Chapter 7

Equality Through Differentiation: Opt-Outs and Enhanced Cooperation as Expressions of Sovereignty

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Abstract

This chapter addresses the equality of Member States in the context of the EU's internal framework, focusing on legal and factual changes in the founding Treaties, exemptions to primary law, enhanced cooperation, and the potential for suspension of cooperation and termination of membership.

The EU's founding treaties establish a framework of equality among its Member States, while allowing for flexibility through exemptions and special arrangements in primary law. This principle of equality is balanced by provisions that accommodate the unique circumstances of Member States, such as accession exceptions and opt-out clauses for states that are unwilling to participate in certain policies. Conversely, opt-in clauses enable selective participation in policies of interest; enhanced cooperation mechanisms provide a legal basis for subsets of Member States to advance integration in specific areas without obligating all members. Cooperation within the EU may be suspended when a Member State violates the EU's principles or obligations, or disrupts its functioning; such actions can trigger infringement proceedings, conditional funding measures, or the Art. 7 Treaty on European Union (TEU) procedure. Provisions for membership termination, as outlined in Art. 50 of the TEU, raise questions regarding the potential application of the rebus sic stantibus clause.

Keywords: EU founding treaties, equality of Member States, exemptions to primary law, accession exceptions, opt-out clause, opt-in, enhanced cooperation, membership termination, *rebus sic stantibus* clause

Michael Siman (2026) 'Equality Through Differentiation: Opt-Outs and Enhanced Cooperation as Expressions of Sovereignty'. In: David Sehnálek (ed.) *Unequal Equals? The Status of Member States in an Integrating European Union*, pp. 235–277. Miskolc–Budapest, Central European Academic Publishing.

https://doi.org/10.54237/profnet.2026.dsuesmsieu_7

1. Introduction

The equality of Member States is one of the most enduring and fundamental principles of the EU, deeply embedded in its founding treaties and repeatedly affirmed in its political discourse and institutional practice. Since the earliest days of European integration, equality has been understood not merely as a formal rule of representation or voting, but as a normative commitment ensuring that all Member States – regardless of size, population, or economic strength – participate on an equal footing in the governance of the EU. This principle has been both a source of legitimacy and safeguard against domination by larger states or supranational bodies.

However, the historical development of the EU has shown that the application of equality is neither absolute nor static. The EU's growth in membership, competence, and policy scope has introduced new tensions between formal legal commitments to equality and practical needs of effective decision-making in a heterogeneous political community. From the foundational legal and institutional reforms of the Rome Treaties through to the Single European Act (SEA), Maastricht, Amsterdam, Nice, and Lisbon treaties, each stage of treaty revision has required a recalibration of the relationship between equality, sovereignty, and integration.

The objective of this chapter is to analyse, from the perspective of EU primary law, the various ways in which the principle of equality is maintained, adjusted, or challenged in the EU's internal dimension. Specifically, it aims to (a) examine the legal and factual changes to the founding treaties and assess how these developments have influenced the principle of equality between Member States, (b) identify and evaluate the role of exemptions to primary law – both permanent and temporary – with particular attention to accession exceptions, territorial derogations, and opt-out clauses, (c) assess the operation of enhanced cooperation as a form of differentiated integration that allows willing Member States to deepen cooperation without binding all members, and its implications for equality, (d) analyse mechanisms for suspension of cooperation (infringement proceedings, conditional funding measures, and the Art. 7 TEU procedure) and their potential to impact equal treatment among Member States and (e) consider the legal framework for membership termination, including Art. 50 TEU and the potential application of the *rebus sic stantibus* doctrine under international law, as a safeguard of sovereign equality.

Following this structure, the chapter situates the principle of equality in the broader constitutional framework of the EU, exploring both its normative significance and pragmatic adaptations. It argues that while differentiated integration mechanisms and exceptions may at times appear to undermine equality, they can also serve as instruments for preserving unity in diversity, allowing integration to proceed without coercion and accommodating legitimate differences among Member States. The analysis thus seeks to clarify the conditions under which equality is upheld or compromised, and to offer reflections on how it can be preserved in the face of evolving challenges.

2. Legal and Factual Changes of Founding Treaties

Since its creation, the EU has undergone significant legal and factual changes, with each reform reflecting its evolving nature. These changes, embedded in the founding treaties, have shaped the legal framework, governance structures, and operational mechanisms of the EU, while testing the principle of equality among its Member States.

The EU's journey began with the Treaty of Paris in 1951, which established the European Coal and Steel Community (ECSC). This was followed by various treaty amendments, culminating in the 2007 Lisbon Treaty. These treaties introduced key legal reforms, facilitating the EU's expansion, integration, and cooperation. The reforms addressed issues such as the creation of a single market, introduction of a common currency, and establishment of new governance mechanisms to ensure effective decision-making.

This section also examines how these changes have reinforced the equality of Member States, striking a balance between deeper integration and respect for national sovereignty.

2.1. The Establishment of the European Coal and Steel Community

On April 18, 1951, the Treaty establishing the ECSC was signed; after rapid ratification, it came into force on July 23, 1952. As the only founding treaty, it was concluded with a limited duration of 50 years. The negotiating states (France, Germany, Italy, Belgium, Luxembourg, and the Netherlands) had to accept its supranational character. Through this treaty, Member States transferred part of their competences in the coal and steel sectors to the ECSC. The Community was recognised as a legal entity, and in international relations, had the capacity to exercise rights and undertake legal acts necessary for fulfilling its functions and achieving its objectives.[1] The goal of the Treaty establishing the ECSC was to create a common market for coal and steel to ensure the most rational division of production and highest level of productivity in these sectors.

The ECSC was represented by its institutions,[2] each with precisely defined competences. The High Authority ('*Haute Autorité*') was entirely independent from the time of its appointment, and was composed of individuals who were selected based on their personal capabilities, ensuring complete independence.[3] Its members were not representatives of any state and were prohibited from following instructions or advice from state authorities or from providing them with information. Instead, they

1 In each Member State, the Community had the broadest capacity for rights and legal acts that their law granted to domestic legal entities; it could, in particular, acquire and dispose of movable and immovable property and act before the court.

2 Art. 6 of the ECSC Treaty.

3 Art. 9, para. 1 of the ECSC Treaty.

were obligated to perform their functions solely in the general interest of the ECSC. Each Member State pledged to respect this principle and to refrain from influencing members of the High Authority in performing their duties. Concerns that the High Authority may fall under the influence of the two largest partners – France and Germany – and overlook the interests of smaller states led to the establishment of the Special Council of Ministers (‘*Conseil spécial de ministers*’). Another institution was the Assembly, composed of representatives of people from the states united in the Community, which exercised supervisory authority over the High Authority.[4] However, these representatives were not elected through general and direct elections but were delegated by their respective parliaments from among their members.[5] Members of the Assembly voted and acted freely, not forming groups based on nationality but instead aligning themselves within political clubs and parties (Christian democrats, socialists, liberals). The final institution was the Court of Justice, which ensured adherence to the law in the interpretation and application of the Treaty establishing the ECSC and the acts adopted for its implementation.[6]

2.2. The Establishment of the European Economic Community and the European Atomic Energy Community

After the establishment of the ECSC, European integration continued to deepen until the signing of the Treaty establishing the European Atomic Energy Community (EURATOM)[7] and the Treaty establishing the European Economic Community (EEC)[8] on March 25, 1957 in Rome. Both treaties came into force on January 1, 1958 for an indefinite period, and remain in effect to this day. Included in these two founding Rome Treaties was the Convention on Certain Institutions Common to the European Communities.[9] According to the Convention, the Assembly created by the EEC Treaty and EURATOM Treaty was shared with the Assembly of the ECSC. Similarly, the Court of Justice of the ECSC also served as the Court of Justice for all three supranational Communities. Additionally, two new separate institutions were established: the Council and the Commission, specifically for the EEC and EURATOM. The Council and the Commission were assisted by the Economic and Social Committee in an advisory capacity.

The essence of the EEC and EURATOM was primarily the expansion of the common market. While the EURATOM market was strictly defined as a common market for nuclear and fissile materials, the EEC common market was incomparably broader, with no parallel market anywhere else in the world. The EEC common market included, in particular, the free movement of goods within the EEC (elimination

4 Art. 20 of the ECSC Treaty.
5 Art. 23 of the ECSC Treaty.
6 Art. 31 of the ECSC Treaty.
7 See: *La Convention relative à certaines institutions communes aux Communautés Européennes.*
8 Ibid.
9 Ibid.

of customs duties, import, and export restrictions); customs unions (adoption of a common customs tariff for goods originating from third countries); free movement of persons, services, and capital, including the right of establishment; common competition rules; harmonisation of tax regulations, and a common trade policy.[10]

The institutions of the Communities were explicitly authorized to adopt so-called Community legal acts with direct effect concerning Member States, as well as natural and legal persons. Under the EEC Treaty, the Council could, upon the proposal of the Commission, adopt regulations, directives to approximate national legislation or decisions.[11]

2.3. Fulfilling the Economic Goals of the European Communities

The six founding Member States of the European Communities experienced economic expansion and were stimulated by the prospect of an ever-expanding common market. Businesses anticipated increases in production, investment, and productivity, while economic and financial disparities between Member States diminished, as all benefited from trade liberalisation. Public opinion also became significantly invested in European integration, and the idea of a European economic grouping grew in popularity. However, not every sector achieved the same level of success.

The customs union was successfully achieved by June 1, 1968. Progress in the Common Agricultural Policy was the most challenging, as this sector faced the greatest differences between Member States and regular vetoes from French President Charles de Gaulle until the establishment of the European Agricultural Guidance and Guarantee Fund. The free movement of workers was widely implemented starting in 1958, and was nearly complete by 1968. In contrast, liberalisation in the free movement of capital was only partial. The European Social Fund was created to increase employment opportunities and enhance the geographical and professional mobility of workers. Similarly, the Regional Development Fund was established as part of the Community's regional policy aimed at countering deepening disparities between regions. However, the EEC achieved significant success in external relations, becoming a major global trading power alongside the United States, Japan, and the United Kingdom.[12]

10 See: Chalmers and Tomkins, 2007, p. 8.

11 See also: Craig and De Búrca, 2008.

12 The six Member States also acted unanimously during negotiations within the framework of GATT, which enhanced the credibility of the EEC as a reliable partner. The EEC established privileged trade relations primarily with African countries through the Yaoundé Agreements of 1964. Association agreements with the prospect of future membership were signed with Greece in 1961, Turkey in 1963, Malta in 1970, and Cyprus in 1972. Without the possibility of future membership, association agreements were concluded with Tunisia and Morocco in 1969. Additionally, preferential agreements were signed with countries such as Spain, Israel, Yugoslavia, Brazil, and Argentina, among others.

2.4. The Fouchet Plan and Other Political Integration Proposals

French President Charles de Gaulle opposed the development of the supranational principle underpinning the functioning of European Communities, instead advocating for integration based on political cooperation between sovereign states. In 1959, he initiated preparatory negotiations to establish cooperation among the six Member States in foreign policy, proposing regular quarterly meetings of foreign ministers to address foreign policy matters. In 1961 and 1962, France presented the *Fouchet* Plan, which aimed to approve a common foreign policy, a common defence policy, and the development of cooperation in science and culture. It also proposed the creation of new (non-supranational) institutions: a Council, a Parliamentary Assembly, and a European Political Commission. The plan did not interfere with the legal framework of the existing founding treaties.

However, other states insisted on preserving the principle of supranationality, maintaining defence cooperation within NATO, and accepting the United Kingdom into the EEC. France's initiative for a political union ultimately collapsed during the Paris Conference on April 17, 1962.

2.5. Institutional Crisis, Luxembourg Compromise, and the Merger Treaty

Since 1959, efforts have been made to merge the High Authority of the ECSC, the EEC Commission, and the EURATOM Commission, as the Court of Justice and the Assembly were formally unified institutions for the Communities, and the Council of Ministers operated as a single body in practice. The Assembly[13] demanded the creation of a 15-member Commission which it would be authorised to elect, and subsequently called for general and direct elections for its members. After complex negotiations, the Treaty Establishing a Single Council and Single Commission of the European Communities (commonly referred to as the Merger Treaty)[14] was signed on April 8, 1965. This treaty established a single commission and council tasked with implementing the founding treaties for all three Communities.

However, French President Charles de Gaulle opposed the introduction of majority voting in the Council of Ministers, which was to be implemented for most decisions from January 1, 1966. The decisive conflict arose during the adoption of a common market for agricultural products, a measure de Gaulle had been advocating since October 1964. Before its adoption, changes were required in the financial arrangements and budgetary provisions of Arts. 201 and 203 of the Treaty establishing the EEC. On July 1, 1965, the French government declared that obligations regarding

13 On March 30, 1962, the Assembly decided to adopt the name 'European Parliament'.

14 OJ, p. 152, 13.7.1967. The Merger Treaty was later repealed by the Amsterdam Treaty of 1997. It is also worth noting that on October 23, 1963, the Council of Ministers approved the principle of merging the institutions with the prospect of merging all three Communities. However, this full merger never materialized.

the financial arrangements of the EEC had not been met. Consequently, it recalled its permanent ambassador to the European Communities to Paris, prohibited French officials from travelling to Brussels for working group meetings, and withdrew French ministers from the operations of the Communities, an approach known as the 'empty-chair policy'. This impasse persisted until January 1966. To resolve the deadlock, the representatives of the Member States met in the Council from January 28–30, 1966, and agreed on a *modus vivendi* known as the Luxembourg Compromise.[15] This compromise was based on the following principles: (a) in cases where decisions, under the treaties, could be adopted by majority voting on a proposal from the Commission, and where significant national interests of one or more states were at stake, Council members would endeavour, within a reasonable timeframe, to reach a solution acceptable to all members, respecting their interests and those of the Communities under Art. 2 of the ECSC Treaty; (b) the French government asserted that in matters of vital importance, negotiations must continue until unanimous agreement was reached; (c) despite the above, the six governments recognized differing views on what should happen if unanimity could not be achieved; (d) the six governments agreed that these differences of opinion should not hinder the normal resumption of the Community's work.

The Luxembourg Compromise represented a significant de facto modification of the founding treaties. The institutional crisis it caused had a profound impact on European integration, leading to weakening of the Community. The planned transition to majority voting in areas specified in the treaties was effectively blocked. Furthermore, the compromise extended the principle of unanimity to secondary matters, resulting in increased rigidity in the Council's decision-making processes.

2.6. The Factual Formation of the European Council and Budgetary Treaties

The revival of European integration was also aimed at by reforming the EEC budget, which involved introducing its own financial resources and providing the Assembly (European Parliament) with control over this budget. The Member States adopted the Treaty of April 22, 1970, which amended and supplemented certain budgetary provisions of the founding treaties of the European Communities and the Treaty establishing the Common Council and the Common Commission of the European Communities.[16] This allowed the Assembly to control its own budget, with the Council being unable to amend it. Furthermore, the Treaty of July 22, 1975, amending certain financial provisions,[17] introduced the so-called 'rebate system' for Member States facing an unacceptable economic situation.

15 Council Agreement of 29 January 1966 on majority votes within the Council (Luxembourg Compromise).

16 OJ L 2, 2.1.1971, p. 1. This treaty entered into force on January 1, 1971.

17 OJ L 359, 31.12.1977, p. 4. This treaty entered into force on June 1, 1977.

2.7. Factually Shaping the European Council

On December 1 and 2, 1969, a meeting was convened in The Hague with the French president, heads of government of other Member States, and foreign ministers. The President of the Commission participated on the second day of the conference. The foreign ministers were to meet at least twice a year, and a political committee was established which was to meet at least four times a year. Later, the new French president, V. G. d'Estaing, convened a meeting on October 14, 1973, at the Élysée Palace with the heads of government of the other EEC countries and the President of the Commission, managing to reach an agreement for regular meetings every three or four months to confront differing views. This was formally confirmed by the highest representatives in December 1974.

These so-called 'European Councils', which had no legal basis in the founding treaties, aimed to help political leaders gain a global approach to issues and carry out a synthesis of community matters related to political cooperation. The discussions did not cover all the issues still handled by the Council, but only urgent matters. The representatives reaffirmed their intention not to take over the competences of the community institutions, to refrain from unanimous voting in the Council of Ministers on all issues, and to return to the Luxembourg Compromise of 1965, which applied only in the case of protecting major national interests.

2.8. Direct Elections to the European Parliament

Twenty years after the creation of the Common Assembly, this institution was democratised through the introduction of universal and direct suffrage. The so-called Brussels Act of September 20, 1976 (an Act concerning the election of the representatives of the Assembly by direct universal suffrage)[18] was adopted. Subsequently, the representatives of Member States meeting with regard to this Act set the date for the first European Parliament elections in mid-June 1978. From that point on, Members of the European Parliament were elected for five years; however, they could combine their national and European mandates. Member States could not agree on a unified electoral system, and each retained the right to decide its own rules.

18 OJ L 278, 8.10.1976, p. 5.

2.9. The Single European Act

The SEA,[19] the first official revision of the founding treaties, was signed by the Member States in two stages: on February 17, 1986 (with nine out of twelve Member States in Luxembourg) and on February 28, 1986, in The Hague (Denmark, Greece, and Italy). This Act legally enshrined structural dualism: on one hand, the European Communities operated,[20] and on the other, European Political Cooperation (EPC) was outside the community framework (not incorporated into the founding treaties), aimed at formulating a common foreign policy for the European Communities. Because the EPC area was outside the community framework (based on the original founding treaties, the first pillar), it functioned under the traditional principles of international law (intergovernmental negotiations), meaning that the jurisdiction of the Court of Justice of the European Communities in this area was excluded. The main objective of the SEA was to create the necessary space for completing the internal market. The SEA also granted the EEC so-called monetary competence,[21] a legal basis necessary for progress towards economic and monetary unions.

The SEA institutionalised and legally established the European Council, which had proven itself as a forum for bringing forward proposals and political cooperation, although the Act did not specify its competence or scope. A key change introduced by the SEA was the improvement of the decision-making process through the extension of qualified majority voting in the Council of Ministers, which limited the Luxembourg compromise. The SEA also partially strengthened the competences of the European Parliament[22] by introducing a cooperative legislative procedure. Furthermore, the Commission's position was strengthened, allowing it to receive delegated executive competences from the Council (known as comitology).[23]

19 OJ L 169, 29.6.1987. The term 'Act on the European Union' was not adopted, as Denmark and the UK rejected the idea of union, and the Benelux countries disagreed with this proposed name for the opposite reason: the treaty significantly fell short of what a union should represent. Therefore, the name of the treaty 'Single European Act' was not intended to be seen as a final goal, but rather as a means to achieve progress through the continued use of the community method and political cooperation.

20 Art. 1, para. 2 of the SEA also defined what the European Communities are, as until then, this term did not have an explicit legal definition: 'The European Communities shall be founded on the Treaties establishing the European Coal and Steel Community, the European Economic Community, the European Atomic Energy Community and on the subsequent Treaties and Acts modifying or supplementing them'.

21 Art. 20 of the SEA.

22 The SEA renamed the 'Assembly' to the 'European Parliament' in the founding treaties (see Art. 6, Paragraph 2 of the SEA), even though the members had already adopted this name themselves in 1962.

23 See: Craig and De Búrca, 2008, p. 12.

2.10. Treaty on the European Union (Maastricht Treaty)

The TEU was signed in Maastricht, the Netherlands, on February 7, 1992, and entered into force on November 1, 1993, following a complex ratification process. The structure of the EU itself was presented in the form of a Greek temple consisting of three pillars: the first, the most significant community pillar, represented the European Communities, while the remaining two pillars of the EU were no longer supranational but merely intergovernmental – the common foreign and security policy, and cooperation in justice and home affairs. As a result, there was also a distinction between the ways in which legal acts were adopted, their binding nature, and their effects on the first supranational pillar (community law), versus the acts adopted in the second and third intergovernmental pillars (union law).[24]

However, no provision granted the EU legal personality so that it could act independently. The EU was declared to have a unified institutional framework from its inception: the European Parliament, Council, Commission, Court of Justice, and Court of Auditors. The TEU responded to the nearly twenty-year request of the European Parliament to introduce a co-decision procedure in the legislative process, which fully equalised the position of the European Parliament and the Council in the adoption of secondary acts, although only in the areas of the internal market, research, environment, consumer protection, education, culture, and healthcare. The TEU also established the principles of subsidiarity and proportionality, as well as EU citizenship. Furthermore, the TEU introduced a three-stage process for creating a monetary union.

2.11. Amsterdam Treaty

The Maastricht Treaty of 1992[25] assumed that necessary changes to the founding treaties would be adopted later. The Amsterdam Treaty was signed on October 2, 1997, and entered into force on May 1, 1999. The Amsterdam Treaty partially 'communitarised' the third pillar, specifically visa, asylum, immigration policies, and other policies related to the free movement of persons, as well as judicial cooperation in civil matters. The third pillar was reduced to police and judicial cooperation in criminal matters. A significant change was the incorporation of the Schengen acquis into the EU framework.[26] Within the second pillar, the responsibility of the European Council was expanded to include defence matters. The Amsterdam Treaty also clarified the representation of the EU in the context of the Common Foreign and Security Policy, confirming that the EU would be represented by a Member State holding the

24 See: Chalmers and Tomkins, 2007, p. 23.

25 OJ C 191, 29.7.1992, p. 1.

26 See in details the Protocol by which the Schengen acquis is incorporated into the framework of the European Union, attached to the TEU and TFEU.

presidency and assisted by the General Secretary of the Council, who would also serve as the High Representative for the CFSP.

Majority voting in the Council and co-decision legislative procedures were expanded. The Amsterdam Treaty also sought to clarify the founding treaties by renumbering, amending, and removing obsolete provisions.[27]

2.12. Treaty of Nice

Institutional reform was an ongoing issue for the EU and posed an obstacle to further expansion. Therefore, the December 2000 meeting of the European Council in Nice concluded the fifth intergovernmental conference and adopted another revision of the founding treaties. The Treaty of Nice[28] was signed by the Member States on February 26, 2001, and entered into force on February 1, 2003.

From an institutional perspective, Member States were to have only one commissioner. The Council continued to decide by qualified majority when appointing the President of the Commission, as well as the entire Commission, a new procedure that freed the Commission from depending on unanimous consent of the Member States' governments and strengthened the competences of its president. The number of members of the European Parliament was increased, and its competence were partially enhanced. The Nice Treaty extended the adoption of secondary acts by qualified majorities to many additional areas, as well as co-decision procedures. The qualified majority system was also adjusted in connection with the EU's further enlargement.

2.13. Lisbon Treaty

The failure of the previous revision of the treaty to establish a Constitution for Europe[29] had to be overcome as soon as possible with new negotiations to recodify the founding treaties. The Lisbon Treaty[30] was approved at an intergovernmental conference of heads of state and government on October 18, 2007. It was signed on December 13, 2007 in Lisbon, and came into force on December 1, 2009. This treaty does not replace the previous founding treaties of the EU and EC, as the unsuccessful treaty establishing a Constitution for Europe intended to do, but only amends these treaties.

According to the Lisbon version of Art. 1 of the TEU, the EU is founded on two treaties with equal legal force: the TEU and the Treaty on the Functioning of the European Union (TFEU) (formerly the Treaty establishing the EU). As of December 1, 2009, the EU became a legal successor to the European Community, which ceased

27 See: Craig and Be Búrca, 2008, p. 25.
28 OJ C 80, 10.3.2001, p. 1.
29 OJ C 310, 16.12.2004, p. 1.
30 OJ C 306, 17.12.2007, p. 1.

to exist. The Treaty establishing the EURATOM remains in force. Thus, the Lisbon Treaty removed the three-pillar structure of the EU, although it preserved the specificities of acts from the second pillar of the EU. Community law was replaced with the term 'Union law' or 'EU law'. The Lisbon Treaty, for the second time after the Amsterdam Treaty, renumbered the Arts. of the founding treaties.

The Lisbon Treaty also addressed the issue of a Member State's withdrawal from the EU, which had not previously been regulated. The competences of the EU were categorised and clearly defined in relation to those of the Member States. The Lisbon Treaty introduced a direct connection between the election of the Commission's president and the results of the European Parliament elections. The competences of the European Parliament were strengthened in areas such as adopting EU acts, budgets, and concluding international agreements. It also established cooperation between national parliaments regarding EU legislative activity, which ensured that the principles of subsidiarity and proportionality were respected. To increase the stability and continuity of the European Council's work, which had previously been disrupted by the semi-annual rotation of the presidency, the Lisbon Treaty created the position of President of the European Council, elected for a term of two and a half years. The Charter of Fundamental Rights of the EU, adopted in 2000 in Nice and amended in 2007 in Strasbourg, became part of the primary law. The EU can also accede to the European Convention on Human Rights.[31]

2.14. Concluding Remarks

The legal and factual changes to the founding treaties of the EU illustrate the increasing complexity and diversity of the EU while continuously grappling with the principle of equality among Member States. This principle has been a cornerstone of the EU since its inception, ensuring that all Member States, regardless of size or influence, play an integral role in shaping the EU's policies and governance.

From the Treaty of Rome in 1957 to the present, the evolution of the EU's treaties has marked a gradual shift in how equality is balanced with the need for efficient decision-making. Early treaties prioritised unanimity and equal participation, preserving Member States' sovereignty. However, as the EU expanded and its responsibilities grew, reforms introduced mechanisms, such as qualified majority voting and institutional restructuring, which altered the balance of power between Member States. The introduction of qualified majority voting, first seen in the SEA and expanded in later treaties, streamlined decision making in specific policy areas. While promoting efficiency, this system also meant that individual Member States could occasionally be outvoted, raising questions about the traditional concept of equality. Institutional changes such as enhanced competences for the European Parliament and a reweighted voting system in the council further shaped the interplay between equality and effective governance. The Lisbon Treaty (2009) marked a significant

31 See Art. 6(2) of the TEU.

effort to reconcile these competing demands. By introducing a double-majority voting system that considers both population size and number of Member States, it aimed to strike a balance between larger and smaller countries. Additionally, the treaty emphasised the principle of subsidiarity, ensuring that decisions were made as close to citizens as possible, thus safeguarding national sovereignty.

However, these changes were introduced through amendments to the primary law. This suggests that the shift in the perception of equality among Member States stemmed less from the actions of supranational institutions and more from the will and preferences of the Member States themselves. Despite these adaptations, the EU continues to face challenges in maintaining the principle of equality amidst growing diversity and complexity. Differing levels of economic development, varying national interests, and the shifting balance between larger and smaller Member States remain sources of tension. Nonetheless, equality remains a defining feature of the EU legal framework and identity. As the EU evolves, it must navigate the ongoing challenge of harmonising equality with the practical realities of governance. The EU's ability to manage these tensions will be critical as it addresses emerging challenges, including economic disparities, geopolitical shifts, and societal transformations, all within the framework of an increasingly diverse membership.

3. Exemptions to Primary Law

The territorial scope of the EU's legal order is generally confined to the territories of its Member States, with certain exceptions. In practice, these exceptions could appear to create an unequal status among Member States because they are not applied uniformly across all Member States, as is demonstrated in this paper. Are these exceptions objectively justified, or do they lead to an undesirable fragmentation of EU law in affected areas?

As for the primary law of the EU, it is difficult to find a legal basis for exceptions to its territorial scope outside of the primary law itself, which consists of the founding treaties, their revisions, the Charter of Fundamental Rights of the EU, accession treaties, and other supplementary acts. Exceptions to primary law, which are directly reflected not only in primary law but also in other sources adopted on its basis, could be classified based on their presumed duration as exceptions of a permanent or temporary nature. The aim of this section is to define exceptions to primary law, categorise them based on their nature, and assess the practical impacts these exceptions may have on the consistency of EU law and the equal status of Member States.

3.1. Accession Exceptions

The EU accession treaties often include transitional periods and exemptions to facilitate the integration of new Member States. These provisions, negotiated during the accession process, reflect the candidate country's economic, legal, and institutional realities. They aim to balance the gradual adaptation of new members, while maintaining the EU's overall stability.

3.1.1. Accession Treaties

In general, international treaties are considered binding sources of law, and we are inclined to agree that they are binding as a whole, including the preambular part, which serves as an important tool for their interpretation.[32] The EU possesses exclusive external competence to conclude international agreements with third countries, primarily in areas that, from an internal perspective, also fall within the EU's exclusive competence. Accession treaties are also included.[33] All conditions of accession of the future Member States of the EU are regulated in acts on the conditions of accession, which are attached to the accession treaties and have the same legal force as these treaties. Acts on the conditions of accession mainly contain changes to the founding treaties related to the enlargement of the EU. These include changes in the composition and functioning of its institutions and bodies and the establishment of exceptions and transitional periods for Member States during which certain provisions of EU law temporarily do not apply. Exceptions and the transitional period can be separately regulated for each acceding state in a separate annex to the act on the conditions of accession.

The provisions of the acts on the conditions of accession are in fact provisions of primary law that can only be changed or repealed by the procedure applied in the revision of primary law, unless the act of accession itself provides otherwise. These provisions include protocols and annexes which are part of the accession treaties and which directly contain changes to the acts of institutions of the EU. Therefore, the Court of Justice cannot assess the validity of these provisions. In this context, however, it is necessary to remember that the legal nature of the secondary acts themselves, changed by the act of accession, remains unaffected, and institutions of the EU can later amend, supplement, or cancel the secondary acts concerned by standard legislative procedures. However, they cannot change the specific provisions of an act concerning the conditions of accession which contain changes to these secondary acts. Meanwhile, secondary law includes provisions of acts on the conditions of accession, which authorise institutions of the EU to adopt the necessary changes to acts related to the accession of new states to the EU.

32 Moravcová, 2024, pp. 865–876.

33 Opinion of 19 March 1993, Convention no. 170 de l'OIT, 2/91, EU:C:1993:106, para 8. Judgment of 5 May 1981, *Commission v United Kingdom*, C-804/79, EU:C:1981:93, paras. 17, 18.

3.1.2. Transitional Periods and Permanent Exemptions

EU law is effective in the territory of Member States upon accession, with the presumption that it does not apply retroactively.[34] Transitional periods are temporary measures that allow new Member States to delay the implementation of specific EU rules. These arrangements help new members adapt economically, legally, and institutionally, while minimising potential disruptions for existing Member States.

A key aspect of transitional periods is the free movement of workers. Existing Member States sometimes fear labour market disruptions due to an influx of workers from new members. For instance, after the 2004 enlargement, countries such as Germany, Austria, and France imposed a seven-year transition period restricting access to their labour markets, gradually lifting these restrictions based on economic conditions. In agricultural and structural funds, new members may initially receive reduced subsidies to allow the EU to adjust its budget. For example, Poland's farmers received 25% of the standard subsidy upon joining in 2004, with gradual increases reaching parity by 2013. Environmental standards also require transitional periods, as meeting strict EU directives often necessitates significant investment. Bulgaria, for example, was granted time to comply with the Industrial Emissions Directive, enabling the modernisation of its power plants and industries. Transitional periods also apply to competition law, allowing states to phase out subsidies incompatible with EU rules, and to euro adoption, in which new members must meet the Maastricht convergence criteria before joining the euro area.

In contrast, exemptions are permanent provisions excusing a Member State from certain EU rules or policies. These are rare and usually linked to national interests or unique circumstances. Unlike transitional periods, exemptions create long-term differentiation among Member States, as they do not aim for eventual alignment with EU rules.

3.1.3. Concluding Remarks

Both transitional accession periods and exemptions raise concerns about equality among Member States, as they treat some countries differently. Transitional accession periods, while temporary, may create perceptions of second-class membership. Accession exemptions present an even greater challenge to equality, as they create permanent differentiation.

To mitigate these concerns, the EU uses several mechanisms: progress monitoring tools such as the cooperation and verification mechanism, tracking reforms in different areas, safeguard clauses allowing the EU to take corrective action if a new Member State fails to meet obligations or disrupts the internal market, and sunset clauses, ensuring that transitional periods expire after a specific timeframe.

34 Bobek, Bříza and Komárek, 2011, p. 544.

3.2. Exceptions in Founding Treaties

These exceptions were not negotiated for a fixed period, making them permanent. Among these permanent exceptions, we included opt-out clauses specifically associated with Member States such as Denmark, Ireland, and Poland. The United Kingdom has also negotiated such an opt-out; however, this paper will not address the case of the United Kingdom, given its withdrawal from the EU. In addition to these permanent opt-out clauses, we can classify permanent exceptions related to overseas or outlying territories within this category.

3.2.1. European Territories of Member States

The scope of primary EU law is not uniform in Europe and overseas, or in outlying territories of Member States. In accordance with Art. 52 of the TEU, any part of the European territory of Member States falls under the territorial scope of EU law. In addition, the primary law of the EU also applies to European territories for which the Member State is responsible for foreign relations.[35] The above also applies to Gibraltar.[36]

The founding treaties also regulate exceptions to the territorial scope, for example, they do not apply in their entirety to the Faroe Islands. They partially apply to the sovereign territories of the United Kingdom of Akroriti and Dhekelia in Cyprus to the extent specified in Protocol no. 3 of the Act on the Conditions of Accession from 2003. The treaties apply to the Channel Islands and the Isle of Man to the extent specified in the Accession Treaty from 1972, and to the Aland Islands to the extent specified in Protocol no. 2 of the Act on the Conditions of Accession of the Republic of Austria, the Republic of Finland, and the Kingdom of Sweden.[37]

Moreover, the Provision of Art. 52 of the TEU states that the primary law of the EU applies to the Republic of Cyprus as a whole. However, this must be applied in connection with Protocol no. 10 on Cyprus, annexed to the Accession Treaty of 2003. According to Art. 1 of this Protocol, the application of EU law is postponed in those parts of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective administration.

In addition to that mentioned so far, Art. 349 of the TFEU provides for the possibility of adopting special measures for the application of treaties to defined overseas territories of Member States (Guadeloupe, French Guiana, Martinique, Réunion, Saint Bartholomew, Saint Martin, Azores, Madeira, and the Canary Islands), whose

35 See Art. 355(3) of the Consolidated version of the Treaty on the Functioning of the European Union (TFEU) (OJ C 326, 26.10.2012, pp. 47–390).

36 See Declaration no. 55. of the Kingdom of Spain and the United Kingdom of Great Britain and Northern Ireland: 'The Treaties apply to Gibraltar as a European territory for whose foreign relations a Member State is responsible. This does not imply changes to the respective positions of the Member States concerned'.

37 See Art. 355(4)(5) of the TFEU.

development is due to the economic and social structure being negatively affected by their remoteness, island location, small area, unfavourable topographical and climatic conditions, or economic dependence on a small amount of products.

These special measures may be adopted by the Council on a proposal from the Commission, after consulting the European Parliament in the areas of customs, trade or tax policy, free zones, agricultural and fisheries policy, supply of raw materials and basic consumer goods, state aid and access to structural funds, and horizontal programme of the EU. The measures take into account the particularities and limitations of these overseas territories without disrupting their integrity and the coherence of the EU's legal order.[38] Therefore, EU law may apply to the aforementioned territories with the possibility of accepting exceptions through secondary law acts.

To the EU are in accordance with Art. 355, para. 2 of the TFEU associated some non-European countries and territories that have special (constitutional) relations with Denmark, France, the Netherlands and the United Kingdom. A taxative calculation of these countries and territories is given in Annex II to the founding treaties.[39] These overseas countries and territories (OCTs) are subject to special arrangements for association listed in the fourth part of the TFEU, Arts. 198 to 204, and Protocol no. 34 on special arrangements for Greenland.[40]

The aim of this association is to support the economic and social development of the OCT and to establish close economic relations between the OCT and the EU as a whole. Its essence is based on equal treatment (expansion of the scope of contracts) in trade relations between Member States and these countries, equal participation in public tenders and supplies financed by the EU, freedom of establishment,[41] and free movement of goods.[42]

Overseas countries and territories are constitutionally linked to their Member States, but are not part of the EU as such.[43] On the basis of Art. 355, para. 2 TFEU, the provisions of the treaty do not, in principle, apply to the OCTs, except for the fourth part of the treaty, which is devoted exclusively to the OCT-EU association.

38 Art. 355(1) of the TFEU.

39 Greenland, New Caledonia and Dependencies, French Polynesia, French Southern and Antarctic Territories, Wallis and Futuna Islands, Mayotte, Saint Pierre and Miquelon, Aruba, Netherlands Antilles (Bonaire, Curaçao, Saba, Sint Eustatius, Sint Maarten), Anguilla, Cayman Islands, Falkland Islands, South Georgia and the South Sandwich Islands, Montserrat, Pitcairn, Saint Helena and Dependencies, British Antarctic Territories, British Indian Ocean Territories, Turks and Caicos Islands, British Virgin Islands and Bermuda. This list varied considerably and after the Second World War it mainly included the French and Belgian colonies in Africa, which gradually gained full independence and today have contractual relations with the EU based on Art. 217 TFEU (see in particular the Partnership Agreement between the African, Caribbean and Pacific Group of States, on the one hand, and the European Community and its Member States, on the other, signed in Cotonou on 23 June 2000).

40 See also Declaration no. 60 of the Kingdom of the Netherlands to Art. 355 of the TFEU.

41 Art. 199(1–5) of the TFEU.

42 Art. 200 of the TFEU.

43 See e.g. Judgment of the Court of 11 February 1999, *Antillean Rice Mills and Others*, C-390/95 P, EU:C:1999:66.

Between the OCTs and the outlying territories listed in no. 355 para. 1 TFEU there is a fundamental difference. In contrast to the OCT, the outlying territories are not only constitutionally connected to the relevant Member State, but also form an indivisible part of the EU and are in principle bound by EU law in its entirety. Therefore, it is not appropriate to make any quantitative or qualitative comparison of OCTs with the outermost regions in terms of benefits provided by the EU and obligations towards the EU.[44]

There are great differences between OCTs[45] themselves in terms of the degree of autonomy *vis-à-vis* the respective Member State with which they are linked, but also in the economic and social sphere. However, no overseas country or territory is a sovereign state. In addition, they are dependent on the import of goods and energy. Exports of goods from the OCTs to the EU or within their respective geographic regions remain generally limited.[46]

3.2.2. Opt-Out Clauses

Permanent opt-out clauses may also pertain to primary law itself, meaning that the legal basis for these exceptions cannot be found in any lower-force legal norm but solely within the 'constitutional framework' of EU law. These exceptions limit the territorial scope of relevant EU law because the Member States in question are excluded from the *ratione loci* application of the EU law from which they have opted out.[47]

44 See Commission Green Paper 'Future relations between the EU and overseas countries and territories', SEC(2008) 2067, COM(2008) 383 final, Point 2.1.

45 Regarding OCTs see e.g. judgment of 8 February 2000, Emesa Sugar, C-17/98, EU:C:2000:70.

46 Unlike third countries, all nationals of the OCT are in principle citizens of the Union within the meaning of Art. 9 TEU. More precisely, all nationals of Greenland and the French and Dutch OCTs automatically also have the nationality of these Member States. From 21 May 2002, citizens of the British OCTs also became British citizens, but they can renounce this citizenship and remain citizens of the British Overseas Territories only and are not required to have a passport identifying them as British citizens. As citizens of the Union, nationals of the OCT are also entitled to rights arising from Union citizenship, such as the right to free movement and residence (but not work) in the territory of the Member States. Citizens of the OCT may also have the right to vote or stand for election to the European Parliament if the conditions set by the relevant Member States in accordance with Union legislation are met. This is the case, for example, with nationals of the French OCTs. In the case of the islands of Saint-Pierre, Miquelon and Mayotte, their specific connection with the Union is also reflected in the use of the euro in these OCTs, although their monetary regime is not specified in the TFEU as they are not part of the Union (Council Decision (EC) No. 1999/ 95 of 31 December 1998 concerning monetary adjustments in the French territorial communities of Saint-Pierre and Miquelon (OJ L 30, 4.2.1999, pp. 29–30)). No other OCTs use the euro, but the French Pacific OCTs are exploring the possibility of replacing their currency with the euro. It may also be noted that, although the general provisions of the treaties do not apply to the OCTs, unless there is a specific reference to them, the jurisdiction of the CJEU includes proceedings on a preliminary question which, in accordance with the TFEU, is requested by a court whose jurisdiction includes the OCTs, as well as actions brought under the conditions laid down in the TFEU by plaintiffs from the OCT, which are directed against legal acts adopted by the EU.

47 Geursen, 2024, p. 370.

As mentioned earlier, all exceptions to primary law naturally impact secondary acts adopted on the basis of primary law. These opt-out clauses may appear to be unjust in terms of the position of Member States. As T. Duttle et al. state, opt-outs allow less integration-friendly Member States to maintain their preferred level of integration without exercising a veto over the more ambitious projects of the majority, a concept referred to as 'constitutional differentiation'.[48]

The creation of these clauses presupposes that the majority of Member States have a shared interest in advancing integration within a specific area, where consensus among all Member States is necessary. This issue arises when a Member State is unable to contribute to a consensus. In such cases, the solution is either to refrain from integration in the relevant area or to establish a mechanism by which integration remains viable despite the disinterest of one or more Member States. Notably, opt-outs have occurred exclusively among acceding countries, and never among the original founders of the integration process.

These clauses should be viewed from two perspectives. On the one hand, they may appear unjust, as they were granted only to certain Member States, and if another Member State sought a similar exception, it would likely require a revision of primary law – a complex process that would definitely not be simple. Opt-out clauses were introduced in cases where consensus among Member States was necessary to advance integration, such as the introduction of a new EU policy, or significant changes to primary law, such as the inclusion of the EU Charter of Fundamental Rights in primary law.

From a more positive perspective, these clauses allowed a Member State, despite not wishing to pursue a particular degree of integration, to refrain from obstructing other Member States and permit progress in the integration process with the insertion of an exception. It remains an open question whether similar clauses may be accepted during potential future revisions of primary law. However, it is difficult to envision such clauses being introduced *ex post* into policies in which these states actively participate in the policymaking process.

We will now briefly examine Member States' opt-outs. First, several provisions of EU law regulating economic and monetary unions that do not automatically bind Denmark can be cited.[49] We can therefore say that it is the only country exempted from the obligation to adopt the Euro. Owing to the negotiated clause, a key referendum was passed in Denmark, and the Danish government accepted the treaty.[50] Denmark negotiated specific exemptions within EU law, as outlined by the European Council. These provisions apply only to Denmark, both currently and in the future. Regarding the third stage of the Economic and Monetary Union (EMU), Denmark has opted out, meaning it will not adopt the euro or be bound by the economic policy

48 Duttle et al., 2017, pp. 406–428, 408.

49 Protocol on certain provisions relating to Denmark, annexed to the Treaty establishing the European Community (1992).

50 Adler-Nissen, 2014, pp. 6–7.

rules of EMU members. Denmark retains control over its own monetary policy and continue to participate in the European Monetary System. Additionally, Denmark maintains autonomy over its social welfare and income distribution policies.[51] Based on Protocol no. 22 on Denmark's position, Denmark has to opt out of defence policy, justice, and home affairs. As a leader in opt-out clauses and in accordance with the protocol, Denmark will not prevent other Member States from cooperating on these matters.

With regard to Protocol no. 21 on the position of the United Kingdom and Ireland in respect of freedom, security and justice, Ireland has an opt-out in these areas. The last permanent opt-out is that of Poland, which, by virtue of Protocol no. 30 on the application of the Charter of Fundamental Rights of the EU to Poland and the United Kingdom, binds itself to the Charter.

It is fundamentally difficult to dispute that permanent opt-outs create a form of multilevel cooperation within founding treaties,[52] which may, to some extent, negatively affect the equal standing of Member States within the EU. Through these clauses, Member States naturally safeguard their sovereignty by creating differentiation. However, we also concur with the view that opt-outs are generally perceived as controversial, potentially leading to a fragmentation of the EU [53] and its legal order. We discuss these impacts further in the concluding remarks.

Finally, we consider it necessary to add that the difference between the exceptions that apply to islands, outlying territories and permanent opt-outs is a possibility or option for a Member State with a permanent opt-out to decide whether or not to make use of the clause. Even this option can be changed subsequently.[54] Therefore, Member States that have negotiated permanent opt-outs can, within the limits of the scope of these block opt-outs for individual policies, moderate the extent to which they are bound by the acts adopted under that policy in the future. A model example is Denmark; based on a referendum held in June 2022, it has been participating in the Common Security and Defence Policy of the EU since July 1 2022.[55]

3.2.3. Concluding Remarks

Diverging views emerge regarding permanent opt-out clauses. How should we perceive permanent opt-outs negotiated by current Member States of the EU:

51 EUR-lex, 2006.

52 Duttle et al., 2017, pp. 406–428, 422.

53 Adler-Nissen, 2014, p. 2.

54 For example, in the case of the Brussels I bis Regulation (Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (OJ L 351, 20.12.2012, pp. 1–32), where we find in the preambular part that it does not participate, but subsequently concluded Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ, 2005 11 16, L299).

55 Heiming, 2023.

Denmark in certain areas, Ireland in other areas, and Poland in relation to the Charter of Fundamental Rights? We agree with the assumption that differentiated integration responds to the increasing heterogeneity of preferences and capabilities resulting from the EU's expansion into additional policy areas, higher levels of centralisation, and new Member States.[56] It is objectively undeniable that the negotiation of these opt-outs by the concerned Member States was driven by political motivations. The prerequisite for these agreements was the desire of Member States to secure the adoption of amendments to the founding treaties, which would have been unattainable without their participation. From this perspective, it is difficult to dispute that opt-outs contribute to the EU's integration process, as they allow Member States to moderate their positions on specific issues during treaty negotiations, rather than issuing a full rejection. The legal basis for these opt-outs lies in the protocols annexed to the founding treaties, which constitute primary EU law. The question of why other Member States did not avail themselves of this option at the time of treaty adoption is irrelevant; what is more pertinent is why it would be difficult to adopt such opt-outs retrospectively. Given that this concerns EU primary law, introducing new opt-outs would necessitate revising primary law, a process that requires consensus. In our view, this question could be raised during future revisions of the founding treaties, although we do not anticipate a retroactive application to existing policies but rather to any new measures introduced by future revisions. Therefore, the perceived disadvantage faced by other Member States stems purely from their failure to raise objections at the time of the treaty's adoption or during the introduction of new policies from which they may wish to opt out.

Additionally, one could argue in favour of opt-outs by drawing on international public law. From the perspective of Member States, founding treaties are, in essence, international treaties, albeit with special status within EU law, as they form the constitutional foundation of EU primary law. Nevertheless, Member States can typically attach unilateral reservations to international treaties, whereas this option is absent in EU primary law and is to some extent replaced by the opt-out mechanism. This, however, requires the consent of all other Member States. A valid argument against opt-outs is that the unequal status of Member States and their unequal participation in the integration process could lead to the fragmentation of EU law. As such, opt-outs can be viewed both as a threat to the uniformity of EU law and as a means to advance integration despite the disinterest of certain Member States, thus overcoming the issue at hand. Ultimately, the objective outcome is that not all Member States are treated equally.

If the principle of equality among EU Member States is to be maintained, the current reality is that while most Member States have achieved the same level of integration, some have not reached this level. In the case of opt-ins, certain Member States have even exceeded it.

56 Winzen and Schimmelfennig, 2015.

In the context of future proposals and considerations, the possibility of introducing new opt-outs could be excluded. However, one could support the opt-in cooperation model in the form of enhanced cooperation, although this mechanism also has certain shortcomings and has been subject to criticism. As R. Böttner notes:

> The files on establishing and implementing enhanced cooperation are all characterised by different timeframes and intensity of discussions and different levels of political controversy, all of which are factors that eventually led to enhanced cooperation'. Enhanced cooperation agreements, such as the European Public Prosecutor's Office and cooperation on European patents, have been discussed for many years. On the contrary, 'the proposal for the financial transaction tax met strong resistance in principle so that willing Member States resorted to enhanced cooperation relatively quickly.[57]

Here, I would strongly recommend establishing an obligation to explore all possible avenues to reach a consensus, with negotiations being sufficiently long and thoughtful, allowing Member States adequate time to consider options rather than rushing into decisions. I believe this is an appropriate form of cooperation, provided that the conditions are met, and that it is only used when a reasonable amount of time has been allocated for states to attempt to reach a consensus. If after ample time and all possible efforts, a consensus cannot be achieved, only then should the mechanism of enhanced cooperation follow as a last resort.

However, the status quo undeniably leads to a lack of clarity and uniformity in EU law. This also raises the question of the 'free rider' issue in terms of equality. To what extent should the non-participation of Member States be reflected in the rules governing budget contributions? Since even Member States benefitting from their exemptions may, to some degree, benefit from the areas they opt out of, we propose that the first step towards ensuring equality without unnecessary doubt could be to draw a clear line and refrain from applying corrective mechanisms to adjust the contributions of these Member States.

4. Enhanced Cooperation

One of the temporary exceptions in EU law is the exception of the so-called opt-in clause, which manifests itself in the form of enhanced cooperation. The provision that was enshrined in the Treaty of Amsterdam has been replaced with a new provision, which has been renamed 'enhanced cooperation' rather than 'closer cooperation'.[58]

57 Böttner, 2022, pp. 1145–1164.
58 Craig and De Búrca, 2008. p. 29.

The establishment of this form of cooperation was a response to political demands for a mechanism that would facilitate deeper integration of selected Member States.[59] In the case of a permanent opt-out, consensus among Member States is a prerequisite, allowing a state to join only under the condition of opting out. Conversely, an opt-in requires a lack of consensus among Member States and a subsequent interest from certain Member States to engage in enhanced cooperation.

The EU has grown over the last few decades, increasing the number of Member States from 6 to 27. Despite the progress made so far, it is necessary to note reservations on the part of Member States related to their various conceptions of the EU. Furthermore, objective factors are likely to complicate uniform integration, which consist of economic and legal differences due to different national legal systems. For this reason, the principle of coherence, based on the idea of uniform integration at the economic, political, and legal levels, will be difficult to achieve, given that the EU is characterised by continuous enlargement and consequent heterogeneity.

As such, it is necessary to progress in a differentiated manner, for example, by allowing cooperation with only some Member States or leaving Member States free to participate in cooperation. However, in this regard, the system of enhanced cooperation is so far the only one to be codified in the founding treaties. Thanks to enhanced cooperation, Member States wishing to collaborate closely may use the EU's institutions, bodies, mechanisms, and procedures to achieve the goals of such cooperation. Enhanced cooperation allows participating Member States to organise broader cooperation than that initially provided for by treaties within the framework of the policy concerned. It allows for establishment of a more flexible decision-making mechanism to authorise a limited number of Member States to advance EU integration more quickly when not all Member States are capable of adopting the same pace. With this regulation in the founding treaties, it is possible to overcome blockages in certain EU policies, including common foreign and security policies.

Furthermore, enhanced cooperation can be regarded as forefront integration that can be followed, even in stages, by the subsequent accession of the remaining Member States to that cooperation. Two sets of provisions implement a mechanism for enhanced cooperation in the founding treaties. First, Art. 20 TEU which governs the general authorisation and conditions of enhanced cooperation in the EU, and second, Art. 326 TFEU et seq. which governs the conditions, rights, and duties relating to enhanced cooperation incumbent on the Member States, notwithstanding their participation. According to Art. 20 TEU, enhanced cooperation is permitted in all EU competences, except for exclusive ones. It must promote the EU's objectives, protect its interests, and strengthen its integration process. The participation of at least nine Member States is required, which makes enhanced cooperation more open and flexible, given that the EU currently has 27 Member States.

Enhanced cooperation remains as ultima ratio respecting the principle of subsidiarity, since it can be triggered only if the objectives pursued cannot be achieved by

59 Malíř, 2019.

all Member States within an acceptable period. In this regard, the Court of Justice ruled that the EU's interests and the process of integration would not be protected if all fruitless negotiations led to enhanced cooperation, to the detriment of the search for a compromise enabling the adoption of legislation for the EU as a whole. The expression 'as a last resort' highlights the fact that only those situations in which it is impossible to adopt such legislation in the foreseeable future may give rise to the adoption of a decision authorising enhanced cooperation.[60]

Of course, any acts adopted within the enhanced cooperation are addressed exclusively to participating Member States and are not part of the EU's acquis regarding the accession of candidate countries to the EU. It follows from the wording of Art. 326 of the TFEU that the provisions of acts adopted within the framework of enhanced cooperation cannot conflict with EU law.

In this context, founding treaties require respect for the equality of Member States and the principle of loyalty, as enhanced cooperation must not under any circumstances undermine economic and social cohesion, nor lead to obstacles or discrimination in trade between Member States.[61] Art. 327 of the TFEU establishes an obligation of mutual respect and loyalty, since enhanced cooperation must respect the competences, rights, and obligations of non-participating Member States, and vice versa. Non-participating Member States cannot prevent the development of such cooperation.

The equality of access by Member States to closer integration within the EU is also ensured by the fact that enhanced cooperation is open – not only at the stage of its establishment but also after its implementation – to all Member States, provided that they fulfil the required conditions. This provision underlines the provisional nature of the enhanced cooperation regime, which should lead to the gradual participation of all Member States in such cooperation and its subsequent incorporation into EU acquis. Participating Member States should, in this regard, encourage other Member States to join the established enhanced cooperation.

According to Art. 329 of the TFEU, which describes the initial establishment of enhanced cooperation, a minimum of nine Member States wishing to cooperate must submit a request to the Commission, which has a margin of discretion to check whether the formal conditions for cooperation are met. It is not clear whether the Commission is authorised to control the possible political consequences of such cooperation. The Commission may then submit the cooperation proposal to the Council which, after obtaining the consent of the European Parliament, can give authorisation to proceed with enhanced cooperation.[62]

60 See Judgment of 16 April 2013, Spain and Italy v Council, C-274/11 and C-295/11, EU:C:2013:240 paras. 49 and 50.

61 See Art. 327 of the TFEU.

62 Regarding the enhance cooperation falling within the scope of the Common Foreign Affairs and Security Policy, the process is slightly different: the request of the Member State is addressed to the Council first and then forwarded for the opinion to the High Representative for Foreign and Security Affairs and to the Commission and notified to the European Parliament.

Once the conditions required for implementation of enhanced cooperation are met and the Council has adopted a corresponding decision, the participating states are entitled to use the bodies, procedures, and legal instruments of the EU within the limits of the objectives pursued by enhanced cooperation. According to Art. 330 of the TFEU, all Member States may participate in deliberations, but only the members of the enhanced cooperation Council have the right to vote, since they are the only ones bound by the law adopted in this framework. This is to ensure that nonparticipating Member States are informed about the activities of enhanced cooperation, which would facilitate their subsequent accession.

According to Art. 331 TFEU, which describes the process of accession to the existing enhanced cooperation, the Member State wishing to participate in that cooperation must fulfil the conditions for such participation, adopt all provisions of that cooperation, and notify its intention to the Council and Commission. The Commission then examines whether the conditions of participation have been fulfilled, and either confirms the participation of the Member State concerned or indicates the arrangements to be adopted to fulfil those conditions.

The Council and Commission ensure that activities conducted under enhanced cooperation align with the EU's other policies and initiatives.[63] Some authors have also proposed a judicial review by the EU Court of Justice of the compliance of the proposed enhanced cooperation with the founding treaties.[64]

The provisions of the founding treaties on enhanced cooperation are still used relatively rarely. So far, strengthened cooperation based on Art. 20 of the TEU has been established in the following areas: divorce and legal separation,[65] matrimonial and registered partnership property issues,[66] Unitary EU patents,[67] and the European Public Prosecutor's Office.[68] Permanent structured cooperation[69] should also be considered a special type of enhanced cooperation based on Art. 42 of the TEU.

63 See Art. 334 of the TFEU.

64 Piris, 2014.

65 Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III) (OJ L 343, 29.12.2010, pp. 10–16).

66 Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (OJ L 183, 8.7.2016, p. 1). Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships (OJ L 183, 8.7.2016, p. 30).

67 Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection (OJ L 361, 31.12.2012, p. 1).

68 Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') (OJ L 283, 31.10.2017, p. 1).

69 Council Decision (CFSP) 2017/2315 of 11 December 2017 establishing permanent structured cooperation (PESCO) and determining the list of participating Member States (OJ L 331, 14.12.2017, p. 57).

All existing cases of enhanced cooperation have arisen as an ultima ratio measure following the impossibility of finding an agreement in the Council voting unanimously on a draft legislative proposal by the Commission. There is a great variety in the number of participating Member States, the regulatory technique used, the type of secretariat or other administrative bodies chosen for the operational stage, and the financing and staffing provisions. The number of participating Member States is usually far beyond the necessary threshold of 9, and varies between 17 and 26. In terms of participation it is also interesting to note that Austria, Belgium, France, Germany, Greece, Italy, Portugal, and Slovenia participate in all cases of enhanced cooperation (all of them among euro area Member States), while Eastern, Northern, and opt-out Member States are less likely to engage in enhanced cooperation.

The enhanced cooperation framework is governed by subsidiarity, because if there is a contradiction between the enhanced cooperation provision and standard EU provision, it is possible to deduce from Art. 326 of the TFEU the primacy of standard EU law over enhanced cooperation law. However, the proportionality of the scope of enhanced cooperation regime is not explicitly defined. The question of the extent to which a cooperation regime is permitted outside the procedure provided for by the founding treaties remains unresolved.

Furthermore, although Art. 20 of the EU states that Member States may establish enhanced cooperation, it does not explicitly exclude the possibility of other forms of cooperation (this issue is examined further in Chapters 8 and 9). Thus, cooperation outside the EU seems, in fact, possible, following the example of the Initial Intergovernmental Schengen Convention. Some specific cases of enhanced cooperation could provoke free riding by non-participating Member States; therefore, it is important to continuously support other Member States in joining that cooperation.

4.1. Concluding Remarks

In addition to the negative exceptions to the application of EU law, there are also positively framed exceptions, specifically the opt-in mechanism, which enables Member States to engage in enhanced cooperation. Apart from permanent opt-outs and, to some extent, the fragmentation of law associated with opt-ins, the remaining exceptions do not provoke significant debate. However, initial practical experience indicates that enhanced cooperation is better suited for the implementation of specific legislative projects rather than for the ongoing development of broader regulatory frameworks.[70]

70 Böttner, 2022, pp. 1145–1164.

5. Potential for Suspension of Cooperation

The potential for suspension of cooperation within the EU arises when a Member State violates its principles and obligations, or disrupts its functioning. The EU has developed several mechanisms to address violations of its fundamental values or legal frameworks by its Member States. These include infringement actions, conditional funding measures, and the Art. 7 procedure. Each serves as a tool to ensure compliance and safeguard the EU's core principles, although each faces significant challenges in its implementation.

5.1. Infringement Proceedings

Under Art. 258 of the TFEU, the European Commission holds the authority to initiate infringement proceedings against Member States that fail to fulfil their obligations under EU law. This process begins with the issuance of a reasoned opinion after a Member State is given an opportunity to present its observations.[71] If the State does not comply within a specified timeframe, the Commission may refer the matter to the Court of Justice of the European Union (CJEU). In this context, the Commission's discretion is extensive, and encompasses both substantive and procedural dimensions. Substantive discretion allows the Commission to decide the reasons for pursuing an infringement action, whereas procedural discretion governs how the process unfolds.

The CJEU has consistently confirmed that the Commission exercises its discretion in full autonomy. The Court's role is strictly limited to assessing whether an objective violation of EU law has occurred, and whether the Commission has adhered to procedural requirements. It does not review the legal or political motivations behind the Commission's decision to initiate proceedings. Moreover, arguments from Member States challenging the Commission's legal interests in pursuing a case have been consistently dismissed by the Court. Despite this broad discretion, the Commission is bound by two procedural limits: Member States must be given a reasonable timeframe to address concerns, and the Commission must base its legal pleas on the reasoned opinion presented during the pre-litigation phase.

In comparison to competition law, in which the Commission's decisions affect private actors and are subject to strict judicial review, infringement actions target Member States and are treated differently. This distinction allows the Commission greater flexibility, as the CJEU does not apply the same level of scrutiny to infringement proceedings. However, this extensive discretion carries significant risks. For instance, infringement proceedings can remain open for indefinite periods,

71 The opportunity granted to Member States is required by the treaties; however, even if a Member State does not avail itself of this possibility, its preservation constitutes a fundamental formal requirement of proceedings within the meaning of Art. 258 TFEU. See: Judgment of 17 February 1970, C-31/69, *Commission v Italy*, EU:C:1970:10.

with sanctions sometimes imposed many years after the initial violation. In some cases, proceedings continue even after the violation has ceased, particularly if the Commission anticipates the recurrence of similar issues or waits for all implicated Member States to comply simultaneously. Additionally, the Commission's ability to selectively pursue cases raises concerns about unequal treatment and potential discrimination among Member States.

To address these risks, the Commission has sought to self-regulate its discretion through its 2017 Communication titled 'EU Law: Better Results through Better Application'.[72] This policy emphasises the strategic use of discretionary power to prioritise enforcement efforts for significant breaches affecting EU citizens and businesses. Key priorities include addressing breaches that undermine EU policy objectives, targeting failures to transpose directives or comply with CJEU judgments, and protecting EU financial interests. Despite these efforts, the self-limitation measures are not legally binding, and the Commission retains the flexibility to deviate from these guidelines in individual cases. Furthermore, individuals lack legal standing to challenge the Commission's discretion under Art. 265 of the TFEU, leaving them without remedies to contest the Commission's decisions.

5.1.1. Concluding Remarks

The absence of judicial or political limits on the Commission's discretion within infringement proceedings has broader implications. Originally justified by its technical expertise, the Commission's discretion has increasingly taken on political dimensions, raising concerns about accountability. While some oversight has been delegated to specialised EU agencies in specific fields, extending such mechanisms to general infringement proceedings would likely require treaty revisions. The principle of equal treatment among Member States remains a particular concern, as the current framework does not ensure uniform application of EU law.

In conclusion, the Commission's broad discretion in infringement proceedings is a double-edged sword. While it enables strategic enforcement of EU law, it also raises risks of inefficiency, unequal treatment, and diminished public trust. Until clearer boundaries are established, either through CJEU case law or treaty amendments, concerns about the transparency and fairness of the Commission's actions will persist. Political oversight, potentially through the European Parliament or Council, may offer a viable avenue for addressing these issues; however, such reforms would require significant institutional changes.

5.2. Conditional Funding Measures

The EU has established conditional funding regulations to ensure that its financial resources are used effectively and in alignment with its fundamental values

72 OJ C 18, 19.1.2017, p. 10.

such as the rule of law, democracy, and good governance. These regulations tie access to EU funds to compliance with specific conditions such as maintaining judicial independence, fighting corruption, achieving economic reforms, and meeting performance targets.

A central pillar of this framework is Regulation (EU, EURATOM) 2020/2092, the Rule of Law Conditionality Mechanism.[73] It allows the EU to suspend or reduce funding to Member States where breaches of the rule of law jeopardise the financial interests of the EU. Examples include threats to judicial independence, systemic corruption, or failure to address fraud. The mechanism is activated through a proposal by the European Commission, and must be approved by a qualified majority of the Council. Measures under the Conditionality Regulation may be proposed solely when the Commission determines that violations of the rule of law principles have a direct impact or pose a serious and sufficiently direct risk to the sound financial management of EU budgets or financial interests.[74]

Another Regulation (EU) 2021/241, governs the Recovery and Resilience Facility,[75] a cornerstone of the €723.8 billion Next Generation EU recovery package. This regulation links funding disbursements to achieving milestones and targets set in Member States' recovery plans. These focus on EU priorities such as climate neutrality, digital transformation, and social cohesion. Failure to meet these targets can delay payments or reduce funding allocations.

Similarly, Common Provisions Regulation (EU) 1303/2013 outlines conditionality rules for the European Structural and Investment Funds, including the Cohesion Fund and the European Social Fund.[76] Funding from these sources is contingent on compliance with EU economic governance standards such as the Stability and Growth Pact. Failure to address excessive deficits or implement the necessary reforms can result in funding suspensions. This regulation also includes a performance-based approach, in which payments are tied to meeting specific goals.

The overarching financial regulations (EU, EURATOM) of 2024/2509 governs the financial management of the EU budget.[77] It emphasises the principles of sound

73 Regulation (EU, EURATOM) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget; OJ L 433, 22.12.2020, p. 1.

74 European Commission, no date.

75 Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility; OJ L 57, 18.2.2021, p. 17.

76 Regulation (EU) No 1303/2013 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; OJ L 347, 20.12.2013, p. 320.

77 Regulation (EU, EURATOM) 2024/2509 of the European Parliament and of the Council of 23 September 2024 on the financial rules applicable to the general budget of the Union; OJ L, 26.9.2024, p. 1.

financial management, strict fraud prevention, and recovery of misused funds, ensuring robust safeguards for EU financial resources.

Conditionality extends to external relations. The Instrument for Pre-Accession Assistance provides funding to candidate and potential candidate countries conditioned on progress in governance, judicial reform, and alignment with EU standards. Similarly, the European Neighbourhood Instrument (Regulation (EU) No. 232/2014) and Global Europe Instrument (Regulation (EU) 2021/947) tie financial aid to progress in democracy, human rights, and sustainable development.

The enforcement of these regulations involves multiple bodies. The European Commission monitors compliance and proposes corrective measures, whereas the Council approves actions such as fund suspension. Agencies such as the European Anti-Fraud Office and European Public Prosecutor's Office investigate and prosecute financial misconduct. The CJEU resolves legal disputes related to these mechanisms.

Recent cases illustrate the applications of these regulations. In 2022, the EU froze billions of euros in funding to Hungary over concerns regarding corruption and threats to judicial independence. Similarly, Poland faced delays in the disbursement of recovery funds due to judicial reforms deemed incompatible with EU principles. These examples underscore the dual purpose of the EU's conditional funding regulations: protecting financial interests and promoting adherence to the EU's core values.

5.2.1. Concluding Remarks

Conditional funding measures in the EU are designed to ensure that financial resources are used effectively and in alignment with the EU's fundamental values, such as the rule of law, democracy, and good governance. However, these mechanisms often raise questions about equality among Member States, particularly when some countries feel disproportionately targeted or argue that these measures undermine their sovereignty.

Conditional funding mechanisms, including Rule of Law Conditionality,[78] are theoretically applied uniformly based on transparent criteria. This mechanism links access to EU funds to respect for the rule of law, which is a foundational principle necessary for the proper management of EU resources. While this applies equally to all Member States, critics, particularly Hungary and Poland, have argued that the mechanism disproportionately targets them, alleging that it is wielded as a political tool by older or larger Member States to enforce values in a way that infringes on their sovereignty. However, proponents contend that measures are necessary to protect EU taxpayers and ensure that financial resources are managed responsibly, with decisions based on objective assessments rather than political considerations.

78 Regulation (EU, EURATOM) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget (OJ L 433I, 22.12.2020, pp. 1–10).

Uniform enforcement of conditionality across all Member States is critical for maintaining equality. The European Commission is responsible for monitoring compliance and proposing corrective measures, and mechanisms such as the Rule of Law Conditionality are triggered based on clear evidence of risks to EU financial interests. However, differences in governance capacity and political influence among Member States can lead to perceptions of unequal treatment, especially when newer or smaller Member States feel disproportionately scrutinised compared to their larger counterparts.

5.3. Art. 7 TEU Procedure

The founding treaties of the EU anticipate the possibility that a Member State, after joining the EU, may violate the fundamental values outlined in Art. 2 of the TEU. In such cases, preventive and sanction mechanisms are associated with the suspension of membership rights.[79] Art. 7 of the TEU is distinctive in that it lays down the procedural framework for determining the existence or imminent risk of a breach of fundamental EU values by a Member State, as well as for the potential imposition of sanctions aimed at restoring compliance. Notably, this mechanism operates beyond the conventional constraints of the EU's competence, ensuring an effective response to systemic violations.[80]

In the preventive phase, the Council may adopt a decision recognising the existence of a clear risk of a serious breach of fundamental EU values. Such a decision does not affect the membership rights of the Member State.[81] The Member State is invited to present its position and propose remedies. This phase focuses on dialogue and diplomacy without imposing sanctions. Art. 7 of the TEU highlights the EU's commitment to upholding its fundamental values and holding Member States accountable. Without reaching the sanctions phase, the activation of Art. 7 places significant political pressure on the Member State, often prompting reforms or dialogue.

In the later sanctions phase, a reasoned proposal regarding the existence of a serious or persistent breach of the EU's fundamental values can be submitted by one third of the Member States or the European Commission. The Council decides on the proposal unanimously after obtaining the consent of the European Parliament and hearing from the Member State in question. Based on this decision, the Council may, by a qualified majority, suspend the membership rights of the Member State in question, such as its voting rights in the Council vote.[82] The Member State remains bound by EU law, but loses access to specified privileges.

79 Art. 7 TEU.
80 Kochenov, 2017.
81 Art. 7(1) TEU.
82 See Art. 7(2) and (3) TEU and Art. 354 TFEU.

The suspension of membership rights in the EU involves the restriction of certain rights derived from membership, including the right to vote in the Council, in situations where a Member State seriously or persistently breaches the EU's fundamental values. When applying this sanctions mechanism, it is essential to consider its potential impact on the rights and obligations of individuals and legal entities. However, the obligations of the Member State under EU law remain unaffected.

In 2017, the European Commission triggered Art. 7(1) over concerns about judicial reforms introduced by the Polish government. These reforms were widely criticised for undermining judicial independence and violating the principle of separation of powers, which are key components of the rule of law. In 2018, the European Parliament activated Art. 7(1), citing issues related to the rule of law, corruption, press freedom, and academic independence in Hungary. Both cases remained in the preventive phase, as the unanimity required for sanctions was not reached. Hungary, a close ally of Poland, consistently opposed sanctions, demonstrating the political complexities of this mechanism.

5.3.1. Concluding Remarks

While Art. 7 TEU is an essential mechanism for safeguarding the EU's core principles, its effectiveness is hindered by procedural and political challenges. One of the primary issues is the unanimity requirement. Imposing sanctions under Art. 7 requires all other Member States to agree unanimously, which is a high bar to clear. Another significant challenge is mutual support among states. Member States that face similar scrutiny or potential investigations under Art. 7 often form alliances to protect each other. Finally, the lengthy process involved in activating and implementing Art. 7 reduces its efficiency. Procedural requirements such as gathering evidence, initiating discussions, and reaching consensus result in delays. This slow pace diminishes the urgency and impact of the mechanism, allowing violations of EU values to persist for extended periods.

Although all EU nations are bound by the same obligations, the selective application of Art. 7 may create the perception that some states are treated differently. The process of triggering Art. 7 depends on political and institutional decisions, which may lead to accusations of bias or inconsistency. For instance, states under investigation may feel that they are being disproportionately targeted, whereas others in similar situations remain unaffected. The unanimity required for sanctions further complicates matters, as politically or strategically aligned states can block actions, reinforcing disparities in treatment. Larger or more influential Member States may appear less likely to face consequences, whereas smaller or less politically connected countries may feel more exposed to scrutiny. This dynamic can create tensions and foster perceptions of unequal treatment within the EU.

6. Membership Termination

Within the framework of EU law, therefore, the sole mechanism for withdrawal is the activation of Art. 50 of the TEU, introduced by the Lisbon Treaty revision and utilised by the United Kingdom in practice. From the perspective of EU law, it may appear that situations in which the principle of *rebus sic stantibus* could potentially be invoked within the bounds of public international law are addressed by separate Arts. in the founding treaties, which allow for adaptation to defined changes in circumstances.

6.1. Withdrawal Under Art. 50 TEU

The EU provides a legal framework for Member States to voluntarily terminate their membership, primarily through Art. 50 of the TEU. Introduced by the Lisbon Treaty in 2007, Art. 50 establishes the steps and conditions for a Member State to withdraw from the EU.

Every Member State has the right to decide on withdrawal in accordance with its own constitutional requirements. After making the decision to withdraw, the state formally notifies the European Council of its intention. Following this notification, negotiations begin between the EU and the withdrawing state to conclude a withdrawal agreement. The negotiations are conducted by the European Commission and the agreement is concluded by the Council, which acts by a qualified majority, subject to the consent of the European Parliament.[83] This agreement defines the conditions and procedures for withdrawal, including a framework for their future relationship. Unless an extension is mutually agreed upon, withdrawal automatically takes effect two years after notification.

The United Kingdom's withdrawal from the EU, commonly referred to as Brexit, is the only instance of membership termination to date. Following a 2016 referendum in which a majority of UK citizens voted to leave, the UK invoked Art. 50 in 2017. After extensive and complex negotiations, the UK formally exited the EU on January 31, 2020. Brexit demonstrated the significant challenges of separating from the EU, including the legal disentanglement of decades of shared regulations, economic uncertainties, and political divisions within the departing state and among remaining Member States.

Termination of EU membership poses several challenges. The geopolitical shift caused by Brexit highlights deep-seated socioeconomic divisions both within the UK and on a global scale. It has exposed regional and generational disparities, reshaped trade and diplomatic relations, and altered the balance of power within the EU, reflecting broader trends of economic nationalism and shifting global alliances.[84] Economically, the departing state must address disruptions to trade, market access,

83 See Art. 50(1) and (2) TEU, Art. 218(3) TFEU.

84 O'Reilly et al., 2016, pp. 807–854.

and financial obligations. Legally, EU laws embedded within the national framework must be replaced or repealed. Politically, withdrawal often exacerbates domestic divisions and may strain relationships with remaining Member States. Geopolitically, the departure of a Member State can affect the EU's global influence and internal cohesion.

While Art. 50 allows for voluntary withdrawal, there is no legal provision for the EU to expel a Member State. However, mechanisms such as Art. 7 of the TEU enable the suspension of certain rights, such as voting, for violations of core EU values, potentially creating indirect pressure to leave.

If a state that has withdrawn from the EU later seeks to rejoin, its application is subject to the standard accession procedure for joining.

6.1.1. Concluding Remarks

The introduction of the possibility of withdrawal from the EU represents a highly positive development, as it ensures that Member States retain sovereign autonomy not only in their decision to accede but also in their right to depart. Given the far-reaching legal, economic, and political consequences of such a withdrawal, the procedural framework established under Art. 50 of the TEU is rightly designed to be lengthy and intricate, ensuring sufficient time for negotiation, mitigation of disruptions, and preservation of stability within both the departing state and the EU as a whole. Thus, the option of unilateral withdrawal reinforces Member States' equality by safeguarding them against both the majority and the supranational institutions.

6.2. Exploring Termination of EU Membership Under International Law

Art. 61 of the Vienna Convention establishes the conditions that must be cumulatively fulfilled in order to invoke a fundamental change of circumstances for the purpose of termination or withdrawal from the treaty. It must be a fundamental change that has arisen regarding the circumstances existing at the time of the conclusion of the contract and which was not previously foreseen by the parties. These circumstances must have constituted an essential basis for the consent of the parties to be bound by the contract, and the change must fundamentally transform the extent of the obligations still to be performed under the treaty. Conversely, it cannot be invoked in two exceptions: where the treaty establishes national boundaries or where the change in question is the result of a breach by the party invoking it, either of an obligation under the treaty or of any other international obligation owed by it to any other party to the treaty.[85] The second exception essentially materialises the principle *ex turpi causa non oritur actio.*[86]

85 Art. 61 of The Vienna Convention on the Law of Treaties.

86 Case *Factory at Chorzow* (Germ. v. Pol.), 1927 P.C.I.J. (ser. A) No. 9 (July 26), para. 31.

We agree with the view that this is not a principle of interpretation, but a substantive principle of law that allows exemption from a contractual obligation, regardless of the intention of the parties. However, intention is decisive in determining the circumstances that a party considers to be fundamental and that constitute a fundamental change in the context of the clause. Therefore, the objective nature of the change is legally based on the intentions of the parties.[87] The International Court of Justice has stated that Art. 61 of the Vienna Convention contains a rule in which the customary rule-making process has been consummated.[88]

From the foregoing, it may be presumed that the change in circumstances envisaged by the international treaty in question would hardly fulfil all conditions, particularly the condition of unforeseeability under Art. 61 of the Vienna Convention. Based on the *Gabčíkovo-Nagymaros* decision,[89] it is not possible to rule out entirely the impact of political considerations on a substantial change of circumstances, to the extent that, for example, a change of government could undermine consistency with the principles underlying the treaty in question.[90] Scholars point out that it is important for the principle to be associated exclusively with state sovereignty, according to which it is solely for the state invoking the substantial change to determine whether it is applicable in a particular case.[91]

Although the rule in Art. 61 of the Vienna Convention can be considered objective in terms of its criteria, it does not provide for the automatic termination of a treaty.[92] International law experts point out that it would be misleading to think only in terms of termination or withdrawal from the treaty. The principle of *rebus sic stantibus* can also produce fewer radical consequences, such as revising the treaty or adapting it to new circumstances.[93]

Before addressing the impact of the principle of *rebus sic stantibus* on the EU's founding treaties, it should be recalled that the Court of Justice has consistently held that the EU's competences must be exercised in compliance with international law.[94] It has also explicitly confirmed that 'the rules of customary international law concerning the termination and the suspension of treaty relations by reason of a fundamental change of circumstances are binding upon the Community institutions and form part of the Community legal order'.[95] However, the present case cannot

87 Shaw and Fournet, 2011, pp. 1415, 1424.

88 Case *Fishekies Jurisdiction* (*United Kingdom v. Iceland*), Judgment, 2 February 1973, ICJ Reports 1973, para. 40.

89 Case *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, 25 September 1997, ICJ Reports 1997, para. 51.

90 Brownlie, 2013, p. 675.

91 Shaw and Fournet, 2011, p. 1426.

92 Brownlie, 2013, p. 375.

93 United Nations, Committee of the Whole, 1986.

94 Judgment of the Court of 3 September 2008., *Kadi a Al Barakaat International Foundation/Rada a Komisia*, C-402/05 P a C-415/05 P, EU:C:2008:461, para. 291.

95 Judgment of the Court of 16 June 1998, *Racke v. Hauptzollamt Mainz*, C-162/96, EU:C:1998:293, para. 46.

be generalised to the founding treaties, since the judgment in question concerned external agreements of the EU.

The founding treaties of the EU are generally governed by the regime of the Vienna Convention on the Law of Treaties, albeit with a specific status compared to other international treaties. The Community, now the EU, was established for an indefinite duration, with Member States relinquishing certain sovereign rights in its favour and transferring part of their sovereignty, in defined areas, to the EU. The CJEU has affirmed that this transfer constitutes a definitive limitation of Member States' sovereign rights, which cannot be unilaterally abrogated by subsequent acts incompatible with EU law.[96] This has established a new legal order under international law.

Based on the foregoing, it is indisputable from the perspective of international law that Member States, as sovereign entities under public international law, may unilaterally withdraw from their obligations under international treaties pursuant to the *rebus sic stantibus* doctrine, provided that the specified requirements are met. From the viewpoint of Member States, the founding treaties are international treaties; however, from the perspective of EU law, these treaties are distinct from ordinary international treaties, as they establish the primary law of the EU, standing at the apex of its legal hierarchy. Consequently, it remains debatable how the doctrine of *rebus sic stantibus* could materialise in practice in the case of the EU's founding treaties.

It should be noted that the EU respects international law,[97] and the CJEU has addressed the principle of *rebus sic stantibus* in its case law[98] on several occasions, although never in the context of a Member State's unilateral withdrawal from the founding treaties. The most extensive treatment of this doctrine was in the *Racke* judgment; on the basis of a fundamental change of circumstances, the Court permitted the adoption of restrictive measures against 'those parties which did not observe the Ceasefire Agreement of 4 October 1991 which they had signed in the presence of the President of the Council and the President of the Conference on Yugoslavia'. In this judgment, the Court tacitly affirmed that the doctrine itself, as opposed to the related specific procedural requirements, constituted an international custom.[99]

Although the EU's founding treaties do not provide a legal basis for the activation of the doctrine in relation to those treaties, this does not constitute an obstacle *per se,* since the doctrine derives from the rules of public international law, as discussed in the first part of this paper. The possibility of withdrawal from the EU, as the only means of terminating membership introduced by the Lisbon revision of the treaties, presupposes a consensus, a necessity that is absent in the application of *rebus sic*

96 Judgment of the Court of 15 July 1964, Costa/E.N.E.L., C-6/64, EU:C:1964:66.

97 Art. 3(5) of the Consolidated version of the Treaty on European Union (OJ C 326, 26.10.2012, pp. 3–390).

98 E.g. Judgment of the Court of 3 March 2009, Commission v. Sweden, C-249/06, EU:C:2009:119.

99 Judgment of the Court of 16 June 1998, Racke v Hauptzollamt Mainz, C-162/96, EU:C:1998:293, paras. 58, 59.

stantibus. Therefore, from the perspective of EU law, it is plausible to conclude that withdrawal from the EU on the basis of a unilateral invocation of the doctrine of *rebus sic stantibus* was likely not envisaged.

Some authors point to the conceptual incompatibility of the doctrine of *rebus sic stantibus* with EU law and, probably correctly, argue that it would not withstand an EU legal assessment.[100] However, such an argument cannot in itself limit the sovereign rights of individual states to invoke the doctrine. Conversely, by establishing the present EU, Member States have permanently limited the part of their sovereignty that has been conferred upon the EU.[101] Therefore, it should be noted that within the scope of the competences conferred upon the EU, the application of the doctrine of *rebus sic stantibus* by Member States cannot be asserted against the exercise of those competences by the EU. As some authors have noted, the situation may differ if the EU acted *ultra vires*, in contravention of the treaties themselves. In such a scenario, in which recourse to available mechanisms would be ineffective, a Member State may find itself with no option but to respond to the situation by unilaterally withdrawing.[102]

Additionally, it remains debatable whether the doctrine could be activated in exceptional situations. A key condition of the doctrine is unforeseeability. If circumstances arise that the treaties anticipate and address, the conditions for the applicability of the doctrine are unlikely to be met. For example, Art. 4(2) of the TEU addresses respect for national identity and designates national security as the sole responsibility of the Member State. Similarly, other potential circumstances, such as internal:

> disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security are envisaged by the treaties, which allow for measures to be taken in derogation from the treaty.[103]

By anticipating these situations and providing for specific solutions, the unforeseeability requirement, a *sine qua non* for the application of *rebus sic stantibus*, remains unfulfilled.

Equally, the doctrine cannot be invoked on the grounds that a Member State is breaching the treaties, as the treaties provide mechanisms to address such situations. Should a Member State seriously violate the values enshrined in the treaties and the available mechanisms prove ineffective, Art. 7 of the TEU provides a legal basis under which certain rights under the treaties may be suspended in relation to

100 Athanassiou, 2009.
101 Judgment of the Court of 15 July 1964, Flaminio Costa v. E.N.E.L., C 6/64, EU:C:1964:66.
102 Athanassiou, 2009.
103 Art. 347 of the Consolidated version of the TFEU (OJ C 326, 26.10.2012, pp. 47–390).

that state.[104] Moreover, the CJEU has repeatedly confirmed that, within the context of EU law, the principle of reciprocity, as known in international law for breaches of international obligations, cannot apply between Member States in the event of a breach of EU law by a Member State.[105]

Therefore, we concur with the authors who argue against the application of the doctrine in situations where the treaties anticipate and adequately address the issues.[106] One potential pathway to establishing unforeseeability in these situations could be the point at which all available mechanisms fail, leaving the State to invoke the doctrine as a last resort. The unforeseeability in this scenario would stem from the treaties not contemplating the failure of all EU recourse mechanisms. At the same time, it is conceivable that it could be used in situations that the treaties do not foresee, which are difficult to identify in practice. Nevertheless, apart from unforeseeability, in each instance all conditions for the application of the doctrine of *rebus sic stantibus* under international law must be met cumulatively.

Another condition for the doctrine's applicability is that it must be invoked within a reasonable period of time following the fundamental change of circumstances; this requirement will not be satisfied in the context of a long-standing EU policy. As noted above, compliance with the condition of fundamentality would remain questionable. In this chapter, we have also discussed changes in political considerations, such as France's invocation of this doctrine in relation to NATO in 1966.[107] Under such circumstances, it is conceivable that these conditions could be met; however, within the EU, it is challenging to identify a specific situation that would, from a legal standpoint, sufficiently satisfy all the conditions of the doctrine of *rebus sic stantibus* while also being unforeseen by the founding treaties.

Therefore, we must again refer to the *Gabčíkovo-Nagymaros* case, where it was acknowledged that the impact of political considerations on the application of *rebus sic stantibus* cannot be entirely ruled out, particularly in instances where a change of government undermines compliance with the principles upon which the relevant treaty is based.[108] However, in order for such an event to cause a change in EU policy, it is possible to envisage that all the conditions of the doctrine would be satisfied, particularly in the case of *ultra vires* EU action. It is more plausible to envisage the doctrine being invoked in extra-EU cases relating to its actions, which may involve relations with third countries or external measures taken by the EU.

104 Art. 7 of the Consolidated version of the Treaty on European Union (OJ C 326, 26.10.2012, pp. 13–390).

105 Judgment of the Court of 11 January 1990, Blanguernon, C-38/89, EU:C:1990:11, paras. 7, 8; Judgment of the Court of 26 February 1976, *Commission v. Italy*, C-52/75, EU:C:1976:29, para. 11.

106 Athanassiou, 2009.

107 Dhondt, 2013.

108 Brownlie, 2013, p. 675.

6.2.1. Concluding Remarks

The mere fact that the founding treaties do not explicitly provide for the doctrine of *rebus sic stantibus* does not affect its existence within the rules of public international law, which are respected by the EU. However, its application is significantly limited by the specific features of EU law and the status of the founding treaties. Considering all the conditions required by international law for the application of *rebus sic stantibus*, it can be asserted that neither the EU's long-standing policies nor the situations envisaged by the founding treaties would formally fulfil those conditions.

The situation is different in cases not anticipated by the founding treaties that may simultaneously meet all these conditions, or in cases where, although envisaged by the treaties, all available mechanisms fail, leaving the Member State with no other option. We also hold the opinion that, given the EU's ability to act only within the limits of the competences conferred upon it by the Member States, if the EU were to act *ultra vires*, the conditions for a Member State to activate the doctrine of *rebus sic stantibus* in relation to the other contracting parties to the treaties establishing the EU could be met under certain circumstances.

7. Conclusion

The historical and legal evolution of the EU demonstrates that the principle of equality among Member States is both foundational and dynamic. From the early supranational experiments of the ECSC to the far-reaching institutional reforms of the Lisbon Treaty, the EU has continuously adapted its decision-making structures, legal provisions, and mechanisms for differentiated integration. These adaptations have been driven by the dual imperatives of preserving equality and ensuring the EU's capacity to function effectively in an increasingly diverse membership.

The examination of treaty reforms shows that equality has been preserved through safeguards such as unanimity requirements and balanced institutional representation, even as qualified majority voting and weighted voting systems were introduced to improve efficiency. The analysis of exemptions to primary law highlights the tension between flexibility and uniformity. While transitional arrangements, territorial derogations, and opt-out clauses enable consensus and respect for national sovereignty, they also create lasting asymmetries in Member States' rights and obligations. Enhanced cooperation, in turn, offers a structured means of allowing willing states to move ahead without forcing integration on unwilling states. However, this must be carefully managed to ensure openness and prevent fragmentation.

Mechanisms for suspension of cooperation – whether through infringement proceedings, conditional funding, or the Art. 7 of the TEU procedure – reveal another dimension of equality: the need for consistent and impartial application of enforcement tools to avoid perceptions of political bias. Finally, the possibility of withdrawal, enshrined in Art. 50 of the TEU and complemented by the theoretical application of the *rebus sic stantibus* principle, underscores that equality also entails the sovereign right to leave the EU, thereby protecting Member States from irreversible subordination to the majority or supranational authority.

Taken together, these findings suggest that equality in the EU is not a static guarantee, but a principle that must be continuously defended and reinterpreted in light of changing political, legal, and institutional realities. The challenge for the future lies in ensuring that mechanisms of differentiation – whether temporary or permanent, voluntary or imposed – are designed and applied in ways that preserve mutual trust, maintain the coherence of the EU's legal order, and reaffirm the equal standing of all its members. As the EU confronts new geopolitical, economic, and societal challenges, the resilience of the principle of equality will remain a decisive factor in the legitimacy and durability of the European project.

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