II The nature of the European legal order and its relationship with the legal orders of the Member States

1 Introduction

The title of this chapter seems straightforward enough, yet it raises many questions mainly regarding the meaning and scope of the term "legal order", whether a legal order can exist beyond the state level in the first place, and what this European legal order entails in practice. The term legal order can be defined in a myriad of ways. In abstract it can be said to stand for "an aggregate or a plurality of general and individual; norms that govern human behaviour, that prescribe, in other words, how one ought to behave", whereby it can be described as an order "if the norms constitute a unity, and they constitute a unity if they have the same basis of validity".[1] In a more down-to-earth and practical definition legal order may be defined as the totality of legal norms applicable in a given the territory, such as a state (domestic legal order). Such order derives from hierarchies and norms on administration and adjudication and a legal order can be said to exist when two conditions are met: authority and autonomy.[2] Autonomy means that the norms that make up the legal order are self-referential and do not rely on other norms for meaning or validity. Authority requires the legal order to have its own institutions to ensure that the norms are enforced, and disputes are settled. Reflecting on these conditions, it becomes apparent why the question whether there is a European legal order is a very relevant one. **II-1**

Many will associate the notion of legal order first and foremost with the territorial state and the hierarchy of norms that govern the exercise of public power and the relations between the citizens and vis-à-vis the executive in any one country. Yet, does this also apply at the level of the European Union? Moreover, if a European **II-2**

1 Kelsen (1982), p. 64.

2 This represents only one way of defining a legal order and different views may be taken resulting in different conditions for a legal order to exist. For an overview and fuller application to the EU see Barents (2004) and Lenaerts and Gutiérrez-Fons (2018).

legal order does exist, has it replaced the legal orders of the member states or does it exist alongside the domestic legal orders? What are the implications for the rule of law and the democratic legitimation of the exercise of power? The relevance of these questions can hardly be overstated. Comprised of 27 member states that individually wield considerable economic, financial, political and even military power, the EU is a formidable actor not only internally, i.e. in relation to individual member states, but also externally, that is in relations with countries that are not member states (third countries) and even international organisations. The European Union has the authority to declare a law of a member state contrary to EU law, forcing that member state to change that law and thus its own legal order.[3] Moreover, individuals can enforce EU law vis-à-vis the state authorities of their own member state.[4] In relations with third countries the European Union can impose trade sanctions on imports from third countries.[5] These interventions all take a legal form, but law needs to be effective and the logical question is whether and to what extent the EU can ensure this effectiveness in and of itself or whether it is dependent on the national legal orders of the member states to be effective.
The answer to these questions lies at least in part in the general principles of EU law. These general principles, much like the principles that can be found in constitutional texts, are central to enabling and constraining the EU in its relations with the member states, individuals and third countries. Understanding these general principles can thus help understand the European legal order and how it seeks to be effective.

II-3 This chapter thus examines several general principles governing the EU legal order. In many states such principles can be found in constitutional texts. The German Basic Law, for example, holds that "All state authority is derived from the people".[6] The United States constitution contains the general principle that this

> Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land.[7]

As a final example, the Finnish constitution states that the "exercise of public powers shall be based on an Act. In all public activity, the law shall be strictly observed".[8] These are just three examples of the kind of general principle that govern legal order in a state. Constitutions in this context serve the purpose of literally constituting the state and conferring powers to that state, thus creating a legal order within which that state can operate.[9] The European Union does not

3 See point II-58.
4 See point II-67.
5 See point X-15 and further on such instruments.
6 German Basic Law (*Grundgesetz*), Art. 20(2).
7 United States Constitution, Art. VI.
8 The Constitution of Finland (*Suomen perustuslaki*), 11 June 1999, Section 2.
9 Like the German Basic Law, the French constitution, for example, holds in Art. 3 that "National sovereignty shall vest in the people […]".

have a constitution in that sense, because, among other things, there is no "European people" who have agreed to confer power on the European Union. Instead, there are the member states who have decided to transfer some of their powers to an international legal body. This means that the European Union can only claim to be *indirectly* constituted by the people *via* the member states.[10] As a result, the European Union's legal actions are thus – even if only theoretically – only as effective as the member states' legal orders allow them to be.[11] Whether this means that there is no European legal order, we would argue, is a matter of perspective. As will become clear in this chapter, the Court has stated and reiterated that there is a European legal order that sets aside whatever national rules exist. However, as will also be shown in this chapter, some national judicial institutions have made and invoked reservations in this regard, thus stating that EU law can only be effective insofar as the national legal order allows for this. This abstract discussion is central to the discussion of the general principles and will form a backbone for this chapter.

The general principles can be grouped in three categories.[12] First, the constituting principles that establish and limit the European Union as an actor. Second, the principles dealing with the member states and individuals as actors in an EU law framework. Third, we deal with the principles that establish the values that guide European Union action. These principles will be dealt with in this order whereby the last category allows us to revisit the question whether there is a European legal order. **II-4**

2 Constituting principles

As was already mentioned in the introduction to this paragraph, the EU can act on its own motion. It can take executive action through one or more of its own institutions, bodies, offices and agencies. The EU can thus for example impose duties on imported goods and can impose fines on companies that break EU competition rules.[13] The EU can also ban products, prohibiting anyone from selling these products in any of the EU member states.[14] The EU can also take legislative action, for example setting standards for products, production processes or the equal treatment of men and women in labour relations that apply in all member states. In acting in its legislative but, moreover, also executive capacity, the EU is empowered and constrained by three general principles: conferral, subsidiarity and proportionality. **II-5**

10 The preambles to both the TEU and TFEU and Art. 1 TEU abundantly clear that the EU is constituted by the member states who in doing so act in the interest of their people.

11 This theoretical possibility has manifested itself, see point II-46.

12 Note that this categorisation like most categorisations is imperfect in that one principle may function in more than one category.

13 See point VIII-92.

14 Such action by the EU often triggers an action for annulment, see point V-43 et seq.

II-6 In relation to the Union's legislative action, this triptych is established by Article 4(1) TEU, read in conjunction with Article 5 TEU. These principles concern the competences assigned to the EU, as well as the means that it can apply to exercise these competences. In 1957, the founding member states were well aware that the EEC would become a self-developing organisation. After all, the framework-like character of European law,[15] necessitated further legislative action, which required powers of intervention. At the same time, however, the member states never intended to hand the European Communities (or at present the Union) a blank cheque. Besides ensuring that they retained a certain amount of influence over decision-making in the European institutions charged with the adoption of further legislation, the member states provided for a more fundamental safeguard in the Founding Treaties.

II-7 This safeguard, which is known as the principle of conferral, ensures that the Union can only act if the member states by means of the Treaties have explicitly authorised the EU to do so. By ratifying the Treaties and treaty revisions in accordance with their national constitutional requirements, the transfer of competences from the member states to the Union has not only been made conditional and enshrined in law but has also been brought about with the participation of democratically legitimised institutions, namely national parliaments.[16] As such, the principle of conferral can be understood to protect the democratic foundations of the transfer of competences to the European legal order by creating a safeguard at the level of the founding Treaties against an uncontrolled expansion of the Union's competences.

The principle of conferral has thereafter been supplemented by the principles of subsidiarity and proportionality by the 1992 Treaty on European Union. These additional safeguards for the exercise of the Union's competences cannot only be understood as an expression of the member states' desire to safeguards their residual competences, but also as an attempt to make Europe, which by that time had been diagnosed with a "democratic deficit", more palatable to its citizens.[17]

Following on from the trinity of conferral, subsidiarity and proportionality that primarily concern the legislative action of the European Union, there are also constituting principles that apply to the executive actions taken by the EU institutions and that may be summarised under heading of EU administrative law.

2.1 The principle of conferral: the Union's competences

II-8 The system (or principle) of the *specific conferral of powers* is enshrined in Article 4(1) TEU, read in conjunction with Article 5(1) and (2) TEU. Pursuant to these provisions, the Union can only act if the Treaties explicitly authorise it to do so. In

15 See points I-11 and III-2.

16 (2019) To be sure, this does not imply that the actions of the various EU institutions and agencies no longer require democratic legitimacy. See Amtenbrink (2007).

17 See point XI-59.

practice, this means that there must be a *legal basis* for EU action. Examples of such legal bases, which are found mainly in the TFEU, include:
– Article 18, second paragraph, TFEU – action relating to the prohibition of discrimination on grounds of nationality;
– Article 46 TFEU – action in support of the free movement of workers;
– Article 114 TFEU – action in support of the internal market;
– Article 192 TFEU – action in support of the environment;
– Article 352 TFEU – flexibility clause.

II-9 In addition to this explicit conferral of powers on the basis of the TFEU, EU law also encompasses the so-called "implied powers" doctrine. Since this doctrine is particularly important in the area of the Union's external relations, it is examined in detail in Chapter X, which focuses on the EU external relations law.[18] In a nutshell, the doctrine provides that the Union can take external action in areas where it has not been granted this competence expressly by the Treaties, but rather where this external competence is implied by the competence in internal matters. That is to say, a power that is implicit in or inherent to the existence of a related internal power. For example, the Court of Justice has held that the fact that the Union is responsible for pursuing a common fisheries policy between the member states implies that it is also competent to negotiate fisheries agreements with third countries. Obviously, trying to protect fishing stocks by regulating quota for EU fishermen is useless unless fishing vessels from third countries can also be regulated.

II-10 Pursuant to Article 5 TEU, all EU measures must have a legal basis in the Treaties. In practice, this legal basis is mentioned in the first recital of the preamble of the measure concerned, which will often commence as follows: "Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof …". In this example, the legal basis is obviously Article 114 TFEU. The requirement that all EU measures must have a legal basis is important for two reasons. First, it is a means of ensuring that the Union does not overstep its competences by taking action in areas where it is not authorised to do so, i.e. in policy areas for which the Member States have not transferred competences upon the EU (material safeguard). Second, it reflects the fact that the TFEU prescribes different decision-making procedures and varying degrees of institutional involvement for EU action depending on the area in question (procedural safeguards). As the formulation above already clarifies, the principle of specific attribution of competences is closely related to examining whether those competences are overstepped in a specific case. This is also referred to as the ultra vires review.[19] Yet, this review goes beyond reviewing whether there is a correct legal basis for a specific legislative or executive action, as it is also about reviewing the intention that is encapsulated in a legal basis. As has become apparent from the German Federal Constitutional Court's judgment in *Weiss*, ultra vires review is also about safeguarding what the national parliament intended to do when it accepted a

18 See point X-4 et seq.
19 For an analysis and overview see: Craig (1998).

program of European integration.[20] This point will be returned to in the context of the discussion of the autonomy of EU law.[21]

2.1.1 Material safeguard

II-11 The material safeguard arising from the principle of conferral is key to ensuring that the Union does not take action in areas where it does not have the competence to do so. This is particularly important in cases were the TFEU specifically prohibits legislative action. According to the final clause of Article 168(5) TFEU, for example, the Union is not allowed to adopt harmonising measures in the area of public health protection.[22] Pursuant to Article 168(1) TFEU, however, it is still meant to ensure a high level of human health protection in all its policies and activities.[23] In addition, a frequently employed legal basis – Article 114 TFEU on the approximation of laws in support of the internal market – requires the Union to act on the basis of "a high level of protection" of public health in its third paragraph. Thus, when the European Parliament and the Council adopted a directive on the approximation of the laws, regulations and administrative provisions of the member states relating to the advertising and sponsorship of tobacco products on the basis of several Treaty provisions, including Article 114 TFEU, it was unclear whether the TFEU actually contained an appropriate legal basis.[24] After all, the substance of the Tobacco Advertising Directive appeared to focus more on the protection of public health than on the establishment or improvement of the functioning of the internal market for tobacco advertising. Instead of facilitating the cross-border trade in tobacco advertising products and services, as one might expect of an internal market directive, it actually prohibited such trade in the interests of public health.[25] The Court of Justice, which shared this view, annulled the directive in the context of an action brought by Germany[26]

20 Amtenbrink and Repasi (2020), 767 et seq.; Schneider (2020), p. 974. See also point IX-27.

21 Point II-40 et seq.

22 The lack of competences resulting from the primacy of the member states in this area is the main reason for the EU's relatively limited involvement in dealing with the COVID-19 pandemic.

23 This is referred to as an integration provision, pursuant to which certain considerations must be integrated into the policy and activities of the Union, see Art. 11 TFEU on environmental protection requirements.

24 This applies to Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products; the Tobacco Advertising Directive.

25 On the role of the internal market and harmonisation in this context, see point VI-14.

26 The fact that this case was brought by Germany cannot be taken to mean that Germany is opposed to stricter tobacco regulation. Rather, it means that Germany wanted to ensure that the EU complies with the principle of conferral when it seeks to attain a high level of protection in creating an internal market.

pursuant to Article 263 TFEU.[27] It was considered that the substance and objectives of the Tobacco Advertising Directive did not focus on the removal of obstacles to free trade or distortions of competition, which meant that it could not be adopted on the basis of a legal basis aimed at establishing or improving the functioning of the internal market. As previously mentioned, the TFEU is not known for its terminological clarity.[28] As a result, the Court of Justice often plays a decisive role in what should first and foremost be a political process, namely the adoption of decisions concerning the transfer of clearly defined competences at national level. The relationship between the legal and the political process of integration is examined further in Chapter XI.

2.1.2 Procedural safeguard

II-12 The procedural safeguard relating to the principle of conferral arise in connection with the various decision-making procedures laid down in the TFEU for the various legal bases. The various procedures in the TFEU entail different roles for the European institutions. In a nutshell, all legislative procedures start with a proposal by the European Commission that then needs to be accepted by the member states represented in the Council.[29] However, depending on the legal basis, the European Parliament has a definitive say or it can only issue an advisory opinion. Furthermore, the legal basis also determines whether the Council votes with a majority or unanimity. Needless to say, the choice of the legal basis is of great importance to a member state that seeks to defend its veto powers as well to the European Parliament that seeks more significant involvement in the legislative process.[30] For example, in the past the common agricultural policy was governed by what was called the consultation procedure,[31] while environmental policy was adopted in accordance with the co-decision procedure (now known as the ordinary legislative procedure) according to which the Parliament decides together with Council.[32] In terms of the European Parliament's influence, for instance, it thus mattered a great deal whether a specific measure was adopted on the basis of the legal basis for agricultural or environmental policy. It translates into the European Parliament just being able to provide an advisory opinion on the matter to the Parliament actually being able to decide, together with the Council, on a piece of legislation. An example of the use of the procedural safeguard arising from the principle of conferral can be found in two cases concerning two regulations on the

27 Case C-376/98, *Germany v. European Parliament and Council (Tobacco Advertising)*. For more information, see Hervey and McHale (2004), p. 96.

28 See point IV-60 on delegated and implementing powers.

29 For a fuller analysis of the legislative procedure see point IV-17.

30 These procedures are explained in greater detail in Chapter IV. In addition to the involvement of the Council and Parliament, the choice for a legal basis also impacts the position of the Commission, for example in negotiating international agreements, see point X-7.

31 Art. 37(2) of the EC Treaty. In the consultation procedure, Parliament is only consulted and the Council decides. See further point IV-25.

32 Ex Art. 175(1) of the EC Treaty (Art. 192(1) TFEU).

protection of forests.[33] The regulations in question had been adopted by the Council, after consulting the European Parliament, in accordance with the legal basis for agricultural policy. However, since they concerned the protection of forests against atmospheric pollution and fire, the Parliament assumed that they actually fell within the scope of environmental policy, under which it had the right of co-decision. The Court of Justice examined the substance and objectives of the regulations in order to determine whether they related to agricultural or environmental policy. Having decided that they fell within the scope of environmental policy, the Court of Justice held that the appropriate legal basis was ex Article 175(1) of the EC Treaty (Art. 192(1) TFEU) and that the European Parliament should have been allowed to participate in the decision-making process under the co-decision procedure.[34]

2.1.3 Resolving disputes concerning the appropriate legal basis

II-13 The Court of Justice always starts its search for the appropriate legal basis with the observation that, in the context of the organisation of the competences of the Union, the choice of a legal basis for a measure must be based on objective factors that are amenable to judicial review, such as the aim and content of the measure.[35] Next, it examines the substance and objectives of the measure concerned. Based on this examination, it may conclude that a measure actually contains elements associated with two different legal bases. For example, although their primary objective was to protect forest ecosystems, the forest protection regulations were also partly agricultural in nature.[36]

II-14 In such cases, it is necessary to consider whether the measure concerned relates principally to a particular field of action, while having only incidental effects on other policies, or whether both elements are equally essential. If one element clearly dominates, the associated legal basis is sufficient. The identification of such an overwhelming aim is often called the center of gravity test.[37] However, if both elements must be considered equally important, both associated legal bases should be used. This is referred to as a cumulation of legal bases.

II-15 It should be noted that such a cumulation is ruled out in situations where the associated decision-making procedures are incompatible with each other. This issue arose, for example, in a case concerning the Titanium Dioxide Directive,[38] which focused on the question whether the Union should have used the legal basis

33 Joined Cases C-164/97 and C-165/97, *European Parliament v. Council*.
34 There are several variations on this judgment, such as Joined Cases C-124/13 and C-125/13, *European Parliament and Commission v. Council*; Case C-490/10, *European Parliament v. Council*, concerning the wrongful choice of a legal basis from the Euratom Treaty instead of the TFEU.
35 See, for example, Joined Cases C-164/97 and C-165/97, *European Parliament v. Council*, Judgment, Para. 12.
36 Ibid., Para. 13.
37 Engel (2018), p. 13.
38 Case C-300/89, *Commission v. Council (Titanium dioxide)*.

associated with the internal market or the legal basis associated with environmental policy. The Court of Justice concluded that "the directive [was] concerned, indissociably, with both the protection of the environment and the elimination of disparities in conditions of competition".[39] At this time, the legal basis associated with the internal market was linked to the cooperation procedure, under which the Council adopted decisions by qualified majority, while the legal basis associated with environmental policy was linked to the consultation procedure, under which the Council adopted decisions by unanimity. In addition, the introduction of the cooperation procedure was motivated by a desire to involve the European Parliament more closely in the legislative process. These two procedures were incompatible, as the requirement for the Council to act unanimously after merely consulting the Parliament would render the cooperation procedure meaningless.[40] In addition, it would have frustrated the explicit desire of the drafters of the Treaties at the time to grant the Parliament a greater role in the legislative process. The Court of Justice was able to overcome this impasse by referring to the so-called integration provisions of ex Article 130r(2) of the EC Treaty (Art. 11 TFEU), pursuant to which environmental protection requirements must be integrated into the Union's other activities. This meant that environmental interests could also be served while relying on the legal basis associated with the internal market, thus making it the appropriate legal basis in this case. Currently, as a result of the ordinary legislative procedure having become the standard procedure for all decision-making in the Union, the incompatibility of decision-making procedures is less of an issue.[41]

II-16 In cases where one or more legal bases for EU action exist, the Union thus has the competence to adopt measures. Perusal of the European Treaties and the openly worded nature of many of the legal bases enable plenty of EU action and law making. Not least in response to criticism of Brussels' regulatory officiousness – primarily from then UK Prime Minister Margaret Thatcher – the principles of subsidiarity and proportionality were included in the TFEU in order to curtail the Union's legislative competences.

2.2 The principle of subsidiarity: the exercise of competences

II-17 When the Union has the competence to act, it still needs to be determined whether it should actually make use of this power. This question can be answered by reference to the principle of subsidiarity, which is found in Article 5(3) TEU. Pursuant to this provision, the principle of subsidiarity applies only to the Union's non-exclusive competences. In other words, the Union's exclusive competences, listed in Article 3 TFEU, are not governed by this principle.

II-18 Under the subsidiarity test, the Union can only act if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the member states and

39 Ibid., Para. 13.
40 Ibid., Paras. 17-21.
41 But see Case C-490/10, *European Parliament v. Council* and several cases concerning actions in the external relations field, see point X-7.

can be better realised at EU level. In practice, this means that the action in question must relate to a cross-border issue for which the European solution offers economies of scale or greater effectiveness than national action. It should be obvious that the principle's ambiguous wording has meant that its application is largely limited to the political arena. This is called the *ex ante* application of the principle; in that it predates the moment at which the political plans become legally binding acts. The *ex post* application refers to the use of the principle to challenge exiting legislation, for example in an annulment procedure. As far as the *ex post* application is concerned, the principle may well be a paper tiger. As far as we have been able to ascertain, the Court has thus far rejected all attempts to annul EU acts on the basis of it.[42] An unintended side-effect of the principle's political character and predominantly *ex ante* application is that in the past it has mostly been used to torpedo politically unpopular proposals, even in cases where the proposed measure seems clearly compatible with said principle. For example, the Dutch parliament's response to the Commission's proposal for a regulation on collective action (strikes) in the context of the free movement of services[43] did not include a single word about the related cross-border issues but did advance a political standpoint on national measures in respect of collective action.[44] On a similar note, the Commission's proposal for a directive to protect the soil in the member states was withdrawn after an eight-year subsidiarity induced coma, despite the fact that soil degradation presents clear transboundary problems that can be addressed far more effectively at the EU level.[45]

II-19 A preliminary question that needs to be answered before the compliance with principle of subsidiarity can be examined is thus whether the action in question relates to an area of exclusive or non-exclusive competence of the Union.[46] In the latter case, the Union and the member states initially both have the competence to

42 Case C-233/94, *Germany v. European Parliament and Council (Directive on deposit guarantee schemes)*, in which Germany argued that the directive's failure to explain how it complied with the principle of subsidiarity violated EU law; Case C-84/94, *United Kingdom v. Council* (*Working Time Directive)*, Judgment, Para. 55; Case C-491/01, *British American Tobacco (Investments) and Imperial Tobacco*, Judgment, Para. 177 et seq.; Case C-377/98, *Netherlands v. European Parliament and Council (Biotechnology Directive)*, Judgment, Para. 30 et seq.; Case T-65/98, *Van den Bergh Foods Ltd v. Commission of the European Communities*, Judgment, Para. 197 and Case C-151/17, *Swedish Match*, Para. 76.

43 COM (2012) 130. The proposal was submitted in response to the Court of Justice's judgments in *Laval un Partneri* and *Viking Line,* see point II-145.

44 Letter from the president of the House of Representatives, annex to Parliamentary Paper 33 251, no. 7. The Commission's response, Parliamentary Paper 33 251, no. 7, accordingly stated that the proposal was not rejected pursuant to the principle of subsidiarity.

45 See Council Press Release 7522/10 (Presse 67), available at: https://europa.eu/rapid/press-release_PRES-10-67_en.htm?locale=en, and see OJ 2014 C153/3 for the official withdrawal by the Commission.

46 E.g. Case C-151/17, *Swedish Match*, Judgment, Para. 66.