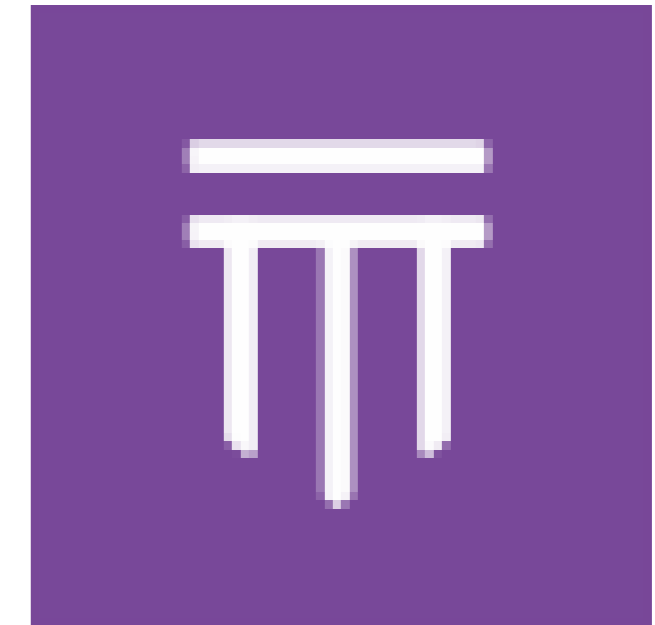


Brno, 13 October 2021

ECJ and Human Rights



JUSTIN
Judicial Studies Institute
Masaryk University

Katarína Šipulová

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.



What do we know about EU Law?

- Structure
- Principles



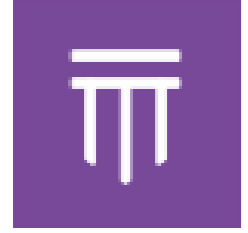
What do we know about EU Law?

- Structure
- Principles
 - Direct effect



What do we know about EU Law?

- Structure
- Principles
 - Direct effect
 - Vertical
 - Horizontal



What do we know about EU Law?

- Structure
- Principles
 - Direct effect
 - Vertical
 - Horizontal
 - Supremacy



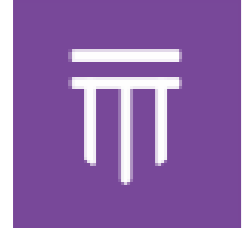
What do we know about EU Law?

- Structure
- Principles
 - Direct effect
 - Vertical
 - Horizontal
 - Supremacy
 - Over domestic law
 - Constitutional law
 - International law



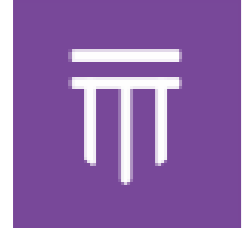
What do we know about EU Law?

- Structure
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 - Constitutional Courts x CJEU



What do we know about EU Law?

- Structure
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 - REACTION: HR AGENDA



What do we know about EU Law?

- Structure
- Principles
 - Direct effect
 - Vertical
 - Horizontal
 - Supremacy
 - Over domestic law
 - Constitutional law
 - International law
 - State liability
 - Effet utile
 - Autonomous interpretation



What do we know about EU Law?

- EU Law & HR
 - Where
 - When
 - Limits



What do we know about EU Law?

- EU Law & HR
 - Where
 - Discrimination
 - ECJ case law
 - Common principles and international treaties
 - EU Treaties
 - Charter
 - When
 - Limits



What do we know about EU Law?

- EU Law & HR
 - Where
 - Discrimination
 - ECJ case law
 - Common principles and international treaties
 - EU Treaties
 - Charter
 - When
 - Infringement of EU law by institutions (Stauder)
 - Actions of MS
 - Implementation of secondary law
 - Deviation from free movement (ERT: must be interpreted and applied in such a way that they respect principles")
 - Justification of the restriction of the free movement (Laval, Omega, Schmidberger)
 - Autonomous application of EU FR (Zambrano)
- Limits



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

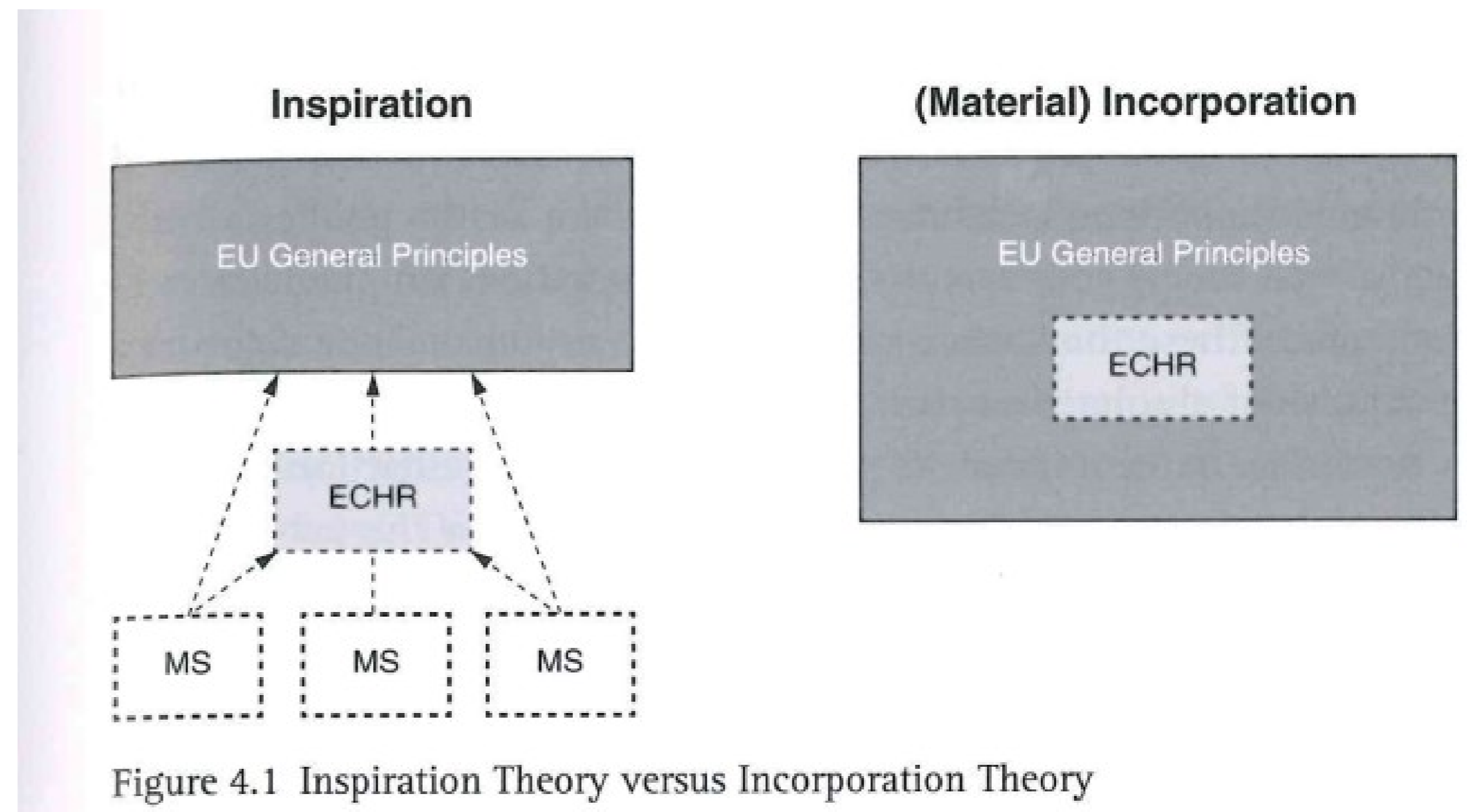
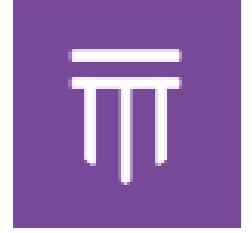


Figure 4.1 Inspiration Theory versus Incorporation Theory

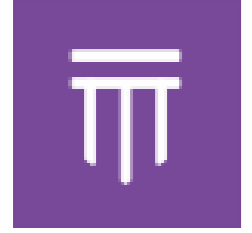
National Challenges II: Competences

- 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**



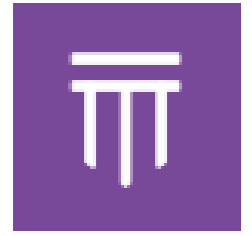
National Challenges II: Competences

- *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.*



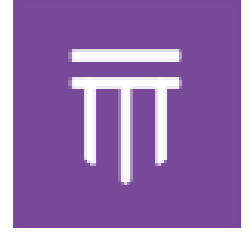
National Challenges II: Competences

- *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.*



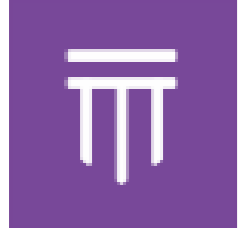
National Challenges II: Competences

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



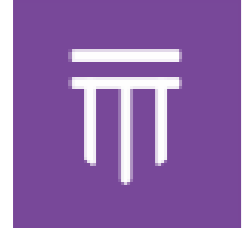
National Challenges II: Competences

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



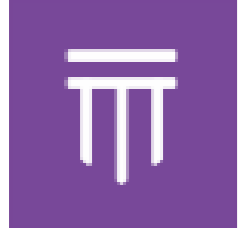
National Challenges II: Competences

- 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



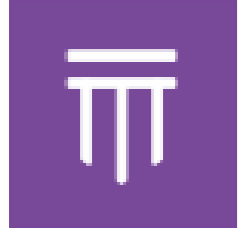
National Challenges II: Competences

- 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



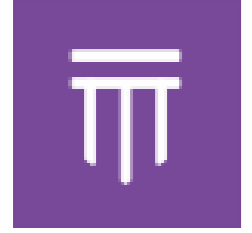
National Challenges II: Competences

- 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



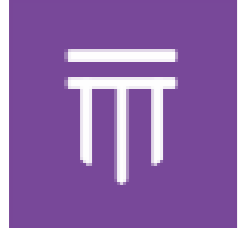
National Challenges II: Competences

- 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



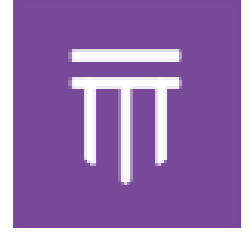
National Challenges II: Competences

- 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.

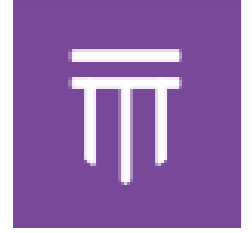


National Challenges II: Competences

- **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

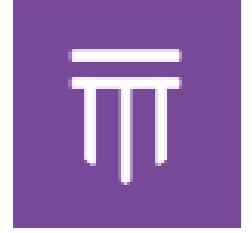


National Challenges II: Competences

- 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

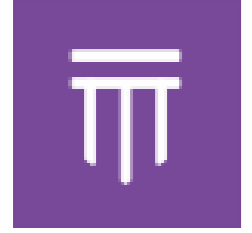


What does Bogdandy et al. propose?



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**

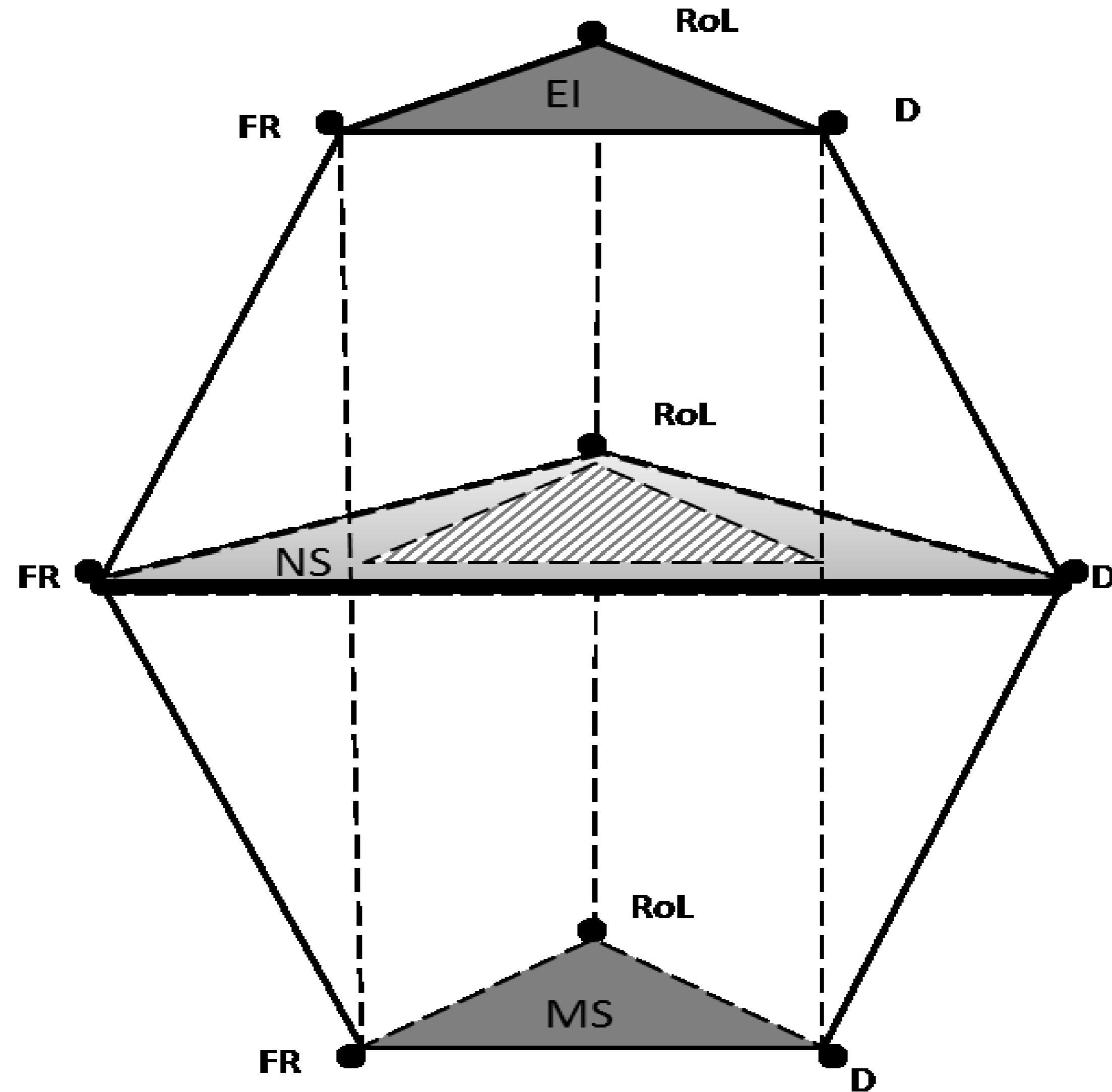


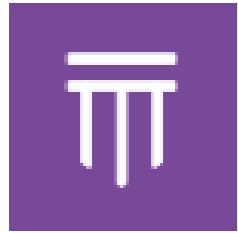
A2 Control

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

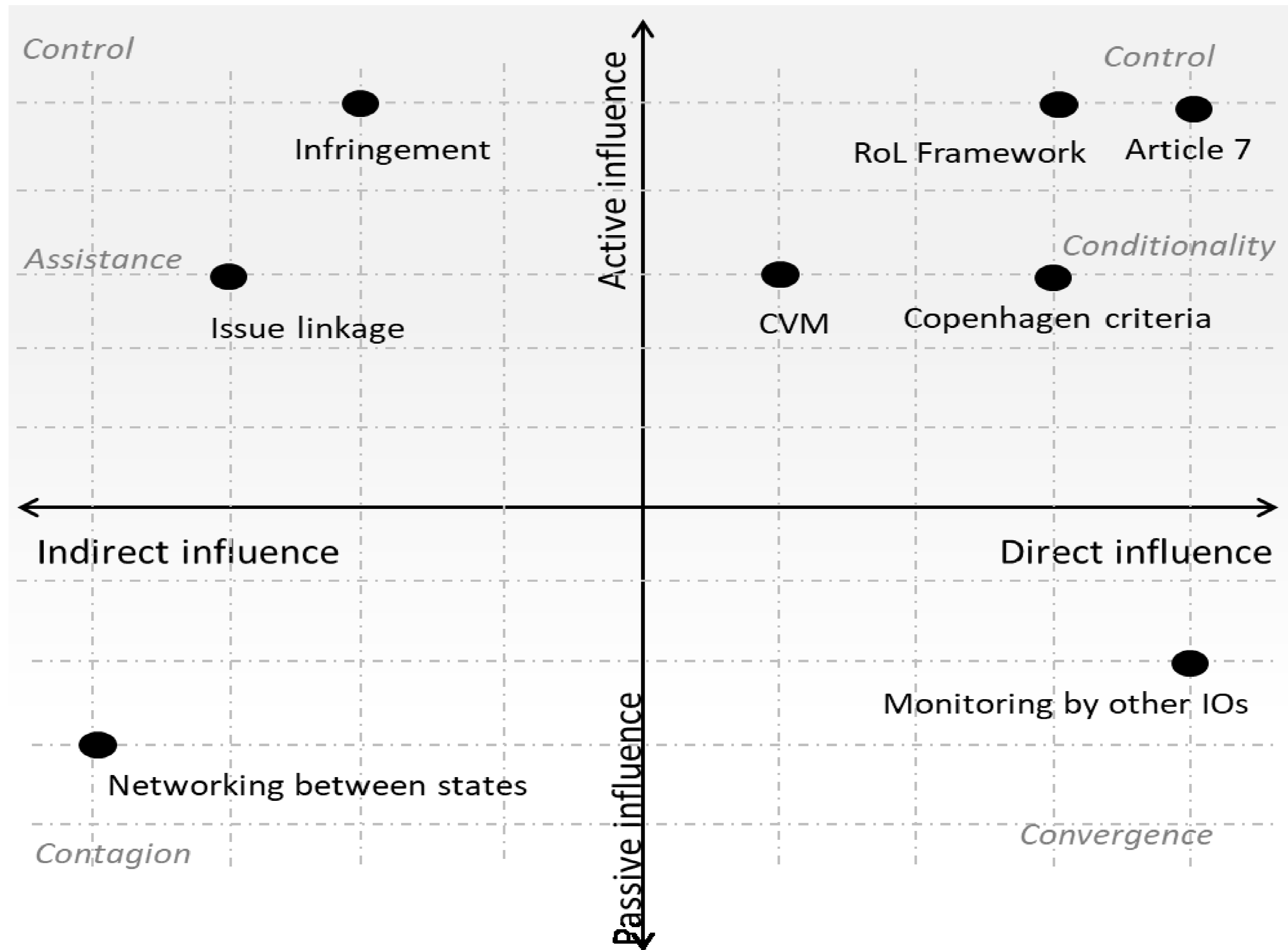


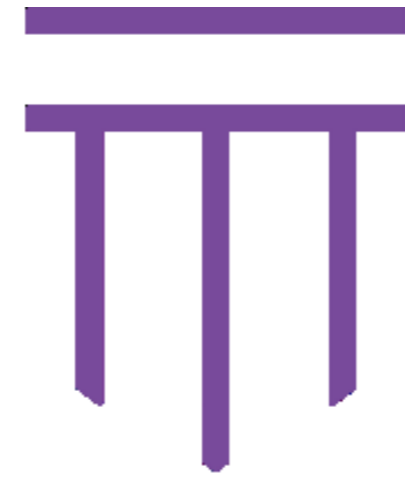
A2 triangular protection





A2 Control





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