EQUALITY OF THE MEMBER STATES BEFORE THE EU INSTITUTIONS

Michal Říha[1]

ABSTRACT

The equality of states is an evolving concept that has changed over time. But whereas in the past states were imaginary fortresses where equality protected them from outside interference and threats, today a balance must be sought in the face of increasing interdependence and complexity. The European Union is a particular example of a complex form of integration in which equal treatment of Member States is important, even though these same states share some of their sovereignty with this supranational organisation. The relationship between the Member States and the Union, and between the states themselves, is a very complicated discipline, as it is necessary to ensure a balance between the freedom of the states and the preservation of a coherent and autonomous Union legal order. Equal treatment by the Union's institutions is crucial for maintaining trust between Member States and for the functioning of the European Union as a whole. The EU institutions have a duty to act impartially and fairly, ensuring that no state is favoured or disadvantaged because of its size, political influence or economic power. This includes equal access to decision-making, funding and the implementation of European policies. If the Union's institutions were to favour some states or neglect others, this could undermine the principles of solidarity, equality and justice that underpin the EU. Equal treatment ensures that all Member States have the same opportunities to promote their interests and participate in the shaping of European policies. This strengthens not only the stability of the Union but also its legitimacy in the eyes of its citizens.

KEYWORDS

equality
European integration
rule of law
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1 | Assistant Professor, Department of European Law, Charles University in Prague, the Czech Republic; rihamich@prf.cuni.cz; ORCID: 0000-0001-9227-2158.

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1. Introduction

The principle of equal treatment is one of the basic conditions for the co-existence of any community. Without it, real or perceived injustices arise, which can have centrifugal tendencies leading to its disintegration. Traditionally, inequality can be seen as the different treatment of two subjects in the same or similar situation or, conversely, equal treatment of two subjects not in the same situation. Beyond the mere act of doing so, there must be a distinction prohibited by law, which, in the case of the European Union, we can find in Article 4(2) of the Treaty on European Union (hereinafter 'TEU'): 'The Union shall respect the equality of Member States before the Treaties as well as their national identities...' However, Luboš Tichý points out that the EU prohibits the selective treatment of a Member State, but this does not prevent differential treatment.[2]

Within the framework of EU law, a distinction can be drawn between formal and substantive equal treatment. The latter is particularly pertinent in instances of differential treatment, where the Union's policies aim to address genuine material inequalities that are historically and/or factually associated with the functioning of the Single Market. The instruments of cohesion policy and the instruments of the common agricultural policy, which together account for the vast majority of the Union's budget expenditure, are particularly pertinent in this regard. Consequently, it can be deduced that States are not formally treated equally, since some States and their regions are in fact more heavily burdened than others and require a greater amount of central support.

Despite the intriguing nature of the subject matter, this text will be constrained in its scope to the formal concept of equality among Member States in the EU within its constitutional context. The primary objective is to present the evolution of this institute and to analyse its content, with particular emphasis on the case law of the Court of Justice of the European Union (hereinafter 'Court', 'CJEU' or 'Court of Justice')[3].

2. Concept of Equality of States

The principle of equality of states is considered by many to be one of the cornerstones of international relations and international law. It is essentially based on the concept of equality in sovereignty, i.e. that states which have no superior subject are sovereign. Sovereign recognises no one superior to himself (*superiorem non recognosens*), therefore sovereigns are equal to each other.[4] At least, this is the doctrine based on a theory of natural law, which also derives from the concept of human equality.[5]

The concept of equality in sovereignty, at least in principle, experienced a significant theoretical development in the 19th century following the Napoleonic Wars. This period,

2 | Tichý, 2021, p. 13.

3 | The Court of Justice of the European Union consists of two courts – The Court of Justice and the European General Court; unless stated otherwise, the paper will work with the case law of the Court of Justice.

4 | Anand, 2008.

5 | Rossi and Casolari, 2017, p. 4.

characterised by a series of congresses on the future of Europe, is often referred to as the Concert of Powers, reflecting the notion that only the major powers were effectively considered equal. The enforcement of equality between major powers could, at times, be perceived as somewhat absurd. For instance, Henry Kissinger cited the example of the 'two hats' situation, where the British Ambassador to Russia doffed his hat as a sign of respect towards the Russian monarch, yet simultaneously retained a second hat symbolising the equality of Britain.[6] It is also notable that, with the exception of the United States of America, equality was reserved only to the European countries – the invitation to the Ottoman Empire was only extended after the Crimean War.[7] The subordinate status to the great powers was often emphasised in a formal context, as evidenced by the seating arrangements during summits and congresses. This symbolism could be abused for political gestures, as illustrated by the incident during the Frankfurt Congress when the Prussian representative, Otto von Bismarck, took the liberty of lighting a cigarette and removing his jacket, an action that was only permitted to the Austrian representative, count von Thun-Hohenstein. Bismarck thus clearly declared to the other German states gathered that he considered Prussia to be the equal of the Austrian Empire.[8]

The rise of Germany was concomitant with the decline of the concert of great powers, and the assertion of a formally more equal status for smaller nations. This process had already been initiated at the pre-war Hague Peace Conferences of 1889 and 1907, and was fully realised in the negotiations at Versailles, where the right of smaller nations to self-determination and the concept of one state, one vote were enshrined.[9] The exception was intended for defeated nations. The newly established League of Nations respected these principles and was built on consensual decision-making and the impossibility of forcing a state to take an action to which it did not voluntarily subscribe.[10]

A significant transformation of the international legal framework was the adoption of the UN Charter, which in its Article 2(1) declared: 'The Organization is based on the principle of the sovereign equality of all its Members.' But the Charter itself contained systemic inequalities. In the first place, the UN established a Security Council whose decisions were to be binding on all states, including non-member states. The Security Council is composed of ten elected states representing geographical regions, as well as five permanent members, who were the victorious powers of 1945. In addition, the permanent members of the Security Council, as opposed to the elected members, have veto power individually, which extends to the reform of the body. It is no coincidence that the permanent members of the Security Council have subsequently also become the only states legally possessing nuclear weapons under the nuclear Non-Proliferation Treaty, further increasing their de facto power. Equality was not granted either under Article 78 to former colonies that held the status of trusteeships.[11]

In 1970, the General Assembly passed the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations that, while not binding from a legal standpoint, was

6 | Kissinger, 2011.
7 | Yosmaoglu, 2017.
8 | Steinberg, 2013.
9 | Rossi and Casolari, 2017, p. 6.
10 | Weinschel, 1951.
11 | Ansong, 2016, p. 16.

widely regarded as one codifying the principle of state equality as a fundamental pillar of international law, even on the basis of recognised international custom. This declaration asserted that states must accept their equality with each other, regardless of size, wealth or population, and must act in good faith. The principle of equality in sovereignty entails the prohibition of interference in internal affairs; failure to do so may result in the liability of the offending state for the consequences of its actions.[12]

However, the concept of sovereignty also confers upon states the liberty to engage in treaty frameworks that may impose limitations or the delegation of sovereignty to supranational entities. Consequently, as states become increasingly interconnected through globalised trade, the rise of supranational justice and regional alliances may lead to a state of interdependence.[13] Such organisations include the International Monetary Fund, in which the distribution of voting rights is determined by the size of the contribution, the International Criminal Court under Rome Statute, or the European Union.

3. Article 4(2) TEU and Union Concept of Equal Member States

Article 4 TEU is the fundamental constitutional provision of the Treaty, which defines the relationship between the Member States and the Union, and between the Member States and each other. Kopa Bončková and Týč refer to this provision as the codification of the current state of EU federalism.[14] In addition to the principle of the equality of Member States, the provision also operates with the obligation for the Union to respect the national identity of the Member States, including the political and constitutional structure and organisation of self-government. The paragraph further defines agendas for which the Member State remains primarily responsible, such as ensuring territorial integrity, public security and the protection of public order. The provision thus defines the legal limits of the future direction of European integration in the context of the existing treaty basis. The Maastricht Treaty of 1993 already incorporated the concept of respect to constitutional identity of the Member States, interweaving it with the principles of conferred powers and the division of competences between the Union and the Member States. However, the precise nature of these concepts was not detailed further. The present wording of Article 4(2) TEU is derived from that of the Treaty establishing a Constitution for Europe (hereinafter 'Constitutional Treaty'), which has been expanded by the Lisbon Treaty to encompass the equality of Member States and the listing of its essential tasks for the preservation of Member States' integrity. From the perspective of the Member States, it is a constitutionally-defensive provision, as it potentially gives the States the tools to protect themselves against too much federalisation of the European project and balances the concept of an 'ever closer union' referred to in Article 1 TEU.

In order to comprehend Article 4(2) TEU, it is necessary to take into account other fundamental principles of the relationship between the Union and its Member States. Article 4(1) TEU can also be regarded as a protective provision, as it establishes a residual

12 | See International Court of Justice, 1984, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America).

13 | Anand, 2008.

14 | Tomášek et al., 2022, p. 1209.

category of powers not explicitly conferred upon the Union that are to be exercised by the Member States. This provision builds on Articles 3, 4 and 5 of the Treaty on the Functioning of the European Union (hereinafter 'TFEU'), which further divide the Union's powers into different categories. A similar provision can be found in other constitutional documents governing the relationship of the states to the federation.[15] In comparison to classical federal systems, this element is further strengthened by the fact that it is the Member States that keep *Kompetenz-Komptenz*, the ability to create and confer powers on the Union level.

Conversely, Article 4(3) TEU establishes the duty of loyalty and good faith of Member States towards the Union, a principle that has been part of primary law since the Treaty of Paris establishing the European Coal and Steel Community. The principle of loyalty entails the obligation to undertake all necessary measures to fulfil the commitments arising from European integration, whilst simultaneously refraining from actions that could potentially compromise the attainment of objectives.[16] Beyond this, the principle has not only vertical effects, but also horizontal effects between Member States, which must respect and cooperate in solidarity. Both the principles of equality and respect for constitutional identities must be read in the context of these other provisions.

By Article 4(2), the TEU accepts the sovereign equality of the Member States as they are Masters of the Treaties (*Herren der Verträge*). That is further reflected in their formal equality contained in the consensual amendment of the primary law. The ordinary procedure for amending primary law requires the ratification of all changes by all States in accordance with their constitutional traditions (48(4) TEU). Similarly, the simplified procedure requires consensual adoption by the European Council (48(6-7) TEU), followed by national ratification. Each Member State therefore has a potential veto over any changes. Such a construction is in many ways very strict, as even many federal constitutions place a lower quorum on the approval of organic law amendments.[17] Originally, the equality of Member States has also been reflected in the Council's decision-making processes - initially on the legal basis for the first stages of the establishment of the Common Market. Later Member States stuck to this principle contradicting the legal rules of the Treaties via a political agreement on the permanent retention of the veto, the so-called Luxembourg Compromise. The Compromise worked with the concept of 'very important interests', which any Member State could declare at any point of the discussion and demand that the matter be decided by consensus. However, this practice led to the freezing of many negotiations and the abuse of the veto right in order to cross-block agendas and blackmail each other. The Compromise was used in the Council until the 80s, however, even today the Council is seeking consensus among its members,[18] even though for most areas the Treaties prescribe only a qualified majority.

When reading the Article 4(2), it is advisable to pay attention to the wording that speaks of the equality of Member States 'before the Treaties'. This leads to a narrower

15 | El-Sabawi, 2020.

16 | Tomášek et al., 2022.

17 | For example, Article V of the U.S. Constitution requires a 2/3 majority in both houses of Congress followed by ratification by 3/4 of the States; the German Constitution in Article 79 requires a 2/3 majority in both houses of Parliament; the UN Charter in Article 108 requires approval by a 2/3 majority of the General Assembly followed by ratification by 2/3 of the States, including all permanent members of the UN Security Council.

18 | Novak, 2013.

interpretation of the notion of equality, which entails the formal equality in the application of the Treaties. The Treaties themselves may thus enshrine in a number of places the legally sanctioned unequal status of Member States - an example is the over-representation of representatives of small states in the European Parliament, or the consideration of the populousness of large states when voting in the Council, violating the principle of 'one state, one vote'. It should be noted that the inequality in question is approved by the Member States.

3.1. Equality of the Member States

It has previously been established by the Court of Justice that all Member States must be treated equally, irrespective of the date of their accession. With regard to the allocation of fishing quotas, the Court has ruled that the accession of Portugal and Spain to the Community entitles those states to a share of the quotas, despite the allocation having taken place prior to their accession.[19] In a similar fashion, the Court of Justice permitted Poland's action for an annulment of the Regulation on transitional measures in the sugar sector, despite the procedural time-limit for initiating legal action having elapsed, on the grounds that the time-limit had commenced prior to Poland's accession to the Union. As a Community founded on the rule of law, its acts must be subject to judicial review, and similar procedural restrictions would violate this principle.[20] On the other hand, the Union could differentiate its approach to a newly incoming Member State and exclude it from the Common Agricultural Policy subsidy system because its agriculture was in a transitional phase. In such instances, the subsidies would no longer serve the same purpose as in other countries.[21] Furthermore, the transitional period and its conditions were established directly by the Act of Accession, which is part of primary law and therefore constitutes a special arrangement. In summary, exceptions are generally permissible, but derogations must be proportionate to its objective and must not create an inadequate obstacle to the functioning of the Single Market.[22]

Furthermore, it should be noted at the outset that differentiation may also occur naturally. For example, certain Member States may not be subject to transposition obligations due to geographical factors, such as their landlock location, which precludes the existence of ports and thus the related regulation, or the absence of a regulated area within their jurisdiction.[23] However, the Court of Justice interprets such exceptions restrictively and a hypothetical situation may occur requiring implementation.[24] Conversely, the EU legislator is only obligated to consider the EU-wide context of the legislation adopted, and

19 | Judgement of the Court of 13 October 1992, Portuguese Republic and Kingdom of Spain v Council of the European Communities. Joined cases C-63/90 and C-67/90, ECLI:EU:C:1992:381, para. 37.

20 | Judgement of the Court (Grand Chamber) of 26 June 2012, Republic of Poland v European Commission, Case C-336/09 P, ECLI:EU:C:2012:386.

21 | Judgement of the Court (Grand Chamber) of 23 October 2007, Republic of Poland v Council of the European Union, C-273/04, ECLI:EU:C:2007:622.

22 | Judgement of the Court of 17 July 1963, Italian Republic v Commission of the European Economic Community, 13-63, ECLI:EU:C:1963:20.

23 | Judgement of the Court (Sixth Chamber) of 16 November 2000, Commission of the European Communities v Hellenic Republic, C-214/98, ECLI:EU:C:2000:624.

24 | Judgement of the Court (Third Chamber) of 14 January 2010, European Commission v Czech Republic, C-343/08, ECLI:EU:C:2010:14.

is not required to adapt the act to the specific circumstances of each individual Member State.: '... Therefore, the attempt to strike such a balance, taking into account not the particular situation of a single Member State, but that of all EU Member States, cannot, in itself, be regarded as contrary to the principle of proportionality...'[25] Paradoxically, the reverse course of action would result in a breach of the principle of equality in legislation. This is because the content would differ in each jurisdiction. It is important to note that this does not imply that the European legislator should disregard the principle of subsidiarity. Indeed, it is vital that Member States are granted greater scope to take account of local conditions. Unfortunately, in practice we see the opposite trend and the increasing replacement of directives by regulations.[26]

3.2. Differentiated Integration

The formulation 'equality of Member States before the Treaties' also requires a certain degree of attention. The phrase 'before the Treaties' suggests that this is a formal equality, which is linked to the prohibition of arbitrary treatment by the Union institutions.[27] However, it is also possible to accept the view that the general rule of Article 4(2) TEU does not apply to situations covered by the Treaties in a special way. This means that the Member States, in their sovereignty, may have agreed to the creation of unequal conditions.

As referred to earlier, the Council's voting system reflects population size, while the European Parliament's system is weighted towards smaller nations. The presidential trios are formed based on the principle of representativeness, considering factors like how long a state has been a member, its geographical location, size, and involvement in the eurozone (for the Eurogroup presidency). However, the length and regularity of the presidency is the same for all states. The number of judges in both CJEU courts is equally based on the number of states, but the large states keep permanent Advocates General representation, while those of the smaller states rotate. The European Commission consists of nominations from all states, even though the primary law said there would be fewer Commissioners. As we can see, there are various quotas brought about by political compromises between equality/representativeness and the efficiency of the composition of the bodies in question.

Differentiations are often based on the sovereign capacity of states to enter into unequal treaties when primary law is changed - in which case the majority takes on more obligations than states that are exempt from the regime. Examples are the Danish and Irish opt-outs from the Area of Freedom, Security and Justice,[28] or Poland's negotiated dubious[29] exemption from the Charter of Fundamental Rights in the area of social

25 | Judgement of the Court (Sixth Chamber) of 13 March 2019, Republic of Poland v European Parliament and Council of the European Union, C-128/17, ECLI:EU:C:2019:194.

26 | Svobodova, 2024.

27 | Haratsch, 2020.

28 | Protocol on the position of the United Kingdom and Ireland.

29 | Judgement of the Court (Grand Chamber) of 21 December 2011, N. S. (C-411/10) v Secretary of State for the Home Department and M. E. and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform, joined cases C-411/10 and C-493/10, ECLI:EU:C:2011:865.

rights.[30] Another example is a turnover limit threshold for VAT registration for Czech businessmen and other European entrepreneurs.[31] Some differentiations, on the other hand, are de facto the continuation of the accession process and are intended to be phased out when conditions are met, such as when countries fulfil the Maastricht criteria and join the eurozone.

Conversely, primary law contains a considerable number of other differentiating provisions that create space within primary law for deeper, albeit selective, integration. These provisions respond to historical experience and the different intents of Member States to integrate. For example, the Schengen acquis stood outside the Community legal structure until the Treaty of Amsterdam. This prompts the concept of instruments of differentiated integration, which, by its very logic, necessitates a multi-speed Europe that directly requires differential treatment on the basis of the consent of the Member States concerned. This form of enhanced cooperation must be kept open for other Member States to join at a later stage,[32] so that it can serve as a sandbox laboratory for further integration.

3.3. Precursor for Primacy

The principle of citizens being equal before the law, an outcome of the 18th century revolutions, prohibits the state from discriminating based on wealth or social status. It also prohibits exemptions and privileges for the nobility and the church, which frequently included exemption from taxation or military service. While equality protects individuals from taking on more than others, it also imposes obligations, such as the duty to endure what others must endure. Consequently, the horizontal aspect of the principle of equality, in conjunction with the principle of loyalty, prohibits Member States from deviating from their obligations under EU law. This principle predates the explicit codification of the principle of equal treatment in primary law, as evidenced by the *Costa v Enel* decision:

> 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 Community law and without the legal basis of the Community.[33]

The unilateral derogation of EU law undermines its autonomous status and results in an unequal (often more favourable) position of a given Member State in the face of other EU members

> ....for a State unilaterally to break, according to its own conception of national interest, the equilibrium between advantages and obligations flowing from its adherence to the

30 | Protocol 7 on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom.

31 | Council Implementing Decision (EU) 2022/865 of 24 May 2022 authorising the Czech Republic to introduce a special measure derogating from Article 287 of Directive 2006/112/EC on the common system of value added tax.

32 | Article 330 TFEU.

33 | Judgement of the Court of 15 July 1964, Flaminio Costa v E.N.E.L., 6-64, ECLI:EU:C:1964:66.

> Community brings into question the equality of Member States before Community law and creates discriminations…[34]

In addition to the principle of sincere cooperation and loyalty, the situation thus created must also be considered in the context of the principle of solidarity between Member States. This is so that the advantages gained by the unilateral action of a Member State are to the detriment of other Member States and their populations:

> In permitting Member States to profit from the advantages of the Community, the Treaty imposes on them also the obligation to respect its rules. For a State unilaterally to break, according to its own conception of national interest, the equilibrium between advantages and obligations flowing from its adherence to the Community brings into question the equality of Member States before Community law and creates discriminations at the expense of their nationals, and above all of the nationals of the state itself which places itself outside the Community rules. This failure in the duty of solidarity accepted by Member States by the fact of their adherence to the Community strikes at the fundamental basis of the Community legal order.[35]

This is true even if such a derogation should be justified by a specific political or legal argument if it lies outside the scope of the rules of EU law allowing derogation. Conversely, as Týč and Bočková contend, the principle of solidarity itself does not engender any rights or obligations for Member States.[36]

The Court of Justice renewed the debate on the primacy of EU law with its press release responding to the decision of the German Federal Constitutional Court (hereinafter 'BVerfG') in the European Central Bank's Public Sector Purchase Programme case.[37] This is a very rare instance of the European Court of Justice to publicly react to and comment on a decision of the highest court of a Member State, as the decision represents the culmination of a clash between the two highest courts over the nature of European integration and the separation of powers between the Union (and its judicial authorities) and the Member States (and their judicial authorities). The press release was grounded in the well-established case law of the Court of Justice, which established a direct correlation between the binding nature of its interpretation of EU law and the obligation of national courts to ensure the full implementation of EU law as the sole means of safeguarding the equality of Member States.[38]

The basis for this conflict was the European Central Bank's decision to launch a Public Sector Purchase Programme to buy government bonds on the secondary market, arguing that the prohibition on financing Member States' budgets in Article 123 TFEU only applied to primary issuance. Put simply, the European Central Bank, which conducts monetary

34 | Judgement of the Court of 7 February 1979, Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland, 128/78, ECLI:EU:C:1979:32.
35 | Judgement of the Court of 7 February 1973, Commission of the European Communities v Italian Republic, 39-72, ECLI:EU:C:1973:13.
36 | Tomášek et al., 2022, p. 1213.
37 | Judgement of the Second Senate of 5 May 2020 of the Federal Constitutional Court of Germany, 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16.
38 | Court of Justice of the European Union, Press Release No. 58/20, 8 May 2020, following the judgement of the German Constitutional Court of 5 May 2020.

policy independently for countries whose currency is the euro, has used its tools to indirectly support the fiscal policy of Member States with economic problems in order to maintain the functionality of the monetary union. This mechanism was endorsed by the CJEU in the *Gauweiler* decision,[39] although the BVerfG had previously announced that it considered this action to be an overreach of the European Central Bank's powers, since budgetary competence in Germany belongs to the Bundestag, not to the central bank. The CJEU's positive review was then included by the federal court as an overreach of the Union's transfer of powers. The reaction was a statement by the CJEU, which drew attention to the fact that it is not possible for national judicial authorities to assess the validity of EU law unilaterally and to disregard the binding interpretation of the CJEU.

The Court's position presented in the press release subsequently found its way into case law:

> It must be added that Article 4(2) TEU provides that the Union is to respect the equality of Member States before the Treaties. However, the Union can respect such equality only if the Member States are unable, under the principle of the primacy of EU law, to rely on, as against the EU legal order, a unilateral measure, whatever its nature.[40]

The Court of Justice has thus made equal treatment of Member States conditional on their sincere cooperation, thus limiting the provisions of Article 4(2) TEU by an unwritten clause based on the system of the Treaties. Subsequent decisions of the Court, however, go even further:

> Compliance with that obligation [supremacy] is also necessary in order to ensure respect for the equality of Member States before the Treaties, which precludes the possibility of relying on, as against the EU legal order, a unilateral measure, whatever its nature, and constitutes an expression of the principle of sincere cooperation set out in Article 4(3) TEU, which requires any provision of national law which may be to the contrary to be disapplied, whether the latter is prior to or subsequent to the EU legal rule having direct effect.[41]

The Court of Justice has continued the Commission's action against the organisation of the Polish judiciary and in particular its disciplinary system: 'Compliance with that obligation [supremacy] is necessary in particular in order to ensure respect for the equality of Member States before the Treaties and constitutes an expression of the principle of sincere cooperation set out in Article 4(3) TEU.'[42] Christoph Krenn thus points out that while in the *Euro Box Promotion* decision the CJEU perceived the principle of supremacy

39 | Judgement of the Court (Grand Chamber) of 16 June 2015, Peter Gauweiler and Others v Deutscher Bundestag, C-62/14, ECLI:EU:C:2015:400.

40 | Judgement of the Court (Grand Chamber) of 21 December 2021, Criminal proceedings against PM and Others, joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, ECLI:EU:C:2021:1034, para. 249.

41 | Judgement of the Court (Grand Chamber) of 22 February 2022, RS, C-430/21, ECLI:EU:C:2022:99, para. 55.

42 | Judgement of the Court (Grand Chamber) of 5 July 2023, European Commission v Republic of Poland, C-204/21, ECLI:EU:C:2023:442, para. 77.

and the principle of equality of Member States as separate principles, subsequent case law makes supremacy an inseparable prerequisite for the equality of Member States.[43]

In this context, Federico Fabbrini points out a certain limitation of the European constitutional discourse, which is devoted to bilateral relations between the European Union and the Member States, with a particular interest in conflicts between the highest courts of these institutions. However, the principle of equality of Member States has a neglected multilateral aspect, as any outlying decision of any national court affects the position of other members of the community of states.[44] Article 4(2) TEU under this approach is therefore not a defence of a Member State in bilateral negotiations with the Union, as many have read the provision.[45] On the contrary, it is limiting manoeuvring space for individual Members States in order to prevent actions that could hinder the rights of other Member States and their nationals.[46] Moreover, it would not be a novelty but an interpretation following the logic of the earlier CJEU case law.[47]

This idea is also related to van Middelar's observation of the attitude of the remaining Member States towards France during the empty chair crisis leading to the aforementioned Luxembourg Compromise. The other states declined to engage in conventional bilateral negotiations with de Gaulle, opting instead to align their positions and insisted on resolving the crisis within the European treaty framework. The Member States thus together form a single unit, which at the same time stands outside the EU institutions (internal sphere) and yet do not deal in a multilateral international relations regime (external sphere). The states are thus simultaneously interdependent and codependent.[48] Lenaerts refers to this phenomenon as a multilateral aspect of the autonomy of the EU legal system.[49]

Under public international law, if one of the contracting parties breaches its obligations, the other parties concerned can take countermeasures without breaching their contractual obligations (*exceptio non adimpleti contractus*). For more than 60 years, European law has rejected such a solution, arguing that Member States gave up this possibility by establishing the Community, which offers instruments of redress of a supranational nature.[50] From historical documents we can doubt whether the Member States actually knew that they were establishing a supranational organisation, but the current logic of the construction of the EU legal system is to insist on its autonomy. The power to interpret and rule on the validity of EU acts has been conferred to the Court of Justice by the 27 Member States, either by the original founding treaties or the acts of accession, so that if an institution of one Member State arrogates this power to itself without the consent of the other Member States, it is acting *ultra vires* on its own. Richard Král reflects on this when he joins the discussion on the resolution of judicial conflicts and clearly says

43 | Krenn, 2024.
44 | Fabbrini, 2015, p. 1015.
45 | Schill and von Bogdandy, 2011.
46 | Filipek and Taborowski, 2024.
47 | Judgement of the Court of 7 February 1973, Commission of the European Communities v Italian Republic, 39-72, ECLI:EU:C:1973:13, para. 24.
48 | van Middelaar, 2014.
49 | Lenaerts, 2020.
50 | Judgement of the Court of 13 November 1964, Commission of the European Economic Community v Grand Duchy of Luxembourg and Kingdom of Belgium, Joined cases 90/63 and 91/63, ECLI:EU:C:1964:80.

that the resolution of EU disputes must be left to the EU level - which, of course, does not exclude some form of involvement of national judges.[51] There is also a practical aspect to be noted: while other states can intervene in proceedings before the Court of Justice, they are not given the same opportunity to do so in national proceedings.

Here David Preßlein, points out a paradox, since this whole approach is based on Kelsen's monistic conception of international law, based on reciprocity, which European law has historically rejected.[52]

3.4. Respect of National Identities

The equality of Member States serves as a counterbalance to the respect for national constitutional identities. Some authors have suggested that this might be a possible exception to the absolute primacy of EU law,[53] as referenced in Article 4(2) TEU. However, I will not be textualist enough to infer a precedence relation between these maxims from the structure of this sentence.[54]

Respect for identity specificities was given by the Court of Justice even before it was explicitly enshrined in primary law, for example in the *Groener* case, where a Dutch teacher was required to pass an Irish language examination even though she was to practise her profession in an English-speaking environment. However, the CJEU accepted this restrictive measure with the aim of promoting the first official language under the condition that implementation will be proportionate.[55] Similarly, the argument of constitutional identity was successfully plead by Austria with regard to the republican system and the equality of its citizens, when it did not allow the use of a title of nobility acquired in Germany to its citizen.[56] Furthermore, the Court of Justice has allowed, in view of the specificities of German history, the prohibition of games simulating killing, provided that the general rules on restrictions on the free movement of services are maintained. In this case, the Court further emphasised that such exceptions are not permanent and must be assessed on a case-by-case basis:

> ...specific circumstances which may justify recourse to the concept of public policy may vary from one country to another and from one era to another. The competent national authorities must therefore be allowed a margin of discretion within the limits imposed by the Treaty.[57]

In the *Bogendorff von Wolffersdorff* case, we recognise this approach, since, in contrast to the Austrian case, the Court of Justice has given the German republican tradition,

51 | Král, 2023.
52 | Preßlein, 2024, p. 10.
53 | Schill and von Bogdandy, 2011.
54 | Fabbrini, 2015.
55 | Judgement of the Court of 28 November 1989, Anita Groener v the Minister for Education and the City of Dublin Vocational Educational Committee, C-379/87, ECLI:EU:C:1989:599.
56 | Judgement of the Court (Second Chamber) of 22 December 2010, Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien, C-208/09, ECLI:EU:C:2010:806.
57 | Judgement of the Court (First Chamber) of 14 October 2004, Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn, C-36/02, ECLI:EU:C:2004:614.

which allows for titles of nobility, less protection and less room for manoeuvre to deny recognition of titles acquired abroad.[58]

It follows from the foregoing that the identical reservation is accepted as a rule of reason exception, but that it is neither absolute nor automatic as a derogatory ground of the general regime. It is thus not a provision that would allow Member States to cherry-pick individual provisions of European law that are or are not in conformity with them.[59] This was particularly highlighted in Hungary's action for the annulment of the Conditionality Regulation,[60] where the Member State argued that the concept of the rule of law under Article 2 TEU is not centrally defined, thus it should be defined by each Member State in the context of its constitutional traditions (ergo differently).[61] As a result, this argument would mean that the content of the fundamental values on which the Union is based would not be the same for each Member State. However, this approach was rejected by the Court:

> The Member States are therefore obliged, by reason, inter alia, of the principle of sincere cooperation, set out in the first subparagraph of Article 4(3) TEU, to ensure, in their respective territories, the application of and respect for EU law. In that regard, as provided for by the second subparagraph of Article 19(1) TEU, Member States are to provide remedies sufficient to ensure effective judicial protection for individual parties in the fields covered by EU law.[62]

On the contrary, the European legal system, according to the Court, requires similarity in all Member States to the extent that it ensures the homogeneity of the European legal system, and only then can derogations be permitted within the procedural autonomy of the Member States, reflecting identity and constitutional specificities.[63]

The CJEU confirms this approach in the case of the organisation of the Romanian courts: 'However, in choosing their respective constitutional model, the Member States are required to comply, inter alia, with the requirement that the courts be independent stemming from the abovementioned provisions of EU law.'[64] Respect for the constitutional identity of Member States is limited upon the acceptance of their decisions regarding the organisation of state and political institutions, provided that these decisions are consistent with the values articulated in Article 2 TEU, the interpretation of which is exclusively reserved for the CJEU. The homogeneous content of such concepts is determined by the

58 | Judgement of the Court (Second Chamber) of 2 June 2016, Nabiel Peter Bogendorff von Wolffersdorff v Standesamt der Stadt Karlsruhe and Zentraler Juristischer Dienst der Stadt Karlsruhe Request for a preliminary ruling from the Amtsgericht Karlsruhe, C-438/14, ECLI:EU:C:2016:401.

59 | Kelemen and Pech, 2018.

60 | Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

61 | Judgement of the Court (Full Court) of 16 February 2022, Hungary v the European Parliament and Council of the European Union, C-156/21, ECLI:EU:C:2022:97, para. 211.

62 | Judgement of the Court (Grand Chamber) of 27 February 2018, Associação Sindical dos Juízes Portugueses v Tribunal de Contas, C-64/16, ECLI:EU:C:2018:117, para. 34.

63 | Bobek ironically comments on this concept that procedural autonomy is a term for an area not yet regulated by EU rules. Bobek, 2022.

64 | Judgement of the Court (Grand Chamber) of 22 February 2022, RS, C-430/21, ECLI:EU:C:2022:99, para. 43.

systematics of EU law, from which other rules are derived, including the principle of mutual trust in the area judicial cooperation.[65]

4. Equal Treatment in the Enforcement Process

Any legal norm will be imperfect unless it is accompanied by a sanction and a procedural instrument to enforce it. Sanctions are a significant encroachment on the sovereignty of the Member States in the classical sense. The fact that the Member States have allowed the Treaties to create mechanisms that can sanction them even against their will only demostrates the high degree of European integration. In the following text, we will look at the two most important instruments, the infringement procedure and the procedure under Article 7 TEU. Each of these procedures has its own specific purpose, although we can see a tendency of the Commission to replace Article 7 TEU, because of its low effectiveness, with the procedure under Article 258 TFEU, which was originally intended for 'ordinary' infringements.

4.1. Infringement Proceedings

The European Commission is often called the guardian of the Treaties because, since the beginning of European integration, it has been endowed with active legitimacy to initiate infringement proceedings against Member States. Over time, changes in the unchanged legal framework have politicised the whole process, making the decision to initiate proceedings a responsibility of the political leadership of the European Commission rather than being left to the technocratic approach of the civil servants. Former Portuguese Minister and Prime Minister José Manuel Barroso, at the head of the College of Commissioners, sought ways to push the Commission's agenda vis-à-vis the other Union institutions. Drawing on his experience in the Council and the European Council, he perceived an aversion on the part of Member State representatives to the indiscriminate, semi-automatic initiation of infringement procedures over which he, as President of the Commission, had no control. So, the possibility of using the litigation initiative to force the Commission's proposals through came handy.[66] After 2007, the European Commission introduced the EU Pilot procedure, an informal dialogue with Member States preceding the administrative phase of the Article 258 TFEU procedure, dramatically reducing the number of procedures. The informal pre-negotiation of potential non-compliance cases has radically reduced infringement proceedings - while in 2006 the Commission brought 254 cases before the Court of Justice against Member States, 15 years later in 2021 the Commission brought only 31 actions.[67] Luca Prete and Ben Smulders describe this development as a sign of the maturity of the system, as the Commission is less formalistic and ignores marginal infringements, allowing it to focus on key cases that are important for

65 | Judgement of the Court (Grand Chamber) of 21 December 2011, N. S. (C-411/10) v Secretary of State for the Home Department and M. E. and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform, joined cases C-411/10 and C-493/10, ECLI:EU:C:2011:865, para. 83.

66 | Kelemen and Pavone, 2023.

67 | Ibid.

European integration.[68] On the other hand, Daniel Kelemen a Tommaso Pavone highlight the consequences of this trend regarding the rule of law at EU level and the selectivity of the European Commission's initiation of proceedings. The Commission, they argue, is trading its role as Guardian of the Treaties to win the Member States' support of its proposals.[69]

For example, the Commission initiated infringement proceedings against Finland for maintaining bilateral capital movements agreements with third countries concluded prior to Finland's accession to the Community. According to the Commission, although the Community had not concluded another similar agreement with these third countries, Finland had transferred this competence to the Council, thereby creating an obligation to terminate the original agreements.[70] In the present case, the Court rejected Finland's defence that other Member States also maintain similar bilateral arrangements:

> A Member State may not rely on the fact that other Member States have also failed to perform their obligations in order to justify its own failure to fulfil its obligations under the Treaty. In the Community legal order established by the Treaty, the implementation of Community law by the Member States cannot be made subject to a condition of reciprocity.[71]

In seeking to preserve the unity of the Community legal regime (ergo the equal status of Member States), the Commission has thus created an inequality by initiating infringement proceedings against only one state which has kept such contracts in force. Similarly, the CJEU has upheld the prohibition of deviations from the general EU regulatory framework for bilateral investment treaties between Member States (albeit without explicit reference to the equality of Member States).[72]In contrast, the Court of Justice has permitted Member States to enter into international treaties to establish a European stability mechanism, even in areas where the European Union has exclusive competence, such as the eurozone. This is allowed as long as the Union has not been granted specific authority to act in that particular sub-area.[73]

The Commission's discretion further deepened after Lisbon by the introduction of the alternative fast-track procedure under Article 260(3) TFEU. Article 260(3) TFEU allows for a combination of the discovery phase and the sanction phase in cases where the Member State's transposition of the Directive has not been notified to the Commission, which is a stand-alone offence. In 2018, twenty Member States did not complete the transposition of the fourth Anti-Money Laundering Directive establishing a register of beneficial owners in time. However, only Romania and Ireland have been subject to Article 260(3) TFEU proceedings, both of which were highlighted in their submissions. Ireland pointed out that there was no explanation given by the Commission as to why it did not proceed under

68 | Smulders and Prete, 2021, p 287.
69 | Kelemen and Pavone, 2023.
70 | Judgement of the Court (Second Chamber) of 19 November 2009, Commission of the European Communities v Republic of Finland, C-118/07, ECLI:EU:C:2009:715, para. 47.
71 | Judgement of the Court (Second Chamber) of 19 November 2009, Commission of the European Communities v Republic of Finland, C-118/07, ECLI:EU:C:2009:715, para. 48.
72 | Judgement of the Court (Grand Chamber) of 6 March 2018, Slowakische Republik v Achmea BV, C-284/16, ECLI:EU:C:2018:158.
73 | Judgement of the Court (Full Court), 27 November 2012, Thomas Pringle v Government of Ireland and Others, C-370/12, ECLI:EU:C:2012:756.

Article 258 TFEU and opted for the faster procedure, which, however, provides the Member State with fewer procedural defences. According to the Member State, the Commission wants to make an example of the defendants as a deterrent to other states.[74] However, the Court of Justice, referring to the absence of jurisdiction to review the Commission's discretion in choosing the form of the proceedings and/or in initiating them in the first place, rejected this plea.[75] It is therefore at the Commission's discretion whether to initiate proceedings under Article 258 or 260(3) TFEU. It is also at the Commission's discretion whether to require a decision on the infringement and the imposition of a sanction or to be satisfied with a finding of non-compliance with the notification obligation.[76] In its reasoning, the Court referred to the *travaux préparatoires* for the Constitutional Treaty,[77] in the draft of which the non-communication procedure appeared precisely as a tool to speed up and simplify this specific infringement procedure.

The case-law of the Court of Justice shows that the infringement and the related amount of the penalty are assessed at the time the action is brought.[78] Thus, while the Commission cannot extend the action beyond its reasoned opinion, it can nevertheless motivate the Member State to comply by offering a partial withdrawal of the action or a reduction of the penalty, which the Court cannot increase again.[79] While such a procedure may lead to the gamification of the process and reduce non-compliance, it may also create unequal treatment of Member States. Moreover, with the absence of judicial review, as the discretion is explicitly based on the wording of Article 258 TFEU.

4.2. Procedure Under Article 7 TEU

The founding countries built European integration on the fact that they shared common interests and values. However much the new acceding states brought their own traditions and perspectives to the European project, the basic foundation was the elementary uniformity of the fundamental constitutional core, which is now codified in Article 2 TEU. While this was originally an unspoken condition, the Member States that joined after 1993 subscribed to these values within the framework of the Copenhagen criteria. Robert Böttner and Nic Schröder speak of horizontal homogeneity in this context.[80] In some cases, EU institutions bring about vertical - especially vertically descending - interaction that can further homogenise the environment of the EU legal space. For example, the Court of Justice drew the human rights agenda into European law despite the lack of explicit support for this in primary law.[81] Later, it even went beyond the text of primary law

74 | Judgement of the Court (Grand Chamber) of 16 July 2020, European Commission v Ireland, C-550/18, ECLI:EU:C:2020:564, para. 65.

75 | Judgement of the Court (Second Chamber) of 14 February 1989, Star Fruit Company SA v Commission of the European Communities, 247/87, ECLI:EU:C:1989:58.

76 | Judgement of the Court (Grand Chamber) of 16 July 2020, European Commission v Romania, C-549/18, ECLI:EU:C:2020:563, para. 49.

77 | Judgement of the Court (Grand Chamber) of 8 July 2019, European Commission v Kingdom of Belgium, C-543/17, ECLI:EU:C:2019:573.

78 | Judgement of the Court (Sixth Chamber) of 30 January 2002, Commission of the European Communities v Hellenic Republic, C-103/00, ECLI:EU:C:2002:60.

79 | Judgement of the Court (Grand Chamber) of 12 July 2005, Commission of the European Communities v French Republic, C-304/02, ECLI:EU:C:2005:444.

80 | Böttner and Schröder, 2024.

81 | Judgement of the Court of 12 November 1969, Erich Stauder v City of Ulm - Sozialamt, 29-69, ECLI:.EU:C:1969:57.

by allowing the review of acts of the European Parliament on the argument of ensuring the guarantees of the rule of law.[82] Furthermore, it has defined itself in favour of ensuring effective judicial protection against the rules of international law.[83] Among the criticised cases that have shaped the national environment, we find anti-discrimination decisions in the areas of sex,[84] age[85] and sexual orientation[86] which were not accepted by the states positively.

Enforcement of the constitutional value core is an agenda in which the Member States have a dominant role, although formally they now act as an EU body. However, in 2000 the Member States took joint action outside the scope of primary law against Austria, where the right-wing political party FPÖ had come to power and there was concern about the respect of shared values. In the absence of a legal instrument, Member States coordinated to limit formal and informal bilateral cooperation, which included cutting diplomatic cooperation, withdrawing support from Austrian candidacies and proposals. Following an investigation directly in Austria and the subsequent Wise men report, these restrictions were discontinued.[87] However, experience has shown the necessity to enshrine a suitable instrument in primary law, whilst also acknowledging the reluctance to repeat the situation. Article 7 TEU, which was introduced by the Treaty of Amsterdam, already existed. However, its application was limited to the *ex post* sanctioning of violations of EU values. This was not the case in Austria.

The Treaty of Lisbon saw the introduction of a new procedure, Article 7(1) TEU, which allows for the initiation of a procedure on the grounds of only the risk of a breach of values. The initiation under Article 7(1) can be initiated by a third of the Member States, the European Parliament or the European Commission, who direct their proposal to the Council, which decides on the matter by a four-fifths majority of its members after receiving the consent of the European Parliament. The Council then monitors the situation regularly and makes recommendations to the state. The *ex post* sanction mechanism under Article 7(2) TEU may be initiated by a third of the states or the European Commission and referred to the European Council, which decides unanimously after receiving the consent of the European Parliament. If the European Council decides in the affirmative, the Council may, on the basis of Article 7(3) TEU, by a qualified majority, restrict the rights of the Member State concerned. In both the Council and the European Council, the representatives of the Member State concerned are excluded from voting under Article 354 TFEU.

82 | Judgement of the Court of 23 April 1986, Parti écologiste 'Les Verts' v European Parliament, 294/83, ECLI:EU:C:1986:166.

83 | Judgement of the Court (Grand Chamber) of 3 September 2008, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities, joined cases C-402/05 P and C-415/05 P, ECLI:EU:C:2008:461.

84 | Judgement of the Court of 8 April 1976, Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena, 43-75, ECLI:EU:C:1976:56.

85 | Judgement of the Court (Grand Chamber) of 22 November 2005, Werner Mangold v Rüdiger Helm, C-144/04, ECLI:EU:C:2005:709.

86 | Judgement of the Court (Grand Chamber) of 5 June 2018, Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne. Request for a preliminary ruling from the Curtea Constituţională a României, C-673/16, ECLI:EU:C:2018:385.

87 | Ahtisaari, Frowein, and Oreja, 2000.

Similarly to the EU Pilot, the European Commission is conducting an informal pre-Article 7 dialogue with the state concerned.[88] In 2015, the Commission initiated proceedings against Poland, which had recently enacted a series of legislative acts aimed at reforming the judiciary and potentially curtailing its autonomy. The issue of the appointment of the highest judicial officials has become a matter of particular concern.[89] Some commentators pointed out the futility and naivety of starting this process with a government which is determined to implement its reforms and is uninterested in real dialogue.[90] However, it should be noted that Article 4(3) TEU is a two-way instrument which requires sincere cooperation and an attempt to find an amicable solution. Despite concerns about the breach of values enshrined in Article 2 TEU, the principle of mutual trust between Member States and the Commission must continue to apply until the procedure under Article 7(2) TEU has been completed.[91]In contrast, the Commission did not initiate this dialogue with Hungary, despite the fact that Hungary has also taken a number of steps that could threaten the rule of law, which some see as an advantage over Poland.[92] On the other hand, engaging in a similar process – as in the case of the EU pilot – could lead to a clarification of the situation and a peaceful resolution. However, the informal dialogue was not successful, and the Commission eventually initiated the procedure under Article 7 of the TEU with Poland in 2017.[93]

Article 7 TEU is often referred to as a nuclear button, whose main purpose is to deter a situation in which it would have to be used.[94] But as with the decision to use a weapon of mass destruction, it is a political decision.[95] This is confirmed by the Court of Justice. The Court confines itself to a procedural review of the procedure under Article 7 TEU.[96] It is therefore up to the Member States to decide to what extent they wish to defend the horizontal homogeneity of EU values, regardless of the formal decisions of the Council or the European Council. Particularly in the context of Article 7 (2) TEU, this aspect is further strengthened by requiring the unanimity of all the Prime Ministers or Presidents of the Member States, with the exception of the representative of the state concerned. It is thus a confirmation or redefinition of what is and what is not permissible behaviour in the club of states. Apart from the obligation to respect the procedural rights of the Member State concerned, the European Council has a very wide margin of discretion since it operates almost exclusively within political boundaries.

88 | Communication from the Commission: A Europe of results – Applying Community law, COM(2007)502.

89 | Wilms, 2017.

90 | Kochenov, 2016.

91 | Judgement of the Court (Grand Chamber) of 22 February 2022, X and Y v Openbaar Ministerie, joined Cases C-562/21 PPU and C-563/21 PPU, ECLI:EU:C:2022:100.

92 | Gostyńska-Jakubowska, 2016.

93 | Motion was later withdrawn by the Commission in the 2024.

94 | Wilms, 2017.

95 | Schmitt von Sydow, 2001.

96 | Judgement of the Court (Grand Chamber) of 3 June 2021, Hungary v European Parliament, C-650/18, ECLI:EU:C:2021:426.

5. Conclusions

Article 4(2) TEU is somewhat difficult to read. Respect for the equality of all Member States before the Treaties leads many to hope that this is a defensive provision, designed to protect Member States against the arbitrariness of the EU institutions. However, such a reading would be limited and lacks a systematic basis in the complexity of EU law, which requires contextualising this principle with other principles and rules that together form the EU's constitutional framework. Moreover, it is a general rule that can be overridden by specific provisions that often either allow or directly require unequal treatment. The obligation of equality between Member States is to be interpreted as a prohibition of arbitrariness on the part of the EU institutions, but the case law of the Court of Justice shows that it is more of a maxim than an enforceable obligation, particularly where the EU institutions pursue the objectives of European integration and have a wide margin of discretion – especially in procedural matters.

Additionally, we must not forget that equal treatment is not a unilateral obligation, as one might assume from a quick reading, and goes hand in hand with maintaining the necessary degree of uniformity between Member States – the principle of equality does not guarantee the right to differentiate unilaterally while demanding equal treatment.

The equality of the Member States has also been weaponised in the face of the polycrisis facing the Union and the subsequent reaction of the highest courts of the Member States. In an attempt to protect the prerogatives of the Member States, the courts are threatening the unity of European law. The autonomous nature of European law requires the preservation of the principle of primacy and, as a countermeasure, the Court of Justice has drawn the horizontal multilateral aspect of equality between Member States into a decade-long debate in order to guarantee the principle.

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