

# The democratization of international organizations



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**CENTRE FOR STUDIES ON FEDERALISM**



**European Union:  
Legal Aspects**

by

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**CENTRE FOR STUDIES ON FEDERALISM**

## **I. From an international organisation to a supranational body**

The European Union (EU) is not only the most advanced example of the supranational evolution of an international organisation, but also an inspiring model for more and more organisations to follow. The original European Economic Community has experienced a progressive supranational evolution (although not without setbacks and delays), with a concurrent separation (though still not a detachment) from the classical patterns of international law. It currently represents what has been called “a federation of nation-states” (Delors 2002), which implies an entity that, while different from a federal state, involves overcoming the international organisation structure.

A number of motives have determined the triggering and maintenance of the integration process, leading Europeans to seek common solutions in the face of common problems. These motives have been historical (the decision to use a method of dispute resolution other than war), economic (promoting growth through market liberalisation and the removal of obstacles to free competition), social (income support to certain vulnerable groups, particularly to farmers), political (facing first the polarisation of the European continent resulting from the cold war and then the sudden thaw of the Eastern bloc) and commercial (the need to cope with increasing external commercial competition).

The integration process was launched by six countries (France, Italy, Belgium, the Netherlands and Luxembourg) by signing the Treaty in 1951, which entered into force the following year, establishing a sectoral organisation, the European Coal and Steel Community (ECSC) with a validity period of fifty years. The ECSC, the only Community organisation designed with an expiration date, finished in 2002 with the transfer of its powers to the European Community. Along with the ECSC, two treaties were signed on March 25<sup>th</sup>, 1957 in Rome (in force since 1958) without any agreed deadline establishing a second sectoral organisation in the field of atomic energy (Euratom) and a third, the European Economic Community, with much broader objectives in order to create a large common market. The three organisations shared, besides a common inspiring philosophy, the same institutional framework already set out for the ECSC, which later would be the subject of a specific “Merger” Treaty of the various executive bodies.

From the beginning, however, there was already the political design of founding an organisation that could create an increased integration among the member states. Although a functional approach had been followed, assigning the European Economic Community all and only the functional powers to achieve the established objectives, these were extremely broad, flexible and evolutionary. This enabled the Community legal system to gradually expand its scope, at the same time extending the powers of its institutions. Moreover, hidden behind the screen of its clear economic-commercial aims, some “seeds” of integration had already been introduced within the first treaties, which over time bore fruit. In particular, the Community institutions were conceived to have a certain degree of autonomy from the member states and to act so that the organisation itself could be more and more autonomous. Consider, on the one hand, the key role of the Commission as an independent institution and, on the other hand, the instrumental impetus given by the Court of Justice in affirming basic principles such as the primacy and direct effect of Community law, sometimes “rewriting” the treaty in an interpretative way.

The subsequent revisions of the founding Treaty, often confirming the principles pronounced by the Court of Justice or codifying the innovations established in institutional practice, have led to steady supranational growth, i.e. (using **Weiler’s definition**) a deepening of integration.

The Single European Act, signed in 1986 and in force since 1987, aimed at breaking the deadlocks in the crisis caused by the refusal of member states’ governments to carry out the revision on the basis of “Spinelli’s” project, more federalist in nature, which had been adopted by the European Parliament. Apparently, this was a “technical” revision, which was actually full of institutional evolutionary implications.

In particular, the Community competences were extended to those fields where there had already been a “material expansion,” such as environmental protection, consumer protection and other matters, where Community action would support and enhance that of the member states. However, the most important innovations concerned its legislative procedures, which were modified in a supranational sense. The Council was enabled to decide by qualified majority rather than unanimity voting on all the matters related to the internal market. A new procedure was also introduced, the so-called “cooperation procedure” (now included in very few

provisions of the Treaty), involving the European Parliament more, which until then had only a purely advisory power, in the law-making process. Thanks to the innovations introduced by the Single Act, the former Commission President, Jacques Delors, was able to relaunch the common market – through successful extensive media and legislative action.

In the wake of that success, the Treaty of Maastricht, signed in 1992 and in force since 1993, was concluded, becoming the first – and so far the most radical – change in the Community structure establishing the European Union, based on three “pillars”. The first pillar corresponded to the European (no longer “Economic”) Community, which absorbed the existing treaties, the second provided for a competence – actually more symbolic than real – in the field of Common Foreign and Security Policy (CFSP) and the third conferred upon the Union the competences to develop the so-called area of freedom, security and justice, inspired by the Schengen Agreement.

Thus, the Community became one – though the most important – of the three pillars of a Union with broader aims. These had very important symbolic significance, though they were only drafted and in some cases lacking in effective instruments. By the Treaty of Maastricht the functionalist approach was abandoned, as matters of high political value, such as European citizenship and the protection of fundamental rights, were incorporated into the Treaty. Through the common currency, provided for in the first pillar, and its activity in the fields of foreign policy and police, as provided for respectively in the second and third pillar, the Union was endowed with the classical symbols of national sovereignty. Furthermore, the principle of “subsidiarity” was also introduced to counterbalance the new powers. This was typical of federal states and already mentioned in the Single European Act, the first reform of the Community Treaties, with reference to the European environmental policy (see *below*, par. 2).

The European Union was thus conceived as a “light” superstructure, combining its new powers with those of the existing European Community, which were more incisive and articulate. The complexity of this design is emphasised by the fact that, even though within a single institutional framework, in each of the three pillars institutions are involved in various ways, using different decision-making procedures and issuing different types of acts. The pillar structure, whose functioning is definitely not easy to understand either by citizens or by third countries, is the result of a

compromise on different degrees of supranationalism that Member States were then ready to grant to the Union in the different matters of the three pillars.

The first pillar was still based on the so-called “Community method”, with a high degree of supranationality: the presence of exclusive competences, widening the scope of the majority voting decision in the Council, the strong role of institutions that were more independent from states, i.e. the Commission, the Court of Justice and the European Parliament. The latter, through the co-decision procedure, also introduced by the Treaty of Maastricht, became the full co-legislator along with the Council, at least in the fields in which this procedure was foreseen. Thus, regarding a significant part of the first pillar, the institution representing the governments (the Council) now has to share its legislative power with the institution directly elected by the EU citizens. Such an innovation has increased the degree of supranationality and democraticity of the European Union.

The second pillar had – and still has – a markedly intergovernmental nature, as decision-making powers were concentrated in the institutions representing the governments of the member states (the Council and the European Council), also bound, in these matters, by unanimity rule, while the institutions independent of the latter had very weak (the Commission and the Parliament) or non-existent (the Court of Justice) powers. Moreover, following the entry into force of the Treaty of Maastricht, the CFSP dramatically demonstrated its ineffectiveness in the dissolution of the former Yugoslavia.

Concerning the third pillar, at that time it included a competence in all the matters that, in the meantime, had been covered by the Schengen Agreement, concluded at the international level first by five and then by a growing number of member states. Police and judicial cooperation on criminal matters was supported by judicial cooperation on civil, administrative and private international law matters, as well as by regulations on the immigration and asylum of non-EU citizens. The decision-making process and the powers of the institutions under the third pillar are placed, in terms of supranationality, at an intermediate level between the first and second pillar, therefore, between the full Community method and the purely intergovernmental method.

The Treaty of Amsterdam, signed in 1997 and in force since 1999, partially revised the division of powers among the three pillars, incorporating the Schengen Agreement

and communitarising the “civil” and immigration matters of the third pillar, thus leaving under its jurisdiction only police and judicial cooperation in criminal matters. Moreover, the Treaty took some further steps in a supranational direction, by simplifying the co-decision procedure and broadening its material scope, introducing the institution of enhanced cooperation and creating the office of the High Representative for the CFSP.

A few years later, the Treaty of Nice, signed in 2001 and in force since 2003, had to tackle the problem of adapting the institutional framework and decision-making procedures to the enlargement to ten new countries. Despite some supranational innovations, such as a further extension of qualified majority voting and a simplification of enhanced cooperation, the revision made in Nice was probably the least significant among those so far adopted of the Community founding treaties due to the political climate, which had become increasingly contentious.

As a result of this Treaty, qualified majority voting is now focused on a triple threshold: quorum of the weighted votes, consensus of 50% of the Member States, but with the possibility to block decisions that do not represent 62% of the population, if a member state requested it. In fact, the practice of voting in the Council has always found adjustments limiting the use of voting, mostly deciding by consensus. It is also increasingly clear that the consequent possibility of adopting EU acts depends not so much on the procedures but on the overall political climate, the willingness of States and the Presidency’s ability to foster consensus.

The Treaty establishing a Constitution for Europe, signed in Rome on October 29<sup>th</sup>, 2004 and never entered into force, not only intended to simplify these procedures, but also set up a new structure of the Union, by removing the pillars, changing the institutional framework and incorporating the Charter of Fundamental Rights, which the Community institutions had proclaimed in Nice. Therefore, this revision would become, after that of Maastricht, the second most important qualitative leap in the European integration process.

The Lisbon Treaty signed on December 13<sup>th</sup>, 2007, while including a large part of that which was laid down in the constitutional Treaty and in any case implying a further advancement towards supranationality compared to the Treaty of Nice in force, took also several steps back, especially in terms of “constitutional symbology” compared to

the Treaty establishing a Constitution for Europe. The new Treaty is in fact the result of a process of “deconstitutionalisation”: the removal of “constitutional” and identity symbols (anthem, motto, flag), mere reference to the Charter of Rights as a source with equal effectiveness as the Treaty, maintenance of the High Representative designation for the CSFP instead of the Foreign Minister designation, maintenance of the existing types of acts, more extended time limits for a state to request the application of voting rules provided for in the Treaty of Nice, the possibility to reduce the EU’s competences. Moreover, the English and Polish opt-outs from the Charter of Rights are a tear in the already constructed fabric of common identity. The Lisbon Treaty itself also underwent a serious impasse after the negative referendum in Ireland, despite its many ratifications from the other member states.

As can be seen, subsequent revisions have progressively made the Community more and more supranational, increasingly reducing unanimity in decision-making procedures in favour of qualified majority voting and gradually extending the scope of Community law. Despite setbacks and discontinuity, the Union has so far maintained a path of continued growth, both in terms of enlarging the number of member states – from the initial six to the current twenty-seven – and of deepening integration. One may surely think that this deepening could have been greater without enlargement, leading for instance to the creation of a federal state; it is undeniable, however, that contrary to the expectations of some scholars (J. Weiler), the Community has so far managed to reconcile widening and deepening.

The current crisis, made even more evident by the difficulties that have characterised the ratification process of the Lisbon Treaty, however, leaves the question open to whether the EU can reconcile its peculiarities and its supranational direction with unlimited enlargement. Forms of differentiated integration increasingly emerge in the European Union.

Finally, it should be noted that the repeated referendum failures of the last treaties are a problem that cannot be ignored. Its solution requires, on the one hand, that citizens are brought closer to the European Union, while vigorously raising, on the other hand, the question of whether it is still possible to maintain unanimity as a rule to revise the founding Treaties.



## **2. Aims and competences of the EU**

The evolution towards an increasing degree of supranationality has been made possible thanks to the flexible conferral of powers upon the Community. The Treaty of Rome did not include a clear list of the powers conferred upon the Community but only a list of the objectives to be attained and the means to attain them. As we have seen, the conferral of competencies in the areas delegated to the Community was initially based on a functionalist approach: the new organisation was assigned with all (and only) the powers necessary for attaining the objectives set out in the Treaty, mostly based on economic needs. The concept of “functionality”, however, was in itself wide and open like the objectives assigned to it.

The primary tool for attaining these objectives was the establishment of a common market. The cornerstones of the market were the four fundamental freedoms, competition policy, agricultural policy and common commercial policy, which were accompanied by other complementary policies, such as that related to transport.

Other implicit goals could be seen behind the explicit ones: the Community legal system was in fact born with the tacit challenge that around the functionalist approach other fields and new forms of integration would then be developed. In other words, the “Economic Community” would over time become a “Community” in a broader sense, by promoting (as initially provided for in art. 2 of the Treaty of Rome) “closer relations among the states belonging to it”.

However, such a system did not imply that the Community enjoyed unlimited powers, if only because, even in the silence of the Treaty, the principle of international law, according to which restrictions on the sovereignty of states must be expressed and cannot be presumed, was always applied. Community competence in the various fields, however, was indicated by specific legal basis, which, as a result of subsequent revisions of the founding Treaty, were then significantly differentiated and multiplied.

A “flexibility clause” then enabled the Council (upon a proposal of the Commission and after consulting the European Parliament) to take the necessary measures for the proper functioning of the common market in areas where the Treaty did not foresee Community action (Rossi 1990). It was a residual legal basis, which has been increasingly less used thanks to the extension of Community competences determined by the revisions incorporating within the Treaty the extensions of

competences previously obtained by such a clause. The same Court of Justice has clarified that this provision may only be used if there are no others to be applied (and therefore there are no other procedures).

If one compares the aims and competences of the original EEC with those of the current EU, a dramatic evolution can be observed. From the initial predominantly “mercantilistic” conception of the European Economic Community, it moved to include matters indirectly “linked” to the market (such as environmental protection) and then, under the Treaty of Maastricht, to create the European Union based on three pillars.

The ways in which the extension of Community competences was carried out are particularly interesting. While there are plenty of cases where the extension of powers was made directly by treaties revising the founding one, most of the time this revision only formalised an extension that had previously occurred, both through the legislative procedures of the institutions (e.g. using the above-mentioned residual legal basis) and by the European Court of Justice’s case law, which interpreted the concept of Community competence in an evolutionary way. This applies, for example, to competences in environmental and consumer protection matters, introduced by the Single European Act, to the trans-European networks provided for in the Treaty of Maastricht, to certain competences in the area of freedom, security and justice provided for in the Treaty of Amsterdam.

The Lisbon Treaty, which largely reproduces the Treaty establishing a Constitution for Europe, not only further extends the sphere of competences (such as space, energy or the creation of an External Action Service) and the objectives and values of the Union, including some of a clearly “constitutional” nature, but also introduces for the first time an explicit distinction between the different types of competences of the Union.

The systematisation carried out by the Treaty of Lisbon is useful to clarify the difficult problem of the distribution of competences between member states and the Union/Community (note that since the Treaty establishing a Constitution for Europe removes the pillars and hence the Community as well, the only competences would be those of the Union).

In fact, even in the silence of the founding treaties, a distinction between exclusive and shared competences had already been formulated by the doctrine based on the Community Court of Justice's case law. The Court had indeed identified certain areas – such as common commercial policy, customs union and conservation of marine biological resources – in which the Community has exclusive competence, precluding the action of Member States. This doctrine added to these competences, according to the powers conferred upon the Community institutions by the EC Treaty, that relating to the euro. Consider that, apart from this small core of exclusive competences, all the other competences conferred upon the Community are shared, i.e. they can be exercised by both the Community (until, and insofar as, the Community acts) and member states.

The problem that arises, however, for those who want to know exactly how member states are able to continue adopting rules on matters of shared competence is that of the so-called “pre-emption”, i.e. the “emptying” of member states' powers in matters of shared competence. Concerning this competence, since the action of states is precluded (in accordance with the principle of loyal cooperation and the primacy effect) once the Community has legislated, whether or not it is possible for states to legislate in certain matters of shared competence should be verified not *a priori*, on the basis of a list of competences, but empirically and case by case, based on the *acquis communautaire* (i.e. on the legislation adopted by the Community) in that matter. The dividing line between a Community competence that has already been carried out or a still potential competence is clearly mobile, and no list of competences could portray it at any given time, if not temporarily.

The solution adopted by the Lisbon Treaty is useful because it helps clarify that there are some matters where pre-emption does not apply and, therefore, where member states retain the possibility to legislate even after the Union adopted rules on that matter. The new treaty peremptorily lists both the exclusive competences of the Union, where member states have lost the possibility to act, and the support and coordination measures, where the action of the Union not only does not affect that of the member states, therefore excluding pre-emption, but it can only be achieved with “soft” instruments, since the recourse to harmonisation is prohibited. Everything that does not come under exclusive competences or support actions is part of the shared

competences, where pre-emption and harmonisation are possible. Due to their residual nature, these latter competences are, unlike the others, listed not peremptorily but merely exemplificatively.

The competences defined as exclusive include, in addition to those traditionally considered as such (e.g. customs union, common commercial policy, euro, marine biological resources conservation), also competition, which seems rather unusual. Neither the Court of Justice's case law nor the recent practice of the institutions (which have indeed envisaged a real decentralisation of antitrust control at the hands of the institutions of member states), nor the overall logic itself of the Lisbon Treaty, including the internal market among the examples of shared competence as well, can justify such a choice. Perhaps those who included it among the exclusive competences had the subject of state aid in mind (which actually would make sense to reserve it exclusively for the Community), but in this case the rule is clearly ill-formulated.

Regarding support actions, the new Treaty sets out certain matters which were introduced in several revisions of the treaties, starting with the Single European Act (health protection, industry, culture, tourism, education, youth, sport, civil protection, administrative cooperation), specifying that with regard to these matters the Community merely has the power to support, complete or coordinate the activities of the member states and cannot harmonise their legislation.

To regulate the relationship between the competences of the Community/Union and those of the member states, the Treaty of Maastricht, in addition to explicitly mentioning the principle of attribution, introduced the principles of subsidiarity and proportionality (Art. 5 TEC). The three principles are combined by respectively establishing the absolute possibility for the Community or the Union to act in a certain area (but it must be stressed once again that the principle of attribution is mitigated by the flexibility clause, Art. 308 TEC, now Art. 352 TFEU) on the relative possibility of acting, meaning that it is commensurate to its usefulness and necessity in relation to the concrete case and the choice of instruments.

The principle of subsidiarity implies that the Union and the Community can only act if and insofar as their action is necessary and more effective than that of the Member States. Unlike the others, it is applied only in cases where Community competence is not exclusive (since in these cases the action of states is precluded).

The principle of proportionality prohibits the use of competences beyond that which is necessary to achieve the objectives of the Treaty and should help the institutions to choose modes and instruments that affect the sovereignty of the member states as little as possible.

Although the principle of subsidiarity is constantly proclaimed, has been invoked during a number of European Councils and is the subject of a specific protocol to the Treaty of Amsterdam, monitoring its compliance is, in the current system, more formal than substantial. The decision-making institutions of the Union (the European Parliament and the Council) constantly claim to be inspired by it and the Commission includes, at the proposal stage of Community acts, a statement certifying its compliance. However, these statements are quite tautological: the need for Community measures is often justified simply by virtue of their transboundary effects.

In fact, on closer inspection, none of the institutions composing the decision-making triangle has a real interest in defending that principle. In the first pillar of the Union, the Commission acts in the adoption of measures under the proposal (however, the proposal of the acts of the second pillar is the prerogative of member states, while that relating to the acts of the third pillar may be exercised both by them and the Commission). Clearly, the Commission shall proceed only if it finds at least a prior interest, if not consensus, from governments to adopt Community acts regarding a certain matter. Both the European Parliament and the Council then tend to focus the legislative debate more on the substantial contents of the act under discussion than on the principle of subsidiarity.

It should also be noted that the Community institutions as such have a sort of *locus standi*. Both the Commission and Parliament, while claiming the legitimacy of Community action, also claim their own jurisdiction rather than that of the member states. The Council itself, which does represent the interests of states, often sees governments more likely to act at a European level in order to circumvent the jurisdiction of their national parliaments. The Court of Justice, finally, despite having repeatedly stated that it has the power to declare Community regulations or directives void for violation of the principle of subsidiarity, frequently shows that it is inspired by a sort of *favor validitatis*, supporting the validity of the Community acts. However, if it can certainly be presumed that a state, outvoted on the adoption of a Community act,

might contest it before the Court of Justice for violation of the principle of subsidiarity, in reality the cases where this has actually happened can be counted on one hand.

### **3. The EU's degree of supranationality**

The degree of supranationality of an international organisation can be measured on the basis of two parameters: 1) the effectiveness of the acts of the organisation against the laws of the member states and 2) the presence of an institutional system ensuring that the organisation's own interests, separate from those of the individual member states, are represented and protected with adequate strength and autonomy. For both of these parameters, the European Union presents a number of characteristics determining a high degree of supra-nationality, albeit at varying degrees depending on the pillars.

#### ***3.1. The effectiveness of Community rules in Member States' legal systems. a) The primacy of Community law over Member States' laws***

Concerning the first point, the statement by the Court of Justice on the primacy and direct effect of Community law over national law along with the prohibition that a state have recourse to self-protection in response to another state's unlawful act, ensures that the rules of the first pillar (and partly also of the third pillar) have a degree of bindingness, compliance and uniform enforcement that is unmatched in the field of international organisations and that is much more similar to the value of the rules of a federal state. The degree of effectiveness, however, varies greatly in relation to the three pillars, with different combination of the Community method and intergovernmental method. The relationship between the Union and member states is based on the general principle of cooperation (Article 10 TEC). Member States shall commit themselves, in accordance with the Treaty, to taking all necessary measures to ensure the fulfilment of the obligations arising out of the treaties, including refraining from any action that might jeopardize this attainment.

The European Court of Justice has drawn from this principle, with reference to the first pillar, two other fundamental principles governing the relationship between Community law and member states laws: primacy and direct effect.

Until the Constitutional Treaty (also subsequently), the principle of primacy of Community law over member states' laws was not included in the Community treaties, although it was pronounced in 1964 by the Court of Justice in the *Costa-Enel* case. At that time it was a truly “revolutionary” principle compared to the approach followed by international law, under which the violation of a treaty (or of a norm resulting from it) by national law has no impact on the effectiveness of the latter, even though it entails the responsibility of the state with respect to the other contracting parties. The Court of Justice, in setting out this principle, however, was well aware of its new and disruptive value, and for this reason immediately clarified that Community law constituted a “new kind of legal order” on the international scene.

Primacy has gradually been accepted by all member states, although sometimes with certain difficulty, in some cases through the case law of constitutional Courts and in other cases directly through its integration in the Constitutional texts.

It should be noted that acceptance of the supremacy of Community law has been carried out differently by member states, each one finding what we might call their own “national route to primacy”. It is a physiological phenomenon, whereby each national legal system's “connection” to Community legal system should be faced with the peculiarities of the national constitutional system. This explains how not only the forms – implicit or explicit – of such recognition and the degree to which it has been carried out – at a constitutional, legislative or merely judicial level – differ, but also the ultimate limits that, at least in theory, it could encounter when faced with some requirements considered absolutely mandatory by each individual legal system.

The existence of different views on the limits to primacy may pose problems regarding the uniform application of Community law. Some states identify them as the respect for the fundamental principles of constitutional order and fundamental rights (the United Kingdom), others (France) appeal to constitutional identity. Spain in a recent ruling of its Constitutional Court, seems to differentiate the concept of the primacy of Community law and the fundamental concept of the supremacy of its own Constitution. Finally, the German Constitutional Court has recently stressed that in addition to the traditional limits (fundamental principles and fundamental rights) to primacy and the effects of the acts of the European Union, there is also a more general

limit to the expansion of the EU's competences and to the supranational integration process.

Until now, however, despite the solemn and sometimes threatening statements of principle, national courts, in practice, have been careful not to identify the conflict between Community rules and those ultimate limits, which in this case would lead them to deny the effect of primacy.

The European Court of Justice, for its part, has never explicitly recognised any national limit to primacy. However, it stated (e.g. in the cases of *Leonesio* and *Kreil*) that Community law can prevail over written rules in the Constitution of a state and that member states cannot appeal to their constitutional order to justify infringements of Community law (*Commission v. Italy*). In the *Simmenthal* judgement, it defined the relationship between Community law and national law in monist terms, with a predominance of the first over the latter recalling Kelsen's hierarchy of sources of law. This approach is not shared by the constitutional case law of the member states, as several national constitutional Courts have expressed a dualistic view of that relationship, according to which legal systems are still separate and the supremacy of Community law is only possible by virtue of - and within the limits of - the recognition by a state rule.

It must be said, however, that the Court of Justice's case law on fundamental rights shows a concern not to challenge the fundamental principles of national constitutions: in fact, it has gradually recognised that the protection of fundamental rights could be invoked by member states to restrict the internal market freedoms. An increasing convergence of positions has thus been achieved on matters of fundamental rights. The Court of Justice has found a solution enabling it to "internalize" external values into the Community legal system, recognizing that Community acts can be annulled when conflicting with the fundamental rights enshrined in the "common constitutional traditions" or in the European Convention on Human Rights, which the Court itself elevated to the level of fundamental principles of Community law. Therefore, formally, Community rules are not conditioned by values "external" to the system but by values "internal" to it.

In this way primacy is not questioned like the monist conception of the relationships among legal systems. The Court may continue to assert that there is a



hierarchical supremacy of Community law over national law, while at the same time it is ready to make “common constitutional traditions” prevail over Community rules and even to interpret them broadly without actually worrying about whether a certain constitutional tradition is truly common to several Member States and how, or instead is only present in the legal system related to the individual case.

From this perspective, it is not only unnecessary, but inappropriate, to highlight a sort of lowest common denominator among the national constitutional traditions. Once admitted that even the constitution of a single member state could limit the primacy of Community law through its fundamental principles, the next step, which is implicit but clear, is that the Court of Justice could not ignore the case law of a Constitutional or Supreme Court related to those principles and in the same way that of the European Court of Human Rights, which interprets the ECHR.

Thus, over the years, in relation to the principle of primacy, a balance has been reached between Community and national requirements and between the uniform application and protection of certain fundamental values of the individual legal systems. Likewise, mutual respect between national Courts and the European Court of Justice has been consolidated and a peaceful coexistence of different constitutional approaches towards the only principle of primacy has been achieved. This peaceful coexistence has been possible even though it is based on an ambiguous situation: in terms of the theory of the relationship among legal systems, the Court of Justice, on the one hand, and national Courts, on the other hand, still respectively deny or affirm, in theory, the existence of national limits to the primacy of Community law, but then at the substantive level they strive to find an agreement to avoid conflict.

Paradoxically, the fact that the Constitutional Treaty specifically stated the primacy seemed to alter this delicate balance and reopened the debate on its scope. The codification of the principle is unable to define, in all its nuanced complexity, the boundary between the supremacy of different legal systems, which, actually, was based on a game of mutually intertwining and reflecting the fundamental principles of the systems themselves.

First of all, the Constitutional Treaty laid down primacy in redundant and unclear terms. According to Articles I-6, “the Constitution and law adopted by the Union’s institutions in exercising the competences conferred on it, shall have primacy over the

law of member states”. That statement was rather unnecessary, because a rule adopted outside the spheres of competence of the institutions or the Community is void. Even faced with an encroachment of powers, member states, however, could not annul or set aside the rule of Community law. This annulment, in fact, can only be declared by the Court of Justice, but not by national Courts: the latter, however, according to the *Fotofrost* ruling, could not even declare Community rules adopted *ultra vires* invalid. The governments of the member states can only try to block the adoption of the act in the Council, or, indeed, contest it later in the Court of Justice.

Even though in the text of Article I-6 no significant changes were found regarding the current notion of primacy, the entry into force of the Constitutional Treaty would result, however, in broadening the scope of the latter due to the fact that the pillars were eliminated. As a result, the binding acts concerning the area of freedom, security and justice (the current third pillar) would also enjoy primacy. Some doubts arose instead in relation to the extension of primacy to foreign and common security policy (the current second pillar). The Constitutional Treaty did not foresee different rules for the latter, therefore, even on these matters the Union’s binding acts did not seem to be able to prevail over national ones. A different conclusion could be reached, however, based on the first declaration annexed to the Constitutional Treaty, specifically dedicated to Art. I-6 stating: “The Conference notes that Article I-6 reflects existing case law of the European Court of Justice and of the Court of First Instance”. On the one hand, since there is no case law, and never could be, regarding the second pillar (which neither current treaties nor the Constitutional Treaty foresees any jurisdiction of the Court of Justice), the declaration meant to exclude primacy from the CFSP and ESDP acts. On the other hand, however, the reference to Community case law also implied another effect: since, as it has been noted, the assertion of primacy by the Court is radical and unconditional, the declaration would mean making any constitutional limit, present “within” the legal systems of member states and not recognised by the Court, invalid against the primacy.

This interpretation has raised a very delicate issue in the relations between the Union legal system and that of its member states. Are member states really ready to give up this kind of “emergency brake”, constituted by the ultimate strength of the

mandatory core of fundamental values of each individual constitution, and the associated supervision by the Constitutional or Supreme Courts of the member states?

The Lisbon Treaty has removed from its text any reference to primacy, relegating it to a simple (not binding) declaration in a textual reference of the Court of Justice's case law that established the principle. On the contrary, the new Treaty has preserved some provisions set forth in the Constitutional Treaty, aimed to prevent the Union's acts from possibly violating the national Constitutions. A general limit is primarily provided for in Art. 4, which establishes the principle of cooperation, by explicitly introducing the obligation for the Union to respect the constitutional systems of the member states, specifying that

The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential state functions, including ensuring the territorial integrity of the state, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

The values themselves that the European Union hereby declares it is inspired by and the goals it must pursue, which, along with the first, form a sort of "core" of the Union's principles, therefore, represent an additional guarantee.

Moreover, the respect for fundamental rights acquires a new and more complex dimension due to the legal value conferred by Article 6 of the new treaty upon the Charter of Fundamental Rights proclaimed in Nice. Even in the latter, however, the common constitutional traditions have a prominent role. The anchor to the ECHR that the Charter itself elevates to a minimum standard of protection, is then a further guarantee that the acts of the Community institutions do not affect that standard, which is shared by all member states and which compliance with shall be proclaimed by the respective Constitutional or Supreme Courts.

Despite the abovementioned considerations, upon close inspection, a margin of difference between the set of values and rights of the Charter and those laid down in the constitutional systems of the Member States may continue to exist. First of all, a procedural bottleneck still remains in the rules for the annulment of Community acts, which excessively limit the admissibility requirements for an action to be brought by individual applicants. Furthermore, there might be a discrepancy among values. Some

written provisions of the French Constitution might not be literally fulfilled, there might be an interpretation of international obligations that is different from that given by the English courts. Finally, it could occur that certain guarantees derived from the Charter are perceived as conflicting with certain basic values of the national legal system.

For these reasons, the existence of an additional filter, consisting of the Constitutional Courts, may be considered an improvement of the system of guarantees, not only for individuals but also in the relationship among legal systems. Moreover, already with reference to the Constitutional Treaty, some (French and Spanish) Constitutional Courts have confirmed that they have no intention to give up their powers.

In conclusion, the primacy of Community law over Member States' laws, while establishing supremacy of Community law over national laws, creates no absolute supremacy, which is still contingent on the respect for the fundamental values of the Member States' Constitutions with a widespread cross check of constitutionality between the Court of Justice and National Courts. When it comes to judging some fundamental rights, the European Court of Human Rights, within its competence, will also be included in this dialogue, conducive to developing a shared value system. Although over time a spontaneous convergence could be achieved by easing mutual distrust, the Union, as such, could not pursue the harmonisation of the constitutional traditions of the Member States.

### ***3.2. The effectiveness of Community rules in Member States' legal systems. b) The direct effects of Community acts and Member States' liability for breach of Community law***

The effectiveness of Community acts within the legal systems of the Member States is much greater than that of international organisations. Regarding the first pillar, the effectiveness of EU rules and their observance by Member States are supported by the principle, pronounced by the Court of Justice, of direct effects, i.e. the possibility for individuals to directly invoke the Community rules before the authorities and courts of the Member States, requesting to disapply possible conflicting national rules. This principle is complementary to that of primacy and strengthens its action.

Direct effects were first recognised by the Court (*Van Gend & Loos*) relating to some articles of the founding Treaty and then gradually with reference to different categories of Community binding acts (regulations, decisions, directives). Concerning regulation, an act that has a general and abstract application and is binding on all its recipients, direct effects had already arisen from the concept of direct applicability expressly assigned to it by the Treaty (Article 249 TEC). The Court has then extended the concept to decisions without too much difficulty, linking it to the particular and concrete nature of this act, with binding effects on all its recipients.

The route taken by the Court of granting direct effect to the directives, on the contrary, has been much more tortuous and nothing has been taken for granted. According to Art. 249 TEC, these acts bind the Member States only regarding the obligations to be fulfilled, without prejudice to their faculty to choose the means to transpose and possibly integrate them into their own legal systems.

The Court has ruled, from the *Sace* Judgement of 1970, that a directive, at the expiration of the established implementation deadline (usually two or three years), may be invoked against States that have failed to transpose it into their legal system. According to the Court, to have direct effects, the directive must be sufficiently precise and unconditional, i.e. clearly define the rights conferred on individuals, without the need for the State to integrate the rule.

The theory of the direct effects of directives, clearly envisioned by the Court as an instrument to sanction defaulting States, raises major problems from the perspective of theoretical coherence and practical application. Although the Court initially claimed that the direct effects of the directive are inherent in the nature of the latter, it was later forced to clarify that the directive has a one-way effect (i.e. it can be invoked by individuals against the State but not vice versa) and it cannot be horizontally effective, i.e. it cannot be invoked by an individual against another individual. This is because, if the Court determined that the State's failure to fulfil its obligations resulted in negative consequences for individuals, it would ultimately end up holding the latter responsible for a fault of the former.

The Court has attempted, however, in two ways to mitigate the lack of horizontal direct effects of the directives. First of all, it has ruled that national courts, where possible, must interpret domestic law in compliance with the directive not yet

implemented (which of course is only possible where domestic law is not openly in conflict with the latter). Moreover, it has interpreted the concept of “State” more broadly, against which the unimplemented directive cannot be made valid upon the expiry of the implementation deadline, also including local authorities, public authorities and public enterprises (in some cases even after their privatisation).

Perhaps driven by the need to overcome the inconsistencies in the theory of direct effects, the Court has taken a rather dramatic step, establishing the obligation that the State compensates for damages individuals due to its failure to comply with the directives and, more generally, to its breach of Community law. This is again an evolutionary and extensive interpretation of the founding treaties, which only set out that the Community institutions (and not the States) should compensate individuals for damages caused by their unlawful conduct.

Through a series of judgments (e.g. *Francovich*, *Brasserie du Pecheur*, *British Telecom*), the Court defined the conditions necessary to claim damages: the rule infringed must confer a right on individuals, the breach must be sufficiently characterised and there must be a causal link between the breach and the damage suffered. In subsequent rulings, the Court then provided some additional details (actually not always clear) on what is meant by a sufficiently characterised breach: a breach by the State must be serious and evident, which is much easier to prove when the violated norm leaves little room for discretion or uncertainty to the State that must apply it. In any case, the breach is serious when the Court of Justice has passed ruling clarifying the illegality of the conduct or when, for a directive, the State has allowed the implementation deadline to expire without taking any measure.

It should be noted that the State is responsible not only for violations committed by its legislator or by the government (in a broad sense), but also for the work of their courts. In the *Koebler* judgement, the Court has made it clear that in this case, when there is an established case law of supreme courts incompatible with Community law, individuals may request the State to compensate for damages suffered as a result of it.

Despite the abovementioned theoretical inconsistencies and even though the principle of the direct effects of directives has never been included in the treaties, it has been explicitly accepted by the constitutional courts of the Member States. Its implicit recognition was also expressed in the revision of treaties, which expressly

excluded framework decisions from direct effectiveness, acts of the third pillar resembling the directives in many respects.

Under its case law on the direct effects and compensation for damages, the Court of Justice has developed two instruments of indirect supervision of the conduct of the Member States, creating an interest and an incentive for individuals to raise such questions in their national courts. Therefore, it falls within the large and widespread network of national Courts to monitor compliance of the conduct of States with Community law and ensure the uniform interpretation of the latter. Under the reference for a preliminary ruling (Article 234 EC), the Courts may (and are obliged to if they are Supreme Courts) raise issues of interpretation and validity of Community law before the Court of Justice, thus ensuring the uniform interpretation of Community law.

The compliance with Community law by Member States is ensured not only by these indirect means, but also by the action for infringement directly set out in the Treaty, brought by the Commission (or another Member State) before the Court of Justice against a defaulting State. Since the Treaty of Maastricht, this has resulted in the State being ordered to comply with the obligation and in imposing fines and/or financial penalties of an appropriate quantity, which contributes to increasing compliance with these judgments (in the past often ignored) by their recipients.

These sanctions and monitoring mechanisms as a whole thus ensure a very high level of compliance with Community rules, at least with regard to the first pillar. Member States are, as it were, subjected to a series of cross-checks on their work: on the one hand, the Commission acts as a “guardian of the treaties” through the action for infringement, and on the other hand, any natural or legal person who has an interest may request the application of national rules conflicting with Community law as well as compensation for damages caused by the defaulting State. The Court of Justice, which has played an instrumental role in the creation of the principles of primacy and direct effects, is also pivotal for this system of checks, supported by the Courts of all Member States.

### **3.3. Inter-institutional relations: the Community method and the intergovernmental method in the various pillars of the EU**

Concerning the second point, the Union has a highly and firmly structured institutional system with a high degree of autonomy from the Member States and voting rules that in most cases are irrespective of unanimity.

As we have seen, since the Treaty of Maastricht, the Union has been founded on different combinations of “Community method” and “intergovernmental method”, which vary depending on the three pillars. While being less supranational than the Community method, the intergovernmental method cannot be likened to the international method: while the former takes place in the Union’s institutional framework and according to the decision-making procedures provided for that purpose, the latter is used by the Member States to operate completely outside the scope of the Union, through the traditional instruments of international law (as occurred with the Schengen Agreement). In a “classification of supranationality”, the intergovernmental method comes after the Community method, but still before the international level, because of the greater constraints it poses on state sovereignty. For example, if some Member States promote closer cooperation within the Union, they should open it to all other Member States; vice versa, if they operate at the international level, they may include or exclude other partners. In addition, Member States cannot invoke self-protection (*inadimplenti non est adimplendum*) to overcome the failure of another Member State, having necessarily to resort to the procedures laid down in the Treaty.

Member States, however, are not able to use either one or the other method indifferently: the Treaty (Article 47 EU) prohibits the enactment of laws in matters covered by Community law, using the procedures under the other two pillars, and the principle of cooperation (Article 10 EC) prohibits the use of international law to circumvent the powers of the Community.

As the Union has a single institutional framework (and therefore the institutions that act are always the same), the different division of powers between the main institutions only varies depending on the three pillars. A correct understanding of the phenomenon thus requires an analysis of different inter-institutional dynamics within



the three pillars and of their gradual evolution through the various revisions of the founding treaties.

The “Community method” is based on common institutions that are strong and autonomous enough to ensure the pursuit of a “common interest”, other than the mere sum of the compromises and the balance of power between the Member States, typical of inter-governmental negotiations. This method is characterised by the balanced powers of the institutions representing the decision-making triangle (the Commission, the European Parliament and the Council) and the jurisdiction of the Court of Justice.

At the heart of the Community method is the Commission, which not only submits proposals for Community acts but also exerts an important role in overseeing the proper functioning of the common market. If one can state that the influence of the Commission on the structure of Member States has gradually increased along with the extension of Community competences, it should be noted, however, that its power to submit proposals for Community acts is increasingly affected by the political influence of other institutions. First of all, during the subsequent revisions of the Treaties, it has been increasingly subject (through a sort of “vote of confidence”) to the control of the European Parliament, which appoints its members and can force it to resign through a vote of no confidence.

Over time, the European Parliament has increased its powers. Initially it was not directly elected by the EU citizens (as its members were appointed by national parliaments) and had mostly advisory powers. As a result of direct elections, it has undertaken a struggle to close the so-called “democratic deficit” due to the fact that the Union’s legislative body was the Council, composed by Ministers of the Member States.

Through the introduction of co-decision and cooperation procedures and the increase in its powers of institutional control, the EP has become an increasingly influential institution.

Over time, the European Council, composed of the Heads of State and Government of 27 Member States and the President of the Commission, has also gained more influence. The European Council, which initially was not foreseen in the treaties, was first considered a non-institution, or rather a *soft-institution*, then it was

gradually and formally integrated into the Union legal system (the Treaty establishing a Constitution for Europe and then the Lisbon Treaty expressly included it in the institutional framework). While not issuing legal acts, but only press-releases, thanks to the authority of its members, it may also exert a powerful influence over the Council, which consists of, in its various configurations, the competent Ministers from the governments of the Member States. The European Council *de facto* sets the policy agenda and legislative priorities in the first pillar, with the result that the power of proposal of the Commission has increasingly become a more or less free implementation of the strategies established by the European Council. Its increasing influence, even though it significantly affects the powers of the institutions of the decision-making triangle, has however resulted in an advantage for the decision-making process. Not infrequently, indeed, the Heads of State and Government have been able to unlock situations of political impasse that prevented the institutions from legislating on a certain matter.

The inter-institutional balance within the first pillar has never been static or unchanging: those who embrace the notion of “classic” balance that is static by definition, then define it “the illusion of institutional balance” (Wallace 2003). Actually, the Community legal system is characterised by a dynamic balance (Rossi 1990). Despite these trends, however, if we compare the evolution of powers at the institutional “community” level (consisting in an increase in the powers of the Parliament and a reduction of the independence of the Commission) with the evolution of powers at the “intergovernmental” level (loss of legislative monopoly by the Council, increased influence of the European Council), we can observe that, at least up to now, while changing the powers of each institution, a substantial balance has been maintained between the two levels. In other words, in the first pillar the balance between Community method and intergovernmental method has been maintained in spite of the many innovations gradually introduced in the treaty revision process or the practice in their application.

The dialectic – and even the rivalry – among the Community institutions is entirely physiological to the system and is important because allows tensions between Community and Member States to be turned into inter-institutional conflicts, keeping the solution to problems within the system.

Even within the first pillar a different degree of supranationality is still possible, depending on the decision-making procedures used and according to the different degrees of involvement of the European Parliament and the required majority in the Council for the adoption of the acts in a specific area. In fact, the degree of supranationality is higher not only when the institution representing the Member States decides by simple or qualified majority on a certain subject, but also when that institution has to share legislative power with the institution representing the citizens and must decide on a proposal made not by one or more Member States, but by the institution representing the interests of the Community as such. In other words, the maximum degree of supranationality within the Union is represented by those sectors of the first pillar in which the Council legislates by majority in co-decision with the European Parliament, on the Commission proposal.

First of all, although over time there has been an evolution tending increasingly to combine the co-decision procedure with qualified majority voting in the Council, the various decision-making procedures foreseen in the Treaty concerning a range of matters can combine these elements in different ways. Thus, within the first pillar, there are still cases in which the Council can legislate according to the cooperation procedure, which gives little importance to the Parliament, or through the mere consultation (not binding) of the latter. The Lisbon Treaty would eliminate the former cases and reduce the significance of the latter.

In some cases (e.g. when deciding on the enlargement of the Union to new Member States), the Council must obtain the European Parliament's assent: although this procedure may seem highly supranational, in reality, it is less supranational than co-decision procedure, because it results in a "take it or leave it" situation, in which, in the case of rejection, the EP, which takes on the political responsibility for the failure of the proposed measure, may not have significant influence over the content of the act. The entry into force of the Lisbon Treaty would result in a major simplification of procedure, because the countless legal basis provided for in the current Treaty would be replaced by a general procedure, the so-called "ordinary legislative procedure", which provides for majority voting in the Council and co-decision with the European Parliament, and that would be applied in every case where a different "special" procedure it is not explicitly established.

Secondly, there are areas, always within the first pillar, where the decision has been made to operate with a low degree of supranationality, using the so-called “open coordination method” (e.g. on employment, but also on issues relating to the Stability Pact of the euro). According to this method, based on peer review and comparison of national best practice (Cafaro), the Commission is an impartial arbitrator who can only issue non-binding acts and distribute the results of the comparison with national policies without any power to harmonise and bring an infringement proceeding before the Court of Justice concerning States that have not fulfilled the required results. The poor results obtained using this method show that only a Commission with strong powers, and certainly not the self-discipline of the Member States, could ensure the proper functioning of the common market and the achievement of Community objectives.

Under the Treaty of Maastricht and the creation of the Union, in managing the legal order of the Union, the Community method has been complemented with the so-called “intergovernmental” method, in which the weight of the two less supranational institutions (the Council and the European Council) takes precedence over that of the other institutions. The intergovernmental method fully governs the second pillar of the Union. Member States shall propose measures for the CFSP, which shall be adopted, in most cases unanimously, by intergovernmental institutions (the European Council, with regard to general guidelines and common strategies, and the Council with regard to decisions, joint actions and common positions). The Commission is linked with the activities of the rotating EU Presidency, but has no independent role. The Parliament is regularly informed on the progress of the CFSP and is consulted on major issues. Finally, the Court of Justice has no jurisdiction to review the acts of the second pillar or condemn the alleged failure of a Member State. The office of the High Representative for the CFSP does not change in any way the intergovernmental nature, as it is little more than an operational secretariat, without any significant power of its own.

Compared to the Community method, the intergovernmental method certainly ensures greater respect for the sovereignty of the Member States but involves less effective decision-making mechanisms and in particular a lower degree of unity, broadly allowing exemptions and abstentions. Therefore, if the results of the second pillar may

seem disappointing compared to those of the first, we should consider that action at the intergovernmental level, however, has a better chance of a consistent coordination with the measures taken by the European Union in other fields than actions taken at the purely international level.

Although the first pillar of the European Union is based on the Community method and the second embodies the intergovernmental one, the boundary between the two integration methods does not strictly correspond to that between the pillars. In fact, there may be possible combinations and contaminations of the two methods or shifts from one area of the legal order of the Union to another.

The two methods are currently combined within the third pillar. Legislative initiative may be undertaken on the proposals made by the Commission or one or more Member States and in some cases the Council shall decide by qualified majority (the role of Parliament is by contrast very limited). Supervision by the Court of Justice is provided for, but the reference for preliminary ruling to the Court can only be limited by the Member States to the Supreme Courts. The harmonisation of national legislation is possible, but the direct effect of framework decisions is expressly excluded.

The “contaminations” of the two methods are part of the current structure. In fact, intergovernmental elements can be found in the first pillar (the increasing importance of the European Council has already been stressed) and more Community elements can be found in the second pillar (it is possible to decide by qualified majority instead of unanimity in some cases, such as the implementation of joint actions related to joint decisions already approved). They seem destined to grow over time, as a result of the limited differences between the pillars in the decision-making procedure. The Treaty establishing a Constitution for Europe, through the abolition of the pillars, would create numerous contaminations, making the decision-making process more intergovernmental than it is today in the first pillar, and also more communitarised than it is today in the other two pillars (especially with regard to the current third pillar).

Shifts from one method to another have already occurred through the partial communitarisation of the third pillar carried out in Amsterdam (while that area still

retains some traces of its “intergovernmental” origin) and have been more fully achieved with the coming into force of the Lisbon Treaty.

The abolition of the pillars shows a tendency that sometimes emerges in the existing practice, in which, thanks to the single institutional framework, instruments and procedures of the first pillar are sometimes used on matters pertaining to the second or third pillar. Since experience has shown that sometimes those instruments and procedures have brought unsatisfactory results when compared to the results obtained under the Community pillar, the natural impulse is to gradually extend the Community method, despite the resistance posed by state sovereignty.

Because of this trend, however, the pillar structure begins to suffer (and cause) a series of tensions due to the fact that in practice cases are emerging in which it is not clear which pillar the Union’s action must be based upon and how measures adopted on the basis of different pillars but related to a unitary need, must be coordinated. The choice of institutions to act within the framework of one or the other pillar results in a series of very delicate consequences: different democratic control, the existence or non-existence of a particular competence of the Commission and above all several guarantees of individual rights.

Examples of possible conflicts among the pillars, i.e. the application of economic sanctions on third States, the adoption of regulations on rapid reaction force or the dismantling of landmines have raised problems of coordination between the first and second pillar. The treatment of personal data involves both the first and third pillar and arrangements with third countries in combating crime and terrorism concern both the second and third pillar. The sanctions on suspected international terrorists adopted in accordance with resolutions of the UN Security Council involve all three pillars (see the judgments of the Community Court of First Instance and the Court of Justice in the *Yusuf* and *Kadi* cases).

The Court of Justice oversees the boundaries among the pillars, reviewing the legality of acts adopted by the institutions regarding an incorrect legal basis and abuse of procedure: in fact, it has annulled a joint action on airport transit and, recently, a framework decision which provided for criminal sanctions in environmental matters because it was adopted under the second pillar instead of the first (*Commission and Parliament v. Council*). While it does not have the power to review the acts of the

second pillar, nevertheless, it does have the power to pronounce on acts that are outside its jurisdiction as well if they intrude on matters within its jurisdiction.

Finally, it should be noted that the coming into force of the Lisbon Treaty has altered the institutional structure in several respects, changing the inter-institutional balance. The European Council becomes a full institution and increases its existing powers, especially in foreign policy and security. The “new” institution should take numerous decisions, in some cases even by qualified majority and is longer be chaired by a six-month rotation but by a President elected by the Heads of State and Government for two and a half years.

The Commission has been weakened. A Vice President, who is also the High Representative for the CFSP (the Constitutional Treaty designated it “the Minister for Foreign Affairs of the Union”), is responsible for External Relations and also presides over the Foreign Affairs configuration of the Union’s Council. An element of intergovernmentalism within the Commission, even with such great powers, might provoke a crisis within the institution. The High Representative is appointed for five years by the European Council with the consent of the President of the Commission and by the same procedure he/she can be removed: therefore, the High Representative is held to a double allegiance, to the Board and to the Commission, which can give rise to some problems. In fact, if the High Representative was in disagreement with the President of the Commission, the latter could not force him to resign, because to do so an authorisation by the Council would be required.

As for the Parliament, its powers have been increased considerably by the Lisbon Treaty: The scope of co-decision procedure has been greatly expanded, the control powers of the EP over the other institutions increase and its budgetary powers have been extended to the approval of all expenditures (and no longer of only non-mandatory expenditures).

Although an overall balance between the institutional bloc, which is much closer to the “Community” (the Commission and the Parliament), and the more “intergovernmental” bloc (the Council and the European Council) is still maintained as a result of these innovations, the new structure creates the risk of weakening the institution that, by its nature, must promote the Union’s interests and ensure the

proper application of its law. A weak Commission could hardly stand up to the nationalist and centrifugal pressures of the Member States.

At any rate, the abolition of the pillars results in a decreased correspondence between pillars and methods as a natural consequence: if, on the one hand, it enables the intergovernmental method to exert greater influence on the whole structure of the Union, on the other hand, an extension of the Community method goes well beyond what was the first pillar.

#### **4. The EU's role at the international level**

Although it was initially conceived as an organisation primarily aimed at regulating the relationship among its Member States, the European Community has been playing an instrumental role at the international level since its inception.

Due to its nature as a Customs Union (a necessary complement of the abolition of internal duties carried out in 1968) and to its exclusive competence in trade matters, it has replaced the Member States in international trade negotiations, both bilateral and multilateral. And precisely within the WTO, the Community has assumed the role of a major world power, capable of balancing the actions of the U.S. and other major trading blocs through its weight. In this context, it has achieved leverage that has definitely increased the weight of the Member States as a whole in a much greater way than the sum of their individual strengths.

Even though this is undeniable, it should be noted, however, that the procedure of the agreements on trade policy contains some aspects that should be improved. First, the conclusion of trade agreements is fully removed from EP control. In addition, the management of international trade by the Community and its Member States takes place in a way often poorly understood by the contracting third parties. Given the fact that Community competence in trade policy is exclusive only in some areas (mainly related to trade in goods), the Community and the Member States often engage in parallel negotiations on aspects within their own respective jurisdiction (the so-called "mixed agreements"). Even at the institutional level there is clear competition between the Commission and the Council on who has the power to conduct negotiations, which is trying to be reduced by introducing monitoring committees of the Council on the Commission.



Community competence to conclude international agreements has been the subject of an extensive case law of the European Court of Justice, which has introduced the so-called “principle of parallelism”. According to it, beyond the areas in which the Community is assigned with an explicit competence to conclude international agreements, the Community has the power to conclude them even though the agreement concerns the external dimension of an internal power (*AETR judgement, Opinion 1/94*).

Even in the area of international cooperation, Community action has had, since its inception, an increasingly important impact, both at the economic and political level. The major plan of association with the ACP countries (Africa, Caribbean, Pacific), originally designed as a way to reconcile the requirements of a common trade policy with the need to safeguard the relationships of Member States with their former colonies, has forced those States to coordinate with each other within the joint institutions set up by the association agreements. Over time, the development aid and economic cooperation agreements, both multilateral and bilateral, later became ways to introduce “conditionality” clauses concerning the respect for fundamental rights and the rule of law. These agreements have enabled the European Community to achieve and expand its “soft power” (Nye) throughout many areas of the world, exerting its influence on an increasing number of countries and becoming a stable reference point for them.

The stabilizing effect achieved after the fall of the Berlin Wall through the association, pre-accession or even the neighbourhood agreements with the Eastern Europe countries has been equally important. For those States, the EU has been and continues to be a target, forcing them to adopt a political and economic model that allows them the prospect of accession.

In terms of international law, as has been rightly pointed out (Cremona 2004), the Community is a “rule generator”. The Community contributes to the development of rules, through the conclusion of bilateral or multilateral international agreements and its participation in the activities of other international organisations. The Community is a member of the WTO and the FAO and has relations with all the organisations dealing with matters covered by it, such as the OECD, the ILO and the Council of Europe and with regional trade organisations as well (the Andean Pact, Mercosur,

ASEAN, etc.). More generally, the Community shows a remarkable propensity for multilateralism, probably because in this way it proposes once again its same model of peaceful relations between States (Cremona 2004). Its commitment to the Kyoto agreements on the environment and the International Criminal Court is an example of this trend.

Finally, it should be noted that the Court of Justice has clearly stated the subordination of Community law to international law and in particular to UN resolutions (*Bosphorus, Racke*). In the recent *Kadi* judgement, however, the Court has held that certain fundamental rights (i.e. the rights of the defence and fair trial) are constitutional principles of the European Union and as such they are mandatory even for the United Nations law. Under this judgement, the Court has strongly reaffirmed the autonomy of the European Union legal order and its nature as a “Community of law”.

Concerning the second pillar, since 2003 the European Union so far has conducted more than twenty missions planned within the framework of the CFSP and the European Security and Defence Policy (ESDP), both military and civilian, or mixed (police, justice and state administration reforms or border monitoring and election observation missions) under UN mandate and in accordance with the provisions of the UN Charter. These missions of peacekeeping fall within the framework of the missions of Petersberg (laid down by the Western European Union – WEU – in 1992 to define the limits and characteristics of the missions of this organisation), including humanitarian and rescue missions, the peacekeeping and strengthening of peace operations, the interposition and intervention in crisis management, including actions to restore peace and evacuate at-risk populations. However, other missions have been planned or are underway, of varying duration and consistency as need be, which under certain circumstances have recently been granted direct military intervention powers in the event of specific violations or attacks (e.g. the mission against piracy in Somalia). The areas involved in the missions already carried out or currently underway, include not only Europe, in the former Yugoslavia (Macedonia, Bosnia-Herzegovina, Kosovo) and the Caucasus or the EU’s eastern border regions (Georgia, Moldova, Ukraine) but also Africa (Congo, Somalia, Guinea), the Middle East (the Palestinian Territories) and South East Asia (the Aceh region in Indonesia). Moreover, the EU has also adopted

other measures and initiatives within the framework of multilateral cooperation. The establishment of the Union through the launch of the CFSP in 1993 and especially that of the ESDP in 1999 also resulted in the transfer of the main functions and structures of the WEU to the EU, which has begun to act not only as an interlocutor but sometimes as an alternative to NATO, also establishing with the latter cooperative agreements aimed to share or access operational capabilities.

However, it should be noted that in the field of external relations, the Union's action is certainly poorer and less influential than that of the Community. We can say, for example, that the contribution to peace provided by the European Community through "soft" and indirect means was much more important than that of the Union through direct instruments of foreign and military policy.

This is due both to the Member States' stronger commitment to matters of foreign policy and defence, and to the fact that the intergovernmental instruments of the second pillar are much less binding and effective than the Community instruments of the first pillar, mostly resulting in a "light" coordination of the action of those Member States that wish to participate. Article 19 TEU requests the coordinated action of Member States within international organisations, but in the event of their failure to fulfil this obligation no sanction can be applied. The procedure for concluding agreements in the second pillar is regulated by Article 24 TEU (the agreement is concluded by the Presidency authorised by the Council), which specifies, however, that no agreement shall be binding upon a Member State if it is in conflict with any of the provisions of its Constitution. The poor effectiveness of the Union's powers raises questions about how it will oblige Member States to respect the agreements concluded with third countries and about the reliability of the Union itself as a contractor, even because the Court of Justice has no jurisdiction on this matter.

Furthermore, an external dimension of the third pillar is also being developed, enabling the Union to conclude agreements aimed at combating international terrorism under the procedure laid down in Art. 24 TEU. The total exclusion of the European Parliament and the Court raises even greater concerns on a matter affecting individual rights.

The Lisbon Treaty sets out common principles for the Union's external action, specifying that

In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter (Article 3 TEU).

It also assigns legal personality to the European Union and provides for the accession of the Union to the European Convention of Human Rights of the Council of Europe.

Despite the adherence to common principles and the formal unification of the three pillars, the Treaty of Lisbon, however, still maintains procedures for foreign and defence policy and institutional responsibilities different from those provided for in international agreements covering other areas.

Under the Treaty of Lisbon, the High Representative for the CFSP, as mentioned in the previous paragraph, participates in the European Council and represents the CFSP. He/she also leads the newly established External Action Service of the Union (the so called “European diplomatic service”). According to the new Treaty, this institutional figure should therefore not only solve the problem of the Union’s external representation (even continuing to share this function with other figures like the President of the European Council), giving greater visibility and unity to the external action, but it should also foster political consensus among Member States on external action and make this action more effective by coordinating the powers of the Council and the Commission.

Its powers, however, seem designed to hinder the Commission’s action, turning it into a sort of secretariat of the Council, rather than enabling the Union to take decisions more easily on matters of foreign and defence policy: the High Representative, in fact, could hardly convince the governments of Member States in the absence of unanimity.

## **5. Conclusions: a process of open and flexible integration**

The European Union has, as we have seen, many peculiarities compared to other international organisations. However, the feature that probably sets it apart and raises the question of whether it can still be defined as an international organisation, is the increasingly close relationship that it has managed to establish with the citizens of the Member States, transforming them into “its” citizens.

This evolution, which has been gradual and certainly unpredictable based on the initial Treaties, is a result of the Court of Justice case law, the increase in the weight of the European Parliament and policies of the Commission. Although the concept of EU citizenship, which made its entry into the Treaty under the revision of Maastricht, is still at a quite embryonic stage, the issues of European membership and identity, certainly unimaginable in 1952, now seems to become a priority for the Union’s future.

The open debate with a great participation first on the Charter of Rights of the European Union and then on the Constitutional Treaty has contributed to creating a “European civil society”, urging the Commission to seek and establish connections with citizens, social groups and non-governmental organisations. In particular, the Charter of Rights has an instrumental role in the creation of a community of shared values and therefore of a European identity as well.

However, European integration appears to be a “cold fusion” process. No European Nation has arisen: on the contrary, the secret of success of the Union is to preserve national identities (it is no coincidence that under the Constitutional Treaty the motto would be “United in diversity”).

The question that therefore arises is whether the European integration process has already produced a federal State at a substantial level or whether it is intended to create it in any case. Although at the current stage the formula of the “Federation of Nation-States” may be used, it seems very unlikely that the Union as a whole may evolve into a federal State at this stage. Despite its territorial expansion, the Union so far has not only maintained but even increased the degree of integration. However, the constant dynamic between the deepening of integration and its enlargement to new States starts to become problematic, raising the subject of variable geometry and enhanced cooperation more and more frequently.

As stated by the Court of Justice in the *Vang Gend & Loos* ruling, the European Union is still an unprecedented model in the area of international relations, even though this model today is very different from how it was then and is still evolving. The supranationality itself, which also characterises this process, is not resolved in a separation of powers between the Union and the Member States, but in a sort of “interconnection” between them: the execution of judgments of the Court of Justice and the application of Community rules are at the hands of States, the monitoring over the application of fundamental rights is shared by the Court of Justice and national Courts, every national court autonomously sets out the limits to the primacy of Community law within its own legal order.

It should be noted that not even the entry into force of the Lisbon Treaty, which also marks a further turning point to the system, is able to transform the Union into a federal State. Its internationalist origin as an international organisation continues to emerge in the assumption that Member States are the *Lords of the Treaties* and that, if they are in agreement, may revise the founding Treaty in any way. Perhaps the best definition, precisely because it does not even require forced similarities to the formulas that have already been tried at the international or state level, is that, according to which, the EU is a project of open and flexible integration. Despite its many achievements, in fact, it still retains its characteristic of being a project, which is developed, tested and modified, along with its legal order, depending on the historical needs and the political consensus of the Member States.

The current stage of integration, should force us to reflect on both the conditions of the process and its direction.

On the one hand, it is clear that citizens need to be more properly informed, precisely because the desire is that they be more actively involved. On the other hand, it should be noted that there are two different views on the ultimate goals of Europe, visions that so far have coexisted in ambiguity: there are those who want a more integrated and supranational Union and conversely there are those who reject growth in this direction using geographical extension as a means to delay or avert the deepening of integration. Since these two views so far have found a compromise in all the new treaties and it is becoming increasingly difficult to achieve this compromise, the problem of differentiated integration is arising more and more even at the highest

levels of the national political elites. The choice between a more enlarged and less integrated European Union and a more restricted one, however, is at present still too painful a dilemma to find a solution.

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