CHAPTER IV

Limits and Use of European Union Competences: General Considerations in the Context of Policies on Border Checks, Asylum, and Immigration

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Abstract

Competences of the European Union have recently become an increasingly interesting issue from a scientific viewpoint. This is primarily because of the law-making activity of European Union institutions, particularly the Court of Justice of the European Union and European Commission. This study aims to analyse the boundaries and rules for exercising the European Union competences in the field of migration and refugee law. The key for this analysis is the principle of conferral, which is of fundamental importance for the limits of European Union competences because of the sovereignty of the subjects of public international law. Moreover, the principles of proportionality and subsidiarity are invoked as determinants for exercising European Union competences. This study explains the meaning of these three principles, particularly focusing on the treaty image of the principle of conferral in the European Union. In this context, it also presents the phenomenon of competence creep described in the literature. The analysis is based on the primary law of the European Union, especially the relevant provisions of the Treaty on European Union and Treaty on the Functioning of the European Union, as a model for the scope of sovereign states' consent while considering the principle of conferral. Further, the study analyses the secondary law of the European Union regarding its compliance with the primary law, specifying the scope of the European Union's

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competences and determining current European Union standards for border checks, asylum, and immigration policies. Consequently, it analyses the decision-maker's choice regrading compliance of the detailed scope of the European Union competences when encountering doubts that cannot be resolved using a literal or systemic interpretation, that is, where it is necessary to refer to a purposive interpretation. The study concludes with a concise summary proposing how to solve the identified problem.

Keywords: EU competences, migration law, refugee law, principle of conferral, principle of subsidiarity, principle of proportionality, competence creep

1. Introduction

An interesting scientific topic for analysis is the limits assigned to the competences of the European Union (EU)[1] under the principle of conferral by the subjects of public international law. The literature contains scientific items related to the phenomenon of competence creep or creeping competence. The essence of competence creep is that the EU extends—particularly through the soft law issued by the European Commission (EC) and jurisprudence of the Court of Justice of the European Union (CJEU)—its competences to areas that have not been assigned to it by the sovereign entities of international law (i.e. states).[2] Thus, competence creep occurs when the EU acts beyond the limits of the competences conferred on it by the principle of conferral. Therefore, legal research focuses on the analysis of borders, and the rules for exercising EU competences appear to be up-to-date and justified by tangible needs. For this analysis, the relevant provisions of the Treaty on the Functioning of the European Union (TFEU)[3] and Treaty on European Union (TEU),[4] as well as the EU picture of the principle of granting as a model for the scope of sovereign states' consent, are crucial. Selected EU secondary legislation, which set the current EU standards in the fields of border control, asylum, and immigration policies and specify the scope of EU competences, are also helpful. This leads to a discourse related to the decision-maker's choice when encountering doubts regarding compliance of the scope of EU competences specified in the EU secondary law, with the relevant provisions of the EU primary law determining the limits of these competences. First, the EU image of the award principle is analysed as a foundation for

1 On EU competences, see, for example, Öberg, 2017, pp. 391–420; Mostowik, 2011, pp. 9–41; Kuś, 2014, pp. 79–95.
2 See, for example, Garben, 2020, pp. 429–447; Prechal, 2010, pp. 5–22; Weatherill, 2004, pp. 1–55.
3 Treaty on the Functioning of the European Union, OJ C 326, 26 October 2012, pp. 47–390.
4 Treaty on European Union, OJ C 326, 26 October 2012, pp. 13–390.

further and more detailed scientific discourse. This is a fundamental principle of public international law, which states that an international organisation such as the EU only has competences that have been transferred to it by sovereign states.[5] This transfer can occur based on international agreements, and only the EU primary law has such a status in the EU.

2. Principle of conferral in the EU

The principle of conferral is the cornerstone of EU competence, because the source of the EU's competences are their transfer to the EU by sovereign states. The EU does not have competences that are due to it because it is an international organisation, and it only has competences that it has been granted based on the autonomous decisions of states that are members of this international organisation. This is directly expressed by the EU primary law. According to Art. 5 of the TEU, the limits of EU competences are determined by the principle of conferral, according to which the EU acts only within the limits of competences granted by EU Member States (EUMeSt) under the EU primary law to achieve the objectives set out therein.[6] Additionally, Art. 5 of the TEU underlines that any powers not conferred on the EU in the EU primary law belong to the EUMeSt.[7] The wording of Art. 5 of the TEU leaves no room for doubt. Art. 3, 4, and 6 of the TFEU remain in synergy with Art. 5 of the TEU. According to Art. 3 of the TFEU, the EU has exclusive competence in areas such as the customs union; establishment of competition rules necessary for functioning of the internal market; monetary policy for the EUMeSt, whose currency is the euro; conservation of marine biological resources under the common

5 See, for example, C-155/91 *Commission of the European Communities v. Council of the European Communities*, Judgement, 17 March 1993, ECLI:EU:C:1993:98; Calliess, 1999, p. 32; Joined Cases C-7/56, C-3/57 to C-7/57 *Dinecke Algera, Giacomo Cicconardi, Simone Couturaud, Ignazio Genuardi, Félicie Steichen v. Common Assembly of the European Coal and Steel Community*, Judgement, 12 July 1957, ECLI:EU:C:1957:7; Pache and Rösch, 2008, pp. 473–480; Judgement of the German Federal Constitutional Court of 30 June 2009, 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09; Judgement of the Czech Constitutional Court of 26 November 2008—Pl. ÚS 19/80; Judgement of the Polish Constitutional Tribunal of 24 November 2010, K32/09 (Journal of Laws 2010 No. 229 item 1506).

6 See, for example, C-361/14 P in proceedings *European Commission v. Peter McBride, Hugh McBride, Mullglen Ltd, Cathal Boyle, Thomas Flaherty, Ocean Trawlers Ltd, Patrick Fitzpatrick, Eamon McHugh, Eugene Hannigan, Larry Murphy and Brendan Gill*, Judgement, 14 June 2016, ECLI:EU:C:2016: 434; C-600/14 in proceedings *Federal Republic of Germany v. Council of the European Union*, Judgement, 5 December 2017, ECLI:EU:C:2017:935; C-687/15 in proceedings *European Commission v. Council of the European Union*, Judgement, 25 October 2017, ECLI:EU:C:2017:803.

7 See, for example, Lohse, 2014, pp. 165–182; Żelazna, pp. 593–606.

fisheries policy; and the common commercial policy.[8] The exclusive competence of the EU is characterised by a hard and intrusive approach. In this respect, competences belong exclusively to the EU, and the EUMeSt voluntarily exercised their sovereignty and waived its exercise for the benefit of the EU. According to Art. 4 of the TFEU, the EU shares competences with the EUMeSt if the primary EU law grants it competences that are not related to the areas specified in Art. 3 and 6 of the TFEU. The areas of shared competence include the internal market; social policy in relation to the aspects set out in EU primary law; economic, social, and territorial cohesion; agriculture and fisheries, excluding the conservation of marine biological resources; environment; consumer protection; transport; trans-European networks; energy; freedom, security, and justice; and common public health safety issues with respect to the aspects set out in the EU primary law.[9] When interpreting the norm included in Art. 4 of the TFEU, it implies that the EU has a field of competence to act in the aforementioned areas in the dimension specified by detailed provisions of the EU primary law. Thus, within the scope of shared competences, what has been transferred to the EU by sovereign states, included in the EU primary law, and defined in terms of scope under specific treaty provisions may constitute EU competences, and what has not been transferred or included in the EU primary law, including that which is not within the specified scope, should not be the subject of EU activity. However, pursuant to Art. 6 of the TFEU, the EU also has the competence to conduct activities aimed at supporting, coordinating, and supplementing activities of the EUMeSt in areas such as the protection and improvement of human health, industry, culture, tourism, education, vocational training, youth and sports, civil protection, and administrative cooperation.[10] EU competences, as set out in Art. 6 of the TFEU, are characterised by the soft approach of EU institutions that can support, coordinate, and supplement activities of the EUMeSt and cannot go beyond

8 The EU also has the exclusive competence to conclude international agreements if their conclusion is provided for in an EU legislative act or is necessary to enable the EU to exercise its internal competences, or to the extent that their conclusion may affect the common rules or alter their scope (see Art. 3(2) of the TFEU); see, for example, C-66/13 *Green Network SpA v. Autorità per l'energia elettrica e il gas*, Judgement, 26 November 2014, ECLI:EU:C:2014:2399; C-422/19 *Johannes Dietrich and Norbert Häring v. Hessischer Rundfunk*, Judgement, 26 January 2021, ECLI:EU:C:2021:63.

9 In the areas of research, technological development, and space, the EU has the competence to conduct activities, particularly to define and implement programmes; however, the exercise of these competences must not prevent multinational corporations (MNCs) from exercising their competences (see Art. 4(3) of the TFEU). Conversely, in the areas of development cooperation and humanitarian aid, the EU has competences to conduct activities and implement common policies; however, exercise of these competences must not prevent MNCs from exercising their competences (see Art. 4(4) of the TFEU).

10 See, for example, C-275/12 *Samantha Elrick v. Bezirksregierung Köln*, Judgement, 24 October 2013, ECLI:EU:C:2013:684; C-391/20 in proceedings brought by *Boriss Cilevičs, Valērijs Agešins, Vjačeslavs Dombrovskis, Vladimirs Nikonovs, Artūrs Rubiks, Ivans Ribakovs, Nikolajs Kabanovs, Igors Pimenovs, Vitālijs Orlovs, Edgars Kucins, Ivans Klementjevs, Inga Goldberga, Evija Papule, Jānis Krišāns, Jānis Urbanovičs, Ļubova Švecova, Sergejs Dolgopolovs, Andrejs Klementjevs, Regīna Ločmele-Luņova, and Ivars Zariņš*, Judgement, 7 September 2022, ECLI: EU:C:2022:638.

this dimension. Nevertheless, it is noteworthy that supporting and coordinating the EUMeSt's activities do not by nature constitute interfering; however, supplementing the activities of the EUMeSt may already be of such nature. Therefore, it is important to note that the EU's exercise of the competences set out in Art. 6 of the TFEU may not prevent the EUMeSt from exercising its competences.

In terms of EU competences, an important, even fundamental, supplement is provided by Art. 2 of the TFEU. This article, by systematising the rules related to EU competences, completes the picture of the principle of conferral in the EU that results from the correlation of Art. 5 of the TEU with Art. 3, 4, and 6 of the TFEU.[11] According to Art. 2 of the TFEU, first, if the EU primary law confers exclusive competence on the EU in a specific area, only the EU can legislate and adopt legally binding acts, whereas the EUMeSt can do so only with EU authorisation or to implement EU acts. Second, if the EU primary law confers on the EU a competence shared with the EUMeSt in a specific area, the EU and EUMeSt can legislate and adopt legally binding acts in that area. In such a situation, to avoid a conflict of competences, the EUMeSt may exercise competences to the extent that the EU has not exercised or does not exercise a specific shared competence. If the EU first decides to exercise a shared competence and then decides to cease exercising it, the EUMeSt may exercise this competence again to the extent that the EU has ceased exercising it. It is worth emphasising here that an important complement is provided by the principles of both proportionality and subsidiarity, which are principles directly related to the exercise of EU competences; the complement is discussed later. Third, the EUMeSt coordinate their economic and employment policies in accordance with the principles provided for in the EU primary law, which the EU has the competence to define. Fourth, the EU has the competence to define and implement a common foreign and security policy, including the progressive definition of a common defence policy. Fifth, in certain areas and under the conditions provided for in the EU primary law, the EU has the competence to conduct activities to support, coordinate, and supplement the activities of the EUMeSt without replacing their competences in these areas. In this dimension, legally binding EU acts cannot lead to harmonisation of laws and regulations of the EUMeSt. Sixth, the detailed scope and conditions for the exercise of EU competences are determined by the provisions of the EU primary law relating to a specific area.

The EU competences are broad, resulting from the relevant provisions of the EU primary law. The EUMeSt voluntarily agreed to this scope using their sovereign

11 In the context of Art. 2 of the TFEU, for example, see the Judgement of the Polish Constitutional Tribunal of 24 November 2010, K32/09; C-24/20 *European Commission v. Council of the European Union*, Opinion of Advocate General Maciej Szpunar, 19 May 2022, ECLI:EU:C:2022:404; Opinion of Advocate General Giovanni Pitruzzelli delivered on 29 September 2020 in Joined Cases C-422/19 and C-423/19 in *Johannes Dietrich (C-422/19) and Norbert Häring (C-423/19) v. Hessischer Rundfunk*, ECLI:EU:C:2020:756; Opinion of Advocate General Eleanor Sharpston delivered on 21 December 2016 on the issuance of Opinion 2/15 in proceedings brought at the request of the European Commission, ECLI:EU:C:2016:992.

powers. The EUMeSt assigned competences to the EU in accordance with the principle of conferral, which was included in the relevant provisions of the TEU and TFEU. In the EU, the principle of conferral has a legally regulated image. Based on the treaty nomenclature, the EU has exclusive, shared, and supporting or coordinating competences. In each case, the areas covered by specific competencies are listed. In addition, in the case of shared competences, the EU plays a privileged role, as it depends only on its own decision, subject to the principles of proportionality and subsidiarity, on whether to exercise entrusted shared competence. If the EU decides to exercise shared competence, the EUMeSt lose the possibility of exercising such competence in the scope specified in the treaty, which implies specific "sharing" of competences in the EU arena. This may even lead to the conclusion that shared competences are, in fact, exclusive competences of the EU that are expressed only indirectly, as is the case in Art. 3 of the TFEU. However, the result of both is that the EU is assigned competences that, if exercised by EU institutions, should not be interfered with by the EUMeSt, as the latter have transferred them to the EU in accordance with the principle of conferral. Although the nomenclature of shared competences should be considered inaccurate, it appears that the ratio law of this division is significantly different between exclusive and shared competences. The difference is the subsidiarity principle, which applies only in areas that do not fall within the exclusive competence of the EU.

There can be only one conclusion to this part of the study: the limits of EU competences are the same as the scope of competences transferred to the EU by the EUMeSt, in accordance with the principle of conferral. These scopes overlap as the EU has no competence of its own. Thus, the source of EU competences is the sovereign competences of the EUMeSt. This implies that if the EUMeSt have transferred competences to the EU, the EU may exercise them but only within the limits of the conferral. If the EU exceeds these limits, the consequences tantamount to competence creep. Therefore, provisions of the TFEU that specify the limits of competences conferred on the EU are of key importance for this analysis. In addition, it appears that other interpretations of the law are not justified by the content of the EU primary law or the principles of public international law and should be regarded as groundless.

3. Limits of EU competences in migration and refugee law: Area of freedom, security and justice

The above discussion clarifies that the area of freedom, security, and justice is a shared competence of the EU, and the TFEU itself contains provisions specifying its limits. The EU's competence in the area of freedom, security, and justice comprises four blocks or categories. The first category includes border checks, asylum, and immigration policies. The second concerns judicial cooperation in civil matters. The

third issue concerns judicial cooperation in criminal matters. The fourth concerns police cooperation. It is already clear *prima facie* that the first segment is of key importance to the subject of this study. According to Art. 67 Para. 2 of the TFEU, the EU has developed a common policy in the field of asylum, immigration, and external border control, based on solidarity between the EUMeSt and fairness towards third-country nationals.[12] In this context, Art. 72 of the TFEU directly emphasises that the legal norms defining the competences of the EU in the area of freedom, security, and justice do not violate the EUMeSt's performance of duties related to the maintenance of law and order and safeguarding of internal security.[13] Using treaty nomenclature, this is the exclusive competence of the EUMeSt.

More detailed limits of EU competences in the field of border checks, asylum, and immigration result from the wording of Art. 77, 78, and 79 of the TFEU. Art. 77 of the TFEU requires the EU to develop a policy aimed at ensuring the absence of any controls on persons regardless of their nationality when crossing internal borders, conducting checks on persons, and efficiently monitoring the crossing of external borders, and the gradual introduction of an integrated management system for external borders. Therefore, the European Parliament (EP) and Council of the European Union (hereinafter referred to as the "Council"), acting in accordance with ordinary legislative procedures, may adopt measures concerning the following: the common policy on visas and other short-stay residence permits; checks to which persons crossing external borders are subject; conditions under which third-country nationals shall have the freedom to travel within the EU for a short period; and any measure necessary for the gradual establishment of an integrated management system for external borders.[14] Art. 78 of the TFEU requires the EU to develop a common policy on asylum, subsidiary protection, and temporary protection, aimed at granting appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement.[15] This policy must comply with the Geneva Convention of 28 July 1951[16] and the Protocol of 31 January 1967 relating to the status of refugees,[17] as well as with other relevant

12 Under the TFEU, stateless persons are treated as third-country nationals; see also C-483/20 *XXXX v. Commissaire général aux réfugiés et aux apatrides*, Judgement, 22 February 2022, ECLI:EU:C:2022:103; C-817/19 *Ligue des droits humains v. Conseil des ministers*, Judgement, 21 June 2022, ECLI:EU:C:2022:491.

13 See C-72/22 PPU *M.A. v. Valstybės sienos apsaugos tarnyba*, Judgement, 30 June 2022, ECLI:EU:C:2022:505; Joined Cases C-368/20 and C-369/20 *NW v. Landespolizeidirektion Steiermark and Bezirkshauptmannschaft Leibnitz*, Judgement, 26 April 2022, ECLI:EU:C:2022:298.

14 In addition, it is worth emphasising that the legal norm contained in Art. 77 of the TFEU does not affect the competence of the MNCs to geographically delimit their borders in accordance with international law.

15 In the context of the non-refoulement principle, see Goodwin-Gill, 2011, pp. 443–457; Loper, 2010, pp. 404–439; Chan, 2006, pp. 231–239.

16 Convention Relating to the Status of Refugees, drawn up in Geneva on 28 July 1951 (Journal of Laws 1991 No. 119, item 515).

17 Protocol Relating to the Status of Refugees, drawn up in New York on 31 January 1967 (OJ 1991 No. 119, item 517).

treaties. For this purpose, the EP and Council, acting in accordance with the ordinary legislative procedure, have the legitimacy to adopt measures concerning the Common European Asylum System, which includes a uniform status of asylum for third-country nationals, valid throughout the EU; uniform status of subsidiary protection for third-country nationals who, without obtaining European asylum, are in need of international protection; common system of temporary protection for displaced persons in the event of a massive inflow; common procedures for granting and withdrawing uniform asylum or subsidiary protection status; criteria and mechanisms for determining which EUMeSt are responsible for considering an application for asylum or subsidiary protection; standards concerning the conditions for the reception of applicants for asylum or subsidiary protection; and partnership and cooperation with third countries for managing inflows of people applying for asylum or subsidiary or temporary protection. In addition, if one or more EUMeSt experience an emergency situation characterised by a sudden influx of third-country nationals, the EUMeSt, at the request of the EC, may adopt interim measures for the benefit of the concerned or interested EUMeSt.[18] Art. 79 of the TFEU requires the EU to develop a common immigration policy aimed at ensuring, at every stage, the effective management of migration flows, fair treatment of third-country nationals residing legally in the EUMeSt, and prevention and strengthening of the fight against illegal immigration and trafficking of human beings.[19] For this purpose, the EP and Council, acting in accordance with the ordinary legislative procedure, are empowered to adopt measures in the following areas: the conditions of entry and residence as well as standards on the EUMeSt's issue of long-term visas and residence permits, including those for family reunification; definition of the rights of third-country nationals residing legally in EUMeSt, including the conditions governing freedom of movement and residence in other EUMeSt; illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation; and combat of the trafficking of persons, particularly women and children. Moreover, the EU is entitled to conclude agreements with third countries on the readmission of third-country nationals who do not or no longer fulfil the conditions for entry, presence, or stay in the territory of one of the EUMeSt, their countries of origin, or the countries from which they arrive. In addition, the EP and Council, acting in accordance with ordinary legislative procedures, are authorised to establish measures to encourage

18 In such a case, the CJEU shall act after consultation with the EP [e.g. Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (OJ L 239, 15 September 2015, pp. 146–156); Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (OJ L 248, 24 September 2015, pp. 80–94)]; see also Joined Cases C-715/17, C-718/17, and C-719/17 *European Commission v. Republic of Poland, Hungary and Czech Republic*, Judgement, 2 April 2020, ECLI:EU:C:2020:257; Joined Cases C-643/15 and C-647/15 *Slovak Republic and Hungary v. Council of the European Union*, Judgement, 6 September 2017, ECLI:EU:C:2017:631.

19 See C-431/11 *United Kingdom of Great Britain and Northern Ireland v. Council of the European Union*, Judgement, 26 September 2013, ECLI:EU:C:2013:589.

and support the activities of the EUMeSt that aim to promote the integration of third-country nationals residing legally in their territories. However, in this case, the possibility of the EU harmonising laws and regulations of the EUMeSt was excluded. Importantly, the powers referred to in Art. 79 of the TFEU do not infringe on the right of the EUMeSt to determine the size of the influx of third-country nationals to their territory in search of employment or self-employment. Moreover, Art. 80 of the TFEU is also important in the context of the entire area of freedom, security, and justice relating to policies on border checks, asylum, and immigration. According to this provision, EU policies on border checks, asylum, and immigration, as well as their implementation, are governed by the principles of solidarity and fair sharing of responsibility between the EUMeSt, including on financial matters.[20] In this context, EU policies adopted to implement Arts. 77, 78, and 79 of the TFEU contain, whenever necessary, appropriate measures to apply this principle.

The cited provisions of the TFEU regarding the scope of EU competence in the context of migration and refugee law are characterised by a certain level of generality. This fact should not come as a surprise, as the provisions of the TFEU, which define the framework for the functioning of the EU and constitute, next to the TEU, a primary legal act legitimising the EU's activity, cannot be casuistic. However, this implies some problems of interpretation considering the principle of conferral, which is particularly evident during the review of the selected secondary EU law. Nevertheless, it can already be seen that the treaty provisions have a programmatic nature and thus indicate a certain direction the EU should follow. Thus, this type of legislation demonstrates the objectives the EU should pursue. They do not state that this goal has already been achieved, nor do they constitute finite or ready-made legal institutions. Achieving the intended goal is a process that may involve several stages.[21] This observation further blurs the transparency of the treaty provisions on border checks, asylum, and immigration from the perspective of the principle of conferral. This implies that there is much room for interpretation here, not so much literal or systemic but more purposive interpretation.[22] This leads to the justified conclusion that, based solely on the provisions of the EU primary law, knowledge of the actual limits of competences granted to the EU in the field of migration and refugee law can only be limited. To determine more precisely the boundaries of the competences granted to the EU by EUMeSt in the analysed scope, it is necessary to refer to the appropriate techniques of legal interpretation. Here, a question arises

20 See Judgement of the Court of Justice of the European Union of 15 July 2021 in Case C-848/19 P in proceedings involving an appeal under Art. 56 of the Statute of the CJEU, filed on 20 November 2019 (Federal Republic of Germany), ECLI:EU:C:2021:598.

21 Based on the content of the provisions of the EU primary law in the context of border control, asylum, and immigration, it appears that the EU legislator has attributed the characteristic of continuous improvement to the process in question.

22 On the legal interpretation, see Kondej, 2019, pp. 39–52; Chauvin, Stawecki, and Winczorek, 2021, pp. 245–256; Smolak, 2014, pp. 5–12; Lewandowska and Lewandowski, 2010, pp. 19–29; Łazor, 2021, pp. 31–48; Kotowski, 2017, pp. 137–153; Choduń, 2016, pp. 57–67.

about the entity authorised to make a binding interpretation of the provisions of the EU primary law that directly determines the limits of the competences granted to the EU. This question is essential for analysis, and its answer is a key conclusion supported by scientific discourse. Therefore, this issue is addressed in the final section of this chapter.

4. Use of EU competences in migration and refugee law

In the context of the area of freedom, security, and justice, particularly border control, asylum, and immigration policies, one may wonder whether the EU primary law contains any guidance regarding the form of EU secondary legislation. The principle of conferral does not answer this question; however, functioning of the EU is based on two other fundamental principles. In accordance with Art. 5 of the TEU, the limits of EU competences are determined by the principle of conferral; however, the exercise of these competences is subject to the principles of subsidiarity[23] and proportionality.[24] As stipulated in Art. 5 Para. 3 of the TEU, in accordance with the principle of subsidiarity, in areas that do not fall within the exclusive competence of the EU, the EU shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the EUMeSt, at either the central or the regional and local levels, but can be better achieved at the EU level because of the scale or effects of the proposed action. Importantly, this provision also emphasises that EU institutions apply the principle of subsidiarity in accordance with Protocol (No. 2) on the application of the principles of subsidiarity and proportionality,[25] and national parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure provided for in this protocol. However, pursuant to Art. 5 Para. 4 of the TEU, in accordance with the principle of proportionality, the scope and form of an EU action do not go beyond what is necessary to achieve the objectives of the EU primary law. This provision emphasises that EU institutions apply the principle of proportionality in accordance with the Protocol on the application of the principles of subsidiarity and proportionality; however, in this case, national parliaments no longer have the legitimacy to ensure that this principle is respected in the EU. Thus, Art. 5 of the TEU results in a triad of rules directly related to EU competences. The principle of conferral determines the limits of EU competences, whereas the principles of subsidiarity and proportionality determine the exercise of EU competences. However, it should be noted that the principle of subsidiarity applies only to

23 See Melé, 2005, pp. 293–305; Spicker, 1991, pp. 3–14; Follesdal, 2013, pp. 37–62.
24 See Hermerén, 2012, pp. 373–382; Portuese, 2013, pp. 612–635; Poto, 2007, pp. 835–869.
25 The Protocol (No. 2) on the application of the principles of subsidiarity and proportionality is an integral part of the EU primary law.

areas that, according to the nomenclature provided for in EU primary law, do not fall within the exclusive competence of the EU. It is worth recalling that the area of freedom, security, and justice is a shared competence. This fact is important because it leads to the conclusion that EU competences in the fields of border checks, asylum, and immigration policies are governed by all three principles of Art. 5 of the TEU. This implies that, in addition to the principle of conferral, it should be checked whether the objectives of border checks, asylum, and immigration policies can be sufficiently achieved by the EUMeSt, at both the central and the regional and local levels, and whether the exercise of competences by the EU, considering the scale or effects of the proposed action, will lead to better achievement of those objectives. If the conditions of the subsidiarity principle are met, it is necessary to analyse the form of exercise of competences by the EU considering the principle of proportionality. This principle provides a clear indication that the scope and form of EU actions must not exceed what is necessary to achieve the objectives of the EU primary law. The exercise of EU competences occurs through the issuance of the EU secondary legislation, which is of two chief types—directives and regulations. EU directives harmonise or approximate EUMeSt regulations, whereas EU regulations unify legal standards throughout the EU. This leads to the conclusion that, from the perspective of compliance with the principle of proportionality, the EU should first use the possibility of issuing directives for reducing interference with an EUMeSt legal order.

The EU secondary legislation in the fields of migration and refugee law is extensive.[26] Therefore, to analyse the compliance of the provisions of the EU secondary law with provisions of the EU primary law, it is necessary to select an exemplary EU secondary law that will enable the presentation of interpretation problems related to conducting such an analysis. As the legal situation of foreigners seeking international protection in one of the EUMeSt is currently primarily determined by the triad of asylum directives, it appears that their choice is justified and sufficient. The first directive is Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or

26 In addition to the triad of asylum directives, such legislation includes, of example, Council Directive 2001/55/EC of 20 July 2001 on minimum standards for providing temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (OJ L 212, 7 August 2001, pp. 12–23); Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ L 348, 24 December 2008, pp. 98–107); Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (OJ L 180, 29 June 2013, pp. 31–59); and Commission Implementing Regulation (EU) No. 118/2014 of 30 January 2014 amending Regulation (EC) No. 1560/2003 laying down detailed rules for the application of Council Regulation (EC) No. 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ L 39, 8 February 2014, pp. 1–43).

stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast; hereinafter referred to as the "Qualification Directive").[27] The second is Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast; hereinafter referred to as the "Reception Conditions Directive").[28] The third is Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast; hereinafter referred to as the "Procedural Directive").[29] The EU's adoption of the Qualification, Reception, and Procedure Directives proves that it has moved to the second stage of building a Common European Asylum System.[30] However, before proceeding to a proper analysis, it is necessary to refer to specific provisions of the triads of asylum directives and their juxtaposition with relevant provisions of the EU primary law. For example, in accordance with Art. 30 of the Qualification Directive, the EUMeSt ensure that beneficiaries of international protection have access to healthcare according to the same eligibility criteria as nationals of the EUMeSt that granted such protection. According to Art. 7 Para. 1 of the Reception Directive, applicants may move freely within the territory

27 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast; OJ L 337, 20 December 2011, pp. 9–26).

28 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast; OJ L 180, 29 June 2013, pp. 96–116).

29 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast; OJ L 180, 29 June 2013, pp. 60–95).

30 Moreover, it should be noted that as part of the first stage of building a Common European Asylum System, the direction of which was set at the Tampere European Council (see European Parliament, 1999, paras. 13–27) and the first versions of the Qualification Directive (Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted; OJ L 304, 30 September 2004, pp. 12–23), Reception Directive (Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers; OJ L 31, 6 February 2003, pp. 18–25), and Procedural Directive (Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status; OJ L 326, 13 December 2005, pp. 13–34). It is also impossible not to mention that, in September 2020, the European Commission presented, not yet in force, the New Pact on Migration and Asylum (see European Commission, 2020, para. X). However, the New Pact on Migration and Asylum is not the subject of this study, as it is not yet hard EU law. One can only hint at the apparent tendency in this area to move away from directives towards regulations, which may raise legitimate questions considering the principles of proportionality and subsidiarity. The potential adoption of these legislative proposals in the EU should be read as the beginning of the implementation of the third stage of building a Common European Asylum System.

of the receiving EUMeSt or within the area designated for them by that EUMeSt.[31] According to Art. 15 Para. 3, lit. pursuant to Art. 1(a) of the Procedural Directive, the EUMeSt shall ensure that the person who conducts the interview is competent to consider the personal and general circumstances of the application, including the cultural background, gender, sexual orientation, gender identity, and special needs of the applicant. An interesting example of a Procedural Directive is the provision of Art. 15 Para. 3 lit. d) of the Procedural Directive, according to which the EUMeSt shall ensure that the person conducting the interview on the substance of the application for international protection does not wear a military or police uniform. The chief question that arises in the context of such regulations is the basis of the EU primary law. Thus, each matter regulated in the EU secondary law must be legitimised by a specific provision of the EU primary law, confirming that the EU has the competence to undertake such activities. The Qualification Directive was adopted as stated in its preamble, particularly because of the content of Art. 78 Para. 2 lit. a) and b) of the TFEU. This implies that the EU has the competence to adopt measures relating to the Common European Asylum System in terms of 'a uniform status of asylum for nationals of third countries, valid throughout the European Union' and 'a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection'.[32] The Reception Directive was adopted as stated in its preamble, particularly because of the content of Art. 78 Para. 2 lit. f) of the TFEU, which provides for the EU competence to adopt measures relating to the Common European Asylum System with regards to 'standards concerning the conditions for the reception of applicants for asylum or subsidiary protection'.[33] However, the Procedural Directive was adopted, as stated in its preamble, particularly because of the content of Art. 78 Para. 2 lit. d) of the TFEU. This provision provides a legal basis for the EU's competence to adopt measures relating to the Common European Asylum System in the field of 'common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status'.[34]

By comparing the regulations contained in the Qualification, Reception, and Procedure Directives with the relevant provisions of the EU primary law, one can conclude that assessing their mutual compatibility is difficult. This is because the triad of asylum directives is characterised by a detailed normative nature. Simultaneously, provisions of the EU primary law are, as already emphasised, characterised by a

31 The designated area must not affect the inviolable sphere of private life and must provide sufficient freedom to guarantee access to all benefits under the Reception Directive.

32 See in terms of the Qualification Directive, Eaton, 2012, pp. 765–792; Bauloz and Ruiz, 2016, pp. 240–268; McAdam, 2005, pp. 461–516; Freier and Jean-Pierre, 2020, pp. 321–362; Lambert, 2006, pp. 161–192; Storey, 2008, pp. 1–49.

33 See in terms of the Reception Directive: Peek and Tsourdi, 2016, pp. 1382–1478; O'Sullivan and Ferri, 2020, pp. 272–307; Velluti, 2016, pp. 203–221; Slingenberg, 2022, pp. 257–276.

34 See on the procedural directive: Ackers, 2005, pp. 1 –34; Schittenhelm, 2019, pp. 229–244; Costello, 2005, pp. 35–70; Costello and Hancox, 2016, pp. 375–445.

general normative nature. Mere juxtaposition of these legal norms does not lead to conclusions relevant to this analysis regarding the compatibility of the provisions of the EU secondary law with those of the EU primary law in the context of the principle of conferral. The same can be said of compliance with the principles of proportionality and subsidiarity. To illustrate the indicated difficulty in assessing conformity, it is necessary to decide whether, for example, Art. 30 of the Qualification Directive is compatible, in particular, with Art. 78 Para. 2 lit. a) and b) of the TFEU. Thus, in this case, it must be decided whether providing beneficiaries of international protection with access to healthcare according to the same eligibility criteria as nationals of the EUMeSt that granted them protection falls within the limits of adopting measures on the Common European Asylum System in terms of 'a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection'. Another example is the compliance assessment of Art. 7 Para. 1 of the Reception Directive, in particular, Art. 78 Para. 2 lit. f) of the TFEU. In this case, it is necessary to decide whether the guarantee of the applicants' freedom of movement within the territory of the EUMeSt receiving the applicant or in the area assigned to them by the EUMeSt falls within the EU's competence to adopt measures relating to the Common European Asylum System in terms of 'standards concerning the conditions for the reception of applicants for asylum or subsidiary protection'. The last example concerns the conformity assessment in Art. 15 Para. 3 lit. a) and d) of the Procedural Directive, particularly with Art. 78 Para. 2 lit. d) of the TFEU. It is important to decide whether introducing the two requirements of (i) the person conducting the interview to be competent to, inter alia, consider cultural origin, gender, sexual orientation, and gender identity and (ii) the person conducting the interview on the substance of the application for international protection to not wear a military or police force uniform should both fall within the EU competence to adopt measures concerning the Common European Asylum System with regard to 'common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status'. It is worth emphasising that the reference in these cases to the content of Art. 78 Para. 1 of the TFEU[35] does not solve the problem of interpretation; rather, it complicates the problem further because this article is an even more general legal norm. It is noteworthy that such dilemmas concern most provisions of the EU secondary law, and only selected examples have been presented. The solution to these interpretation problems is not to use literal or systematic interpretation techniques. In such cases, it is necessary to refer to a purposeful interpretation. This is because the validity of specific provisions cannot be determined based on the general standards. In the examples presented, answers regarding the EU secondary

35 Content of Art. 78(1) of the TFEU:
The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.

law's compatibility with the EU primary law may be either positive or negative. The reason for this is that limits of the aforementioned EU competences can either include everything or remain minimal. Thus, it is extremely important and relevant to answer the question regarding the EUMeSt's intention when transferring competences to the EU, as defined in Art. 78 of the TFEU. Moreover, it is necessary to exactly decipher the sovereign will of the EUMeSt, because it was decided based on the actual limits of the EU's competences. This leads to the conclusion that indicating the entity that should be authorised to decipher the sovereign will of the EUMeSt is fundamental. In addition, similar interpretation problems arise in the context of compliance with the EU secondary legislation with the principles of proportionality and subsidiarity. In this case and in the context of the same examples, a decision on compliance can be made based on not a literal or systemic interpretation but rather a purposeful interpretation. The problem of interpretation is determining whether Art. 30 of the Qualification Directive, Art. 7 Para. 1 of the Reception Directive, Art. 15 Para. 3 lit. a) and d) of the Procedural Directive, and other provisions of the EU secondary law under migration and refugee law are actions taken by the EU (i) in a situation and to the extent that the objectives of the intended action could not be sufficiently achieved by the EUMeSt at either the central or the regional and local levels; (ii) where the objectives could be better achieved at the EU level owing to the size or effects of the proposed action; or (iii) where their scope and form do not go beyond what is necessary to achieve the objectives of the EU primary law. In these cases, it is fundamentally important to indicate which entity should make a binding decision regarding the compatibility of the EU secondary law with the principles governing the exercise of EU competence.

In sum, the EUMeSt, using their sovereign powers and under the principle of conferral, transferred competences in the field of migration and refugee law to the EU, as defined in the EU primary law. The limits of these competences are set by the EU image of the principle of conferral. However, the treaty provisions relevant in this respect are of a general and directional nature. There is much room for interpretation here, which is directly visible in the situation of juxtaposing the EU secondary law with its appropriate basis in the EU primary law. Such a juxtaposition clearly demonstrates that it is not possible to assess the conformity of the EU secondary law with the principle of conferral set out in the EU primary law to the full extent using a literal and systemic interpretation. It is necessary to interpret the actual and sovereign will of the EUMeSt purposefully from the moment of ratification of the currently binding EU primary law. A similar situation applies to compliance with the EU secondary legislation on border checks, asylum, and immigration policies with the principles of subsidiarity and proportionality. In this case, based on not a literal or systemic interpretation but a purposeful interpretation, it is possible to decide on compliance. Importantly, the entire EU bases its operations on three basic principles: the principles of conferral, subsidiarity, and proportionality. This implies that making interpretative decisions related to these principles is of key importance for not only the functioning of the EU, including its competences, but also a sovereign

EUMeSt. Interpretations of the scope and form of EU activities directly determine the scope and form of EUMeSt activities. This leads to the conclusion that interpretative decisions regarding the principles of conferral, subsidiarity, and proportionality affect the content of the decisions made by the EUMeSt in connection with the EU primary law. This is of fundamental legal importance.

Therefore, the entire scientific discourse to date has led to the need to analyse the last research segment in this chapter, that is, the indication of which entity should be authorised to make binding interpretative decisions regarding compliance with the EU secondary law relating to border checks, asylum, and immigration policies with the principles of conferral, proportionality, and subsidiarity.

5. Decision-maker on EU competences

In accordance with the current legal framework in the EU, it is clear that considering Art. 19 of the TEU,[36] the CJEU is the EU institution responsible for respecting the interpretation and application of the EU primary law. Therefore, the CJEU is competent to consider, in principle, every case in which it is necessary to interpret the provisions of the EU primary law. We discuss literal, systemic, and purposeful interpretations. As a rule, the EU primary law itself states that the CJEU does not have jurisdiction in a strictly defined matter. According to Art. 275 of the TFEU, the CJEU has no jurisdiction over provisions relating to the Common Foreign and Security Policy or the acts adopted on their basis.[37] However, the same provision also emphasises that the CJEU is competent to review compliance with Art. 40 of the TEU and adjudicate on complaints lodged under the conditions provided for in Art. 263 of the TFEU regarding reviewing the legality of decisions imposing restrictive measures against natural or legal persons adopted by the Council based on Art. 23 to 46 of the TEU.

Therefore, considering the version of the EU primary law currently in force, after the adoption of the Treaty of Lisbon,[38] it is clear which entity is authorised to make decisions in the fields of conferral, proportionality, and subsidiarity. However, this

36 Thought-provoking rulings on Art. 19 of the TEU: C-204/21 *European Commission v. Republic of Poland*, Judgment, 5 June 2023, ECLI:EU:C:2023:442; C-156/21 *Hungary v. European Parliament and Council of the European Union*, Judgment, 16 February 2022, ECLI: EU:C:2022:97; C-157/21 *Republic of Poland v. European Parliament and Council of the European Union*, Judgment, 16 February 2022, ECLI:EU:C:2022:98.

37 See C-72/15 *The Queen on the application of PJSC Rosneft Oil Company v. Her Majesty's Treasury, Secretary of State for Business, Innovation and Skills, Financial Conduct Authority*, Judgment, 28 March 2017, ECLI:EU:C:2017:236.

38 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (OJ C 306, 17 December 2007, pp. 1–271).

study does not aim to indicate which entity is legitimised from the perspective of the EU legal framework, but rather which entity should be legitimised to increase the transparency of the EU's functioning, counteract the phenomenon of competence creep, and prevent the blurring of the EU's status as an international organisation. Therefore, at this point, it is necessary to consider which solution best meets the objectives set in this manner, justified by concerns for the sovereignty of the EUMeSt, and ensures compliance of the scope and form of EU activities with the principles of conferral, proportionality, and subsidiarity, which have their own specificity and are determined by the actual will of the EUMeSt image in the EU primary law. When analysing possible solutions, it should be noted that, generally and at the moment, regardless of any arguments, there are two possible solutions in the indicated scope. First, EU institutions, such as the EC, Council, and CJEU, or one of them, should be authorised to make binding decisions regarding the interpretation of the principles of granting, proportionality, and subsidiarity in the EU. Second, the EUMeSt should be authorised to make such decisions. All other solutions that fall between these two should be classified as hybrids.

Referring to the solution that comprises providing the decision-making field to EU institutions, or one of them, when interpreting the principles of conferral, proportionality, and subsidiarity, it should be stated that this solution is the current and functioning standard within the EU. As noted above, considering Art. 19 of the TEU, the CJEU, which is an EU institution, has the task to respect the law in the interpretation and application of the EU primary law. However, it should be emphasised that such a solution is not conducive to objectively controlling EU activity in terms of the triad of principles set out in Art. 5 of the TEU, which have their own fundamental specificity. This is about the fullest possible implementation of the aforementioned objectives, that is, increasing the transparency of the EU's functioning, counteracting the phenomenon of competence creep, and preventing the blurring of the EU's status as an international organisation. Unfortunately, adoption of the currently assessed solution in the EU has led to the opposite effects. It appears that the reason for this was natural. If the EU decides on its own the scope and form of exercising its competences through a creative process because it is based on teleological interpretation, interpretation of the principles of conferral, subsidiarity, and proportionality leads to a lack of objectivity. Objectivity is lost first when one judges one's own case (*nemo iudex in causa sua*). Such a situation occurs in the analysed case because, as already mentioned, the principles of Art. 5 of the TEU have their own fundamental specificity. These are not legal norms of a standard nature, as their content determines the most sensitive aspects of EU functioning. These legal norms determine the validity and content of other norms in the EU legal order. Therefore, they can be referred to as meta-norms.[39] It appears that an important purpose of the principles of conferral, subsidiarity, and proportionality is to act as a watchdog so that the EU acts in accordance with the actual will of the EUMeSt, which expresses its will by being bound

39 See Czepita, 1994, pp. 31–38.

by the provisions of the EU primary law.[40] Therefore, if we assume that the principles of Art. 5 of the TEU are the watchdog overseeing the EU and continue with this example, this watchdog cannot be employed by the EU, which includes paying him and deciding on his responsibilities. In such a situation, the function of the guard misses the illusory point. In addition, it is noteworthy that the entire issue concerns decoding the image of the actual will of the EUMeSt from the moment of binding the current version of the provisions of the EU primary law. For example, in criminal proceedings, we want to know specific facts about certain circumstances; the easiest method is to ask questions of the person to whom these facts directly concern (e.g. the defendant or a witness).[41] In such a case, the court will not consider what the person saw, thought, or did, but will interrogate them. In addition, it is worth mentioning that if the adjudicating panel includes a person whose legal or factual interest is directly related to the outcome of the court case, there are precise provisions for the mandatory exclusion of a judge in this circumstance.[42] These are European standards that are part of the rule of law[43] and the principle of citizens' trust in the state and law, including the principle of legal certainty.[44] This leads to the conclusion that it is not the EU institutions, but the EUMeSt, that should express their opinion on the actual scope of their will from the moment of binding the current version of the EU primary law. This is because the EUMeSt created the EU, the source of the EU's competences are the EUMeSt's sovereign powers, and the EUMeSt defined the content of the rules from Art. 5 of the TEU; thus, the EUMeSt have the most complete information regarding the actual image of their will. In such a situation, the EUMeSt will not be a judge in their own case, because it does not involve a dispute but rather sovereign decision-making on the scope and form of exercising state powers (the essence of sovereignty). In the context of the latter, it is worth mentioning that the EU, as an international organisation, does not have the attribute of sovereignty, and, therefore, in the same situation, it will be a judge in its own case. Therefore, leaving the decision-making field regarding the interpretation of the principles of conferral,

40 By ratifying either the Lisbon Treaty or Accession Treaty [e.g. Treaty between the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Republic of Croatia concerning the accession of the Republic of Croatia to the European Union; OJ L 112, 24 April 2012, pp. 10–110].

41 For example, see Art. 177 of the Act of 6 June 1997, the Code of Criminal Procedure (hereinafter referred to as the "Code of Criminal Procedure"; i.e. Journal of Laws 2022, item 1375, as amended).

42 For example, see Art. 40 of the Code of Criminal Procedure; on the scope of Polish criminal procedure, see Wielec, 2017a, pp. 111–124; Wielec, 2014, pp. 39–44; Wielec, 2020, pp. 76–87; Wielec, 2017b, pp. 51–96.

43 See Varga, 2023, pp. 13–58.

44 See Węglińska, 2020, pp. 169–188.

proportionality and subsidiarity to the EUMeSt appears to be sufficiently justified, not only in the area of border control, asylum, and immigration policies but also more broadly within the EU legal order. Nevertheless, this conclusion does not apply to other provisions of EU primary law. As a rule, it is appropriate for the CJEU to interpret it. This is because these provisions do not have the status of meta-norms but rather have a standard character.

Referring to the solution that comprises providing the EUMeSt the decision-making field in interpreting the principles of conferral, proportionality, and subsidiarity, it should be stated that, based on the above arguments, this solution is conducive to objective control of the EU's activity in terms of the triad of principles of Art. 5 of the TEU. Such a solution is also conducive to the achievement of objectives such as counteracting the phenomenon of competence creep and preventing blurring of the EU's status as an international organisation. In addition, this appears to be consistent with the general principles of public international law. However, in this case, the objective of increasing transparency in the EU's functioning is worse. This is because the internal structure of the EUMeSt determines which of its national entities is competent to take a position on behalf of the EUMeSt on the compliance of EU activities with the principles of Art. 5 of the TEU.[45] Most likely, in the vast majority of cases, these entities comprise national constitutional courts (constitutional tribunals or councils).[46] However, such a solution could lead to excessive decision-making dispersion, which could result in organisational chaos. Thus, a solution may be considered wherein the EUMeSt would create a joint entity (within or outside the EU) under which they would make sovereign decisions on compliance of EU activities with the principles of Art. 5 of the TEU. Instead of establishing a new entity, it is also possible to designate one of the EU's institutions for this purpose. However, because of the need to represent only national interests in this case, the Council or European Council[47] could potentially be considered. However, regardless of the form, in this context, it is important that the vote of each EUMeSt be treated as a sovereign decision of a specific EUMeSt in relation to the EU, along with all the related consequences, such as suspension of the EU secondary legislation in relation to this specific EUMeSt or the need to amend the EU primary law.[48] It appears that these are the standards of sovereignty resulting from the statehood of the EUMeSt. In addition, it may be considered that the EUMeSt jointly set a deadline within which they should

45 However, it appears that a boundary condition should be that such an entity becomes entrenched in the basic act or constitution of the selected state.

46 For example, see Art. 188 of the Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws 1997 No. 78, item 483, as amended).

47 However, in that case it would be necessary to amend the EU primary law through a treaty amending the provisions of the TEU and TFEU.

48 A unilateral decision by an MNC should not lead to a change in the EU primary law in relation to it, as this could interfere with the sovereignty of other MNCs. However, it is important to keep in mind the possibilities offered by the institution of reservations in public international law, which can be applied successfully when binding the provisions of the EU primary law.

make decisions to avoid possible protractions or inaction. Each EUMeSt should also be free to submit cases for resolution under the principles of Art. 5 of the TEU.

However, the above proposals are only recommendations, as impositions cannot be placed on sovereign subjects of public international law regarding the manner in which they make decisions about interpretation of the principles of proportionality, subsidiarity, and conferral in the EU. Nevertheless, this recommendation appears to be a solution that enables more effective supervision of the EU's activities than the current EU standard in terms of the triad of principles set out in Art. 5 of the TEU. This also leads to the elimination of, or at least a significant reduction in, the occurrence of such pathologies in the EU, such as lack of transparency in the EU's functioning, the phenomenon of competence creep, or blurring of the EU's status as an international organisation. However, currently in the EU, considering the already cited Art. 19 of the TEU, the fact that another standard applies does not mean that it is appropriate or unchangeable. This also does not mean that it should be assessed positively.[49] This is valid in the EU because the EUMeSt agreed to it by ratifying the current version of the EU primary law. However, as a natural consequence of the sovereignty resulting from the statehood of the EUMeSt, they can change their will by reporting the need to depart from one standard in the direction of another. The changeability of such standards should be made conditional on the existence of a justified need, and it appears that, in the analysed case and considering the arguments cited, such a justified need exists. For all these reasons, it is recommended that the EUMeSt at least consider using their indisputable sovereignty and make this seemingly justified change in the functioning of an international organisation, that is, the EU.

6. Conclusion

The EU was established because of the sovereign decisions of the first (founding) EUMeSt. Subsequent EUMeSt joined or left it, also making independent decisions. The EU does not have its own competences, resulting from being an international organisation. All competences the EU has assigned to it as a result of sovereign decisions of the EUMeSt are in accordance with the principle of conferral. The source of the EU competences is, therefore, competences of the EUMeSt resulting from their statehood and sovereignty. The EU is neither a state nor a sovereign. The EU is an international organisation founded by states to pursue common goals. Therefore, specific competences have been provided by the EUMeSt, including those related to border control, asylum, and immigration policies. Although the EUMeSt may, at any time and each separately, remove the competences transferred to the EU

49 This standard has stood the test of time, and its objective evaluation is fully justified.

using the power of their sovereignty, the EUMeSt decided to provide additional protection contained in the content of the EU primary law: the principles of subsidiarity and proportionality. Therefore, considering the arguments cited in this study, it is recommended to consider shifting the decision-making field from the CJEU to the EUMeSt in the context of interpreting the principles of conferral, proportionality, and subsidiarity in the EU, including the assessment of the conformity of the EU secondary law relating to migration law and asylum with these rules. At the end of the scientific discourse, one can refer to the position of the Polish Constitutional Tribunal expressed in the judgement of 7 October 2021.[50] The Polish Constitutional Tribunal noted that

> the Constitutional Tribunal fully appreciates the place and role of the CJEU as an institution solely authorised to adjudicate in the areas entrusted by the Treaty, but only within the competences transferred to the EU, while respecting the constitutional identity and basic functions of the Member States as well as the principles of subsidiarity and proportionality, and provided that EU law is interpreted in a way that is not manifestly arbitrary. These are the impassable limits of a European law-friendly interpretation of the Constitution. Leaving the Constitutional Tribunal's control over the constitutionality of any norms of law which, on any basis, are binding in the Republic of Poland, would mean consent to the resignation of sovereignty. The provisions of the Lisbon Treaty should ensure a balance between preserving the subjectivity of the Member States and the subjectivity of the EU. From the point of view of the fundamental principles of the Union, an interpretation of the treaty provisions aimed at eliminating state sovereignty or a threat to national identity, taking over non-treaty sovereignty in the area of competences not transferred, would be contrary to the Treaty of Lisbon. (judgement of the Constitutional Tribunal ref. K 32/09)

Finally, the content of the norm is contained in Art. 4 of the TEU.[51] The EU should respect the EUMeSt's equality against the EU primary law as well as their national identity, which is inextricably linked to their basic political and constitutional structures, including those related to their regional and local governments. The EU should respect the essential functions of the state, particularly those aimed at ensuring territorial integrity, maintaining public order, and protecting national security. This provision emphasises that national security remains the sole responsibility of each EUMeSt.

50 Judgement of the Constitutional Court of 7 October 2021 on file K 3/21 (Journal of Laws of 2021, item 1852).

51 See C-546/14 *Degano Trasporti Sas di Ferrucio Degano & C*, Judgement, 7 April 2016, ECLI:EU:C:2016:206; C-317/18 *Cátia Correia Moreira v. Município de Portimão*, Judgement, 13 June 2019, ECLI:EU:C:2019:499.

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