

The End of Exceptionalism and a Strengthening of Coherence? Law and Legal Integration in the European Union post-Brexit

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The EU's legal system has been built on the principle of a 'single legal order'. Undeniably, however, differentiation has crept in. The UK has been at the forefront of seeking opt-outs and exceptions to the euro, Schengen etc. After Brexit, will others' requests for special treatment continue, or will the Brexit experience strengthen the legal order? Is the EU's legal system capable of absorbing differentiation in its fabric? This contribution argues that differentiation can only be accommodated so far in the Treaty arrangements without a wholesale re-evaluation of the purpose of EU law. The UK's departure removes the Member State most ready to challenge some of the fundamentals of the legal order, but the article urges caution against a full re-characterisation post-Brexit. Instead, the article foresees a continuation of the *status quo*, in which differentiation exists in various forms but as exceptions to the rule, rather than the rule itself.

Introduction

The European Union (EU) is often regarded as being in permanent crisis and divided in its responses to both internal and global migration, over the operation of the euro and economic dimensions of membership, over different aspects of social welfare and free movement (such as posted workers), and over more existential questions such as 'sovereignty' (Dinan et al., 2017; Grimm, 2017). Whilst this characterisation of 'perma-crisis' goes back years – some might say to the 'empty chair crisis' and 'eurosclerosis' of the 1960s and 70s – there is something different about the feeling of crisis today, not least with regards to the relationship between the EU institutions and the Member States. Since the EU has been built on a set of legal rules and an institutional framework designed to integrate the Member States whilst enforcing those rules, the role of (EU) law in any of these situations is crucial.

The institutional hand-wringing over the first participation of the Freedom Party in the government of Austria in the early 2000s (Gehler, 2002) now seems to be a distant memory since the multiple concerns about populists in governments in Poland, Hungary and Italy, amongst others, openly challenging some of the foundations on which the EU is built. This has led straight into the uncharted territory of the use of Article 7 TEU on the breach of fundamental values of the Union against Poland and Hungary. Challenges by Member States to pieces of EU *legislation* are nothing new or unusual, and an expected dimension of any large entity where disputes can arise.¹ Not all such actions are for the purposes of disputing EU law on principle, but to ensure respect for fundamental rights, an appropriate balance of competence and procedural rules and other constitutional requirements (de Visser, 2014). But the *political* rhetoric behind some of the challenges is different – and particularly in recent

¹ For example, Germany challenged the Directive on Tobacco Advertising, Case C-376/98 *Germany v Parliament and Council ('Tobacco Advertising I')*, ECLI:EU:C:2000:544

years. The unsuccessful challenges by Hungary and Slovakia to refugee relocation quotas is a case in point.²

Brexit is, of course, a relevant dimension in the characterisation of the contemporary EU as one of being in crisis. And yet, one of the most remarkable things about the Brexit process is the extent to which the remaining EU27 have presented a ‘united front’. The United Kingdom (UK) government appears to have – wrongly – assumed that it would be able to pick off various member states who might be sympathetic to the UK’s demands, whether that would be sharing concerns about migration; or the loss of an economically pro-free market Member State, or appealing to the logic of (large) business interests to ensure favourable future trade relations. Rather, the EU27 appear to have been fully behind the Commission, led by its Brexit negotiator Michel Barnier, in resisting any attempts by the UK to ‘cherry pick’ aspects of EU integration, at least so far. In particular, the ‘four freedoms’ of the single market have been regarded as indivisible, with the UK unsuccessful in its efforts to try to prise off free movement of citizens from goods and services.

The durability of such a ‘united front’ thus speaks volumes of the legal order of the EU in the Brexit period, as well as the miscalculation on the part of the British that it’s exceptional position within the EU’s (legal) order is destined to continue, even after leaving the EU (Tilford, 2017). It is true that the closest relationships with non-Member States – those in the EEA (Iceland, Liechtenstein and Norway) and Switzerland – are different in both legal form and scope, but the insistence by the EU on the indivisibility of the ‘four freedoms’ has been interpreted in much the same way as for Switzerland when it effectively voted to limit free movement (Lavenex and Schwok, 2015, 38).

Against the background of the departure of the EU Member State who had secured the greatest number of Treaty-based opt-outs, special conditions (such as the budget rebate) and, even before the referendum, attempted to challenge the very foundation of the EU as an ‘ever closer Union’, it is pertinent to question the extent to which the legal order of the EU will look in the future. Will the UK’s departure deprive the ability of other Member States to ask for special treatment, or will the Brexit experience prove to be a factor in the strengthening of the coherent legal order? Is the EU’s legal system capable of absorbing differentiation to the extent that now seems to be part of the fabric of European (dis)integration?

Differentiated integration in the EU’s legal order

Legal analysis of the EU has generally spoken of a legal ‘system’ or ‘order’ of the Union, in the singular. Standard accounts of integration through law point to the importance of administrative cooperation in various fields, but underpinned by a legal system that grew out of international law. The early, seminal decision of the Court of Justice of the European Union

² C-643/15 and C-647/15 *Slovak Republic and Hungary v Council of the European Union*
ECLI:EU:C:2017:631

(CJEU)³ in *Van Gend en Loos*⁴ which set out the direct effect of EU law in the legal systems of the Member States points to the ‘new legal order’ (though the reference to ‘...of international law’ is often left out). Our understanding therefore about the nature of EU law is that it is more than classic international law, but something different. It does not merely rely on a metaphor of contractual relations between the participating Member States (Cardwell and Hervey, 2015a).

Crucial to this understanding of EU law and the EU legal system is the creation from the outset in the Treaty of a single institutional framework of ‘supranational’ institutions that are not under the control of national governments. The CJEU in particular has forged a constitutional template for the Union – not without controversy – which relies on fleshing out the provisions of the Treaty to ensure the effectiveness of the legal order and the commitments made by the Member States in signing the Treaty. These innovations, including direct effect, supremacy,⁵ and liability for harm caused by breaches of EU law,⁶ did not rely on the consent of the Member States – but they have required the CJEU to work in an effective partnership with national courts (see Alter, 2001; Sarmiento, 2013). Studies of the role of law in European integration (including Cappelletti, Seccombe et al., 1986; Weiler, 1991) explained these legal processes, implicitly casting the CJEU as a key player in constraining national governments and upholding the commitments made in the Treaty. Key to this, and why it resonates in any legal discussion of differentiated integration, is the single and unitary legal order.

A few years ago, disintegration was a minority subject in EU studies but has since grown (Vollard, 2018; Rosamond, 2019). But for this to occur in legal perspectives, there would need to be a wholesale re-evaluation of the core of EU law. The single and unitary legal order is deeply embedded in legal scholarship, and has been further enhanced by successive treaties which have gradually moved the different institutional dimensions of European integration from the Treaty of Maastricht onwards (such as the pillar structure, and the legal personality of the former Communities rather than the Union) towards a more coherent whole. At the same time, and analysed further below, there is increasing ‘legalization’ of components of the EU’s activities which do not include all the Member States and options available in the Treaty for those who do wish to pursue further integration. The institutional changes within each Treaty, notwithstanding the increasing number of exceptions, have generally been welcomed by legal scholars as enhancing coherence within the legal order. This does not imply – as von Bogdandy (1999) has written – necessarily seeing this as the move towards the EU become a ‘state’.

In practice however, the ‘single legal order’ approach interprets its law as if it were the law of a state. This includes in studies on the various areas of EU substantive law, as the assumption

³ Although referred to informally as the European Court of Justice, the current Treaty on European Union, Article 13, states that the full name of the institution is the Court of Justice of the European Union. The original Treaty of Rome referred only to the ‘Court of Justice’ (Article 4).

⁴ C-26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen*
ECLI:EU:C:1963:1

⁵ C-6/64 *Costa v ENEL* ECLI:EU:C:1964:66

⁶ C-6/90 *Francovich v Italian Republic* ECLI:EU:C:1991:428

is that the EU's law can be understood in largely the same way as national law on the same topic (such as in competition law or employment law). The approach is also found in some scholarship dealing with the EU's institutions and conceptualising the EU as having relationships with not only its Member States, but also its people(s) (see, e.g. van Gerven, 2005). A growing stream of literature has started to question the impact of a single legal order – which extends beyond the single market – on the legal systems of the Member States and the institutions that govern them (see, e.g. Somek, 2008; Menendez, 2015). Thus, legal scholars are not hostile to the idea of differentiated integration *per se*, but more that the work of the institutions, including the CJEU, goes against the grain in quite a fundamental way as far as legal analysis is concerned.

As outlined in the introduction to this Symposium, since the 1990s, the discussion of differentiated integration has certainly increased across European studies, but comparatively less so in legal scholarship (with some notable exceptions, eg. De Witte, Ott and Vos, 2017). This is because, in a formal sense, differentiation has been treated as a defined set of exceptions to existing norms in discrete, well-defined or distinct areas. As such, many of the major studies of general EU law do not devote significant attention to it, except for the enhanced cooperation as a way out over the tensions over 'one size fits all' which emerged after Amsterdam (Schütze, 2015; Chalmers et al., 2016, Craig and de Búrca, 2015). But the characterisation of the contemporary EU as essentially a system of differentiated integration (Leuffen et al. 2013), has gained currency. The multiple and complex opt-outs for too many areas to be perceived as exceptions means that notions of the EU as a unitary 'legal order' are increasingly problematic. Discussions that have taken place over the relationships between opt-outs and the general legal-institutional framework have proceeded largely on a case-by-case basis, given the diversity of the policy areas concerned (for example, the Danish opt-out on defence cooperation (Cremona, 2010)). Article 50 TEU itself was only introduced in the Treaty of Lisbon, and in opening the door to a Treaty-based exit procedure was the source of debates about whether this undermined the 'ever closer Union' principle or opened the door to unintended effects such as 'cherry-picking, Europe à la carte or some sort of regressive, gradual disintegration' (Closa, 2017, p. 204).

The extent to which the various opt-outs can be considered to have gone beyond the stage where they could realistically be counted as exceptions to the general rule is a pertinent question. As per Article 51 TEU, 'The Protocols and Annexes to the Treaties shall form an integral part thereof.' Within the current Treaty provisions, the UK's exception on Economic and Monetary Union is listed in Protocol 15 as attached to the Article 1 TEU: 'Unless the United Kingdom notifies the Council that it intends to adopt the euro, it shall be under no obligation to do so'. Protocol 16 covers the exception for Denmark. Sweden has not adopted the euro, but the legal position is ambivalent, described succinctly by Schütze (2015, pp. 809-810) as such: 'The country has not formally obtained a constitutional opt-out, yet it enjoys an informal exemption that politically locates it in between a constitutional derogation and a constitutional opt-out.'

Protocol 18 on Schengen lists the Member States "authorised to establish closer cooperation among themselves in areas covered by provisions defined by the Council which constitute the Schengen acquis" (Article 1), which constitute all of them, except the UK and Ireland who "may at any time request to take part in some or all of the provisions of the Schengen acquis"

(Article 4). Denmark's position in Schengen is subject to a further, lengthier protocol (no 22) (Adler-Nissen, 2014). Schengen does, however, include non-Member States too (Iceland, Norway, Liechtenstein and Switzerland)⁷, which is a further (external) dimension to differentiated integration in legal terms: the inclusion of actors who are not part of the 'core', rather than the reverse.

Declarations do not benefit from the provision of Article 51. Declarations 51-65 found in the annex to the TEU, resulting from the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, are made by one or more Member States. Not all of these Declarations can necessarily be seen as attempt to register opposition (even if symbolic) to aspects or principles of European integration, though this 'resistance' characterisation certainly applies to some. For instance, in Declaration 61 by Poland, 'Poland declares that, having regard to the tradition of social movement of "Solidarity" and its significant contribution to the struggle for social and labour rights, it fully respects social and labour rights, as established by European Union law, and in particular those reaffirmed in Title IV of the Charter of Fundamental Rights of the European Union'. Whereas most of these Declarations would not appear to lend themselves to legal enforceability, the Charter of Fundamental Rights was attached to the Treaties in the form of a Declaration with express legal enforceability. Overall, therefore, the legal status of Declarations generally is uncertain – but there is no doubt as to the rise in frequency of their use in each new Treaty.

The Treaty of Lisbon appeared to mark a step-change. As such, Leruth and Lord (2015) characterise the contemporary period of integration as one of 'institutional reality'. Whether or not the protocols are present merely for their symbolic value or because of a genuine risk of constitutional conflict with national law, the very fact that they exist serve as a testament to differentiation within the heart of the legal system. It is possible that their presence is needed as a domestic political 'gain', including in the process of ratifying a Treaty. But although not a strictly legal point, this need speaks to a narrative that European integration (as expressed via law) is somehow set up in opposition to domestic law, rather than the harmonious approach which has largely been seen as the core of law and legal scholarship of the EU (Cardwell and Hervey, 2015b)

In some examples, such as the Charter of Fundamental Rights, it appears that once the door is opened to the possibility of opt-outs, largely spearheaded by the UK (and to a lesser extent Denmark), it makes it more likely that they will be used. Poland and the Czech Republic's respective Protocols on the Charter of Fundamental Rights were directly related to the UK's insistence on a provision for itself (Peers, 2012).

We might also consider, as Rosas and Armati (2012, p. 121) have said, that differentiation can occur within a state too: 'the Union is not blind to the differentiation which may exist within a Member State. There are therefore a number of exclusions or derogations applicable to certain autonomous or other regions and territories to which the Treaties apply'. There is also a large amount of literature on the well-established phenomena of the export of legal norms

⁷ See the Preamble of Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), 39-41.

to third countries and the 'global reach' of EU law, particularly towards countries covered by the European Neighbourhood Policy and (pre)accession strategies, but also the EEA states and Switzerland (see, inter alia, Scott, 2014; Dragneva and Wolczuk, 2011; Lavenex and Schimmelfennig, 2009). It is certainly possible that the future EU-UK relationship will bear some of these characteristics.

The 'Single Legal Order' Paradox

We thus arrive at a paradox, since all these examples of differentiated integration via methods of opt-outs etc rely on legal tools of integration, even if not all of the 28 Member States are bound by the relevant legal instruments. And yet at the same time, legal analysis based on the idea of the EU as a single legal system cannot explain integration processes with differentiation. Neither can the EU's variable legal order be treated on an entirely 'intergovernmental' basis (and hence closer to 'classic' international law). In the recent words of the Court of Justice, the characteristics of EU law have given rise to a 'structured network of principles, rules and mutually interdependent legal relations binding the European Union and its Member States reciprocally as well as binding its Member States to each other'.⁸

To further underline this point, differentiated integration is not only about Member States seeking to go slower or exempt themselves completely from the integration process, but also is the other direction. For example, admission criteria for new Member States set conditions which bind them, even if the same obligations do not extend to current Member States (e.g. to work towards eventual euro membership for accession states since 2004). Enhanced cooperation frameworks have been introduced by the Treaty of Amsterdam and allow the possibility for some Member States to work more closely. Although extensive analysis is beyond the scope of the discussion here, the provisions have not been frequently used (Kroll and Leuffen, 2015; Peers, 2017), and indeed the Court of Justice has said that these provisions should only be used as a 'last resort'⁹ – thus emphasising the principle of the single legal order that measures should include all Member States as far as possible to do so. However, where some Member States have pursued closer integration, this has also occurred outside the Treaty framework and later incorporated in it: the original Schengen Convention and the Prüm Convention are two prominent examples. The Commission's White Paper on Governance in 2001, whilst reinforcing the importance of the method of integration via regulations and directives (the 'Community method') nevertheless did recognise that further differentiation via the mechanisms provided for in the Treaty could be the way forward. This was further elaborated as one of five scenarios in the 2017 White Paper on the Future of Europe. Doing so would promote the continued relevance of the EU for its citizens and ensure continued momentum for integration, at least for those states who wanted to do more.

Trade-offs and opt-outs have led some to consider that there is a lack of a constitutional framework in the European Union to govern what are seen as the inevitable interstate compromises in this multi-actor polity (Fabbrini, 2016). This point is closely related to those

⁸ C-284/16, *Achmea*, EU:C:2018:158, paragraph 33.

⁹ C-274/11 and C-295/11 *Spain and Italy v Council (Unitary Patent)* ECLI:EU:C:2013:240. For discussion, see Chalmers et.al. (2016, 136).

made by proponents of a 'new intergovernmentalist' approach (Bickerton, Hodson and Puetter, 2014; Hodson and Puetter, 2019) which sees Member States as pursuing integration in a Europe characterised by disequilibrium, but in ways that redirect rather than redress the problems of legitimacy facing the EU. On legitimacy, Thym (2017) has argued that the increased number of examples of differentiation have been absorbed by the Treaty framework – but the real issue is that the EU is made ever more complex, especially for citizens.

A constitutional framework for the EU which accounts for differentiation at its core is not beyond the realms of possibility, but would need a wholesale reimagining of the system as we have known it since the foundation of the process. Curtin's (1993) designation of the EU as one – constitutionally-speaking – of 'bits and pieces' remains apt. Some lawyers (e.g. Piris, 2012) have called for the idea of a 'two-speed' Europe to be formalised. This would entail Eurozone membership marking the formal division between two groups of member states. However, the will needs to exist for the establishment of an 'adequate framework of meta-constitutional institutions, rules and conventions to manage a multi-dimensional configuration of authority' (Walker, 1998, pp. 387-388). This does not seem likely at present due a lack of overall agreement about the direction the EU should take. The departure of the UK would not be likely to tip a balance in favour or against a constitutional revolution in EU terms – the lack of debate over whether to launch another round of Treaty negotiations supports this claim.

Rather than suggesting a wholesale change in the way in which we understand the core concept and purpose of EU law, but at the same time recognising that the 'single legal order' is necessarily a given, legal scholars have found newer ways of characterising the system. The terms 'legal order', or even 'legal system', is increasingly replaced by use of terms indicating geographic or physical spaces for circulation and interaction, such as legal 'space' or 'architecture' (Piris 2012, Krisch, 2008). Since differentiation applies both at the institutional, constitutional level and within specific policy area, we find an increasingly use of the language of constitutional pluralism (see in particular De Búrca and Weiler, 2011, MacCormick, 1999). As Itzcovich (2012, p. 374) has described it, this characterisation indicates the emergence of 'a new kind of law than can no more be conceived of as being a legal order, as it is pluralist (rather than exclusive), contradictory (rather than consistent), unfinished (rather than complete)'. In this respect, law is able to provide a practical solution to the political problem of pursuing integration without pursuing an end goal of 'statehood'. Implicit in this use of legal 'pluralism' is the reliance on the shared European respect for the rule of law and the consequent respect of administrative and executive authorities for the judiciary, who are responsible for the application of the law across the EU.

Questioning the extent of the 'legal order' of the EU

The debates over the departure of the UK from the EU have consistently highlighted the rules-based nature of the polity, and that bespoke arrangements between a third state and the EU are far from simple to put in place. And yet, there has been a growing scepticism about the centrality of law in accounts of what holds the EU together and make it work, or not. This is closely related to the question of differentiation, since EU law – in the form of regulations and

directives as set out in Article 288 TFEU – relies on the same legal provisions applying across the Union and underpinned by the principle of supremacy of EU law. Any departure from this would suggest a model which does not rely on the same principle at its core.

There are several components to this. First, in contrast with the period leading up to the Single Market ‘Europe 1992’ project, there is less legislation and fewer proposals for legislation emerging from the institutions. Moves towards ‘deregulation’ are closely associated with successive UK governments, and found an institutional home in the Barroso Commission which committed itself to the idea that *more* law or top-down relations does not equate to a more efficient or more United Europe (Radaelli, 2007). The subsequent Juncker Commission has, in principle, subscribed to this approach.

Second, attempts to find solutions to Europe’s contemporary problems have now been found outwith the Treaties and ‘traditional’ law-making. For the euro-crisis, the European Stability Mechanism is, legally speaking, outside of the framework of EU law (Peers, 2013). In migration, the EU-Turkey ‘deal’ to combat flows between Turkey and Greece was found by the General Court of the CJEU (after a series of individual challenges)¹⁰ not to be a measure of the EU institutions, but rather a statement by the Member States and Turkey, outside the framework of EU law. This at least opens up the possibility that Member States will seek to engage in integration processes which potentially undermine the existing single legal order. As a general characterisation, ‘soft law’ have been across a whole spectrum of the EU’s activities to bridge the divide between the lack of formal legislative competences or Member State political will and the policy ambitions of European institutions (for recent commentary, see Lancos, 2018). Crucially, this implies that the ‘heroism’ (Hunt, 2007) of the Court of Justice in furthering integration and creating or reaffirming foundational principles will be lost.

Conclusion

The UK has been a major factor in the emergence of differentiation on the EU horizon. At the most basic level, the departure of the UK should remove the ability of a single state to prevent the EU as a whole from moving forward. Recalling that the first concern for Cameron in his Bloomberg speech launching the referendum (2013) was the worry that the eurozone ‘core’ would impact negatively on those Member States not in the euro (‘those of us outside the Eurozone also need certain safeguards to ensure, for example, that our access to the Single Market is not in any way compromised’). But also, and again elaborated in his speech, a Member State that has been consistently advocating ‘flexible union’ will also no longer be present. In many ways, had the UK voted to remain in the EU, there would likely be greater debate over differentiation to satisfy the promises made to the electorate – although these would have been difficult to accommodate for the reasons explored above (Cardwell, 2016).

More generally, other Member States will not be able to presume that opposition to further integration measures – especially in a future comprehensive Treaty – will be spearheaded, allowing any sceptical members to use the UK as cover. Nevertheless, given the open hostility of some Member States’ governments to the aims and policies of the EU, any future efforts

¹⁰ T-192/16, T-193/16 and T-257/16 *NF, NG and NM v European Council* ECLI:EU:T:2017:128

to step-up integration – in particular by a new Treaty – may find significant opposition within the process from (some) Member States without the presence or influence of the UK. The increasing plurality of views towards European integration from an enlarged EU that encompasses Member States with different recent histories suggests that finding a path towards future integration may be difficult – even without Brexit.

Leruth and Lord (2015, p. 758) consider differentiated integration to be a ‘permanent, organisational principle of the Union’. But in legal terms, it is important not to overstate this or fundamentally change our conception of the place of law at the heart of the Treaties. The unpicking of the core parts of EU law appears to be a very distant prospect: Member States are fully aware of the dangers of opening the Pandora’s Box of Treaty change. This can be seen in the defence of the core treaty provisions of Brexit. The *Wightman* decision of the Court of Justice,¹¹ which was the result of a question referred from the UK courts on the possibility of revocation of Article 50 was also an opportunity for the CJEU to remind us that the autonomy of EU law with respect both to the law of the Member States and to international law is justified by the essential characteristics of the European Union and its law, relating in particular to the constitutional structure of the European Union and the very nature of that law. Since these essential characteristics rely on a single legal order, there would appear only a certain amount of capacity at the core to allow it. The view of Leuffen et al. (2013, p. 4) of the EU as a system of differentiated integration, i.e. ‘one Europe with an organizational and member state core but with a level of centralization and territorial extension that vary by function’ is certainly compatible with a legal understanding of the polity, but only if the opt-outs (or even opt-ins) are treated as exceptions to the norm.

Thus, it is certainly possible to be reflected in its legal structure – but the Treaty can only tolerate this so far. Distinction helpful between differentiated between policies – and the (founding) principles of law. In other words, direct effect and supremacy must logically apply to all Member States as a trade-off between the enforcement of law across the EU with the loss of ‘absolute’ sovereignty in the national context. Therefore, if these principles were to be changed, they would either need to be done so in the context of policy areas (e.g. using the example of the CFSP and its specific provisions in the Treaty¹² or those relating to the adoption of the euro¹³) or be somehow qualified more comprehensively, in which case differentiation would not be the appropriate term. Perhaps the solution is a constitutional one, by revisiting the project to establish a Constitution for Europe, clearly delimiting the competences of the EU and the possibilities where integration can occur at different speeds, and thus an opportunity to examine whether the contemporary EU is about integration or something else. However, this would require a high level of political commitment on institutional – rather than policy – matters for the EU27. The evidence, therefore, suggests a continuation of the *status quo*. Brexit may yet prove to be a catalyst for a greater commitment to the integration goals of the EU, but perhaps only if the perception of a permanent state of ‘crisis’ in the EU subsides.

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¹¹ C-621/18 *Wightman and others* ECLI:EU:C:2018:999, para 44.

¹² Article 24 TEU *et seq.*

¹³ See, in particular, Articles 136-139 TFEU.

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