CHAPTER 8

The Intergovernmental Alternative: 'Tertial Law' and Agreements Outside the Framework of Treaties

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Abstract

In this chapter of the monograph, I will deal with the legal status of so-called subsidiary treaties concluded among EU Member States outside the framework of EU law, but with a close legal link to it. I will analyse their relationship to primary and secondary EU law, compare them to interstate compacts in the USA, and examine their nature on the basis of their interpretation by the CJEU. I will also address the question of EU and Member State competences in the context of these treaties, and the implications of the Lisbon Treaty on their existence. In particular, my analysis will focus on whether these treaties constitute a source of international or EU law. The key question is then whether these treaties represent a possible alternative to cooperation between EU Member States *vis-à-vis* the European Union. Finally, I will focus on the scope and future of subsidiary treaties within European integration.

Keywords: subsidiary treaties, interstate compacts, Art. 293 EC Treaty, intergovernmental cooperation, federalism, democratic legitimity, EU competences

David Sehnálek (2026) 'The Intergovernmental Alternative: 'Tertial Law' and Agreements Outside the Framework of Treaties'. In: David Sehnálek (ed.) *Unequal Equals? The Status of Member States in an Integrating European Union*, pp. 279–299. Miskolc–Budapest, Central European Academic Publishing.

https://doi.org/10.54237/profnet.2026.dsuesmsieu_8

1. Overview of the Chapter's Purpose

European integration is a gradual process, conditional on the willingness of EU Member States to cooperate on issues of common interest. It follows that for cooperation to work out, two conditions must be met. Firstly, cooperation is possible where Member States consider it jointly meaningful. This is not the case, for example, on issues that do not have a general impact on most or all Member States. Secondly, all Member States must agree to cooperate within the European Union. The problem therefore arises in a situation where cooperation is desirable, but touches on an issue perceived by some Member States as sensitive, potentially impinging on the sovereignty of a given state. In such a case, the consent of all Member States is not a given.

Over time, mechanisms have evolved to overcome the absence of the second condition in situations where the first condition was met. One such mechanism is the European Union in its pre-Lisbon form, i.e. as originally established in 1993. The introduction of the so-called pillars made it possible to overcome national resistance to further limit the sovereignty of Member States, while at the same time ensuring their cooperation on necessary issues of common interest. The creation of the European Union in 1993 was, however, a rather revolutionary step, simultaneously affecting a few areas of cooperation. Therefore, the adoption of the Maastricht Treaty was also relatively challenging and certainly could not be described as simple and unproblematic.

The aim of this chapter is therefore to explore the possibilities of alternative forms of cooperation outside of the legal framework and competences of the European Union, but with the close and active involvement of some of its main institutions. At the same time, the possibilities of using these forms of cooperation in the current conditions of European integration should be identified. The reason for this study is the fact that alternative forms of cooperation are neglected in current legal scholarship and are thus positioned outside the scope of the literature. The starting premise is that these alternative forms do seem to weaken the EU, or at least to not strengthen it. Nevertheless, they can effectively contribute to the effective realisation of the project of European integration.

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2. The Phenomenon of Subsidiary Treaties

Even before the Maastricht Treaty, Member States had already established effective mechanisms for mutual cooperation, which had the advantage of overcoming the lack of compliance with the second condition defined in the first paragraph of this text. At the same time, these mechanisms did not require any amendments to primary law. It should be kept in mind that any change in primary law is very sensitively perceived, is generally unwelcome and is closely monitored by States, politicians and citizens. It is therefore not easy to implement successfully. It is much simpler and quicker (not least because it is not necessary to use the rather complicated mechanism foreseen by EU law for changes to primary law) to cooperate outside the framework of EU law. The Brussels Convention[1] and the Rome Convention are undoubtedly the best known, but not the only, examples of this form of cooperation.[2] Both of these treaties were concluded to provide for judicial cooperation in private international law – a matter falling at the time of their conclusion outside the scope of EU competences.

The possibility of cooperation between EU Member States outside the legal framework of EU law, but still in relation to it, has been foreseen by Member States since the EEC was created. In fact, the Treaty of Rome provided in Art. 220:

> Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals: (a) the protection of persons and the enjoyment and protection of rights under the same conditions as those accorded by each State to its own nationals, (b) the abolition of double taxation within the Community, (c) the mutual recognition of companies or firms within the meaning of the second para. of Art. 48, the retention of legal personality in the event of transfer of their seat from one country to another, and the possibility of mergers between companies or firms governed by the laws of different countries, (d) the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.

This provision was part of primary law, later as Art. 293 EC Treaty, until the adoption of the Lisbon Treaty, which repealed it without replacement.[3] The possible consequences of this repeal will not be discussed right now, but later in this chapter.

Art. 293 of the EC Treaty can be understood as a provision which provided that certain issues relevant to European integration would be regulated by the Member States amongst themselves. The phrase ‘enter into negotiations’ used in the provision implies that the negotiations between the States would result in an international treaty. However, I believe that this would be a narrow interpretation. Nevertheless, it was the international treaties that the Member States negotiated between themselves based in Art. 293 EC Treaty. In view of their complementary and subsidiary nature to the integration secured by primary law, they can be referred to as ‘subsidiary treaties’ or as ‘tertiary law’. The first designation better describes the situation where these treaties are considered as a part of international law, subsidiary (complementary) to the activities of the EU and its law. The second designation is

1 Convention on jurisdiction and the enforcement of judgments in civil and commercial matters.
2 Convention on the law applicable to contractual obligations.
3 For this reason, this now repealed provision will be referred to in this text as Art. 293 EC Treaty.

particularly applicable when we consider any treaties concluded on the basis of Art. 293 EC Treaty as a broader part of EU law. Since I am convinced, for reasons I will explain later, that these treaties are not a source of EU law, the first term will be used in this study.

Art. 293 EC Treaty can be understood to confirm the otherwise obvious fact that Member States, as fully-fledged subjects of public international law, may conclude international treaties among themselves. These treaties, given the supranational nature of the EU and its law, cannot conflict with EU law, and can only comply with it. And according to the cited provision, in some cases such treaties are even considered as foreseen, wanted and therefore desirable by EU law. This may create conditions for the active involvement of EU institutions. At the same time, Art. 293 EC Treaty regulates an obligation that Member States themselves have imposed on themselves in primary law – the use of the word 'shall' indicates this. I therefore conclude that if it were necessary to establish this form of cooperation and the Member States had still failed to do so, the European Commission and the Court of Justice would have to enforce this obligation. However I should stress that this is an unlikely scenario. Moreover, the Member States have by the Art. 293 EC Treaty only undertaken to make an effort, that is to say, to act, not to actually achieve the result of concluding an international treaty. Actual enforcement of this obligation in infringement proceedings has therefore never been very likely.

In many ways, the EU resembles the US. As with the EU, the sub-states of the US federation can regulate their affairs among themselves by treaties between the individual states. Thus, as in the EU, in addition to federal/union law on the one hand and state/national law on the other, there is a category that goes beyond the sub-state level, but at the same time is not created by the actions of the federal/union legislature. The United States Constitution in Art. I, Sec. 10, Clause 3 states that:

> No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

A specific, yet not very relevant legal difference lies in the fact that while Art. 293 EC Treaty, in my view, in principle presupposes the involvement of a majority or all Member States, in the American legal environment the possibility of concluding treaties between States has been used even in purely bilateral matters, such as the delimitation of a disputed border between two States of the American Federation. It is my understanding that in principal, Art. 293 EC Treaty was not intended for such situations.

The regulation in US law presupposes the consent of the federation granted through Congress. Such consent may be given by Congress either explicitly or implicitly.[4] It must be explicitly granted, according to the jurisprudence of the Supreme Court of the USA, in particular if the agreement between the States would be 'directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States'.[5] If I were to use terminology characteristic of EU law, this would mean that such agreements must be approved by the federation if they are entered into outside the competence of the states, i.e. on matters where the federation exercises exclusive or shared competence. Implied consent, on the other hand, is sufficient where the agreement is to regulate an internal, non-federal area of activity of the States concerned.

The fact is that the U.S. Constitution presumes Congressional consent has implications for the legal status of these agreements. Indeed, according to the Supreme Court's decision, 'where Congress has authorised the States to enter into a cooperative agreement and the subject matter of that agreement is an appropriate subject for congressional legislation, Congress' consent transforms the States' agreement into federal law under the Compact Clause, and construction of that agreement presents a federal question'.[6]

The opportunity to enter into an interstate compact was used, for example, to adopt the National Popular Vote Interstate Compact. This compact establishes a mechanism among the participating states that will modify the way they implement Art. II, Sec. 1, Clause 2 of the U.S. Constitution for selecting electors in presidential elections.[7] It is thus an example of closer cooperation among the states of the American federation on an issue that is within their exclusive jurisdiction (albeit affecting the affairs of the federation), and thus outside the scope of the federation's authority.[8]

There are other subtle differences between the EU and US regulation of these treaties. The wording of Art. 293 of the EC Treaty suggests that the scope of this provision was restricted to just some specific areas of cooperation, whereas the American clause is not so specifically limited. Ultimately however, at least in this respect, the two regulations do not differ. While the text of Art. 293 EC Treaty might suggest that the list contained in this provision is exhaustive, I believe that this is not the case, and that cooperation through a subsidiary treaty could be established in other areas if the Member States so wished as demonstrated in the subsequent chapter. Art. 293 of the EC Treaty outlines specific areas where Member States could choose, if needed, to cooperate with one another. In doing so it indicates the possibility of involving EU institutions in facilitating such cooperation. Since Member States are still sovereign, they can conclude a treaty under public international law in any area where they have not delegated their powers to the EU.

4 *Virginia v. Tennessee*, 148 U.S. 503 (1893).
5 *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978).
6 *Cuyler v. Adams*, 449 U.S. 433 (1981).
7 Wikipedia, no date b. For general information on these contracts, see: Wikipedia, no date a.
8 Although this is not a clear-cut conclusion, as the expert discussion on this issue proves. See: Brody, 2013, p. 33.

Despite subtle differences, subsidiarity agreements resemble Interstate Compacts in several aspects. One notable similarity is their role in enabling, or rather, confirming the possibility of cooperation between EU Member States outside the scope of EU competences. This function is irreplaceable, as it is both necessary and practical for Member States to coordinate and reach agreements at national level without the direct involvement of a supranational entity imposing the 'right' solution.

However, the difference between subsidiary treaties and Interstate Compacts lies in their intended purpose. Subsidiary treaties are primarily designed to be used in areas implicitly or explicitly anticipated by the 'constitution', meaning primary law, and in alignment with the objectives pursued by the supranational entity, which in this context resembles a federation. In contrast, Interstate Compacts in the United States can be employed by states even in matters unrelated to the functioning of the federal government. Thus, the two types of agreements differ fundamentally in their purpose.

Furthermore, subsidiary treaties cannot interfere with competences already conferred on the EU. There is no mechanism for prior or subsequent consent by an EU institution. On the contrary, the US Constitution, as conceived, offers the possibility of a broader application of the Interstate Compacts, although it does not appear from the available literature that it has actually been used in practice. The general mechanism in the EU law is set up in the opposite way. The EU has the possibility to empower Member States to regulate by their own laws (either national or international), with certain issues falling within the competence of the EU. Nevertheless, although subsequent joint action conceived by an international treaty is not excluded, it is not a solution used by Member States in practice.

The legal status of subsidiary treaties and Interstate Compacts is also different. The latter becomes a part of federal law by granting consent, according to the jurisprudence of the Supreme Court of the USA. If EU law were to work the same way, it would mean that subsidiary treaties would become a part of EU law. However this is not clear-cut, and legal scholarship has diverged on this issue. Some authors have considered subsidiary treaties as a source of public international law,[9] while others have considered them as a source of so-called tertiary EU law,[10] and have therefore considered them as another source of EU law.[11] For reasons that will be explained later in this chapter I believe that subsidiary treaties are not part of EU law.

A provision similar to Art. 293 EC Treaty was also contained in the EU Treaty (MAA), in Art. K.3.(2)(c). This provision provided that the Council may:

> without prejudice to Art. 220 of the Treaty establishing the European Community, draw up conventions which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements. Unless otherwise

9 Bělohlávek, 2004, pp. 15–19.

10 Rozehnalová and Týč, 2000, p. 36.

11 Horspool and Humphreys, 2006, p. 71.

> provided by such conventions, measures implementing them shall be adopted within the Council by a majority of two-thirds of the High Contracting Parties. Such conventions may stipulate that the Court of Justice shall have jurisdiction to interpret their provisions and to rule on any disputes regarding their application, in accordance with such arrangements as they may lay down.

This provision constituted a *lex specialis* to Art. 293 of the EC Treaty and was intended for cooperation in the field of internal security and justice. Compared to Art. 293 EC Treaty, it was more modern in the sense that it explicitly regulated the involvement of EU institutions in the drafting of the text of the Treaties, their implementation and interpretation. However, the practical purpose of both provisions was identical, to ensure cooperation between Member States in areas falling within their competence, insofar as they were related to the objectives pursued by the EU. This provision has also now been repealed, or more precisely, absorbed into EU law because of the transfer of competences. Finally, in the case of treaties concluded based on Art. K.3 of the EU Treaty (MAA), there can be no doubt about their legal status. Given the intergovernmental nature of the EU's third pillar, they must contain an international legal character. The Brussels Convention adopted on its basis will be dealt with in the following chapter.

3. Legal Status of Subsidiary Treaties

The legal status of subsidiary treaties is not directly regulated by primary law. They may either be regular international treaties and therefore a source of public international law or, they might also be considered as a source of EU law. Firstly, I consider it important to stress that the former Art. 293 EC Treaty cannot be understood as a legal basis for the adoption of legislative measures by Member States outside the legislative procedures inherent in EU law. This provision is simply a confirmation of the fact that at the time of the conclusion of the EC Treaty, Member States did not consider that the EEC and later the EC had the relevant competence to regulate certain areas. Art. 293 of the EC Treaty is therefore not analogous to Arts. 114 TFEU or 115 TFEU et al., which do in fact constitute such a legal basis. I am further convinced that the subsidiary treaties would not extend the EU's spheres of activity to new areas of cooperation. This would have meant changes in the functioning of the EU made outside the framework of the primary law, changes to which can only be made by means of the prescribed procedural procedures. These treaties therefore only extended cooperation between Member States, i.e. cooperation of an intergovernmental nature, but did not extend supranational cooperation within (intra-) the EU. This is a seemingly insignificant difference, but it had a practical impact in situations where national constitutions provided different approval mechanisms for international treaties that limited the powers of Member States on the one hand, and for 'ordinary' international treaties on the other.

Not only is the primary law silent on the legal status of these treaties, but the treaties themselves do not provide a conclusive answer. Both the Brussels Convention and the Convention on the Mutual Recognition of Companies and Legal Persons, which never entered into force, do not address this issue. An indication is provided by the Rome Convention – a treaty which, although not foreseen by Art. 293 EC Treaty, can be considered a *de facto* subsidiary treaty in all respects. The Rome Convention provides, *inter alia*, in Art. 18 governing interpretation, that 'interpretation and application of the preceding uniform rules, regard shall be had to their international character'. The Rome Convention is not a subsidiary treaty concluded directly based on Art. 293 of the EC Treaty, which in the field of private international law concerns only the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration. However, as already mentioned, this text does not presuppose or exclude cooperation in other areas, such as the issue of determining the applicable law, which is covered by the Rome Convention. Moreover, despite this different basis of the Rome and Brussels Conventions (which, unlike the former, is based on Art. 293 EC Treaty), there is not a single indication in the case-law of the Court of Justice that these treaties have a different legal status. The Rome Convention was modelled on the Brussels Convention, so if there were to be a difference between the two, it would certainly be reflected in the case law of the Court of Justice. It can therefore be concluded that this shows their nature is identical and that they both therefore have an international law character.

Art. 293 EC Treaty was an important link between the subsidiary treaty and primary law. This was made possible by the then Art. 239 EC Treaty (now Art. 273 TFEU), which provided: 'The Court of Justice shall have jurisdiction in any dispute between Member States which relates to the subject matter of this Treaty if the dispute is submitted to it under a special agreement between the parties'. That provision has been broadly interpreted to mean that 'the dispute' could also be a dispute over the interpretation of a subsidiary treaty which could not be resolved in any other way. This created a mechanism of preliminary references which could be cited to ensure a uniform and correct interpretation of the Brussels and Rome Conventions. The broad interpretation concerned the notion of 'relates to the subject matter', since Art. 293 EC Treaty was an acknowledgement that the cooperation established by the Member States by the subsidiary treaty was related to EU activities (but this did not necessarily mean that it was part of EU activities).

However, the institution of preliminary references does not in itself mean that the rules which the Court of Justice can interpret are part of EU law. There are other arguments which support the contentions laid out here that Art. 293 EC Treaty, read in conjunction with Art. 273 TFEU, does not confirm that subsidiary treaties are a source of EU law. First, the Court's jurisdiction was established *ex post* by the protocols negotiated from the two conventions. It was not therefore part of the original arrangement. I do not consider that the protocols in themselves could change the legal status of the two conventions and make them a source of international law into a source of EU law. Such a transformation is legally possible, but if that was indeed the intention of the Member States, it would be assumed that this would have been explicitly expressed in the protocols.

If that argument is not enough, then a second one can be offered. According to the literature, Art. 273 TFEU was employed to ensure a uniform interpretation in a purely bilateral treaty between Germany and Austria (Austro-German Convention).[12] This is an extremely interesting matter that deserves deeper attention in this text. The purpose of this treaty was to avoid double taxation – hence the thematic link to EU law, which is confirmed by Art. 293 EC Treaty. It should be stressed, however, that in this case, a simple bilateral international treaty was concluded. There was no doubt that this treaty was a source of international law and not EU law. The Austro-German Convention contained this remarkable provision:

> In the case of difficulties or doubts concerning the interpretation or the application of this convention, for which no solution can be found during a mutual agreement procedure between the competent authorities arranged in accordance with the preceding Paras of this Art. within a period of three years from the initiation of that procedure, the States Parties are obliged, at the request of the person referred to in Para. 1, to submit the dispute to the Court of Justice [of the European Union] under an arbitration procedure pursuant to Art. [273 TFEU].[13]

In principle, therefore, like the Brussels Convention, it envisaged ensuring uniform interpretation through the decisions of the Court of Justice. Hence this illustrates that Art. 273 TFEU simply cannot be used as an argument to support the claim that subsidiary treaties are part of EU law. Indeed, Art. 273 TFEU applies to those cases where jurisdiction is based on an objectively identifiable link to EU law. On the other hand, there is no need for any requirement that the subject matter be the same as the subject matter of the Treaties.[14] In this way, the Court of Justice can resolve disputes for Member States, including those on interpretation, which concern international law.[15]

However, arguments to the contrary can also be found and put forward, confirming the EU nature of subsidiary treaties. In my view, the Brussels Convention

12 *The Abkommen zwischen der Republik Österreich und der Bundesrepublik Deutschland zur Vermeidung der Doppelbesteuerung auf dem Gebiet der Steuern vom Einkommen und vom Vermögen.*

13 See Art. 25(5)of the Austro-German Convention (translation by the Court of Justice).

14 Judgment of the Court (Grand Chamber) of 12 September 2017 C-648/15 – *Austria v Germany*, paras. 23–25.

15 Indeed, the interpretation under international law and on the basis of the Vienna Convention on the Law of Treaties was applied by the Court in the present case. Cf. paras. 39 and 39 of the cited decision, where this Court refers to the necessity of interpretation according to the methods proper to international law, and where it referred to the rules of interpretation in the Vienna Convention.

was negotiated in a spirit which, suggested a closer connection with EU law.[16] This treaty stated in its preamble:

> Desiring to implement the provisions of Art. 220 of that Treaty by virtue of which they undertook to secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals, Anxious to strengthen in the Community the legal protection of persons therein established, ...[17]

The link to the EEC (EC) was further confirmed by other facts, in particular that in the event of a revision of the Treaty, a revision conference was to be convened by the President of the Council of the European Communities.[18] However, none of this was intended to imply that this subsidiary treaty was to become directly part of EU law. This can be inferred from the way in which the mechanism for extending the contracting parties to the Brussels Convention was set up in relation to the extension of the EEC (EC) membership base. The Brussels Convention provided that:

> The Contracting States recognize that any State which becomes a member of the European Economic Community shall be required to accept this Convention as a basis for the negotiations between the Contracting States and that State necessary to ensure the implementation of the last Para. of Art. 220 of the Treaty establishing the European Economic Community.
>
> The necessary adjustments may be the subject of a special convention between the Contracting States of the one part and the new Member States of the other part.

Of course, the Rome Convention did not contain a similar link to EU law in its preamble. Nevertheless, it also declared its close connection to EU law. Indeed, the Rome Convention specified in a joint declaration that Member States 'express the view that any State which becomes a member of the European Communities should accede to this Convention'. The decision of a new Member State to accede and become a contracting party was therefore an entirely voluntarily action made by that State. Membership of the EU was merely a prerequisite for the possibility of being a party to this Treaty, nothing more. If the convention were part of EU (then EC) law, enlargement would have been provided for directly in the Accession Treaty. Thus, it was only subsidiary and complementary to EU law.

16 Similar text was also contained in the preamble of the Convention on the Mutual Recognition of Companies and Legal Persons '*in dem Wunsch, die in Artikel 220 des genannten Vertrags getroffenen Bestimmungen über die gegenseitige Anerkennung der Gesellschaften im Sinne des Artikels 58 Absatz 2...*'.

17 Preamble to the Brussels Convention.

18 Art. 67 of the Brussels Convention.

The case law of the CJEU that could clarify this issue is either missing or does not give a clear answer, only indications. For example, in Mund & Fester case, the Court stated:

> By providing that the Member States shall, so far as is necessary, enter into negotiations with each other … the purpose of the fourth indent of Art. 220 of the Treaty is to facilitate the working of the common market through the adoption of rules of jurisdiction for disputes relating thereto and the elimination, as far as is possible, of difficulties concerning the recognition and enforcement of judgments in the territory of the Contracting States. It follows that the provisions of the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, concluded on the basis of that Art. and within the framework defined by it, and also the national provisions to which the Convention refers, are linked to the EEC Treaty.[19]

In this decision, the Court emphasises the Brussels Convention's link to EU law, but it is also clear that it places it in the same category as national provisions governing private international law. It is obvious that the national provisions to which the Convention refers have not become part of EU law. There is therefore no reason to argue that it should be otherwise in the case of a treaty concluded between Member States. Nor does the cited decision suggest any such thing.

However, two other decisions of the Court suggest a different approach. In the first judgment, in case Duijnstee, this Court stated:

> The principle of legal certainty in the Community legal order and the aims pursued by the Convention in accordance with Art. 220 of the Treaty, on which it is based, require that the equality and uniformity of rights and obligations arising from the Convention for contracting states and the persons concerned must be ensured, regardless of the rules laid down in that regars in the laws of those states.
> It must by concluded that the Convention, which seeks to determine the jurisdiction of the courts of the contracting states in civil matters, must override national provisions which are incompatible with it.[20]

This decision could imply the preferential application of the Brussels Convention (and other subsidiary treaties) over national law. The principle of primacy of application is characteristic of supranational EU law. On the contrary, it could not be inferred by the Court if the subsidiary treaties were ordinary international treaties. The question of the relationship between international and national law is thus

19 Judgment of the Court (Sixth Chamber) of 10 February 1994. Case 398/92 – *Mund & Fester v. Hatrex Internationaal Transport*.

20 Judgment of the Court (Fourth Chamber) of 15 November 1983. Case 288/82 – *Ferdinand M.J.J. Duijnstee v. Lodewijk Goderbauer*, paras. 13 and 14.

determined by national constitutional law. However, I consider that this would be a misinterpretation of the cited decision. In fact, the Court's decision gives a very precise answer to the question it has received from the national court. The question is whether the provisions of the Brussels Convention override the provisions of the national Code of Civil Procedure. The Court's answer is therefore understandable; it held that it does, and provided its reasoning. In doing so, the Court did not need to address the context, as that was not what the national court had asked. Indeed, since it was a Dutch court, it did not need to do so, because The Netherlands is a state with a monist approach to public international law, which has no problem with the primacy of that law over domestic law. I am convinced that the question would have been resolved differently in the case of a state with a dualist approach. In such a scenario, the courts of that state would not be able to apply the Brussels Convention in priority per se, and there would be an obligation on the legislator to ensure that the legislation in national law complied with its international obligations.

The second decision suggesting that subsidiary treaties could be a direct part of EU law is the Truck Center case. In that case, the Court of Justice used the phrase

> It should be noted at the outset that, in the absence of any unifying or harmonising measures at Community level, in particular under the second indent of Art. 293 EC, the Member States retain the power to define, by treaty or unilaterally, the criteria for allocating their powers of taxation, particularly with a view to eliminating double taxation.[21]

However, the phrase 'at Community level' is again, in my view, to be interpreted broadly, i.e. to include both activities within the EC(EEC) and those related to their subject matter based on Art. 293 EC Treaty. I am convinced that if the Court were to regard subsidiary treaties as a source of EU law, it would say so explicitly.

It should be emphasised that the situation was different in the case of the accession of Romania and Bulgaria to the EU. Accession to both conventions was foreseen directly in the Accession Treaty itself (and it is part of EU law), and for existing Member States the consent to accession had to be given by a Council decision.[22] However, the reason for this change was the transfer of competence in the field of private international law, which was implemented by the Treaty of Amsterdam. Member States conferred their own competence in this branch of law in question on the EU, which began to exercise it for them. Hence the change in the procedure for expanding the treaty base (and the subsequent replacement of both treaties by EU regulations). The legal status of the subsidiary treaties in question as

21 Judgment of the Court (Fourth Chamber) of 22 December 2008. Case C-282/07 – *Belgian State – SPF Finances v. Truck Center SA*, para. 22.

22 2007/856/EC: Council Decision of 8 November 2007 concerning the accession of the Republic of Bulgaria and of Romania to the Convention on the Law applicable to Contractual Obligations, opened for signature in Rome on 19 June 1980.

such has not changed, only the entity under whose jurisdiction the selected issues of private international law henceforth fell.

The nature of subsidiary treaties (including those that bear a similar to them) may have been made clear by Brexit. The UK was a party to both the Brussels Convention (a subsidiary treaty provided for by EU law) and the Rome Convention (a similar treaty, just not expressly provided for by EU law). Following the adoption of the regulations which replaced both conventions for most proceedings, the UK was bound by those regulations. However, both conventions were never formally repealed. The relationship between the EU and the UK following the exact date that Brexit came into force has been governed by the Agreement on Trade and Cooperation between the European Union and the European Atomic Energy Community on the one hand, and the United Kingdom of Great Britain and Northern Ireland on the other. This treaty provides for arrangements for judicial cooperation, but only in criminal matters. There has therefore been a 'hard Brexit' in judicial cooperation in civil matters. In my opinion, this absence of direct regulation in civil law matters could be resolved in two ways. If both conventions are part of EU law, Brexit would mean that the UK would no longer be a party to them and would not be bound by them. If they were international treaties, then the UK's withdrawal from the EU cannot affect their legal status. While the Rome Convention was, under Art. 28, open for signature only by EU Member States, none of its provisions address the situation where a contracting state to that treaty ceases to be a party to the treaties establishing the EU.

However, this approach is not the only conceivable one. One can also imagine the opposite argument. According to this view, the United Kingdom is no longer bound by the Rome Convention, for the following mutually alternative reasons. Firstly, the purpose of the treaty was not to regulate relations with third countries, which is what the United Kingdom became as a result of Brexit.[23] Secondly, from an internationalist perspective, the treaty has been superseded by later regulations adopted by the EU in the same area. It is therefore no longer a valid convention. Thirdly, the Rome Convention can be seen as a subsidiary treaty, i.e. viewed as part of EU law more broadly, so-called tertiary law. Therefore, by 'leaving' the EU, the UK will also cease to be a party to the Rome Convention.

23 This is how Sada and Drusian argued in their article. They argue that the reason is a material hange of circumstances under Art. 62 of the Vienna Convention. 'Since the accession to the Brussels Convention of 1968 was the first step in the implementation of the European project, the spirit of such Convention is diametrically opposed to the exit of the United Kingdom from the European Union, with the consequent inapplicability of the same post-Brexit'. I believe that they interpret Art. 62 too broadly. The fact that a state will withdraw from the EU is not something that could not have been foreseen and could not have been directly provided for in the relevant treaties. However, I concede that it is a possible interpretation. See: Sada and Drusian, 2024.

However, the reality is that post-Brexit, the UK is using its own domestic law,[24] which in a modified form has taken over the content of the Rome I Regulation rather than the Rome Convention.[25]

> The Rome Convention applied to the UK during the UK-EU transition period.[26] At the end of the transition period (at 11.00 pm (UK time) on 31 December 2020) the Rome Convention stopped applying to the UK on a reciprocal basis.[27]

The EU takes a similar approach, applying the Rome I Regulation, being the EU's 'national law' which has universal application, rather than the Rome Convention.[28] Thus, the current practice of both parties therefore does not provide a clear answer, only a distinct desire not to continue to apply these treaties.

4. Interpretation of Subsidiary Treaties

For further interpretation, it can be taken as a given that subsidiary treaties were not part of supranational (Community and then EU) law. The principles of primacy and direct effect were therefore not applicable in their case. Nevertheless, these treaties were more intertwined with EU law than other ordinary international treaties. The reasoning for this conclusion are twofold. Firstly, the Court of Justice used a specific approach to their interpretation, taking into account the links to EU law and its content. Secondly, the Court has again, in interpreting these treaties, treated them not as a normal international treaty, but as an instrument of an autonomous nature on the national law of the Member States. It is however true that the first approach is closely related to, and a prerequisite to the second.

Firstly, it should be explained how and why the Court of Justice provided the interpretation of these treaties. Art. 293 of the EC Treaty did not confer any such power on this Court. Its competence to interpret these treaties is therefore not

24 The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (UK Exit) Regulations 2019 (SI 2019/834) (Regulations).

25 Attenborough, 2021.

26 UK-EU transition period.

27 Rome Convention.

28 The Court specifically addressed the issue of the application of the Rome Convention in its judgment of the Court (Seventh Chamber) of 14 September 2023. Case C-632/21 – *JF and NS v. Diamond Resorts Europe Limited (Branch in Spain) and Others* paras. 54 and 55: 'the United Kingdom's withdrawal from the European Union has no bearing on the application of the provisions of the Rome I Regulation to the dispute in the main proceedings. As regards the rules applicable during the transition period, laid down in Art. 66(a) and Art. 126 of the Withdrawal Agreement, they were drawn up with regard to the cases pending before the courts and institutions of the United Kingdom and as such do not affect the position of the Spanish court hearing the dispute in the main proceedings'.

implicit (automatic). It is, however, based on the agreement of the Member States (the contracting parties to both Conventions) and is made possible by the already quoted Art. 239 EC Treaty (now Art. 273 TFEU). In both cases, the power of the EU and, within it, of the Court of Justice to ensure a uniform interpretation was based on the Protocols negotiated by the Member States to the two Conventions.[29]

The Court's first approach to the interpretation of the two Conventions can be demonstrated in the Eurocontrol case.[30] Here the Court used the following reasoning:

> the principle of legal certainty in the Community legal system and the objectives of the Brussels Convention in accordance with Art. 220 of the EEC Treaty, which is at its origin, require in all Member States a uniform application of the legal concepts and legal classifications developed by the court in the context of the Brussels convention.[31]

What is particularly noteworthy about this paragraph is that the Court uses reasoning that is not based on the norms and rules of public international law when interpreting an international treaty. The rules and principles of European Union law are used to interpret this international treaty. The latter approach necessarily follows from the former. The interpretation of both conventions is autonomous to national law. This means that it is not up to the Member States to independently determine the meaning of words, concepts and institutes in these Conventions through the filter of their own national law. Both conventions are independent of national law.[32] From a public international law perspective, such a solution is possible. Both the Vienna Convention on the Law of Treaties and international customs do not preclude this approach to interpretation, and the exclusion of self-interpretation of an international treaty by the contracting parties is permitted,[33] without modifying their international legal status in any way.

At the same time, the CJEU's interpretation is fully in line with the Vienna Convention and thus public international law. In fact, this method of interpretation takes into account the purpose pursued by the contracting states of the subsidiary treaties in negotiating them, which was the close link to EU law. In this respect, it is again Art. 293 EC Treaty that plays a very important role, although the same approach

29 Protocol on the interpretation of the 1968 Convention by the Court of Justice; the First Protocol on the interpretation of the Convention on the law applicable to contractual obligations, opened for signature at Rome on 19 June 1980, by the Court of Justice of the European Communities; and the Second Protocol on the delegation of certain powers concerning the interpretation of the Convention on the law applicable to contractual obligations, opened for signature at Rome on 19 June 1980, to the Court of Justice of the European Communities.

30 Judgment of the Court of 14 July 1977. Joined cases 9 and 10–77 – *Bavaria Fluggesellschaft Schwabe & Co. KG and Germanair Bedarfsluftfahrt GmbH & Co. KG v. Eurocontrol.*

31 Ibid., para 4.

32 Ibid.

33 Sehnálek, 2019, p. 14.

was also applied to the Rome Convention. The Vienna Convention places teleological interpretation among the general rules of interpretation.[34]

5. *Ratione Materiae* of Subsidiary Treaties

With regard to the scope of possible cooperation between Member States, the following can be stated: as regards the positive definition of the possibility of concluding them, firstly, I believe that subsidiary treaties could also be concluded in areas that were not explicitly mentioned in Art. 293 EC Treaty; secondly, I believe that they can be concluded even today, even though neither Art. 293 EC Treaty nor any other similar provision is part of primary law anymore. As for the negative definition, I believe that the conclusion of a subsidiary treaty is generally precluded by the existence of EU competence. Member States cannot therefore conclude such a treaty where the EU has exclusive competence to regulate an issue, or where its competence is shared, and the EU has already exercised it (thus emptying the space for regulation by national law of the Member States).

In the previous paragraph, I stated that the existence of exclusive competence excludes the possibility of regulation by national law of the Member States, and therefore also by subsidiary treaties (pre-emption). A subsidiary treaty should not be permissible in such cases, even in the case of internal regulatory gaps. I.e. in cases where the EU has competence over an issue but has not yet used it. However, the situation may be more complicated if we consider that the transfer of competence may only concern the possibility to regulate a certain issue. It is therefore a situation where there has been a transfer of legislative competence to adopt standards of regulation in a given area. Equally, however, it may relate to issues of an institutional nature where there may not have been a transfer of power, and even where the power to legislate is exclusive. This can be demonstrated by the example of customs. The EU has exclusive competence to set external tariffs on imported goods. Yet it does not have this competence at institutional level. The customs administrations that administer customs duties, and therefore EU regulations in everyday practice, are governed by national law and not EU law. A subsidiary treaty ensuring cooperation between the customs administrations of the Member States in such a defined segment of customs matters would therefore, in my view, be perfectly permissible.

Indeed, the Court of Justice has interpreted the notion of 'so far as is necessary' used in Art. 293 EC Treaty in an interesting way. On first reading, it would appear that this provision softens the obligation imposed on Member States to initiate negotiations. This is because the Member States themselves can assess whether this is

34 See Art. 31(1) of the Vienna Convention.

necessary. The Court of Justice has also taken an alternative approach to this connection, stating in *Überseering*:

> As the Advocate General maintained at point 42 of his Opinion, Art. 293 EC does not constitute a reserve of legislative competence vested in the Member States. Although Art. 293 EC gives Member States the opportunity to enter into negotiations with a view, inter alia, to facilitating the resolution of problems arising from the discrepancies between the various laws relating to the mutual recognition of companies and the retention of legal personality in the event of the transfer of their seat from one country to another, it does so solely 'so far as is necessary', that is to say if the provisions of the Treaty do not enable its objectives to be attained.[35]

In this sense, the text 'so far as is necessary' represents limit, which is nevertheless not related to the Member States' obligation to act as it relates to the scope of Art. 293 EC Treaty instead. It therefore limits the breadth of the list of areas where Member States may cooperate under this provision. The Court of Justice has thus rejected the essentially contradictory argument in the cited case that Art. 293 EC Treaty is, on the contrary, a confirmation of the absence of EU competence to regulate certain issues (here, certain aspects of the freedom of establishment) by EU law. This means that the Court of Justice has allowed a narrow interpretation of this provision so that it cannot, by its broad scope, restrict the functionality of the fundamental freedoms of the internal market or of EU law in general.

So what is the relationship between Art. 293 EC Treaty, and what it allows to be regulated by subsidiary treaties and the competence provisions contained in primary law? I believe that this can be demonstrated by the freedom of establishment and its possible use by those who practise the law. Firstly, it is a relationship between two parallel independent areas, one governed by EU law and the other which can be governed by subsidiary treaties. This was the case of the so-called primary establishment dealt with in the Daily Mail[36] case, in which the Court of Justice allowed that the provisions of the freedom of establishment do not directly create the possibility of primary establishment (but this right may be enshrined by Member States in a convention under Art. 293 EC Treaty). Secondly, it is a competing relationship where an issue can be regulated under both EU law provisions and a subsidiary treaty. I can illustrate this relationship with the example of the never adopted so-called 14th Directive on the transfer of the registered office of a company. It is interesting to note that the issue of the transfer of the registered office of a company has moved from the first to the second category over time as the internal market

35 Judgment of the Court of 5 November 2002. Case 208/00 – *Überseering BV v. Nordic Construction Company Baumanagement GmbH (NCC)*, para. 54.

36 Judgment of the Court of 27 September 1988. Case 81/87. – *The Queen v H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc.*

has developed.[37] This is a consequence of the dynamic development of the internal market and the general nature of the EU legislative competence under Art. 114 TFEU. Certain issues that could not be regulated in the past because they did not pose a threat to the functioning of the internal market can be regulated now if they have become an obstacle to its functioning in the meantime.

The problem lies in the fact that the scope for cooperation between Member States in the form of subsidiary treaties has been shrinking over time. The reasons for this contraction are twofold. Firstly, there is the gradual increase in the EU's competences, which occurs with every primary law revision. The second reason is the internal hollowing out of the scope for the use of these treaties. This is linked to the EU's legislative activity, i.e. in the form of secondary law or acts implementing secondary law. In any case, over time, the supranational method of regulation seems to be clearly prevailing over the intergovernmental method typical of subsidiary treaties.

The final question that should be addressed in this chapter in relation to Art. 293 EC Treaty is what is meant by its annulment without any successor in primary law. There is currently no similar provision in the current text of the TEU and the TFEU. The first possibility is that, by repealing Art. 293 EC Treaty by the Lisbon Treaty, the Member States have expressed the belief that subsidiary treaties are a special category of law created between themselves that has already been overtaken. This type of treaty has therefore ceased to exist not only in fact (by replacing the existing Brussels Convention with a regulation),[38] but also in law. I do not share this view.

The second, and to me more likely, possibility is that the Member States eliminated Art. 293 EC Treaty only to indicate that the preferred form of integration is that which already exists within the EU. This is understandable, since most of the areas covered by Art. 293 EC Treaty have in the meantime been emptied by the transfer of competences to the EU (private international law and the area of companies and the transfer of their seats). It can therefore be assumed that a similar shift is expected in the other areas previously covered by Art. 293 EC Treaty. This provision has therefore become hollowed out in its current form and therefore redundant. New areas of cooperation have apparently not been identified by the Member States. However, this does not mean that they do not exist and that subsidiary treaties could

37 The proposal was based on Art. 50(2) (f) which provides for progressive abolition of restrictions on freedom of establishment and Art. 50(2) (g) which provides for coordination measures concerning the protection of interests of companies' members and other stakeholders. In the beginnings of the common market, there were no such restrictions as the number of companies seeking the transfer of a company seat was limited, thus, there was no legal basis for any European regulation.

38 The Brussels Convention was replaced in relations between EU Member States by Council regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which was subsequently replaced by 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).

not be concluded within them, quite the contrary. The following chapter will be devoted to the subsidiary treaties concluded between Member States to date.

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