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Supremacy, the Uniformity of EU Law, and the Principle of Equality

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Abstract: Despite being one of the pivotal principles of European Union law, there still is no consensus on the rationale for the supremacy of the law of the European Union over the law of the Member States. There is also not much discussion on the repeated claims in case law that Union law must have uniform application in the Member States. This paper suggests that both supremacy and uniformity can be understood as preventing the discrimination of individuals that would be caused by the divergent application of Union law in the Member States. In this respect, Member state-centred non-discrimination, now provided in Article 4(2) TEU on the equality of Member States, (merely) complements individual-centred non-discrimination, anchored in Article 18 TFEU and Article 21 CFR. Moreover, this paper discusses how these two standards relate to what is referred to as the unity of the internal market.

Keywords: Supremacy, Primacy, Equality, Uniformity, Non-discrimination, Unity, Internal market, General principles

I. Introduction

Despite being one of the pivotal principles of European Union law, there still is no consensus on the rationale for the supremacy of the law of the European Union over the law of the Member States. Recently, in the aftermath of the *ultra vires*-decision by the German Federal Constitutional Court in the PSPP/*Weiss* case,[1] it has been argued that Article 4(2) TEU would underpin the supremacy of EU law by requiring the equality of Member States *"before the*

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1 BVerfG 5.5.2020, 2 BvR 859/15 et al.

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law".[2] This claim has been contested instantly, and, as will be shown in the following, for good reason.[3]

A frequent *topos* in the case law of the Court is the uniform application of EU law in the Member States. Such 'uniformity' mostly pertains to the interpretation of Union law and to the jurisdiction of the European Court of Justice. It is rarely mentioned in connection with supremacy.[4]

The third concept of interest here is the 'unity' of Union law the Court refers to in case law on the internal market. It is also normally not seen as being connected with supremacy.

It will be shown in this paper that supremacy, as well as uniformity and (partly) unity, are all grounded in two connected non-discrimination standards, one individual-centred anchored in Article 18 TFEU and the other member state-centred provided in the first half of the first sentence of Article 4(2) TEU.

II. Two standards of non-discrimination

Article 18 TFEU lays down a general principle of Union law.[5] It applies independently only to situations that are governed by EU law and, additionally, in respect of which the Treaties provide no specific rules on non-discrimination.[6] Such specific rules are the provisions guaranteeing the fundamental freedoms.[7] Article 45(2) TFEU on the free movement of workers is the only other provision in the Treaties that explicitly prohibits discrimination based on nationality. In this form, non-discrimination serves to protect individuals from violations of free movement rights respectively from their rights as Union citizens.[8]

Whereas discrimination based on nationality is mentioned in Article 21(2) CFR next to discrimination based on 'special' grounds such as sex or age listed in Article 21(1) CFR, these prohibitions are fundamentally different.[9] Discrimination based on nationality is said to lack the "transformative" potential of prohibitions of discrimination based on grounds such as sex or age.[10] Yet, while these special grounds could also be (and are) protected within a purely

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2 *Lenaerts*, No Member State is More Equal than Others: The Primacy of EU law and the Principle of the Equality of the Member States before the Treaties, https://verfassungsblog.de/no-member-state-is-more-equal-than-others/.

3 *Lindeboom*, Is the Primacy of EU Law Based on the Equality of the Member States? A Comment on the CJEU's Press Release Following the PSPP Judgment, Vol. 21 German Law Journal 2020, 1032. See also *Klamert*, Rationalizing Supremacy: Supremacy, effectiveness, and two standards of equality in EU law, https://verfassungsblog.de/rationalizing-supremacy/.

4 In contrast, uniformity is commonly discussed in the context of "variable geometry" respectively flexibility. *See de Búrca/Scott* (eds.), Constitutional Change in the EU: From Uniformity to Flexibility? (2000) 133.

5 See ECJ C-115/08, *Land Oberösterreich v. ČEZ*, ECLI:EU:C:2009:660, para. 91, ensuing its application also to the EAEC Treaty.

6 See, e.g. ECJ C-581/18, *TÜV Rheinland*, ECLI:EU:C:2020:453.

7 See, e.g. ECJ C-3/88, *Commission v. Italy*, ECLI:EU:C:1989:606, para. 8. On the relation with the rules on competition, see EGC T-158/99, *Thermenhotel*, ECLI:EU:T:2004:2, para. 146.

8 On the relation between Art. 18 and 20 TFEU, see von *Bogdandy* in *Grabitz/Hilf/Nettesheim* (eds.), Das Recht der Europäischen Union: Kommentar[75] (2022) Art. 18 AEUV paras. 35 et seq.

9 The prohibition on grounds of nationality laid down in Art. 21(2) CFR restates Art. 18 TFEU. See Art. 52(2) CFR.

10 See *Muir*, Pursuing Equality in the EU, in *Arnull/Chalmers* (eds.), The Oxford Handbook of European Union Law (2015) 919, 926: "It remains closely intertwined with its function as a device for further integration among the Member States through the elimination of borders so that significant limitations persist on its ability to operate as a genuine tool for the transformation of European societies."

national context, non-discrimination based on nationality is a (logical) consequence of supranationality.[11]

These variations of an 'individual-centred' non-discrimination standard have been complemented by a 'member state-centred' standard first developed in case law predating the Lisbon Treaty. The Court held that different rules cannot apply for Member States that have become Members earlier and for more recently acceded Member States.[12] While it is justified for the original Member States provisionally to accept inequalities caused by exceptions provided in acts of accession, for new Member States "it would be contrary to the principle of the equality of the Member States before Community law to accept that such inequalities could continue indefinitely".[13] This standard is now provided in the first part of the first sentence of Article 4(2) TEU, requiring the Union to respect "the equality of Member States before the Treaties".[14]

III. On the supremacy of EU law[15]

A. The rationale for supremacy in case law and in the literature

In EU law textbooks, the point has been made that Union law can have direct effect in national law and can, therefore, conflict with national law in specific situations.[16] However, this only explains why there must be some sort of conflict resolution mechanism, but not why this must necessarily be supremacy.

In *Costa/ENEL*,[17] the Court presented the following line of arguments for introducing the supremacy of EU law over (pre-existing) national law: It repeated the *sui generis* argument familiar from *Van Gend en Loos*,[18] stressed the subjective side of obligations under (then) Community law, and referred to "the terms and the spirit of the Treaty". It made the systematic argument that "wherever the Treaty grants the States the right to act unilaterally, it does this by clear and precise provisions", and gave several examples to this point. The Court referred to regulations under (now) Article 288 TFEU, which would otherwise be "meaningless". These

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11 Compare *Somek*, Individualism – An Essay on the Authority of the European Union (2008) 215: "...from a jurisprudential point of view, the protection from discrimination on the ground of nationality is the most fundamental principle of Union law, for it accounts for the very authority of supranational law".

12 See ECJ C-63/90 and C-67/90, *Portugal and Spain v. Council*, ECLI:EU:C:1992:381, paras. 36 et seq. and 44. See also, applying pre-Lisbon law ECJ C-336/09 P, *Poland v. Commission*, ECLI:EU:C:2012:386, para. 36 et seq.

13 ECJ 231/78, *Commission v. UK (Potatoes)*, ECLI:EU:C:1979:101, para. 17; see also ECJ C-273/04, *Poland v. Council* ECLI:EU:C:2007:622, para. 87. Invoking Art. 4(2) TEU by claiming that secondary law would fail to consider differences between Member States absent an accession context has so far not been successful. See ECJ C-128/17, *Poland v. Parliament and Council*, ECLI:EU:C:2019:194, on the claim that the cost of implementing the National Emission Ceilings Directive (EU) 2016/2284 were considerably higher in Poland than in other Member States. See now, pending, ECJ C-550/20 and C-549/20, *Cyprus v. Parliament and Council*, and ECJ C-545/20, C-544/20 and C-543/20, *Bulgaria v. Parliament and Council*.

14 See *Rossi*, The Principle of Equality among Member States of the European Union, in *Rossi/Casolari* (eds.), The Principle of Equality in EU Law (2017) 3; *Classen*, Die Gleichheit der Mitgliedstaaten und ihre Ausformungen im Unionsrecht, EuR 2020, 255.

15 A shorter version of this part has been published as *Klamert*, Rationalizing Supremacy, https://verfassungsblog.de/rationalizing-supremacy/.

16 *Schütze*, European Constitutional Law² (2016) 117 et seq. See also *Hofmann*, Conflicts and Integration: Revisiting Costa v ENEL and Simmenthal II, in *Maduro/Azoulai* (eds.), The Past and Future of EU Law – The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty (2010) 60; see *Craig/de Búrca*, EU Law: Text, Cases, and Materials⁶ (2015) 268 on a categorisation of arguments.

17 ECJ C-6/64, *Costa/ENEL*, ECLI:EU:C:1964:66.

18 ECJ C-26/62, *Van Gend & Loos*, ECLI:EU:C:1963:1.

arguments have been categorised as "contractarian" (ie. the Member States have given away their sovereignty by agreeing to membership), "functional" / "pragmatic" (the aims of the Treaties and integration require it, thus essentially *effet utile*), and "analytical" (the instrument of the regulation would be negated otherwise).[19] However, all these arguments cannot (fully) explain the need for supremacy.

Especially, an argument based on the 'effectiveness' of Union law may be tempting but arguably is not compelling.[20] Effectiveness has emerged from loyalty as a means to ensure that Union law takes full effect in national law.[21] According to longstanding case law of the Court such as *Adeneler*,[22] it is the basis for certain effects of Union directives in the time before the expiry of the deadline for transposition and for the principle of state liability, among others. Yet recently, supremacy has, in passing, been declared the basis for the duty of the consistent interpretation of national law in light of Union directives and state liability.[23] At the same time, in a press release following the German Constitutional Courts' *Weiss*/PSPP/*Ultra vires*-decision – relying on *Adeneler* and avoiding the term supremacy or primacy – it was stated that authorities of the Member States including national courts were required to ensure that EU law takes full effect, which would be the only way of ensuring the equality of Member States in the Union they created.[24] This, taken together, seems to assert the following: EU law must be effective and therefore it takes precedence over national law which in turn is the reason for state liability and indirect effect. This, however, is at odds with years of case law linking effectiveness with Article 4(3) TEU but not with supremacy.

Moreover, rationalizing supremacy with effectiveness also confounds two distinct permutations of *effet utile*.[25] On the one hand, *effet utile* can mean to interpret a provison of Union law in order to have any effect, ie in order not to be pointless.[26] On the other hand, it can mean that Union law is interpreted in order to have a strong or even the strongest possible effect. Union law would not be ineffectual in the absence of supremacy. As already mentioned, there could be other forms of conflict resolution that might be less effective but that would not render Union law completely meaningless. Supremacy, in contrast, means awarding Union the strongest possible effect vis-à-vis national law. Relying on effectiveness would therefore require admitting that it is a very special form of effect that is sought for.

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19 *Craig/de Búrca*, EU Law[6] 268; compare also *Wouters*, National Constitutions and the European Union, Vol. 27 Legal Issues of Economic Integration 2000, 25 (64 et seq.), who, pointing to ECJ C-44/79, *Hauer*, ECLI:EU:C:1979:290 discussed below, speaks of the "practical concern" that the status of Community rules would differ from Member State to Member State, of which non-discrimination based on nationality would only be a further concretization.

20 See *de Witte*, Direct Effect, Primacy, and the Nature of the Legal Order, in *Craig/de Búrca* (eds.), The Evolution of EU Law[2] (2011) 323, 329, finding all arguments not particularly convincing by themselves and settling for the *effet utile*-argument as most apposite.

21 See *Klamert* in *Kellerbauer/Klamert/Tomkin* (eds.), The EU Treaties and the Charter of Fundamental Rights – A Commentary (2019) Article 4 TEU paras. 61-66.

22 See, e.g. ECJ C-212/04, *Adeneler*, ECLI:EU:C:2006:443.

23 ECJ C-573/17, *Popławski,* ECLI:EU:C:2019:530, paras. 53-57, on Framework Decisions.

24 *ECJ*, Press Release 58/20 of 8 May 2020, https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cp200058en.pdf (accessed June 24, 2021). See, critically, *Lindeboom*, Vol. 21 German Law Journal 2020, 1032.

25 See *Potacs,* Effet utile als Auslegungsgrundsatz, EuR 2009, 465.

26 See *Klamert*, EU-Recht[3] (2021) para. 1153.

Article 4(2) TEU on the equality of Member States has been seen as having a connection with enhanced cooperation and differentiated integration,[27] as well as with (member state-) solidarity and mutual trust.[28] National interests cannot justify unilateral acts as this would not respect the "equilibrium between advantages and obligations" flowing from membership in the EU and would undermine the mutual trust the Union is built on.[29] Recently, in the aftermath of the *ultra vires*-decision by the German Federal Constitutional Court in *Weiss*,[30] it has been argued that Article 4(2) TEU underpins the supremacy of EU law by requiring the equality of Member States "before the law".[31] Similarly, an "egalitarian" argument for explaining supremacy has been laid out as follows: "If a Member State law could unilaterally take precedence over EU law then that would lead to discrimination in the application of EU law as between the Member States, and would mean also that a state was taking the benefits of EU law without accepting all the burdens".[32]

It is submitted that relying on Article 4(2) TEU to rationalise supremacy places too much argumentative burden on this provision, which is neither supported by its wording which imposes an obligation on the Union and not on the Member States, nor by the case law mentioned above. It also compounds the principle of supremacy with the principle of solidarity. It is a breach of solidarity and 'unfair' *vis-à-vis* the other Member States if one Member State fails to respect common(ly agreed) rules.[33] Such 'unfairness' can be addressed perfectly well with an infringement action but does not necessarily call for supremacy.[34]

Most recently, in *Euro Box Promotion*, the Grand Chamber of the Court[35] has framed the relevance of Article 4(2) TEU in a much more indirect and less forceful manner: "It must be added that Article 4(2) TEU provides that the Union is to respect the equality of Member States before the Treaties. However, the Union can respect such equality only if the Member States are unable, under the principle of the primacy of EU law, to rely on, as against the EU legal order, a unilateral measure, whatever its nature."

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27 *Wouters/Schmitt*, Equality Among Member States and Differentiated Integration in the EU, in *Rossi/Casolari* (eds.), The Principle of Equality in EU Law (2017) 43-82.

28 *Rossi*, The Principle of Equality among Member States of the European Union, in *Rossi/Casolari* (eds.), The Principle of Equality in EU Law (2017) 3.

29 Opinion in ECJ C-137/05, *UK v. Council*, ECLI:EU:C:2007:420, para. 110; Opinion in ECJ C-715/17, *Commission v. Poland*, C-718/17, *Commission v. Hungary*, and C-719/17, *Commission v. Czech Republic*, ECLI:EU:C:2019:917, para. 253.

30 BVerfG 5.5.2020, 2 BvR 859/15 et al.

31 *Lenaerts*, *No Member State is More Equal than Others,* https://verfassungsblog.de/no-member-state-is-more-equal-than-others/: "It would mean in essence "that all provisions of EU law are to have the same meaning and to be applied in the same fashion throughout the EU"; see also *Fabbrini*, After the OMT Case: The Supremacy of EU Law as the Guarantee of the Equality of the Member States, Vol. 16 German Law Journal 2015, 1003.

32 *Craig/de Búrca*, EU Law[6] 268: Compare the 5th edition where the egalitarian point was not mentioned yet. See also the Opinion in ECJ C-213/07, *Michaniki*, ECLI:EU:C:2008:544, para. 33, in connection with Art. 4(2) TEU: "Furthermore, it could lead to discrimination between Member States based on the contents of their respective national constitutions."

33 See *Klamert*, Loyalty and Solidarity as General Principles, in *Ziegler/Neuvonen/Moreno-Lax* (eds.), Research Handbook on the General Principles of EU Law (2022) 118, 130.

34 For a different perspective, see *Phelan*, The Revolutionary Doctrines of European Law and the Legal Philosophy of Robert Lecourt, Vol. 28 European Journal of International Law 2017, 935, arguing for a connection between the rejection of any form of reciprocal or retaliatory self-help between Member States and supremacy (and direct effect).

35 ECJ C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *Euro Box Promotion*, ECLI:EU:C:2021:1034, para. 249.

B. Rationalizing supremacy based on equality[36]

In addition to the reasoning discussed above, in *Costa/ENEL*, the Court[37] also claimed that "[t]he executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty set out in Article 5(2) [now Article 4(3) TEU] and giving rise to the discrimination prohibited by Article 7 [now Article 18 TFEU]". This argument has now been repeated by the ECJ[38] for, as far as can be seen, the first time since *Costa/ENEL* in the Grand Chamber judgement in *Euro Box Promotion*. The Court thus found that the denial of supremacy by a Member State would jeopardize the attainment of the objectives of the Treaty and give rise to discrimination based on nationality. Intriguingly, it is not clear which objectives were referred to. Moreover, Article 18 TFEU (ex Article 7 EC) has never been applied by the Court or understood in the literature as conferring a right on a national/resident against its 'own' Member State (of residence) in such situation. It is normally concerned rather with how and to what effect Member States apply their 'own' laws and regulations within the scope of application of EU law.[39]

It is submitted that the reference to Article 18 TFEU by the Court makes perfect sense if we understand the prohibition of discrimination based on nationality as also including a comparison between the situation of a person subject to Union law in one Member State with the situation of a person subject to Union law in (an)other Member State(s). This pertains to a Union directive on worker rights that is not applied by a Member State as much as to rules on the set-up of a Member State's judicial system. While the latter are directly addressed only to the Member State, the functioning or malfunctioning of national courts also affects the rights of individuals coming under their jurisdiction. Even failing to follow ECB decisions ultimately touches the interests of natural and legal persons in the respective Member State.

While this might not be explicitly covered by Article 18 TFEU, this provision can be seen as expressing the objective or principle that equality must also be upheld in this constellation.[40] 'Equality before Union law' would then be a Treaty objective as referred to in Article 4(3) TEU, thereby activating the only basis in the Treaties for obliging Member States to either abstain

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36 The principles of "equal treatment" and of "non-discrimination" can be considered as being synonymous. See ECJ C-422/02 P, *Europe Chemi-Con*, ECLI:EU:C:2005:56. See *Wouters/Schmitt* in *Rossi/Casolari* (eds.), The Principle of Equality 43, 45 et seqq.

37 ECJ C-6/64, *Costa/ENEL*, ECLI:EU:C:1964:66.

38 ECJ C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *Euro Box Promotion*, ECLI:EU:C:2021:1034; para: 246. See *Spieker*, Werte, Vorrang, Identität: Der Dreiklang europäischer Justizkonflikte vor dem EuGH, EuzW 2022, 305; *Klamert*, Strukturprinzipien, in *Klamert* (ed.), Jahrbuch Europarecht 22 (2022) 95, 103-104.

39 See, e.g. ECJ C-1/78, *Kenny*, ECLI:EU:C:1978:140, para. 18: "By prohibiting every Member State from applying its law differently on the ground of nationality, …." (emphasis added). Cf. *Epiney* in *Calliess/ Ruffert* (eds.), EUV/AEUV[5] (2016) Art. 18 AEUV para. 10.

40 This does not mean that Union law recognizes a right to all-encompassing 'equality before the law' prohibiting discrimination on any conceivable ground and in all instances. If this were the case, 'reverse' discrimination would also be prohibited by EU law, which however it is not. See the discussion at *Martin* in *Kellerbauer/Klamert/Tomkin* (eds.), The EU Treaties and the Charter of Fundamental Rights – A Commentary (2019) Article 20 CFR paras .1-10.

from doing something or to actively do something to this end.[41] In this sense, the equal treatment in light and within the application of Union law between persons subject to the laws of different Member States would be the objective that is jeopardised if Member States fail to abstain from applying national law over Union law. The point then is not that Member States would have an unfair advantage *vis-à-vis* other Member States without supremacy, as the "egalitarian" reading of supremacy mentioned above suggests, but that it would discriminate individuals in light of Union law.

This 'individualistic'[42] viewpoint on supremacy also explains the use of the term supremacy. It is in my view perfectly reasonable to speak of primacy or precedence, as the Court seems to do overwhelmingly, when alluding to the 'functionality' of setting aside national law,[43] or when making the point that there is no strict hierarchy between Union law and national law in a formal sense.[44] It is, however, apposite to see supremacy as more than a functionality and as more than the solution to a conflict of norms. It is essential for fulfilling a central promise of the European Union, *viz*. the equal application of its rules to all its subjects irrespective of the Member State they reside in. This arguably justifies speaking of a 'principle of supremacy' that involves giving primacy/precedence to Union law over national law. In this light, the foremost purpose of supremacy is not to resolve a conflict between legal orders but it is to prevent discrimination.[45]

While Article 4(2) TEU only concerns the position of Member States *vis-à-vis* Union law and not the position of individuals *vis-à-vis* Union law, member state-centred non-discrimination at the same time pertains to individual-centred non-discrimination because treating Member States differently entails treating the persons residing therein differently. The equality of Member States before Union law thus entails the equality before Union law of the individuals on their territory. Article 4(2) TEU is therefore relevant here, but 'only' because, by obliging the Union to treat Member States equally, it complements the obligation to give precedence to Union law incumbent on the Member States.

As is well known, supremacy cannot be found in primary EU law, despite an attempt to include it with the failed Constitutional Treaty.[46] Recently, the German Federal Constitutional Court[47] has deemed it important that such "express guarantee specifying the precedence of application of EU law" is missing from the EU Treaties. Tentatively, the view offered herein might go

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41 *Klamert*, The Principle of Loyalty in EU Law (2014) 72. It transpired later in ECJ C-106/77, *Simmenthal*, ECLI:EU:C:1978:49 that Member States were 'merely' meant to abstain from applying conflicting national law.

42 This should be distinguished from other reasons why Union law is focused on individuals, such as especially the direct effect of large parts of its law. See the Chapter with the title "A Central Role for the Individual" in *de Witte* in *Craig/de Búrca* (eds.), The Evolution of EU Law² 323, 358-359. Direct effect itself arguably is not based on non-discrimination. Whether individuals can rely directly on provisions of Union law does not make them more or less equal. It 'only' is important that such direct effect applies equally and uniformly in all Member States.

43 *Claes*, Primacy of EU Law in European and National Law, in *Arnull/Chalmers* (eds.), The Oxford Handbook of European Union Law (2015) 178.

44 See *Avbelj*, Supremacy or Primacy of EU Law—(Why) Does it Matter? Vol. 17 European Law Journal 2011, 744. See also *Tuominen*, Reconceptualizing the Primacy–Supremacy Debate in EU Law, Vol. 47 Legal Issues of Economic Integration 2020, 245.

45 If we accept this view, the question of whether there must be a conflict of norms arguably becomes less central. See, on this debate, among others, *Lenaerts/Corthaut*, Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law, Vol. 31 European Law Review 2006, 287 (289, 297). See also *Dougan*, When worlds collide! Competing visions of the relationship between direct effect and supremacy, Common Market Law Review 2007, 931.

46 See *Claes* in *Arnull/Chalmers* (eds.), The Oxford Handbook 200 et seq.

47 BVerfG 23.6.2021, 2 BvR 2216/20 and 2 BvR 2217/20.

some way explaining why it would not be necessary to do so after all.[48] Article 18 TFEU and Article 4(2) TEU can be understood as essentially disallowing different treatment of individuals in the EU resulting from an unequal application of Union law between Member States. Taken together, by this perspective, they strongly suggest that Union law must take precedence over national law as a matter of principle to forestall such discrimination.

IV. Uniformity of EU law and the jurisdiction of the Court

Whereas supremacy safeguards the uniform application of EU law throughout the Member States, there are two separate strands in the case law of the Court on the uniform interpretation of provisions of Union law. The first is concerned with how a provision of Union law is interpreted, the other is concerned with who is competent to interpret it.

The Court[49] has held that "the need for uniform application of Community law and the principle of equality require that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community". It is not clear to which principle of equality the Court refers to here. Most likely it is the 'meta-principle' requiring similar situations not being treated differently mentioned above.

Striving for the harmonious interpretation of legal terms in a legal order is nothing peculiar to EU law.[50] The peculiarity of the EU legal order, when compared with the legal orders of nation-states, is that a heterogeneous interpretation will most likely not occur within one legal order (by lower courts to be eventually corrected by the national supreme court) but between at least two different Member State legal orders. If this happens, the discrepancy is not 'merely' a disturbance of theoretical aspirations to legal 'unity' but is likely to lead to a divergent treatment of persons subject to the rules concerned depending on the Member State they find themselves in.

It arguably is for this reason that, starting with *Van Gend*, the Court reserved the right to decide on the (direct) effect of Union law within the national legal orders to itself, at variance with the modus under public international law.[51] The Court alone is also competent to interpret certain provisions in mixed agreements to safeguard the unity of the Union legal order.[52] The preliminary ruling procedure as the keystone of the EU judicial system would

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48 See, for such view: *Lenaerts,* No Member State is More Equal than Others, https://verfassungsblog.de/no-member-state-is-more-equal-than-others/, based however solely on Art. 4(2) TEU.

49 ECJ C-388/18, *Finanzamt A v. B*, ECLI:EU:C:2019:642, para. 30 with further references; ECJ C-373/00, *Adolf Truley*, ECLI:EU:C:2003:110, para. 35.

50 *Klamert*, Einheit und Fragmentierung im Unionsrecht, EuR Special Issue 2019 No 2, 133.

51 ECJ C-26/62, *Van Gend & Loos*, ECLI:EU:C:1963:1, para. 3.

52 See ECJ C-53/96, *Hermès*, ECLI:EU:C:1998:292, para. 28; ECJ C-89/99, *Schieving-Nijstad*, ECLI:EU:C:2001:438, para. 35. See also *Klamert*, Dark matter: Competence, Jurisdiction and the Area Largely Covered by EU Law – Comment on Lesoochranárske European Law Review 2012, 340.

have "the object of securing uniform interpretation of EU law".[53] The Court[54] additionally stresses that it is "the jurisdiction of the Court of Justice alone to declare an act of the European Union invalid, and in particular a directive, the purpose of that jurisdiction being to guarantee legal certainty by ensuring that EU law is applied uniformly".

It is this centralization of the power to interpret the meaning and the effect of provisions of Union law (and to decide on their validity) that safeguards the uniform interpretation of Union law. It is this second strand emphasising who is competent to ensure uniformity that is owed to supranationality and that is, at its core, as much about non-discrimination before EU law as supremacy. Only the uniform and centralized interpretation of EU law can safeguard equality before EU law. Again, the point is not effectiveness because EU law could well be effective even if it were interpreted differently throughout the EU.

Thus, uniformity is not required for the sake of uniformity; rather, the uniform application of Union law in all Member States is paramount for preventing the heterogeneous treatment of natural and legal persons under Union law.[55]

V. Unity, uniformity, and the internal market

The unity of the internal market is an ill-defined concept. It has been understood broadly as the substance of the common and complete order of the internal market.[56] It can also refer to the convergence of the prohibition and justification regimes under the different freedoms.[57] Another approach asks whether only the 'whole' or also parts of the (rules governing the) internal market can be extended to third countries.[58] Especially in the context of the competition rules, unity can refer to the unity of the market in economic terms through the uniformity of trade conditions, in the sense of a level playing field for all operators on the market.[59]

Mostly, however, the Court appears to have alluded to two issues when referring to the 'unity' or 'integrity' of the internal market.

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53 ECJ Opinion 2/13, *Accession to the European Convention of Human Rights (ECHR II)*, ECLI:EU:C:2014:2454, para. 176. See also, e.g. ECJ C-166/73, *Rheinmühlen*, ECLI:EU:C:1974:3.

54 ECJ C-188/10 and C-189/10, *Melki and Abdeli*, ECLI:EU:C:2010:363, with further references.

55 See also *Mayer* in *Grabitz/Hilf/Nettesheim* (eds.), Das Recht der Europäischen Union: Kommentar (2019) Art. 19 EUV para. 33.

56 *Barents*, The Autonomy of Community Law (2004) 208; *Öberg*, The Boundaries of the EU Internal Market (2020) 92 et seq.

57 See, e.g. *Tryfonidou*, Further steps on the road to convergence among the market freedoms, Vol 35. European Law Review 2010, 36.

58 This most likely depends on the legal basis for such an extension. Contrast the full extension vis-à-vis EFTA with selective extension vis-à-vis Turkey, both based on what is now Art. 217 TFEU for association agreements. See ECJ C-452/01, *Ospelt*, ECLI:EU:C:2003:493, para. 29 and ECJ C-351/08, *Grimme*, ECLI:EU:C:2009:697, para. 27, on the one hand, and ECJ C-221/11, *Demirkan*, ECLI:EU:C:2013:583, on the other hand. On the refusal to grant any form of extension in the context of the negotiations of the Trade and Cooperation Agreement with the UK (based on Art. 207 TFEU), see *Shuibhne*, The Integrity of the EU Internal Market: Connecting Purpose and Context for Brexit – and Beyond, in *Amtenbrink* et al. (eds.), The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley (2019) 549 (555 et seq.). See also *van Elsuwege*, Exporting the Internal Market Beyond the EU's Borders: Between Political Ambition and Legal Reality, in *Amtenbrink* et al. (eds.), The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley (2019) 637 (645 et seq.); see also, on this, *Öberg*, The Boundaries 32-36.

59 See ECJ C-14/68*, Wilhelm*, ECLI:EU:C:1969:4, para. 5; ECJ Opinion 1/94, *WTO*, ECLI:EU:C:1994:384, para. XIV.

On the one hand, such references have been made in the context of negative integration. Articles 34 et seq. TFEU would ensure the unity of the (now) internal market.[60] Non-discrimination has a different role here than suggested above concerning supremacy. Although all fundamental freedoms contain a (directly effective) ban on discrimination based directly or indirectly on nationality, this 'only' prevents Member States from applying different rules of national law from those they apply to their own nationals. The specific prohibitions of discrimination do not exclude that rules and regulations differ between Member States.[61] In this context, therefore, unity does not mean uniformity.

On the other hand, the Court[62] has made several references to the unity of the internal market in the context of positive integration. It referred to the internal market as an "economically integrated entity with a single market, based on common rules between its members". Harmonisation under the Common Agricultural Policy must be exercised "from the perspective of the unity of the market to the exclusion of any unilateral measures by the Member States".[63] Directives would aim to prevent damage to the unity of the internal market resulting from unilateral measures by Member States.[64] In the *Hauer* case on the internal market and fundamental rights, the Court held[65] that the "introduction of special criteria for assessment stemming from the legislation or constitutional law of a particular Member State would, by damaging the substantive unity and efficacy of Community law, lead inevitably to the destruction of the unity of the Common Market and the jeopardizing of the cohesion of the Community".

This arguably links harmonisation and the unity of the market achieved on its basis with non-discrimination, supremacy, and uniformity. It means that harmonisation measures by the Union specifically do not permit deviations caused by national law of any level unless this is explicitly allowed by the Treaty or by the Union act itself.[66] If a harmonising Union directive would not fully apply to a certain Member State, this would entail a different treatment of the persons coming under the scope of application of the directive in this Member State. This frames the unity of the market as a market without unequal treatment of natural and legal persons operating under common Union rules. In this sense, the unity of the market is a legal concept and means the uniform application of the Union rules regulating the market. One

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60 ECJ C-51/75, *EMI*, ECLI:EU:C:1976:85, para. 11; ECJ C-193/80, *Commission v. Italy*, ECLI:EU:C:1981:298, para. 17. See also, to this effect, ECJ C-660/15 P, *Viasat Broadcasting*, ECLI:EU:C:2017:178, para. 31; ECJ C-159/94, *Commission v. France*, ECLI:EU:C:1997:501, para. 55.

61 This issue is rather addressed by the prohibition of restrictions. See *Klamert*, Services Liberalization in the EU and WTO – Concepts, Standards and Regulatory Approaches (2014) 283.

62 ECJ C-351/08, *Grimme*, ECLI:EU:C:2009:697, para. 27, in the context of the refusal of Switzerland to accede to the EEA.

63 See ECJ C-80/77 and C-81/77, *Commissionaires Réunis*, ECLI:EU:C:1978:87, para. 35 et seq.

64 ECJ C-377/98, *Netherlands v. European Parliament and Council*, ECLI:EU:C:2001:523. See also ECJ C-359/92, *Germany v. Council*, ECLI:EU:C:1994:306, para. 37.

65 ECJ C-44/79, *Hauer*, ECLI:EU:C:1979:290, para. 14. See also ECJ C-399/11, *Melloni*, ECLI:EU:C:2013:107, para. 60; ECJ C-206/13, *Siragusa*, ECLI:EU:C:2014:126, para. 32; and the Opinion C-550/07 P, *Akzo Nobel*, ECLI:EU:C:2010:229, para. 168.

66 See the derogations in Art. 114(4) TFEU. See also ECJ C-22/70, *Commission v. Council (AETR/ERTA)*, ECLI:EU:C:1971:32, para. 31, implying a connection between exclusive competence and the unity of the internal market: "These Community powers exclude the possibility of concurrent powers on the part of Member States, since any steps taken outside the framework of the Community institutions would be incompatible with the unity of the Common Market and the uniform application of Community law." See also ECJ C-14/68, *Walt Wilhelm*, ECLI:EU:C:1969:4, on Art. 103(2)(e) TFEU (ex Art. 87(2)(e) EEC).

might also say that, in contrast to deregulation through negative integration, (re)regulation[67] is very much about the 'uniformity' of the law in the Member States.

VI. Conclusion

In 1993, Advocate General *Jacobs*[68] deemed the prohibition of discrimination on grounds of nationality "the single most important principle of Community law", "the leitmotiv". This article has made the case that it remains pivotal until today, underpinning the 'positive integration'-side of the principle of the unity of the internal market and, more importantly, the principle of supremacy and the requirement for the uniform and centralised interpretation of EU law. The uniform application of Union law that has been emphasised in both contexts is grounded on the objective that there should be no inequity in the way Union law is applied in a Member State compared to other Member States to prevent the unequal treatment of individuals in light of EU law. The first half-sentence of Article 4(2) TEU has been suggested as merely an additional, indirect foundation of this, contrary to what has been claimed in the literature.

67 See *Weatherill*, The Internal Market as a Legal Concept (2017) 151-156.

68 ECJ Opinion C-92/92 and C-326/92, *Phil Collins*, ECLI:EU:C:1993:276 para. 9. See also *ibid* para. 11: "No other aspect of Community law touches the individual more directly or does more to foster that sense of common identity and shared destiny without which the 'ever closer union among the peoples of Europe', proclaimed by the preamble to the Treaty, would be an empty slogan."