EXEMPTIONS TO PRIMARY LAW AND EQUALITY OF MEMBER STATES

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ABSTRACT

European Union (EU) law generally applies within the territories of its Member States, with certain exceptions, both permanent and temporary, to this rule. This paper aims to examine the nature of these exceptions and their potential impact on the consistency of EU law and the principle of equality of Member States. The analysis categorises and defines the various exceptions, identifies their distinguishing features, and assesses their consequences within the EU legal framework.

KEYWORDS

EU primary law
territorial scope
opt-out clause
opt-in
equality of Member States

1. Introduction

The European Union (EU) respects the equality of Member States before the Treaties,[2] which form the constitutional core of the Union's legal order and are part of primary law. The EU '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',[3] taking precedence over the national legal systems of Member States.[4] The Treaty on European Union did not specify its territorial scope, limiting itself to the use of the term 'Member State'.[5] The EU does not possess its own territory but refers to

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2 | Article 10 of the Consolidated version of the Treaty on European Union (OJ C 326, 26.10.2012, pp. 13–390) (hereafter referred to as 'TEU').

3 | Judgment of the Court of 15 July 1964, *Flaminio Costa v E.N.E.L.*, C 6/64, EU:C:1964:66.

4 | E.g. Judgment of the Court of 9 March 1978, *Amministrazione delle finanze dello Stato/ Simmenthal*, C-106/77, EU:C:1978:49.

5 | Lenearts, 2005, p. 351.

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the territory of its Member States when applying Union law. It is exclusively the Member States that decide on the acquisition or loss of their state territory and, thus, also on the territorial scope of Union law, including the airspace above their land surfaces and coastal waters over which they exercise their sovereignty and state jurisdiction.[6]

Based on the above, the territorial scope of the EU's legal order is generally confined to the territories of its Member States, with certain exceptions to this rule. These exceptions could, in practice, appear to create an unequal status among Member States because they are not applied uniformly across all Member States, as we will demonstrate in this paper. Are these exceptions objectively justified, or do they lead to an undesirable fragmentation of EU law in the affected areas?

As for the primary law of the Union, it would be difficult to find a legal basis for exceptions to its territorial scope outside of primary law itself, which consists of the founding Treaties, their revisions, the Charter of Fundamental Rights of the EU, accession treaties, and other supplementary acts. Exceptions to primary law, which directly reflect not only in primary law but also in other sources adopted on its basis, could be classified, based on their presumed duration, as exceptions of a permanent or temporary nature. This paper aims to define the exceptions to primary law, categorise them based on their nature, and assess the practical impacts these exceptions might have on the consistency of Union law and the equal status of Member States.

2. Permanent exceptions to primary law

These exceptions were not negotiated for a fixed period, making them permanent. Among these permanent exceptions, we include the opt-out clauses, specifically associated with Member States such as Denmark, Ireland, and Poland. The United Kingdom also negotiated such opt-out. However, this paper does not address the case of the United Kingdom, given its withdrawal from the Union. In addition to these permanent opt-out clauses, we can also classify permanent exceptions related to overseas or outlying territories within this category.

2.1. European territories of Member States

The scope of primary Union law is not uniform in terms of European and overseas, or outlying territories of Member States. In accordance with Article 52 TEU, any part of the European territory of the Member States falls under the territorial scope of Union law. In addition, the primary law of the Union also applies to European territories for which the Member State is responsible in foreign relations.[7] The above basically applies to Gibraltar.[8]

6 | Siman and Slašťan, 2012, p. 101.

7 | See Article 355 (3) of the Consolidated version of the Treaty on the Functioning of the European Union (OJ C 326, 26.10.2012, pp. 47–390) (hereafter referred to as 'TFEU').

8 | See Declaration n. 55. of the Kingdom of Spain and the United Kingdom of Great Britain and Northern Ireland: 'The Treaties apply to Gibraltar as a European territory for whose foreign relations a Member State is responsible. This does not imply changes to the respective positions of the Member States concerned'.

The founding treaties also regulate exceptions to the territorial scope, namely that the treaties do not apply, in their entirety, to the Faroe Islands and partially apply to the sovereign territories of the United Kingdom of Akroriti and Dhekelia in Cyprus to the extent specified in Protocol No. 3 to the Act on the Conditions of Accession from 2003, to the Channel Islands and the Isle of Man to the extent specified in the Accession Treaty from 1972, and to the Åland Islands to the extent specified in Protocol No. 2 to the Act on the Conditions of Accession of the Republic of Austria, the Republic of Finland, and the Kingdom of Sweden.[9]

It is further necessary to briefly mention Cyprus. The provision of Article 52 TEU states that the primary law of the Union applies to the entire Republic of Cyprus. However, the above must be applied in connection with Protocol No. 10 on Cyprus annexed to the Accession Treaty of 2003. According to Article 1 of this Protocol, the application of Union law is postponed in those parts of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective administration. The Council is entitled to cancel this postponement unanimously on the basis of the proposal of the Commission. In case of solving the Cyprus problem (i.e. the reunification of Cyprus), the Council, based on the proposal of the Commission, will unanimously decide on the adjustment of the conditions of Cyprus' accession to the EU, taking into account the Turkish population in Cyprus.

2.1.1. Outlying overseas territories of Member States within the scope of Union law

In addition to that mentioned so far, Article 349 of the Treaty on the Functioning of the EU provides for the possibility of adopting special measures for the application of treaties to defined overseas territories of Member States (Guadeloupe, French Guiana, Martinique, Réunion, Saint Bartholomew, Saint Martin, Azores, Madeira, and the Canary Islands), whose development is due to the economic and social structure negatively affected by their remoteness, island location, small area, unfavourable topographical and climatic conditions, or economic dependence on a small amount of products.

These special measures may be adopted by the Council on a proposal from the Commission and after consulting the European Parliament in the areas of customs, trade or tax policy, free zones, agricultural and fisheries policy, supply of raw materials and basic consumer goods, state aid and access to structural funds, and the horizontal program of the Union. The measures take into account the particularities and limitations of these overseas territories without disrupting their integrity and the coherence of the legal order of the Union.[10] Therefore, Union law may apply to the mentioned territories with the possibility of accepting exceptions through acts of secondary law.

Based on the initiative of the Member State concerned, the European Council may adopt a decision that changes or supplements the status of a Danish, French, or Dutch country or territory in relation to the Union. The European Council decides unanimously after consultation with the Commission.[11]

9 | See Article 355(4)(5) of the TFEU.
10 | Article 355(1) of the TFEU.
11 | See Article 355(6) of the TFEU and Declaration No. 43 to Article 355 (6) of the Treaty on the Functioning of the European Union.

2.1.2. Other overseas countries and territories of Member States with special association with the Union

In accordance with Article 355 Paragraph 2 of the TFEU, some non-European countries and territories that have special (constitutional) relations with Denmark, France, the Netherlands, and the United Kingdom are associated with the EU. A taxative calculation of these countries and territories is given in Annex II to the founding treaties.[12] These overseas countries and territories (OCTs) are subject to special arrangements for association listed in the fourth part of the TFEU, Articles 198 to 204, and in Protocol No. 34 on special arrangements for Greenland.[13]

This association aims to support the economic and social development of the OCT and to establish close economic relations between the OCT and the Union as a whole. Its essence is based on equal treatment (expansion of the scope of contracts) in trade relations between Member States and these countries, equal participation in public tenders and supplies financed by the Union, freedom of establishment,[14] and free movement of goods.[15]

The detailed rules and procedures for the association of the OCTs with the Union are adopted unanimously by the Council at the proposal of the Commission or, in accordance with an extraordinary legislative procedure, unanimously at the proposal of the Commission and after consultation with the European Parliament, usually for a period of ten years.[16] Currently, until 31 December 2013, Decision No. 822/2001 on overseas association[17] stipulates that based on the initiative of the Member State concerned, the European Council may adopt a decision that changes or supplements the status of a Danish, French, or Dutch country or territory in relation to the Union. The European Council decides unanimously after consultation with the Commission.[18] Association according to Article 355 Paragraph 2 TFEU is directly based on the provisions of the treaty and cannot be confused with association established by a special international treaty based on Article 217 of the TFEU with any independent non-member state.

Overseas countries and territories are constitutionally linked to their Member States but are not part of the Union as such. Based on Article 355 Paragraph 2 TFEU, the

12 | Greenland, New Caledonia and Dependencies, French Polynesia, French Southern and Antarctic Territories, Wallis and Futuna Islands, Mayotte, Saint Pierre and Miquelon, Aruba, Netherlands Antilles (Bonaire, Curaçao, Saba, Sint Eustatius, Sint Maarten), Anguilla, Cayman Islands, Falkland Islands, South Georgia and the South Sandwich Islands, Montserrat, Pitcairn, Saint Helena and Dependencies, British Antarctic Territories, British Indian Ocean Territories, Turks and Caicos Islands, British Virgin Islands, and Bermuda. This list varied considerably and after the Second World War, it mainly included the French and Belgian colonies in Africa, which gradually gained full independence and today have contractual relations with the EU based on Article 217 TFEU (see in particular the Partnership Agreement between the African, Caribbean and Pacific Group of States, on the one hand, and the European Community and its Member States, on the other, signed in Cotonou on 23 June 2000).

13 | See also Declaration No. 60 of the Kingdom of the Netherlands to Article 355 of the TFEU.

14 | Article 199 (1-5) of the TFEU.

15 | Article 200 of the TFEU.

16 | See Article 203 of the TFEU.

17 | Council Decision (EC) No. 822/2001 of 27 November 2001 on the association of overseas countries and territories with the European Community (Decision on Overseas Association), (OJ L 314, 30.11.2001, pp. 1–77).

18 | Article 355(6) TFEU.

provisions of the treaty do not in principle apply to the OCTs, except for the fourth part of the treaty, which is devoted exclusively to the OCT-EU association. A fundamental difference exists between the OCTs and the outlying territories listed in Article 355 Paragraph 1 TFEU. In contrast to the OCT, the outlying territories are not only constitutionally connected to the relevant Member State but also form an indivisible part of the Union and are, in principle, bound by Union law in its entirety. Therefore, it is not appropriate to make any quantitative or qualitative comparison of the OCTs with the outermost regions in terms of benefits provided by the EU and obligations towards the EU.[19]

There are significant differences among the OCTs[20] themselves in terms of the degree of autonomy vis-à-vis the respective Member State with which they are linked, as well as in the economic and social spheres. However, no overseas country or territory is a sovereign state. In addition, they are dependent on the import of goods and energy. Exports of goods from the OCTs to the EU or within their respective geographic regions remain generally limited.[21]

2.1.3. Former overseas countries and territories of Member States outside the scope of Union law

The Treaties do not apply to (former) OCTs that maintain special relations with the United Kingdom of Great Britain and Northern Ireland and are not included in the list in Annex II to the founding Treaties. This provision of Article 355 Paragraph 2 of the TFEU

19 | See Commission Green Paper 'Future relations between the EU and overseas countries and territories', SEC(2008) 2067, COM(2008) 383 final, point 2.1 [Online]. Available at: https://op.europa.eu/en/publication-detail/-/publication/fbafa331-f91b-4018-8929-d495f7dc82d9 (Accessed: 20 September 2024).

20 | Regarding OCTs, see e.g. judgment of 8 February 2000, *Emesa Sugar*, C-17/98, EU:C:2000:70.

21 | Unlike third-world countries, all nationals of the OCT are, in principle, citizens of the Union within the meaning of Article 9 TEU. More precisely, all nationals of Greenland and the French and Dutch OCTs automatically also have the nationality of these Member States. From 21 May 2002, citizens of the British OCTs also became British citizens; however, they can renounce this citizenship and remain citizens of the British Overseas Territories only and are not required to have a passport identifying them as British citizens. As citizens of the Union, nationals of the OCT are also entitled to rights arising from Union citizenship, such as the right to free movement and residence (but not work) in the territory of the Member States. Citizens of the OCT may also have the right to vote or stand for election to the European Parliament if the conditions set by the relevant Member States in accordance with Union legislation are met. This is the case, for example, with nationals of the French OCTs. In the case of the islands of Saint-Pierre, Miquelon and Mayotte, their specific connection with the Union is also reflected in the use of the euro in these OCTs, although their monetary regime is not specified in the TFEU as they are not part of the Union (Council Decision [EC] No. 1999/ 95 of 31 December 1998 concerning monetary adjustments in the French territorial communities of Saint-Pierre and Miquelon [OJ L 30, 4.2.1999, p. 29–30]). No other OCTs use the euro; however, the French Pacific OCTs are exploring the possibility of replacing their currency with the euro. It should also be noted that, although the general provisions of the Treaties do not apply to the OCTs, unless there is a specific reference to them, the jurisdiction of the Court of Justice of the EU includes proceedings on a preliminary question, which, in accordance with the TFEU, is requested by a court whose jurisdiction includes the OCTs, as well as actions brought under the conditions laid down in the TFEU by plaintiffs from the OCT, which are directed against legal acts adopted by the EU.

applied to Hong Kong until 1997, whose special relations with Great Britain were completed on 30 June 1997.

All other OCTs of Member States that are not listed in TFEU[22] fall under EU law. Examples include the Spanish cities of Ceuta and Melilla in North Africa.[23]

As a general rule, the exceptions outlined in this subsection do not allow for an 'opt-in' mechanism in cases where a Member State expresses interest in foregoing the application of a given exception. These exceptions are established based on objective grounds and, in our view, do not give rise to contentious debates regarding the equal status of individual Member States or the potential fragmentation of EU law.

2.2. Opt-out clauses

Permanent opt-out clauses may also pertain to primary law itself, meaning that the legal basis for these exceptions cannot be found in any lower-force legal norm but solely within the 'constitutional framework' of EU law. These exceptions limit the territorial scope of the relevant EU law because the Member States in question are excluded from the ratione loci application of the EU law from which they have opted out.[24] As mentioned earlier, all exceptions to primary law naturally also impact secondary acts adopted on the basis of primary law. These opt-out clauses may appear to be unjust in terms of the position of the Member States. As T. Duttle et al. state, opt-outs allow less integration-friendly Member States to maintain their preferred level of integration without exercising a veto over the more ambitious projects of the majority, a concept referred to as 'constitutional differentiation'.[25]

The creation of these clauses presupposes that the majority of Member States have a shared interest in advancing integration within a specific area, where consensus among all Member States was necessary. The issue arises when a Member State is unable to contribute to this consensus. In such cases, the solution is either to refrain from integration in the relevant area or to establish a mechanism by which integration remains viable despite the disinterest of one or more Member States. Notably, opt-outs have occurred exclusively among acceding countries and never among the original founders of the integration process.

These clauses must be viewed from two perspectives. On one hand, they may appear unjust, as they were granted only to certain Member States, and if another Member State sought a similar exception, it would likely require the revision of primary law, which is a complex process. Opt-out clauses were introduced in cases where consensus among Member States was necessary to advance integration, such as the introduction of a new Union policy or significant changes to primary law, such as the inclusion of the EU Charter of Fundamental Rights in primary law.

From a more positive perspective, these clauses allowed a Member State, despite not wishing to pursue a particular degree of integration, to refrain from obstructing the other Member States and permit progress in the integration process with the insertion of an

22 | Article 355, Paragraph 2 of the TFEU (special association of the OCT), or Article 355(1) of the TFEU (outlying overseas territories).

23 | See Article 25 of the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties (OJ L 302, 15.11.1985, pp. 23–465).

24 | Geursen, 2024, p. 370.

25 | Duttle et al., 2017, p. 408.

exception. Whether similar clauses might be accepted during potential future revisions of primary law remains an open question. However, it is difficult to envision such clauses being introduced *ex post* to policies in which these states actively participated in the policymaking process.

We will now briefly look at the opt-outs of the Member States. First, several provisions of Union law regulating economic and monetary union, which are not automatically binding on the Denmark, can be cited.[26] Therefore, we can say that it is the only country exempted from the obligation to adopt the euro. Thanks to the negotiated clause, a key referendum was passed in Denmark and the Danish government accepted the treaty.[27] Denmark has negotiated specific exemptions within EU law, outlined by the European Council. These provisions apply only to Denmark, both now and in the future. Regarding the third stage of the Economic and Monetary Union (hereinafter referred to as 'EMU'), Denmark has opted out, meaning it will not adopt the euro or be bound by the economic policy rules of EMU members. Denmark will retain control over its own monetary policy and continue to participate in the European Monetary System. Additionally, Denmark maintains autonomy over its social welfare and income distribution policies.[28] Based on Protocol No. 22 on the position of Denmark, Denmark has to opt out also in defence policy and justice and home affairs. Denmark, as a sort of leader in opt-out clauses, in accordance with the protocol, will not prevent the other Member States from cooperating on these matters.

Based on Protocol No. 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security, and justice, Ireland has an opt-out in the area of freedom, security, and justice. The last permanent opt-out is the Polish one, which, by virtue of Protocol No. 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom, binds itself to the Charter.

It is fundamentally difficult to dispute that permanent opt-outs create a form of multi-level cooperation within the founding treaties,[29] which may, to some extent, negatively affect the equal standing of Member States within the EU. Through these clauses, Member States naturally safeguard their sovereignty by creating differentiation. However, we concur with the view that the result may be that opt-outs are generally perceived as controversial, potentially leading to a fragmentation of the EU[30] and its legal order. We discuss these impacts in the conclusion.

Finally, we consider it necessary to add that the difference between the exceptions that apply to island and outlying territories and permanent opt-outs is the possibility, a kind of option, for a Member State with a permanent opt-out to decide whether to make

26 | Protocol on certain provisions relating to Denmark, annexed to the Treaty establishing the European Community (1992).
27 | Adler-Nissen, 2014, pp. 6–7.
28 | Denmark: 'EMU opt-out clause?' Summaries of EU legislation, 16 August. [Online]. Available at: https://eur-lex.europa.eu/SK/legal-content/summary/denmark-emu-opt-out-clause.html (Accessed: 16 December 2024).
29 | Duttle et al., 2017, p. 422.
30 | Adler-Nissen, 2014, p. 2.

use of the clause. Even this option can be changed subsequently.[31] Therefore, with permanent opt-outs, Member States that have negotiated them can, within the limits of the scope of these block opt-outs for individual policies, moderate in the future the extent to which they are bound by the acts adopted under that policy. For example, Denmark, which, based on a referendum held in June 2022, has participated in the Common Security and Defence Policy of the European Union since 1 July 2022.[32]

3. Transitional exceptions

There is a fundamental difference between temporary and permanent exemptions in terms of how they evolve. In this category of temporary exemptions, we include those contained in Accession Treaties, which are typically negotiated for specific areas and cease to apply once the agreed-upon period expires.

3.1. Accession treaties

Accession treaties without their components are generally only two-page documents (legal provisions usually consist of only three to six articles). All the conditions of accession of future Member States of the Union are regulated in acts in the conditions of accession, which are attached to the accession treaty and have the same legal force as these treaties.

Acts on the conditions of accession mainly contain changes to the founding treaties related to the enlargement of the Union, including changes in the composition and functioning of its institutions and bodies and the establishment of exceptions and transitional periods for Member States, during which certain provisions of Union law do not apply temporarily. Exceptions and the transitional period can be separately regulated for each acceding state in a separate annex to the act on the conditions of accession.

The provisions of the acts concerning the conditions of accession, including their protocols and annexes, which are part of the accession treaties and which directly contain changes to the acts of the institutions of the Union, are, in fact, provisions of primary law that can only be changed or repealed by the procedure applied in the revision of primary law, unless the act of accession itself provides otherwise. Therefore, the Court of Justice cannot assess the validity of these provisions.[33] In this context, it is necessary to remember that the legal nature of the secondary acts themselves, changed by the act of accession, remains unaffected, and the institutions of the Union can later amend,

31 | For example, in the case of the Brussels I bis Regulation (Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (OJ L 351, 20.12.2012, pp. 1–32), where we find in the Preamble that it does not participate, but subsequently concluded the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ, 2005 11 16, L299).

32 | Heiming, 2023.

33 | Judgment of the Court of 11 September 2003, *Austria v Council*, C 445/00, EU:C:2003:445, Paragraph 62; Judgment of the Court of 28 April 1988, *LAISA v Council*, C-31/86, Paragraph 12. See, for example, Article 7 of the Accession Act.

supplement, or cancel the secondary acts concerned through standard legislative procedures; however, they cannot change the specific provisions of the act concerning the conditions of accession containing changes to these secondary acts.[34]

On the other hand, secondary law includes those provisions of acts on the conditions of accession, which authorise the institutions of the Union to adopt the necessary changes to acts related to the accession of new states to the Union.[35] For example, the Treaty on the Accession of the Slovak Republic and other States to the EU[36] was signed on 16 April 2003 in Athens and entered into force on 1 May 2004. The Act on the Conditions of Accession of the Slovak Republic and other States to the EU[37] is attached to the Accession Treaty[38] and contains mainly institutional changes and changes to acts related to accession, establishes exceptions and transitional periods, and also regulates some international law obligations, for example, Article 6 Paragraph 5 of the Act on the Conditions of Accession contains the obligation of new states to accede to the Agreement on the European Economic Area and Article 6 Paragraph 10 contains the obligation to withdraw from the Central European Free Trade Agreement.

It follows from Article 2 of the Act on the Conditions of Accession[39] that the acts adopted by the institutions before accession are binding on the new Member States and are applicable in these States from the date of accession.

34 | See, for example, Articles 8 and 9 of the Act concerning the conditions of accession.

35 | Judgment of the Court of 28 April 1988, *LAISA v Council*, C-31/86, Paragraphs 12 and 18. See, for example, Articles 21 and 57 of the Act concerning the conditions of accession.

36 | Full title: Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the EU) and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, the Slovak Republic on the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, and the Slovak Republic to the EU (OJ L 157, 21.6.2005, pp. 11–27). See Annexes, Treaty of Accession, p. 1171 (hereafter referred to as 'the Accession Treaty').

37 | Full title: Act on the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, and the Slovak Republic and on the amendments to the Treaties on which the EU is founded, OJ L 236, 23.9.2003, pp. 33–49.

38 | See Article 1(2) of the Accession Treaty.

39 | Article 2 of the Act on the conditions of accession reads:
'From the date of accession, the provisions of the original treaties and acts adopted by the authorities and the European Central Bank before accession shall be binding on the new member states and shall be applied under the conditions laid down in these treaties and in this act'.

In addition, according to Article 58 of the Act on the Conditions of Accession,[40] the text of the acts of the Union institution, which were adopted before the accession of the Slovak Republic to the European Union and which are drawn up in the official languages of the acceding Member States (including the Slovak language), are as binding as the texts drawn up in the official languages of the old Member States and are also published in the Official Journal of the European Union.

Exceptions and transition periods in relation to the Slovak Republic are primarily defined by Annex XIV[41] of the Act on the Conditions of Accession[42] on the free movement of capital, economic competition, agriculture, transport, taxes, energy, and the environment.

3.2. Economic and Monetary Union

We have decided to include the area of economic and monetary union among the temporary exemptions. To some extent, until Member States meet the Maastricht convergence criteria, they have a sort of 'exemption' from the obligation to adopt the common currency, which will lapse once these criteria are met. The Treaty does not establish a specific timeline for entering the euro area; instead, it allows Member States to devise their own strategies for fulfilling the requirements for adopting the euro.[43] As practice shows, the lack of a fixed deadline and the absence of mechanisms to force a Member State to adopt the euro means that not every Member State complies with this obligation. It is conceivable that, under certain circumstances, infringement procedure according to Article 258 TFEU for failing to fulfil Member State's obligations under the Treaty could be invoked in these cases, provided certain conditions are met.

3.3. Enhanced cooperation

The final area we have incorporated into the temporary exceptions is the exception of the so-called opt-in clause, which manifests as enhanced cooperation. In the case of a permanent opt-out, consensus among Member States is a prerequisite, allowing a State to join only under the condition of opting out. Conversely, an opt-in requires a lack of consensus among Member States and a subsequent interest from certain Member States to engage in enhanced cooperation.

The EU has grown over the last few decades, increasing the number of Member States from six to 27. Despite the progress made so far, Member States still have reservations in

40 | Article 58 of the Act on the Conditions of Accession reads,
'The texts of the acts of the authorities and the European Central Bank adopted before accession prepared by the Council, the Commission or the European Central Bank in the Czech, Estonian, Hungarian, Latvian, Lithuanian, Maltese, Polish, Slovak and Slovenian languages will be from the date of accession authentic under the same conditions as the texts drawn up in the present eleven languages. They will be published in the Official Journal of the European Union, if the versions in the current languages have also been published in this way'.

41 | MFA announcement no. 185/2004 Coll.; OJ EU L 236, 23.9.2003, pp. 915–924. See Annexes, Annex XIV to the Act on Conditions of Accession, p. 1197.

42 | See Article 60 of the Act on the Conditions of Accession in the areas of free movement of workers and freedom to provide services.

43 | European Commission: Who can join and when? [Online]. Available at: https://economy-finance.ec.europa.eu/euro/enlargement-euro-area/who-can-join-and-when_en#national-target-dates-for-adoption-of-the-euro (Accessed: 30 September 2024).

terms of their varying conceptions of the Union. Furthermore, certain objective factors, such as economic and legal differences due to different national legal systems, are likely to complicate uniform integration. For this reason, the principle of coherence, based on the idea of uniform integration at economic, political, and legal levels, will be difficult to achieve, given that the Union is characterised by continuous enlargement and that the consequence is heterogeneity.

Consequently, it is necessary to progress in a differentiated manner, for example by allowing cooperation with only some of the Member States or by leaving some Member States free to participate in cooperation. However, in this regard, the system of enhanced cooperation is currently the only one to be codified in the founding treaties. Thanks to enhanced cooperation, it is possible for Member States wishing to closely collaborate to use the Union's institutions, bodies, mechanisms, and procedures to achieve the goals of such cooperation. The enhanced cooperation allows participating Member States to organise broader cooperation than that initially provided for by the treaties within the framework of the policy concerned. It allows the establishment of a more flexible decision-making mechanism to authorise a limited number of Member States to advance Union integration more quickly when not all Member States are capable of adopting the same pace. This regulation in the founding treaties helps overcome blockages in certain Union policies, including common foreign and security policies.

Furthermore, the enhanced cooperation can be regarded as the forefront integration that can be followed, even in stages, by the subsequent accession of remaining Member States to that cooperation. There are two sets of provisions implementing the mechanism of enhanced cooperation into the founding treaties. First, Article 20 TEU, which governs the general authorisation and conditions of enhanced cooperation in the EU, and second, Article 326 TFEU et seq., which govern the conditions, rights, and duties related to enhanced cooperation incumbent on the Member States, notwithstanding their participation. According to Article 20 TEU, enhanced cooperation is permitted in all EU competences except for exclusive ones. It has to promote the objectives of the Union, protect its interests, and strengthen its integration process. The participation condition of at least nine Member States is required, which makes the enhanced cooperation more open and flexible regarding the fact that the EU currently has 27 Member States.

The enhanced cooperation remains as ultima ratio respecting the principle of subsidiarity since it can be triggered only if the objectives pursued cannot be achieved by all Member States within an acceptable period. In this regard, the Court of Justice ruled that the Union's interests and the process of integration would not be protected if all fruitless negotiations could lead to enhanced cooperation, to the detriment of the search for a compromise enabling the adoption of legislation for the Union as a whole. The expression 'as a last resort' highlights the fact that only those situations in which it is impossible to adopt such legislation in the foreseeable future may give rise to the adoption of a decision authorising enhanced cooperation.[44]

Of course, any acts adopted within the enhanced cooperation are addressed exclusively to participating Member States and are not part of the Union's acquis regarding the accession of candidate countries to the EU.

44 | See the Judgment of 16 April 2013, *Spain and Italy v Council*, C-274/11 and C-295/11, EU:C:2013:240 Paragraphs 49 and 50.

It follows from the wording of Article 326 TFEU that the provisions of acts adopted within the framework of enhanced cooperation cannot be in conflict with Union law. In this context, the founding treaties require respect for the equality of Member States and the principle of loyalty, as enhanced cooperation must not, under any circumstances, undermine economic and social cohesion or lead to obstacles or discrimination in trade between Member States.[45] Article 327 TFEU establishes an obligation of mutual respect and loyalty, since the enhanced cooperation must respect the competences, rights, and obligations of non-participating Member States and, vice versa, non-participating Member States cannot prevent the development of such cooperation.

The equality of access by Member States to closer integration within the EU is also ensured by the fact that the enhanced cooperation is open – not only at the stage of its establishment but also after its implementation – to all Member States, provided that they fulfil the required conditions. This provision underlines the provisional nature of the enhanced cooperation regime, which should lead to the gradual participation of all Member States in such cooperation and its subsequent incorporation into the Union acquis. In this regard, the participating Member States should encourage other Member States to join the established enhanced cooperation.

According to Article 329 TFEU, which describes the process of the initial establishment of enhanced cooperation, a minimum of nine Member States wishing to cooperate must submit a request to the Commission, which has a margin of discretion to check whether the formal conditions for that cooperation are met. It is unclear whether the Commission is authorised to also control possible political consequences of that cooperation. Then, the Commission may submit the cooperation proposal to Council, which, after obtaining the consent of the European Parliament, can give authorisation to proceed with that enhanced cooperation.[46]

Once the conditions required for implementing enhanced cooperation are met and the Council has adopted a corresponding decision, the participating States are entitled to use the bodies, procedures, and legal instruments of the EU within the limits of the objectives pursued by the enhanced cooperation. According to Article 330 TFEU, all Member States may participate in the deliberations; however, only the members of the enhanced cooperation Council have the right to vote since they are the only ones bound by the law adopted in this framework. This is to ensure that non-participating Member States are informed about the activities of enhanced cooperation, which would facilitate their subsequent accession.

According to Article 331 TFEU, which describes the process of the accession to the existing enhanced cooperation, the Member State wishing to participate in that cooperation must fulfil the conditions for such participation and adopt all provisions of that cooperation and shall notify its intention to the Council and the Commission. Then, the Commission shall examine whether the conditions of participation have been fulfilled

45 | See Article 327 of the TFEU.

46 | Regarding the enhanced cooperation falling within the scope of the Common Foreign Affairs and Security Policy, the process is slightly different: the request of the Member State is first addressed to the Council and then forwarded to the High Representative for Foreign and Security Affairs and to the Commission for their opinion and the European Parliament is notified.

and shall either confirm the participation of the Member State concerned or indicate the arrangements to be adopted to fulfil those conditions.

The Council and the Commission ensure that activities conducted under enhanced cooperation align with the Union's other policies and initiatives.[47] Some authors also propose an EU Court of Justice judicial review of the compliance of the proposed enhanced cooperation with the founding treaties.[48]

The provisions of the founding treaties on enhanced cooperation are still relatively little used. To date, strengthened cooperation based on Article 20 TEU has been established in the following areas: divorce and legal separation,[49] matrimonial and registered partnership property issues,[50] Unitary EU patent,[51] and the European Public Prosecutor's Office.[52] The permanent structured cooperation[53] should also be considered a special type of enhanced cooperation based on Article 42 TEU.

All existing cases of enhanced cooperation have arisen as an ultima ratio measure following the failure to find an agreement in the Council voting unanimously on a draft legislative proposal by the Commission. There is a great variety in the number of participating Member States, in the regulatory technique used, in the type of secretariat or other administrative body chosen for the operational stage, and in the financing and staffing provisions. The number of participating Member States is usually far above the necessary threshold of 9 and varies between 17 and 26. In terms of participation, it is also interesting to note that Austria, Belgium, France, Germany, Greece, Italy, Portugal, and Slovenia participate in all cases of enhanced cooperation (all of them among eurozone Member States), whereas Eastern, Northern, and opt-out Member States are less likely to engage in enhanced cooperation.

The enhanced cooperation framework is governed by the subsidiarity, since, if a contradiction occurs between the enhanced cooperation provision and standard Union provision, it is possible to deduce from Article 326 TFEU the primacy of standard Union law over enhanced cooperation law. However, the proportionality of the scope of the enhanced cooperation regime is not explicitly defined. The question of the extent to which

47 | See Article 334 of the TFEU.

48 | Piris, 2014.

49 | Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III) (OJ L 343, 29.12.2010, pp. 10–16).

50 | Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law, and the recognition and enforcement of decisions in matters of matrimonial property regimes (OJ L 183, 8.7.2016, p. 1). Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law, and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships (OJ L 183, 8.7.2016, p. 30).

51 | Regulation (EU) No. 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection (OJ L 361, 31.12.2012, p. 1).

52 | Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') (OJ L 283, 31.10.2017, p. 1).

53 | Council Decision (CFSP) 2017/2315 of 11 December 2017 establishing permanent structured cooperation (PESCO) and determining the list of participating Member States (OJ L 331, 14.12.2017, p. 57).

a cooperation regime is permitted outside the procedure provided for by the founding treaties remains unresolved.

Furthermore, although Article 20 TEU states that Member States may establish enhanced cooperation; however, it does not explicitly exclude that there may be other forms of cooperation. Thus, cooperation outside the EU seems, in fact, possible, following the example of the initial intergovernmental Schengen Convention. Some specific cases of enhanced cooperation could provoke free riding by non-participating Member States; therefore, it is important to continuously support other Member States to join that cooperation.

3.3.1. Schengen acquis

In this chapter, we consider the Schengen acquis as the Court of Justice has included it under enhanced cooperation in its case law. The Schengen acquis, which was initially created on an intergovernmental basis, was later incorporated as a form of enhanced cooperation. The Schengen acquis became part of the EU acquis on the basis of Protocol No. 19 on the Schengen acquis integrated into the framework of the EU ('Schengen Protocol'), attached to the TEU and TFEU. However, not all standard provisions governing enhanced cooperation laid down by Article 20 TEU are fully applicable to the Schengen acquis. For example, based on Article 7 of the Schengen Protocol, the Schengen acquis forms an integral part of the Union law that every acceding candidate State must adopt.

The Court of Justice recalled in this regard that it follows from the Schengen Protocol that the integration of the Schengen acquis into the EU framework is based on the provisions of the founding treaties on enhanced cooperation. In particular, it follows Article 327 TFEU that the implementation of enhanced cooperation is structured by the distinction between participating States, which are bound by the acts adopted in that context, and non-participating States, which are not. Moving from the status of a non-participating Member State to that of a participating Member State is governed generally by Article 331 TFEU and means that the Member State in question is required to apply the acts already adopted within the framework of the enhanced cooperation concerned.[54] The Schengen area comprises 29 Member States (of which three are non-EU countries), including Denmark, which has a special position, Ireland which has an opt-out, and Cyprus, which should soon become a member of this area.

4. Concluding remarks

This paper has focused on exceptions to the territorial scope of EU law, particularly primary law. As noted, these exceptions can be classified according to their temporal framework into temporary and permanent exceptions. We contend that in the case of the EMU, the exceptions can be regarded as both cumulatively temporary and permanent. In addition to the negative exceptions to the application of EU law, the paper also addresses positively framed exceptions, specifically the opt-in mechanism, which enables Member States to engage in enhanced cooperation. Apart from permanent opt-outs and, to some

54 | See, for example, Judgement of the Court of Justice of 8 September 2015, *Spain v European Parliament and Council*, C-44/14, ECLI:EU:C:2015:554.

extent, the fragmentation of law associated with opt-ins, the remaining exceptions do not provoke significant debate.

Diverging views emerge regarding permanent opt-out clauses. How should we perceive permanent opt-outs negotiated by current Member States of the EU – Denmark in certain areas, Ireland in other areas, and Poland in relation to the Charter of Fundamental Rights? It is objectively undeniable that the negotiation of these opt-outs by the Member States concerned was driven by political motivations. The prerequisite for these agreements was the desire of the Member States to secure the adoption of amendments to the founding treaties, which would have been unattainable without their participation. From this perspective, it is difficult to dispute that, in a somewhat positive sense, opt-outs contribute to the EU's integration process, as they allow Member States to moderate their positions on specific issues during treaty negotiations, rather than issuing a full rejection. The legal basis for these opt-outs lies in the protocols annexed to the founding treaties, which constitute primary EU law. The question as to why other Member States did not avail themselves of this option at the time of treaty adoption is irrelevant; what is more pertinent is why it would be difficult to adopt such opt-outs retrospectively. Given that this concerns EU primary law, introducing new opt-outs would necessitate revising primary law, a process that requires consensus. In our view, this question could be raised during future revisions of the founding treaties, although we do not anticipate retroactive application to existing policies but rather to any new measures introduced by future revisions. Therefore, the perceived disadvantage faced by other Member States stems purely from their failure to raise objections at the time of the treaty's adoption or during the introduction of new policies for which they may now wish to opt out.

Additionally, one could argue in favour of opt-outs by drawing on public international law. From the perspective of Member States, the founding treaties are, in essence, international treaties, albeit with a special status within EU law, as they form the constitutional foundation of EU primary law. Nevertheless, Member States can typically attach reservations to international treaties, whereas this option is absent in EU primary law, which, to some extent, is replaced by the opt-out mechanism. On the other hand, a valid argument against opt-outs is that the unequal status of Member States and their unequal participation in the integration process could potentially lead to the fragmentation of EU law. As such, opt-outs can be viewed both as a threat to the uniformity of Union law and as a means to advance integration despite the disinterest of certain Member States, thus overcoming the issue at hand. Ultimately, the objective outcome is that Member States are not treated equally.

If the principle of equality among Member States within the EU is to be maintained, the current reality is that while most Member States have achieved the same level of integration, some have not reached this level, and in the case of opt-ins, certain Member States have even exceeded it.

In the context of proposals and considerations for the future, we suggest excluding the possibility of introducing new opt-outs. Although we support the opt-in cooperation model in the form of enhanced cooperation, this mechanism also has certain shortcomings and has been subject to criticism. As R. Böttner notes, 'The files on establishing and implementing enhanced cooperation are all characterised by different timeframes and intensity of discussions and different levels of political controversy, all of which are factors that eventually led to enhanced cooperation'. Some enhanced cooperation agreements, such as the European Public Prosecutor's Office or cooperation on European

patents, were discussed for years. On the contrary, 'the proposal for the financial transaction tax met strong resistance in principle so that willing member states resorted to enhanced cooperation relatively quickly'.[55] Here, we strongly recommend establishing an obligation to explore all possible avenues to reach a consensus, with sufficiently long and thoughtful negotiations, allowing Member States adequate time to consider options—rather than rushing into decisions. We believe this is an appropriate form of cooperation, provided the conditions are met and it is only used when a reasonable amount of time has been allocated for States to attempt to reach a consensus. Only if, after ample time and all possible efforts, a consensus cannot be achieved should the mechanism of enhanced cooperation follow as a last resort.

However, the status quo undeniably leads to a lack of clarity and uniformity in EU law. This also raises the question of the 'free rider' issue in terms of equality. To what extent should the non-participation of Member States be reflected in the rules governing budget contributions? Since even Member States benefiting from their exemptions may, to some degree, benefit from the areas they opt out of, we propose that the first step towards ensuring equality without unnecessary doubt could be to draw a clear line and refrain from applying corrective mechanisms to adjust the contributions of these Member States.

55 | Böttner, 2022, p. 1148.

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