

## **The national interest in European Union law**

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*This article argues that the national interest is understood EU law as placed in an antagonistic relationship with the interest of the Union and as overlapping with the Union interest. This dual positioning of the national interest follows from the foundational principles which govern the commitments and the position of the Member States in the EU. On the one hand, they demand for the purpose of securing the mutual benefits of European integration for the Member States that Member State interests are leveraged and confined. On the other, they express the ultimate rationale for European integration that EU policies are developed and executed in the shared interests of the Member States. The article provides an analysis of the principles governing Member State obligations and EU-Member State relations from this dual perspective.*

For conceptualising the national interest in the law of the European Union, the principles governing EU-Member State relations must be examined. They reveal that the interests of the Member States are conceived both in an antagonistic relationship with the interests of the Union and in a relationship in which the national interest overlaps with the shared EU commitments of the Member States. This follows mainly from interpreting Article 4(3) TEU together with Article 1(1) TEU as a foundation for the Treaty obligations undertaken by the Member States. They demand, on the one hand, that under the EU framework Member State opportunities for pursuing interests of their own are confined. On the other, they make it clear that the Member States entered into their Treaty commitments to secure the success of

common policies based on cooperation, which were called to life for the mutual benefit of the Member States and to secure advantages which the Member States alone would not be able to achieve. This complex relationship between the interests of the Union and the Member States is most visible in policy areas infused with the subsidiarity principle under Article 5(3) TEU where the achievement of the common objectives requires not only the Member States refraining from certain types of conduct, but also EU policies being supported and often supplanted by autonomous Member State policy action (eg Services of General Economic Interest).

The article commences with an overview of the core Treaty provisions governing Member State commitments in the EU. In their interpretation, it relies on the theories advanced concerning national preference formation in the EU, and it also borrows from the theories which understand the EU as a dynamic and flexible polity in terms of the choice of governance arenas and the geographical allocation of functions in the different locations of governance. This is followed by an overview of the Treaty provisions regulating EU-Member State relations. They are, predominantly, preoccupied with separating the respective positions of the Member States and the Union and they aim to reconcile what could be called as the ‘centrifugal’ and ‘centripetal’ forces of European integration. Nevertheless, practice shows that the boundaries they erect in law between the national and the European are fluid and flexible, and that they do not exclude the confluence and the overlap of national and Union interests. Finally, flexibility as a key characteristic of the EU legal order is examined, which by highlighting the importance of Member State diversity in EU governance reinforces the hereby discussed dual positioning of the national interest as a concept in EU law.

### **The national interest as a concept under the EU framework**

The question of the national interest in the EU is analysed most directly in the political science scholarship on national preference formation. Liberal intergovernmentalism sees national preferences as determined by domestic constituents within the available national frameworks having regard to their locally and internationally conditioned interests, which bind and allow little flexibility for Member State government in inter-state bargaining.<sup>1</sup> In the EU context, it understands national preferences as conditioned by both the benefits and the costs of co-operation, indicating that there are benefits to be gained through joint efforts by the Member States and also that European policies can disadvantage national economic, social and other interests.<sup>2</sup> The alternative to the liberal intergovernmentalist analysis of Member State preference formation argues – among others – that national preference formation depends on the capacity of each Member State to administer the formulation and the representation of national interests, that national preferences can be influenced by past experiences of governments with choices and processes at the EU level, and, most importantly, that national preferences can be reconsidered, re-prioritised or abandoned in European inter-state negotiations.<sup>3</sup> A particularly dynamic understanding of national preference formation and representation emerged from the work on Member State choices concerning the acceptance and the rejection European integration ‘on the basis of a

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<sup>1</sup> A. Moravcsik, ‘Preferences and power in the European Community: a liberal intergovernmentalist approach’, (1993) 31 *Journal of Common Market Studies* 473, 483.

<sup>2</sup> See *ibid* at 485-486 and 507-517, and P. Craig, ‘Competence and Member State autonomy: casualty, consequence and legitimacy’, in H. Micklitz and B. de Witte (eds), *The ECJ and the Autonomy of the Member States* (Intersentia, 2012), 11, at 26-34.

<sup>3</sup> D. G. Dimitrakopoulos and H. Kassim, ‘Deciding the future of the European Union: preference formation and Treaty Reform’, (2004) 2 *Comparative European Politics* 241, 248-249.

calculation of the national interest', which regards the national interest as constructed and, therefore, discussable, and the boundaries between the national and the European negotiable.<sup>4</sup>

In contrast, it is far from clear that the law – which has been used widely in the construction of European integration – is capable of internalising that the national interest in a manner which would express that there are both costs and benefits of European integration and that there is fluidity in the relationship between the Member States and the Union. The ability of the law to conceptualise the national interest in its complicity is of high relevance as the law determines how the Member States approach their commitments under the EU framework. Conventionally, in the EU legal context the national interest is raised as a justification for the Member States deciding to disengage with their commitments. It also appears as a factor – for example, in the form of the national identity clause and the subsidiarity principle recognised in Articles 4(2) and 5(3) TEU – capable of determining the boundaries of EU interference with Member State autonomy. These applications of the national interest assume conflicts between the Union and the Member States, and they have enabled the Member States to secure themselves preferential political treatment at the EU level, or to gain legitimate exceptions from the application of European rules establishing common obligations.

EU law, however, also recognises the national interest in a non-dialectic relationship with the interests of the Union. The preamble of the TEU makes it clear that the commitment of the Member States to European integration is in their interest, and that their membership obligations in the Union are based on the realisation – clarified and legitimised at the national level – that there are benefits which they hope to secure by joint action and which they cannot achieve acting alone. The Treaties articulate a strong preference towards common policies

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<sup>4</sup> M. Aspinwall, 'Government preferences on European integration: an empirical test of five theories', (2007) 37

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which enable the Member States to pursue their shared interests in a political, economic and social environment characterised by cross-border interdependencies. It may be inferred from Article 1(1) TEU that the commitments of the Member States are *shared* commitments undertaken for the mutual benefit of the participants. This also means that the common obligations anchored in EU law were imposed voluntarily by the Member States on *themselves* in the promise of mutual benefits achieved by co-operation.

By clarifying in Article 1(1) TEU that the Union was established for the purpose of enabling the Member States ‘to attain objectives they have in common’ and that the EU is founded on values that ‘are common to the Member States’, EU law gives a clear recognition that there is a unity of interests among the Member States. This should provide the foundation for the legal treatment of the Member States in the Union which requires Member States to treat other Member States as they would treat themselves and expect other Member States to do the same.<sup>5</sup> The mutual commitment of the Member States for the attainment of the common objectives could also be translated into a notion of trust and loyalty, which in law has materialised in the construction that the advantages offered by EU membership necessarily entail obligation/s and that enjoying those advantages presumes compliance with those obligations.<sup>6</sup> In this reading, Article 1(1) TEU does not promise the realisation of some ideal of European unity but it provides the constitutional basis of the pragmatic undertaking by the Member States to secure mutual benefits in pursuance of shared interests through collective action.

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<sup>5</sup> See the discussion in P. Cramér, ‘Reflections on the roles of mutual trust in EU law’, in M. Dougan and S. Currie (eds), *50 Years of the European Treaties: Looking Back and Thinking Forward* (Hart, 2009), 43, especially at 54.

<sup>6</sup> See paras. 24-25, Case 39/72 Commission v Italy [1973] ECR 101 and Joined Cases 90&97/73 Commission v Luxembourg and Belgium [1964] ECR 625. Only a few judgments address this issue explicitly.

The Treaty recognition of these foundational ideas of the Union indicates that cooperation in pursuance of shared interests and mutual commitments among the Member States are not simply necessities, but they also operate as the norms underlying the demand side of European integration. While the Treaties – perhaps intentionally – do not offer a precise constitutional entrenchment of these norms, Article 4(3) TEU on the principle of loyalty, nevertheless, offers a general Treaty basis. With its emphasis on sincere co-operation, assistance and mutual respect, the loyalty principle – read together with Article 1(1) TEU and the other provisions on common objectives and values – can be interpreted as providing a legally enforceable acceptance by the Member States that there are common causes achieving which requires common efforts from all concerned. In this connection, the fundamental non-discrimination principle (Article 18 TFEU) plays an important role. Its emphasis on Member States being treated equally as a matter of complying with their obligations and in their relations with each other signals that the Member States depend on each other in securing the mutual benefits of European integration. They are reminded that realising the Treaty objectives necessitates equal compliance by every Member State and that in horizontal relations the success of common policies requires the Member States mutually treating the interests of other Member States as they would treat theirs. This point is expressed in the leveraging function of the principle of loyalty which demands that the Member States comply with their commitments and refrain from pursuing interests capable of frustrating the common interests of the Member States in the Union.

The conceptual duplicity of the national interest is also confirmed by its concrete legal manifestations in the EU framework. The Treaty provisions on Services of General Economic Interest make it clear that Member State public services can be embraced in EU law both in the interest of enhancing European economic integration and in pursuance of local socio-economic preferences. Article 106(2) TFEU authorises a departure from core EU obligations,

such as those laid down in the law of the Single Market or in EU competition law, for the purpose of securing national policy priorities. These priorities match those of the Union enumerated in the Treaties,<sup>7</sup> which under Article 14 TFEU recognising the protection of public services as a value for the Union is driven to fulfil its role ‘in promoting social and territorial cohesion’ alongside the Member States.<sup>8</sup> Under the EU framework for Services of General Economic Interest and in other policy areas, the principle of subsidiarity – regulated in Article 5(3) TEU – is available to construct frameworks of governance in which both the Union and the national interest can be realised. For instance in EU transport policy, subsidiarity provides the basis of a predominantly decentralised system of European governance which builds on autonomous Member State policy action for ensuring the effective delivery of common policies in an environment characterised by social and economic diversity at the national level.<sup>9</sup> The duality of the national interest as a concept is also reflected in the system created for the enforcement of Member State compliance. In the course of investigating their non-compliance with their EU commitments, the Member States are often reminded that the effective operation of the Union and its policies is in their interest,

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<sup>7</sup> Article 14 TFEU is an example of the Union internalising Member State interests. ‘Uploading’ of Member State interests to the Union level have always been part of the integration process as demonstrated by the Treaty-level recognition of the rule of law and the protection of fundamental rights in Article 2 TEU, which had traditionally been concerns of the national level.

<sup>8</sup> The provision of public services in Europe – as an EU economic and social policy objective – is achieved by the Member States being allowed – within the applicable EU legal boundaries – to regulate, finance and provide public services as deemed appropriate at the local level. See, *inter alia*, White Paper – Services of General Economic Interest, COM(2004) 374 final; Commission Communication – Services of General Interest, COM(2007) 724 final; Protocol 26 – Services of General Interest, OJ 2010 C83/308.

<sup>9</sup> See, in particular, Regulation 1370/2007/EC on public passenger transport services by rail and by road, OJ 2007 L315/1.

as originally agreed in the Treaties.<sup>10</sup> The argument is always available that fulfilling their EU obligations is hardly ever exclusively to the disadvantage of the Member States. Although during the execution of EU policies certain local interests may be compromised, others will be satisfied.

Decentralised systems of EU governance, such as those created under the Single Market or in case of certain sectoral policies,<sup>11</sup> hold in themselves the indication that national and European policy-making are mutually dependent on each other and the respective overlapping interests of the Union and the Member States can indeed be expressed under a single framework. These systems are created to avoid policy failures both at the European and the national level. The interest in setting up the European elements of the governance framework may follow from the desire to avoid the negative consequences individual action at the national level and also to secure the benefits of mutual action for the individual Member States in an environment characterised by cross-border interdependencies.<sup>12</sup> The necessity to place more trust in governance and administration at the national level may emerge from the dilemmas raised by Member State social, economic, cultural, policy, regulatory etc., diversity,

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<sup>10</sup> From the few explicit judicial engagements with the issue, see para. 83, Joined Cases C-411/10 and C-493/10, N.S. [2011] ECR I-13905 and paras. 167-168, 172, Opinion 2/13 ECLI:EU:C:2014:2454. See also reciprocity being identified as the basis for the Member States binding themselves to the obligations of the Founding Treaties in Case 6/64, *Costa v ENEL* [1964] ECR 1141, and the reference to mutual obligations between the Member States in Case 26/62, *Van Gend* [1963] ECR 1. See also the View of Advocate General Kokott in Case C-370/12, *Pringle* not yet reported, paras. 143 and 147.

<sup>11</sup> See *infra* note 22 and *supra* note 9.

<sup>12</sup> See, in this regard, W. Mattli, *The Logic of Regional Integration: Europe and Beyond* (Cambridge, 1999), and in a more critical tone, E.O. Eriksen, *The Normativity of the European Union* (Palgrave, 2014).

and from questions of effective transnational governance.<sup>13</sup> Although sustaining national diversity could contradict the commitment to common policies, eradicating that diversity – because the EU lacking the competences, the right political environment missing, or because reducing Member State diversity being completely out of question – may not be an option. Including the local level and its preferences in European governance could also be supported in case the particular EU policy recognises the benefits of diverse markets, societies and polities,<sup>14</sup> or when effective governance requires information available at the local level and the effective management of local considerations.<sup>15</sup>

These observations are also valid for the long-standing decentralised system for the implementation and enforcement of common policies in the EU. In order to avoid policy failure by non-compliance, the national level –Member State administrations and judiciaries – have been drawn into the process of realising EU policies requiring local actors to act as agents of the European Union.<sup>16</sup> While exposure to the particularities of the national procedural and institutional environment could weaken the implementation and enforcement of EU policies, the system is supported by the argument that effective implementation and enforcement may necessitate allowing Member States authorities and courts to proceed in the legal and institutional environment familiar to them.

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<sup>13</sup> See, for instance, K. van Kersbergen and B. Verbeek, 'Subsidiarity as a principle of governance in the European Union', (2004) 2 *Comparative European Politics* 142, C.F. Sabel and J. Zeitlin, 'Learning from difference: the new architecture of experimentalist governance in the EU' (2008) 14 *European Law Journal* 271.

<sup>14</sup> See, for instance, Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, OJ 2010 L95/1.

<sup>15</sup> See, for instance, the Common Provisions Regulation (Regulation 1303/2013/EU), OJ 2013 L347/320.

<sup>16</sup> J. Tallberg, *European Governance and Supranational Institutions: Making States Comply* (Routledge, 2003) at 7-8.

The treatment of Services of General Economic Interest under the EU framework again provides a suiting example for the robust overlap between national and Union interests. Beyond the previously mentioned agreement among the Member States in the Union on the value of public services in European societies, the regulation of Services of General Economic Interests expresses both the Union's intentions to strengthen the social dimension of economic integration in Europe and the desire of the Member States to secure the benefits of the Single Market without compromising the standards of social protection at national level.<sup>17</sup> Because the Union lacks sufficient redistributive policy competences and means,<sup>18</sup> in the areas of Services of General Economic Interest there is a supplementary relationship between EU objectives and autonomous Member State policy action. Both EU social objectives and Member State social policies affecting public services will be achieved by the Member States being given a legal opportunity – most notably, under Article 106(2) TFEU – to govern their public services sector shielded – if necessary – from EU economic law.<sup>19</sup> Since the Treaty-level recognition of the value of services of general interest in what is now Article 14 TFEU, this can be interpreted as the Member States being invited to supplant EU social policy objectives through independent national policy action.

In the dynamic EU political and governance framework, as analysed in theoretical writing on European integration, no other conceptualisation of the national interest seems feasible. Although they disagree as to the ability of the Member States to renegotiate and reorder national interests at the European level, the earlier mentioned analyses of national preference formation in the EU acknowledge that national preference formation cannot be

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<sup>17</sup> See, M. Ross, 'Article 16 E.C. and Services of General Interest: from derogation to obligation?', (2000) 25 *European Law Review* 22.

<sup>18</sup> See G. Majone, 'Europe's 'Democratic Deficit': the question of standards', (1998) 4 *European Law Journal* 5; G. Majone, *Dilemmas of European Integration* (Oxford: 2005) at 207-208.

<sup>19</sup> See, for example, Case C-280/00 *Altmark Trans* [2003] ECR I-7747.

isolated from the benefits and constraints offered by EU integration.<sup>20</sup> The constructivist accounts are particularly explicit about the possibility of European negotiations interests being dropped and picked up, and being shifted upwards to the EU and downwards to the national level.<sup>21</sup> There seems to be a constant availability of choices, which could also involve the Member States internalising the interests of other Member States and allowing them into the national domain for political reasons or on the basis of considerations (and the benefits) of mutuality,<sup>22</sup> and they present the national interest as circumscribed and positioned rather loosely – especially *vis-à-vis* the interests of the Union. Understanding the boundaries between the national and the European as fluid and changeable also enabled discussing EU membership in terms of its double benefits and burdens and of its double offerings for the Member States.<sup>23</sup>

The (constitutional, political and functional) overlaps between the national and the Union interest and the fluidity of the boundaries between them assume a high degree interconnectedness (and interdependence) between the national and the European levels. This has been discussed recurrently in academic writing on European integration. It includes the liberal intergovernmentalist argument that European political developments cannot be viewed separately from preferences, constraints and opportunities available at the national level.<sup>24</sup> It also involves the critique of the liberal intergovernmentalist position that the stages of preference building at the national and inter-state negotiation at the European level are not

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<sup>20</sup> *supra* note 2.

<sup>21</sup> *supra* note 3.

<sup>22</sup> This assumes decentralised EU frameworks with emphasis on horizontal co-operation between the Member States, such as those under the mutual recognition principle in the law of the Single Market. See, for example, Directive 2006/123/EC on services in the internal market, OJ 2006 L376/36.

<sup>23</sup> S. Bartolini, *Restructuring Europe* (OUP, 2005), at 305-306, 405.

<sup>24</sup> Moravcsik, *op cit supra* note 1, at 480-483; Craig, *op cit supra* note 2, at 11-12.

operated separately from each other.<sup>25</sup> In analyses of European integration as a complex phenomenon of spatial shifts of power from state level to the European level, because of the changeability and dynamics of these processes of legal, economic, cultural and social boundary redefinition, EU-Member State interest relations were also found as undefinable in purely static and unidirectional terms.<sup>26</sup> On this basis, it is doubtful that national and Union interests could be strictly separated, and that the national interest would be fixed in a linear relationship of conflict with the interests of the Union. When the changes affecting state functions take place without sealing or separating the different spatial scales (eg the national and the Union levels of governance), a constantly evolving location of Member State interests moving between different spatial levels of governance must be assumed.

The national interest as a concept can, therefore, be interpreted in the EU framework as overlapping with the interests of the Union. Nevertheless, it must not be ignored that Member State interests – especially, when it drives Member State conduct pursuing particular local interests in contravention with their Treaty commitments – can be on a collision course with the interests of the Union. The idea that the national interest cannot alone be imagined in conflict, but must also be seen in harmony with the Union interest is consistent with the arrangements of the general framework of the polity which emphasise that the Member States have shared interests and that in order to secure these they have imposed mutual political and legal constraints on themselves. The straightjacket of mutual dependence among the Member States entails that the benefits of European integration may only be gained if the effective operation of common policies is not impaired by Member State particularism.

### **The national interest and the principles governing EU-Member State relations**

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<sup>25</sup> Dimitrakopoulos and Kassim, *op cit supra* note 3, at 249.

<sup>26</sup> M. Keating, *Rescaling the European State* (OUP, 2013), at 6 and 8.

In the EU framework, the national interest both contradicts and overlaps with the interests of the Union. This follows from the fundamental Treaty arrangements for the *union* of the Member States and also from the dynamism and fluidity of the EU political and legal framework, which is capable of combining considerations of the European and the national level. Building on the earlier analysis of the core Treaty provisions governing the commitments of the Member States, in the following, we examine further how this is expressed in EU law and how this is embedded in the Treaty principles introduced to govern in law EU-Member State relations.

EU law encounters the national interest in many different circumstances. The national interest could manifest in the specific legal issue of Member State policy and legal discretion and its limits, the principle of neutrality (of national ownership regimes) offering partial legal immunity to fundamental economic policy choices made at national level, the constitutional principle protecting the integrity of Member State identities, the legal ability of the Member States to promote public interest and public policy considerations which compete with those pursued by EU policies, the principles and the rules introduced to ringfence Member State competences (ie conferral, subsidiarity and proportionality), the rules, strategies and mechanisms allowing differentiated legal and policy developments among the Member States, or in the principles and provisions allowing some degree of immunity for Member State policies from Treaty prohibitions (eg the protection of Services of General (Economic) Interest). These suggest a fundamentally dialectic relationship between the national and the Union interest. They regulate the national interest as enabling a derogation or immunity from EU commitments, or as offering a counterbalance the predominantly economic policy commitments of EU integration.

Arguably, such positioning of the national interest may come as straightforward to EU law which has been characterised predominantly by its functionality.<sup>27</sup> If law is conceived as available – for the purpose of securing the effectiveness of common policies – to resolve disputes between the EU and the Member States through principles, such as supremacy, direct effect and the duty of interpretation, and also to enable interferences with national autonomy and discretion, the national interest will necessarily be identified and treated as a source of conflict requiring confinement and mediation. There may be no alternative image available for the national interest in a legal order which is so extensively infused with an ‘ideology of obedience’ and which has exploited so successfully for the promotion of the integration process the basic constitutional instincts of the Member States under the rule of law to comply with rules.<sup>28</sup> The compliance and the ‘no frustration’ limb of Article 4(3) TEU regulating Member State conduct in the EU – if interpreted strictly – support this one-sided view.

Nevertheless, the imperative of compliance under Article 4(3) TEU is regulated together with demands for co-operation and assistance, and it requires – implicitly – equal and mutual compliance by all Member States. Read together with the equal treatment principle, equal Member State obedience with the law is not only a precondition for the effective delivery of EU policies even against the competing interests of the Member States, but it is also crucial for reminding the Member States that they are bound together by shared interests and for enabling the Member States to achieve the mutual benefits they hope to gain from European integration. Legal constraint (leverage) in EU law must, therefore, be understood as (the mutually agreed) consequence of the Member States having realised that the attainment

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<sup>27</sup> N. Walker, ‘The place of European law’, in J.H.H. Weiler and G. de Búrca (eds), *The Worlds of European Constitutionalism* (CUP, 2011), 57, at 98 and R. Dehousse, ‘European integration and the nation state’, in M. Rhodes *et al* (eds), *Developments in West European Politics* (Macmillan, 1997), 37, at 53.

<sup>28</sup> As criticised in J. Shaw, ‘European Union studies in crisis? Towards a new dynamic’, (1996) 16 *Oxford Journal of Legal Studies* 231, 237.

of the mutual benefits associated with European integration can be put to jeopardy by rogue Member States pursuing particularist interests, and that equal compliance with the mutual obligations placed on every Member State is necessary for the success of the European integration project.<sup>29</sup> Expecting the law to force the Member States to play by the common rules and to reduce Member State particularism to a minimum is fundamental when co-operation between the Member States is based on expectations of shared interests and mutual trust.<sup>30</sup>

Under these premises, the legal understanding of the national interest cannot be based exclusively on an idea of conflict with the interests of the Union. It is inevitable that it is also recognised that the interests of the Union cannot be separated from the interests of the Member States. This follows, as argued earlier, from Treaty provisions expressing the unity of interests among the Member States and demanding Member State conduct which corresponds with this plain recognition of solidarity. There is a raw pragmatism in the collective arrangement of the EU the legal principles of which are available to treat the national interest through demands of compliance as a source of conflict with the Union's interests *and* to remind the Member States that their interests in fact overlap with the interest of the Union and should, in their own interest, support the equal and effective enforcement of EU obligations against every Member State.

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<sup>29</sup> The foundational idea in EU law of constraining Member State sovereignty and autonomy, as revealed in *Van Gend*, *op cit supra* note 10, came as part of an argument that this is necessary to realise the shared Treaty objectives for the mutual benefit of the Member States.

<sup>30</sup> See Case 39/72, *Commission v Italy* *op cit supra* note 6 and Case 128/78, *Commission v UK* [1979] ECR 429. See para. 20, Case 5/94 *Hedley Lomas* [1996] ECR I-2553 and the cases cited concerning the adoption of unilateral measures 'designed to obviate' the breach of EU law by another Member State. See also paras. 5 and 8, Opinion of Advocate General Geelhoed in Case C-304/02, *Commission v France* [2005] ECR I-6263.

The case law is not particularly strong in expounding this fundamental circumstance. Beyond *Van Gend* and *Costa*,<sup>31</sup> a couple of judgments have considered that unilateral derogations from Treaty obligations and avoiding the control of EU institutions will undermine solidarity among the Member States, mainly because the conduct of individual Member States is ‘of common concern’, especially, when they threaten common policies.<sup>32</sup> The ruling in *Pupino*, which wedded in its reasoning the effective enforcement of obligations with the mutual interest of the Member States in meeting those obligations, made it clear that the fruits of collaboration among the Member States pursuing shared interests could be put to jeopardy in case the principle of consistent interpretation is not extended to measures passed under ex Title VI of the TEU to ensure that EU law is complied with, as required under the principle of loyalty.<sup>33</sup> For a further recognition in the law, we may need to look at the Treaties again. Article 197 TFEU – codifying decades of jurisprudence<sup>34</sup> – lays down that equal compliance and the effective implementation of Union law in all dimensions of Member State conduct is a ‘matter of common interest’ and not simply a legal constraint for the Member States, as otherwise Member State expectations towards the Union (the proper functioning of the Union) as regulated in the Treaties can be put to jeopardy.

When the broader EU constitutional framework is considered, it may be problematic to find evidence of this dual positioning of Member State interests beyond the general clauses

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<sup>31</sup> *supra* note 10, and *supra* note 6.

<sup>32</sup> Paras. 14-16, Case 6 and 11/69 *France v Commission* [1969] ECR 523 and paras. 24-25, Case 39/72, *Commission v Italy op cit supra* note 6. These could be interpreted as making a firm link between the commitment of the Member States in Article 4(3) TFEU to comply with EU obligations and the solidarity the expressed in Article 1(1) TEU.

<sup>33</sup> Paras. 41-43, Case C-105/03 *Pupino* [2005] ECR I-5285.

<sup>34</sup> *Inter alia*, paras. 22-24, Case 8/81 *Becker* [1982] ECR 0053; para. 15, Case 314/85 *Foto Frost* [1987] ECR 4199; para. 31, Case 103/88 *Costanzo* [1989] ECR 1839.

and principles discussed earlier. The Treaties – reflecting the main thrust of Treaty negotiations – embody a constitutional status quo creating a balanced and fixed relationship between the Union and the Member States. Their emphasis is on distinguishing the respective positions of the Union and the Member States separating and contrasting the European and the national. The Treaties strive to prescribe an ideal equilibrium between European communality and Member State particularism as they regulate the parallel commitments of sustaining and furthering European integration, and of respecting national identities and Member State diversity.<sup>35</sup> They seem to indicate a default position for the national interest which is of being balanced perpetually against – and not encompassed within – Member State obligations of compliance with their mutual obligations.<sup>36</sup>

The Treaties' focus on reconciling (and separating) the position of the Member States and of the Union is most visible in their combining provisions which are designed to preserve the positions of the Member States, such as the principle of conferral of EU powers or the protection of the identities of the Member States, with provisions which promote and consolidate the interests of European integration.<sup>37</sup> The Treaties regulate in parallel the centrifugal, constitutionalising intentions of the Union by referring to common roots and aspirations and common values and objectives, and the necessity of preserving cultural diversity, delimiting EU competences, protecting national identities and essential state functions, allowing enhanced co-operation between the Member States, and of permitting Member States to initiate the revision of the Treaties or to withdraw from them. Although

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<sup>35</sup> This is also expressed in the 'United in diversity' motto adopted for the European Union.

<sup>36</sup> J. Schwarze, 'Die Abwägung von Zielen der europäischen Integration und mitgliedstaatliche Interessen in der Rechtsprechung des EUGH', (2013) *Europarecht*, 253, 273, arguing that conflicts can be resolved by the Court of Justice for the benefit of European integration under its general jurisdiction by creating a 'fair and reasonable' relationship (balance) between the requirements of EU membership and the interests of the Member States.

<sup>37</sup> A. Dashwood, 'States in the European Union', (1998) 23 *European Law Review* 201, 203.

there is an *a priori* commitment to pursuing shared interest in the framework of common European policies for the mutual benefit of the Member States, the Treaties make sure in this process the boundaries between the EU and the national levels and the positions of the EU and the Member States are not confused.

Despite the overall Treaty framework suggesting a clear separability of Member State and Union positions, the apparent dynamism of the principles which govern the respective positions of the Member State and the Union suggests that the contrast and the balance created between the national and the European are not absolute and that distinctions between Member State and Union positions may often become blurred. The boundaries they establish between the Union and the Member States are shifting – most times in favour the Union and at other times the Member States. This volatility of boundaries may in fact indicate that the interests of the Member States and the Union overlap, especially, when the dynamic interpretation of the relevant constitutional principles is used to confirm a previous decision by the Member States to push integration further in a particular area. In such a case, the legal and policy changes can be interpreted as consequences of the Member States having considered that securing the mutual benefits offered by EU policies necessitates the rebalancing of EU-Member State relations allowing further EU action and a further reduction of Member State autonomy. It is more controversial when an EU institution – the Court of Justice – assumes a mandate to reassess EU-Member State positions pursuing an agenda of effective implementation of common commitments, presumably, to the mutual benefit of the Union and its Member States.

The principles of the EU constitutional order, which confine Member State interests and control Member State conduct, do not maintain a settled relationship between the national and the European. They tend involve a certain degree of bias in favour of the Union,<sup>38</sup> which

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<sup>38</sup> M. Klamert, *The Principle of Loyalty in EU Law* (OUP, 2014), at 211.

could follow from an understanding that the reinforcement and the expansion of EU commitments is in the mutual interest of the Member States pursuing shared objectives. This could entail continuously increasing the legal influence of European policies over the national, and bringing further and further policies at the national level under the scope of EU obligations.<sup>39</sup> This is evident in the case of the broadest gravitational principle – the principle of loyalty under Article 4(3) TFEU. It has been defined as the principle which ‘bridges the State/Community gap by stressing the Community context in which national action occurs’.<sup>40</sup> Put slightly differently, through the principle of loyalty EU law is able to draw boundaries regarding when and where securing the mutual benefits of European integration would be undermined by so far unaddressed instances of Member State particularism. Its expansion as a principle took place by having gradually incorporated an expanding cocktail of potent requirements addressed to the Member States, mainly for the purpose of neutralising the disintegrative pressures of Member State diversity and particularism.<sup>41</sup> Its growing influence is felt most heavily when it enables the EU to decline to take into account the interests of individual Member States in the context of developing and executing EU policies, and when it ties Member State executives, legislatures and judicial actors to the Union interest when acting under the scope of EU law and, potentially, also when acting autonomously in their own competences.<sup>42</sup>

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<sup>39</sup> See also how the general principles of EU law have surpassed self-imposed limitations on the effect of EU law in Case C-144/04, *Mangold* [2005] ECR I-9981; Case C-555/07, *Kücükdeveci* [2010] ECR I-0365; Case C-176/12, *AMS* ECLI:EU:C:2014:2.

<sup>40</sup> . Weatherill, ‘Beyond preemption? Shared competence and constitutional change in the European Community’ in D. O’Keeffe and P. Twomey (eds), *Legal Issues of the Maastricht Treaty* (Wiley, 1994), 12, at 31.

<sup>41</sup> Klamert, *op cit supra* note 38, at 13-17, 234-241.

<sup>42</sup> *ibid* at 24.

The substantive legal constraint imposed by the principle of supremacy has revealed similar tendencies for expansionism. This followed from judgments, such as *Melloni* where the Court of Justice – having reasserted the long-standing legal autonomy and immunity of the EU legal order from national human rights standards – indicated that is not prevented from expanding the influence of EU obligations, and argued that the application of national standards of human rights protection by national courts and authorities is allowed only so far as ‘the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law’ are not compromised.<sup>43</sup> The dynamism experienced in case of the supremacy principle has, nevertheless, more to do with accentuating existing commitments. As recognised widely, the intrusive potential of supremacy will necessarily be amplified when the EU’s legislative competences are broadened and an active legislative programme is pursued on the basis of those competences.<sup>44</sup>

The principles aiming to secure Member State positions within the EU do not fare better in maintaining strict boundaries between the national and the European. The open-ended competences system of the European Union – which aims to limit EU legislative action and discretion by means of the principles of conferral, subsidiarity and proportionality – has enabled European governance to react dynamically to the demands of common policies.<sup>45</sup> The EU legislator is allowed a broad discretion to pursue, for instance, the mutual benefits offered by the Single Market, in which it is constrained only minimally by the relevant Treaty

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<sup>43</sup> Paras. 58-60, Case C-399/11 *Melloni* ECLI:EU:C:2013:107.

<sup>44</sup> Discussed in N. Walker, ‘Late Sovereignty in the EU’, in N. Walker (ed), *Sovereignty in Transition* (Hart, 2003), 3. See further S. Weatherill, ‘Competence creep and competence control’, (2004) 23 *Yearbook of European Law* 1 and R. Barents, ‘The internal market unlimited: some observations on the legal basis of Community legislation’, (1993) 85 *Common Market Law Review* 85.

<sup>45</sup> See Bartolini, *op cit supra* note 23, at 134.

provisions – Article 114 and 352 TFEU – and the related judicial formulas.<sup>46</sup> Although the law excludes the use of certain general legislative competences by the EU –‘a general power to regulate the internal market’,<sup>47</sup> it may altogether fail to curb legislative discretion at the EU level in determining what action is needed in which common policy areas.<sup>48</sup> The Court of Justice seems to be a willing partner, as the exercise of its competences in judicial review is affected by generous judicial deference to Union legislative discretion, and it has been criticised for low intensity of the judicial control on the use of Treaty powers.<sup>49</sup>

The principle of subsidiarity – contrary to early expectations – is responsible for a particularly dynamic boundary between the Member States and the Union. Although its original purpose was to curb back EU legislative action, it has always enabled an unprincipled structure for the division of risk and responsibility for regulation between the EU and the Member States.<sup>50</sup> As Weatherill noted critically, as a legal principle it does nothing to reassure Member State regulatory autonomy and to restrain the inflation of European regulatory centralisation threatening the diversity of locally formulated interests.<sup>51</sup> In practice, subsidiarity has most often been applied to legitimise the expansion of EU legislative action

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<sup>46</sup> See paras. 83-86, Case C-376/98, *Germany v Parliament and Council* [2000] ECR I-8419.

<sup>47</sup> *ibid* para. 83.

<sup>48</sup> S. Weatherill, ‘The limits of legislative harmonisation ten years after *Tobacco Advertising*: how the Court’s case law has become a “Drafting Guide”’, (2011) 12 *German Law Journal* 827, 833-837. See also paras. 68-73, Case C-491/01 *BAT* [2002] ECR I-11453.

<sup>49</sup> Weatherill, *op cit supra* note 48, at 833-837.

<sup>50</sup> *ibid* at 844-847 and the literature cited there.

<sup>51</sup> *ibid* at 846.

by enabling the Union the claim and justify that the EU's involvement is required for securing the mutual benefits of European integration.<sup>52</sup>

Nevertheless, subsidiarity has not only been responsible for the augmentation of EU competences. Following pragmatic considerations of effective governance in a diverse socio-economic environment, it has enabled the Member States to gain some ground by moving away from the centralised, European to the decentralised, national frameworks of governance.<sup>53</sup> The resulting complex governance framework where the emphasis is placed on national level governance could be driven to internalise particular interests as of the Union, and as the earlier discussed example of Services of General Economic Interest demonstrates autonomous Member State conduct could be invited to reinforce and supplant EU policies. Subsidiarity, having been applied to highlight that the realisation of certain EU objectives may necessitate the curbing back of the EU's involvement, for example, by suspending the applicability of its general Treaty rules, has allowed the Member States to regulate, use resources, and design and maintain systems and infrastructures autonomously within the confines of a broad EU policy framework.<sup>54</sup>

In principle, the protection of Member State (national) identities as laid down in Article 4(2) TEU should erect fairly concrete boundaries between the Union and the Member States. The constitutional principle introduced by the Lisbon Treaty aiming to rebalance the Treaty regulation of Member State commitments seems to contradict the fundamental determination of the Member States to pursue shared interests under a collective framework,

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<sup>52</sup> Bartolini, *op cit supra* note 23, at 152-153. See also the criticism formulated in A. Estella, *The EU Principle of Subsidiarity and its Critique* (OUP, 2002), at 95.

<sup>53</sup> See, for example, White Paper – An energy policy for the European Union, COM(95) 682 final, at 37 and Commission Communication – Delivering the internal electricity market and making the most of public intervention, COM(2013) 7243 final.

<sup>54</sup> *supra* notes 8, 9 and 19.

where the success of common policies depends on the equal and effective adherence of every Member State to the common rules. It suggests that there are national interests separate from the interests of the Union, and that the cooperation of the Member States in the Union cannot go as far as putting certain notions and values – which are deemed essential for maintaining the identity of the Member States – to jeopardy.<sup>55</sup> Nevertheless, it is still uncertain what genuine effects the principle may have on the operation of the expanding EU competences system and whether it will radically influence the adjudication of Member State compliance on the basis of the traditional norms and principles before the Court of Justice.<sup>56</sup> There is considerable doubt concerning when national policy specific interests or particular policy considerations could benefit from the status of being constitutive elements of Member State identity, and when, as a result, Member State interests could be removed with the help of Article 4(2) TEU from under the scope of the mutual commitments laid down in the Treaties. Finally, the impact of the Member State identities clause on keeping Member State positions separate from those of the Union is affected by the lack of an explicit indication that the principle would in fact represent a constitutional break away from the foundational ideals of the Union which regard individual Member State conduct as a ‘common concern’ for all the Member States.

In order to provide a more complete picture of EU-Member State relations, a final important characteristic of the EU constitutional and legal order need to be considered. This is

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<sup>55</sup> Klamert, *op cit supra* note 38, at 20; A. von Bogdandy and S. Schill, ‘Overcoming absolute primacy: respect for national identity under the Lisbon Treaty’, (2011) 48 *Common Market Law Review* 1, 3.

<sup>56</sup> It merely ‘repackages’ pre-Lisbon case law concerning the protection of Member State legitimate interests, T. Konstadinides, ‘Constitutional identity as a shield and as a sword: the European legal order within the framework of national constitutional settlement’, (2011) 13 *Cambridge Yearbook of European Legal Studies* 195. The protection for national identity is not absolute, but it must be balanced against the principle of the uniform application of EU law, von Bogdandy and Schill, *op cit supra* note 55, at 4.

the flexibility of EU law which affects fundamentally how Member State commitments in the EU are viewed, and which by legitimising certain forms of Member State particularism can question the idea of a union among European states. In connection with this latter point, it is highly relevant that any assessment of flexibility must take into account that it comes in different forms and with different potential justifications.<sup>57</sup> As a consequence, flexibility is unlikely to serve as a general and total challenge to the arrangement of mutual Member State commitments in the Union. For example, when flexibility denotes the Treaty recognition of essentially obstructionist political interests of individual Member States, we can no longer speak of the unity of interests among the Member States and of expectations of mutual equal compliance from them. Conversely, when flexibility stands for the choice in EU measures of regulating procedures instead of substantive issues at the Member State level and of allowing the Member States to develop the relevant substantive rules themselves,<sup>58</sup> its application is driven by the functional considerations of policy effectiveness and of avoiding policy failures in a diverse European Union, which essentially is in the service of the interests of the Member States.

By allowing differentiation (differentiated policy development) within the EU framework including individual or a certain group of Member States, flexibility has allowed Member State interests to be successfully contrasted with those of the Union. Flexibility emerged as an instrument enabling the Union to address – not only in the political domain but

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<sup>57</sup> G. de Búrca, 'Differentiation within the core: the case of the Common Market', in G. de Búrca and J. Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility?* (Hart, 2000), 133, at 138-139; F. Tuyschaever, 'EMU and the Catch-22 of European constitution-making', in G. de Búrca and J. Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility?* (Hart, 2000), 173, at 178-179.

<sup>58</sup> J. Scott, 'Flexibility, "proceduralization", and environmental governance in the EU', in G. de Búrca and J. Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility?* (Hart, 2000), 259, at 259-260.

also in the law and governance of core EU policies<sup>59</sup> – the dilemmas following for European integration from the economic, social, political, cultural etc. diversity of the Member States.<sup>60</sup> It has been characterised to have become a second characteristic (an operational principle) of the EU legal order besides its uniformity building capacity,<sup>61</sup> which is arguably essential for a varied and complex polity, such as the EU. It is available to treat situations where because of Member State diversity the unity of interests among the Member States and their adherence to their mutual commitments just cannot be assumed. In its most extreme form, flexibility allows the Member States to lean on their political influence to have their interests recognised as distinct from those of the Union, as demonstrated by instances of politically engineered, subsequently constitutionally acknowledged Member State opt-outs attached to the Treaties.<sup>62</sup>

Nevertheless, flexibility and differentiation in EU law can also be interpreted from the very opposite perspective. In case the EU polity is not associated exclusively with centralisation and uniformisation, and decentralisation and differentiation are considered as necessary and justifiable in a multi-layered polity, the flexible treatment of Member State obligations emerges as indispensable in securing the achievement of the shared objectives laid down in the Treaties in governance and regulatory frameworks which are designed to be able to address the challenges of Member State diversity. In this setting, differentiation and the flexible treatment of Member State particularities are essential for the realisation of common

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<sup>59</sup> G. de Búrca and J. Scott, 'Introduction', in G. de Búrca and J. Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility?* (Hart, 2000), 1, at 2.

<sup>60</sup> See, in particular, the possibility of enhanced co-operation under Article 20 TEU.

<sup>61</sup> C-D. Ehlermann, 'How flexible is Community Law? An unusual approach to the concept of "Two Speeds"', (1984) 82 *Michigan Law Review* 1274, 1279.

<sup>62</sup> For example, Protocols 15-18 and 20-22, OJ 2010 C83/284-303.

policies.<sup>63</sup> With the principle of subsidiarity also taken into account,<sup>64</sup> the Member States are allowed – under constraints – to pursue their interests interlinked with those of the Union in a largely autonomous manner. These different interpretations of flexibility follow from the possibility of evaluating Member State diversity from the EU perspective in a contradictory fashion: as an asset or as an impediment, which affects their possible treatment, such as being nurtured, accommodated, decreased, circumvented, or suppressed, under the EU framework.<sup>65</sup>

The dual position of Member State interests in the Union is also expressed in the earlier mentioned condition of flexibility that it does not permit unrestricted preference choices for the Member States and allow limitless Member State particularism. In principle, the opportunities following from flexibility and differentiation for the Member States are confined in law, and as a norm their availability is subject to authorisation.<sup>66</sup> In particular, the flexible treatment of Member State interests must be based on objective, legitimate (economic and social) causes but not on subjective political preferences.<sup>67</sup> The Member States are also required to provide a justification, and their differentiated treatment must comply with the proportionality requirement, in particular, that it must be a proportionate response to the difference in question and it must cease when the cause of differentiated treatment no longer exists.<sup>68</sup>

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<sup>63</sup> It reflects a particular ideal for European integration in which differentiation has a place under a broad common framework, de Búrca and Scott, *op cit supra* note 59, at 2.

<sup>64</sup> C. Barnard, 'Flexibility and Social Policy' in G. de Búrca and J. Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility?* (Hart, 2000), 197, at 199.

<sup>65</sup> E. Philippart and M. Sie Dhian Ho, 'Flexibility and models of governance for the EU', in G. de Búrca and J. Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility?* (Hart, 2000), 281, at 304-308.

<sup>66</sup> de Búrca, *op cit supra* note 57, at 138-139.

<sup>67</sup> Ehlermann, *op cit supra* note 61, at 1289.

<sup>68</sup> *ibid.*

As noted earlier, flexibility can enable legal and governance arrangements where in the shared interest in the Union and the Member States – having regard to the pressures of Member State diversity – the virtues of centralisation and decentralisation in regulating and delivering common policies can be contrasted and reconsidered.<sup>69</sup> This corresponds with the theories discussed earlier which see the interests and positions of the Member States and the Union governed in a dynamic political and legal framework,<sup>70</sup> which enables their mutual accommodation and their definition *vis-à-vis* each other. When the Member States – as a result of the internal diversity of the EU polity and following the ideas of flexibility and subsidiarity – are allowed to negotiate on the spatial locations of governance and also on the spatial distribution of functions within Europe, the relationship between the interests of the Member States and of the Union is difficult to be understood merely in terms of conflicts, and overlaps between them emerge as equally valid characterisations.

## **Conclusions**

This article examined the national interest as conceptualised in EU law – primarily at the level of the principles governing Member State commitments and EU-Member State relations. It found that in the EU political and legal framework the national interest is positioned both in a dialectic relationship and as overlapping with the interests of the Union. This duality follows from the idea that the legal commitments of the Member States were imposed on themselves voluntarily, and their equal and effective enforcement cannot be interpreted solely as leveraging Member State interests to the benefit of the Union, but also as enabling the Member States to realise their shared interests as expressed in the common policies of the

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<sup>69</sup> *supra* notes 9, 13 and 14.

<sup>70</sup> *supra* notes 23 and 26.

Union. At the Treaty level, this dual positioning of the national interest is expressed in Articles 1(1) and 4(3) TEU imposing obligations of compliance and no frustration for the mutual benefit of the Member States.

EU law conceptualising the national interest in this manner gives a clear indication that the European Union is an interest community and an essentially collective enterprise of its Member States. When EU law reminds the Member States of their obligations – which it does regularly, it makes a reference to the mutual dependence of the Member States, and of the Member States and the Union on each other in realising the benefits promised by European integration. That meeting their EU obligations is in the interest of the Member States should not come as a surprise to any national government which takes its Treaty commitments seriously. It, nevertheless, presents a difficult dilemma for governments feeling constrained by their Treaty commitments. Unless there is a recognised deficit in a common policy or national interests of equal relevance with those of the Union are raised, not meeting their obligations will damage not only the interests of other Member States individually and in the Union, but also those of the Member State concerned.