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The originality (and complexity) of the European Union's legal system between international models and state experiences - Part II

L'originalità (e la complessità) del sistema giuridico dell'Unione europea tra modelli internazionali ed esperienze statali - Parte II

A originalidade (e a complexidade) do sistema jurídico da União Europeia entre modelos internacionais e experiências estatais - Parte II

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

Serena Crespi * Università degli Studi Milano-Bicocca, Milano MI, Itália

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Editores-chefes
Katherinne de Macêdo Maciel Mihaliuc
Universidade de Fortaleza, Fortaleza, Ceará, Brasil
katherinne@unifor.br

Sidney Soares Filho
Universidade de Fortaleza, Fortaleza, Ceará, Brasil
sidney@unifor.br

Editor Responsável
Sidney Soares Filho
Universidade de Fortaleza, Fortaleza, Ceará, Brasil
sidney@unifor.br

Autor
Serena Crespi
serena.crespi@unimib.it
https://orcid.org/0000-0002-3759-3036

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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.*

* Associate professor of European Union Law at the Law Faculty of Università degli Studi Milano-Bicocca (serena.crespi@unimib.it). This article is the English translation of a work originally published in Italian, in two parts, in Pensar, 2025, n.30, and 2026, n. 31.

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.*

6 Structural characteristics of the EU's legal system

As already anticipated, the case law of the Court of Justice has had a particularly significant impact on the legal system of the European Union, shaping it as a novel and, to a large extent, self-contained legal order, autonomous both from international law and from the domestic legal systems of the Member States. This is evident, first and foremost, in the capacity of EU rules to address individuals directly, conferring upon them rights and obligations without the need for mediation through national law, and which they may invoke before a court, whether national or EU, depending on the circumstances. Whereas international rules, or those of confederal models, generally produce effects only vis-à-vis States and are regarded as external to domestic legal systems – thus requiring incorporation into national law in order to affect individual legal positions – rules adopted by EU institutions, much like those emanating from the central level in multi-level systems, form part of the national legal order of the Member States. And indeed, Article 288 TFEU, in listing the acts that EU institutions may adopt, attributes to one such act – the regulation – the capacity to be directly applicable within the Member States without the need for national implementing measures.[1] Such measures would, in fact, be incompatible with EU law – and would therefore constitute an infringement liable to be challenged before the Court of Justice, as explained in the previous section – since the adoption of implementing acts for regulations would undermine their direct applicability, as well as their simultaneous and uniform application throughout the Union.[2]

The fact that the Treaties expressly attribute the characteristic of direct applicability only to regulations might, *a contrario*, have suggested that such a feature should be denied to all other sources of EU law, whether of primary law (Treaty provisions or the Charter of Fundamental Rights of the European Union), secondary law (provisions of directives[3] and decisions[4]), or international agreements concluded by the Union with third States or international organizations. This would have meant that, in such cases, the recognition of rights and obligations under EU law for individuals would have been conditional upon the adoption of national implementing measures by each Member State. Adopting an expansive interpretation – regarded by some as reflecting a federal logic[5] – of the Treaties, the

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1 A regulation is addressed not to a limited number of addressees, expressly identified or readily identifiable, but rather to one or more categories of addressees defined in abstract terms and as a whole. It is also binding in its entirety and, as noted in the main text, directly applicable (Article 288 TFEU)

2 CJEU, 7 February 1973, case 39/72, *European Commission v Italy*, ECLI:EU:C:1973:13, point 127; 27 May 1993, case C-290/91, *Peter*, ECLI:EU:C:1993:220.

3 A directive is a normative EU act which sets out the objectives to be achieved, while leaving Member States free to choose the national means and methods for attaining those objectives. Unlike regulations, directives presuppose, by their nature, a division of powers between the Union, which adopts the act, and the Member States, which are required, within a time-limit specified in the directive itself, to transpose it into their national legal systems in order for it to produce its effects. The fact that this instrument requires mediation through national law does not preclude certain provisions of a directive from producing direct effects within national legal systems, thereby enabling individuals to invoke before national courts obligations imposed on the Member State where the latter has failed to implement the directive or has done so incorrectly or incompletely. The recognition of direct effect thus constitutes a safeguard for individuals in the event of failure by Member States to transpose the directive at national level. In this sense, see the landmark judgment in CJEU, 4 December 1974, Case 41/74, *Yvonne van Duyn*, ECLI:EU:C:1974:133. Unlike Treaty provisions and regulations, however, EU case-law has limited the possibility for individuals to rely on the direct effect of directives to situations involving the State, since directives cannot of themselves impose obligations on other private parties. In this sense, see CJEU, 10 March 2005, Case C-235/03, *QDQ Media*, ECLI:EU:C:2005:147.

4 Decisions are primarily the instrument through which EU institutions give concrete effect to Treaty rules vis-à-vis individuals (for example, Commission decisions addressed to undertakings that infringe competition rules) or Member States (for example, Commission decisions addressed to Member States that breach the prohibition of State aid granted to one or more undertakings). While the former, being addressed to private parties, produce direct effects, decisions addressed to Member States produce such effects under the same conditions as directives, which are likewise addressed to them. In this sense, inter alia, CJEU, 6 October 1970, Case 9/70, *Grad*, ECLI:EU:C:1970:78; 12 December 1990, Joined Cases C-100/89 and C-101/89, *Peter Kaefer and Andrea Procacci*, ECLI:EU:C:1990:456; 10 November 1992, Case C-156/91, *Hansa Fleisch Ernst Mundt*, ECLI:EU:C:1992:423; 7 June 2007, Case C-80/06, *Carp*, ECLI:EU:C:2007:327. The Treaty of Lisbon (2009) has also introduced decisions of general application, which do not have specific addressees but are addressed to general and abstract categories (for example, decisions determining the configurations of the Council or decisions adopted by the Council and the European Council in the field of CFSP).

5 See E. Cannizzaro. *Il diritto dell'integrazione europea. L'ordinamento dell'Unione*, Turin, 2017, p. 289 ff.

Court of Justice, in the aforementioned *Van Gend en Loos* judgment, nevertheless held that, under certain conditions, even Treaty provisions – in that case, Article 12 EEC (now Article 30 TFEU), banning customs duties on imports and exports between Member States – confer rights upon individuals. In the case at hand, this concerned the right of the Dutch company Van Gend en Loos not to be subjected by its national authorities to customs duties on goods imported from Germany, and this even in the absence of national legislation implementing the prohibition laid down in Article 12 EEC (now Article 30 TFEU). In a legal order which, like that of the Union, recognises as "subjects […] not only the Member States but also their nationals," the Treaty is capable of conferring subjective rights upon individuals, and this "not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States, and upon the institutions" of the Union."[6] The international origins of Treaty provisions do not, however, allow to attribute this characteristic to every such provision. Taking this into account, the Court of Justice, in that same judgment, made the production of direct effects for natural and legal persons subject to the fulfilment of certain conditions by the provision in question – namely, that it be clear, precise, complete, and unconditional[7] – which have to be assessed on a case-by-case basis.

Subsequent EU case law has further extended the application of this principle, and of its conditions, to other sources of primary EU law, such as certain provisions of the Charter of Fundamental Rights,[8] as well as to directives[9] and decisions.[10] In doing so, it has transformed the capacity of EU law to create rights for individuals into a pervasive feature of the system, thereby both enhancing the position of individuals and further strengthening the Union's "federal" strand. Through this interpretative development, the Court has played a role whose fundamental importance in giving operational substance to the principle – already embedded in the founding Treaties – that European integration is not merely a form of cooperation between Member States, but a process that directly concerns natural and legal persons, can scarcely be denied. In other words, it has transformed the freedoms enshrined in the Treaties into genuine rights (and obligations) that individuals may directly invoke in fields such as, inter alia, free movement, non-discrimination, equal pay between men and women, free competition, environmental protection, and health and safety at work.

The fact that EU law is integrated into the legal systems of the Member States inherently places the norms of these two legal orders in a situation of constant interaction and potential conflict.[11] It was precisely in order to govern such potential conflicts that the Court of Justice, in the absence of express provisions in the founding Treaties, developed – in the already mentioned judgment in *Costa v ENEL* – the principle of the primacy of EU law over the law of the Member States. This principle, which constitutes a structural feature also found in many multi-level systems, especially federal ones,[12] is aimed at ensuring the coherence and unity of the system as a whole. The opportunity

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6 Case 26/62, *Van Gend en Loos*, cited above.

7 The prohibition laid down in Article 12 EEC/30 TFEU, like all obligations of a negative nature, possesses these three characteristics, since prohibitions are, by their nature, clear and precise and do not require the adoption of further implementing measures at national or EU level.

8 See, for example, CJEU, 19 January 2010, case C-555/07, *Kücükdeveci*, ECLI:EU:C:2010:21, as regards the principle of non-discrimination on grounds of age; 3 October 2023, Case C-583/11, , *Inuit*, ECLI:EU:C:2013:625, as regards Article 47 of the Charter (right to an effective remedy and to a fair trial); 17 April 2028, Case C-414/16, *Vera Egenberger*, ECLI:EU:C:2018:257, as regards Articles 21 (non-discrimination) and 47 of the Charter. By contrast, in 15 January 2014, Case C-176/12, *Association de médiation sociale*, ECLI:EU:C:2014:2, the Court held that Article 27 of the Charter (workers' right to information and consultation within the undertaking) does not have direct effect, since that provision provides that the right is to be guaranteed "in the cases and under the conditions provided for by Union law and national laws and practices", thereby lacking the condition of unconditionality.

9 See case law cited in footnote 105.

10 See case law cited in footnote 106.

11 As regards the integration between the EU system and national systems, see expressly the judgment in *Costa v ENEL*, cited above.

12 For example, Article VI of the United States Constitution provides that federal law is the supreme law of the land and that judges in every State are bound thereby (Supremacy Clause); Section 109 of the Australian Constitution provides that, where a law of a State is inconsistent with a law of the Commonwealth, the latter prevails; while Article 31 of the German Basic Law (*Grundgesetz*) and Article 49 of the Swiss Constitution establish the primacy of federal law over that of the Länder and the cantons, respectively. In other systems (Brazil, Canada), the principle of the supremacy of federal law has been developed through case-law and institutional practice in the absence of an express constitutional provision. By contrast, in the Belgian system, which is based on a rigid and parity-based allocation of competences whereby each level exercises its powers exclusively, no principle of federal supremacy applies. On these aspects, see E. Arcq, V. De Coorebyter, C. Istasse, *Fédéralisme et confédéralisme*, cited above, pp. 62–64; F. Amez, "Primauté au fédéral", available at: https://bplus.be/fr/articles/dossiers/primaute-au-federal (27 September 2024); M. Croisat and J.L. Quermonne,, *L'Europe et le fédéralisme*, cited above, p. 92; G. F. Mancini, *La nascita di una Costituzione per l'Europa*, cited above, p. 43; M. Moussa, "On sovereign bonds and marijuana: Comparing supremacy limits in the US and the EU", *Maastricht Journal of European and Comparative Law*, 2021, p. 834 ff.;L.F. Ribeiro, "Supremo Tribunal Federal e federalismo: antes e durante a pandemia", *Revista Direitos Fundamentais & Governança*, 2021, p. 163 ff. Cannizzaro expressly refers to a "federalist approach" of the Court of Justice in the development of the principle of primacy (E. Cannizzaro, *Il diritto dell'integrazione europea*, cited above, p. 289). This does not mean, however, that such a principle is entirely absent from international law, as there exist rules – particularly in treaties and customary law – which impose binding obligations on States that prevail over conflicting domestic rules, such as the principle *pacta sunt servanda* or the supremacy of fundamental international human rights norms over incompatible national laws. See, for example, Article 27 of the Vienna Convention on the Law of Treaties, which provides that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

for the Court to address this issue arose in the early 1960s, following a preliminary reference made by the *giudice conciliatore* of Milan concerning a conflict between the competition rules of the EEC Treaty and a subsequent Italian law nationalising the electricity supply undertaking (ENEL). Given that the Member States, "by creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity […], have limited their sovereign rights and have thus created a body of law which binds both their nationals and themselves," national legislative measures encroaching upon the sphere of competence of the Union must be regarded as devoid of any legal effect,[13] since the exercise of those competences precludes the adoption and maintenance of domestic measures incompatible with EU provisions.[14] To accept the contrary – namely, that Member States might allow a subsequent unilateral measure to prevail over a legal order they have freely accepted – would, in the Court's own words, "amount to a corresponding denial of the effectiveness of obligations undertaken unconditionally and irrevocably by Member States pursuant to the Treaty and would thus imperil the very foundations of the [Union]".[15] As further clarified by Declaration No. 17 on primacy annexed to the Treaties, this principle is rooted in the "specific nature" of the Union.

From this conception of primacy it follows that all EU norms prevail over all national provisions, irrespective of their rank – legislative, regulatory, administrative, or even constitutional[16] – and regardless of whether they predate or postdate the EU rule in question.[17] The adoption or maintenance of a conflicting national provision therefore constitutes a breach by the Member State of its obligations under EU law, which may, inter alia, be the subject of infringement proceedings. Where such a conflict arises in relation to an EU provision endowed with direct effect, national courts are required to disapply, of their own motion, any incompatible domestic measure, or even any measure liable to undermine the effective application of EU law at the national level,[18] and to do so without having "to request or await the prior setting aside of such provision by legislative or other constitutional means."[19] This obligation is not confined to the judiciary but extends to the national legal order as a whole, and thus also binds administrative authorities, since it would "be contradictory to rule that an individual may rely upon the provisions of a directive which fulfil the conditions defined above in proceedings before the national courts seeking an order against the administrative authorities, and yet to hold that those authorities are under no obligation to apply the provisions of the directive and refrain from applying provisions of national law which conflict with them."[20] The disapplication of national law incompatible with EU law does not, however, relieve the national legislature of the obligation to repeal or amend the conflicting domestic provision,[21] since the continued existence of such a rule can generate uncertainty for individuals as to their effective ability to benefit from the rights they derive directly from EU law.[22] It thus becomes clear how these two fundamental features of the Union legal order – direct effect and primacy – complement and reinforce one another, placing the individual at the centre of the system and enabling them to benefit fully from the protection conferred by EU law. Without primacy, direct effect alone would not suffice to confer effective rights upon individuals in Member States where conflicting or divergent national rules remained applicable.

It is thus not surprising that the Court of Justice has drawn from the principle of primacy all those consequences necessary to ensure the effective protection of individual rights, not hesitating to engage with particularly sensitive legal issues arising in the relationship between EU law and national legal systems. In *Lucchini*, for example, while acknowledging the importance of the principle of *res judicata*, the Court held that the referring court (in that case, an Italian court) was required to disregard Article 2909 of the Italian Civil Code, insofar as its application would have prevented the recovery of State aid granted in breach of the rules on the allocation of competences between the

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13 Case 6/64, *Costa v ENEL*, cited above, in particular the section concerning "the argument based on the obligation for the national court to apply domestic law". For a reconstruction of this principle, in addition to the doctrine cited in footnote 2 of this article, see also A. Arena, "Sul carattere 'assoluto' del primato del diritto dell'Unione europea", *Studi sull'integrazione europea*, 2018, p. 317 ff.

14 Case 106/77, 9 March 1978, *Simmenthal*, ECLI:EU:C:1978:49, para. 17

15 CJEU *Simmenthal*, cited above, point 18. These principles have been reiterated in CJEU, 8 September 2010, Case C-409/06, *Winner Wetten*, ECLI:EU:C:2010:503, point 61; 21 December 2021, Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *PM and a.*, EU:C:2021:1034, points 245 ff.; 22 February 2022, Case C-430/21, *RS*, ECLI:EU:C:2022:99, point 49 ff.

16 In this sense, with specific regard also to constitutional provisions, see CJEU, 17 December 1990, case 11/70, *Internationale Handelsgesellschaft*, ECLI:EU:C:1970:114, point 3; *PM and a.*, cited above, point 251; *RS*, cited above, point 51.

17 CJEU, 22 June 2010, Joined Cases C-188/10 and C-189/10, *Melki and Abdeli*, ECLI:EU:C:2010:363; 6 September 2012, Case C-18/11, *Philips Electronics UK*, ECLI:EU:C:2012:532.

18 CJEU, 9 June 1990, Case C-213/89, *Factortame e a.*, ECLI:EU:C:1990:257, point 20.

19 CJEU *Simmenthal* cited above, point 24. The principles set out in this latter judgement were reiterated by the CJEU in *Melki and Abdeli* cited above, point 43; 18 May 2021, Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *Asociaţia «Forumul Judec ă torilor din România*», ECLI:EU:C:2021:393, point 251.

20 CJEU, 22 June 1989, Case 103/88, *Fratelli Costanzo*, ECLI:EU:C:1989:256, point 31.

21 CJEU, *PM and a*, cited above, point 193.

22 CJEU 24 March 1998, Case 104/86, *European Commission v Italy*, ECLI:EU:C:1988:171, point 12.

Member States and the Union, given that only the European Commission – rather than a national appellate court, as had occurred in the case at hand – has the power to determine the compatibility of a national State aid measure with the internal market.[23] In *Taricco*, the Court held that Article 325(1) TFEU ("The Union and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union through measures […] which shall act as a deterrent […].") and paragraph 2 thereof ("Member States shall take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests.") required national courts – once again, in that case Italian courts – to disapply domestic rules on limitation periods in criminal proceedings concerning value added tax (VAT) offences, where such rules prevented the imposition of effective and deterrent penalties in a significant number of cases of serious fraud affecting the Union's financial interests and provided for shorter limitation periods than those applicable to comparable domestic offences.[24]

Moreover, the Court of Justice has found national procedural rules incompatible with EU law where they subjected the power of Member States' courts to review the compatibility of domestic provisions with EU law to certain conditions: for instance, by reserving such review to the (Italian) Constitutional Court;[25] by making the disapplication of national law conditional upon a prior reference for a preliminary ruling to the Court of Justice on the interpretation of the relevant EU provision;[26] by precluding national courts, under English law, from granting interim relief suspending the application of a national measure pending a determination of its incompatibility with EU law;[27] or, under Belgian law, by allowing such review only if invoked by the parties (and thus not on the court's own motion) and within a specified time limit.[28]

It is precisely because the Court of Justice has affirmed the effectiveness of EU law with such force that the need to guarantee an adequate level of protection of fundamental rights within the EU legal order itself has progressively emerged, including in the light of certain tensions with national systems. These aspects were, in fact, absent from the original framework, since the European Communities were initially conceived as pursuing essentially economic objectives, such as the establishment of a common market. It was therefore assumed that areas relating to fundamental rights would remain unaffected by EEC/EU law. This was all the more so given such matters were already governed both by national constitutions and by international instruments, such as the European Convention on Human Rights (ECHR), to which all the Member States were parties. It is interesting to note, in this respect, that this original approach bears some resemblance to the reasoning advanced by certain prominent American Founding Fathers, notably Alexander Hamilton and James Madison, who considered it unnecessary to include specific protections of individual rights in the federal Constitution – rights that were already protected under the constitutions of the federated States – given the limited powers conferred upon the central government. In other words, as Hamilton himself put it: "Why declare that things shall not be done which there is no power to do?". [29] Although, as is well known, a Bill of Rights was subsequently introduced through a series of constitutional amendments, it was not until well into the twentieth century that the United States Supreme Court began to engage systematically with such rights, for example through a number of landmark rulings on freedom of speech.[30]

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23 See CJEU, 18 July 2007, Case C-119/05, *Lucchini*, ECLI:EU:C:2007:434. It should be noted, however, that in CJEU, 10 July 2014, Case C-213/13, *Impresa Pizzarotti*, ECLI:EU:C:2014:2067, the Court held that the situation addressed in *Lucchini* was "a highly specific situation, in which the matters at issue were principles governing the division of powers between the Member States and the European Union in the area of State aid" (para. 61), so that EU law does not require a national court necessarily to disapply domestic procedural rules conferring res judicata effect on judicial decisions (paras 59–60), even where this would make it possible to remedy a national situation incompatible with EU law. For doctrinal analysis, including of further judgments in this line of case-law, see B. Gencarelli, "Alcune riflessioni conclusive sui rapporti tra diritto comunitario e atti nazionali definitivi", in F. Spitaleri (ed.), *L'incidenza del diritto comunitario e della CEDU sugli atti nazionali definitivi*, Milan, 2009, p. 113 ff.; A. Tizzano and B. Gencarelli, "Union Law and Final Decisions of National Courts in the Recent Case Law of the Court of Justice", in A. Arnull, C. Barnard, M. Dougan, E. Spaventa (eds.), *A Constitutional Order of States. Essays in EU Law in Honour of Alan Dashwood*, Oxford and Portland, 2011, p. 267 ff.

24 See case CJEU, 5 December 2017, Case C-42/17, *M.A.S. and M.B.*, ECLI:EU:C:2017:936, paras 51 ff. This is, however, without prejudice to situations in which such disapplication would entail a breach of the principle of legality of criminal offences and penalties as enshrined in Article 49 of the Charter of Fundamental Rights. On this delicate issue, see, inter alia, A. Tizzano, "Les relations entre juridictions en Europe", in K. Lenaerts, N. Piçarra, C. Farinhas, A. Marciano and F. Rolin (eds.), *Building the European Union: The Jurist's View of the Union's Evolution*, London, 2021, p. 223 ff.; M. Blanquet, "Droits fondamentaux – Pluralisme juridique – Double préjudicialité", in *Les grands arrêts de la Cour de justice de l'Union européenne. Droit constitutionnel et institutionnel de l'Union européenne*, Paris, 2023, p. 933 ff.

25 Case 106/77, *Simmenthal*, cited above.

26 Case C-555/07, *Kücükdeveci*, cited above.

27 Case C-213/89, *Factortame*, cited above.

28 CJEU, 14 December 1995, Case C-312/93, *Peterbroeck*, ECLI:EU:C:1995:437.

29 In opposing the inclusion of such guarantees in the federal Constitution, Alexander Hamilton stated: "Why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?" A. Hamilton, *Federalist No. 84*, in C. Rossiter (ed.), *The Federalist Papers*, New York, 2003, p. 513.

30 See, in this sense, M. Cappelletti, M. Seccombe and J. H. H. Weiler (eds.), *Integration through Law: Europe and the American Federal Experience*, cited above, p. 225; G. F. Mancini, *La nascita di una Costituzione per l'Europa*, cited above, p. 55.

Similalry, within the Union, notwithstanding the initial silence of the Treaties, the Court of Justice was soon called upon to address issues relating to fundamental rights. On the one hand, because the exercise by the European Communities of their competences inevitably intersected with – and impacted upon – civil and/or constitutional rights, particularly in cases where EU measures were challenged by individuals on the grounds of alleged violations of fundamental rights (such as freedom to conduct a business, the right to property, or the right to a fair trial). In a well-known case from 1969, for example, a German citizen argued that a Community scheme for the distribution of butter at reduced prices – intended primarily to facilitate the disposal of surpluses within the common market – violated his right to human dignity, as protected by his national constitution, since access to the scheme required the presentation of a nominative coupon.[31] On the other hand, the very impact of EU law on fundamental rights led certain constitutional courts – initially the German and subsequently the Italian constitutional courts,[32] followed over time by other supreme courts[33] – to assert that, while recognising in principle the primacy of Community law, they reserved the power to exercise constitutional review in order to oppose the application of EU rules in exceptional cases where such rules might infringe the fundamental constitutional principles of their respective legal orders. In other words, they thereby established – as put by a more recent judgment of the Italian Constitutional Court summarising that earlier line of case law from the 1970s – so-called "counter-limits" (*controlimiti*) to the penetration of EU law into the domestic legal system.[34] This form of review, conceived as a kind of safeguard clause or "filter", was justified precisely by the original absence, within the Community system, of an explicit competence in the field of fundamental rights.

Not least in order to avoid jeopardising the principle of primacy of Union law and to safeguard the autonomy of the Union legal order, the Court of Justice held in 1974 that "respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice"[35] and that "in safeguarding these rights the Court is bound to draw inspiration from constitutional traditions common to the Member States [and] international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories" (such as the ECHR).[36] General principles of EU law are understood as those principles to which the Court has accorded primary law status, equivalent to that of the Treaties, and which serve as standards for the validity and interpretation of EU rules. It is thus through this avenue that the Court of Justice progressively developed a catalogue of fundamental rights – including, inter alia, the right to a fair trial and to effective judicial protection, freedom of expression and information, the prohibition of torture or inhuman or degrading treatment, the principle of equality and non-discrimination, the protection of private life, the inviolability of the home, the principle of non-retroactivity in criminal law, legal professional privilege, and the right against self-incrimination. These rights were later incorporated into the Charter of Fundamental Rights of the European Union of 2000, which, following the Treaty of Lisbon of 2009, acquired the same legal value as the Treaties (Article 6(1) TEU). Article 51 of the Charter

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31 This refers to CJEU, 12 November 1969, Case 29/69, *Stauder*, ECLI:EU:C:1969:57.

32 Italian Constitutional Court, judgment No. 98 of 27 December 1965, *Acciaierie San Michele*, and subsequently judgment No. 183 of 27 December 1973, *Frontini*. As regards the German Federal Constitutional Court, see *Solange I* (29 May 1974), *Solange II* (22 October 1986), *Bananen II* (7 June 2000), and judgment of 15 December 2015 (2 BvR 2735/14). German case-law refers in particular to the so-called "eternity clause" under Article 79(3) of the Basic Law that is, those fundamental principles (human dignity, equality before the law, inviolability of the home, the federal structure of the State, etc.) which are not subject to amendment and therefore form part of the constitutional identity of that State.

33 Other constitutional courts have challenged the scope of the principle of the primacy of EU law from a more general perspective. See, for example, the judgments of the Slovak Constitutional Court (18 October 2005, Pl. ÚS 8/04); the Czech Constitutional Court (31 January 2012, Pl. ÚS 5/12); the Danish Supreme Court (6 December 2016, No. 15/2014); the Hungarian Constitutional Court (30 November 2016, No. 22/2016; 25 February 2020, No. 2/2019; 19 May 2020, No. 11/2020); the Romanian Constitutional Court (8 June 2021, No. 390/2021); and the Polish Constitutional Tribunal (7 October 2021, K 3/21; 11 December 2023, K 8/21). In critical terms regarding the recent tendency of the Italian Constitutional Court (see Judgment No. 181/2024 and, in the same vein, Judgment No. 269/2017) to assess the possible unlawfulness of national legislation on the ground of its incompatibility, inter alia, with EU principles – even where these have direct effect – in breach of the principles established by the Court of Justice in the 1970s in the *Simmenthal* judgment, whenever the legal issue is deemed to have a "constitutional dimension", see the contribution by R. Mastroianni, V. Capuano, *Primato del diritto dell'Unione europea e "tono costituzionale": le risposte della prassi*, in V. Capuano, C. Schepisi, *Primato del diritto dell'Unione europea*, cited above, p. 1 ff.; as well as those in the same special eddition by F. Ferraro, *I chiarimenti forniti dalla giurisprudenza costituzionale sul "tono costituzionale" e i nodi ancora da sciogliere*, p. 77 gg.; C. Schepisi, *Il primato del diritto dell'Unione nel nuovo orientamento della Corte Costituzionale e le possibili tensioni con il rinvio pregiudiziale*, p. 99 ff.; and L. Daniele, *Norma di legge incompatibile con norma dell'Unione direttamente efficace, tra disapplicazione e dichiarazione di incostituzionalità: una storia "vecchia" di quarant'anni*, p. 134 ff. On the subsequent similar orders of the Italian Constitutional Court in 2025 (Nos. 21/2025 and 31/2025), see, *ex multiis*, C. Amalfitano, "*Tono costituzionale": formalmente concicliante, sostanzialmente preoccupante. Brevi riflessioni a partire dalla sentenza costituzionale n. 31/2025*, in Rivista del contenzioso europeo, April 2025.

34 Italian Constitutional Court, judgment No. 238/2014, para. 3.2. On the *counter-limits* doctrine in the case law of the Italian Constitutional Court – which was introduced precisely in response to the original absence of fundamental rights protection within the EEC system - see R. Mastroianni, V. Capuano, *Primato del diritto dell'Unione europea e "tono costituzionale": le risposte della prassi*, in V. Capuano,C. Schepisi, *Primato del diritto dell'Unione europea*, cited above, p. 6.

35 Case 11/70, *Internationale Handelsgesellschaft*, cited above, para. 4.

36 CJEU, 14 May 1974, Case 4/73, *Nold*, ECLI:EU:C:1974:51, para. 13.

defines its scope of application, clarifying that the fundamental rights it enshrines apply only within the scope of EU law and thus constitute a standard of legality for acts and conduct of the EU institutions,[37] as well as for those of the Member States when they are implementing Union law – for instance, where EU law requires or authorises the adoption of national measures.[38] These limits to the application of the Charter recall, in some respects, those that existed in certain federal systems at an early stage of their development. Thus, before acquiring *erga omnes* effect following the Fourteenth Amendment of 1868 and the subsequent doctrine of incorporation developed by the Supreme Court,[39] the United States Bill of Rights bound only the federal government.[40] Similarly, and more recently, it was the Canadian Charter of Rights and Freedoms, adopted in 1982, which extended these protections to all public authorities in Canada, both federal and provincial.[41]

The progress achieved by the Union system in introducing and strengthening the protection of fundamental rights has undoubtedly reduced the scope for conflicts between EU law and national constitutional law, and thus the occasions for invoking counter-limits.[42] Indeed, limiting ourselves to the Italian context, such arguments have been raised only on a few occasions and upheld in a single case – the aforementioned *Taricco* litigation. According to the Italian Constitutional Court, the obligation imposed by the Court of Justice on national courts to disapply limitation periods applicable to offences affecting the Union's financial interests – on the ground that they were shorter than those applicable to comparable domestic offences and, given the duration of criminal proceedings in Italy, resulted in *de facto* impunity – violated the principle of legality in criminal matters enshrined in Article 25(2) of the Italian Constitution, which embodies "a supreme principle of the constitutional order, safeguarding the inviolable rights of the individual." This conflict was ultimately resolved by the Court of Justice, through interpretation, in its subsequent 2017 judgment,[43] in which it clarified that national courts are not required to comply with the obligation to disapply provisions of their criminal law where doing so would conflict with the principle of legality of offences and penalties – a principle also enshrined in Article 49 of the Charter and thus of fundamental importance both in the Union legal order and in national systems. Without indulging in undue optimism, this episode suggests that today, where genuine and legitimate concerns arise regarding the sensitivity of the legal issues at stake, counter-limits may function less as a source of conflict between legal orders than as an opportunity for dialogue and mutual accommodation between courts, in search of a pragmatic balance between shared objectives and national constitutional identities – an equilibrium that lies at the very heart of the integration process. It is thus the Union system itself which, through both procedural mechanisms – such as preliminary rulings – and substantive developments – such as the strengthening of fundamental rights protection through the adoption of the Charter – provides the tools necessary to identify points of convergence, and at times compromise, between the various interests involved,[44] thereby contributing to the emergence of a "European constitutional heritage" [45] nurtured and enriched by the reciprocal contributions of the EU and national legal systems.

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37 As regards the incompatibility of a directive, see, for example, CJEU, 8 April 2014, Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd and Kärntner Landesregierung*, ECLI:EU:C:2014:238; as regards the incompatibility of an international agreement, see Opinion 1/15 of 26 July 2017, ECLI:EU:C:2017:592, and Opinion 1/17 of 30 April 2019, ECLI:EU:C:2019:341, para. 162 ff.

38 On this latter aspect, see CJEU, 11 July 1985, Cases 60/84 and 61/84, *Cinéthèque SA and Others v Fédération nationale des cinémas français*, ECLI:EU:C:1985:329; 26 February 2013, Case C-617/10, *Åkerberg Fransson*, ECLI:EU:C:2013:105. The Explanations relating to Article 51 of the Charter further recall that "[a]s regards the Member States, it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law". From the applicability of the Charter to national measures implementing EU law it follows that, in the event of a conflict between provisions of national law and rights guaranteed by the Charter in a clear, precise and unconditional manner, the national court seised is under an obligation to ensure the full effectiveness of those rights by disapplying any conflicting provision of national law (see *Åkerberg Fransson*, cited above, para. 45; 11 September 2018, Case C-68/17, *IR v JQ*, ECLI:EU:C:2018:696, para. 71; 6 November 2018, Case C-684/16, *Max-Planck-Gesellschaft*, ECLI:EU:C:2018:874, para. 74). Where the Charter is not applicable, the Court has emphasised that the protection of fundamental rights relied upon is not thereby excluded, since the ECHR remains applicable (Case C-256/11, *Murat Dereci*, cited above, para. 72).

39 United States Supreme Court*, Gitlow v. New York, 268 U.S. 652 (1925*).

40 United States Supreme Court, *Barron v. Baltimore*, 32 U.S. 243 (1833)

41 Unlike the Canadian Bill of Rights of 1960, which applied only to federal legislation. Similarly, in the Australian, Mexican and Swiss systems, certain fundamental rights and freedoms were initially guaranteed only at the federal level, before their protection was subsequently extended to the federated entities.

42 This would also appear to apply to the counter-limit linked to constitutional identity, since the Treaty of Lisbon (2009) introduced Article 4(2) TEU, which requires the Union and its institutions to respect the "national identity [of the Member States], inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government."

43 Case C-42/17, *M.A.S. and M.B.*, cited above, paras 51–53 and 61. On the use of judicial dialogue between the Court of Justice and the Italian Constitutional Court in resolving such conflicts, see L. S. Rossi, "Il nuovo corso della Corte costituzionale italiana sui rapporti tra l'ordinamento dell'Unione europea: è davvero una questione di tono costituzionale?", *Federalismi.it*, No. 14/2025

44 A. Tizzano, "Corte e Corte di Giustizia", in *La Corte costituzionale compie cinquant'anni*, *Foro italiano*, vol. 129, October 2006, p. 351 ff.

45 The expression is from A. Tizzano's, *ibidem*, p. 351.

The foregoing considerations regarding the progressive strengthening of fundamental rights protection at the EU level appear all the more compelling when one considers that the "constitutional" dimension of the Union has been further reinforced through the introduction into the Treaties of the protection of common values. Following the amendments introduced by the Treaty of Lisbon of 2009, Article 2 TEU provides that "[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail." In reality, many of these principles and rights had already been recognised within the EU legal order through the case law of the Court of Justice. Drawing once again on the ECHR and on the constitutional traditions common to the Member States, the Court had in fact characterised many of them – from non-discrimination and equality to principles inherent in the concept of the rule of law, such as legality, legal certainty and the protection of legitimate expectations – as general principles of Union law[46]

As the case law interpreting Article 2 TEU has made clear, that provision "encompass values which are part of the European Union's very identity as a shared legal system"[47]and "which the Union is founded on".[48] Accordingly, compliance with those values constitutes a condition for accession to the Union (Article 49(1) TEU), and they must be respected both by the EU institutions and by the Member States since, as the Court has emphasised, "Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which [...] are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States."[49] On this basis, the Court of Justice has drawn particularly far-reaching consequences for national legal systems, holding, inter alia, that once they have joined the Union, Member States may not amend their domestic legal orders in a manner that entails a regression in the protection of the rule of law – for example, by undermining judicial independence or restricting effective judicial protection of rights conferred by EU law upon individuals – since compliance with the common values constitutes an obligation arising directly from the commitments undertaken by the Member States vis-à-vis one another and the Union itself.[50] Moreover, failure by Member States to comply with those shared values may entail specific legal consequences, including, in particular, the initiation of infringement proceedings by the European Commission, as well as the procedure provided for in Article 7 TEU, which is specifically designed to address the existence of a clear risk of a serious breach of those values and, where appropriate, to sanction such breaches – for example, by suspending certain rights of the Member State concerned, including its voting rights in the Council.[51] The inclusion in the Treaties of a specific framework also for the protection of common values has thus further enriched the EU legal order, reinforcing its character as a largely self-contained system more firmly anchored in the principles of modern democratic states.

7 European Union citizenship

European citizenship represents, in a certain sense, the ideal culmination of this – necessarily partial and selective – trajectory within the complexity of the Union system. This is so not only because citizenship has traditionally been regarded as one of the core prerogatives of state sovereignty, but also because it reflects a number of defining features of the EU legal order encountered at each stage of this journey: the evolutionary and innovative character of the European integration process; the hybrid nature of the system, which eludes traditional classifications between domestic legal orders and international law; its capacity to address individuals directly, conferring upon them rights

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46 On the progressive recognition and protection, in the case-law of the Court of Justice, of the common values of the Union -particularly the rule of law – as general principles of EU law, also derived from the ECHR and from the constitutional traditions common to the Member States, see R. Adam, A. Tizzano, *Manuale di diritto dell'Unione europea*, cited above, p. 434, and already L. Daniele, *Diritto dell'Unione europea*, Milan, 2014, p. 172 ff.

47 CJEU, Case C-156/21, 16 February 2022, *Hungary v Parliament and Council*, ECLI:EU:C:2022:97, paras 124, 127, 231 and 233; and 22 February 2022, Case C-157/21, *Poland v Parliament and Council*, ECLI:EU:C:2022:98, paras 145, 169 and 265

48 Opinion 2/13 of 18 December 2014, *Accession of the European Union to the ECHR*, ECLI:EU:C:2014:2454, paras 167-168.

49 Case C-156/21, *Hungary v Parliament and Council*, cited above, para. 232.

50 This principle was first set out in CJEU, 20 April 2021, Case C-896/19, *Repubblika*, ECLI:EU:C:2021:311, para. 63, with regard to respect for the rule of law in Malta. It was subsequently confirmed in further judgments, such as Case C-83/19, *Asociaţia "Forumul Judecătorilor din România"*, cited above, para. 162, concerning the rule of law in Romania.

51 For an analysis of the legal value of Article 2 TEU and of the mechanisms provided within the EU system to ensure its protection, see S. Crespi, "La protezione dello Stato di diritto nel sistema dell'Unione europea: cosa resta da fare?", *Eurojus*, 2024, No. 2, p. 326 ff., which also examines the use of the procedure under Article 7 TEU against Poland and Hungary.

independently, "over the heads" of the Member States; and the particularly far-reaching, structuring impact of the case law of the Court of Justice.

The introduction of Union citizenship into the Treaties by the Maastricht Treaty (1993) constitutes, indeed, a particularly original development of the EU system, one without real equivalent in other international or multi-level state systems. Such citizenship operates as a shared identity-building element of considerable significance, strengthening, on the one hand, the direct link between citizens and the Union – that is, their identification with a political community broader than the national one – and, on the other hand, European integration itself, as citizens of the Member States are, in principle, entitled to treatment in other Member States equivalent to that accorded by those States to their own nationals.[52] As the Court of Justice has recently observed, "the provisions relating to citizenship of the Union […] contribute to the implementation of the process of integration that is the raison d'être of the European Union itself and thus form an integral part of its constitutional framework."[53] It is therefore no coincidence that the principal provision governing EU citizenship – Article 9 TEU, according to which "every national of a Member State shall be a citizen of the Union" – is, following the revisions introduced by the Treaty of Lisbon of 2009, located in Title II of the TEU, entitled "Provisions on democratic principles," which further specifies that "every citizen shall have the right to participate in the democratic life of the Union" (Article 10(3) TEU).

Although, according to Article 9 TEU, Union citizenship "shall be additional to and not replace national citizenship" – a complementary nature which distinguishes it from state systems, including federal ones, [54] where citizenship is generally unitary[55] – it nevertheless confers rights deriving directly from the Union legal order, and thus independent of any particular Member State of nationality.[56] In this way, EU citizenship has enriched the legal position of individuals, extending it beyond the predominantly economic dimension that had characterised the integration process up to that point, by conferring, inter alia, the following rights: the right to move and reside freely within the territory of the Member States under the same conditions as nationals of the host State (Articles 20(2)(a) and 21 TFEU); the right to vote and to stand as a candidate in municipal and European Parliament elections in the Member State of residence, under the same conditions as nationals[57] (Articles 20(2)(b) and 22 TFEU); the right to enjoy diplomatic and consular protection in third countries by any Member State where the citizen's own State is not represented (Articles 20(2)(c) and 23 TFEU); and, pursuant to Articles 20(2)(d) and 24 TFEU, the rights to petition the European Parliament, to apply to the European Ombudsman in cases of maladministration by EU institutions, and to address and receive a reply from those institutions in any of the 24 official EU languages.[58] Article 24(1) TFEU also refers to a further right not included in Article 20 TFEU, namely the right to invite the European Commission, through the European Citizens' Initiative (ECI), to submit a legislative proposal.[59] In addition, Title V of the Charter of Fundamental Rights, specifically devoted to Union citizenship, supplements the above rights – as also set out in Articles 39, 40 and 43–46 of the Charter – with the right of access to documents of the institutions, bodies, offices and agencies of the Union (Article 42). The list of rights set out in Articles 20–24 TFEU is not exhaustive, since the Council may, acting unanimously on a proposal from the Commission and after consulting the European Parliament, adopt provisions to add to those rights (Article 25 TFEU).

Notwithstanding its uniqueness in the supranational context – particularly in conferring upon Union citizens an active role within the European polity (through, in particular, electoral rights, petitions, recourse to the Ombudsman, or the ECI),[60] which is of a very different nature from certain economic and residence-related facilities that may exist

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52 For a general overview, also in light of the requirements of the internal market, see M. Condinanzi, B. Nascimbene, A, Lang, *Cittadinanza dell'Unione e libera circolazione delle persone*, Milan, 2006.

53 CJEU, 29 April 2025, Case C-181/23, *C*, ECLI:EU:C:2025:283, para. 91.

54 On the federal inspiration of EU citizenship, see M. Croisat and J.-L. Quermonne, *L'Europe et le fédéralisme*, cited above, p. 101 ff.; P. Magnette, *Le régime politique*, cited above, p. 265 ff., in particular p. 270.

55 In this context, Switzerland appears to constitute an exception, providing for a "bottom-up" system of acquisition of federal citizenship, which is in some respects closer to the EU model: Swiss citizenship is in fact always linked to, and derived from, cantonal and municipal citizenship. See Article 37 of the Federal Constitution of the Swiss Confederation.

56 For a detailed analysis of these rights, see C. Morviducci, *I diritti dei cittadini europei*, Turin, 2010.

57 The right to vote and to stand as a candidate in European elections in the Member State of residence directly affects the political relationship between the citizen and the Union and points towards a progressive denationalisation of political representation in the European Parliament. As regards the rules giving concrete effect to this right, see Council Directive 93/109/EC on European elections (OJ L 329, 6 December 1993) and Council Directive 94/80/EC on municipal elections (OJ L 368, 19 December 1994)).

58 The official languages of the EU are: Bulgarian, Czech, Croatian, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish.

59 On the function of this instrument, see CJEU, 19 December 2019, Case C-418/18 P, *Puppinck*, ECLI:EU:C:2019:1113, para. 70.

60 See, in this regard, R. Adam, A. Tizzano, *Manuale di diritto dell'Unione europea*, cited above, pp. 439-440.

in some regional organisations[61] – EU citizenship cannot, at least at present, be equated with national citizenship. From the standpoint of content, the catalogue of rights attached to Union citizenship remains more limited than the body of civil, political and social rights, as well as reciprocal duties and obligations, that express the bond of belonging between an individual and a State. This is all the more so given that certain of these rights are not reserved exclusively to Union citizens but may also be invoked by residents within the Union (such as the right to petition or to apply to the Ombudsman). In this regard, it should also be noted that, although Article 20(2) TFEU provides that Union citizens not only enjoy rights but are also "subject to the duties provided for in the Treaties," as is the case in national systems,[62] the Treaties appear, in practice, to associate citizenship expressly only with rights. The fact that Article 25 TFEU allows the Council to add new rights – but not duties – to Union citizenship further suggests that the latter cannot be expanded in this respect through the simplified revision procedure provided for therein.

Perhaps the most significant difference between the EU system and national systems concerns the allocation of the power to determine the conditions for the acquisition and loss of citizenship. Even in multi-level state systems, such as certain federal systems, which allow for the coexistence of federal citizenship with other forms of affiliation at sub-federal level, federated entities do not possess genuine decision-making power in this regard, being generally limited to regulating rights connected to residence (such as access to certain social benefits governed by federated entities' laws, eligibility for certain public offices, etc.) or participation in local elections. Thus, for example, "State citizenship" in the United States derives automatically from the federal Constitution (Fourteenth Amendment) on the basis of the individual's State of residence, while the conditions for acquiring or losing U.S. "national" citizenship fall within the exclusive competence of the federal level.[63] By contrast, in the EU, as the Court of Justice has clarified with regard to the relationship between Union and national citizenship, "it is for each Member State […] to lay down the conditions for the acquisition and loss of nationality."[64] The Union thus lacks competence both to establish uniform criteria for the acquisition and loss of EU citizenship – which is contingent upon prior possession of the nationality of a Member State – and to adopt harmonising measures, even of a limited or partial nature, in this field.

These considerations also apply to the capacity of citizenship to produce effects at the international level. While such effects are fully recognised in the case of state citizenship – as illustrated, once again, by the United States, where only federal citizenship has international relevance – they remain more limited in the case of EU citizenship. Although, in order to foster trust between Member States and between them and third countries, the EU legislature has adopted minimum harmonised standards for passports and travel documents issued by the Member States,[65] EU citizens continue to be identified internationally on the basis of their national citizenship and passport.

Moreover, although Article 23 TFEU provides that Union citizens shall, in the territory of a third country where their own Member State is not represented, be entitled to diplomatic and consular protection by any other Member State, such protection is neither exercised collectively by the Member States nor by the Union. It is also not of general application, as it remains conditional upon the absence of diplomatic or consular representation of the citizen's own Member State in the country in question. It thus operates, in practice, as a mechanism of mutual assistance between

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61 Citizens of the fourteen Member States participating in the Caribbean Community (CARICOM) Single Market may move freely for employment purposes but only if they belong to certain professional categories (covered by the CARICOM Skills Certificate regime). Similarly, citizens of the ten Member States of the Association of Southeast Asian Nations (ASEAN) benefit from free movement only in respect of highly skilled workers, while citizens of the Mercosur countries (Argentina, Brazil, Paraguay and Uruguay) enjoy facilitation in obtaining residence permits, and those of the twelve Member States of the Economic Community of West African States (ECOWAS) benefit from facilitation in terms of free movement and rights of residence.

62 On this link with national citizenship, see CJEU, 26 May 1982, Case 149/79, *Commission v Belgium*, ECLI:EU:C:1980:297, para. 10. It should, however, be noted that in modern systems obligations linked exclusively to national citizenship tend to be rather limited. In the Italian case, for example, these essentially consist of the duty to defend the homeland (Article 52 of the Constitution), of limited relevance in peacetime and in a context in which compulsory military service has been suspended, and the duty of loyalty to the Republic (Article 54), which is reflected, inter alia, in the oath required of holders of certain public offices or functions in the public administration and of members of the armed forces. In practice, most commonly invoked obligations (compliance with the law, payment of taxes, etc.) are linked to residence or presence within the State and therefore also apply to non-nationals.

63 Section 1 of the Fourteenth Amendment to the Constitution of the United States provides that "all persons born or naturalised in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

64 CJEU, 2 March 2010, Case C-135/08, *Rottmann*, ECLI:EU:C:2010:104, para. 39. In this regard, it should be recalled that, at the time of its accession to the then EEC, the United Kingdom excluded, by means of a specific declaration, the possibility of recognising certain categories of its "nationals" as British citizens for the purposes of EU law. British legislation provided for different categories of nationality (British citizens, British Dependent Territories citizens and British Overseas citizens), the latter not enjoying a right of entry and residence in the United Kingdom and, consequently, in the Union. These rules remain in force, as they are reflected in the Withdrawal Agreement between the EU and the United Kingdom, available at: https://commission.europa.eu/strategy-and-policy/relations-united-kingdom/eu-uk-withdrawal-agreement_it (p. 55 ff.). This limitation was held to be compatible with EU law in CJEU, 20 February 2001, Case C-192/99, *Kaur*, ECLI:EU:C:2001:106, paras 23–24.

65 See, in this regard, Council Regulation (EC) No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States (OJ L 385, 29 December 2004), as last amended in 2009 (OJ L 42, 6 June 2009); and Council Directive (EU) 2019/997 of 18 June 2019 establishing an EU Emergency Travel Document (OJ L 163, 20 June 2019). The latter is a one-way document enabling its holder to return to their home country - or, exceptionally, to reach another destination – where they do not possess their regular travel document, for example because it has been lost or stolen.

Member States rather than a fully common system.[66] In this context, the role of the Union is essentially one of support and coordination, as also reflected in Article 35(3) TEU, which provides that the Union's delegations in third countries "shall contribute to the implementation of the right of citizens of the Union to protection in the territory of third countries".[67]

Although this type of co-operation is to some extent already present in international law[68] – for example, "A sending State may […] undertake the temporary protection of the interests of a third State and of its nationals" (Article 46 of the Vienna Convention on Diplomatic Relations, 1961) – Article 23 TFEU has the merit of conferring upon this mechanism a degree of permanence and automaticity in relations between Member States and vis-à-vis Union citizens. Moreover, whereas at the international level such protection remains a matter for the discretion of States – "a consular post of the sending State may [...] exercise consular functions in the receiving State on behalf of a third State" (Article 8 of the Vienna Convention on Consular Relations, 1963) – under EU law it is framed as a right of Union citizens vis-à-vis the Member States, as reflected in Articles 35 TEU and 20(2)(c) TFEU. In sum, even if EU action in this field still falls short of enabling Union citizenship to produce full effects at the international level, the right of citizens to receive diplomatic and consular protection from another Member State under the same conditions as that State's own nationals nonetheless introduces an external dimension to Union citizenship and contributes to strengthening the Union's identity in third countries.

More generally, and notwithstanding the obvious differences with the status of citizenship in national legal systems, the significance and scope of the introduction of Union citizenship into the Treaties should not be underestimated.[69] In particular, the fact that Member States retain exclusive competence over the acquisition and loss of nationality does not mean that the exercise of that power, when it concerns Union citizens, is entirely beyond the reach of EU law. According to a well-established principle in the case law, in situations falling within the scope of EU law, even national measures adopted in areas of exclusive Member State competence must comply with that law.[70] Indeed, decisions taken by individual States in matters of nationality – particularly as regards its grant or withdrawal – inevitably affect Union citizenship by virtue of the direct link between the two established by Article 9 TEU.[71] Applying this principle, and in light of the importance attributed by the Treaties to the status of Union citizen, the Court of Justice held, for instance, in *Rottmann* that when reviewing a decision withdrawing naturalisation (in that case, under German law), obtained by fraudulent means, from an individual who had lost his original nationality (Austrian) as a consequence of that naturalisation and would thereby have become stateless, it is necessary to take into account the consequences of such a decision for the person concerned, and, where appropriate, for his family members, in terms of the loss of the rights attached to Union citizenship. EU law therefore required both the Member State of naturalisation (Germany) to grant Mr Rottmann a reasonable period before withdrawing his nationality – so that he could seek to recover his original nationality – and the Member State of origin (Austria) to consider the possibility of allowing him to do so.[72]

Similarly, in the *Ruiz Zambrano* case, the Court held that Article 9 TEU precludes the application of a Belgian measure which, by expelling from the country the Colombian father of a Belgian minor, had the effect of depriving that Belgian citizen of the enjoyment of the core rights conferred by Union citizenship, in particular the right to reside and move freely within the territory of the Member States, in so far as the child would in practice have had no choice but to leave the territory of the Union in order to accompany his parents.[73] It was also in that judgment that

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66 On these aspects, see J.P. Jacqué, *Droit institutionnel de l'Union européenne* cit., p. 150; C. Morviducci, *I diritti dei* cittadini, cited above, p. 243 ff.; R. Adam, A. Tizzano*, Manuale di diritto dell'Unione europea*, cited above, p. 470.

67 On the basis of Article 35 TEU, the Council adopted Directive (EU) 2015/637 of 20 April 2015 laying down coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries (OJ L 106, 24 April 2015). See also the European Commission's Green Paper of 28 November 2006 on diplomatic and consular protection of Union citizens in third countries (COM(2006)712).

68 See also Article 8 of the Vienna Convention on Consular Relations of 24 April 1963. Moreover, following the introduction of this right into the Treaties, many Member States have incorporated specific provisions on the matter into consular agreements concluded with third countries.

69 In this sense, see U. Villani, *Cittadinanza dell'Unione europea, libertà di circolazione e di soggiorno e diritti fondamentali*, in *L'integrazione europea sessant'anni dopo i trattati di Roma*, Milano, 2017, p. 49 ff., which also provides an overview of the relevant case-law.

70 To this effect, see Case C-135/08, *Rottmann*, cited above, paras 45 and 48. For a similar case, see 18 January 2022, Case C-118/20, *Wiener Landesregierung*, ECLI:EU:C:2022:34.

71 For a general analysis, B. Nascimbene, *Nationality Law and the Law of Regional Integration Organisation. Towards New Residence Status?*, Leiden-Boston, 2022, p. 52 ff.

72 Case C-135/08, *Rottmann*, cited above, paras 60–63.

73 CJEU, 8 March 2011, Case C-34/09, *Ruiz Zambrano*, ECLI:EU:C:2011:124, paras 44–45. However, as clarified in the subsequent judgments *McCarthy* and *Dereci* (5 May 2011, Case C-434/09, *Shirley McCarthy*,:EU:C:2011:277; *Murat Dereci*, cited above), that condition is not fulfilled where the EU citizen is an adult spouse residing in the Member State of nationality without having ever exercised free movement rights. In such a case, that person would not be compelled to leave the territory of the Union and would therefore not be deprived of the genuine enjoyment of the essential substance of the rights conferred by EU citizenship. More recently, see 30 June 2016, Case C-115/15, *NA*, , ECLI:EU:C:2016:487; Case C-304/14, *CS*, and 13 September 2016, Case C-165/14, *Rendón Marín*, ECLI:EU:C:2016:674; and 10 May 2017, Case C-133/15, *Chavez-Vilchez*, ECLI:EU:C:2017:354.

the Court solemnly reaffirmed that "citizenship of the Union is intended to be the fundamental status of nationals of the Member States."[74]

More recently, in a case concerning the granting of Maltese nationality – and thus, automatically, Union citizenship – to third-country nationals in exchange for predetermined payments or investments (so-called "golden passports"), the Court held that such a naturalisation scheme, which amounts to the commercialisation of the grant of nationality in the absence of a genuine link with the Member State concerned, manifestly jeopardises the relationship of solidarity and loyalty between the Member State and its citizens and breaches the mutual trust between Member States on which Union citizenship is founded.[75] EU law therefore precludes not only the application of the Maltese legislation at issue, but also any similar national regimes providing for comparable naturalisation schemes, such as those in force in Bulgaria and Cyprus.[76] Once again, this illustrates the central role played by the Court of Justice in safeguarding the integrity of the EU legal order as a whole, extending its review to matters that may appear to fall outside the Union's direct competences where the choices of Member States risk compromising the balance and coherence of the European integration process.

8 Conclusions

The foregoing analysis shows that the European construction process has established itself, and continues to do so, as a distinct and autonomous reality which, precisely because it has drawn upon elements from different political and legal systems, cannot be readily subsumed under any of them and has no true precedent in either the experience of states or that of international organisations.[77] It occupies, rather, an intermediate position between the classic forms of intergovernmental organisation – as an Union established on the basis of international treaties concluded by sovereign States; characterised by the centrality of the Member States and the requirement of their unanimous consent for Treaty amendment; by the existence of a unilateral right of withdrawal; and by the absence of a coercive apparatus capable of enforcing EU acts throughout the entire European territory – and federal-type state structures – where the Union is endowed with legislative powers, co-exercised by a parliament elected by direct universal suffrage; where majority voting predominates in decision-making; where EU law enjoys primacy over national law and is capable of conferring rights directly upon individuals; and where the Court of Justice plays a central role in ensuring compliance with common rules by a plurality of EU and national actors. This originality and indeterminacy are further reinforced by the "work-in-progress" nature of the European integration process, whose ultimate objective – "creating an ever closer union among the peoples of Europe" (Article 1 TEU) – is at once declared ("a union among the peoples of Europe"), evolutionary ("ever closer"), and indeterminate, if not uncertain (at what point can that objective be said to have been truly achieved?).

It is likely that this very plasticity, and the absence of any definitive choice between competing models – reflected also in the careful avoidance of overly rigid or too specific terminology, in favour of expressions such as "Community" or "Union" – largely explain the success of the EU project. Indeed, this has enabled different orientations and aspirations to coexist, interact, and adapt within a framework which, as repeatedly emphasised, remains

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74 Case C-34/09, *Ruiz Zambrano*, cited above, para. 4.

75 Case C-181/23, *Commission v Malta*, cited above, para. 96

76 See https://ec.europa.eu/commission/presscorner/detail/it/ip_22_2068. The reasoning underlying the judgment in *Commission v Malta* may also be relevant for the Italian Constitutional Court, which has been called upon to rule on the compatibility of Law No. 91 of 5 February 1992 on citizenship, insofar as it allows the acquisition of citizenship *iure sanguinis* without temporal limits or effective connection requirements. The issue was referred in November 2024 by the Court of Bologna and concerns the possible unconstitutionality of Article 1 of Law No. 91/1992 – "a person is a citizen by birth: (a) if born to a father or mother who are citizens" – in the light of Articles 3 (principle of reasonableness and proportionality) and 117 (obligation to comply with international and EU law) of the Italian Constitution, as well as Articles 9 TEU and 20 TFEU on EU citizenship. The case arose from an application brought by several Brazilian nationals, including minors, residing in Brazil, seeking recognition of Italian citizenship *iure sanguinis* as direct descendants of a female ancestor, an Italian citizen born in Marzabotto on 27 April 1874, who later emigrated to and died in Brazil in 1976. Given that the applicants have no effective link with Italy – having always resided in Brazil, never having stayed in Italy, not even for short visits, and not speaking Italian – the Court of Bologna considered that, in the absence of mechanisms of progressive attenuation (for example, limiting entitlement to the first generations or requiring residence for a certain period), the *ius sanguinis* criterion, applied in absolute terms, infringes the aforementioned Italian and EU provisions. Possibly also in response to such concerns, Legislative Decree No. 36/2025 of March 2025 amended Law No. 91/1992 by providing that descendants of Italian citizens born abroad will automatically acquire citizenship only up to the second generation. On this issue, see C. Sanna, *La cittadinanza Ue non è in vendita: la Corte UE dichiara incompatibili con il diritto UE i programmi di naturalizzazione per investimenti della Repubblica di Malta. Le implicazioni della sentenza sul criterio dello ius sanguinis previsto dalla legislazione italiana*, in *Eurojus*, 2025, p. 1 ff.

77 In this sense, see also V. Constantinesco*, Europe fédérale ou fédération d'Etats-nations* cit., p. 140; M. Clapié, *Manuel d'institutions européennes* cited above, p. 40 ; J.P. Jacqué, *Droit institutionnel de l'Union européenne* cited above, p.127 ; J.L. Quermonne, *La question du gouvernement européen. Etude de recherche*, n. 20, 2002, p. 13; P. Ponzano, *Une réforme fédérale de l'Union européenne* cit., p. 165; A. Tizzano, *Il costituzionalismo europeo nell'età dell'incertezza*, cited above, pp. 366-367.

dynamic and pragmatic.[78] In our view, this dialectic, though not without complexity and contradictions, will continue to shape the European integration journey, constituting a necessary point of equilibrium – both indispensable and evolving – for further progress in the integration process, as illustrated by the recent responses – innovative, albeit not always fully satisfactory – to the various financial, health, and geopolitical crises. It follows that the transformation from Community to Union, and the developments it has entailed over time (including the generalisation of qualified majority voting in place of unanimity; the strengthening of the role of the European Parliament; the introduction of Union citizenship; the enhanced protection of common values and fundamental rights; and the extension of EU competences to areas traditionally regarded as lying at the core of State sovereignty, such as justice, monetary policy, or defence), should not be taken to suggest that the objective pursued by the actors of the EU decision-making process, or its natural trajectory, is the creation of a federal European superstate intended to replace the nation-States. Rather, it represents a further phase of (significant) growth of a system which, precisely because it preserves its originality – or, if one prefers, its underlying constructive ambiguity – retains its creative dynamism and capacity for development.

In other words, the Union will most probably continue to take shape as an unprecedented, multinational and multilingual entity centred on States which, on the one hand, do not wish to relinquish their individual statehood, but which, on the other, are increasingly aware – and the succession of internal and external crises in recent years has made this abundantly clear – of the need to converge in strengthening shared action in policy areas that still largely remain within national control (foreign policy, defence, migration, economic governance, etc.), in enhancing the Union's decision-making agility, in more clearly defining the socio-economic model to be pursued, and in ensuring that Union citizens continue to find compelling reasons to lend their active support to the European project. In this respect, the words contained in the report drafted some forty-five years ago by the so-called "Committee of Three", established by the European Council to propose institutional reforms to the then European Communities, retain their full significance and continuing relevance: "When we speak of European Union, therefore, *we are speaking not so much of a definite goal as of a direction of movement*. We wish to see more and more united action in efforts to resolve the manifold problems which now face the Community itself and its Member States, problems which may well become even more serious in the years to come" (emphasis added).[79] Ultimately, it is precisely this movement, or dynamic process – of which this article has sought to give an account, highlighting and contextualising its distinctive features – that perhaps best captures both the nature and the object of the EU project.

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[78] Emphasising the functional and pragmatic dimension of the EU system, see A. Tizzano, *Il costituzionalismo europeo nell'età dell'incertezza* cit., p. 368; R. Baratta, *Il sistema istituzionale*, cited above, p. 3; S. Torcol, C. Maubernard, Q. Hanan, *Le fédéralisme (quel fédéralisme) pour sauver l'Europe ?*, in *Revue de l'Union européenne*, 2019, p. 256 ff.

[79] Committe of Three, *Report on European institutions*, October 1979, p. 39, available at : https://www.cvce.eu/content/publication/1999/1/1/d1e23cf8-0d43-4ddd-81ba-8f4b61c0259d/publishable_en.pdf .

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Português

Nota editorial: O presente artigo dá continuidade ao estudo publicado na Revista Pensar em 2025, de autoria de Serena Crespi, disponível em: https://doi.org/10.5020/2317-2150.2025.16346. Trata-se de desenvolvimento e aprofundamento analítico da discussão iniciada na Parte I, com nova abordagem e novos desdobramentos.

Inglês

Editorial note: This article continues the study published in Pensar in 2025, authored by Serena Crespi, available at: https://doi.org/10.5020/2317-2150.2025.16346. It develops and deepens the analysis begun in Part I, with a new approach and further developments.

Espanhol

Nota editorial: El presente artículo da continuidad al estudio publicado en la revista Pensar en 2025, de autoría de Serena Crespi, disponible en: https://doi.org/10.5020/2317-2150.2025.16346. Se trata de un desarrollo y una profundización analítica de la discusión iniciada en la Parte I, con un nuevo enfoque y nuevos desarrollos.

Italiano

Nota editoriale: Il presente articolo dà continuità allo studio pubblicato sulla rivista Pensar nel 2025, a cura di Serena Crespi, disponibile all'indirizzo: https://doi.org/10.5020/2317-2150.2025.16346. Si tratta di uno sviluppo e di un approfondimento analitico della discussione avviata nella Parte I, con un nuovo approccio e ulteriori sviluppi.