The sources of EU law and their relationships: Lessons for the field of taxation
Szudoczky, R.

Citation for published version (APA):
Szudoczky, R. (2013). The sources of EU law and their relationships: Lessons for the field of taxation
Chapter 3

The constitutional structure of the European Union and the system-nature of EU law

3.1. Introduction

This Chapter aims at describing the Union’s political structure and its legal system. It constitutes both the starting point for our systematic analysis of the sources of EU law and the justification for taking such approach by pointing out the existing system-characteristics of EU law which substantiate the application of this method.

Contrary to the claims which describe EU law as a functional area of law or a functional legal order, we maintain that EU law constitutes a coherent whole, a unity which is characterised by constitutional as opposed to functional consistency. As regards the European Union itself, unlike those who consider it a supranational administrative governance structure whose autonomy is merely functional and whose legitimacy is derived from the national democratic institutions, we perceive the Union as an autonomously legitimised constitutional polity, a federal organization that constitutes the middle ground between national and international formations. The founding Treaties together with the general principles of EU law, including fundamental rights, constitute primary Union law and fulfil the function of a constitution within the Union’s legal order. The Treaties play the role of validating norms as regards secondary Union law. Primary law of a constitutional nature sets the framework within which legislative and executive rule-making by the Union institutions must remain both in a procedural and a substantive sense. The constitutional review of secondary EU law in the light of the Treaty rules and the general principles of EU law is designed to ensure constitutional consistency within the system. The hierarchy between primary and secondary law is an important system-characteristic in the Union’s legal order and an essential element of the Union’s constitutional infrastructure.

77. See Mortelmans, supra note 72.
With Dashwoods’s famous expression what this Chapter describes in detail is a ‘constitutional order of States’. This term refers to all the important elements of the European Union’s essence: constitutional, order, (consisting of) States. In this Chapter, we will examine what each of these elements refers to in the light of the legal, political and governance structure of the Union. Through this analysis we aim to demonstrate that EU law is undoubtedly more than a functional set of rules: it is the law of a constitutional federal formation which is characterised by sufficient coherence and consistency to be called a legal system.

3.2. Nature of the European Union and EU law

3.2.1. The Union’s governance structure: between a federal State and an international organization

3.2.1.1. Theories of federalism

According to classic constitutional-legal theory, there are two possible types of groupings of States, namely, confederations and federal States. Confederations are an association of States where the component States retain their sovereignty in international relations. The term ‘confederation’ includes international organizations which are normally characterised by a permanent institutional structure. In contrast, a federal State itself acts with full sovereignty vis-à-vis other actors of international law and their component States are not recognized as independent actors of international law. In other words, while federal States are sovereign by themselves in the eyes of international law, confederations are not. This polarization of possible federal structures, which recognizes only the opposing categories of international organization– federal State, has come under critique and revision in recent academic literature. Schütze points out that a strict
conceptual duality is a characteristic of European federal thinking which is embedded in “statist traditions” and the idea of indivisible sovereignty. Conversely, the American legal tradition recognizes different degrees in the spectrum of federal structures. Accordingly, while the traditional European school identified the original federation of the Unites States of America with a national structure and classified it as a federal State, American federalism placed the latter on the spectrum of federations somewhere between the national and the international. Schütze advocates that the European Union’s polity should be explained from the theoretical perspective of American federalism, as only such analytical framework can capture its legal and political reality, which can be best described as “a hybrid (inter)national phenomenon”.

3.2.1.2. Inter-governmental and supranational features of the Union

Indeed, the European Union does not fit into the established dual categories of international organization – federal State. The Union represents a political formation that is more than a traditional international organization but less than a federal State. European legal thinking – not acknowledging the premise that federal organizations are normally and generally a mix between the national and the international – started to describe the European Union as a sui generis legal phenomenon operating on a twofold logic of ‘inter-governmentalism’ and ‘supranationalism’. The latter terms correspond in common language to ‘international features’ and ‘national features’ respectively.
The intergovernmental (international) logic predominantly manifests itself in the fact that the Union is created by and based on an international agreement between the Member States. Primary law, as we have defined above, originates from the Member States meaning that the TEU and the TFEU, as the most important pieces of primary law, take the form of international treaties from the point of view of international law. The Treaties not only originate from the Member States but the Member States remain the “Masters of the Treaties” which as according to Article 48 TEU, the procedure for the revision of the Treaties are controlled by the Member States which have to agree to any possible amendments by common accord and which have to ratify the amendments according to their constitutional requirements. The central role of the Member States in changing the Union and its fundamental is also evident from the provisions on admission of new Member States which set out that the conditions of admission and any adjustment to the Treaties are a matter for the applicant State and the Member States. The explicit recognition of the possibility of withdrawal by a Member State from the Union introduced by the Lisbon Treaty is also perceived as a reinforcement of the international organization character of the Union. These features of the Union distance it from a federal State and approximate it to a traditional international organization.

On the other hand, the (supra)national logic in the Union’s structure differentiates it from most international organizations. This is reflected, first of all, in the fact that the Union has its own institutions which enact secondary law that may have direct effect on the nationals of the Member States. This

---

90. This is true for the ordinary revision procedure, which involves an IGC and optionally, a convention composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission. However, it is also true for the simplified revision procedures that were introduced by the Lisbon Treaty and which require the unanimous decision of the European Council for less significant amendments to the Treaties.
91. Article 49 TEU, see Chalmers, Davies and Monti, supra note 17, p. 212.
92. Article 50 TEU, see Griller, supra note 81, p. 46.
means that it imposes obligations and confers rights on individuals and those rights can be enforced through the national legal infrastructure of the Member States. Direct effect and primacy are the features of EU law which distinguish it from traditional forms of international law under which individual States decide themselves if, and to what extent, they give effect within their national legal systems to the various rules of international law.\footnote{Ibid. As regards the primacy of EU law, the Member States’ perspectives differ from the perspective of EU law. The absolute primacy of EU law, which would make EU law prevail unconditionally even over the national constitution, is not accepted by most of the Member States. Several national constitutional/supreme courts expressed the view that their fundamental constitutional structures and values are beyond the reach of EU law, see Chalmers, Davies and Monti, supra note 17, pp. 188-197.}

The twin principles of primacy and direct effect of Union law are central to the understanding of the nature of the Union’s polity.\footnote{G. De Búrca, Sovereignty and the Supremacy Doctrine of the European Court of Justice, in: Sovereignty in Transition (N. Walker ed., Hart Publishing 2003), pp. 449-460, at p. 450.} In the early seminal cases of Van Gend en Loos\footnote{ECJ, 5 February 1963, Case 26/62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration.} and Costa v ENEL,\footnote{ECJ, 15 July 1964, Case 6/64 Flaminio Costa v ENEL.} the Court based the concepts of direct effect and primacy on the new, special and original nature of the then Community’s legal order and Community law as such. In the words of the Court:

“...the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subject of which comprise not only Member States but also their nationals.”\footnote{Case 26/62 Van Gend en Loos.}

“...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 it character as Community law and without the legal basis of the Community itself being called into question.”\footnote{Case 6/64 Costa v ENEL.}

In these cases the Court, by emphasizing the independent and original nature of EU law,\footnote{Following the Lisbon changes and the merging of the Community with the Union, ‘Community law’ (the law of the former first pillar) is no longer distinguished from other forms of EU law and the legal norms of the Union are generally referred to as EU law. The question that arises is whether EU law in general, including the law of the former second and third pillar, should be recognized as having primacy and direct effect. In the Kıcıkdeveci case the CJ expressly referred to “the principle of the primacy of European Union law” (CJ, 19 January 2010, Case C-555/07 Seda Kıcıkdeveci v Swedex GmbH} asserted that the Union’s legal authority is autonomous,
independent and not derived from the authority of the Member States.\textsuperscript{100} In other words, the Court formulated a claim to sovereignty on behalf of the Union.\textsuperscript{101}

The question that arises in this regard is whether or not the claim of sovereignty by the Union transforms the Union from an international organization to a State. And what does such a claim imply for the Member States? If it is the Union which has autonomous legal authority and sovereignty in the EU’s legal order, does this mean that the Member States no longer possess the latter? This would be the view of the traditional European federal thinking, which is built on the concept of indivisible sovereignty holding that, as sovereignty cannot be divided, it is either the Union or the Member States which possess sovereignty.\textsuperscript{102} The political and legal reality of the Union, however, is more subtle. In order to capture it, we need to distinguish between the ‘transfer of sovereignty’, on the one hand, and the ‘transfer of powers’ or the ‘transfer of sovereign rights’, on the other. ‘Sovereignty’ refers to the body which has the ultimate authority or the “summa potestas on which the whole legality/legitimacy of the order depends”.\textsuperscript{103} In the modern nation State, the people or the nation is the bearer of sovereignty which vests the institutions of the State with the power to exercise sovereign authority. The State, in turn, may transfer certain parts of its sovereign power to other entities – notably, international organizations – depending on and according to the conditions laid down in the constitution of the State. The transfer of some sovereign powers to an international organization does not automatically cause the international organization to replace its component States in the international law sphere, whereas a full transfer of sovereignty would certainly have such a result. As regards the European Union, membership in the EU for most of the Member States cannot entail more than the delegation of certain powers to the EU and hence, the limitation of their sovereign rights in certain areas of public authority. Full transfer of

\textit{and Co. KG }, para. 54), which confirms this position. In view of this, it is fair to assume that the same is true for direct effect. Below we shall continue to refer to the Union and EU law or Union law even though the original doctrines and concepts that are analysed here have been developed with respect to the Community and Community law.


\textsuperscript{101} Chalmers, Davies and Monti identify four different doctrines resulting from the sovereignty of EU law, namely (i) the supremacy of EU law, (ii) the doctrine that EU law alone should determine the quality of legal authority of different norms, (iii) the doctrine of conferred powers and (iv) the fidelity principle set out in Article 4(3) TEU, see Chalmers, Davies and Monti, supra note 17, p. 185.

\textsuperscript{102} Schütze, supra note 81, p. 1095.

\textsuperscript{103} Leben, supra note 80, p. 106.
sovereignty or alienation of public authority would be allowed by hardly any of the Member States’ constitutions, if at all. In accordance with this, the Court in Van Gend en Loos was cautious enough not to talk about the transfer of sovereignty by the Member States but rather the limitation of their sovereign rights.104

In the light of this, the most accurate description of the Union’s polity is that it is characterized by the concepts of ‘shared’ or ‘divided’ sovereignty where powers, competences and capacities are jointly held and exercised by the Union and the Member States in most of the fields of public action.105 Maduro, on the other hand, introduces the notion of ‘competing sovereignties’ to describe the legally and politically pluralist structure of the Union. This goes beyond the ideas of shared, pooled or limited sovereignty and signals a situation where the claim to sovereignty by the Union competes with that of the Member States.106 All in all, from the point of view of the internal dimension of sovereignty, neither the Member States nor the EU can be considered as possessing exclusive sovereignty.107

Besides the autonomous nature of Union law, another important element on the list of (supra)national features of the Union is the position of individuals in the Union’s legal order which differs markedly from that characteristic of international organizations. The direct effect of EU law which confers directly enforceable rights on individuals is only one aspect of this position. The other is the formal establishment of Union citizenship by the Maastricht Treaty, which created a direct “legal bond between the European Union and

105. In this respect, some authors do make a distinction between ‘division’ of competences and ‘sharing’ of competences. The former suggests that both the Union and the Member States have their circumscribed sphere of competences where they can exercise fully autonomous powers without the influence of the authority of the other polity, while the latter describes a more complex way of interaction between the competences of the Union and the Member States where powers cannot be exercised in any policy fields independently from the other polity. See De Búrca, supra note 94, p. 457-459; Börzel and Risse, supra note 88, p. 46-51.
106. Maduro, supra note 100, p. 505.
107. From the external perspective, sovereignty merely refers to the fact that a political formation is recognized as a member of the international community in its own right independently from other formations and it enjoys equal rights to those of the other members (sovereign equality), see Griller, supra note 81, p. 37. In this respect, the fact that the Lisbon Treaty endowed the Union with legal personality (see Article 47 TFEU) placing it on a par with States is an important development (previously only the Community was a legal person), see Chalmers, Davies and Monti, supra note 17, p. 632.
The nationals of the Member States automatically became Union citizens. Union citizenship is additional to national citizenship and does not replace the latter. This is a distinguishing feature from traditional international organizations, as in the case of the latter, legal relationships exist only between the organization and its component States and not between the organization and the component States’ citizens.

Despite its (supra)national traits, the majority of the scholars of the traditional European school is in agreement that the Union is not a (federal) State. The factors that distinguish it from a State can be summarised as follows:

a) Lack of certain competences

Some commentators emphasize the fact that the Union does not possess some of the key competences or powers that States do have. For some, the decisive competence that the Union lacks and which prevents it from being considered a State is the taxation and spending powers.

According to the classical theory of international law, the decisive competences are foreign relations and national defence. If a State transfers these competences to another political formation, e.g. to an international organization, the State loses its sovereignty under international law. The Union’s competences in the field of foreign policy and security policy are still quite weak, even after the Lisbon changes. Although the latter abolished the structural separation of the former second pillar, it maintained derogating provisions as regards the common foreign and security policy with the result that the actions of the Union in these fields are characterised by intergovernmental cooperation mechanisms instead of supranational decision-making.

In this regard, interesting is Griller’s unconventional stance as regards the nature of the powers of the Union. He disputes the traditional view according to which as long as the monopoly of exercising power (i.e. the conducting of foreign policy, defence and the enforcement of Union law) belongs essentially to the Member States, the Union cannot be regarded as a State. He claims that what is decisive in deciding whether or not a polity

---

108. Schütze, supra note 81, p. 1093. In Schütze’s view, instead of Union citizenship being a ‘supranational feature’, it is proof of the fact that the European Union is on ‘federal middle ground’ between the national and the international, see p. 1082.
109. Article 20 TFEU.
111. Leben, supra note 80, p. 106.
112. Griller, supra note 81, p. 39.
has reached statehood is not the lack of centralization of specific areas of competence but the general picture with regard to division of powers between the central bodies and the component parts. Having regard to the ever-expanding competences of the Union, its high volume of ‘regulatory output’ and the fact that there is hardly any policy area by now where the Member States can exercise full sovereignty without any influence whatsoever of EU law and EU policies, Griller states that the powers of the Union do encompass what is necessary for a (federal) State.

Another commonly repeated opinion emphasises that the Union does not have the capacity to define its own competences (Kompetenz-Kompetenz), which, being a key attribute of a sovereign State, prevents it from being considered a state-like formation.113 Indeed, the Union is based on the principle of ‘conferred powers’, under which the

‘...Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States’.114

Although the Court interpreted this principle as meaning that it is the Treaties, i.e. EU law itself, which determine the remit of EU legal authority,115 this doctrine is hardly endorsed by the constitutional courts or supreme courts of the Member States, which persist on the view that it is the domestic constitutional arrangements of the Member States which designate the boundaries of the authority of the Union by setting limits to the transfer of sovereign powers by the Member States.116 A less controversial aspect of the principle of ‘conferred powers’ is that the Union is a limited government meaning that the Union may act only on specific, contained fields. The Lisbon Treaty underlined this ideal with the express specification of the powers of the Union in the catalogue introduced in Articles 2 through 7 TFEU. In any event, both aspects of the principle of ‘conferred powers’ imply limits to the Union’s competences that differentiate it from the universal authority of States which is based on the principle of Kompetenz-Kompetenz.117

114. Article 5(2) TEU.
116. Chalmers, Davies and Monti, supra note 17, p. 212. The Member States’ view is underpinned by the actual wording of Article 5 TEU that refers to the conferral of competences by the “Member States in the Treaties” instead of conferral “by the Treaties”.
117. Schütze observes, however, that individual Member States of the Union have lost their Kompetenz-Kompetenz, as by acceding to the Union they are no longer competent
b) No separation of powers

Other commentators point to the fact that the institutional structure of the Union does not replicate a State structure. Separation of powers is not carried out within the construct of the Union in the same way as in a State model. The European Parliament, although the representative body of the citizens of the Union which exercises legislative powers and control over the executive, differs in many respects from national parliaments. First, it does not have a monopoly over law-making or a general power of legislative initiative. There are no European parties which would compete in the European elections and the Members of the European Parliament (MEPs) are elected on the basis of quotas allocated to each Member State instead of a European-wide principle of ‘one citizen one vote’. The Council, the forum where the Member States’ interests are represented, jointly exercises legislative and budgetary powers with the Parliament and it still has the final decision-making power over almost all fields of EU law. The European Council, which gained formal recognition with the Lisbon Treaty, gives the general political direction to the Union. The Commission, the supranational institution in the structure, is the prime body representing the Union interest. It is entrusted primarily with executive powers and administration, and, at the same time, it oversees the compliance of national administrations with EU law. It is, however, also the main initiator of Union legislation and it also engages in law-making itself in the sphere of delegated powers. The judicial power is exercised by the Court of Justice of the European Union.

This architecture is based on inter-institutional balance rather than a clear separation of the legislative-executive-judicial branches of power in the classical sense. The implementation of a system of clearer separation of powers with the aim of bringing the Union closer to a State structure and thereby enhancing its democratic credentials was one of the central elements of the political proposals and academic debates which led to the process of drafting the Constitutional Treaty. Along this line, in 2000, in his groundbreaking speech on the finality of European integration, Joschka Fischer described as one of the key elements of the envisaged European Federation “a European Parliament and a European government which unilaterally to determine the limits of their own competences; the Member States could transfer powers back to themselves by a common act only following the procedure for Treaty amendment, see supra note 81, p. 1083.

119. Chalmers, Davies and Monti, supra note 17, p. 53.
120. Craig, supra note 89, p. 110.
really do exercise legislative and executive power”.121 This shows that, in the eyes of many political thinkers and legal scholars, the lack of classical separation of powers is decisive in the classification of the Union.

c) Lack of a ‘constituent demos’

An attribute which is frequently indicated as a reason for which the Union cannot be characterised as a State is the lack of legitimisation by a political community, a ‘constituent demos’, which is culturally and socially – and according to the extremist view on the nation State even ethnically – homogeneous. Currently, such European people or European demos does not exist. We will discuss this aspect in more detail below.

d) Lack of will to turn the Union into a State

Another factor is highlighted by Griller who concludes that the Union – both before and after the entry into force of the Lisbon Treaty and irrespective of the never-enacted changes envisaged by the Constitutional Treaty – does meet the basic tripartite definition of a State, i.e. territory, people and power.122 Nevertheless, the lack of will on the side of the Member States and the institutions of the Union to form a European State and the corresponding acceptance of this stance by the international community cause the Union not to be a State.123

3.2.2. Constitution and constitutionalism within the Union

3.2.2.1. The founding Treaties as the Union’s constitution

Although the Union cannot be assimilated to a State, this does not exclude the Union’s legal order from being based on a constitution and, more generally, from being a constitutional order.124

122. Griller referring to Jellinek, see Griller, supra note 81, p. 37.
123. Griller, supra note 81, p. 40.
124. For the views in German legal literature on the question whether or not only States can have a constitution see Von Bogdandy, supra note 85, pp. 215-218. According to Nergelius, the question whether or not international organizations can have a constitution was answered precisely by the “accomplished constitutionalisation of the EU”, see J. Nergelius, The Constitutional Dilemma of the European Union (Europa Law Publishing 2009), p. 13. According to the views of “international constitutionalism”, certain concepts of
When dealing with the question of whether the EU has a constitution, we cannot avoid starting out from the fact that the Union does not have a unified text that is formally called a ‘Constitution’. The rejection of the Draft Constitutional Treaty of 2004 at the Netherlands and French referendums is often described as the failure of the European constitutionalization project. The position that the process of constitutionalization has failed and, as a result, the EU does not have – even after the Lisbon changes – a constitution seems to be underpinned by the political documents issued by the EU institutions after the rejection of the Constitutional Treaty. In particular, the European Council when entrusted the Intergovernmental Conference (IGC) with the drawing up of the Lisbon Treaty specifically ordered that the constitutional concept be set aside:

“The IGC is asked to draw up a Treaty (hereinafter called the “Reform Treaty”) amending the existing Treaties with a view to enhancing the efficiency and democratic legitimacy of the enlarged Union, as well as the coherence of its external action. The constitutional concept, which consisted in repealing all existing Treaties and replacing them by a single text called “Constitution”, is abandoned...”

The European Council stated expressly that the TEU and the TFEU would not have a constitutional character. Nonetheless, these political statements should be kept apart from the issue of the real constitutional status of the Union. The European institutions’ political agenda by emphasizing that the amended Treaties, in contrast with the Constitutional Treaty, would not have the character of a constitution was to avoid the necessity of new referendums in the Member States which would have put at risk the reinvigorated reform process of the Union. Psychologically, leaving behind the provisions of the Draft Constitutional Treaty which resembled the most to State constitutions had the purpose of assuring the European public, which national constitutions – such as democracy, rule of law and human rights protection – must be applied to international organizations and bodies on the ground that more and more sovereign powers are being transferred to them by the States in the current international legal order, see Griller, supra note 81, p. 31.

126. Griller, supra note 81, p. 22. At the end, only Ireland held a referendum on the ratification of the Lisbon Treaty which, for the second time, on 2 October 2009 approved it. See Chalmers, Davies and Monti, supra note 17, pp. 48-50.
127. The European Council thought to ensure the “abandonment” of the constitutional concept by replacing the term of ‘Union Minister for Foreign Affairs’ with that of ‘High Representative of the Union for Foreign Affairs and Security Policy’, by retaining the terms ‘regulations’, ‘directives’ and ‘decisions’ instead of ‘laws’ and ‘framework laws’ which were terms that were used in the Draft Constitutional Treaty, by leaving out from the text of the Treaty the provisions on the symbols of the Union and by removing the statement
was rather skeptical about the European constitutionalization project, that the European Union would not be turned to a super-State substituting the Member States in their traditional political, economic and societal roles. In the light of these, the ‘abandonment of the constitutional concept’ was more of a political slogan than a legally underpinned description of the Union’s state of affairs. Accordingly, our starting point is that the fact that the Union lacks a single and uniform document which is called a ‘constitution’ cannot be decisive in answering the question of whether or not the construct of the European Union is based on a constitution and – as a somewhat different question – whether or not that construct can be described as constitutional.

In order to answer the question whether the Union has a constitution in a substantive sense, first, the various aspects of the concept of ‘constitution’ need to be outlined.

According to Kelsen’s pure theory of law, the legal order is a hierarchy of different levels of legal norms in which the validity of a norm rests on another norm whose validity, in turn, is determined by a third one. Thus, the basic premise of this theory is that the reason for the validity of a norm can only be the validity of another norm. The norm which represents the reason for the validity of another norm is called the ‘higher’ norm and the other is called the ‘lower’ norm. The higher norm authorises the enactment of the lower norm, that is, it grants authority and competence to a person or body to create norms. The legal order in this perspective is seen as a chain of super- and subordinated norms. On the top of this chain there must, however, be a norm whose validity cannot be traced back to any other positive norm. Thus, the search for the reason of validity of positive norms ends with a norm which, as the last and highest, is presupposed. It is presupposed because it cannot be posited, that is to say, created, by an authority whose competence would have to rest on a still higher norm. This presupposed highest norm in Kelsen’s pure theory of law is called ‘basic norm’ or ‘Grundnorm’. The Grundnorm can also be seen as the presupposed starting point of the procedure of positive law creation. Its function is to authorise a norm-creating authority. It is a rule according to which the norms of the legal order must be created. The presupposed basic norm of the legal order postulates that ‘one ought to comply with an actually established, by
and large effective, constitution, and therefore with the by and large effective norms, actually created in conformity with that constitution”. In a national legal order the constitution represents the highest level of positive law which regulates the creation of general legal norms, that is, what we call ‘legislation’ in the political processes of the modern State. This is the concept of constitution in a material sense. The constitution in a formal sense, that is, the document which is formally called ‘constitution’, may contain norms other than those regulating the process of legislation, e.g. rules which determine how the norms in the constitution can be amended or abolished. These latter normally subject the amendment of the constitution to more rigorous conditions than those applying to ordinary statutes for the purpose of stabilising the norms having a constitutional status. Sometimes a different body is authorised to create or amend the constitution than the one creating and amending general statutes or, if the body is the same, the procedure for changing the constitution is more cumbersome in terms of voting rules or quorum requirements. The norms making up the constitution may also contain prescriptions as to the content of the general norms that are to be created in conformity with them. The function of the catalogue of fundamental rights that can be found in most of the modern constitutions is to exclude the creation of general norms with certain content, i.e. a content which contravenes the fundamental rights of citizens.

The positivist definition of the constitution, which is described above, is also called by some authors the ‘thin’ concept of constitution. According to this concept, the only function of the constitution is the regulation of the creation of general legal norms. Although the formal constitution may contain norms other than the ones regulating law-making, e.g. fundamental rights, these latter provisions are not indispensable elements of the constitution. In contrast, according to the ‘thick’ concept of constitution, born from the ideas of the European Enlightenment, a set of legal norms must fulfill certain functions in order to gain the status of constitution; these being the recognition of the rights of citizens, the organization of the relations between the government and the governed and the separation of powers between the various branches of government (establishment of a system of ‘checks and balances’). In a functional sense, the constitution is the basic order in a polity according to which public authority can be exercised. In a historical perspective,

130. Ibid. p. 212.
131. Ibid. pp. 221-224.
132. Griller, supra note 81, at p. 29.
133. Griller, supra note 81, p. 30; Nergelius, supra note 124, p. 12.
constitutions gave the answer to the dilemma that arose when the people were acknowledged to be the bearer of ultimate authority, i.e. sovereignty, instead of absolute rulers. In a modern State, the people confer powers to exercise sovereignty on the State. However, the State institutions can exercise that sovereignty only within proper limits. Thus, the question arose how the powers conferred on the State by the people could be legally bound if law was the very product of exercising those powers.\(^\text{134}\) The answer was found in dividing positive law into two groups of norms, one directed at the institutional structure and the processes by which State power is exercised and the other at the behaviour and relationships of the subjects of State power. The norms in the former group regulate the creation and application of the norms in the latter group. This presupposes not only a hierarchical relationship between the two but also that the two groups of norms originate from different authors. As Grimm describes, in the process of constitutionalization “[t]he splitting of the legal order is […] preceded by a splitting of the public power into a pouvoir constituant, formed by the people as sovereign, and various pouvoir constitutés deriving their powers from it.”\(^\text{135}\) The norms in the first group derive from the ultimate bearer of sovereignty that is, the people. These norms enjoy precedence over the norms in the second group which originate from the State institutions in which the people vested public authority. For the higher-ranking norms which derive from the people and are directed at the State power the term ‘constitution’ came into use.\(^\text{136}\)

Some of these theories define ‘constitution’ with a view and primary focus on national legal orders. Nevertheless, except for the strictly nationalistic or statist perceptions of the concept of ‘constitution’, most of the theories do not exclude \textit{a priori} the possibility that formations other than States can have a constitution. In view of this, it should be analysed whether the founding Treaties of the EU can be considered the constitution of the Union’s legal order.

Starting from the legal-functional concept of the constitution, most authorities agree that the founding Treaties can be considered the constitution of the Union’s legal order. Griller concludes that the EU has a constitution both in the ‘thin’ sense and the ‘thick’ sense of the term.\(^\text{137}\) The Treaties lay down the basic order according to which legislative powers can be exercised by the Union. In particular, the Treaties regulate the process of creating general norms by empowering certain EU institutions to enact secondary legislation.

\(^{134}\) Grimm, supra note 118, p. 286.
\(^{135}\) Ibid. p. 287.
\(^{136}\) Ibid.
\(^{137}\) Griller, supra note 81, p. 32.
setting out the forms of secondary legislation, providing for their legal bases and the procedures through which they can be enacted (‘thin’ constitution concept). Beyond this, the constitutional features of EU law are detectable also in the ‘thick’ sense. The case law of the Court, relying on the common constitutional traditions of the Member States and the European Convention for the Protection of Human Rights and Fundamental Freedoms and other international instruments, has long ensured the protection of fundamental rights in the EU’s legal order. Separation of powers is guaranteed both vertically – between the EU and the Member States – and horizontally – between the EU institutions, although in different terms to those in a State model.

Similarly, Lenaerts states that “the [EC] Treaty can essentially be considered the constitution of the European Community in a substantive, functional sense”, as it performs all the classical functions of a constitution, in particular, when it guarantees the division of powers in a horizontal and vertical dimension and ensures the protection of fundamental rights. The Treaties fulfill these functions owing to the case law of the Court, which was instrumental in the Treaties’ ‘constitutionalization’. The latter concept refers to the process through which “the EC Treaties have asserted their normative independence vis-à-vis the Member States, who created them in the first place, and evolved into the founding charter of a supranational system of government”. Besides asserting that the Union’s autonomous legal order originates directly from the Treaties, the Court developed, through the interpretation of the founding Treaties, several other elements of the constitutional infrastructure of the Union. As Maduro describes, this constitutional infrastructure consists of “individual and fundamental rights, enforcement mechanisms, an institutional rule of law (e.g. separation of powers) and an autonomous and hierarchical legal order”.

138. Ibid.
141. M. P. Maduro, We The Court, The European Court of Justice and the European Economic Constitution – A Critical Reading of Article 30 of the EC Treaty (Hart Publishing 1998), p. 8. Nergelius refers to the establishment of primacy and direct effect of EU law and the recognition by the Court of certain procedural prerogatives of the European Parliament (Case 294/83 Les Verts) as core elements in the Union’s constitutionalization, as well as other, non case law-driven, factors, such as the gradual expansion of qualified majority voting in the Council, gradual increase of the powers of the Parliament and enhancement of transparency in the EU institutions resulting from the amendments of the
Hence, the majority opinion in legal doctrine seems to be that the Treaties do qualify as the ‘constitution’ in this order.

The same conclusion as to the nature of the Treaties was drawn by the Court itself more than two decades ago in the landmark judgment of Les Verts.\(^\text{142}\) In a famous and ever-recurring sentence the Court held that:

\[
\text{“The European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty”}.\(^\text{143}\)
\]

The Court expressed the same premise with a slightly different emphasis when it stated that the Treaty “concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law”.\(^\text{144}\) This statement answers to all those voices which deny the Treaties’ constitutional nature on the ground that the Treaties are formally international agreements. Among those is Grimm, who claims that although the founding Treaties “fulfill various functions in relation to the European Union’s public power that domestically go to constitutions”, they cannot be considered the constitution of the Union, as they derive their existence from the will of the Member States.\(^\text{145}\) Schütze counters this claim by highlighting that when the Court proclaimed in Van Gend en Loos and Costa v ENEL the independent and original nature of Union law, it established the normative autonomy of the latter and thereby it cut the “umbilical cord with the international legal order”.\(^\text{146}\) As a result, the Treaties are the Grundnorm in the Union’s legal order\(^\text{147}\) whose validity is not derived from any other legal norm forming part of the Member States’

\(^\text{142. Case 294/83 Les Verts. Besides the points discussed here, the Court ruled on several other pivotal issues of EU law e.g. the standing of the European Parliament as a defendant in an action for annulment, the interpretation of direct and individual concern for natural and legal persons. See Lenaerts, supra note 139, pp. 295-297.}\)

\(^\text{143. Case 294/83 Les Verts, para. 23.}\)

\(^\text{144. Opinion 1/91 Draft Agreement relating to the creation of the European Economic Area, supra note 115, para. 21.}\)

\(^\text{145. Grimm, supra note 118, p. 289, 291.}\)

\(^\text{146. Schütze, supra note 81, p. 1080.}\)

\(^\text{147. Ibid. p. 1082.}\)
Chapter 3 - The constitutional structure of the European Union and the system-nature of EU law

national legal orders and is not dependent on the lawmaking authority of the Member States but is presupposed. As such, the Treaties qualify as the constitution of the Union’s legal order.

As it appears, in the eyes of the Court already in the mid-eighties the EC Treaty was the ‘basic constitutional charter’ of the then European Economic Community.\(^{148}\) The subsequent amendments of the EC Treaty and the creation of the European Union have reinforced the elements of the Union’s constitutional architect. This also applies to the last amendment, the Lisbon Treaty, which has brought about significant changes bolstering the Union’s constitutional foundation.\(^ {149}\) The principle of horizontal separation of powers between the Union institutions had already been included in the former versions of the Treaties and is now set forth in Article 13(2) TEU which states that:

"Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation”.

This principle has been the basis of the Court’s abundant case law on the legal basis disputes between the Union institutions (see Section 5.2.). Through this case law, the Court has striven to preserve the institutional balance by ensuring that the acts of secondary EU law are adopted on the proper legal basis prescribed in the Treaties with the involvement of all the institutions who are to participate therein according to the relevant decision-making procedure.\(^ {150}\) Second, as regards the vertical separation of powers between the Member States and the Union, as has been mentioned above, the Lisbon Treaty introduced a catalogue of Union powers listing the competences of the Union according to their nature, that is, whether they are exclusive, shared with the Member States or only complementing the competences of the Member States.\(^ {151}\) This is seen as an attempt to delimit the competences of the Union in a more explicit manner and thereby halt their further expansion, which has been a constant worry for the Member States through the last decades. The Court’s case law, although to a lesser extent than in the case of horizontal separation of powers, reaffirms the principle of

\(^{148}\) The Court has repeated this statement in eg. ECJ, 23 March 1993, Case C-314/91 Beate Weber v European Parliament, para. 8; ECJ, 10 July 2003, Case C-15/00 Commission v European Investment Bank, para. 75; Joined Cases C-402/05 P and C-415/05 P Kadi and Al Barakaat para. 281.

\(^ {149}\) Griller, supra note 81, p. 33.

\(^ {150}\) Lenaerts, supra note 139, p. 298.

\(^{151}\) Articles 2-6 TFEU.
vertical division of competences, \(^{152}\) inter alia, by policing the use of Article 114 TFEU – a general legal basis provision – as a basis for harmonization. \(^{153}\) The third aspect of constitutionality, i.e. the protection of fundamental rights, \(^{154}\) was also given a powerful boost from the Lisbon Treaty with the recognition of the Charter of Fundamental Rights as a binding source of law having equal value with the Treaties. Article 6 TEU now refers not only to the protection of fundamental rights as a general principle of Union law but also to the Charter. This is backed up by long-standing case law through which the Court undertook to ensure respect for fundamental rights primarily by the Union institutions but also by the Member States in the areas of their action which fall within the scope of EU law.

3.2.2.2. Constitution without constitutionalism?

The term ‘constitutionalism’ seems to imply more than just a legal order based on a constitution. ‘Constitutionalism’ is often associated with the theory of popular sovereignty according to which ultimate authority rests with the people (demos) and only the people can constitute themselves into a legal sovereign. \(^{155}\) ‘Constitutionalism’ is a characteristic of a political formation in which the constitution can be traced back to a unilateral act taken by or attributed to the constituent demos in which they attribute political capacity to themselves. \(^{156}\) In other words, the constitution must be rooted in the people’s sovereignty. \(^{157}\) This view, with Schütze’s terminology, represents the normative or democratic notion of constitutionalism. \(^{158}\) He criticizes this standpoint. To him, constitutionalism should not mean anything more or less than the existence of a constitutional theory. The hybrid nature of the European Union as an (inter)national phenomenon necessitates a federal constitutional theory, i.e. federal constitutionalism. Democratic
Chapter 3 - The constitutional structure of the European Union and the system-nature of EU law

constitutionalism is, in contrast, the product of national constitutional theory that identifies constitutionalism with the legitimising theory of the nation State.159

The ideas of democratic constitutionalism came to the forefront in the debate on the constitutionality of the Union which took place in the aftermath of the ratification of the Maastricht Treaty and the German Constitutional Court’s Maastricht decision.160 The debate centered on the issue to what extent the exercise of public authority by the Union can be considered democratic and legitimate. More specifically, the question was whether or not a formal constitution should be adopted in order to enhance the democratic features and the level of legitimacy of the then Community and whether or not the adoption of such constitution would transform the Community into a (federal) State. These questions arose having regard to the ever-increasing transfer of powers from the Member States to the then Community which continued under the Maastricht Treaty and resulted in an unprecedented empowerment of the Community and the newly created European Union. The accumulation of powers and competences by the Community was not supported by a proper justification. It was still explained by the conventional logic of international law which provided no real legitimisation for the Community’s authority and rule-making powers that were having major effects not only on the Member States and their institutions but also on their citizens.161 The problem was actually twofold. On the one hand, it concerned the well-known issue of the ‘democratic deficit’ of the Union. The legislative processes of the Union have long been accused of not living up to the requirements of democracy.162 On the other hand, illustrious academics and jurists maintained that the Union would not possess legitimacy similar to that of a (nation) State even if all the deficiencies of the Union’s legislative process were cured. The reason for this is that there was no ‘European people’ or ‘demos’ who would constitute a homogeneous political community capable of legitimising the Union’s political structure.

159. Schütze, supra note 81, p. 1099.
162. Legislative processes were said not to involve sufficient parliamentary input and thus, undermining national parliamentary processes. EU law-making was (and is) considered dominated by administrators (e.g. preparatory process of EU legislation; high volume of legislation delegated to the executive). Representative democracy is not fully realized by the Union’s institutional structure and the quality of participatory democracy was also criticized for the inability of the legislative processes to take into account sufficiently plural interests. In addition, public deliberation in the legislative process was said to have been largely replaced by strategic negotiations, see Chalmers, Davies and Monti, supra note 17, pp. 125-136.
The most influential advocate of the ‘No Demos’ thesis was the German Constitutional Court whose Maastricht decision was based on this precept.\textsuperscript{163} The Constitutional Court stated that the principle of democracy requires that each and every exercise of sovereign powers derives from the ‘people of the State’. The will of the people is expressed in the frame of public opinion which is formulated through an effective political discourse in the society mediated through established communicative channels and structures. Conditions for such political discourse exist only within the nation States where the nation, the constituent people, is homogeneous and bound together by spiritual, social and political ties. In contrast to the nation State, neither a European demos nor a European political discourse exists in the European Union. First, the peoples of Europe do not share a collective identity and loyalty that is characteristic of nations, nor are the conditions present which could produce the sense of collective identity among them, i.e. common origin, language and culture.\textsuperscript{164} Second, the lack of mediatory structures, the function of which is to channel the multitude of interests existing in a modern society towards the political decision-makers and create links between individuals – civil associations – State bodies, entails that no real political discourse can develop in the European public sphere. One of the judges of the Constitutional Court, Justice Grimm, explains that parliamentary process does not of itself guarantee democratic structures without the communication and mediation structures on which the parliament should rest.\textsuperscript{165} In this respect, Grimm maintains that neither a European party system, nor an interest group system exits and it is not likely to develop in the short term. The communication media, which plays a crucial role in a national constitutional democracy exists only within the boundaries of the Member States and the prospects of its Europeanisation are minimal given the lack of a common language in Europe.\textsuperscript{166} Thus, Europe’s democratic deficit and weak legitimisation, in the view of the German Constitutional Court and its judges, is structurally determined.\textsuperscript{167} From this, Grimm concludes that enhancing the European Parliament’s powers or adopting a constitution and/or a fully-fledged State model by the Union would not solve the democratic and legitimacy problems of the Union. The conclusion of the “No Demos” view is that democracy and constitutionality can only be realised in the framework of the nation State.\textsuperscript{168}

\textsuperscript{164} Weiler, supra note 161, p. 229.
\textsuperscript{165} Grimm, supra note 118, p. 293.
\textsuperscript{166} Ibid. p. 294.
\textsuperscript{167} Ibid. p. 297.
\textsuperscript{168} Mancini also argued that a statal form is necessary to ensure proper legitimacy for the exercise of public authority. However, in his view, not only a nation State but also a
According to Weiler’s powerful criticism these views derive from the misconception that there is an inextricable link between nation – State – citizenship where nation is understood as people bound together by organic-ethnic-cultural ties. Weiler challenges this view on several grounds. First, a constituent demos, which is capable of legitimising public authority and rule-making, can be formed by a community other than an organically homogeneous nation. He maintains that the demos of a polity should be defined in civic terms, as a community “coming together on the basis of shared values, shared understanding of rights and societal duties and shared rational, intellectual culture which transcend organic-national differences”. Second, he doubts that a democratically legitimised polity can only be perceived in statal terms. Third, he rejects the view that the only way of thinking of the Union is in some statal form (federal State or confederation of States etc.) For him, ‘supranationalism’ cannot mean the creation of a European super-State, which would replace the nation States and would be susceptible to the same kind of exclusionary attitudes and boundary abuses as the nation States. What he suggests is the view of ‘multiple demois’ where individuals would see themselves as belonging simultaneously to a nation, on the one hand, and to a broader community of European citizens, on the other. The sense of belonging to that broader community would entail that the decisions brought within the area of competence of the Union by fellow European citizens would be accepted by all members of that community as legitimate public authority. Weiler describes the unique brand of federalism developed in Europe as being based on constitutional tolerance, the essence of which is the voluntary acceptance of constitutional discipline within the Union despite the fact that the Union is composed of distinct people and distinct political communities. The top-to-bottom hierarchy of norms coupled with a bottom-to-top hierarchy of authority and real power is another unique feature of the Union’s construct. According to European State could enjoy such legitimacy. He maintained that statehood for the Union was necessary in order to maintain the social and political rights that the European people obtained under the conditions of the modern welfare States. He claimed that the Community/Union should be freed from the intergovernmental mechanisms of policy-making which is to be blamed for the proliferation of executive rule-making and the lack of proper control by, and accountability to the people’s representative body, see supra note 163, pp. 39-41. 169. Weiler, supra note 161, p. 244. See Mancini’s criticism on similar ground supra note 163, p. 35. Grimm refutes that either the Maastricht decision or his own views would be based on the idea that an ethnically homogeneous community is a necessary precondition for democratic government, see supra note 118, p. 297. 170. Weiler, supra note 161, p. 244. 171. Ibid. p. 238. 172. Ibid. p. 253. 173. Weiler, supra note 157, p. 247. 174. Ibid. p. 240.
Weiler, these elements together represent the Union’s constitution which had already existed at the time of the European constitutional debate. He pleaded for the preservation of this constitution and strongly opposed the adoption of a new formal one.\textsuperscript{175}

Although Weiler acknowledged the existence of a constitution in the Union’s legal order, he described the condition of the Union as “constitution without constitutionalism”.\textsuperscript{176} The reason for this is that “Europe’s constitutional architecture has never been validated by a process of constitutional adoption by a European constitutional demos and, hence as a matter of both normative political principles and empirical social observation, the European constitutional discipline does not enjoy the same kind of authority as may be found in federal states”.\textsuperscript{177} It is not entirely clear what Weiler refers to here as a reason for the deficient legitimacy of the Union and thus, the lack of its constitutionalism. First, the statement can be understood as pointing to the fact that currently, no homogeneous European demos – in the ‘civic sense’ – exists; there is a possibility, however, that further evolution in the Union’s social conditions will form such a European people. Second, it may also articulate the fact that the ‘Masters of the Treaties’ are the Member States, that is, the Treaties and their amendments require ratification only by the Member States, which in the vast majority of the Member States is entrusted to the national legislatures. It can be argued that as long as neither the ‘European people’ through the European Parliament nor the peoples of the Member States voting in referendums are empowered to approve directly the founding Treaties and their amendments they can hardly be considered “being rooted in the sovereignty of the people”.

3.2.2.3. A new explanation: constitutional pluralism

More recent academic discourse has stepped over the question whether the European Union is a federal State or merely an international organization and whether further integration requires the Union to assume statehood. Mainstream constitutional theory is content with the perception of the Union as a federal organization, a federation of States which is based on the idea of divided sovereignty representing a middle ground between international and national.\textsuperscript{178} This understanding of the Union is expressed

\textsuperscript{175} Ibid. p. 244.
\textsuperscript{176} Weiler, supra note 161, p. 220.
\textsuperscript{177} Weiler, supra note 157, p. 239.
\textsuperscript{178} Schütze, supra note 81, p. 1105.
by terms such as ‘supranational federalism’,179 ‘European Commonwealth’180 and ‘constitutional order of States’.181 It is commonly accepted that the supranational level in the Union’s polity has obtained autonomous constitutional legitimacy; therefore, it can be described as constitutional in its own right. Compared to these widely held views, the conception of the Union as a form of supranational administrative governance is an isolated but vehemently defended opinion. Lindseth claims that although the Union has gained significant autonomy in terms of regulatory power, this autonomy is fundamentally functional and incapable of self-legitimisation.182 Therefore, any sort of legitimacy that the Union possesses is mediated through the structures and processes of the nation-states which remain the focal points of democratic and constitutional legitimisation within the Union. In essence, in his view, the Union instead of being a constitutional polity legitimised separately from its Member States is merely a formation of Europeanised administrative governance.

Contrary to the above, the predominant trend in EU legal scholarship focuses nowadays on the issue of the nature of the division of sovereignty between the Union and the Member States and, more specifically, the phenomenon of multiple and parallel claims of final authority coexisting in the Union’s legal order. The new theory that has emerged and become dominant in the explanation and description of the Union’s constitutionality is called constitutional pluralism. It is a manifestation in the field of EU law of the broad concept of pluralism, which has influenced various sciences, amongst others, law. Sarmiento explains, in general terms, that “pluralism supports a non-hierarchical approach to the law, a conception of democracy based on discursive procedures and not majoritarian outcomes, an individualistic and even rebellious role of courts and other institutions, and a vision of legal principles close to moral relativism”.183 According to Hesselink, legal pluralism is a descriptive theory the basic observation of which is that in our post-national world there exists a variety of legal systems and a variety of legal sources, as well as a variety of claims to ultimate authority made

181. Dashwood, supra note 79, at p. 113.
182. Lindseth, supra note 78.
by those various legal systems.\textsuperscript{184} Pluralism can be contrasted with constitutionalism, which perceives the legal sphere as being unitary built on a hierarchy between different authorities and different legal sources. As far as constitutional pluralism is concerned, it has been developed specifically in the context of the European Union in order to describe the legal nature of European integration where national and supranational constitutional orders coexist and make competing claims for ultimate authority. The constitutional pluralist analysis starts by pointing out the different national and European perspectives on the notion of ultimate authority in the Union. The EU Court of Justice’s narrative is the ultimate authority and absolute primacy of Union law over national law, including national constitutions.\textsuperscript{185} Union law is autonomous, the Treaties are not derived from the national constitutions but they constitute an independent source of law. Due to the independent and autonomous nature of Union law, the validity of Union acts cannot be questioned in the light of any rule of national law even if it is the highest norm in the hierarchy of sources of national law:

“[…J] the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the Constitution of that state or the principles of a national constitutional structure.”\textsuperscript{186}

In contrast, the perspective of (most) national constitutional courts is that the primacy of Union law over most national law is due to the effect which national constitutions confer on Union law. Therefore, they recognize the primacy of Union law over the main body of national law and even \textit{vis-à-vis} some national constitutional norms but only under the conditions dictated by national constitutions.\textsuperscript{187} It is for the national constitutional courts to assess as a final arbiter whether the conditions of primacy of Union law are met. Hence from the perspective of national constitutionalism the holders of final authority are the national constitutions. This contested or negotiated normative authority of Union law is the main source of constitutional pluralism.\textsuperscript{188}

\textsuperscript{184} Hesselink, supra note 12, p. 26.
\textsuperscript{185} Maduro, supra note 100, p. 503.
\textsuperscript{187} Maduro, supra note 100, p. 505.
\textsuperscript{188} Maduro identifies other sources of pluralism in the European legal sphere such as the emergence of new forms of power that challenges the traditional private/public distinction and, as a source of external pluralism, the increased interactions and inter-dependence of the Union’s legal order with international and foreign legal orders, see Maduro, supra note 10, at p. 1.
In this context of competing claims to final authority, constitutional pluralism argues that the potential constitutional conflicts between the Union and the national constitutional orders should be resolved in a non-hierarchical manner. The top-down conception of EU law and national law which the EU Court of Justice has emphasised from the beginning merely followed from the need to establish the authority of EU law according to the traditional ideas of law. Conversely, constitutional pluralism sees the relationship between the European and national constitutions as non-hierarchical and based on discourse and mutual adaptation. It maintains that the European legal order should be conceived of as integrating the claims of authority of both constitutional orders. According to the advocates of constitutional pluralism, the co-existence of the legal orders in the Union is, in fact, characterised by mutual adaptations and reciprocal concessions with the aim of avoiding actual conflicts. Maduro highlights that EU law has adopted substantive constitutional changes such as fundamental rights protection in order to accommodate the claims of national constitutionalism. On the other hand, national constitutions have been interpreted by national constitutional courts in a manner that tends to prevent the review of Union measures by the latter.

Constitutional pluralism, which purports to resolve potential constitutional conflicts between the European legal order and the national legal orders by acknowledging their mutual claims of authority instead of definitively deciding on which of them has the final authority, faces particular challenges from the point of view of maintaining a coherent and integrated legal system. If competing determinations of the law are authorised by various institutional players belonging to different legal orders (i.e. the EU Court of Justice, on the one hand, and national courts, on the other) the risk of inconsistent and incoherent judgments is increased to a great extent. Maduro admits the particular dangers that constitutional pluralism pose to the unity of the European legal order. He considers, however, that as long as all the players involved in the judicial adjudication of European disputes commit themselves to maintain the coherence of the common legal order and reason and justify their own decisions with regard to the previous decisions of all other participants such dangers can be minimised. From this perspective he emphasises the importance of not only vertical coherence – whereby

189. Ibid.
190. Maduro, supra note 100, p. 512.
191. Ibid. p. 522.
192. Ibid. p. 527.
national courts must render their decision in a way which make them fit with the decisions of the European Court of Justice – but horizontal coherence too, that is, national courts taking into account each other’s decisions.\textsuperscript{193}

Admittedly, the conditions of pluralism within the Union’s legal order may cast doubt on the unity and coherence of such order. This, combined with the lack of hierarchical relationships, which – according to constitutional pluralist ideas – characterizes the Union’s constitutional structure, seems to directly oppose the systematic approach that we pursue in this thesis. The systematic approach presupposes the existence of hierarchies, as organizing principles, in the system subject to examination. It needs to be emphasised in this regard that the analysis in this thesis focuses mainly on the European Union’s internal legal order. True, the fact that in the centre of our discussion are the relationships between various norms of EU law does not mean that aspects concerning the relationship of EU law and national law can be totally excluded from the examination. However, as long as the latter remain ancillary to the main subject matter, considerations relating to the pluralism of legal sources within the Union also remain in the background. Therefore, our starting point is unaltered, that is, the Union’s internal legal order constitutes a sufficiently coherent and unified legal system where hierarchies exist and which can thus, be analysed by a systematic approach aimed at searching for principles governing the relationships of different sources of law within the legal order.

3.3. Outline of the relationships of the various sources of EU law

3.3.1. Hierarchy between primary and secondary law

We have outlined the sources of EU law in Chapter 2. They can be grouped to the following major categories: (i) the founding Treaties and the Charter of Fundamental Rights; (ii) (unwritten) general principles of EU law, including the fundamental rights which are recognized as such; (iii) international agreements concluded by the EU; (iv) binding acts adopted by the EU institutions and (v) soft law. The Treaties, the Charter and the general principles of EU law constitute primary law. The acts of the institutions belong to the category of secondary law. International agreements concluded by the EU formally also qualify as secondary law, however, as will be explained below, in fact, it is at the level of the hierarchy between primary law and secondary

\textsuperscript{193} Ibid. pp. 528-529.
law. Soft law instruments, although, as a matter of fact, function as a source of law, do not have legally binding force, and as such, cannot be qualified either as primary law or secondary law. As we stated above, the case law of the Union Courts also function as a source of EU law and it shares the hierarchical ranking of the norm which it interprets.

The principle of hierarchy of norms plays a crucial role in the building up of a legal system. The function of that principle is to organize the complex relations between the components of that legal order, i.e. the various sources of law. Primarily, it serves to resolve potential conflicts between competing norms which could simultaneously apply to the same facts and would lead to different results. Hierarchy of norms can be defined as “a pre-established ranking of different types of legal acts in accordance with the democratic legitimacy of their respective authors and adoption procedures, which is used as a means to resolve conflicts among these different types of legal acts”. Without such pre-established order it would hardly be possible to ensure the consistent, foreseeable and equal application of the law. Therefore, hierarchy of norms is a necessary element of a legal system in the absence of which a collection of legal norms could not be called a ‘system’. Another function of the hierarchy of norms within a legal system is to guarantee that all the norms are adopted within the limits determined by the fundamental rules and principles of that system. Thus, the existence of a hierarchy of norms not only ensures the mechanical operability of a legal system, it also plays a role in guaranteeing the constitutionality of that system by dictating that all the norms forming part of the system are in line, not only in terms of their adoption procedure but also as to their content, with the basic norms of the system having constitutional value.

The Union’s legal order is a hierarchical order in which pre-established relations of superiority and subordination exist between the various norms forming part of that order. First and foremost, there is a hierarchy between primary and secondary law. This is rather self-evident; the terms ‘primary’ and ‘secondary’ law indicate, in themselves, that the former takes precedence over the latter. The hierarchical subordination of secondary law to primary law is inherent in the fact that secondary law is adopted on the basis of primary law. The Treaties endow the EU institutions with law-making powers which they may exercise on the basis of predefined legal basis provisions laid down therein. In this way, secondary law derives its

196. Ibid.
existence from the Treaties. In relation to secondary law, the Treaties fulfil
the function of a validating norm from which the various manifestations of
secondary law derive their own validity.

As we have concluded above, the founding Treaties are not only the highest
ranking rule of law in the Union’s legal order, they also qualify as the consti-
tution of that order in a substantive-functional sense. From this perspective,
the requirement for secondary law to comply with the Treaties is not only
a consequence of the principle of hierarchy of norms but also an important
expression of the constitutionality of the Union’s legal order. The Treaties
are the superior law of the land, not only in relation to national law but also
in relation to the acts of the EU institutions. As emphatically stated by the
Court in *Les Verts*:

“The European Economic Community is a Community based on the rule of law,
inasmuch as neither its Member States nor its institutions can avoid a review
of the question whether the measures adopted by them are in conformity with
the basic constitutional charter, the Treaty”.197

Although the Treaties are silent on the relationship of the various sources
of EU law, some of their provisions imply that secondary legislation must
comply with primary law, and, that such compliance is subject to control by
the Court. Article 19(1) TEU first subparagraph provides that “[the Court
of Justice of the European Union] shall ensure that in the interpretation and
application of the Treaties the law is observed.” This provision establishes
the principle of legality by reaffirming that the Union is bound by the rule
of law and observes the principle of separation of powers.198 It grants the
Court competence to supervise that the law is respected not only by the
Member States but also by the EU institutions. This evidently implies that
the Court has jurisdiction to review the legality of the legislation enacted by
the other EU institutions in carrying out their competences. The other Treaty
provision which proves such jurisdiction is Article 263 TFEU199 providing
that the Court in actions for annulment may review the legality of the acts
of the institutions “on grounds of lack of competence, infringement of an
essential procedural requirement, infringement of the Treaties or of any rule
of law relating to their application, or misuse of powers.” Accordingly, the
Court’s review extends, not only to monitoring compliance with formal
procedural requirements but also checking the conformity of secondary law
with rules and principles of a substantive nature. Procedural review is aimed

198. Tridimas, supra note 140, p. 19.
199. Lenaerts and Van Nuffel, supra note 16, p. 703.
at checking whether or not acts of secondary law comply with the Treaties formally; that is, their adoption was authorised by a legal basis provision set out in the Treaties, the legislature chose the correct legal basis and enacted them by the required legislative procedure and, generally, whether the essential procedural requirements for the adoption of Union acts, e.g. the duty to give reasons, due process rights, were complied with. From the point of view of substantive legality review, the general principles of EU law has obtained special importance. In particular, as the founding Treaties include very few substantive principles on the basis of which the legality of secondary law could be reviewed, these general principles have started to serve as standards for such review.\textsuperscript{200} This way, the general principles of EU law have gained constitutional status as is also recalled by the Court in a number of cases.\textsuperscript{201} Where Article 263 TFEU mentions amongst the grounds of review of secondary law “\textit{any rule of law relating to [the Treaties’] application}”, this primarily refers to the general principles. The relevant principles in this context are the protection of fundamental rights, the principle of equality and proportionality, legal certainty, protection of legitimate expectations and the rights of defence. According to the categorization of Tridimas, these principles ‘\textit{derive from the rule of law}’.\textsuperscript{202} The recognition of these principles as norms of constitutional status enables the Union’s legal order to be described as constitutional not only in the ‘thin’ but also in the ‘thick’ sense of the term.\textsuperscript{203} As to the substantive rules, which are laid down in the Treaties themselves and which can serve as a standard of review of secondary Union law, the most prominent ones are the basic internal market freedoms, namely, the free movement of goods, persons, services and capital. In addition, the principle of subsidiarity and proportionality – which are, in fact, general principles that are explicitly laid down in the Treaties – the various non-discrimination provisions, and – only theoretically – the State

\textsuperscript{200} Tridimas, supra note 140, p. 20.


\textsuperscript{202} Tridimas, supra note 140, p. 4.

\textsuperscript{203} Other general principles, such as primacy and direct effect of EU law, state liability for breach of EU law – called by Tridimas ‘systemic principles’ – are also of a constitutional character. They have been crucial elements in the constitutionalization of EU law. Unlike the principles deriving from the rule of law, systemic principles do not play a role in the review of legality of secondary EU law. Their function is to govern the relationship of EU law and national law and in that, they do create a relationship of a constitutional-nature between the two placing the supranational legal order in a normatively superior position to the national legal orders, see A. von Bogdandy, \textit{The European Union As a Human Rights Organization? Human Rights and the Core of the European Union}, 37 CMLRev 6 (2000), pp. 1307-1338, at p. 1333.
aid rules may serve as a basis for substantive legality review. The scrutiny of the correct legal basis of secondary law mainly involves procedural scrutiny but it can extend to substantive inquiries as well.

The Court’s legality review of secondary law extends to legislative and executive acts as well as to acts of general application and individual acts. Thus, the legality of a legislative act (e.g. directive of the Council and the Parliament) can be reviewed in the light of primary law just as that of a general executive act (e.g. Commission implementing regulation) or an individual administrative act (e.g. Commission decision), although different courts – either the Court of Justice or the General Court – may have jurisdiction to conduct such review depending also on who the applicant is. These categories are not distinguished in the scheme of the TFEU insofar as Article 263 TFEU encompasses the judicial review of all types of acts of the institutions. However, the provisions of Article 263 TFEU make important distinctions between the various types of acts as regards the question who can initiate judicial review against what type of acts under what conditions. This question concerns the right of access to courts which is a further important aspect of the constitutionality of a legal order. It is answered by the detailed rules on standing of the various actions available for challenging the legality of Union acts, which will be discussed in detail in Chapter 6. In anticipation of that discussion, it is worth pointing out here that even after the changes that the Lisbon Treaty made to the conditions of standing under Article 263 TFEU, the direct recourse of individuals against Union legislative acts is very limited. This, however, does not necessarily diminish the constitutional nature of the Union’s legal order having regard to the fact that various degrees of restriction on individuals’ access to judicial review of legislation also exist in the national constitutional orders of the Member States. While the TFEU does not formally distinguish between the judicial review of acts of general application and that of individual acts, in most national legal systems these two problems are dealt with separately – the former under constitutional law and the latter under administrative law – with different courts having jurisdiction to carry out the constitutional review of general acts, on the one hand, and the legality review of administrative acts, on the other. In this thesis, we will deal predominantly with the constitutional review of Union acts of general application (with the exception of Part III where the Commission’s State aid decisions, as individual acts, will also come into the picture).

Chapter 3 - The constitutional structure of the European Union and the system-nature of EU law

In accordance with the Treaties’ constitutional status, the Court of Justice – the final arbiter entrusted with the Treaties’ interpretation and the assurance of their observance – fulfills the functions of a constitutional court in the Union’s legal order. Advocate General Maduro made a link between this role of the Court of Justice and the autonomous legal order of the Union which derives directly from the founding Treaties:

“The EC Treaty, [...], has founded an autonomous legal order, within which States as well as individuals have immediate rights and obligations. The duty of the Court of Justice is to act as the constitutional court of the municipal legal order that is the Community”.

The following jurisdictions attributed to the Court enable it to be characterised as a constitutional court: (i) reviewing the legality of secondary law, (ii) maintaining the institutional balance, (iii) ensuring the delimitation of the competences of the Union and the Member States, (iv) exercising the protection of fundamental rights, and (v) reviewing ex ante the compatibility of international agreements concluded by the Union with the founding Treaties. Formally, the exercise of all these constitutional court functions involves the testing of secondary law for its compliance with primary law. The first of these functions, when understood in the narrow sense, refers to the review of legality of acts of the institutions in the light of certain – procedural or substantive – rules of the Treaties. Preservation of the institutional balance and policing the borderline between the competences of the Member States and the Union largely correspond to the examination of whether secondary law is based on the correct legal basis as set out in the Treaties. The protection of fundamental rights in the majority of the

205. We are not aiming here to answer such complex questions as whether the Court of Justice can be considered a constitutional court and what a constitutional court is, in general, as that would necessitate a comparative analysis of the various courts and entities having such a function in the Member States. Instead we follow the position taken by Sharpston and De Baere whose starting point is that the Court of Justice, at least in a number of respects, can be described as a constitutional court, see E. Sharpston and G. de Baere, The Court of Justice as a Constitutional Adjudicator, in: A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood (A. Arnulf, C. Barnard, M. Dougan and E. Spaventa eds., Hart Publishing 2011), pp. 123-150, at p. 123.


207. G.C. Rodriguez Iglesias, Der Gerichtshof der Europäischen Gemeinschaften als Verfassungsgericht, 27 Europarecht 3 (1992), pp. 225-245, at p. 226 who compares the role of the Court in the Union’s legal order to that of the US Supreme Court which, apart from being a supreme court, is also a constitutional court.

208. Opinion of the Court of 30 November 2009, Opinion 1/08 Competence of the European Community to conclude with certain members of the WTO agreements modifying the Schedules of Specific Commitments of the Community and its Member States under the GATS, paras. 111-113 (concerning the vertical division of competence); ECJ, 10 January
cases involves the review of secondary Union law in the light of the general principles of EU law or the Charter of Fundamental Rights, although Member State measures – between defined jurisdictional limits – can also be the subject of fundamental rights scrutiny by the Court. The preventive review of international agreements concluded by the Union involves the assessment of international agreements in the light of the founding Treaties and the general principles of EU law.

It has to be mentioned that in a few cases, the Courts expressly referred to the 'principle of the hierarchy of norms'.209 Most of these cases, however, concerned the relationship between various forms of secondary law and not that of primary and secondary law. This clearly shows that there can be a hierarchical relationship between two acts of secondary law. It must be emphasised, however, that this is the case only where one of the acts of secondary law contains a delegation of rulemaking powers on the basis of which the other act had been adopted. The act adopted in the exercise of delegated (or implementing) powers is sometimes referred to as ‘tertiary law’, which also expresses its subordinated position to secondary law.210

In addition, a hierarchical relation also exists between (certain) international agreements concluded by the Union and acts of the Union institutions, which follows from the international law principle of pacta sunt servanda reflected in Article 216(2) TFEU.

When looking at the case law dealing with the review of legality of secondary legislation it appears that formal review – primarily the review of the legal basis of the acts of the institutions – has considerably outweighed the substantive review of secondary legislation.211 This signals the reluctance of the Court to influence the content of Union legislation in a substantive

2006, Case C-178/03 Commission v Parliament and Council (Rotterdam Convention II) and ECJ, 8 September 2009, Case C-411/06 Commission v Parliament and Council (Basel Convention) (concerning the horizontal division of competence), see the analysis of these cases by Sharpston and De Baere, supra note 205, pp. 133-136, 137-139, 143-144.


manner. The self-restraint by the Court in substantively reviewing the acts of the Union legislature can be explained by the relations between the EU institutions which are different from those that usually prevail between the various branches of political power in a State. The Union’s institutional structure is characterised by the sensitive phenomenon of ‘institutional balance’ whereas in States, a stronger enforcement of ‘checks and balances’ tends to be present as required by the classic constitutional theory of separation of powers. In addition, under the circumstances of constitutional pluralism and multiple legal authorities competing in the Union, the primary focus of the Court has always been to ensure the status of EU law as ‘superior law of the land’ vis-à-vis the national level of government and the powerful national constitutional courts rather than enforcing substantive standards vis-à-vis the Union legislator. As pointed out in academic literature, “most of the great judgments which led to a constitutionalization of the Treaties are not meant to implement substantive principles, but focus instead on furthering integration through ensuring that the results of the political process, i.e. primary or secondary law, are enforced”. This refers to the Court’s case law laying down the ‘systemic principles’ which are meant to ensure the integration of EU law in the national legal orders as well as its primacy over national laws. Furthermore, the Court’s higher deference to the outcomes of the Union’s legislative process may be rooted in the recognition of the particular difficulties inherent in supranational law-making requiring consensus, or at least, the qualified majority approval by 28 Member States. Much of the forthcoming part of this thesis (Chapter 5, 7, 8) will examine the relationship of different sources of EU law from this perspective in order to establish to what extent the Court carries out a substantive review of secondary legislation under various types of primary law norms thereby, enforcing the hierarchy between primary and secondary law.

3.3.2. Lack of hierarchy between the various forms of secondary law

Despite the hierarchies between various sources of EU law that we described above (primary law – secondary law, primary law – international agreements, international agreements – secondary law, secondary law – tertiary law), in academic writings, we can occasionally encounter statements such

213. Von Bogdandy, supra note 203, p. 1325.
as “there is no clear hierarchy of norms in EU law”. Such statements must be confined to describing the relationships of various forms of secondary law between one another. Only in this limited sense can be understood the following observation of Advocate General Jacobs too:

“[…] the Community treaties do not establish a clear hierarchy of norms and while the EC Treaty draws a distinction between basic Community measures and implementing measures, the former are not systematically adopted by more democratically legitimate procedures than the latter. For example, a basic regulation adopted by the Council and the European Parliament may confer the task of adopting implementing measures upon the Council or the Commission. The choice of implementing authority may affect the procedures by which the implementing measures will be adopted and their democratic legitimacy. Moreover, while the European Parliament plays an increasingly important role in the Community legislative process, its powers vary with the area of the Treaty concerned.”

Here the Advocate General hinted at different factors which indicate a lack of hierarchy of norms. First, the Treaties do not establish a hierarchy between the different acts adopted by the Union institutions. Second, the Advocate General referred to the fact that even the – in principle – hierarchical relationship between a basic act, which contains a conferral of implementing powers, and the implementing act is blurred by the fact that the two acts may be adopted by the same institution and, possibly, via the same procedure. Therefore, differences in the democratic legitimation of the authority adopting the measure and of the adoption procedure – factors on the basis of which hierarchical relations are normally established in a national legal system – do not work to the same effect under EU law. These aspects of the relationships of various forms of secondary law will be discussed in detail in Chapter 4 (see Sections 4.1. and 4.2.).


3.3.3. Possible conflicts between the various sources of EU law

Having regard to the sources of law that make up the Union’s legal order and the different levels they are classified into, we can distinguish various scenarios where conflicts can occur between these sources.

As regards the level of primary law, conflicts may arise in the following constellations:

- **the provisions of the founding Treaties versus general principles of EU law:** as we have seen above, the provisions of the founding Treaties are, in principle, on the top of the pyramid of the sources of EU law. However, the general principles of EU law which are of a constitutional nature, including fundamental rights, have been elevated to the same level as the founding Treaties. The equal ranking of these two sources of EU law is confirmed by the case law. An example is mentioned by Lenaerts, who refers to the *Chernobyl* case in which the Court declared that the European Parliament has a right to bring an action for annulment under what is now Article 263 TFEU. At the time of the case, the European Parliament was not listed under the provision which was the predecessor of Article 263 TFEU (i.e. Article 173 EEC Treaty) and which expressly specified the eligible applicants who could seek judicial review of the acts of the institutions. Despite the omission by the relevant Treaty provision, the Court held that the principle of institutional balance within the Union requires the Parliament to be endowed with the right to bring an action for annulment against acts of the other institutions in order to protect its prerogatives in the legislative process. Considering that the principle of institutional balance is inherent in the provisions of the Treaties on the distribution of competences between the institutions – especially, in what is now Article 13(2) TEU – one of the explanations of the decision can be that the Court filled in the gap in the former Article 173 EEC by interpreting it in light of the context and the scheme of the Treaty. Tridimas considers the case an illustration of the interpretative function of the general principles that they fulfil.

---

216. Lenaerts and Van Nuffel, supra note 16, FN 231.
217. ECJ, 22 May 1990, Case C-70/88 European Parliament v Council (‘Chernobyl’).
218. “The absence in the Treaties of any provision giving the Parliament the right to bring an action for annulment may constitute a procedural gap, but it cannot prevail over the fundamental interest in the maintenance and observance of the institutional balance laid down in the Treaties establishing the European Communities.” (Case C-70/88 European Parliament v Council, para. 26.)
in relation to the Treaty provisions. He emphasises that the Court does not have jurisdiction to rule on the validity of the Treaty provisions, hence the only tool by which it can influence the effectiveness of the latter is by interpreting them consistently with the general principles of EU law. The Chernobyl case – just like the earlier Les Verts where the Court in the reverse situation declared that the Parliament can be a defendant in an action for annulment (see Section 3.2.2.1.) – is an example of the Court using the fundamental right to judicial protection, a general principle of EU law, for attributing a meaning to a Treaty provision that is, in fact, contrary to its wording. Thus, general principles which are of a constitutional nature rank at least as high in the hierarchy of sources of Union law as the Treaties. In principle, they do not take precedence over the Treaties, as the Treaty provisions cannot be invalidated on account of contradicting a general principle. However, they can decisively influence the interpretation of written primary law, sometimes even contra legem.

Another, even more instructive, example of a confrontation between a Treaty provision and a general principle of EU law is Schmidberger, where the Treaty provisions on the free movement of goods had to be measured against the freedom of expression and freedom of assembly, which constitute fundamental rights that are protected in the EU’s legal order as general principles of EU law. In this case, Austria had decided not to ban a demonstration by environmental protestors on one of the busiest transit highways connecting Italy, Austria and Germany, which, the applicant in the case, a transport organization, claimed to be a restriction on the free movement of goods in infringement of Article 34 TFEU. The Court held that although the free movement of goods constitute one of the fundamental principles of the Treaty, it can be restricted on grounds set out in Article 36 TFEU or on public interest grounds defined in the case law. On the other hand, the fundamental rights which were at stake are not absolute either and thus, can be restricted “provided that the restrictions in fact correspond to objectives of

222. ECJ, 12 June 2003, Case C-112/00 Eugen Schmidberger Internationale Transporte und Planzüge v Austria.
223. Tridimas, supra note 140, p. 54.
general interest and do not, taking account of the aim of the restrictions, constitute disproportionate and unacceptable interference, impairing the very substance of the rights guaranteed”. The Court weighed the two interests against each other, essentially carrying out a proportionality analysis aimed at determining whether the hindrance to the free movement of goods was proportionate to the legitimate objective of protecting the fundamental rights at issue. It came to the conclusion that the Austrian authorities did not exceed their margin of discretion by permitting the demonstration and thereby granting priority to the fundamental rights of expression and assembly as opposed to the principle of the free movement of goods. The case shows that the Treaty provisions do not enjoy automatic precedence over fundamental rights; on the contrary, under certain circumstances, the latter can prevail over the former. Whether the Treaty provisions on free movement or the fundamental rights prevail in a certain case depends on a proportionality analysis carried out on a case-by-case basis under which the interest of the internal market is balanced against the interest of ensuring unfettered application of a fundamental right.

The conclusion that fundamental rights rank at least as high as the Treaty provisions in the hierarchy of EU norms is also dictated by the status that fundamental rights formally obtained by the Lisbon Treaty which declared the Charter of Fundamental Rights to have the same value as the Treaties. Advocates General Kokott and Sobotta, suggest that the fundamental rights may have an even higher value than some of the Treaty provisions. As they point out, in the case law there are indications that not all norms within the category of primary law may be at the same level; those which qualify as ‘constitutional principles’ may rank higher than other primary law norms. The Court described the respect for fundamental rights by all Union acts as a constitutional principle of the then EC Treaty, thus, positioning fundamental rights higher in the normative hierarchy than other, non-constitutional Treaty provisions.

-- conflicts between different provisions of the Treaties: in principle, situations can occur where various provisions of the TEU and the TFEU

224. Case C-112/00 Schmidberger, para. 80.
225. Article 6(1) first subparagraph TEU.
apply simultaneously to the same factual setting and the application of the differing provisions may, in some cases, dictate differing solutions. The question is thus, whether the provisions of the founding Treaties are of equal rank or whether some provisions take priority over the others. Similar to the propositions described above as regards fundamental rights, Tridimas suggests that amongst the provisions of the founding Treaties, there are some which are of fundamental importance to the constitutional structure of the Union and as such, may have higher value than other Treaty provisions. He refers to the Court’s Opinion on the Draft EEA Agreement in which the Court held the judicial system provided for by the Draft EEA Agreement to be incompatible with the founding Treaties. The Court stated that such incompatibility could not be eliminated by amending Article 217 TFEU (ex Article 310 of the EC Treaty), the provision authorising the conclusion of association agreements. Apparently, the Court considered Article 19 TEU (ex Article 220 of the EC Treaty), which entrusts the Court with safeguarding the principle of legality and the provisions of the Treaties laying down the judicial system of the Union to be norms of higher rank which cannot be amended indirectly through changes to other Treaty provisions. Thus, one of the consequences of the fact that a Treaty provision is of higher rank or value than another such provision would be that it can only be amended or repealed by a revision which is expressly directed at it and from which the intention of the Member States to that effect clearly and unequivocally shines through. Another consequence of being a fundamental Treaty provision is, according to Tridimas, that such provision guides the interpretation of other Treaty provisions which are not considered to be fundamental.

In this thesis we will deal with the relationship of the Treaty provisions which are aimed at realising the main economic objective of the Union, that is, the internal market. Namely, we will examine the relationship of the Treaty’s free movement provisions, on the one hand, and the State aid rules, on the other (see Part III). Although these provisions are not concerned with the Union’s political constitutional structure, they can be perceived as fundamental provisions of higher rank in the scheme of the Treaties forming the basis of the Union’s economic constitution.

On the level of secondary law the plausible conflicts are:

228. Tridimas, supra note 140, pp. 55-56.
229. Opinion 1/91 Draft Agreement relating to the creation of the European Economic Area, supra note 115.
230. Tridimas, supra note 140, p. 55; Kokott and Sobotta, supra note 226, p. 6.
act of the institutions versus another act of the institutions: no hierarchical relationship exists between regulations, directives and decisions thus, if conflicts arise between these instruments they can only be resolved by the application of the lex specialis or the lex posterior principle just as conflicts between two acts of the same form (eg. regulation – regulation, directive – directive). An exception is the superiority of the basic (legislative) acts vis-à-vis a delegated or implementing act, as long as the latter is adopted on the basis of the former (see Sections 4.1 and 4.2.).

international agreements versus acts of the institutions: international agreements concluded by the Union rank higher in the Union’s legal order than other acts of the institutions. Thus, when conflicts arise between these two sources of EU law, international agreements has precedence over other instruments of secondary law.\(^{231}\) (see Section 4.3.)

Finally, conflicts may arise between the two levels of the sources of EU law, that is, between primary law and secondary law. As primary EU law, including the founding Treaties and the general principles of EU law, has a constitutional status in the Union’s legal order, secondary law has to comply with primary law. This would be the case in the following situations:

General principles of EU law versus acts of the institutions: reviewing the compatibility of secondary Union law with the general principles of EU law is a crucial building block of the constitutional structure of the Union. An act of the institutions which conflicts with such principles can be annulled or declared invalid by the Court. We will discuss this aspect of the relationship of primary and secondary law in Section 5.1.

General principles of EU law versus international agreements: with respect to this conflict, the Court stated in Kadi\(^{232}\) that the primacy of international agreements does not extend to primary law, in particular the general principles of EU law, including fundamental rights.

\(^{231}\) ECJ, 10 September 1996, Case C-61/94 Commission v Germany, para. 52; ECJ, 12 January 2006, Case C-311/04 Algemene Scheeps Agentuur Dordrecht BV v Inspecteur der Belastingdienst – Douanedistrict Rotterdam, para. 25; ECJ, 10 January 2006, Case C-344/04 International Air Transport Association, European Low Fares Airline Association v Department for Transport, para. 35; ECJ, 3 June 2008, Case C-308/06 International Association of Independent Tanker Owners (Intertanko) v Secretary of State for Transport, para. 42; Joined Cases C-402/05 P and C-415/05 P Kadi and Al Barakaat, para. 307.

\(^{232}\) Joined Cases C-402/05 P and C-415/05 P Kadi and Al Barakaat.
Consequently, the general principles of EU law enjoy precedence over international agreements. The position of international agreements in the Union’s legal order will be discussed in Section 4.3.

- **Treaty provisions versus international agreements**: the statement in *Kadi* also resolves this conflict in favour of primary law.

- **Treaty provisions versus acts of the institutions**: within this domain, a whole range of different conflicts are plausible, depending on the provision of the Treaties, that is alleged to be contradicted by an act of secondary law. The most commonly invoked provisions of the Treaties in this category are: (i) the principle of subsidiarity (Article 5(3) TEU) and the principle of proportionality (Article 5(4) TEU); (ii) the principle of sincere cooperation (Article 4(3) TEU), although instead of general legislative acts it is more individual administrative acts of the Union institutions or omissions by them which may come into conflict with this primary law provision; (iii) the obligation to state reasons (Article 296 TFEU); (iv) the general and specific legal basis provisions set out in the Treaties; (v) the prohibition of discrimination (Article 10 TFEU) and the prohibition of discrimination on the ground of nationality (Article 18 TFEU); (vi) the free movement provisions (Articles 21(1), 30, 34, 35, 45, 49, 56, 63); (vii) the prohibition of discriminatory internal taxation (Article 110 TFEU); and (viii) at least, theoretically, the State aid rules (Articles 107-108 TFEU).

233. See for details L.W. Gormley, *Some Further Reflections on the Development of General Principles of Law within Article 10 EC*, in: General Principles of EC Law in a Process of Development – Reports from a conference in Stockholm, 23-24 March 2007, organized by the Swedish Network for European Legal Studies (U. Bernitz, J. Nergelius and C. Cardner eds., Kluwer Law International 2008), pp. 303-315; J. Temple Lang, *Article 10 EC – The Most Important ‘General Principle’ of Community Law*, in: General Principles of EC Law in a Process of Development – Reports from a conference in Stockholm, 23-24 March 2007, organized by the Swedish Network for European Legal Studies (U. Bernitz, J. Nergelius and C. Cardner eds., Kluwer Law International 2008), pp. 75-115. Gormley points out that despite the fact that Article 4(3) TEU is clearly addressed to the Member States, the Court has derived from the principle of sincere cooperation laid down therein various obligations also for the Union institutions, see Gormley at p. 304. Specifically, the Court held that the provision entails reciprocal duties of cooperation between the Member States and the Union institutions, meaning that the Commission must cooperate with national courts e.g. where the latter investigate various irregularities (see Order of the Court, 6 December 1990, Case 2/88 J.J. Zwartweld and Others, para. 10). On the other hand, the principle imposes obligations in the relations between the Union institutions, meaning that they must conduct the inter-institutional dialogue during the legislative process in accordance with this principle (see ECJ, 30 March 1995, Case C-65/93 Parliament v Council, para. 28).
Some of these Treaty provisions, such as the principle of subsidiarity, proportionality and sincere cooperation, as well as the general prohibition of discrimination which is specified by some of the Treaty provisions above, are also recognized as general principles of EU law.

In this thesis, we will predominantly focus on conflicts and other aspects of the relationship between the Treaty’s free movement provisions and secondary law (see Part II). Inevitably some other Treaty provisions which are linked to those on the free movement, such as prohibition of nationality-based discrimination and the prohibition of discriminatory internal taxation, will also come to the purview of the analysis. In addition, the relationship between the State aid rules and secondary law will also be touched upon (see Section 8.3.2.).

However, before embarking on the analysis of the Treaty’s free movement provisions and secondary law, we will address the relationship of different types of secondary law between one another (see Chapter 4) and provide an overview of those aspects of the relationship of primary and secondary EU law, which will not be discussed in detail in Part II, namely secondary law and the general principles of EU law and secondary law and the Treaty’s legal basis provisions (see Chapter 5).

3.4. Overview

In this Chapter, we set out to provide a background to the systematic analysis of Union law through which we aim to identify principles, rules and tenets that govern the relationships of the various sources of EU law. At the same time, with the description and explanation of the basic characteristics of the European Union and EU law we intended to justify our systematic approach by demonstrating that the European Union constitutes a constitutional order with a coherent legal system which can be analysed by way of a systematic approach.

Along this line, we depicted the European Union as a federal political formation and a constitutional order of States whose authority and legitimation is independent from its Member States. As regards the federal character of the Union, we have seen the characteristics – the autonomous nature of EU law, direct effect and supremacy of EU law, including the law enacted by its institutions, over national law and direct legal bonds between the Union and the nationals of the Member States in the form of Union citizenship – which differentiate it from international organizations. On the other hand,
we also saw the features which distance the Union from federal States, i.e. the Member States remain the ‘masters of the Treaties’, lack of classical separation of powers, lack of powers in certain policy fields, lack of Kompetenz-Kompetenz, democratic deficit and deficient legitimation. In the light of this, we concluded that the Union should be perceived as a federal organization which constitutes the middle ground between ‘international’ and ‘national’.

As regards the Union as a constitutional order, we pointed out that its legal-political structure is based on a constitution. The founding Treaties have long been defined by the Court as the ‘basic constitutional charter’ of the Community and later the Union. Indeed, from a functional point of view the Treaties perform all the classical functions of a constitution. First, they lay down the basic order according to which legislative powers can be exercised in the Union by empowering certain institutions to enact secondary legislation, setting out the forms of secondary legislation, providing for their legal bases and the procedures through which they can be enacted. In this sense, the Treaties play the role of validating norms as regards secondary Union law. Second, the Treaties guarantee the division of powers horizontally – i.e. between the Union institutions – and vertically – i.e. between the Member States and the Union – within the Union. As regards the former, horizontal distribution of powers is expressed by the principle of ‘institutional balance’, which is safeguarded by the Court, primarily, by keeping the legal basis of secondary law under judicial surveillance. With regard to the latter, the vertical distribution of powers between the national and the supranational layer of governance was reinforced by the Lisbon Treaty through the introduction of a catalogue of Union competences in the TFEU with the aim of halting the continuous expansion of the latter. Despite this effort, it is dubious whether the inflation of Union competences is kept within effective limits by the Union’s constitutional construct. Most of the criticism is targeted at the Court that is accused of being a passivist in protecting the Member States competences – by policing the use of the general legal basis provisions and the observance of the principles of subsidiarity and proportionality by the Union legislature – from the intrusions of Union activity. Finally, the founding Treaties fulfill a constitutional function by guaranteeing the protection of fundamental rights as laid down in the now binding Charter and the Court’s jurisprudence. We have emphasized that, besides the Treaties, the general principles of EU law and the fundamental rights also have a constitutional status in the Union’s legal order. They constitute important substantive prerequisites which the Union institutions must observe when exercising legislative, executive and administrative powers in the areas of their competences. As a consequence of this, secondary Union
legislation is subject to review by the Union Courts for its compatibility not only with the founding Treaties but also the general principles of EU law and fundamental rights.

We concluded that, in the light of the above, the Union’s legal and institutional structure can undoubtedly be described as constitutional. Conversely, the proposition that the Union, as a polity, is constitutional – in the sense that it derives its authority from the people’s sovereignty which confers democratic legitimation on it – has been much more controversial. The infamous debate in the last decade about the Union’s constitutionality revolved around this issue. According to the most sceptical voices in this debate, the Union’s democratic deficit and deficient legitimation has structural reasons, particularly, the absence of a European *demos* and a common European political discourse. This means that the exercise of public authority by the Union cannot be legitimized in a way similar to what happens in a state, therefore, Union law cannot have the same authority as national law. Recent constitutional thinking about the Union has moved away from the question whether the exercise of public authority by the Union is legitimate enough and whether EU law can claim to have supremacy over all types of national law. According to the precepts of constitutional pluralism, the question whether, and to what extent, EU law has supremacy over national law is not the right one, as the relationship of Union law and national law should not be perceived in hierarchical terms. Within the Union national and supranational constitutional orders coexist and make competing claims to final authority. In this context of constitutional plurality potential conflicts between the national and the supranational constitution should be resolved by mutual adaptations and reciprocal concessions rather than by establishing hierarchies.

While this contemporary constitutional theory about the Union and EU law rejects the idea of hierarchy, in this thesis we follow a systematic approach the basic assumption of which is that hierarchies exist in EU law. However, our systematic approach focuses predominantly on the internal legal order of the Union, that is, on relationships between norms which all originate from the supranational level of the Union’s legal order. In contrast, the ideas of constitutional pluralism aim to explain the relationship of EU law and national law, that is, norms originating from different levels of authority within the Union. Given the different perspectives and the different aims, our systematic approach is not irreconcilable with the propositions of constitutional pluralism.
As far as the law of the European Union is concerned, we described it as an autonomous legal order which is independent from the laws of the Member States and which has sufficient coherence and consistency to be considered a legal system. There are hierarchical relationships within this legal system. Hierarchy of norms – i.e. a pre-established ranking of norms according to the democratic legitimacy of the author of the norms and their adoption procedure aimed at resolving conflicts between the norms – is a necessary element of a legal system. Without it the law cannot be applied consistently, foreseeably and equally. The hierarchy between primary and secondary law is not only an important system-characteristic of the Union’s legal order but also an essential element in the Union’s constitutional infrastructure. Primary law of a constitutional nature sets the framework within which legislative and executive rule-making by the Union institutions must remain both in procedural and substantive terms. The constitutional-type review of secondary Union law in the light of the Treaty rules, the general principles of EU law and fundamental rights is designed to ensure constitutional consistency within the system of Union law. Besides primary and secondary law there are hierarchical relations in the Union’s legal order between primary law – international agreements, international agreements – secondary law and between two acts of secondary law where one of them is a basic act and the other is a delegated or implementing act adopted on the basis of the former. Apart from the latter scenario, there are, however, no hierarchies between two acts of secondary law.

Although secondary law must comply with primary law and the Court must enforce such compliance irrespective of whether the norm of primary law is of procedural or substantive nature, the case law demonstrates that the Court has been so far very reluctant to effectively engage in a constitutional-type review of secondary legislation on substantive grounds. The highly deferential attitude of the Court towards the Union legislature can possibly be explained by the relations between the Union institutions which are different from those between the various branches of political power in a state model. The maintenance of ‘institutional balance’ within the Union may require an approach more cautious than that implied by the classic theory of separation of powers with a strong claim for effective ‘checks and balances’. In addition, in the circumstances of constitutional pluralism and multiple legal authorities competing in the Union’s legal order the Court’s main focus has traditionally been to reinforce the hierarchy between Union law and national law rather than the hierarchy between primary and secondary Union law by way of enforcing substantive standards vis-à-vis the Union legislator.
Furthermore, the Court’s higher deference to the outcomes of the Union’s legislative process may derive from the recognition of the particular difficulties inherent in supranational lawmaking.

The latter aspect of the relationship of primary and secondary law will be explored in detail in the forthcoming Chapters in the context of reviewing secondary law in the light of the general principles of EU law and fundamental rights (see Section 5.1.) and in that of the Treaty’s free movement provisions (see Chapters 7 and 8).