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European Union law

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One of the greatest achievements of European integration is the establishment of a legal system which is, for its original features and the innovative solutions proposed, an unprecedented example of legal engineering in the international community. Of course, this immediately shows one of its limits: the high level of complexity has evident shortcomings, especially with regard to the comprehension of the system by European citizens and third parties. It can be justified only if it is considered the best option to achieve the intended results.

For the purposes of this chapter, we do not consider it necessary to distinguish between *legal system* and *legal order*, although we acknowledge the nuance existing between the two terms (Moorhead, 2014: 1, quoting MacCormick, 2005).

The European Union (EU) legal system, as we know it today, is the result of an integration process that has developed steadily for almost 70 years, but centrifugal forces have eventually slowed it down in the recent years: interlocking events and various crises in sequence – from the financial and economic global crises to the Eurozone crises, from the conflicts in neighbouring countries to the crisis in the management of the immigration flows and the rise of nationalist and populist movements across Europe, from the avoided Grexit to the Brexit (Rhinard, 2019: 616; Craig and De Búrca, 2020: 22; Ryan J., 2021: in this book; Pichler P., 2021: in this book) – have led us today to a turning point. In the crises mentioned previously, the EU Member States seem to have increasingly diverging positions (see, among others, about the Eurozone crisis: Otero-Iglesias, 2015; about the immigration management: Athanasopoulos Köpping, 2020). Do EU Member States have fewer and fewer interests in common? Or maybe less interest in discussing possible solutions to common problems?

From the legal point of view, Besson (2004: 259) invokes the principle of coherence: "nothing prevents competing legal determinations in Europe from being made coherent if the justification and conditions of integrity are given in such a complex and pluralist legal order".

The necessity and/or opportunity of European integration, its legal system and even its values are today challenged (Scheppele, Vladimirovich Kochenov, Grabowska-Moroz, 2020). The coming years could take the European Union either towards a slow decline or a reform and reinvigoration.

To illustrate why EU law, in all its complexity and with all its limitations, is one of the greatest achievements of European integration, this chapter will first present a few major EU rules and

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characteristics. EU law is different from international law, just as much as the relations between its Member States differ from those between the members of the international community. The debate about the EU legal nature will then be illustrated. The diverse interpretations of the EU hybrid nature highlight how European integration is an ongoing process: EU law should be understood not as a frozen system of rules but as a dynamic legal system. Finally, some conclusions will be drawn about the possible further evolution of EU law in a post-Brexit scenario.

Special features of EU law

Legal orders can be organised on three levels: international law, national law and, in between, EU law as supranational law. This classification has not been generally accepted, and different interpretations of the nature of the EU have been developed (see next section), but it allows us to easily point out the peculiarities of EU law.

Both in international law and in EU law, states are subject to law, have legal personality and are equal and sovereign. International rules are addressed mainly to states and international organisations (IOs) – only recently, to some extent, to individuals, while EU supranational rules are addressed to States and individuals, establishing rights and obligations. In particular, individuals can invoke EU rules having direct effect before national court. The direct effect principle is a significant pillar of the EU legal system and ensures the effective implementation of the EU law in the Member States. In contrast, traditionally international law is not considered to have direct effect; it is rather integrated in the domestic legal system in different ways, depending on the constitutional order of each state. Even though a number of different practices can be observed, "to some extent, direct effect in the European Union (EU) remains a unique phenomenon" (Nollkaemper, 2014: 106).

Therefore, international law and domestic laws are parallel systems, autonomous and separated, while EU law and its Member States' laws constitute an integrated system.

Both at the international and supranational level, all states are equal and sovereign. The international legal system is qualified as horizontal (among others, Malanczuk, 2002: 5), because there is no superior legislative, executive or enforcing authority. The EU has a hybrid nature but, in our opinion, the non-horizontal nature is prevailing, which is confirmed by the progressive establishment of several mechanisms.

First, the ordinary legislative procedure (Article 294 of the Treaty on the Functioning of the European Union – TFEU) attributes legislative initiative powers to the European Commission and requires a co-decision process where the European Parliament and the Council of the European Union jointly adopt the legislative act. This procedure has been reinforced with the Lisbon Treaty and is used widely – it applies today to the majority of policy areas. This legislative mechanism, together with the increasing use of qualified majority voting in the Council,

Table 19.1 Peculiarities of legal orders

Legal orders	*International law*	*Supranational law*	*National law*
Subjects of law	Mainly states and international organisations (IOs)	Both states and individuals	Mainly individuals
Nature	Horizontal system	Hybrid system	Vertical system
Relation	International and supranational law: parallel separate systems	Supranational and national law: integrated systems	

allows it to overcome the limits of the unanimity voting and consensus approaches, which are typical of intergovernmental decision-making systems. In accordance with Article 16 of the Treaty on the European Union (TEU),

> The Council shall act by a qualified majority except where the Treaties provide otherwise. As from 1 November 2014, a qualified majority shall be defined as at least 55 % of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65 % of the population of the Union.

Second, the principle of the primacy of EU law demonstrates the full integration of EU law and Member States' domestic laws, notwithstanding the resistance showed by national Constitutional Courts (see next section). It was established by the Court of Justice (CJEU) in the renowned *Costa v. Enel* case (Judgment of the Court of Justice, Costa v ENEL, Case 6/64, 15 July 1964). In case of conflict between national and EU provisions, Member States' authorities must apply EU law, while the national rule's binding force is suspended. Judicial authorities cannot abrogate internal laws – only the legislative power can do it – but, in case of conflict with EU law, internal laws have to be disregarded by national courts. It does not matter which act was adopted first. Without the primacy principle, the effective implementation of EU law would not be possible. Lindeboom (2018: 356) explains that the "Court's underlying conception of law is essentially mimetic of the typical characteristics of national legal systems, which also questions the extent to which the EU legal system is a threat to 'traditional', allegedly state-focused legal philosophy", and that "Whereas the EU is certainly not a state, the EU legal system is no different from national legal systems".

Third, the extensive judicial competences and proactive attitude of the Court of Justice of the EU play an important role (see, among others, Moorhead, 2014: 11; Forganni, 2015: 146).

The CJEU has to be distinguished from the European Court of Human Rights (ECHR), an international court that has judicial competence in case of violation of the European Convention on Human Rights. Callewaert (2018: 1691) underlined that the two Courts have an open and regular dialogue, although informally, that has ensured harmony in their jurisprudence. The EU accession to the ECHR is not expected to alter this equilibrium but rather to have a political meaning with regard to the protection of human rights in the EU.

As explained by Sarrión Esteve (2014: 60),

> it is necessary to adopt a multi-level constitutionalism theoretical approach, where the European Court of Justice, EU Member States Constitutional or Supreme Courts and European Human Rights Court (EHRC) have a relevant position as actors in the protection of fundamental rights in Europe.

The CJEU's proactive role in European integration was possible in particular through the preliminary rulings and the infringement and sanction procedures, which justify the reference to the Court of Justice as "guardian of the treaties", together with the European Commission (Smith, 2015: 351). In accordance with Article 267 TFEU,

> The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it

> considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

The infringement procedure is regulated by Article 258 TFEU, which provides as follows:

> If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.

If the Member State concerned does not comply, a financial sanction can be imposed (Smith: 2015, 369).

These procedural remedies allow for a centralised judicial review which represents an element of distinction compared to international law, where, on the contrary, retaliation establishes a decentralised system of sanctions: states can react in case of violation of international rules, for example, imposing trade restrictions or other measures (Petersen, 2009: 1249). In the EU, non-compliant Member States can receive pecuniary sanctions, just like individuals in domestic law.

Thus, EU law is characterised not only by a strong attitude to regulation and codification, which can be traced back to the civil law legal family – for example, legal systems of continental Europe, developed from Roman law – but also by a creative and pro-active jurisprudence, typical of the common law legal tradition – Anglo-American legal systems, developed from English law from the 11th century. This combination has led to a complex set of rules that has no equal in the world.

Nevertheless, several elements of the EU legal system suggest that national sovereignty is strong and remains essential for the functioning of the Union. Without claiming to be exhaustive, a number of examples show that the political direction still depends on the will of the representatives of the national governments, that the Council still deliberates unanimously in certain cases, that the revision of the treaties requires an intergovernmental procedure proper to international organisations, that the European Parliament's role is still limited (although it has been reinforced by the Lisbon Treaty) and that the accession of new States to the Union is the subject of an international treaty submitted to ratification.

The hybrid nature of EU law has been (and will continue to be) a controversial question.

The legal nature of the EU and European integration: a long-term debate

The origin of the EU's complexity lies in its intrinsic nature. The debate around the legal nature of the EU, and the integration among its Member States, has a long history and has involved academic scholars, national constitutional courts and, certainly, the Court of Justice of the EU.

Besson (2009: 242) summarises the qualification of the EU provided by the CJEU (notably, in Opinion 1/91 and Case 26/62, *Van Gend en Loos*) as follows:

> Generally speaking, the EU's perspective, or more exactly that of the Court of Justice, is that the EU is an international organisation vested with international legal personality and that its legal order is an international legal order. According to the Court, however, the EU is a *sui generis* organisation and its international legal order is of a new kind.

Different schools of thought emerged among the academics with regard to the EU's legal nature.

Initially the European integration process was traced back to the traditional forms of intergovernmental collaboration proper to international law; in this interpretation, the EU legal system stems from international law, and the EU is an international organisation. In particular, EU law has been indicated as example of regional international law, that is, a set of rules applying only to certain states belonging to the same region, as opposed to general international law (Malanczuk, 2002: 2), or as "sub-system of international law" (De Witte, 2020: 192).

The EU is indeed established by treaty (as the European Communities before), and the requirements to be qualified as an international organisation are fulfilled. However, nowadays, the EU pursues not just the interests of its Member States but rather the common interest of the Union (Archer, 2014: 38).

Notably, in the EU a specific institution, the European Commission, is in charge to protect the interest of the EU as a whole, which could represent something more than the interests of all the Member States. Article 17(1) of the Treaty of the European Union provides that

> the Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union.

Bredt (2006: 64, quoting Verhoeven, 2002: 24) has applied Rousseau's social contract theory at the European level and transferred the idea of the individual interest to pursue the collective interest from Nation State to supranational form of governance.

A minority of scholars traced it back to a constitutional development in federalist terms (about federalism and European integration, see Burgess, 2002). Academic studies (among others, Tizzano, 1955) highlighted that, without being a federal Union, this new entity in the international community had elements of federalism, and the debate on its legal nature was just a matter of discussion. The origin of the European Community was an exercise in institutional engineering, not necessarily conceived to evolve in a federal sense. It could have continued on its peculiar path without being bound by older traditions.

Fossum and Jachtenfuchs (2017: 471, quoting Friedrich, 1968; Monnet, 1978; Spinelli and Rossi, 1944) explained that since the very beginning of European integration, the federalist model was an alternative to the intergovernmental model. The latter model prevailed, but federal traits were introduced during the integration process. Beutler et al. (1998: 76) pointed out that the principles of a federal state cannot apply to the EU. In case of lack of rules governing a specific subject, the general principles of international law should be used, codified for the first time in the Vienna Convention on the Law of Treaties of 23 May 1969.

Other scholars argued that the EU could be considered a confederation (Neri, 1964: 231; against: Orsello, 2006: 93) or used the confederal analysis to explain European integration (Warleigh, 1998). Archer (2014: 38) underlined that "there may be a case for the EU being regarded as a confederation whereby each of the composite states is still sovereign though there is also a central government with some powers".

These approaches do not fully illustrate the nature of the EU. The intergovernmental approach does not explain a great number of features that allow to introduce a higher degree of interdependence among the states, such as the large use of qualified majority in the decision-making process instead of unanimity. On the other hand, the federalist approach is incomplete: a constitutional federal organisation, which is in place in federal states, cannot be found at the European level (Archer, 2014: 38).

Another school thus emerged, embracing the interpretation provided by the Court of Justice that qualifies the EU as *tertium genus* (or *sui generis*), an original system of rules with regard to both international and domestic law (among others, Monaco, 1975: 202; Wunderlich, 2012: 653). This interpretation has the merit of highlighting the peculiarities of the EU, which make it a unique creation in the world, beyond the internationalist school, which is a bit too reductive. Pliakos (1993: 215) referred to the EU as an original creation of federal, supranational and confederal elements.

The European integration process can therefore be considered an "extraordinary laboratory" (Guizzi, 2000: 52) that leads to an ever-changing entity. Consequently, any description of the EU and EU law cannot happen in absolute terms but is always dependent on place and time, given its permanent development.

The *tertium genus* approach allows one to define EU law as a set of rules that have developed in parallel to, but integrated with, national law. Any conflicts between them are resolved according to the principle of the primacy of EU law (or precedence principle): the cornerstone tenet of EU law providing that supranational law prevails over national law. As mentioned, it was developed by the Court of Justice's case law, and it is now included in the Declaration 17 concerning primacy of the Lisbon Treaty. However, "it has not been generally accepted by national courts" (Craig and De Búrca, 2020: 326).

The constitutional jurisprudence of the EU Member States has shown the delicate equilibrium between national and supranational law and competences, which is in constant evolution. Without being exhaustive, a series of judgements of the Constitutional Courts in Italy and in Germany (so called *competence competence* case) offer comparative examples of the participation of constitutional judges in the legal and political debate about the European integration process.

Picchio Forlati showed the caution of the Italian Constitutional Court (*Corte Costituzionale*, hereby ICC) in clarifying the legal nature of European integration, which almost resembled the theologians' caution to approach the definition of God (1999: 463). The difficulty of providing a precise legal qualification is due to the hybrid nature of the EU: as shown previously, the integration among its members is more profound than in an international organisation but less than in a federal state. In addition, the repartition of competences between local and central level and the decision-making process are peculiar and different from any other national or international entity.

The interpretation provided by the Italian Constitutional Court on the relations between national and supranational law has evolved, and its jurisprudence on the subject has been divided into three main periods (Sorrentino, 1996: 6).

The first phase approximately corresponded to the transitional period introduced by the Treaty of Rome for the establishment of the internal market (Italian Constitutional Court, judgements 14/1964 *Costa v. ENEL*, and 98/1965 *Acciaierie San Michele*). The ICC first argued that conflicts between internal and supranational rules should be resolved according to the principle of the succession of laws over time – that is, in case of conflict, the most recent act prevails over the previous one – thus denying the primacy principle. Then it acknowledged the peculiar characteristics of European integration and affirmed the derogatory nature of the treaties with regard to the Constitution, based on Article 11 of the Constitution, without prejudice of fundamental rights.

After the judgement 14/1964 *Costa v. ENEL*, a request of preliminary ruling was submitted to the CJEU, which affirmed the principle of primacy of EU law over national law (Judgment of the Court of Justice, *Costa v ENEL*, Case 6/64, 15 July 1964).

The second period (Italian Constitutional Court, judgement 183/1973, *Frontini*) was in line with the rapid development of European integration and was characterised by the recognition

of the direct applicability of supranational legislation (namely regulations) and their pre-eminence over national laws. However, the ICC established a limit on the transfer of competences from Member States to European institutions: the protection of the Constitution's fundamental principles and rights. The ICC reaffirmed its competence to control the respect of such principles and rights at the European level.

Barnard (2020: 246) highlighted that, in this context,

> one of the very foundations of the emerging European building – the principle of supremacy of EU Law – was at risk of being compromised. It did not take long to the Court of Justice to find that fundamental rights were part of "the general principles of Community Law" which the Court would protect.

The third period (Italian Constitutional Court, judgement 170/1984, *Granital*) corresponded to one of the most significant phases of European integration, with the Treaty on European Union of 1992 and the further enlargement of the Union. The ICC's interventions in this period aimed at enhancing the primacy of supranational law over domestic law.

Today we are probably in a phase of relaunch of this debate, or "revival of judicial nationalism" (Scaccia, 2019: 822). The judgements *Frontini* and *Granital* mentioned counter-limits that more recently were recalled in a series of judgements concerning the relationship between EU law and domestic law which focus, among others, on the protection of fundamental rights (see judgements 269/2017 and 115/2018).

Regarding judgement 269/2017, Di Marco (2018: 846) emphasised "the robust commitment of the ICC to attract every issue concerning fundamental rights into its own mechanism of centralised judicial review". As explained by Gallo (2019: 435) "according to the Court, national judges should always submit questions of constitutionality *rather than or before* referring the matter to the Court of Justice by virtue of Article 267 TFEU" through the preliminary ruling (so called *dual preliminarity*). The Court intervention thus seemed to establish boundaries to one of the fundamental mechanisms of integration between supranational and national law.

Rossi (2018: 7) proposed a second, more nuanced, interpretation of judgement 269/2017. If a national law is suspected to be in conflict with the Constitution as much as with the Charter of Fundamental Rights of the European Union, national courts must raise the question of constitutional legitimacy before the Constitutional Court, without prejudice to ask preliminary ruling to the CJEU. This interpretation should be preferred because the Charter is an EU legal source with the same rank as the treaties. It cannot be attracted by national Constitutional Courts within their competence, and it cannot be assimilated to national Constitutions (Rossi, 2018: 6).

The principle expressed in the judgement 269/2017 was reaffirmed in the case 115/2018 (one of the *Taricco* judgements) with regard to the application of "counter-limits" in the context of criminal law. As Piccirilli (2018: 814) underlined,

> Partially overlapping with the *Gauweiler* case, the Brexit negotiations, and the turmoil caused by the rule of law crisis in some Central European states, the "*Taricco* saga" further stressed this difficult moment for European integration.

Judicial activism has been significant in Germany, too (Davies, 2018: 361). In the 1974 *Solange I* case (BVerfGE 37, 271 2 BvL 52/71), the German Constitutional Court (*Bundesverfassungsgericht*, hereby BVerfG) stated its competence to decide about the constitutional legitimacy of supranational acts (specifically, regulations) as long as the EU's standard of protection of

fundamental rights was not substantially equal to the protection provided at the national level by the German Constitution.

Some years later, in the 1986 judgement *Solange II* (BVerfGE, 73, 339 2 BvR 197/83), the BVerfG showed a more cooperative approach: as long as the Court of Justice's jurisprudence ensured, at the European level, an effective protection of fundamental rights, equivalent to the German one, the BVerfG renounced its competence to review supranational legislation by the standards of the fundamental rights protected in the Constitution.

With the 1993 *Maastricht* case (BVerfGE, 2 BvR 2134/92, 2 BvR 2159/92), the BVerfG rejected the constitutional complaint regarding the ratification of the Maastricht Treaty, which implied a Constitutional modification. In this way, it paved the way for increased European integration but imposed boundaries, too. The reform of the Constitution aimed to make Germany's commitment in European integration conditional upon the respect at the European level of the democratic and subsidiarity principles and fundamental rights (Baquero Cruz, 2008: 390). At this occasion, the BVerfG also evoked the right of Member States to withdraw, since they are "masters of the treaties" (Baquero Cruz, 2008: 392).

Like in Italy, lately the debate has developed around criminal law and fundamental rights. With a recent order, in 2016, the BVerfG denied the execution of a European Arrest Warrant issued by the Florence Court of Appeal to ensure the protection of the fundamental rights in accordance with the German Constitution. Meyer (2016: 277) defined this intervention as a "judicial earthquake" and criticised the Court's activism:

> To call this "*Solange III*" would mischaracterise its impact. The BVerfG insists that it has and will always have the unfettered original and supreme authority to rule whenever principles are involved that fall under the so-called eternity clause (*Ewigkeitsgarantie*): "Forever I".

The so-called eternity clause specifies the untouchable principles that cannot be amended by a Constitution modification nor by EU Law. Yet it was considered that in this case, a conflict between supranational and national law did not exist (Meyer, 2016: 283).

With the *ultra vires* decision of 2020, after submitting a preliminary ruling about the compatibility of the European Central Bank Bond Purchasing Program with the EU law, which the EUCJ considered compatible, the GCC affirmed that the European Central Bank violated the principle of proportionality (see next section). It also stated that if the CJEU exceeds its competences or provides an interpretation that is not comprehensible, its judgement is not binding for Germany (Mayer, 2020: 1119). As a result, in July 2020, a parliamentary question (P-004295/2020) was addressed to the Commission, asking for an infringement proceeding for the violation of the principle of primacy of the EU law.

Integration versus disintegration

In recent years, we have observed waves of populism (Lazar and Diamanti, 2018) and Euroscepticism (Usherwood, 2018), as well as an increasing discourse around sovereignty and the need to take back national powers. Fierce and outspoken resistance of Member States to coordinate their policies and reluctance towards further integration could be expected in a post-Brexit scenario.

However, sovereignty should not be a prerogative that States own or keep. In a globalised economy and multipolar world, to what extent would a state be independent from the international community or would governments be free to do whatever they wanted? In a modern concept of the State, to what extent is centralisation the best option? Sovereignty is a system of powers that States exercise. Powers can be more centralised in certain countries than in others;

certain functions can be transferred to the local level, to some extent, depending on their constitutional organisations. In any case, policy coordination at supranational and international level is necessary in order to face common challenges. The environmental question of global warming (Barnes P., 2021: in this book) and the COVID-19 pandemic are just two examples. The issue is how competences are attributed and to what extent functions are transferred to the local or supranational level. Limits to their powers accepted by the Member States do not concern sovereignty in itself but its exercise (Kelsen, 1950).

Based on the subsidiarity principle, the centralisation process is acceptable only if the EU produces overall welfare and does not decrease overall economic efficiency (Portuese, 2010: 234; Craig and De Búrca, 2020: 129). Article 5 TEU establishes the subsidiarity and proportionality principles:

> Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level [and that] the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.

The coordination of these fundamental rules manages the risk of overregulation or too-intrusive regulations at the EU level. The subsidiarity and proportionality principles lead to sharing competences between the EU institutions and the Member States that are original and innovative.

However, in the long run, this configuration implies that the Member States continue to share the common ideal of advancing European integration, that is, the common project of designing new solutions to cope with the challenges that a multipolar fast-changing international community presents. Degression, isolation and nationalism have jammed the system. The lack of cohesion in dealing with common crises and responding jointly to a trying environment risks deteriorating progress in the European integration process.

Conclusion

EU law is halfway between two traditional legal orders. It is close to a federal system, without however establishing a federal state. It stems from international law but without the shortcomings of a horizontal system. EU law has evolved as an advanced set of rules which is highly organised and has specific characteristics. We cannot find elsewhere such a deep integration between independent states. However, its complexity could become a crucial factor of its decline.

Brexit is introducing great instability. In this context, it seems essential for the Member States to redefine their fundamental values and to reorganise their priorities. At the same time, it could represent a window of opportunity. Member States that are willing and ready to commit themselves to advance the integration process, to make it more agile, to solve its malfunctioning and to overcome its deadlock, should not hesitate to do it in the framework of variable geometry (Rabinovych and Pintsch, 2021: in this book). The establishment of the Eurozone (Otero Iglesias, 2021: in this book) or the Schengen Area are forms of differentiated integration, which allow the achievement of closer cooperation between some Member States. Where irreconcilable differences block the dialogue, it could be preferable to pursue common interests even if that happens just between a few Member States. Such kind of projects should not be abandoned but left for other partners open to join later on.