

EU Competences

ARTICLES 4 AND 5 TEU

Article 4- Union competences

General remarks

Paragraph 1 **confirms** that competences that have not been conferred on the EU remain with the MS.

Paragraph 2 **confirms** the Union's respect for each of the Member State (MS) as sovereign equals, including, in particular, as regards the national identities they represent, their fundamental political and constitutional structures, and essential state functions they fulfil.

Paragraph 3 **explains** the principle of loyalty or „sincere cooperation” .

Structure of Article 4

Article 4 comprises several distinct principles of EU law:

1. para. 1 pertains to the **principle of conferral** in Article 5 TEU;
2. the **principle of the equality of MS** in para. 2 which is closely connected with the unwritten principles of solidarity and mutual trust between the MS'
3. the safeguard for **national identities**, equally in para. 2;
4. the **principle of loyalty** or „sincere cooperation”

Structure of Article 4

Article 4 has been called the **cornerstone of the federal structure of the EU**, respectively the core of EU authority in the constitutional order of the MS.

The principle of loyalty is one of the foundations of supremacy of Union law, the respect for national identities can be seen as a principle to overcome this very supremacy.

The loyalty and national identities serve the „vertical“ axis of the relations between the EU and the MS, the equality, solidarity and mutual trust serve the horizontal relationship between the MS.

Moreover, the principles comprised in Article 4 so far have had **different roles in EU law**.

Equality between MS, solidarity, and mutual trust

1. MS equality

Article 4(2) refers to the equality of the MS „before Treaties”.

See: [Case C-336/09, Poland v Commission](#), paras. 36-37: „ ...as is now provided for expressly in Article 4(2) EU, that the new Member States are to be treated on the basis of equality with the old Member States”.

Equality between MS, solidarity, and mutual trust

2. MS solidarity

Solidarity has two meanings under the Treaties:

- it refers to solidarity towards and among Union citizens;
- it refers to the relationship between the MS. This „MS solidarity” can be seen as an expression of the principle of ‚the equality of the MS before the Treaties’, as started in Article 4(2). It has a „positive” and „negative” side.

MS must abstain from unilateral acts („negative” MS solidarity). See: Case C-39/72, Commission v Italy, paras 24-25; Case C-128/78, Commission v UK, para. 12.

Equality between MS, solidarity, and mutual trust

At the same time, the Treaties provides certain obligations for MS to support each other either in kind or financial terms („positive” MS solidarity).

- Article 222 TFEU- the „solidarity clause”;
- Article 80 TFEU;
- Article 122(1) TFEU;
- Article 136(3) TFEU.

See: Case- C-39/72, Commission v Italy, para. 24: „MS are under the duty of solidarity as the result of the equilibrium between advantages and obligations” flowing from their adherence to the Union; Joint Cases C-643/15 & C-647/15, Slovakia and Hungary v Council, para. 291: „ The principle of solidarity, in accordance with Article 80 TFEU, governs EU asylum policy”.

Equality between MS, solidarity, and mutual trust

3. Mutual trust

According to Opinion 2/13 „...the EU legal structure is based on the fundamental premise that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded. That premise implies and justifies the existence of **mutual trust** between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected”.

The ECJ has referred to the importance of mutual trust in cases on the Area of Freedom, Justice and Security (AFJS). In N.S. Case, suggested that mutual trust should be regarded as a constitutional principle pervading the entire AFJS.

The principle of mutual trust is closely connected with the principle of mutual recognition, which the ECJ has found to be a specification of the principle of loyalty in the freedom to provide services.

Equality between MS, solidarity, and mutual trust

It is also closely related to the rule of law and the principle of effective judicial protection.

See: Opinion 2/13, para. 191: „...it should be noted that the [principle of mutual trust](#) between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law”.

National identities

The term „national identity” is used to indicate a State’s **self-conception** or **self-image** as it evolved in the mirror of its political, social and cultural features.

In recital 6 the **TEU Preamble** demands respect for the history, the culture and the traditions of the EU’s peoples.

Article 167 TFEU speaks of respecting the MS’ national and regional diversity.

The self-image finds expression in the **basic political and constitutional structures of each single MS** which also comprise the peculiarities of its regional and local self-administration .

National identities

1. Constitutional identity

According to Article 4(2), the EU The Union must respect national identities of the MS, that are inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.

Under EU law, MS cannot successfully invoke Article 4(2) in connection with their national constitutional law where this would detract from the supremacy of EU law.

Invoking Article 4(2) could also not exempt national courts from the obligation to apply EU law, nor could it justify a breach of secondary law.

Article 4(2) has also served as a guidance for interpretation of primary and secondary law (see: case T-529/13)

National identities

See: **Opinion of AG Maduro in Case C-213/07, para. 33:** „If respect for the constitutional identity of the Member States can thus constitute a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, it can all the more be relied upon by a Member State to justify its assessment of constitutional measures which must supplement Community legislation in order to ensure observance, on its territory, of the principles and rules laid down by or underlying that legislation. It is, nevertheless, necessary to point out that that respect owed to the constitutional identity of the Member States cannot be understood as an absolute obligation to defer to all national constitutional rules. Were that the case, national constitutions could become instruments allowing Member States to avoid Community law in given fields. Furthermore, it could lead to discrimination between Member States based on the contents of their respective national constitutions. Just as Community law takes the national constitutional identity of the Member States into consideration, national constitutional law must be adapted to the requirements of the Community legal order. In the present case, the national constitutional rules can be taken into consideration to the extent that they fall within the discretion available to the Member States in order to ensure the observance of the principle of equal treatment required by the directive. The exercise of that discretion must, however, remain within the limits fixed by the principle and by the directive itself. The national constitutional rule is thus relevant, when identifying the national context in which the principle of equal treatment between candidates for a public contract must apply, when establishing, in that context, the risks of a conflict of interests and, finally, when assessing the importance to be attached, in the national legal system, to the prevention of those conflicts of interests and, therefore, the appropriate regulatory level of intervention”.

National identities

See: Case C- 208/09, para. 83: National constitutional law must be taken into consideration as an element of national identity „when a balance is struck between legitimate interests and the right of free movement of persons recognised under European Union law”.

National identities

2. Essential state functions

Article 4(2) includes a requirement that the Union respect „essential state functions” of the MS, which include „ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security”. The requirement to respect such functions does not, amount to an „inherent general exception excluding all measures taken for reasons of public security from the scope of European Union law”.

In general, Article 4(2) does not create an obligation on the EU to give priority to national interests over Union interests. Neither could such a duty be derived from the principle of loyalty.

Protection of basic State functions

The second area being absolutely protected against Union actions comprises the fundamental functions of every State.

Insofar the provision points at **securing the territorial integrity of the State, at maintaining law and order and at safeguarding national security.**

Duty of sincere cooperation

The principle of sincere cooperation was originally conceived as a variation of **pacta sunt servanda principle**.

In EU law, can be seen as **,ad enhanced obligation of good faith'**, which is incumbent upon the MSs as regards their relations with one another and with the institutions of the EU as a result of their membership of the EU.

The principle sincere cooperation/loyalty **comprises three separate indents**:

1. The EU and the MSs are required, in full mutual respect, to assist each other in carrying out tasks which flow from the Treaties.
2. The MSs must take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.
3. The MSs must facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

Duty of sincere cooperation

Mutual obligations

Article 4 para. 3 subpara. 1 formulates the **general rule** that in fulfilling their Treaty obligations the MSs and the EU owe each other loyalty cooperation and mutual assistance in carrying out tasks which flow from the Treaties.

Duty of sincere cooperation

Obligations of the Union

The Union institutions must **respect the fundamental interests** of the MSs.

This includes the prohibition of an illoyal expansion of the Union competences to the detriment of legislative and administrative competences of the MSs.

Duty of sincere cooperation

Obligations of the MSs

The subparas. 2 and 3 of para. 3 formulate provisions on the issue of Treaty performance by the MSs. They are obligated to actively take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. In addition, they have to assist the EU in the achievement of its tasks.

Finally, in all their activities they have to refrain from any measure which could jeopardise the attainment of the Union's objectives. So, they are not allowed to introduce or to retain measures capable of prejudicing the practical effectiveness of the Treaty.

Domestic law has to be interpreted as far as possible in accordance with the EU law. If such interpretation should not be possible, the MSs may not apply the domestic rules which turn out to be inconsistent with the EU directive.

Duty of sincere cooperation

The obligation of sincere cooperation usually leaves the MS a scope of discretion concerning the method of meeting the duty.

In individual cases, however, this discretion may be reduced to ,zero' (Case 71/76, Thieffry). In any case, MSs and the Union must cooperate in order to overcome possible difficulties (case 94/87, C v Germany).

Duty of sincere cooperation

Loyalty has been referred to as **the most important principle of the EU law**.

Loyalty is a **legal principle**. The ECJ has qualified it as ,principle inherent in the Union legal order' (Joint cases C046/93 7 C-48/93, Brasserie du Pecheur) and as a ,principle underlying Article 5 of the Treaty' (Case C-404/97, Commission v Portugal).

Duty of sincere cooperation

Addresses of loyalty

Loyalty applies in the following constellations:

1. between the MSs (horizontal loyalty);
2. obligations imposed on the MSs (vertical loyalty);
3. duties imposed on the EU institutions (reverse vertical loyalty);
4. between different Union institutions (institutional/mutual loyalty).

Duty of sincere cooperation

Functions of loyalty

1. In early cases, it has been applied in the process of the **constitutionalization** of the EU;
2. It applies to **prevent conflicts** between the EU measures and national measures;
3. Provides the basis for various duties of **cooperation and coordination**, both between the EU and the MSs and between the MSs;
4. It ensures **compliance** of MSs with their obligations under Union law.

Duty of sincere cooperation

See also:

Case C-600/14, OTIF, paras. 104-107;

Joint cases C- 231-233/06, Jonkmann, para. 38;

Case C- 212/04, Adeneler, para. 123;

Case C-459/03, MOX Plant, para. 179;

Case C- 433/03, Inland Waterway, para.72;

Case C- 105/03, Pupino, para. 42;

Opinion 2/91, ILO Convention 170, para. 37.

Case C-2/88, Zwartveld, para. 18.

Article 5- Limits of Union competences

General remarks

Article 5 stipulates **general principles** for the **relationship of competences between the EU and the MSs**.

These include the principle of conferral of (limited) competences, and the principles of subsidiarity and proportionality which are relevant for making use of competences already conferred to the EU.

The **limitations of Union competences** provided for in Article 5 are rules binding by the EU law. Compliance with them must be examined cumulatively: every measure taken by the EU must respect the limitations of the Conferred competences (para. 1), it must comply with the principle of subsidiarity in case non-exclusive Union competences (para.2) and finally must be necessary as to the intensify of its regulation (para.3).

Principle of (limited) conferral

Article 5 (1): "The limits of Union competences are governed by the principle of conferral".

Article 5 (2): „Under the principle of conferral, 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".

According to the principle of conferral, the EU may 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. These competences are defined in Articles 2–6 of the Treaty on the Functioning of the EU. Thereby the Treaty explicitly makes clear that the EU possesses only competences which are limited. The EU may realize only those tasks and powers that have been conferred on it and may not intrude on competences which have remained with the MSs.

Principle of (limited) conferral

Besides supremacy and direct effect among others, conferral has been qualified as an 'essential characteristic of the EU law' (Opinion 2/13, paras. 158, 164-167; Opinion 1/09, para. 21).

Article 5 states two 'flip-sides' of conferral. The EU only has those powers it is vested with by the MSs for attaining a set of objectives. Conversely, all powers not conferred by the MSs remain with them.

Principle of (limited) conferral

The scope of the conferral must be **assessed according to the objective** of the relevant provisions in connection with the **principle of *effet utile***.

The principle of conferral does not exclude recourse to ,implied powers' and the rule of *effet utile*. It is complemented by the principle of conferral of **institutional competences** and the **procedure** to be followed by the Union institutions (Article 7(2) TEU).

Principle of (limited) conferral

The kinds of powers conferred

The Treaties mainly confer **legislative powers** (Article 2 (1) and (2) TFEU).

Executive powers are conferred on the Commission by the rules on competition in Articles 103 and 108 TFEU, and on the 'Eurosystem' by the rules on monetary policy (Article 3 TFEU).

The **implementation** of Union law is the joint responsibility of the EU and the MSs (Article 293 TFEU).

The Union legislator, however, can confer executive powers through secondary law, mainly to the Commission (Article 114 TFEU, also Case C-66/04 and Case C-217/04).

Principle of (limited) conferral

See also:

Case C-600/14, OTIF, para. 44;

Opinion 2/13, paras. 158, 164-167;

Opinion 1/09, para. 21;

Opinion 1/91, para. 35;

Case C-221/89, Factortame, para. 14;

Case 68/86, UK v. Council, para. 32;

Joined cases 3, 4, & 6/76, Kramer, paras. 19/20 and 30/33.

Principle of subsidiarity

Objective

It **aims** to ensure that decisions are taken as closely as possible to the citizen and that constant checks are made to verify that action at EU level is justified in light of the possibilities available at national, regional or local level.

It is a **fundamental principle** of Union law.

It functions as a **binding guideline** on how the competences are to be used.

Principle of subsidiarity

Area of application

The application of the principle is confined to the particular areas of competence of the EU, where the MSS may in general still be active.

It can be **applied only** in the areas of so-called shared or divided or concurring competences (Articles 4-5 TFEU) or in the field of Union powers for supporting, coordinating or supplementing measures (Article 6 TFEU).

Principle of subsidiarity

Content

It can be exercised only under three conditions:

1. the area concerned does **not fall within the Union's exclusive competence**;
2. the Union may act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level. This is called the **necessity or negative criterion**;
3. by reason of the scale or effects of the proposed action, the objectives can be better achieved at Union level. This is the **added value or positive criterion**.

Principle of subsidiarity

Judicial review

Actions on grounds of infringement of the principle subsidiarity by a legislative act can be brought to the ECJ by the MSs in accordance with their legal order also on behalf of their national Parliament or a Parliament's chamber (Article 263 TFEU).

The Committee of Regions may also bring such actions against legislative act for the adoption of which the TFEU provides that the Committee must be consulted (Article 307(1) TFEU).

See: [Protocol No 2 on the application of the principles of subsidiarity and proportionality](#).

Principle of subsidiarity

See also:

Case C-358/14, para. 119;

Case C-58/08, para. 76;

Case 377/98, para. 32.

Principle of proportionality

Article 5(4) : „Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.

The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality”.

The principle of proportionality is one of the **general principles of EU law**.

It is a **criterion for lawfulness of any act of the institutions** of the EU, including the decisions taken by the Commission in its capacity of competition authority.

It also **applies** to measures based on **exclusive competences**.

Principle of proportionality

It operates on several levels:

- constitutes a standard for **ex post control** for Union measures;
- it applies in justifying MSs measures under the **fundamental freedoms**;
- it applies in the context of **fundamental rights**;
- it is an express element of many competences of the Union, when they provide for ,appropriate measures or actions’;
- it guides the **balancing of different Union law objectives** and of Union law objectives with fundamental rights;
- it may also be used for the **interpretation** of Union law.

Principle of proportionality

See also:

Case C-358/14, para. 78;

Case C- 508/13, para. 39;

Case C-58/08, paras. 51 and 58;

Case C- 441/07P, para. 36;

Case C- 331/88, para. 14;

Case 181/84, para. 20.