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La originalidad (y la complejidad) del sistema jurídico de la Unión Europea entre modelos internacionales y experiencias estatales - Parte I

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Abstract

Further developing a contribution to the Master's programme on "Teoria da Complexidade Estatal. Ciclo de Lições Internacionais. Organização política e estrutura de poderes" directed by Prof. Humberto Cunha at the University of Fortaleza (UNIFOR), this article seeks to illustrate how the originality and complexity — if not the essence — of the European Union (EU) system lie in the fact that it largely eludes the usual categories of public law and international organizations law. Indeed, from the examination of its legal order, its functioning, and its evolution, it emerges that in some respects this system has borrowed elements from various State and international models, while in others it has diverged from them, charting an autonomous and innovative path that has significantly contributed to the success of the European integration process. The analysis is also carried out from a comparative perspective, with reference to other international and national (in particular, confederal and federal systems) experiences.

Keywords: European Union; legal system; European integration; comparative law.

Abstract

Nato da un contributo all'attività di ricerca svolta nell'ambito del Master «Teoria de Complexidade Estatal. Ciclo de Lições Internacionais. Organização politica e estrutura de poderes» diretto dal Prof. Humberto Cunha nell'Universiade de Fortaleza (UNIFOR), il presente articolo si propone di illustrare come l'originalità e la complessità — se non l'essenza — del sistema dell'Unione europea (UE) risiedano nel fatto che esso sfugga, in gran parte, alle usuali categorie del diritto pubblico e di quello delle organizzazioni internazionali. Dall'esame del suo ordinamento giuridico, del suo funzionamento e della sua evoluzione risulta, infatti, che esso abbia, per alcuni versi, preso in prestito elementi da diversi modelli statali e internazionali e, per altri, se ne sia discostato, tracciando un percorso autonomo ed innovativo, il quale ha significativamente contribuito al successo del processo d'integrazione europea. L'analisi è svolta anche in ottica comparatistica, con riferimento ad altri ordinamenti nazionali e internazionali, in particolare confederali e federali.

Parole chiave: *Unione Europea; sistema giuridico; integrazione europea; diritto comparato.*

Resumo

Nascido de uma contribuição para a atividade de pesquisa desenvolvida no âmbito do Mestrado «Teoria da Complexidade Estatal. Ciclo de Lições Internacionais. Organização política e estrutura de poderes», dirigido pelo Prof. Humberto Cunha na Universidade de Fortaleza (UNIFOR), o presente artigo propõe-se a ilustrar como a originalidade e a complexidade — se não a própria essência — do sistema da União Europeia (UE) residem no fato de que este escapa, em grande parte, às categorias usuais do direito público e do direito das organizações internacionais. Da análise do seu ordenamento jurídico, do seu funcionamento e da sua evolução resulta, com efeito, que ele tenha, sob certos aspectos, tomado emprestados elementos de diversos modelos estatais e internacionais e, sob outros, deles se tenha distanciado, traçando um percurso autônomo e inovador, o qual contribuiu de modo significativo para o êxito do processo de integração europeia. A análise é igualmente desenvolvida sob uma ótica comparativa, com referência a outros ordenamentos nacionais e internacionais, em particular de natureza confederal e federal.

Palavras-chave: *União Europeia; sistema jurídico; integração europeia; direito comparado.*

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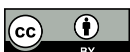
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Resumen

Nacido de una contribución a la actividad de investigación desarrollada en el marco del Máster «Teoría de la Complejidad Estatal. Ciclo de Lecciones Internacionales. Organización política y estructura de poderes», dirigido por el Prof. Humberto Cunha en la Universidad de Fortaleza (UNIFOR), el presente artículo se propone ilustrar cómo la originalidad y la complejidad —si no la propia esencia— del sistema de la Unión Europea (UE) radican en el hecho de que este escapa, en gran medida, a las categorías usuales del derecho público y del derecho de las organizaciones internacionales. Del examen de su ordenamiento jurídico, de su funcionamiento y de su evolución se desprende, en efecto, que este ha tomado, en ciertos aspectos, elementos prestados de diversos modelos estatales e internacionales y, en otros, se ha apartado de ellos, trazando un camino autónomo e innovador que ha contribuido de manera significativa al éxito del proceso de integración europea. El análisis se desarrolla asimismo desde una perspectiva comparada, con referencia a otros ordenamientos nacionales e internacionales, en particular de carácter confederal y federal.

Palabras clave: *Unión Europea; sistema jurídico; integración europea; derecho comparado.*

1 The originality and autonomy of the European Community and Union system as compared to international and national models

The European Union's legal order, and prior to it those of the European Communities – the European Coal and Steel Community (ECSC), the European Economic Community (EEC and then EC) and the European Atomic Energy Community (EURATOM) – righty falls within the range of legal systems to be analysed in the *Teoria de Complexidade Estatal. Ciclo de Lições Internacionais. Organização politica e estrutura de poderes* master's programme directed by Prof. Humberto Cunha of Universiade de Fortaleza (UNIFOR). As we will see, in fact, these are characterised by original and specific elements which mark them out from both the international organisations founded in the second half of the 20th century (the United Nations (UN), the North-Atlantic Treaty (NATO) and the Council of Europe, to name just a few) and from all the various State-based models (federal, quasi-federal, confederal). It was the Court of Justice itself which highlighted this atypical and novel form, as far back as the early 1960s, when it affirmed in its 5 February 1963 *Van gend en Loos* judgement that "the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields".[1] Similarly, in the equally famous *Costa v Enel* decision of 15 July 1964, the Court specified that "by contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States... By creating a community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves."[2]

At least at first sight, in those judgments the Court of Justice emphasised the originality (*Van Gend en Loos*) and autonomy (*Costa v ENEL*) of the European Communities' legal order (only) in relation to international law – "the Community constitutes a new legal order of international law…"; "unlike ordinary international treaties, the EEC Treaty…". The Communities were indeed founded on international treaties – those establishing the ECSC, the EEC and Euratom – so that, quite naturally, the first and most immediate point of comparison for the Community model was that of international organisations.[3] However, the originality and autonomy of the common system also distinguish it from State-based models, including multi-level systems such as federations, highly decentralised States or, albeit in a more theoretical perspective,[4] confederations.[5] The very choice of the term "Community", atypical for the time, to

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[1] CJEU, 5 February 1963, Case 26/62, *Van Gend en Loos*, ECLI:EU:C:1963:1. For commentary on this historic Court of Justice judgement, see, among others, B. De Witte, *The Continuous Significance of Van Gend en Loos*, in L.M. Poiares Maduro, L. Azoulai (eds.), *The Past and Future of EU Law: the Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Oxford, 2010, p. 9 ss.; P. Pescatore, *Van gend en Loos, 3 February 1963 - A View from Within*, *ibidem*, p. 3 ff.

[2] CJEU, 15 July 1964, Case 6/64, *Costa v ENEL*, ECLI:EU:C:1964:6. See, *ex multiis*, M. Blanquet, *Affirmation du principe de primauté. CJCE, 15 juill. 1964, no. 6/64, Costa v ENEL, Les grands arrêts de la Cour de justice de l'Union européenne. Droit constitutionnel et institutionnel de l'Union européenne*, Paris, 2023, p. 892 ss.; L. S. Rossi, *Le principe de primauté en tant que « règle de cohésion » de l'ordre juridique de l'Union européenne*, in *Cahiers de droit européen*, 2023-2025, n°1, p. 39 ff. See also V. Capuano, C. Schepisi, *Primato del diritto dell'Unione europea, giudice nazionale e dialogo con le Corti: quali nuovi equilibri?*, in *Eurojus*, Special Edition, September 2025.

[3] In this sense, see J.P. Jacqué, Droit institutionnel de l'Union européenne, Paris, 2015, 8 ed., p. 111 ff.

[4] This is, in fact, largely a historical phenomenon, as there are today no properly confederal systems in existence. Confederations have generally proved to be relatively fragile or transitional arrangements, in that they tend, more or less rapidly, to evolve into more stable forms of organisation, often transforming into federations (for example, Argentina, the United States and Switzerland) or dissolving altogether (for example, the German Confederation, the Senegambia Confederation, the Federation of Rhodesia and Nyasaland or, more recently, the State Union of Serbia and Montenegro, which was dissolved in 2006 following a referendum on Montenegrin independence). There do, however, exist formally federal systems that display certain features akin to confederations. This is the case, for instance, of the Commonwealth of the Bahamas, Saint Kitts and Nevis (particularly as regards the powers conferred upon Nevis, including the right of secession), and the United Arab Emirate.

[5] For an analysis of these State models, also in comparison with the EC/EU system, see V. Constantinesco, *Europe fédérale ou fédération d'Etats-nations*, in R. Dehousse (sous la direction de), *Une constitution pour l'Europe*, Paris, 2002, p. 115 f. ; M. Clapié, *Manuel d'institutions européennes*, Paris, 2006, p. 12 ff. ; H. Dumont, M. El Berhoumi, *Les formes juridiques fédératives d'association et de dissociation dans et entre les États*, in *Droit et société,* 2018, p. 15 ff. On the fact that, in the literature, the comparative analysis between the EC/EU system and state-based models developed later than that with international models, see L. Ronchetti, *Sovranazionalità senza sovranità: la Commissione e il Parlamento dell'UE*, in *Politica del diritto*, June 2001, p. 197 ff.

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describe the process of integration among the countries of the European continent – rather than "organisation", or also than "confederation" or "federation" – reflected the intention of the six founding States (Belgium, France, Germany, Italy, Luxembourg and the Netherlands) not to constrain that process within any pre-existing or predetermined legal model, but rather to construct a new one, distinct from both national and international systems as they were then known. As Paul Reuter observed in his 1953 monograph,[6] one of the first devoted to this new phenomenon, the characterisation of the ECSC as "supranational" is "*plus neutre et plus neuf*" and makes it possible to avoid the oppositions and conflicts that might arise from the use of the aforementioned terms in relation to the European Communities.

The same holds true for the current Union system, which represents an advanced stage of the European integration project insofar as it goes beyond the original, predominantly economic scope of the ECSC, EEC and Euratom Treaties – namely, the creation of a market without internal frontiers, within which the free movement of workers, goods, services and capital is guaranteed – extending instead to more political fields traditionally falling within the sphere of State sovereignty (citizenship, currency, security and justice, foreign and defence policy, etc.).[7] The Treaty establishing the European Union (Maastricht, 1993), those which strengthened its structure and functioning (Amsterdam, 1999, and subsequently Nice, 2003), and the most recent revision Treaty (Lisbon, 2009), which fully replaced the notion of "Community" with that of "Union", do not, in fact, contain any definition of the latter, nor do they seek to fit it within any specific legal category.[8] The Treaties – including those currently in force, namely the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) – merely state that it represents a further step towards the creation of "an ever closer union among the peoples of Europe" (Article 1(2) TEU; see also the preamble to the EEC Treaty). In other words, they leave the EU system free to shape the political and institutional framework deemed most appropriate for ensuring coexistence among States that have freely chosen to participate in the European project. Even where the EU legal order has adopted rules resembling those of international organisations or State systems, it has done so without ever committing itself exclusively to any one of these models, instead combining their elements as required by the historical context and the concrete objectives to be achieved.[9] One may thus speak of a "freedom from models", underscoring how the European integration process has in reality always followed its own distinctive and original path, grounded more in pragmatic considerations than in theoretical constructs.[10] The nature of the Union may therefore still justify the use of the notion of a "wonderfully ambiguous" entity, [11] coined more than forty years ago to describe the European Communities, or, to recall the words of a renowned President of the European Commission, Jacques Delors, of an "unidentified political object.

This approach has not only preserved the originality (*Van Gend en Loos*) and autonomy (*Costa v ENEL*) of the European construction, but has also made it possible to strengthen integration among the Member States and their peoples in a gradual manner or – to echo Robert Schuman's words in the Declaration of 9 May 1950, which marked the foundational moment of this process – "through small steps",[12] thereby avoiding too explicit choices that might have generated tensions between those advocating merely a reinforcement of cooperation between Member States and those seeking to transcend that dimension. Put somewhat schematically, the European integration process – and, in a sense, its very originality – unfolds through the continuous search for a point of equilibrium between an intergovernmental approach, which, while acknowledging the need to deepen integration, seeks to preserve the centrality of the States, on one hand, and supranational dynamics aimed at reinforcing the (quasi- or more) federal nature of the Union, on the other.

This underlying tension in the process of European integration has undoubtedly given rise, over the past seventy years, to periods of stalemate and difficulty, but it has also fostered the development of innovative solutions through which significant advances have been achieved, both quantitatively and qualitatively. From the six founding

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6 *La Communauté européenne du Charbon et de l'Acier*, Paris, 1953.

7 For an overview of the main stages of the European integration process, see, B. Olivi, *L'Europe difficile – Storia politica della Comunità europea*, Bologna, 1998; P. Magnette, Le *régime politique de l'Union européenne*, Paris, 2023, spec. p. 17 ff.

8 In this sense, see A. Tizzano, *Il costituzionalismo europeo nell'età dell'incertezza*, in *Il diritto dell'Unione europea*, 2023, p. 363 ff. F. Pocar had already written of the "individualism" of the European Communities in *Lezioni di diritto delle Comunità europee,* Milan, 1997, p. 16. For considerations on this subject, see B. Conforti, *Sulla natura giuridica delle Comunità europee*, in *Scritti Raselli*, Milano, 1971, p. 563 ff.; L. Ferrari-Bravo, E. Moavero-Milanesi, *Lezioni di diritto comunitario*, Naples, 1997, p. 36; V. Guizzi, *Manuale di diritto e politica dell'Unione europea*, Naples, 2000, p. 51; L. Daniele, Diritto *dell'Unione europea*, Milan, 2014, p. 47 ff.

9 On this point, see R. Adam, A. Tizzano, *Manuale di Diritto dell'Unione europea*, Turin, 2024, p. 6.

10 Ibid.

11 See R. Bieber,J. P. Jacqué, J.H.H. Weiler (sous la direction de), *L'Europe de demain : une Union sans cesse plus étroite*, Bruxelles, 1985, p. 7.

12 The text of the Declaration is available on website of the European Commission: https://european-union.europa.eu/principles-countries-history/history-eu/1945-59/schuman-declaration-may-1950_en

States of the European Communities, the Union has expanded to its current twenty-seven Member States and, having absorbed the shock of Brexit,[13] continues to exert a strong attraction on neighbouring European countries,[14] not least because it represents an area of stability in an increasingly unstable world. As already noted, a Community of essentially economic character has evolved into a Union with far broader political ambitions. Finally, as will be shown below, the search for a point of equilibrium between different aspirations and models has led to important reforms of the EU institutional framework. The legislative process, for example, initially dominated by the institution representing the Member States (the Council), is now structured around a largely equal dialogue between the latter and the institution representing European citizens (the European Parliament), which, since the late 1970s, has moreover been directly elected by universal suffrage – making it unique among supranational parliamentary bodies.[15] The initial reliance on unanimity and veto rights has progressively given way to qualified majority voting.

Against this background, it seems useful to highlight the extent to which the originality and autonomy of the Union system shape some of its foundational elements: the establishment of a common legal order and the issue of the limitation of national sovereignty (Section 2); the system for the allocation of competences between the European Union and the Member States, including in areas traditionally reserved to the latter (Sections 3-4); the EU institutional framework and, in particular, the exercise of the legislative function (Section 5); the structural features of the Union legal order, such as direct effect and primacy of EU law, as well as the protection of fundamental rights and common values (Section 6); and Union citizenship (Section 7). These aspects will also be examined in light of the changes introduced over time by the main revision treaties (Single European Act, 1986; Maastricht, 1993; Amsterdam, 1998; Nice, 2003; Lisbon, 2009). In this context, the comparison between the EU system and international or national models will serve solely to illustrate the former's "wonderful ambiguity", since the tendency – prevalent in the past among international and constitutional law scholars - In this context, the comparison between the EU system and international or national models will serve solely to illustrate the former's "wonderful ambiguity", since the tendency – prevalent in the past among international and constitutional law scholars – to classify the EU model within predefined legal categories cannot be endorsed. This is all the more justified given that such categories are themselves far from homogeneous, as will become apparent in the following sections, with numerous variants existing within international, confederal and federal systems alike. Accordingly, these categories will be referred to in this contribution with the awareness that doing so necessarily entails a certain degree of legal approximation.

2 The establishment of the EEC/EU legal system and the issue of limitations on national sovereignty

The European Union, like the European Communities before it, is founded on the willingness of the Member States to accede to it by transferring to it a number of competences. This transfer has taken place, and continues to take place, through the conclusion of treaties under international law – ECSC, EEC, Euratom and, today, the EU – entered into by sovereign States. As recalled by Advocate-General Sánchez-Bordona of the Court of the Justice of the European Union, the TEU "is an international treaty between States and, at the same time, the constituent instrument of an international organisation."[16] This brings the EU system significantly closer to the model typical of international organisations or confederations than to that of federations. In the latter case, the founding act takes the form of a constitution rather than a treaty, since sovereignty is vested exclusively in the federation as a whole, even though the federated entities enjoy a wide degree of autonomy. The distance between federal systems and that of the EU is, however, perhaps more limited than might appear. In its 1986 judgment in *Les Verts*, the Court of

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[13] On Brexit, see M. Vellano, Brexit *e oltre*, in P. Manzini, M. Vellano, *Unione europea 2020. I dodici mesi che hanno segnato l'integrazione europea*, Milan, 2020, p. 3 ff.

[14] There are currently nine countries with candidate status for accession to the Union: Albania, Bosnia and Herzegovina, Georgia, North Macedonia, Moldova, Montenegro, Serbia, Turkey and Ukraine. A tenth country, Kosovo, has the status of "potential candidate".

[15] The few parliamentary bodies within international organisations (the parliamentary assemblies of NATO, the Council of Europe, the OSCE, the African Union and ASEAN) are not directly elected by citizens and exercise predominantly consultative functions. They are composed of delegates drawn from the national parliaments of the Member States, that is, according to a system similar to that which characterised the EEC prior to the introduction of direct universal suffrage in 1979. The only exceptions to this model are the Andean Parliament and the Parliament of Mercosur (Parlasur), whose members are partly directly elected (in Colombia, Ecuador and Peru for the Andean Parliament; in Argentina and Paraguay for Parlasur) and partly appointed by the national parliaments of those member countries that have opted for indirect election (Bolivia and Chile for the Andean Parliament; Brazil and Uruguay for Parlasur). Even these parliamentary bodies, unlike the European Parliament, do not exercise genuine legislative functions, but rather perform primarily consultative and monitoring roles. See, A. Colefelice, *Parliamentary Institutions in Regional and International Governance: Functions and Powers*, London, 2018.

[16] CJEU, 4 December 2018, Case C-621/18, *Wightman and Others*, ECLI:EU:C:2018:999, para. 78

Justice clarified that the EEC Treaty constituted "the basic constitutional charter" of the Community system.[17] This appears all the more true today with regard to the Union, given that, as already noted, the EU Treaties – unlike those establishing the European Communities, which pursued primarily economic objectives – also protect areas of a "constitutional" character, such as common values (Article 2 TEU), fundamental rights (Article 6 TEU and the Charter), and Union citizenship (Article 9 TEU and Articles 20 ff. TFEU). It is therefore not surprising that another Advocate General at the Court of Justice, Miguel Poiares Maduro, could – precisely by referring to the *Les Verts* judgment – characterise the EU legal order based on the Treaties as "a *municipal* legal order of transnational dimensions of which [the Treaties form] the 'basic constitutional charter'".[18] These different interpretations, put forward by two authoritative members of the Court of Justice of the European Union, further confirm the elusive and difficult-to-classify nature of the integration process, which challenges traditional legal categories.

Despite this underlying ambiguity, it remains nonetheless indisputable that the accession of the Member States to the Communities — and today to the Union — and the transfer to the latter of competences previously exercised at national level do not entail the loss, by the former, of their full sovereignty.[19] This can be inferred primarily from three elements. First, the States that are members of the Union retain, exclusively, the power to decide whether and, if so, how to amend the Treaties. Article 48(4) TEU in fact confers this power on the Member States, acting by common agreement within a "conference" composed of representatives of their governments, who are not by chance traditional referred to as the "Masters of the Treaties." Amendments to treaties adopted by Member States in the framework of the conference must be ratified by all Member States in accordance with their respective constitutional procedures,[20] which once again testifies to the central role played by Member States in the "basic constitutional charter" amendment process. In this respect, it is worth recalling that the proposal contained in the "Spinelli Project" of 1984 — which had a distinctly federal character — to amend the Treaties by qualified majority (i.e. by a majority of Member States representing two-thirds of the European population) was never incorporated into the Treaties due to opposition from the Member States themselves.[21] In this way, they intended to retain control over the constituent power and over the essential stages of the European integration process.[22] In other words, the Union does not possess the so-called *Kompetenz-Kompetenz*, in the sense that it does not have the authority to determine autonomously the scope of its own decision-making powers or to confer new competences upon itself.

In the second place, it is precisely with a view to reaffirming the sovereignty of the Member States – even after their accession to the Union and the transfer of previously national competences to it – that an explicit unilateral right of withdrawal from the Union (Article 50 TEU) was introduced by the 2009 Lisbon Treaty. [23]

Lastly, precisely because the Member States do not relinquish their sovereignty upon joining the Union, they retain their own international legal personality alongside that of the Union – although the latter is of a different nature, insofar as it is limited to the competences conferred upon it by its members.

The above-mentioned powers reserved to the Member States thus create closer affinities with international and confederal models than with federal ones. In the former, States remain sovereign and cooperate with one another to achieve the objectives laid down in the founding treaties, retaining the power to amend those treaties by unanimity and always being able to withdraw from the confederal arrangement. By contrast, federal models – which generally aspire to go beyond mere cooperation between States and aim to establish a common territory, citizenship and legal order – presuppose that the federated entities are no longer sovereign, even though they enjoy a high degree of autonomy. Consequently, the constitution of federal States, although based on the convergence of the

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[17] CJEU, 23 April 1986, Case 294/83, *Parti écologiste "Les Verts" v European Parliament*, ECLI:EU:C:1986:166.

[18] CJEU, 16 January 2008, Joined Cases C-402/05 and C-415/05, *Kadi v Council and Commission*, ECLI:EU:C:2008:11, para. 21. On this terminological choice, see F. Casolari, *Leale cooperazione tra Stati membri e Unione europea. Studio sulla partecipazione all'Unione al tempo delle crisi*, Naples, 2020, p. 12.

[19] On these aspects, see B. De Witte, *The European Union as an International Legal Experiment*, in G. De Burca, J.H.H. Weiler (eds.), *The Worlds of European Constitutionalism*, Cambridge, 2010, p. 19 ff.; H. Dumont, M. El Berhoumi, *Les formes juridiques fédératives d'association et de dissociation dans et entre les États,*cited aboves, p. 31.

[20] An exception is provided by the so-called simplified Treaty revision procedure under Article 48(6) TEU, which in any event requires the unanimous consent of the Member States in accordance with their respective constitutional requirements.

[21] For an analysis, see P. Ponzano, *Une réforme fédérale de l'Union européenne*, in *Revue du droit de l'Union européenne*, 2022, p. 163 ff., spec. p. 166.

[22] On the difficulties associated with the ratification of Treaty revisions under a system based on double unanimity, see J. Ziller, *The Law and Politics of the Ratification of the Treaty of Lisbon*, in S. Griller, J. Ziller (eds.), *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?*, New York, 2008, p. 309 ff.

[23] For an analysis of the right of secession in confederal and federal systems, including in relation to the EU system, see P. B. Busquets, *Constitutional theory of federalism and the European Union*, in *European Constitutional Law Review*, 2024, p. 713 ff.

will of the federated entities, can generally be amended by a majority vote – often a strengthened majority – with some form of involvement of both the federated States and their peoples.[24] Furthermore, the federal bond is, in principle, indissoluble and therefore does not therefore permit secession, as is reflected in constitutional provisions (for example, Article 1 of the Brazilian Constitution) or in constitutional practice and case law (Germany, India, Mexico, Switzerland and the United States).[25] It is therefore no coincidence that the introduction of the right of withdrawal from the European Union was requested by the Member States (at the initiative of the United Kingdom…) at the time of the adoption of the Treaty of Lisbon in 2009, as a counterbalance to the enhanced integration elements contained therein – such as the strengthening of the European Parliament's powers and the binding nature of the EU Charter of Fundamental Rights.

However, as already explained, the differences and similarities between the Union model and national or international models are never as clear-cut as they may appear at first sight. Much like federations, the European Communities already sought to establish a legal order going beyond mere cooperation between Member States – namely, European integration – the founding treaties having created a single [*rectius*: territory] market without internal frontiers, as well as a "European people" endowed from the outset with rights that would later evolve, as will be seen below, into a fully-fledged Union citizenship. Unlike confederal models, moreover, once Member States hand over competence in a given area to the EU, they lose – albeit only within that circumscribed field – "their sovereign powers," as stated in the well-known formula used by the Court of Justice in *Van Gend en Loos* and *Costa v ENEL*. Clearly this does not mean that the EU's Member States have forfeited their sovereignty altogether, as would be the case for federated entities within a federal system. Rather, membership of the EU entails a sharing of sovereign powers, the Member States having chosen to exercise certain competences jointly – that is, through the EU institutions (those listed in Article 13 TEU) – which, as will be seen, produce a body of shared legal rules (EU acts) that, in principle, have direct effect and prevail over national law.[26]

3 The allocation of competences between the European Union and its Member States

The division of competences between the EU and its Member States is regulated by the conferral principle set out in Article 5(2) TEU: "The Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States." This principle is a foundational element of all legal systems – in particular international organisations and confederations – whose powers are exercised solely on a derivative basis, that is, following a transfer of competences by the constituent entities. By contrast, similarly to what occurs in several federal States, the TEU and TFEU Treaties make no reference whatsoever to areas of national competence,[27] with articles 3, 4 and 6 of the TFEU limiting itself to listing the powers accorded the EU. Articles 3, 4 and 6 TFEU in fact merely listing the competences conferred upon the Union. As clarified in Article 5 TEU, national competences are, as a rule, inferred from the absence of any reference to them in those provisions of the TFEU.[28]

As the 2009 Lisbon Treaty specified, moreover, the competences conferred upon the European Union are of different types: in certain fields the EU alone has the power to legislate ("exclusive competences" listed in Article 3 TFEU, such as the customs union, the common commercial policy, competition rules, or monetary policy for Member States whose currency is the euro); in other fields this power is shared with the Member States ("shared competences" listed in Article 4 TFEU, including the environment, energy, transport and justice); and in yet others the Union may

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24 See, for example, Australia (in addition to an absolute majority in both chambers of the federal Parliament, constitutional amendment requires a referendum with a "double majority", that is, a majority of voters nationwide and a majority in at least four of the six States), Brazil (three-fifths of the members of both chambers of Congress), Germany (two-thirds of the Bundestag and two-thirds of the Bundesrat), the United States (two-thirds of both chambers of Congress and ratification by three-quarters of the federated States), and Switzerland (a double majority of the overall electorate and of the cantons). On these aspects, and the functioning of federal systems more generally, see F. Palermo, K. Kössler, *Comparative Federalism: Constitutional Arrangements and Case Law*, Oxford, 2017.

25 The only apparent exception among federal States is the Federal Democratic Republic of Ethiopia, which provides for a right of secession in Article 39 of its Constitution.

26 On the transformation of the concept of sovereignty in the context of European integration, see R. Baratta, *Il sistema istituzionalî*, cited above, p. 9 ff.

27 There are, however, certain important exceptions to this, such as Belgium (whose Constitution expressly defines the competences of the Federal State, the Regions and the Communities), Canada (whose Constitution does the same, listing both federal and provincial powers) and India (the Indian Constitution includes a list of the exclusive powers of its federated States).

28 However, there are certain exceptions, such as Article 4(2) TEU, which provides that national security remains the sole responsibility of the Member States; Article 135(5) TFEU, which prohibits the Union from intervening in certain social matters (wages, the right to strike, the right of association); or Article 345 TFEU, which prevents the Union from prejudicing the system of property ownership in the Member States.

only adopt acts intended to support, coordinate or supplement national action, in which case the Member States retain full legislative authority ("supporting, coordinating and complementary competences" under Article 6 TFEU, covering, for instance, culture, education, civil protection and sport).[29] This type of detailed classification tends to echo categories typical of federal or otherwise highly decentralised systems, rather than those of international organisations or confederations, which are primarily aimed at coordinating national policies.

In order to determine the appropriate level – either the EU or national systems – entrusted with exercising competences which are not exclusive to the EU, Article 5(3), TEU provides for the application of the principle of subsidiarity. This principle governs the distribution of powers in systems in which multiple levels of government (local, regional, national, supranational, etc.) share competences. In the EU system this principle provides that the Union can only intervene where the following twofold condition is satisfied: (i) Member States alone cannot adequately achieve a Treaty's objective and (ii) this objective is best achieved at the EU level, given the scale or effects of the proposed action. Although the principle is designed to limit the exercise by the Union of its competences – the Union "shall act only if…" – its application in practice appears to show that its conditions are frequently fulfilled, as many matters subject to legislative action increasingly display a transnational dimension, which tends to justify EU-level measures.[30] In this context, as we will see, the 2009 Treaty of Lisbon sought to strengthen national political oversight over the application of the subsidiarity principle by involving the parliaments of the Member States through a specifically dedicated procedure (Article 5(3) TEU and Protocol No. 2 annexed to the Treaties).

Paragraph 4 of Article 5 TEU sets out a further principle that is relevant to the exercise of Union competences: the principle of proportionality – "the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties". This principle governs the intensity of EU intervention and, specifically, the scope of the obligations that the Union legislature may impose. Such obligations must be suitable for attaining the objective pursued and must not exceed what is necessary to achieve it. Experience indicates that, while the principle of subsidiarity tends to have a predominantly political dimension, the principle of proportionality enables the Court of Justice to conduct a more substantive judicial review of the appropriateness and extent of the measures adopted by the Union in the exercise of its competence.[31]

Outside cases of exclusive Union competence, an additional principle that often governs the exercise of powers in multilevel systems – such as in the federal system of the United States, by virtue of the Supreme Court's case law[32] – is that of pre-emption. Under this principle, where a given field has been regulated by the higher level of government, the lower level (a Member State, a federated State, a region, etc.) may no longer legislate.[33] This principle is now reflected in Article 2(2) TFEU, which specifies that, in areas of shared competence, the Member States may exercise their competence only "to the extent that the Union has not exercised its competence" or where the Union "has decided to cease exercising it". However, this does not prevent the two spheres of competence from coexisting in certain cases, depending on the nature and breadth of the subject matter, the only limit being that national measures must not conflict with, or otherwise jeopardise, the measures adopted by the Union. Such a situation arises, for instance, in the fields of scientific and technological research, as well as development cooperation – areas of shared competence for which the Treaty expressly provides that the exercise of Union competence shall not have the effect of preventing the Member States from exercising theirs, as long as the Union and the Member States coordinate their actions in order to ensure their mutual consistency.[34] In other cases – such as consumer protection under Article 169(4) TFEU and environmental protection under Article 193 TFEU – the Treaties stipulate that Union legislation shall be limited to laying down minimum requirements, leaving the Member States free to maintain or introduce more stringent protective measures.

The complexity of the Union's system of allocating and exercising competences manifests itself in further respects.. The European Union may, in fact, exercise its powers also in areas not expressly listed in the Treaties,

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[29] In sectors in which support and co-ordination is provided for, the EU cannot take action which requires harmonisation in the laws and regulations of its Member States (Article 2(5) TFEU).

[30] The Protocol on subsidiarity annexed to the Amsterdam Treaty indeed suggested that competence should be allocated to the Union whenever the matter to be regulated presents transnational aspects.

[31] In this sense, see R. Adam, A. Tizzano*, Manuale di Diritto dell'Unione* europea, cited above, p. 444 ff., spec. pp. 447-448.

[32] See J. Nowak, R. Rotunda, *Constitutional Law*, St. Paul, 2000, p. 197. On this matter, also see G. F. Mancini, *La nascita di una Costituzione per l'Europa*, in G. F. Mancini (ed.), *Democrazia e costituzionalismo nell'Unione europea*, Bologna, 2004, p. 48.

[33] On this principle, see A. Arena, *Il principio della* preemption *in diritto dell'Unione europea*, Napoli, 2013.

[34] See Article 4 (3) and (4) TFEU, as well as Articles 180 and 181 TFEU.

primarily by virtue of the so-called doctrine of implied powers developed by the Court of Justice in the *ERTA* case.[35] Drawing inspiration from the US Supreme Court's implied powers doctrine,[36] this line of case law notably recognised that the European Union has the competence to conclude international agreements with third countries and international organisations in all areas in which it possesses an internal competence (in the case at hand, transport), in order to ensure consistency between the exercise of its internal and external powers. This is a jurisprudential development of considerable significance, which has enabled the Union to play a leading role in numerous areas of international cooperation by negotiating and concluding agreements in the name and on behalf of its Member States.[37]

Moreover, Article 352 TFEU, known as the "flexibility clause", allows the Union, on an exceptional basis, to adopt EU acts even where the Treaties do not provide any specific power to do so, provided that such common action is necessary to attain one of the objectives set out in the Treaties. Although subject to stringent conditions (unanimity in the Council and the prior consent of the European Parliament), this mechanism has had a significant impact on the integration process, allowing the EU legislator to intervene in new and rapidly evolving fields – such as the environment, research, consumer protection and civil protection – before these areas were formally attributed to the Union by subsequent amending treaties. The breadth of the objectives set out in the Treaties, now listed in Article 3 TEU (establishment of an internal market; promotion of economic, social and territorial cohesion and scientific and technological progress; contribution to peace, security and sustainable development in the world, etc.), has indeed fostered an expansive interpretation of the flexibility clause. It thus essentially performs a "closure" role – to borrow a constitutional law concept [38] – enabling the EU system to adapt to new circumstances not foreseen by the drafters of the Treaties, thereby attenuating the constraints of the principle of conferral[39] and, in so doing, moving the EU legal order away from the classical model of an international organisation and closer to certain federal experiences.[40]

As in various federal or highly decentralised systems, the distribution of competences within the Union's legal order therefore presents a complex and dynamic framework, not always easy to decipher. This is also because determining the precise scope of an EU competence requires reference not only to the general category to which it belongs (exclusive, shared, or supporting, coordinating or complementary competences), but also to the provisions that specifically govern the field concerned (the exact extent of the competence, the type of act that may be adopted, the applicable decision-making procedure, and so on). By way of example, although justice policies are listed among the areas of shared competence in Article 4 TFEU, it is in fact the provisions of Chapters 3 and 4 of Title V (Area of Freedom, Security and Justice) that delineate their concrete contours: Article 81 TFEU for judicial cooperation in civil matters and Articles 82–84 TFEU for cooperation in criminal matters. These provisions identify not only the precise areas in which the Union legislature may intervene (for instance, in civil matters, the mutual recognition of judicial and extrajudicial decisions; cooperation in the taking of evidence; the development of alternative dispute-resolution methods; or support for the training of judges and legal practitioners), but also the types of acts that may be adopted (for example, under Article 82(2) TFEU, minimum-harmonisation directives in criminal procedure) and the decision-making modalities applicable (for instance, unanimity for family-law measures under Article 81(3) TFEU. Given these complexities, the question of "who does what" – that is, which level of authority holds (or ought

[35] CJEU, 31 March 1971, Case 22/70, *Commission v Council*, ECLI:EU:C:1971:32.

[36] *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819)

[37] Taking only the example of relations between Brazil and the Union over the past decade, the exercise of its external competence includes the conclusion by the EU of the Administrative Arrangement for cooperation in research and innovation (2018), the Partnership Agreement and the interim trade agreement with Mercosur (2024), the Agreement on the exchange of personal data between Europol and the Brazilian Federal Police (2025), and the "mutual adequacy arrangement" on the protection and flows of personal data (2026).

[38] On this concept, see Vezio Crisafulli, *Lezioni di diritto costituzionale, vol. II/1: L'ordinamento costituzionale italiano. Le fonti normative*, Padua, 1993, p. 221.

[39] It should nevertheless be recalled that, in addition to the procedural conditions already mentioned, the use of the flexibility clause is subject to important substantive limitations. In particular, recourse to this clause may not result in legislative or regulatory harmonisation in cases where the Treaties exclude it (Article 352(3) TFEU); it cannot serve as a legal basis for pursuing objectives relating to the Common Foreign and Security Policy (Article 352(4) TFEU); and it may not be invoked so broadly as to justify the adoption of measures that would, in substance, amount to amending the Treaties without following the prescribed revision procedures (see Declaration No. 42 annexed to the Treaties following the Lisbon Treaty).

[40] One may consider, for instance, the *Necessary and Proper Clause* in Article I, Section 8, Clause 18 of the United States Constitution, which grants Congress the authority to enact all laws "necessary and proper" for carrying into execution the powers conferred upon the federal government. This "elastic clause" has been interpreted by the Supreme Court as a source of implied powers, enabling Congress to exercise powers not expressly mentioned in the constitutional text but deemed necessary for the exercise of the enumerated powers. Thus, in the landmark case *McCulloch v. Maryland*, the Court upheld the constitutionality of establishing a national bank as a means necessary for the exercise of the federal government's taxing and spending powers. On the extensive interpretation of this clause, see, among many others, G. SAGER, "The Sources and Limits of Legal Authority", in A. B. MORRISON (ed.), *Fundamentals of American Law* (Oxford: Oxford University Press, 1994), p. 30; and, on its similarities with Article 352 TFEU, A. CUYVERS, *The EU as a Confederal Union of Sovereign Member Peoples – Exploring the Potential of American (Con)Federalism and Popular Sovereignty for a Constitutional Theory of the EU* (Leiden: Leiden University, 2013), p. 115 ff., available at: https://scholarlypublications.universiteitleiden.nl/access/item%3A2715656/download).

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to hold) the competence to act in a given area – frequently arises not only among legal scholars, but also in the media, political debates and public discourse in the EU,[41] much as it does in multilevel State systems (and far less in traditional international organisations). This reveals something not only about the nature of the allocation of competences between the Union and the Member States, but also about the very character of the European integration process itself.

4 'Reverse European federalism' – taxation, currency and foreign and defence policies

The European Union today enjoys particularly broad and diverse competences – those listed in Articles 3, 4 and 6 TFEU – which distinguish it from many international organisations, but also from certain State models, especially confederal[42] and, in some cases, even federal ones.[43] All the amending treaties since the 1986 Single European Act have progressively expanded the competences conferred upon the Union, so that it now holds powers in no fewer than thirty different fields, ranging from horizontal policies (the internal market, the customs union, external trade, competition, research and innovation, protection of the environment, regional development, etc.) to sectoral policies (industry, agriculture, fisheries, energy, transport, etc.), and from monetary affairs to justice, immigration, and the Common Foreign and Security Policy. From this specific perspective, the EU system resembles federal systems more closely than confederal ones, since the latter typically deal primarily with external relations and defence, whereas federations – with more ambitious aims – also regulate domains that form part of the internal competences of States, such as monetary policy, the economy, transport, and social policies. Indeed, the production of rules in areas of EU competence has now reached a scale comparable to the central legislation of federal or strongly decentralised States, with only a few fields of national law remaining untouched by EU law.[44] This is all the more true considering that, as will be seen in connection with Union citizenship, even areas of exclusive national competence must nevertheless comply with EU law.

Unlike however what happens in federal, or highly decentralised, systems, some of the sectors typically under central government control – foreign and defence policies, taxation and currency, justice, immigration and asylum – were, for many years, under Member States' exclusive jurisdiction, as the founding treaties did not confer competences upon the European Communities in those areas or, when they did, such powers were partial and primarily functional to the creation of the common market (as in the case of tax legislation, where harmonisation powers were limited to certain taxes and, in any event, subject to unanimity). Since the present contribution cannot address all these complex questions in detail, attention will be limited to a few examples — taxation, monetary policy, and foreign and defence policy — that concern domains traditionally associated with the core prerogatives of State sovereignty.

Starting with the power to levy and collect taxes, while the EU budget has been financed since the 1970s through a system of "own resources" - and no longer through contributions paid by the Member States, as is the norm in international organisations – the European Union does not possess, unlike State systems, an autonomous fiscal capacity.[45] Taxes are levied by Member States who subsequently transfer them to the EU. The powers of national systems in this field are, however, counterbalanced by a number of factors. First, the amount of those resources is now derived from a tax set directly at the European level (customs duties on imports from third countries

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41 See e.g. J. M. Smits, *Who does what? On the distribution of competences among the European Union and the Member States,* in K. Purnhagen, P. Rott (eds.), *Varieties of European Economic Law and Regulation.* Liber Amicorum *for Hans Micklitz*, Heidelberg, 2014, p. 343 ss.

42 In this sense, see also H. Dumont and M. El Berhoumi, *Les formes juridiques fédératives d'association et de dissociation dans et entre les États*, cited above, p. 31.

43 According to P. M. Leslie (*Le modèle de Maastricht. Point de vue canadien sur l'Union européenne*, Institut des relations intergouvernementales, Université Queens, Kingston, 1995) this is true, for instance, of the Canadian system. Within the Union itself, one may also consider certain aspects of the Belgian federal system, which grants very extensive autonomy to the Regions and Communities that compose it. On the allocation of competences in the Belgian system and in the EU, see F. Massart-Pierard, *La Belgique à l'épreuve de l'introduction du principe de subsidiarité au sein de l'Union européenne: entre fédéralisme européen et fédéralisme belge*, in *Belgique 2000 : entre régulations globales et exigences réflexives*, Observatoire social et politique, 2000, vol. 31, p. 67 ff. According to some authors, the Belgian system thus displays quasi-confederal features. See, in this sense, E. Arcq, V. De Coorebyter, C. Istasse, *Fédéralisme et confédéralisme*, Brussels, 2012, esp. pp. 9-10 and 70-76.

44 According to certain studies, approximately 50-60% of current Member States' law derives directly or indirectly from EU law. See, European Data Journalism Network, *To what extent EU lawmaking matters for citizens' life: facts and figures*, available on: www.europeandatajournalism.eu/cp_data_news/to-what-extent-eu-lawmaking-matters-for-citizens-life-facts-and-figures/?utm_source=chatgpt.com.

45 The European Union, however, does possess direct authority over certain sources of revenue, namely the European taxes levied on the salaries of members and officials of the EU institutions; the pecuniary sanctions imposed by the Court of Justice pursuant to Article 260 TFEU when Member States fail to comply with EU law or with the Court's judgments; and the fines imposed on undertakings that violate EU competition rules (Articles 101-106 TFEU)..

and agricultural levies, reflecting the importance of EU competences in external trade and agriculture), as well as predetermined shares of a specific tax (VAT) and of a common prosperity indicator (the resource based on Gross National Income).[46] Furthermore, while these revenues are collected by Member States, the latter are required, on the one hand, to carry out such collection in a manner that does not make these operations less effective than those relating to comparable national taxes[47] and, on the other hand, to transfer these amounts to the EU budget immediately upon their domestic collection.[48]

Even though the EU possesses the tools with which to fund its budget independently, its overall financial capacity remains modest when measured against, on the one hand, the breadth and diversity of its competences and, on the other, the substantial resources typically available to central governments in federal States. The EU's current budget – for the 2027-2034 period – amounts to just 1.26% of the whole EU gross domestic product (GDP). This represents an annual expenditure close to 200 billion euros, to be compared, for instance, with the roughly 6 trillion euros of the annual federal budget of the United States – approximately 24% of its national GDP. Internationally, the budget of central authorities in federal systems generally stands around 25% of national GDP, with significant variations depending on the degree of decentralisation. These comparisons must, however, be read in light of the fact that the Union, unlike the central governments of federal States, does not ordinarily incur substantial expenditure in areas such as defence or macroeconomic stabilisation. The picture outlined is, moreover, subject to significant developments, as the Union is increasingly called upon to respond directly to geopolitical challenges, such as in the context of Russia's war of aggression against Ukraine, or to systemic crises such as that resulting from the Covid-19 pandemic. It is therefore not surprising that the European Commission has recently sought to expand and diversify its financing instruments, by issuing debt on financial markets in order to provide loans or guarantees to Member States facing periods of economic difficulty, and by proposing the introduction new categories of own resources.[49]

The power to issue currency probably represents the attribute of state authority on which European integration has had the most profound impact: from the near silence of the founding treaties to the gradual emergence, in the 1970s and 1980s, of a coordination of the monetary policies of the Member States, culminating in the provision in the 1993 Maastricht Treaty for the establishment of a single currency – the euro (Article 2 EC, now Article 3 TEU) – which formally replaced the currencies of the participating States as of 28 February 2002. This is one of the very rare examples in history of a truly supranational currency, managed by a common institution – the European Central Bank (ECB), assisted by the European System of Central Banks (ESCB)[50] – following a full transfer of the relevant powers from the Member States. From a monetary standpoint, the EU therefore presents a situation very similar to that of a nation-state. Indeed, monetary policy falls within the exclusive competences of the Union (Article 3 TFEU).

That said, upon closer examination, this field also displays specific and original features which, although evolving, cannot be entirely traced back to state models. Precisely because the adoption of a single currency represented a very significant step towards a more "federal" type of integration, it was decided that participation in the euro. area would not be a mandatory component of EU membership. As the adoption of the euro by a Member State depends not only on compliance with specific economic criteria (the so-called convergence criteria),[51] but also on a clear national political will,[52] the euro is currently used by twenty-one Member States out of twenty-seven – as well as by several non-EU European countries by virtue of agreements concluded with the Union (Andorra, Monaco, San Marino and the Vatican) or through unilateral decisions (Kosovo and Montenegro). Although this differentiation between EU Member States and euro area participants undoubtedly adds another layer of complexity to an already intricate multi-level governance system, this type of pragmatic solutions – based on a degree of differentiation among

[46] This system was introduced by Council Decision 70/243/ECSC/EEC/Euratom of 21 April 1970, OJ L 94, 28 April 1970. For a detailed analysis, see R. ADAM and A. TIZZANO, *Manuale di diritto dell'Unione europea*, cited above, p. 141.

[47] CJEU, 27 March 1980, case 66/79, 127/79 and 128/79, *Meridionale Industria Salumi e.a*, ECLI:EU:C:1980:101, point 18.

[48] On this point, see Council Regulation (EEC) No 15552/89 of 29 May 1989, OJ L 155, 7 June 1989.

[49] See the proposed multi-year financial framework for the 2028-2034 period: https://commission.europa.eu/news-and-media/news/eu-budget-2028-2034-stronger-europe-2025-07-16_it

[50] The ECB is responsible for the management and direction of the euro area and determines the Union's monetary policy. It also holds the exclusive right to authorise the issuance of euro banknotes and coins and to represent the Eurosystem at the international level. Together with the national central banks of the Member States, the ECB forms the European System of Central Banks (ESCB), whose mission is to maintain price stability within the euro area. For a history of the Economic and Monetary Union, see M. Markakis, *Accountability in the Economic and Monetary Union: Foundations, Policy, and Governance*, Oxford, 2020, and the earlier O. Porchia (ed.), Governance *economica europea*, Naples, 2015.

[51] If a State does not fulfil these conditions, it is referred to having a "derogation". This status is periodically re-examined to assess whether the conditions for the derogation to be ended apply (Article 140 TFEU).

[52] Examples are the United Kingdom, then an EU Member State, and Denmark, which fulfilled the convergence criteria but exerted their right to "opt out" of the euro, as set out in Protocols 15 and 16 attached to the TFEU.

the Member States – are far from uncommon in the European integration process. By avoiding the need for overly rigid choices between competing models in particularly sensitive areas, they enable pioneering States to advance significantly in the integration process, often to be joined at a later stage by Member States that were initially more cautious or reluctant to embrace such developments.[53]

Another feature that distinguishes the EU's monetary competence from the more complete institutional framework of state organisations is that it is not flanked by economic policy powers of similar breadth and effectiveness (taxation, public spending, public investments, welfare). Although this field is complementary to monetary policy and is indeed addressed alongside it in the Treaties (Articles 119–144 TFEU), it lacks a genuine European governance structure, as the Union holds only a limited competence to coordinate national economic policies (Article 2(3) TFEU). In other words, macroeconomic policies remain almost entirely within national hands: Member States are merely required to exercise their competences in a manner that does not obstruct the achievement of the Union's objectives (for example, the prohibition of excessive public deficits or unsound fiscal practices) and in accordance with the general orientations laid down by the Council (which typically include a general assessment of the Union's economy followed by Member-State-specific recommendations concerning their economic, fiscal, and labour policies). The Council, as the EU institution representing the Member States, also bears responsibility for monitoring Member States' compliance with these recommendations in the exercise of their national competences.

It is with this somewhat asymmetric and truncated structure that the Union has had to operate over the past two decades, often resulting in coordination problems among the various aspects of those policies, as well as difficulties in responding swiftly and coherently to economic shocks. However, as we have seen, this situation is an evolving one. The inability of the Union to define, in positive terms, appropriate economic and fiscal policies, combined with the weak oversight exercised by the Council – whose guidelines have rarely led to substantial changes in national policies – ultimately jeopardised the stability of the Union's monetary system during the 2008 financial crisis. This, in turn, prompted the Union to strengthen its powers through a series of initiatives: for instance, under the so-called Six Pack, Member States agreed to progressively reduce their debt-to-GDP ratio whenever it exceeded 60%,[54] failing which the European Commission may initiate infringement proceedings (Article 258 TFEU); the European Stability Mechanism (ESM) was established to provide, under certain conditions, financial assistance to euro-area States already in, or at risk of entering, severe financial distress[55]; the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG or Fiscal Compact) – an instrument of international law – requires contracting States to introduce a binding balanced-budget rule into their domestic law, preferably of constitutional rank;[56] Regulations 472 and 473 of 2013 established common rules for monitoring and assessing national draft budgets and for correcting excessive deficits;[57] national banking systems were placed under

[53] Differentiated application of EU law was institutionalised by the 1999 Amsterdam Treaty through the so-called enhanced cooperation and is now provided for in Article 20 TEU. This mechanism allows a group of Member States (at least nine) to pursue among themselves – yet within the EU framework and in full compliance with it (the subject matter of the cooperation must fall within the limits of EU competences but may not concern areas of exclusive EU competence; it must comply with all other treaty provisions; it must not prejudice the internal market, create obstacles or discrimination, etc. (Article 326(2) TFEU)) – a Treaty objective that cannot, for the time being, be achieved by the Union as a whole due to the absence of a majority in favour of it in the Council. This instrument has been used in the field of the law applicable to divorce and legal separation (Council Regulation (EU) No 1259/2010 of 20 December 2010, OJ L 343, 29 December 2010), for the establishment of a unitary patent protection system among 25 Member States (Regulations (EU) No 1257/2012 and 1260/2012 of the European Parliament and of the Council of 17 December 2012, OJ L 361, 31 December 2012), as well as for the creation of the European Public Prosecutor's Office, empowered to identify, investigate and prosecute the perpetrators of criminal offences affecting the Union's financial interests and their accomplices (Council Regulation (EU) 2017/1939 of 12 October 2017, OJ L 283, 31 October 2017). The EU legal order also recognises other forms of differentiated application of EU law. In addition to what was noted in the previous footnote concerning the United Kingdom and Denmark, one may recall, for example, Protocol No 30, which subjected to specific conditions the application of the Charter of Fundamental Rights (when it became legally binding under the 2009 Lisbon Treaty) to Poland and the United Kingdom. Unlike enhanced cooperation, these forms of differentiated application allow a Member State—by virtue of an opt-out granted with the agreement of the others—to exempt itself from the application of EU law. However, the Court of Justice has denied the truly derogatory scope of this latter protocol, noting that its own preamble acknowledges that Article 6 TEU requires the Charter to be applied and interpreted by the Polish courts strictly in accordance with the explanations attached to the Charter itself (ECJ, 24 June 2019, Case C-619/18, European Commission v Poland, ECLI:EU:C:2019:531, para. 53). For a detailed analysis of the various forms of differentiated integration, see A. Miglio, *Integrazione differenziata e principi strutturali dell'Unione europea*, Turin, 2020.

[54] These are Council Regulations (EU) Nos 1173, 1174, 1175, 1176 and 1177 of 16 November 2011 on budgetary surveillance in the euro area, as well as Council Directive 2011/85/EU of 8 November 2011 on requirements for the budgetary frameworks of the Member States, all published in OJ L 306, 23 November 2011.

[55] For an in-depth analysis of the international treaty which set up the European Stability Mechanism (2 February 2012), see www.ecb.europa.eu/pub/pdf/other/art2_mb201107en_pp71-84en.pdf. In 2021, 19 of the Eurozone States adopted a new agreement, known as the Single Resolution Fund, to further reinforce the ESM's crisis-prevention powers. Italy's non-ratification of this agreement is, however, still holding up its entry into force.

[56] The treaty was approved by the European Council on 30 January 2012, signed on 2 March 2012 by all EU Member States (with the exception of the United Kingdom and the Czech Republic) and came into force on 1 January 2013.

[57] See *GUUE* L 140, 27 May 2013.

a European supervisory framework.[58] Finally, in response to the economic crises that have followed since 2020 (Covid-19, the war in Ukraine, inflation), the *Next Generation EU* programme has contributed – through substantial loans, for the first time raised at the level of the Union and entered in the EU budget – to supporting and protecting the economies of the Member States. [59]

Although these instruments undoubtedly represent a step forward, they nevertheless result in interventions that remain overly partial, fragmentary, and often intergovernmental in nature. With the exception of *Next Generation EU*, the supranational EU institutions – namely the European Commission and the European Parliament – continue to play only a marginal role. It is therefore unsurprising that the former President of the ECB, Mario Draghi, recently underlined, under the banner of "pragmatic Europeanism", the need for further advances in EU integration, including precisely in the economic and monetary sphere, so as to overcome the tension between, on the one hand, the requirement under Article 125 TFEU that "the Union […] or a Member State shall not be liable for or assume the commitments" of a (another) Member State's central governmental, regional, local or other public bodies, and, on the other, the possibility under Article 122 TFEU of adopting solidarity measures in favour of Member States facing economic difficulties. [60]

Lastly, foreign and defence policy has traditionally constituted one of the most significant bastions of state authority, and specifically of the powers of the central government in federal and confederal systems. The Union's capacity to act in these fields was introduced only with the 1993 Maastricht Treaty, and even today is exercised through the intergovernmental method – which most closely resembles that generally used in international organisations. Decision-making power lies in the hands of the EU institutions representing the Member States, namely the European Council and the Council, while the supranational institutions (European Parliament, European Commission, Court of Justice) play only a relatively marginal role. Similarly, the voting method is, as a rule, unanimity or consensus, rather than qualified-majority voting generally used in the EU system. Finally, decisions in these areas – classified as non-legislative acts and as not producing legal effects vis-à-vis third parties – fall outside the judicial review of the Court of Justice, save for individual restrictive measures (sanctions imposed on natural or legal persons).

But it is not only procedures which distinguish the Common Foreign and Security Policy (CFSP) from the EU's more traditional spheres of action. Compared with various aspects and achievements of the EU's external action more closely connected to the functioning of the internal market and the customs union (for example, the conclusion of trade agreements such as the recent one with Mercosur, which falls within the Union's exclusive competences) or to other common policies (such as international relations in the fields of transport, energy, the environment, agriculture, development cooperation, etc.), the Union's foreign policy in the strict sense may appear, in certain respects, incomplete or unfinished. Although it has progressively developed its own institutional structure, bringing it closer to state models – through the creation of a High Representative for Foreign Affairs and Security Policy, effectively an EU foreign minister, assisted by the European External Action Service (EEAS), which performs functions akin to those of a foreign affairs ministry[61] – it does not seem to have acquired genuine autonomy. Through instruments such as decisions establishing the Union's position on a given international situation[62] or adopting operational measures such as the deployment of military training missions to third countries, [63] this policy remains largely oriented toward coordinating Member States' national foreign policies and/or facilitating their concertation, with a view to achieving "an ever-increasing degree of convergence of the actions of the Member States" and "strengthening and developing their mutual political solidarity" (Article 24 TEU). It therefore seems persuasive to accept the view put forward by leading scholarship that the CFSP can hardly yet be regarded as a genuine common policy.[64] This results not only from the

58 The European System of Financial Supervision (ESFS) was established by European Parliament and Council Regulation 1092/2010 of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board, *GUUE* L 331,15 December 2010, last amended in 2019, *GUUE* L 334, 27 December 2019.

59 Council Decision 2020/2053 of 14 December 2020 relating to the EU system of own resources, *GUUE* L 424, 15 December 2020; Council Regulation 2020/2094, 14 December 2020 which set up a European Union economic recovery tool in the wake of the Covid-19 crisis (*GUUE* L 433, 22 December 2020); European Parliament and Council Regulation 2021/241, 12 February 2021 which set up the recovery and resilience fund (*GUUE* L 57, 18 February 2021). For a scholarly commentary, see L. Calzolari, F. Costamagna, *La riforma del bilancio e la creazione di SURE e Next Generation EU*, in P. Manzini, M. Vellano, *Unione europea 2020* cit., p. 169 ff.

60 See Mario Draghi, "*L'Europa tra oggi e domani*,"speech of 22 August 2025: https://www.ansa.it/documents/1755878141437_Intervento.pdf.

61 The EEAS notably manages the EU diplomatic representations (called "delegations") to third countries and international organisations.

62 Where such positions are adopted, Member States are required to align their national policies accordingly and to uphold them within the international organisations and conferences in which they participate (Art. 29 and 34, par. 1, TEU).

63 In this case, too, Member States' positions and actions must accord with these (Art. 28, par. 2, TEU).

64 See R. Adam, A. Tizzano*, Manuale di diritto dell'Unione europea*, cited above, p. 880.

rigidity of the decision-making process – particularly the continued predominance of unanimity[65] (as unfortunately illustrated, at the time of writing, by the Union's persistent difficulties in defining a clear and resolute approach to the situation in the Gaza Strip) – but more fundamentally from the very design and appoach of the relevant treaty provisions, which repeatedly address the Member States as the true holders of their foreign policies.

While foreign and defence policy therefore tends to appear, to use a well-known expression from French constitutional practice, as one of the last *domaines réservés* of state sovereignty – and thus not easily accommodated within a *sui generis* organisation such as the Union – this does not exclude the possibility that the Union may strengthen its powers in this area in the future. European integration has already demonstrated itself to be a dynamic process, whose outcome is difficult to predict, and which is marked by both setbacks and unexpected accelerations. It is therefore not surprising that an increasingly challenging international context has triggered – and will likely continue to generate – innovative impulses in this field. In that regard, suffice it to note that, following Russia's aggression in February 2022 and for the first time in its history, the European Union used specific CFSP funds to finance the supply of lethal weapons to a third country under attack (Ukraine)[66] – thus marking a significant evolution in this policy, one that few could have imagined even a few years earlier.

This cursory examination of these three examples helps explain why the Union's acquisition of a certain degree of competence – variable and evolving – in areas traditionally at the heart of state sovereignty (currency, taxation, budgetary policy, foreign policy, defence, etc.) has led some scholars to refer to a form of "reverse European federalism." [67] Whereas in classical federal systems these matters are typically among the first to be allocated to the central level, with more sector-specific or technical fields being assigned only at a later stage, the European Union, by contrast, was entrusted with the latter first and only subsequently, and progressively, with those more typically "federal" competences.

5 The EU institutional system and its legislative process

As already made clear in the seminal judgments in *Van Gend en Loos* and *Costa v ENEL* in the 1960s, the European Communities – and today the Union as well – are endowed "with institutions invested with sovereign powers to be exercised both vis-à-vis the Member States and their nationals." The existence of a structured and permanent institutional framework – comprising the European Council, the Council, the European Parliament, the European Commission, the Court of Justice, the Court of Auditors and the European Central Bank (Article 13 TEU) – which, in compliance with the Treaties, adopts acts binding upon the Member States and their citizens, brings the Union's system closer to that of federal states than to confederal models. Unlike the former, which are characterised by permanent institutions exercising their powers (legislative, executive and judicial) in accordance with a federal constitution, confederal legal models typically rely on a less developed institutional structure, with decision-making mechanisms essentially based on cooperation among representatives of the participating states. Also when compared with the prevailing models found in international organisations, the Union's institutional architecture stands out for its higher degree of maturity and complexity, combining intergovernmental and supranational bodies endowed with distinct and extensive legislative, executive and judicial powers.[68]

The EU is also closer to state models as far as the nature and volume of its normative output is concerned. Within the limits of the competences conferred upon it by the Treaties, it possesses a genuine legislative power – as expressly provided for in Articles 14 and 16 TEU – exercised, in principle, jointly by the European Parliament and the Council. Each year, this power results in the passing of several hundred of legislative acts and thousands of delegated and implementing acts which – as already noted – have a significant impact on national legal orders. Lastly, it is noteworthy that relations among the EU institutions (and between them and the Member States) are governed

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[65] The fact that the Treaty's relevant articles provides that when Member States decide to abstain – while this does not block unanimity – they can make a formal declaration of their desire not to be bound by the decision at issue, confirms the strongly intergovernmental nature of the CFSP. Those abstaining will not be bound by the consequent obligations (article 31, paragraph 1, TEU). In the current challenging international context which requires rapid responses, it is interesting to note that the issue of overcoming the foreign policy's unanimity rule was mentioned by the President of the European Commission, Ursula von der Leyen, in her last State of the Union speech at the European Parliament on 10 September 2025: "And I believe that we need to move to qualified majority in some areas, for example in foreign policy. It is time to break free from the shackles of unanimity." The speech is available on https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_25_2053.

[66] On the use of this financial instrument – the "European Peace Facility" – to support Ukraine's defence from the Russian invasion, see, https://www.consilium.europa.eu/it/policies/european-peace-facility/

[67] The expression is from V. Constantinesco's in *Europe fédérale ou fédération d'Etats-nations,* cited above, p. 128 in relation to CFSP.

[68] See R. Baratta in *Il sistema istituzionale dell'Unione europea*, Milan, 2022, p. 9 ff.

by the Treaties through principles largely inspired by federal systems, such as the principle of sincere cooperation laid down in Articles 4(3) TEU ("the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties…") and 13(2) TEU ("the institutions shall practice mutual sincere cooperation"),[69] as well as the principle of subsidiarity, discussed above.

Beyond these similarities and differences, the composition and functions of the individual EU institutions, as well as the interinstitutional relationships between them, are governed by a distinct underlying logic – one that is indeed autonomous and of a new kind – when compared with other state or international models. This logic reflects the continuous search for a balance between the intergovernmental and supranational dimensions that has characterised the European integration process since its inception. Thus, institutions that are independent from the Member States (the European Commission, the Court of Justice, the Court of Auditors, and the European Central Bank—the members of the European Parliament being, moreover, organized into different groups according to political affiliation rather than nationality) and are entrusted with acting in the interest of the Union coexist with, and are complemented by, institutions of an intergovernmental composition that represent the diverse national interests and play a role of primary importance (the European Council, composed of the Heads of State or Government of the Member States;[70] and the Council, composed of their ministers, whose configuration varies depending on the subject matter under discussion: ministers of agriculture for agricultural matters, ministers of transport for transport policy, and so forth) – in ways that, to a large extent, resemble the systems of international organisations or confederal states. At the same time, however, further confirmation that the Union's system does not easily fit within any single model lies in the fact that the European Council includes among its members the President of the European Commission, thereby ensuring a degree of balance and continuity in decision-making and action between intergovernmental and supranational institutions.[71] Similarly, the High Representative of the Union for Foreign Affairs and Security Policy, while being a member – and indeed a Vice-President – of the European Commission, acts in conjunction with the Council and chairs its meetings in the "Foreign Affairs" configuration (composed of the foreign ministers of the Member States)

With regard to the appointment of the members of the aforementioned institutions, whereas the European Parliament is directly elected by Union citizens, the European Council (Heads of State or Government) and the Council (their respective ministers) reflect the choices of Member States' citizens only indirectly. Candidates for positions within the European Commission, the Court of Justice, the European Central Bank, and the Court of Auditors are nominated by the Member States and appointed by institutions of an intergovernmental nature – namely, the European Council (for the Commission), the Council (for the European Central Bank and the Court of Auditors), or the representatives of the Member States (for the Court of Justice). This circumstance has often led to criticism concerning the excessive influence of Member States in the appointment of EU institutions, even when the latter are formally independent from the frome. In order to counterbalance such national influence, corrective mechanisms have nevertheless been introduced. The European Parliament is, for example, consulted in the appointment procedures for members of the European Central Bank and the Court of Auditors. Over time, and following successive Treaty revisions, parliamentary oversight has become more pervasive with regard to the appointment of both the President and the members of the European Commission. These are now subjected to public hearing before the relevant parliamentary committees, which – if resulting in a negative assessment – may lead, and in several instances has led (including in the case of Italy), to the withdrawal of the candidate. Moreover, the appointment first of the President and subsequently of the College of Commissioners as a whole must be approved by the European Parliament, according to a procedure that in some respects resembles the vote of confidence that a government must obtain

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69 On the principle of sincere cooperation, see F. Casolari, *Leale* cooperazione, cited above. On this subject, also see the conclusios of Advocate-general Mazák, 8 May 2008, case C-203/07 P, *European Commission v Greece*, ECLI:EU:C:2008:270, point 83, where he spoke of "the existence of an enhanced obligation of good faith which is incumbent upon Member States of the European Union as regards their relations with one another and with the institutions of the European Union as a result of their membership of the EU. In the present case, such an obligation applied to the Hellenic Republic in its relations with the Commission and the partner States in the Abuja II project." This case related to a building in the Nigerian capital destined to be shared by the EU and several Member States to host their respective diplomatic delegations. On the use of this principle in federal systems, see H. Dumont, M. El Berhoumi, *Les formes juridiques* cit., p. 31. This principle also shows affinities with the principle of good faith in co-operation between states within international organisations.

70 The Treaty of Lisbon (2009) formally recognised the European Council as a fully-fledged EU institution, including it among the institutions listed in Article 13 TEU, thereby reinforcing the intergovernmental component within the Union's institutional framework.

71 However, pursuant to Article 235(1) TFEU, where the European Council acts by vote, the President of the European Commission does not take part in the vote, thereby attenuating the weight of the supranational component in both the composition and functioning of the European Council.

in certain parliamentary systems before formally taking office, [72] and in other respects mirrors the parliamentary approval required for the appointment of high public officials in systems often of a presidential nature (notably the confirmation power exercised by the United States Senate over members of the presidential cabinet or federal judges, or the *sabatina* procedure before the Brazilian Federal Senate required, for example, for appointments to high judiciary offices, oversight bodies, and regulatory agencies). Conversely, the European Commission may be subject to a motion of censure which, if adopted by a two-thirds majority of the votes cast and by a majority of the Members of the European Parliament, brings its mandate to an end.[73] In other words, it is politically accountable to the Parliament. As for candidates for the positions of judge and Advocate General at the Court of Justice of the European Union, they must undergo an interview before a dedicated panel of independent experts composed of former members of the Court itself and of supreme courts of the Member States.

The attribution, within the Treaties, of specific functions to one or another EU institution reflects the interests which those institutions embody. It is therefore with this in mind that, by way of illustration, the exercise of the legislative function within the Union will be examined. At least since the Treaty of Lisbon of 2009, this function displays certain structural features reminiscent of the model found in federal states. Legislative authority is, in fact, exercised jointly (the so-called ordinary legislative procedure) by the European Parliament, elected by universal suffrage of Union citizens, and the Council, which represents the interests of national governments. Similarly, federal parliaments are generally composed of two chambers representing different interests: one representing the national community as a whole (the House of Representatives in the United States; the *Bundestag* in Germany; the National Council in Switzerland; the *Câmara dos Deputados* in Brazil), and another representing the federated entities (the Senate in the United States; the *Bundesrat* in Germany; the Council of States in Switzerland; the *Senado Federal* in Brazil). Moreover, in a manner analogous to the Council within the Union system – where each Member State is represented – many federal systems provide for equal representation of each state in the chamber representing federated entities, irrespective of their demographic weight,[74] although exceptions do exist.[75] This does not mean, however, that demographic considerations are irrelevant in the functioning of the Council. The most commonly used voting method is, in fact, that of qualified majority voting, designed precisely to ensure that no legislative act may be adopted without clear support both from the Member States – at least 55% of them – and from the peoples of Europe – for acts to be passed, the supporting votes must represent at least 65% of the total EU population. There is, however, an important difference with respect to most modern federal systems.[76] Within the Union, the Council, as the “upper chamber” participating in the exercise of legislative authority, is not composed of members directly elected by Union citizens, but rather of delegates of national governments (namely, the minister responsible for the subject matter under discussion). In this respect, the system reflects an approach more firmly grounded in the centrality of the Member States and is thus closer to that of international organisations or confederations[77] – although in such models the relevant bodies typically possess far more limited, and not properly legislative, powers. Once again, then, what emerges is the fundamentally hybrid nature of the EU system, escaping traditional categorisations.

This specificity is also reflected in the respective weight of the European Parliament and the Council within the legislative procedure. On the one hand, the process of European integration has witnessed the progressive strengthening of the parliamentary institution, which today enjoys, in the majority of cases (approximately 90% of those in which the Treaties provide for the adoption of normative acts), a position of parity with the intergovernmental institution, namely the Council – thus giving rise to a form of perfect bicameralism or, in EU terminology, “co-decision.” The Treaty of Lisbon of 2009 formally recognized that both the legislative and budgetary functions are exercised

[72] This is the case, for example, in Germany, Italy, Israel, Portugal and Spain.

[73] It was precisely in order to avoid such a vote of no confidence that, in 1998, the European Commission, then chaired by Jacques Santer, tendered its resignation.

[74] By contrast, the number of Members of the European Parliament is degressively proportional to the population of the individual Member States (Article 14 TEU), with a minimum threshold of six seats (Luxembourg, Cyprus and Malta) and a maximum of ninety-six (Germany).

[75] As is the case, for example, in the United States, where each State is represented by two senators; in Brazil, where the Federal Senate is composed of three senators for each State or the Federal District; and in Switzerland, where each canton is represented by two members in the Council of States. By contrast, the German *Bundesra*t comprises between three and six representatives per Land, while the Indian *Rajya Sabha* ranges from one to thirty-one members per State. There are also mixed systems, such as that of the Mexican Senate, which combines equal representation of the federated entities (three members per State and for Mexico City) with an additional thirty-two members elected at national level under a proportional system.

[76] An exception in this regard is represented by Belgium, whose Senate is composed of fifty members appointed by the parliaments of the Communities and Regions, together with ten members co-opted by the Senate itself.

[77] Similarly, prior to their transformation into federal systems, the Congress of the Confederation of the American States and the *Tagsatzung* of the Swiss Confederation were composed of delegates of the States and of the cantons, respectively.

jointly by these two institutions (Articles 14 and 16 TEU):[78] under the ordinary legislative procedure, an act is therefore adopted only when the European Parliament and the Council reach agreement on its text. This marks a departure from many bicameral state systems, including those of federal states, in which the two chambers tend instead to perform partially differentiated roles.[79]

On the other hand, and in certain limited areas, the EU Treaties provide that legislative acts are to be adopted by the Council with the involvement of the European Parliament or, albeit less frequently, by the latter with the involvement of the Council. The existence of these so-called special legislative procedures, and in particular the attribution within them of a more prominent legislative role to the Council than to the European Parliament, is rooted in historical considerations. Under the original EEC Treaties, legislative authority was in fact vested exclusively in the Council, while the European Parliament was confined to a merely consultative role – a solution consistent with the original, predominantly intergovernmental and international character of the Community.[80] Under the current institutional framework, the special legislative procedure – under which the Council continues to act as the sole legislator – remains applicable in areas (such as taxation, foreign and defence policy, family law, and social security) that the Member States consider to pertain to the core of state sovereignty and/or to be strongly shaped by national choices and traditions, and as such too sensitive to be subject to full co-decision with the European Parliament.

The exercise of the legislative function, however, is not limited to a dialogue between the Council and the European Parliament; rather, it assumes more complex features, involving a plurality of additional actors at both supranational and national levels. Within this framework, the European Commission occupies a position that is undoubtedly highly distinctive when compared to other international and state models. As the institution responsible for promoting the general interest of the Union (Article 17(1) TEU), it is independent from the Member States[81] and endowed with particularly extensive prerogatives, ranging from monitoring the correct application of EU law – also through the power to bring infringement proceedings before the Court of Justice against a Member State that has failed to fulfil its obligations, as we will see below – to the management of the budget and the exercise of executive functions, such as negotiating international agreements on behalf of the Union or enforcing competition rules vis-à-vis economic operators (including, where appropriate, the imposition of pecuniary sanctions). With specific reference to the adoption of legislative acts, the European Commission holds the power of legislative initiative, which, save for rare exceptions, belongs to it exclusively. This prerogative enables the Commission to exert a particularly significant influence over the legislative process, as such a process cannot be initiated in the absence of a proposal from it. It is therefore the Commission that determines which issues are brought onto the legislative agenda and, where its proposal follows general political guidelines set by the European Council[82] or the European Parliament, how such orientations are to be translated into concrete legal proposals.[83] The concentration of such a power of initiative in the hands of a supranational body – independent from both the Member States and the other EU institutions, and thus insulated from overly national or partisan logics – constitutes a defining feature of the EU system, distinguishing it both from international systems and from many state models, where the power of legislative initiative is often shared between government and parliament.

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[78] On the strengthening of the role of the European Parliament as an element of "federalisation" of the EU system, see M. Croisat, J.L. Quermonne, *L'Europe et le fédéralisme*, Paris, 1999, p. 99 ff.

[79] In certain systems, such as those of Brazil, Italy and Switzerland, the two chambers enjoy identical legislative powers, so that every law must be adopted by both chambers with the same wording. In many systems, by contrast, the vote of one chamber prevails in the event of disagreement, generally that which represents the national community as a whole and/or is directly elected by the citizens (as, for example, in Canada, France, India and Spain), or at least some degree of differentiation is provided for (as, for example, in Germany, where the *Bundestag* prevails, except with regard to legislation directly affecting the competences of the Länder, over which the *Bundesrat* enjoys a right of veto). In some systems, moreover, one of the two chambers is entrusted with additional responsibilities (for example, powers of the Senate in matters of approval of appointments, as in Brazil, or of ratification of international treaties, as in the United States). On this topic, see Venice Commission, *Report on Bicameralism* (2024), available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2024)007-e .

[80] In this respect, it is also useful to recall that, within the ECSC, established in 1952, the decision-making function was instead entrusted to the High Authority (now the European Commission), that is, the institution independent of the Member States and acting solely in the common interest. Unlike the EEC Treaties of 1957, the ECSC – albeit in more limited sectors – adopted a fully supranational mode. See P. Fois's overview in *Dalla CECA all'Unione europea. Il declino della sovranazionalità*, in *Studi sull'integrazione europea*, 2006, n. 3, p. 479 ff.

[81] The Treaties require the members of the European Commission to be "completely independent", "neither seek[ing] nor taking] instructions from any Government or other institution, body, office or entity" (Article 17 (3) TEU).

[82] On the influence of the European Council in the legislative procedure, see R. Adam, A. Tizzano*, Manuale di diritto dell'Unione europea* cited above, p. 83 ff.

[83] As follows from Article 293 TFEU, the Commission's monopoly of legislative initiative is further strengthened in two respects. On the one hand, the Council may depart from the Commission's proposal only by acting unanimously, including in areas otherwise governed by qualified majority voting. On the other hand, the European Commission may amend its initial proposal at any stage of the procedure. Its significant influence over the legislative process is therefore exercised not only at the initial stage, but also throughout the negotiations leading to the adoption of the act, where it often plays a central role in identifying areas of convergence and possible compromises between the positions of the Council and the European Parliament.

Precisely because of the far-reaching nature of this competence – which has effectively enabled the European Commission to provide decisive impetus to the European integration process – it is not surprising that successive Treaty revisions have seen calls from various quarters to frame, in one way or another, the exercise of this power of proposal. Accordingly, the Treaties now provide that the preparation of a legislative proposal may be requested by the European Parliament, the Council, one third of the Member States, or European citizens themselves through the mechanism of the European Citizens' Initiative (ECI),[84] albeit without imposing any obligation on the Commission to act upon such requests. In addition, where a legislative proposal concerns matters that do not fall within the exclusive competence of the Union, it is transmitted to national parliaments for scrutiny of compliance with the principle of subsidiarity, as previously mentioned. In particular, if, within eight weeks of transmission, one third of national parliaments consider that the proposal does not comply with that principle,[85] the draft must be reviewed by the Commission (the so-called "yellow card" procedure), which must decide whether to maintain, amend, or withdraw it. Should the Commission decide to maintain the proposal, the Council, acting by a majority of 55% of its members, and the European Parliament, by a majority of votes cast, may definitively block it (the so-called "orange card" procedure).[86]

Lastly, two consultative bodies – the Economic and Social Committee (composed of representatives of workers' and employers' organisations and other interest groups) and the Committee of the Regions (composed of representatives of regional and local authorities) – are called upon to deliver opinions on legislative proposals. To ensure that the contribution of these latter is considered as fully as possible, the Commission frequently seeks the opinion of these bodies even where the Treaties do not impose such an obligation and/or takes their views duly into account although those opinions are not legally binding. Only once the Commission has gathered, and possibly incorporated into its proposal, the observations of these different actors does it transmit the proposal to the co-legislators – typically the European Parliament and the Council – which will examine it in accordance with the applicable legislative procedure. These complex linkage mechanisms between EU and national actors are thus aimed at strengthening the legitimacy of Union action by involving all the various components of the EU system: not only the EU institutions and the Member States, but also European citizens (through the ECI), national parliaments (through subsidiarity control), regional and local authorities (through the Committee of the Regions), and representatives of social partners and other socio-professional groups (through the Economic and Social Committee).

As regards the voting method used for the adoption of EU legislative acts, it has already been noted that it is generally based on qualified majority voting, which requires the fulfilment of two cumulative conditions: a majority of Member States (55%) representing of a majority of the EU population (65%). This distinguishes the Union system from most international organizations and confederal models, where decisions are generally taken unanimously or by consensus. In reality, the use of qualified majority voting is the result of a gradual evolution brought about by successive Treaty revisions which, from the Single European Act of 1986 onwards, progressively altered the original, strongly intergovernmental structure of the EEC – characterized by unanimity, consensus, and veto practices, including in cases where the Treaties formally allowed majority voting. But even following the Treaty of Lisbon of 2009, which further expanded the use of qualified majority voting in the EU decision-making system, unanimity continues to be required in a number of legislative areas which, not surprisingly, largely correspond to those in which the Treaties provide for the use of special legislative procedures, and in particular those that designate the Council as the sole EU legislator. These include, in particular, the system of own resources and the multiannual financial framework (Articles 311 and 312 TFEU); the language regime of the EU institutions (Article 342 TFEU); the harmonization of indirect taxation (Article 113 TFEU) or measures relating to social security and social protection (Article 153 TFEU); family law (Article 81 TFEU); the extension of the powers of the European Public Prosecutor's Office (Article 86 TFEU); and operational cooperation between law enforcement authorities (Articles 87 and 89 TFEU).

More generally, unanimity voting – or consensus in the case of the European Council (Article 15(4) TEU) – continues to apply to other types of decisions in areas that the Member States consider particularly important or

[84] Article 11(4) TEU requires that a European Citizens' Initiative be supported by at least one million citizens from a significant number of Member States. Only a limited number of initiatives (approximately ten) have reached this threshold and, of those, even fewer have prompted the European Commission to submit a legislative proposal. Among the rare examples is the proposal to revise the Drinking Water Directive, which partially reflected the *Right2Wate*r initiative, aimed at recognising access to water as a human right and excluding water services from liberalisation. That proposal was adopted in 2020.

[85] As regards draft acts relating to police cooperation or judicial cooperation in criminal matters, that threshold is reduced to one quarter of the votes.

[86] To date, the so-called "yellow card" procedure has been triggered three times, leading the European Commission to withdraw its proposal in one case, while the "orange card" procedure has never been used.

sensitive, whether by reason of their "constitutional" or institutional nature (for example, the establishment of the existence of a serious and persistent breach of common values by a Member State – Article 7 TEU; the determination of the number of members of the European Commission – Article 17 TEU; the accession of new countries to the Union – Article 49 TEU; or the conclusion of association agreements with third States – Article 218(8) TFEU), or because they relate to policies with a strong intergovernmental dimension, such as foreign and defence policy (Article 31 TEU).[87] Considering also the requirement of double unanimity for Treaty revision, as previously noted (Article 48 TEU), the introduction of significant substantive, structural, and constitutional changes to the EU system thus continues to be driven by the Member States through markedly intergovernmental decision-making methods.

If any single EU institution can be said to embody the other strand of the European construction – namely, its federal component – it is the Court of Justice of the European Union. This is so both in light of the functions it performs (which will be examined in this section) and of the impact of its case law on the EU system as a whole (addressed in the following section). As regards the first aspect, the Court of Justice of the European Union – now composed of the Court of Justice and the General Court, whose decisions may be appealed to the former – enjoys a very broad jurisdiction in matters of interpretation and review of the validity of acts of the EU institutions. This jurisdiction extends well beyond that of judicial bodies traditionally operating within the international legal system[88] and displays significant similarities with the administration of justice in domestic legal orders. Indeed, as the permanent judicial authority of the EU system, exercising compulsory jurisdiction on an exclusive basis in the areas assigned to it,[89] the Court of Justice is called upon not only – and not primarily – to resolve disputes between Member States (through infringement proceedings under Articles 258-260 TFEU) or between the EU institutions and their staff (Article 270 TFEU), that is, the types of disputes typically falling within the competence of international tribunals, but above all to rule on the rights and obligations of natural and legal persons as guaranteed within (and by) the Member States.[90] The broad and diverse competences of the Union frequently affect the legal situations of such individuals.[91] In particular, subject to certain conditions,[92] the Union legal system enables private parties to take action before the Court of Justice on matters relating to both compatibility with the Treaties of acts adopted by EU institutions (actions for annulment under Article 263(4) TFEU) and their failure to act (actions for failure to act under Article 265 TFEU), where such acts or omissions affect their legal sphere, including incidentally (Article 277 TFEU). Furthermore, again subject to certain conditions, the unlawfulness of such acts or omissions may lead the Court to establish the non-contractual liability of the Union for damage suffered by individuals as a result of the conduct of its institutions in the exercise of their functions (Articles 268 and 340(2) TFEU).

Such forms of judicial review may also be initiated by any EU institution – for instance, actions for annulment brought by the European Commission, the European Parliament, and/or the Council in order to ensure respect for their respective spheres of competence or to determine the appropriate legal basis for the adoption of an EU act (a matter which affects both the applicable legislative procedure, whether ordinary or special, and the respective powers of the Parliament and the Council)[93] – as well as by the Member States. In the latter case in particular, these

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[87] On this point,, see L. S. Rossi, *Da arma "atomica" ad arma "convenzionale". Reinterpretare l'articolo 7 TUE per neutralizzare la strategia di veto ungherese nella PESC,* in *Eurojus,* 2025, fascicolo 3, p. 99 ff., spec. p. 100.

[88] See, in this regard, already extensively A. Tizzano, *La Corte di giustizia delle Comunità europee*, Naples, 1967; R. Adam, A. Tizzano, *Manuale di Diritto dell'Unione europea* cit., p. 279 ff.

[89] The Court of Justice also has an advisory jurisdiction (Article 218(11) TFEU) concerning the conclusion of international agreements by the Union, which remains, however, ancillary to its core judicial functions. As regards the effects of such opinions, where the opinion is negative, the agreement may enter into force only if it is amended in accordance with the Court's indications. This occurred, for example, in relation to the Agreement on the European Economic Area (EEA), which, having been found incompatible with the Treaties in Opinion 1/91 of 14 December 1991 (ECLI:EU:C:1991:490), was subsequently held to be compatible (Opinion 1/92 of 10 April 1992, ECLI:EU:C:1992:189) following its amendment.

[90] See A. Arnull, *The European Union and its Court of Justice*, Oxford, 2005.

[91] As already highlighted by Prof. Monaco in 1958 (R. Monaco, *Struttura ed organi della Comunità*, in Unione italiana delle camere di commercio, industria e agricoltura (ed.), *Comunità economica europea. Ciclo di conversazioni per i Funzionari direttivi delle Camere di Commercio, Industria e Agricoltura*. Rome 9-19 April 1958, Milan, 1958, p. 60) disputes arising within the EU system concern inter-State conflicts only to a limited extent, more frequently involving inter-institutional disputes or disputes involving natural or legal persons.

[92] Article 263(4) TFEU reads: "Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures." Similarly, Article 265(3) TFEU states that: "Any natural or legal person may [...] complain to the Court that an institution, body, office or agency of the Union has failed to address to that person any act other than a recommendation or an opinion."

[93] To mention a recent example, on 20 August 2025, the European Parliament brought an action before the Court of Justice pursuant to Article 263 TFEU against the Council, seeking the annulment of Regulation (EU) 2025/1106 establishing the Security Action for Europe (SAFE) instrument (OJ L 2025/1106, 28 May 2025), that is, a mechanism designed to provide financial assistance to Member States for investments in the defence sector. The action is based on the alleged incorrect choice of legal basis, namely Article 122 TFEU, which confers decision-making powers exclusively on the Council. In particular, according to the Parliament, the SAFE instrument would not constitute an urgent measure intended to address exceptional emergency circumstances such as to justify recourse to that provision.

actions constitute an important guarantee for the Member States with regard to the proper exercise of the significant powers conferred upon the EU institutions.

In order furthermore to strengthen the review of the validity of acts of the EU institutions and, at the same time, to prevent divergences in their application across the various Member States – an essential requirement for any multi-level system – the Union legal order requires national courts at all levels to refer such assessment to the Court of Justice by way of the preliminary ruling procedure on validity (Article 267 TFEU) whenever, in the course of applying an EU act in domestic proceedings, they entertain doubts as to its compatibility with primary law. Such a reference entails the suspension of the national proceedings pending the delivery of the Court's judgment,[94] which is then notified to the referring court. As regards the effects of judgments declaring an act invalid, although formally addressed to the referring court, they constitute, for any other court –including those of other Member States – a sufficient ground for considering the act in question invalid for the purposes of the decision to be delivered.[95] Moreover, national authorities are required to refrain from applying the EU act declared invalid, and the EU institutions that adopted it are required to "take the necessary measures to comply with the judgment" (Article 266 TFEU).

Likewise, in order to ensure the unity and uniformity of the application of EU law,[96] the Court of Justice is empowered to assess the compatibility with primary law not only of acts adopted by the EU institutions but also of those of the Member States through the preliminary ruling procedure on interpretation (Article 267 TFEU), as is the case in many federal systems. [97] This provision establishes that where national courts, in applying EU law in domestic proceedings, entertain doubts as to its interpretation – including for the purpose of assessing the compatibility of national legislation with EU law – they may (where their decisions are subject to appeal) or must (where they act as courts of last instance) refer the matter to the Court of Justice, which provides the authoritative interpretation of EU law to be applied in the case at hand. Although Article 267 TFEU leaves it to national courts the (delicate) task of assessing, on the basis of the interpretation provided by the Court of Justice, the compatibility of national law with that of the Union, the practical operation of the mechanism has often led the Court to pronounce more directly on the issue, stating – according to a now well-established formula – whether the relevant provision of Union law "precludes or does not preclude" the application of the national measure at issue. This "alternative use" [98] of the preliminary ruling procedure on interpretation has significantly strengthened the instruments available to natural and legal persons to protect themselves against Member States – especially, their own State – which fail to apply, or apply only partially or incorrectly, EU law at the domestic level, thereby denying them the rights they derive from it.

Given that European integration relies on cooperation between EU institutions and the Member States, which are responsible for implementing EU acts within their domestic legal orders, the Treaties confer upon the Court of Justice the power to review compliance by Member States (including their governments, legislative and judicial authorities, central administrations, regional or local entities, as well as private bodies whose activities are controlled by the State) with the obligations incumbent upon them under EU law, through the infringement procedure laid down in Articles 258–260 TFEU. An infringement arises where a measure of the Union is not implemented fully or correctly at the national level, or where a Member State adopts or maintains a domestic measure that is incompatible with EU law. This mechanism for reviewing the conduct of Member States is, however, not available to natural or legal persons, but rather to the European Commission (Article 258 TFEU), as the institution independent from the Member States entrusted with ensuring compliance with Union law (Article 17 TEU), as well as to the Member States themselves (Article 259 TFEU). The latter possibility is, in practice, rare, as States tend to prefer to invite the Commission to initiate the procedure rather than engage in a legal dispute against another State. Before either the Commission or a Member State brings such an action before the Court of Justice, Articles 258 and 259 TFEU

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[94] However, where the request for a preliminary ruling is manifestly outside the Court's jurisdiction or is inadmissible, or where the question raised has already been resolved by a previous ruling or settled case-law, the Court tends instead to issue a reasoned order.

[95] CJEU 13 May1981, case 66/80, *International Chemical Corporation*, ECLI:EU:C:1981:102, point 13; ord. 8 November 2007, case C-421/06, *Fratelli Martini*, ECLI:EU:C:2007:662.

[96] And it is, in fact, for this same reason that certain federal systems (for example, Austria, Belgium and Germany), or more broadly highly decentralised systems (such as Italy and Spain), provide for forms of incidental review enabling ordinary courts to refer questions of constitutionality to the constitutional court, generally limited to the validity, rather than the interpretation, of norms of national or federal/regional law. The Belgian system, moreover, adopts terminology similar to that of EU law, referring to the possibility for courts to raise "preliminary questions" concerning federal norms or those of the federated entities. On the United States system and the role of the Supreme Court in reviewing the compatibility of State laws with federal law, see M. Cappelletti, M. Seccombe, J.H.H. Weiler (ed.), *Integration through Law. Europe and the American Federal Experience*, Berlin, 1985-88, vols 1– 5; G. D'Ignazio, *Il sistema costituzionale degli Stati Uniti d'America*, Milan, 2020.

[97] On the preliminary reference as an instrument for the protection of individual rights, in J. Alberti, G. De Cristofaro, Il *rinvio pregiudiziale come strumento di sviluppo degli ordinamenti*, Pisa, 2023, p. 3 ff.

[98] The expression is used in R. Adam, A. Tizzano*, Manuale di diritto dell'Unione europea* cit., p. 384.

provide for a preliminary pre-litigation phase, conducted by the Commission in the exercise of its aforementioned institutional role. This phase, based on an adversarial exchange between the Commission and the Member State concerned, is intended, on the one hand, to ascertain whether a breach of EU obligations has in fact occurred and to define the legal issues that may subsequently be referred to the Court, and, on the other hand, to seek an out-of-court settlement of the dispute. Only where this attempt fails may the Commission (or the Member States) bring the matter before the Court, which will then determine, by judgment, whether there has been an infringement of EU law. Where the Member State fails to comply with the Court's ruling, the Commission may, pursuant to Article 260(2) TFEU, bring the case once again before the Court of Justice[99] in order to request the imposition on that State – now in a situation of repeated infringement – of a financial penalty (a lump sum and/or a periodic penalty payment), the amount of which is proposed by the Commission in light of the circumstances of the case (such as the seriousness and duration of the infringement).[100]

Endowed with powers unprecedented in the landscape of supranational judicial bodies, the Court of Justice has not fallen short of expectations.[101] By interpreting with particular rigour its role as guarantor of the unity and uniformity of the Union's legal order, it has in fact made a unique contribution to the process of European integration, developing – often in the silence of the Treaties – essential principles for the proper functioning and effectiveness of the EU system as a whole. These principles shape some of its most fundamental and distinctive features: from the allocation of competences to the institutional balance, from the nature and effects of EU law to the protection of individual legal positions vis-à-vis both EU institutions and the authorities of the Member States, to mention but a few examples. Scholarly literature has therefore not hesitated to speak of a "constitutionalisation" or "federalisation" of the EU system brought about precisely by the case law of the Court of Justice.[102] Regardless of the most appropriate terminology to describe the impact of the Court's jurisprudence – and, as already noted, the importance of such terminological questions and classifications should not be overstated – it can reasonably be asserted that, without this contribution, the Union's system would today present a markedly different, and certainly less integrated, shape.

(Segue: paragrafi 6-8).

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[99] The so-called "double infringement" procedure is, in substance, analogous to that described in the main text with regard to the initial infringement procedure, likewise consisting of a pre-litigation phase and a subsequent, possible contentious phase. In this case, however, the pre-litigation phase is shorter, due to the absence of one of the steps characterising the first procedure, namely the so-called reasoned opinion.

[100] With a view to strengthening the deterrent effect of this procedure, the Treaty of Lisbon (2009) introduced the possibility of requesting the application of such financial sanctions already at the stage of the initial infringement procedure, but only where the infringement concerns the failure to notify the European Commission of national measures transposing a directive adopted under the ordinary legislative procedure (Article 260(3) TFEU).

[101] The expression is used in R. Adam, A. Tizzano, *Manuale di Diritto dell'Unione europea*, Turin, 2025, p. 222.

[102] In this sense, see G. F. Mancini, *La nascita di una Costituzione per l'Europa* cit., p. 39 ss. and the authors cited in this work, as well as R. Baratta, *Il sistema istituzionale* cit., p. 10 ff.

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