding privatisation, paras. 16-17, Case C-244/11 *Commission v Greece op cit supra* note 105. Regarding nationalisation, para. 23, Case C-309/96 *Annibaldi* [1997] ECR I-7493.

[120] Para. 30, *Essent op cit supra* note 45, which in para. 31 held that 'Member States may legitimately pursue an objective of establishing or maintaining a body of rules relating to the public ownership of certain undertakings.'

[121] Para. 36, *ibid* and the cases cited; paras. 16-18, Case C-244/11 *Commission v Greece op cit supra* note 105. See also para. 38, Case C-302/97 *Konle* [1999] ECR I-3099; para. 67, Case C-463/00 *Commission v Spain* [2003] ECR I-4581; para. 44, Case C-503/99 *Commission v Belgium* [2002] ECR I-4509; para. 44, Case C-483/99 *Commission v France* [2002] ECR I-4781.

[122] F. Tuytschaever, 'EMU and the Catch-22 of European constitution-making', in G. de Búrca and J. Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility?* (Hart, 2000), 173-196, at 180-181.

[123] See the related expression that Maastricht 'hijacked' the *acquis* in D. Curtin, 'The Constitutional Structure of the Union: a Europe of Bits and Pieces', (1993) 30 *Common Market Law Review*, 17-69, at 46.

As a general rule under EU law, the Member States are required to realize their interests in well-regulated and governed processes, and they must avoid promoting interests which lack comprehensive preparation, sufficient epistemic support, transparency and accountability, or adequate regulatory and governance arrangements at the national level.[124] The burden of justification and explanation is placed on the Member States, which need to ensure that the interests promoted are substantively not deficient and are adequately prepared and presented in the legal framework of EU policies.[125] As part of the transformative impact of EU law, because of the particular position of the EU with regards the Member States, the Member States could be asked to internalize non-national interests (e.g., the interests of foreign nationals) in domestic law and governance, for instance through the principle of mutual recognition.

Considering that the Member States assumedly possess superior competences in regulation and governance, the expectations raised by EU law when moderating the national interest are not particularly strenuous, although habitually or intentionally badly governed and regulated Member States policies will face difficulties meeting them. Beyond observing the groundrule of non-discrimination,[126] Member State action is expected to relate to a particular purpose and objective (i.e., regulation must be adequately targeted), it must pursue genuine policy objectives, which are determined clearly and transparently in advance, and it must be limited to what is necessary to achieve the policy objectives identified and the application of excessive administrative discretion must be avoided.[127] Realising the national interest must also have regard to the fundamental requirements of accessible and transparent regulation, and it must comply with formal rule of law requirements, such as the precise and clear determination of the legal position of individuals, the provision of adequate information on rights and obligations, the availability of effective judicial protection and remedies, and the adequate (objective) delimitation of the applicable measures and policies.[128] The moderation by EU law of the national interest reaches the furthest into Member

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[124] This would take place within the traditional framework of examining choices between controlled and accountable, and effective and responsive governance. It is far from clear that national governments using blatantly the rhetoric of the national interest to remove transparency and accountability from national governance and to circumvent rule of law requirements in order to grant excessive executive discretion for themselves – practices which because of their gravity go beyond the dichotomy of good and bad governance and which could undermine the shared values of the Union – can be monitored effectively within these remits. For a potential novel instrument to tackle such Member State conduct without resorting to Article 7 TEU, see Commission Communication: A New EU Framework to Strengthen the Rule of Law, COM(2014) 158 final/2 and Council Conclusions on Ensuring Respect for the Rule of Law, PR 16936/14, at 20-22.

[125] In particular, that they meet the predetermined parameters of justification, such as those provided in the proportionality test in connection with the fundamental freedoms or under Article 106(2) TFEU. This burden imposed on the Member States could be approached from opposing perspectives: while it reduces Member State freedom in promoting its interests, its impact that the Member States are forced to follow practices of open and good governance could be in the interest of nations.

[126] It contains the openness and transparency requirements of its own, see paras. 22-23, Case C-410/04 *ANAV* [2006] ECR I-3303 and paras. 50-51, Case C-458/03 *Parking Brixen* [2005] ECR I-8585.

[127] *Inter alia*, paras. 17-21 and 35-46, Case C-265/08 *Federutility* [2010] ECR I-3377; paras. 48 and 66-80, Case C-242/10 *ENEL Produzione* [2011] ECR I-13665. See the rather similar conditions in connection with the compensation of public service obligations, paras. 89-93, Case C-280/00 *Altmark Trans GmbH* [2003] ECR I-7747.

[128] *Inter alia*, para. 59, *ibid*; paras. 16-19, Case C-320/91 *Corbeau* [1993] ECR I-2533; paras. 57-65, Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089. The Member States could be required to introduce compensatory mechanisms or regulatory systems to control the operation of Member State policy or to remedy its unlawful (economic) impacts, paras. 56-62, Case C-340/99 *TNT Traco* [2001] ECR I-4149. See in this regard, N. Boeger, 'Minimum Harmonisation, Free Movement, Proportionality', in P. Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (CUP, 2012), 62, at 90-91.

State autonomy in the form of the less restrictive alternative national measure requirement, as it may be available under the principle of proportionality.[129] These European requirements of good governance and regulation demand that Member States in pursuing their interests should avoid (bad) routines and domestic practices, and that their conduct is able withstand professional legal and policy scrutiny.[130] It will not be permitted that the shared interests of the Member States are unduly undermined by badly regulated and governed national interests.

The intensity of moderation is particularly interesting in case of national interests which match EU policy objectives, or which promise to supplant EU efforts in achieving those objectives through autonomous Member State action.[131] In case of such overlap between the Union and the national interest, Member State autonomy and discretion in realising the relevant objectives could be granted a rather broad leeway.[132] In its early electricity market judgments, the EU Court of Justice recognized – as a matter of principle – the discretion available to Member States to interfere with the public services market in pursuance of national public service policy and the related economic, fiscal and other policy objectives.[133] These include – matching the definition given to Services of General Economic Interest in the EU[134] – the objectives of the undisturbed and sufficient, reliable and effective, efficient and socially responsible provision of public services.[135] It also held that the assessment of potential, less restrictive alternative Member State measures must take place having regard to the specificities of the domestic public services market, and that speculative assessments of potential alternative measures must be avoided.[136] Supplanting EU social policy objectives through Member State conduct, especially when there is a genuine and sufficiently serious threat affecting the

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[129] *Inter alia*, paras. 56-58, Case C-157/94 *Commission v the Netherlands* [1997] ECR I-5699; paras. 53-54, Case C-158/94 *Commission v Italy* [1997] ECR I-5789; paras. 100-101, Case C-159/94 *Commission v France* [1997] ECR I-5815. Opinions may differ whether this is desirable; see, regarding Article 106(2) TFEU, T. Prosser, *The Limits of Competition Law* (OUP, 2005), at 137-138, J. Baquero Cruz, 'Beyond Competition: Services of General Interest and EC Law', in G. de Búrca (ed) *EU Law and the Welfare State* (OUP, 2005), 169-212, at 191-192, and H. Schweitzer, 'Services of General Economic Interest', in M. Cremona (ed), *Market Integration and Public Services in the European Union* (OUP, 2012), 11-62, at 42.

[130] Narrow-minded, badly designed, erroneously prepared, potentially unfair and unsustainable expression of local interests and considerations will be deemed unacceptable, see para. 35, Case C-162/06 *International Mail Spain op cit supra* note 107; paras. 14-16, Case C-320/91 *Corbeau op cit supra* note 128. See also the requirement of consistent and systematic regulatory intervention at national level as a condition for finding national measures suitable to achieve their aim, paras. 59-61, Case C-42/07 *Liga Portuguesa de Futebol Profissional* [2009] ECR I-7633 and the cases cited.

[131] Necessarily, the autonomy of Member State action will depend on the nature of the EU competence affected (i.e., exclusive or shared), and on the nature of EU harmonisation efforts in the area (i.e., minimal or full). Also, there may be a temporal dimension of these legal possibilities, such as that experienced in case of Services of General Economic Interest, where the protection of public service values was first an interest represented at national level which later found its way into the Treaties (Protocol No. 26).

[132] A fitting example is the EU-created concept of Services of General Economic Interest, the content and application of which will be determined at the national level, which will only be subject to limited supervision by the EU, Commission Communication on Services of General Interest in Europe, OJ C 2001 17/4.

[133] Paras. 37-40,
*Commission v the Netherlands*, cited *supra* note 133; paras. 52-55, *Commission v France*, cited *supra* note 133.

[134] See Commission Communication on Services of General Economic Interest, COM(2000) 580 final and Commission Communication on Services of General Interest, COM(2007) 724 final.

[135] See paras. 41-42, Case C-157/94 *Commission v the Netherlands op cit supra* note 129; paras. 57-58, Case C-159/94 *Commission v France op cit supra* note 129.

[136] Paras. 56-58, Case C-157/94 *Commission v the Netherlands op cit supra* note 129; paras. 100-101, Case C-159/94 *Commission v France op cit supra* note 129.

operation of fundamental public services and meeting fundamental social needs,[137] could entail that the usual good governance and regulation requirements (e.g., the powers available will be adequately targeted[138] and executive discretion will be sufficiently constrained[139]) represent only fairly light burdens on Member State action, and that substantive matters are left for the assessment of the Member State concerned.

Moderation by EU law may be more confined when Member States decide to take unilateral action to tackle allegedly abusive conduct affecting national interests, which may follow from imprecise European regulation. In such an instance, the Member State concerned would be pursuing its own particular interest in a grey, boundary area where the reach or the substance of EU obligations are uncertain, and while it is likely that national action would formally be lawful it may as well be morally or socially controversial.[140] In a similar vein, the interests promoted by the Member States could receive a more favourable treatment when the Member States are allowed to fill concepts available in EU law with their own content and different Member States are permitted to give different meanings to the same legal concepts. The examples include the concept of Services of General Economic Interest,[141] or the concepts of public morality, public health and, to a lesser extent, public order. Judgments, such as *Omega Spielhallen*, *Denkavit* or *Sandoz*[142] indicate that national particularities can be accommodated under European legal concepts and national interest considerations can be given a deferential treatment even when they constitute an interference with the fundamental freedoms.

**Conclusions**

With the Treaties establishing the European Economic Communities, and later the European Union, the Member States agreed in a Faustian pact to give up the *sauve qui peut* approach of national unilateralism and to develop common policies pursuing shared interest for the mutual benefits of every Member State. In a collective regime among States bound together under shared interests by cross-border interdependencies and other cross-border pressures, such as the EU, committing to equal and effective compliance by the Member States is fundamental as otherwise the Member States would be damaging their interests elevated to the European level and also the particular interests of individual Member States. Nevertheless, because common policies may suffer from deficits, or competing legitimate policy aims need to be given effect, or for reasons to be found in Member State diversity or in the application of the subsidiarity principle, the Member States are not prevented completely from pursuing their interests under the EU framework. Their freedom is, however, not complete. Because they have committed themselves to the collective arrangements of the EU, Member State conduct will fall under scrutiny under EU law and the Member States are expected to follow certain patterns of behaviour, both of which will have a transformative impact on

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[137] Paras. 47-48, Case C-483/99 *Commission v France op cit supra* note 121; paras. 45-47, Case C-503/99 *Commission v Belgium op cit supra* note 121; paras. 71-72, Case C-463/00 *Commission v Spain op cit supra* note 121; paras. 50-54, Case C-207/07 *Commission v Spain* [2008] ECR I-0111.

[138] Para. 56, *ibid*; para. 82, Case C-463/00 *Commission v Spain op cit supra* note 121.

[139] Paras. 69-75, Case C-244/11 *Commission v Greece op cit supra* note 105.

[140] See, for instance, C. O'Brien, 'I trade, therefore I am: legal personhood in the European Union', (2013) 50 *Common Market Law Review* 1643-1684, making the point at 1643 that the particular framework for EU citizenship enables 'parsimonious approach to implementation' by the Member States offering 'minimal, piecemeal entitlements' and undermining European solidarity.

[141] *Supra* note 132.

[142] Case C-36/02 *Omega Spielhallen* [2004] ECR I-9609; Case 251/78 *Denkavit* [1979] ECR 3369; Case 53/86 *Sandoz* [1987] ECR 2691.

how Member State interests are formulated and represented within the EU framework. Accordingly, the Member States find their interests positioned between the imperative of equal and effective compliance with their obligations and the law guaranteeing legitimate areas of Member State particularism.

What this means for the Member States is that when they contest their EU obligations, or argue for legal and policy leeway from those obligations, as they often do, they need to remind themselves that the containment of unilateralism under the EU framework has taken place for their own individual and mutual benefit. EU legal obligations and the related principles aiming to ensure the equal and effective compliance of every Member State are observed not only because this is how European States are expected to behave under the rule of law, but also because cooperation and other forms of collective conduct are inevitable in areas where cross-border pressures make the attainment of policy objectives and the avoidance of policy failures by Member States acting individually impossible, or excessively risky or costly. From this perspective, Member State non-compliance risks much more than the failure to observe the common legal rules. This is not to say that the Member States should not be tenacious and perhaps stubborn in representing their interests. European diversity, the imbalances and asymmetries of the EU polity, and the criticized inability of the Union to generate genuine collective goods necessitate that the Member States are aware of their interests and are prepared to pursue them within the collective EU framework.