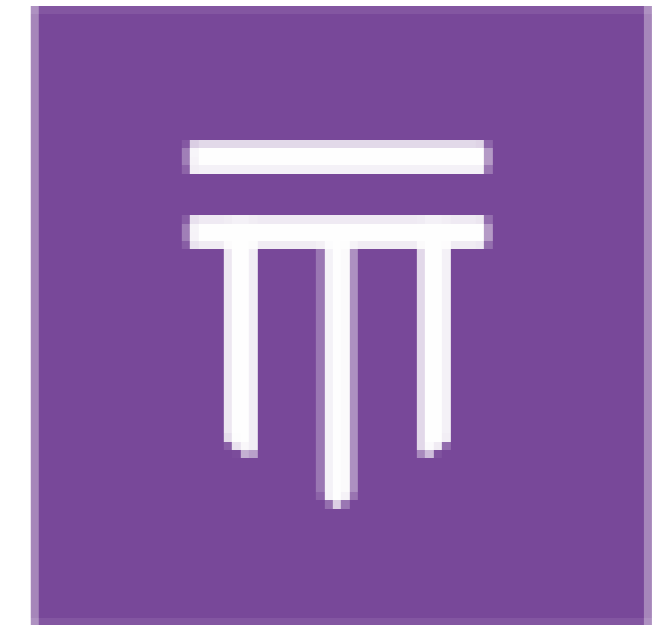


Brno, 13 October 2021

ECJ and Human Rights



JUSTIN
Judicial Studies Institute
Masaryk University

Katarína Šipulová

Article 119 TEEC

Each Member State shall in the course of the first stage ensure and subsequently maintain the application of the principle of equal remuneration for equal work as between men and women workers.

For the purposes of this Article, remuneration shall mean the ordinary basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the workers' employment.

Equal remuneration without discrimination based on sex means:

(a) that remuneration for the same work at piece-rates shall be calculated on the basis of the same unit of measurement; and

(b) that remuneration for work at time-rates shall be the same for the same job.

Article 2

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Article 3

(ex Article 2 TEU)

1. The Union's aim is to promote peace, its values and the well-being of its peoples.
2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.

Article 6
(ex Article 6 TEU)

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, **shall constitute general principles of the Union's law.**

Article 7

(ex Article 7 TEU)

1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.

The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State.

4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.

5. The voting arrangements applying to the European Parliament, the European Council and the Council for the purposes of this Article are laid down in Article 354 of the Treaty on the Functioning of the European Union.

Article 19

1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.

Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

2. The Court of Justice shall consist of one judge from each Member State. It shall be assisted by Advocates-General.

The General Court shall include at least one judge per Member State.

The Judges and the Advocates-General of the Court of Justice and the Judges of the General Court shall be chosen from persons whose independence is beyond doubt and who satisfy the conditions set out in Articles 253 and 254 of the Treaty on the Functioning of the European Union. They shall be appointed by common accord of the governments of the Member States for six years. Retiring Judges and Advocates-General may be reappointed.

3. The Court of Justice of the European Union shall, in accordance with the Treaties:

- (a) rule on actions brought by a Member State, an institution or a natural or legal person;
 - (b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions;
 - (c) rule in other cases provided for in the Treaties.
-

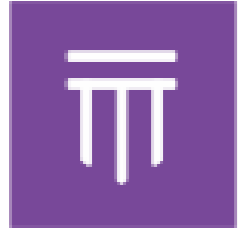
EU Charter of FR

Article 51

Field of application

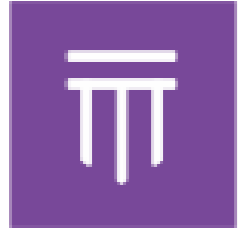
1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.
2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

Human Rights v Fundamental Rights and Freedoms



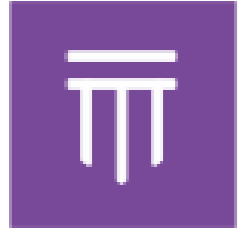
Four Freedoms of Single Market

- Freedom of movement of persons
- Freedom of movement of goods
- Freedom of movement of Services and capital
- Freedom of establishment



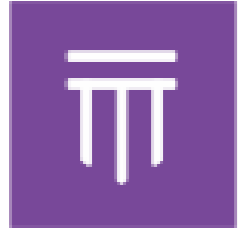
Supremacy of EU Law?

- Two perspectives:
 - *European*
 - Absolute
 - *National*
 - Relative
 - Ultra vires control



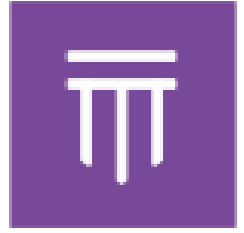
European Perspective of Supremacy

- Over domestic law
 - Fear of decentralization
 - *Costa v ENEL*
 - *Principle of autonomous interpretation*
- Over constitutional law
 - Internationale Handelsgesellschaft
 - Solangene?
- Over international treaties
 - A 351 TFEU
 - The rights and obligations arising from agreements conclude before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one ore more on the other, shall not be affected by the provision of the Treaties.
 - Limits:
 - Obligations towards third states
 - Kadi: x derogation from principles of liberty, democracy and respect for human rights and fundamental freedoms of A2 TEU
 - Matthews: the fact that MS delegates part of its sovereignty on IO does not mean that it will stop complying with FR



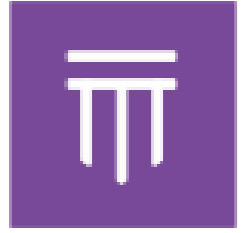
Premacy or Supremacy of EU Law?

- Costa v ENEL (6/64)
 - Italian Constitutional Court: in case of conflict, newer law prevails (nationalization statute over Treaty of Rome)
- Should EC law, the Treaty of Rome in particular, be considered dominant over national statutes?
- Treaty's provision on single market did not have direct effect -> only the Commission can bring a case against Italy. HOWEVER, Mr Costa can turn to Italian courts and contest the compatibility of national law with the EC law



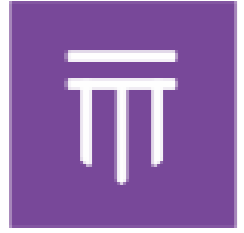
Premacy or Supremacy of EU Law?

- Costa v ENEL (6/64)
 - Italian Constitutional Court: in case of conflict, newer law prevails (nationalization statute over Treaty of Rome)
- By contrast with ordinary international treaties, the E[U] Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the member states and which their courts are bound to apply...The integration into the laws of each Member State of provisions which derive from the [Union], and more generally the terms and the spirit of the Treaty, make it **impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity.** Such a measure cannot therefore be inconsistent with that legal system. **The executive force of [European] law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty...**It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as [European] law and without the legal basis of the [Union] itself being called into question.



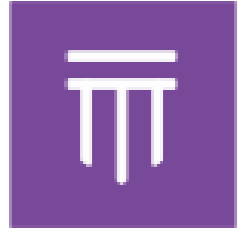
Premacy or Supremacy of EU Law?

- European view: supremacy
 - confirmed in Internationale Handelsgesellschaft
 - Can European legislation violate fundamental rights as granted by the German Constitution?
 - Are the fundamental structural principles of national constitutions, including human rights, beyond the scope of Union supremacy?
 - ECJ: Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the [Union] would have an adverse effect on the uniformity and efficiency of [European] law. The validity of such measure can only be judged in the light of [European] law.
 - The whole of European law prevails over the whole of national law



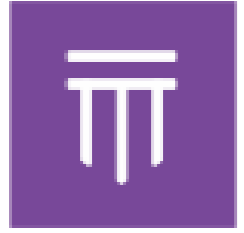
Repercussion of the Supremacy

- *Simmenthal II*
 - *What consequences flow from the direct applicability of a provision of [Union] law in the event of incompatibility with a subsequent legislative provision of a Member State?*
- National courts are under a direct obligation to give **immediate effect** to European law.
- Supremacy = rules of [European] law must be fully and uniformly applied in all the member states from the date of their entry into force and for so long as they continue in force
- Effect
 - Break (x)
 - Principle of precedence:



Repercussion of the Supremacy

- Principle of precedence (Simmenthal 106/77)
 - [I]n accordance with the **principle of precedence** of [European] law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures not only by their entry into force **render automatically inapplicable** any conflicting provision of current national law but – in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member States – also **preclude the valid adoption of new legislative measures** to the extent to which they would be incompatible with [European] provisions.
- = principle of executing force



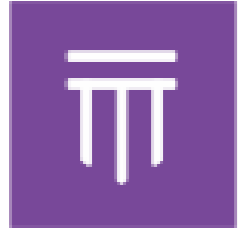
National challenges to Supremacy

- Human rights
- Competence limits

How did the ECJ approach HR?

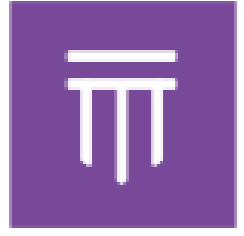
How did the ECJ approach HR?

Initial resistance, then *Stauder*
(FR as general principles of Community law)



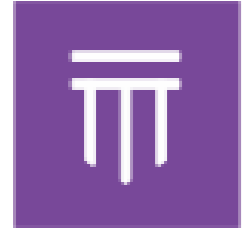
Human Rights: from Premacy to Supremacy of EU Law?

- Internationale Handelsgesellschaft
 - forfeiture of a deposit lodged in connection with the issue of export licenses for maize meal
 - The plaintiff had failed to export the quantities of maize he had obtained a license for (more profitable to sell to a domestic buyer)
 - Failure to export = forfeiture of the deposit (unless a force majeure)
 - Claim: disproportional to German constitutional right to conduct business (a general right to **freedom of action and economic liberty**)
- **AG:** the individual should not have his freedom of action limited beyond the degree necessary for the general interest
- NO VIOLATION FOUND



Human Rights: from Premacy to Supremacy of EU Law?

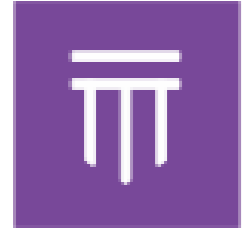
- German Constitutional Court reacts:
 - Solange I. (BVerfGE 37, 271) [1974]
 - Can national fundamental rights affect the application of European law in the domestic legal order?
 - Rejects ECJ's vision: **theory of relative supremacy of European law**
 - German Constitution expressly allowed for the transfer of sovereign powers to the EU in A24, this transfer was **limited** by the constitutional identity of the German State.
Fundamental constitutional structures are beyond the supremacy of European law.
 - Solange II. (BVerfGE 73, 339) 1987



Human Rights: from Premacy to Supremacy of EU Law?

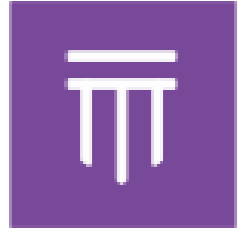
Solange I

- The part of the Basic Law dealing with fundamental rights **is an inalienable, essential feature** of the valid Basic Law of the Federal Republic of Germany and one which forms part of the constitutional structure of the Basic Law. ... In this, the present state of integration of the Community is of crucial importance. **The Community still lacks ...in particular, a codified catalogue of fundamental rights**, the substance of which is reliably and unambiguously fixed for the future in the same way as the substance of the Basic Law ...
- **So long** as this legal certainty, which is not guaranteed merely by the decisions of the European Court of Justice, favourable though these have been to fundamental rights, is not achieved in the course of the further integration of the [Union], the reservation derived from Article 24 of the Constitution applies...



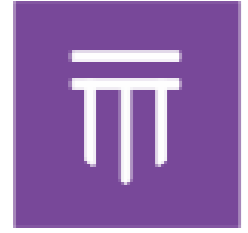
Human Rights: from Premacy to Supremacy of EU Law?

- If there is a hypothetical case of a conflict between [European] law and a part of national constitutional law or,...the guarantees of fundamental rights in the Constitution, **there arises the question of which system of law takes precedence**...In this conflict of norms, the guarantee of fundamental rights in the Constitution **prevails so long** as the competent organs of the Union have not removed the conflict of norms in accordance with the Treaty mechanism.
- NO CHANGE TO THE TREATIES -> but a doctrine of HR is developed



Solange II [1973]

- BVerfG recognized a creation of substantially similar fundamental rights guarantees
- *In view of those developments it must be held that **so long as the European [Union] and in particular in the case law of the European Court, generally ensures an effective protection** of fundamental rights as against the sovereign powers of the [Union] which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Constitution, and in so far as they generally safeguard the essential content of fundamental rights, the **Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary [Union] legislation cited as the legal basis for any acts of German courts...***



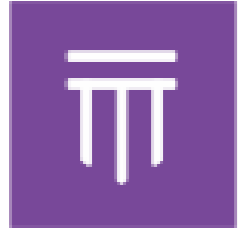
Motives of incorporating HR?

- Unified interpretation of European law
- Strong position of ECJ because of multi-level system

No EEC Bill of Rights – where to find them?

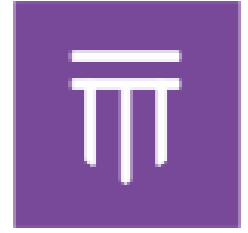
No EEC Bill of Rights – where to find them?

EEC Constitutions + int treaties



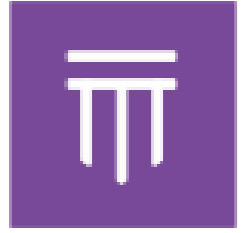
Human Rights: from Premacy to Supremacy of EU Law?

- Stork: argument that Commission infringed German fundamental rights
 - Mortgage theory (HR mortgage)
 - National FR would bind the EU, since MS could not have created an organization with more powers than themselves.
 - REJECTED BY ECJ
 - National FR – no direct source of EU HR. EL does not contain any general principle, express or otherwise, guaranteeing the maintenance of vested rights
- IHG
 - Shift, FHR enshrined in the general principles of European law
 - National HR are not applicable to European law, but! Confirms existence of analogous guarantee inherent in European law
 - Unwritten bill of rights would be inspired by the constitutional traditions common to the MS



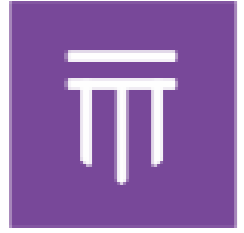
Human Rights: from Premacy to Supremacy of EU Law?

- Nold
 - Explains the indirect relationship between national rights and European rights.
 - Distribution of fuels – do the EC rules require companies to meet certain volume of sales requirements to qualify as a direct wholesaler with a right to direct purchase from a selling agency?
 - Denial of the status based on reduced sales = violations of the **fundamental right to freely practice the trade and profession**
- NO VIOLATION FOUND



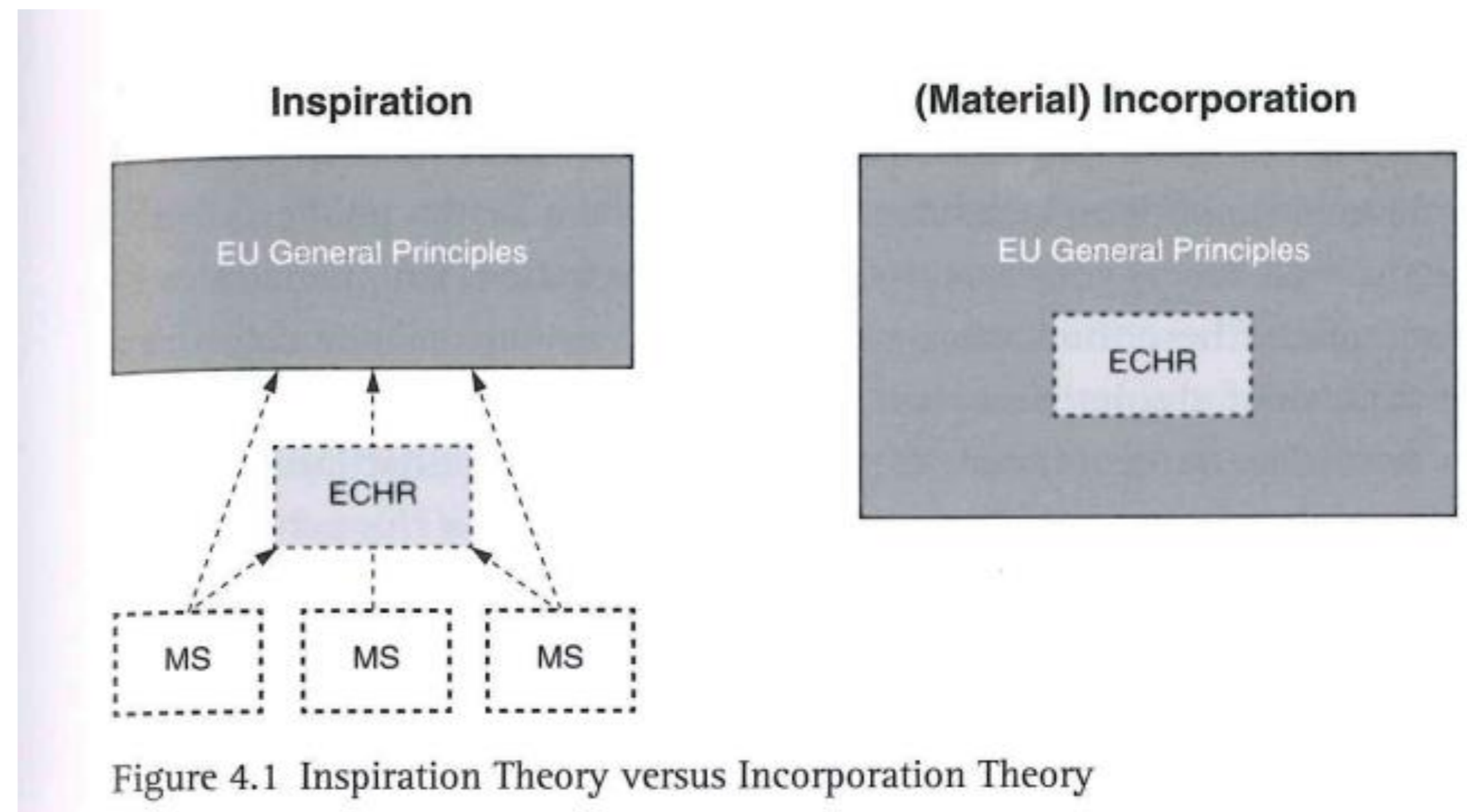
Human Rights: from Premacy to Supremacy of EU Law?

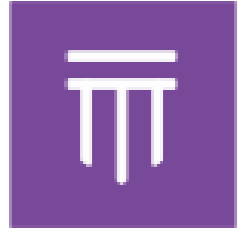
- Nold
 - *Fundamental rights form an integral part of the general principles of law, the observance of which it ensures. In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the constitutions of those States. Similarly, international treaties for the protection of HR on which the MSs have collaborated or of which are signatories, can supply guidelines which should be followed within the framework of [European] law.*



EU Autonomous approach to HR

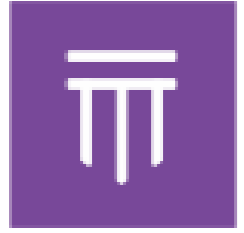
- Bound by common constitutional traditions
 - Minimum standard
 - Maximum standard
 - Union standard
- ECJ never considered itself materially bound by ECtHR interpretation
- BUT: Lisbon Treaty, Article 6.3





Limits

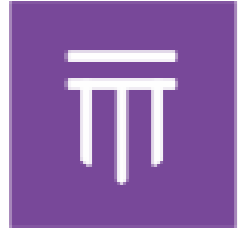
- Hauer
- Vajnai
- Proportionality test?
 - First paragraph
 - Conditions of justified infringement
 - Proportionality test – policy conditions



Limits

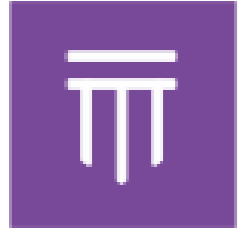
- Proportionality test
 - Legitimate aim
 - Regulation of the market
 - Necessary measure
 - Is there any other equal measure?
 - Proportional burden

- ECtHR Proportionality test:
 - (scope and interference)
 - Legality
 - Legitimate aim
 - Necessity in a democratic society (proportionality test)



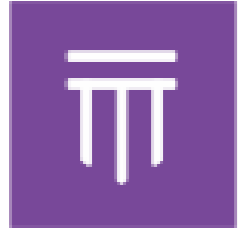
Limits

- ECtHR: Is political measure a legitimate & proportional restriction of the human right?
- CJEU: is human right a legitimate & proportional restriction of the fundamental freedom?



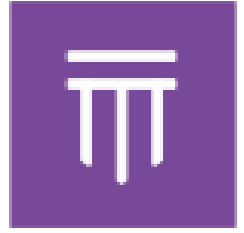
National Challenges II: Competences

- Who should control the scope of EU law?
- GCC Maastricht Decision & Honeywell
- Maastricht (BVerfGe 89,155)
 - Since European Treaties adhere to the principle of conferred powers -> EU is not able to extend its own competences
 - There is a clear dividing line between legal development within the terms of the Treaties and a making of legal rules which breaks through its boundaries and is not covered by valid Treaty Law
- **Ultra vires doctrine**



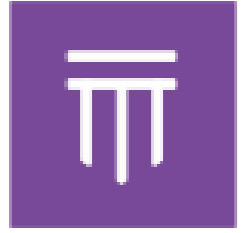
National Challenges II: Competences

- *Thus, if European institutions or agencies were to **treat or develop the Union Treaty in a way that was no longer covered by the Treaty in the form that is the basis for the Act of Accession**, the resultant legislative instruments would **not be legally binding** within the sphere of German sovereignty. The German state organs would be prevented for constitutional reasons from applying them in Germany...*
- *... in future, it will be noted as regards interpretation of enabling provisions by [Union] institutions ...that the Union Treaty as a matter of principle distinguishes between the **exercise of a sovereign power conferred** for limited purposes and **the amending of the Treaty**, so that its interpretation may not have effects that are equivalent to an extension of the Treaty. Such an interpretation of enabling rules would not produce any binding effects in Germany.*



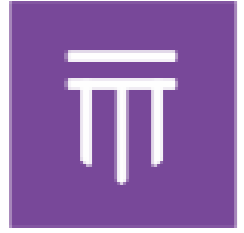
National Challenges II: Competences

- *i.e. threat to disapply European law that has been adopted **ultra vires***
- *Honeywell 2011*
 - Relates to Mangold
 - Claimant argued that ECJ's discovery of a European principle that prohibited discrimination on grounds of age was ultra vires
 - GFCC confirmed **the relative supremacy doctrine**
 - Option to disapply it when the EU law is not considered to be covered by the principle of conferral
 - BUT: also presumption that Union would generally act within the scope of its competences



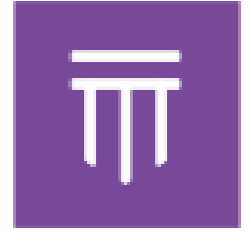
National Challenges II: Competences

- *If each member state claimed to be able to decide through their own courts on the validity of legal acts by the Union, the primacy of application could be circumvented in practice, and the uniform application of Union law would be placed at risk. If however, on the other hand the member states were completely to forgo ultra vires review, disposal of the treaty basis would be transferred to the Union bodies alone, even if their understanding of the law led in the practical outcome to an amendment of a Treaty or a expansion of competences...*
- *The ultra vires review by the FCC can moreover only be considered if it is manifest that acts of the European bodies and institutions have taken place outside the transferred competences. A breach of the principle of conferral is only manifest if the European bodies and institutions have transgressed the boundaries of their competences in a manner specifically violating the principle of conferral, the breach of competences is in other words sufficiently qualified.*



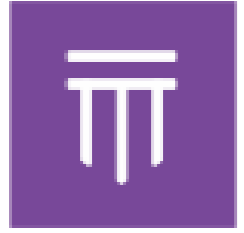
National Challenges II: Competences

- Pillar structure and ECJ competences:
- II. Pillar: principle of nondiscrimination
 - **Tanja Kreil:**
 - **Alexander Dory**
 - **Maria Pupino**



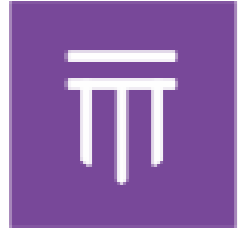
National Challenges II: Competences

- Can ECJ announce a constitutional revision void?
- Can ECJ say that a constitutional revision violates the Treaties?



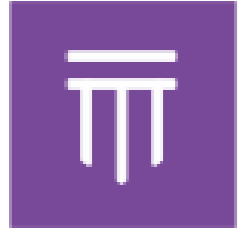
National Challenges II: Competences

- National constitutional courts
 - Constitutional identity
 - Material core
 - Rule of Law
- How CCs react:
 - Where is the European law in the hierarchy
 - What constitutional system there is (diffuse – concentrated)
 - Old v new member states



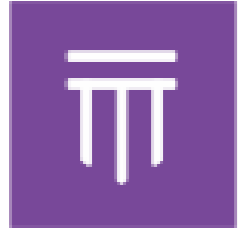
National Challenges II: Competences

- Hungarian CC 6/2004: regulation of agricultural goods: The Hungarian constitutions will not bow to European law
- Constitutional Courts and CJEU:
 - General courts have less problematic relationship
 - German FCC: long refused to send a preliminary ruling question, however, forces general courts to do so
 - Same approach: Czech CC
 - Austrian, Belgian, Dutch, Nordic – combined courts, more willing to ask



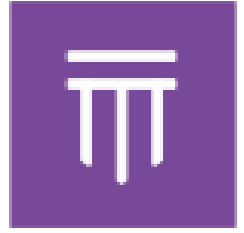
National Challenges II: Competences

- Italy
 - Costa v ENEL 1964
 - Lex posterior derogate legi priori
 - European law = international law
 - Frontini 1973
 - Confrontation with direct effect and supremacy principles
 - There can be primacy, but in case of conflict of laws, it is up to Constitutional Court to decide which law has primacy
 - Primacy not from European law, but essence of A11 of the Constitution on conferral of competences
 - Simmenthal I.: Italian CC is not right and violates the concept of diffused European judiciary. Against the effectiveness of the European law
 - But: Doesn't the diffuse system violates legal certainty?
 - Granital 1984
 - Dualism, in case of conflict, the EU law prevails, but the domestic law stays intact. Only primacy in application
 - Between Solange I and Solange II



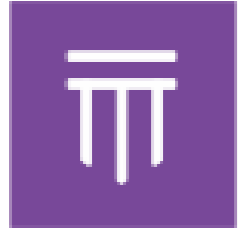
National Challenges II: Competences

- France
 - Matter's doctrine: in case of the conflict of domestic and international law, the court should aim for conform interpretation
 - If not possible, domestic law is applied
 - i.e. no primacy of international law
- Jacques Vebre decision – X Matter doctrine
 - Communitarian law has unconditional primacy (only primary law)
- State Council:
 - 1968 Samoules: international treaty does not have primacy over later domestic law
 - 1986 Smanor: a judge can review the compliance of later law with a treaty but if the law is more detailed, it will prevail
 - 1989 Nicolo – same principle
 - 1990 Boisdet primacy of a regulation
 - 1992 Rothmans International France: vertical direct effect of a directive
- Constitutional Council
 - 70-39 DC: refuses to review the constitutionality of founding Treaties: only a priori control
 - 76-71 Constitutional conformity of direct election to EP
 - Limitation of sovereignty v conferral of sovereignty. Conferral not possible, temporary limitation yes



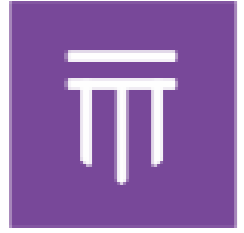
National Challenges II: Competences

- France
 - Changed in Maastricht I.
 - Transfer of competences is possible, but it cannot be in conflict with specific areas of constitutional law
 - Material core of the Constitution
 - Areas: right to vote in regional election, monetary union, migration and asylum



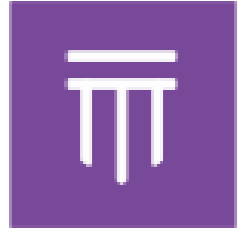
National Challenges II: Competences

- The Court of Justice of the European Union **exceeds its judicial mandate**, as determined by the functions conferred upon it in Article 19(1) second sentence of the Treaty on European Union, **where an interpretation of the Treaties is not comprehensible and must thus be considered arbitrary from an objective perspective. If the Court of Justice of the European Union crosses that limit**, its decisions are no longer covered by Article 19(1) second sentence of the Treaty on European Union in conjunction with the domestic Act of Approval; ... **these decisions lack the minimum of democratic legitimation** necessary under Article 23(1) second sentence in conjunction with Article 20(1) and (2) and Article 79(3) of the Basic Law.



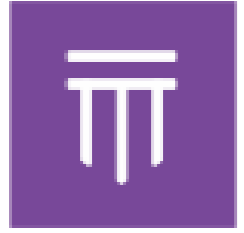
National Challenges II: Competences

- **Where fundamental interests of the Member States are affected, as is generally the case when interpreting the competences conferred upon the European Union as such and its democratically legitimated European integration agenda (*Integrationsprogramm*), judicial review may not simply accept positions asserted by the European Central Bank without closer scrutiny.**
- **The combination of the broad discretion afforded the institution in question together with the limited standard of review applied by the Court of Justice of the European Union clearly fails to give sufficient effect to the principle of conferral and paves the way for a continual erosion of Member State competences.**
- **German constitutional organs, administrative bodies and courts may participate neither in the development nor in the implementation, execution or operationalisation of *ultra vires* acts. This generally also applies to the *Bundesbank*.**



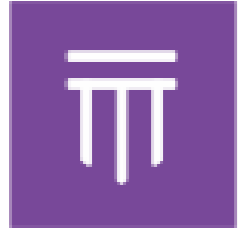
National Challenges II: Competences

- Germany after Lisbon
- FCC ruling of 5 May 2020 on the partial unconstitutionality of the ECB's PSPP program (Public Sector Asset Purchase Programme)
 - Accepts the primacy of Treaties over Constitution, but classifies an individual secondary act of EU institution as ultra vires
- Follow-up: Commission filed infringement proceedings against Germany: Germany has not only violated fundamental principles of EU law (autonomy, primacy of application, effectiveness, uniform applicability of EU law). It has also interfered with the judicial mandate of the ECJ)
- FCC should not have declared Weiss decision to be ultra vires act without referring the matter back to ECJ – violated primacy of EU law.
- Interference in the independence of a MS's court
- ECJ will be a judge in its own case



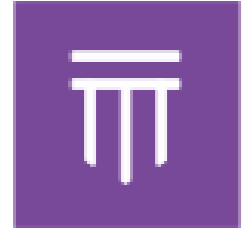
National Challenges II: Competences

- ECJ Press release
- In general, it is recalled that the Court of Justice has consistently held that a judgment in which the Court gives a preliminary ruling is binding on the national court for the purposes of the decision to be given in the main proceedings. 1 In order to ensure that EU law is applied uniformly, the Court of Justice alone – which was created for that purpose by the Member States – has jurisdiction to rule that an act of an EU institution is contrary to EU law. Divergences between courts of the Member States as to the validity of such acts would indeed be liable to place in jeopardy the unity of the EU legal order and to detract from legal certainty. 2 Like other authorities of the Member States, national courts are required to ensure that EU law takes full effect. 3 That is the only way of ensuring the equality of Member States in the Union they created

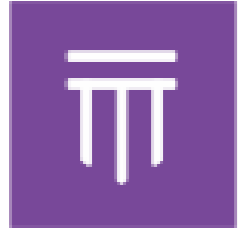


National Challenges II: Competences

- Poland: Constitutional Tribunal decision of 7 October 2021
- Unlike the German ruling, it calls into question the cornerstone of European integration
 - Sweeping rejection of the primacy of European law
 - Establishes the unconstitutionality of central primary law norms: A1 and 19 TEU
 - Poor reasoning, does not address harmonization or reconciliation of EU law and national constitution
 - **Blanket primacy of Polish constitution**
 - Effectively denies any competence of the EU
 - Denies national judges power to review the conformity

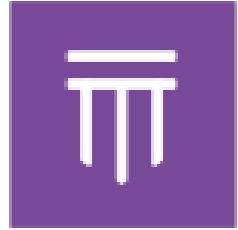


What does Bogdandy et al. propose?



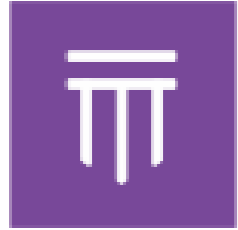
What does Bogdandy et al. propose?

- beyond the scope of Article 51(1) CFREU Member States remain autonomous in fundamental rights protection as long as it can be presumed that they ensure the essence of fundamental rights enshrined in Article 2 TEU
- The scope:
 - 1. MS executing obligations from EU law
 - 2. MS implementing EU law (directives)
 - 3. The scope of EU law: national limitations of a right granted by EU law (market freedoms) trigger the application of EU fundamental rights
 - Not applicable to non-economic activities and purely internal situations



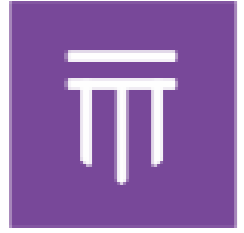
What does Bogdandy et al. propose?

- **Systemic violations of the essence of fundamental rights (A2 TEU) by any public authority in the European legal space amount to infringements of Article 20 TFEU which can be considered by national courts in cooperation with the Court of Justice**

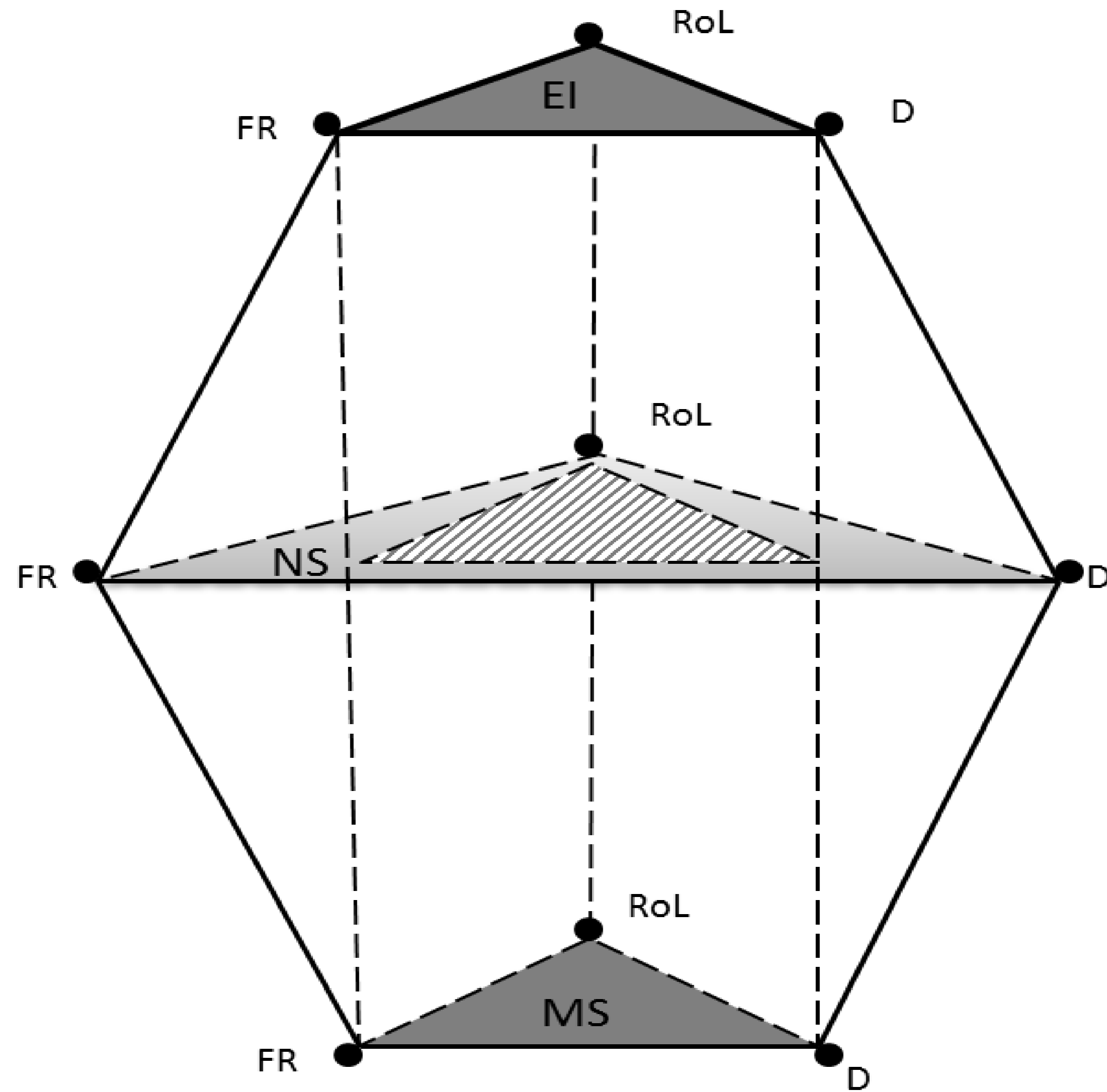


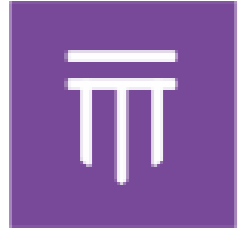
A2 Control

Policy instruments	Sanction mechanism, Article 7 TEU	Control
	International peer pressure	Convergence
	Evaluation reports of the accession process/CVM	Conditionality
	Issue linkage (loans, package negotiations)	Control (indirect influence)
	Pre-accession influence + networking (social learning)	Contagion
Legal instruments	Infringement	Control (indirect influence)
	Preliminary ruling procedure	Control

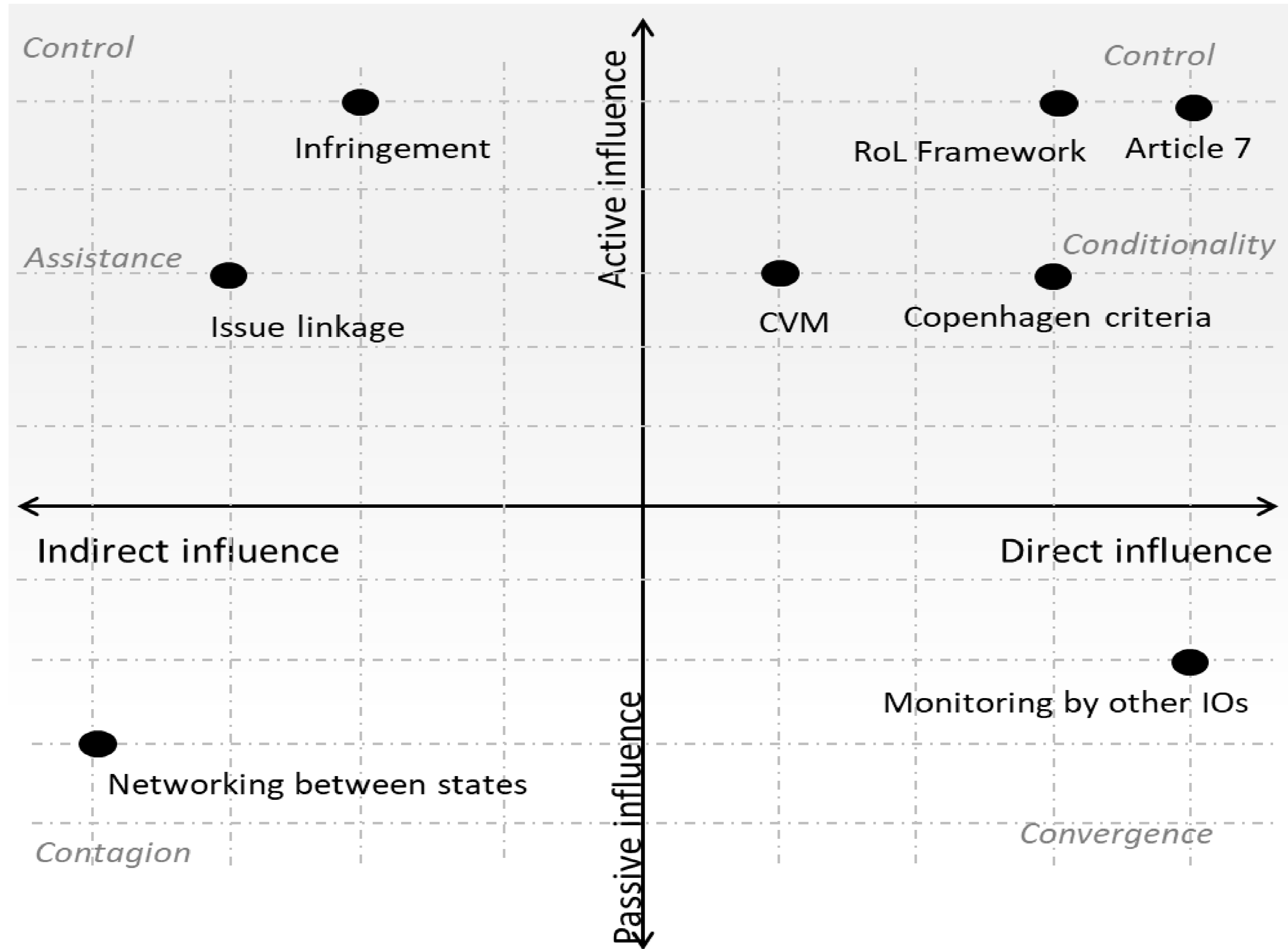


A2 triangular protection





A2 Control





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