

# THE EUROPEAN UNION IN THE LIGHT OF COMPARATIVE POLITICS

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## Introductory remarks — the European Union in theoretical perspectives

The European Union is a relatively new phenomenon, starting in the 1950s from three Communities, *i.e.* European Coal and Steel Community (1951), European Economic Community (1957) and European Atomic Energy Community (1957). The primary objective of setting up the Communities was to make the European states cooperate, to create an ever closer union, in order to preserve peace and prosperity on the continent. The European Communities were based on a functional rationale, namely the cooperation in chosen, strategic fields, which then spread to other areas according to the neofunctional approach. Nowadays, the cooperation takes place not only in an economic domain, but it extends to the social, cultural and political areas. This, in turn, has contributed to a substantial change in the legal, political and institutional arrangement that have been established to carry out assigned tasks.

In academic writing, especially when a new treaty enters into force, a discussion develops about what is the nature of the European Union. Is the European Union an international organization since it is based on an international treaty; is it a *quasi*-state entity, *i.e.* a federation because it carries out tasks previously assigned to states or is it a *sui generis* structure, without any equivalent? The answer to this question is important and varies depending on the perspective adopted. Looking at the issue from the perspective of international relations, the European Union is an international organization or — as some authors want — a confederation, a structure based on an international accord between 27 sovereign states that are ‘masters of the treaties’. It is up to the member states to de-

cide whether to deepen and widen integration processes or to retreat to a looser structure, limited to a voluntary cooperation between high contracting parties. On the other hand, taking the perspective of comparative politics, the European Union emerges as a *quasi*-state structure since it enjoys control over a nation (however not in the ethnic sense),<sup>1</sup> has defined territory (although with changing borders)<sup>2</sup> and the Union and the member states share sovereignty (the accession to the Union results not only in the common sharing of sovereignty but *de facto* in the limitation of national sovereign rights, or in other words limitation in the exercise of sovereign rights).<sup>3</sup> However, the European Union lacks a political dimension and it needs a greater involvement in the area of foreign policy as well as security and defence policy.<sup>4</sup>

The European Union falls somewhere *in between*. It ranges from an intergovernmental organization to a *quasi*-state structure, being neither a classical international organization nor a federal state. It reveals intergovernmental features when cooperation is a means that facilitates an achievement of common goals, and supranational ones when decisions taken bind not only member states but also citizens as well as features that are characteristic only for the Union, a *sui generis* entity — the European Union as an original structure, *tertium genus* that requires new terminology and original ideas.<sup>5</sup> The governance school perceives the European Union as a new, emerging system of *governance without government*,<sup>6</sup> a non-hierarchical system, involving public and private actors that are deliberating to solve common problems, led by informal rules and formal institutions.

Each theoretical approach underlines different features that determine the structure; each brings a new perspective and adds new

elements. With the subsequent treaties, the European construction has undergone changes, evolving from an international organization — however a special one — to a political organism, a *quasi*-state entity. At the present stage of development, when the European Union resembles many features characteristic for the federal system, the most appropriate seems to be the comparative approach. The comparison of the European structure with the fully-fledged, established federal political systems will reveal similarities and differences and will help define the *differentia specifica* of the European Union system in institutional, political and legal terms.

Another issue that deserves attention concerns integration processes in Europe. The difficulties with the proper labelling of the European Union<sup>7</sup> are caused *inter alia* by the fact that integration — a term from the domain of international relations — is severely lacking in clarity. Integration is a term, which is used for various actors, situations and functions that are present and contribute to the integration processes. This ambiguity is also seen when making an attempt to make a proper distinction between integration as a process and integration as a state, integration of masses and integration of elites, international interaction and international integration, and finally the distinction between economic, political, social and military integration.

Based on the comparative method, the analysis will focus on two leading traditions, namely: cooperative and dual federalism, to which we now turn to. The traits of dual federalism are still to be seen in the United States, whereas the cooperative federalism is present in Germany. The comparison of a derived, international entity with fully-fledged, established federal systems is possible, since federalism is not limited to the national context, but can be used in the international arena.

### The concept of federalism

The term *federal* derives from the Latin term *foedus*, which means an accord (an

agreement, a covenant). Federalism as a result of an agreement unites parties, without leading to merging in one entity.<sup>8</sup> Among many definitions that can be found in the academic literature one defines federalism as an instrument that relates to the division of competences, the structure of public authority and to the application of law. The aim of federalism is to guarantee unity of the whole structure, while at the same time preserving an independence, autonomy and identity of constituent units. The essence of federalism can be reduced to: *united in diversity*.

An issue that deserves here clarification is a distinction between federalism, federation and a federal political system — the terms that are easily and often mixed. Generally speaking federalism provides a technique for a political organization of power, making possible on the one hand the federal government to carry out activities to achieve common goals whereas on the other autonomous actions of regional entities (governments) to preserve their regional (national) identity and distinctiveness. Federation, in turn, is a form of political integration where constituent entities are united in a special kind of a political union, and where at least two autonomous and independent governments are present: central and regional.<sup>9</sup> Federalism is a normative term that refers to a multi-level government combining shared-rule and territorial self-rule as well as adjustment, maintenance and promotion of distinct territorial identities within a political union. The essence of federalism as a normative concept is guaranteeing at the same time union and non-centralization. On the other hand, the federal political system is a descriptive term that can be applied to a broader category of political systems, where — in contrast to a single central source of the constitutional and the political power (as is the case in unitary political systems) — there are two levels of government, linked by mechanisms of shared-rule, embodied in common institutions and territorial self-rule, embodied in the governments of constituent units.<sup>10</sup>

A federal political system is a broad category that includes: federations, *quasi*-federations, confederations, associations of states, leagues, *etc.* Federation is one, a special arrangement, where neither the federal government nor the constituent entities are constitutionally subordinated to each other. Each of them disposes of a sovereign power derived from the Constitution and can take direct actions *vis-à-vis* citizens in carrying out legislative and executive authority as well as a power to levy taxes, moreover, each government (of federation and constituent entities) is directly elected by citizens.<sup>11</sup>

Federalism is a form of political organization that unites separate *politie*s in a political system and distributes power between central government and the governments of constituent entities. It allows for joint participation in a decision-making and an implementation process. In general terms, federalism means a union of free citizens and communities within stable, however limited political arrangements to guarantee the rights and freedoms and an achievement of common goals, while preserving integrity of all.<sup>12</sup>

The European Union (previously the European Community) is a combination of different principles, types and forms. Depending on the reference point we can speak either about confederation, when we focus on the institutional structure, or a federation, when we pay attention to legal principles on which the European Union is based. Legal principles, *i.e.* the primacy of the European law over law of the member states and the direct effect of the European law in the member states' legal orders represent a federal form of government, whereas the decision-making procedures at the European level point to federal as well as confederal qualities. Besides, the unanimity rule in the Council of the European Union is a confederal element, while the majority rule represents a federal solution, especially when the ordinary procedure applies (previously the codecision procedure). Moreover, the so-called practical politics to which the cohesion policy belongs represent this, what in the Ger-

man tradition is called interlocking politics, on the other hand the European Union's finances have a confederal character — the Union can determine neither the source nor the level of its revenues, since it does not have a financial autonomy.<sup>13</sup>

#### **The tradition of dual (inter-state) and cooperative (intra-state) federalism**

As it was mentioned there is no one model of federalism but, instead, we are dealing with many paradigms of *federalisms*. However, we can distinguish two leading traditions, namely the dual federalism, which is characteristic for the United States and the cooperative federalism of which Germany is the prime example. The dual federalism implies that competencies and finances as well as partly institutions should be separated, and this should guarantee not only an independent functioning of federation but also its constituent entities. In federal systems, both in the dual and the cooperative model of federalism a special role is assigned to the constituent units that exert influence on federal legislation *via* votes of its representatives in the federal upper chamber. However, in case of the dual federalism the representatives of the constituent entities are directly elected by citizens whereas in the cooperative model of federalism this representation is indirect.

An important issue from the point of view of federal models is the division of competences, for when it comes to exclusive competencies then we can speak about the dual federal model, whereas in case of the shared and the complementary competencies we can assume that we are dealing with the cooperative model of federalism.<sup>14</sup> The European integration, *i.e.* integration within the European Communities (now the European Union) was essentially limited to economic aspects and was primarily carried out using an instrument that allowed for the harmonization of law.<sup>15</sup> Over the course of time, the European Union undertook activities that went beyond economic issues, although some of them were conducted within a limited intergovernmental cooperation. Howev-

er, the problem with competences remained and it was the task of the European Court of Justice to rule on the question of competences. Now, with the Lisbon treaty the situation has changed. The treaty provides for a clear distinction between exclusive and shared competences as well as competences to support, coordinate or supplement actions of the member states.<sup>16</sup>

The dual federalism is characterized by the constitutional allocation of competencies to the federation and the constituent units. Besides, each level of government is responsible for making, financing, implementing and administering its own policies. And this is not a coincidence that in the works of the German authors, the United States model of federalism is referred to as a *Trennsystem*, which means a duality but duality of a special kind, where the federal level is responsible for enacting laws, and the constituent entities act under the control of the federation and assume responsibility for the implementation of law. This model is sometimes referred to as the functional federalism due to the fact that the legislative function in principle falls to the federation, whereas the administrative function belongs to the constituent entities. However, unlike in the case of the functional federalism, the cooperative federalism is also characterised by sharing of responsibility for decisions taken, both in the financial and the administrative sphere.<sup>17</sup>

The model of dual federalism underlines the autonomy of different levels of government (at least two) as well as the clear separation of powers. This results in each government having its own sphere of responsibility. Besides, what is important and what distinguishes at the same time the dual from the cooperative federal model is the fact that competences are allocated according to policy sectors rather than policy functions. This in turn means that each level of government carries out legislative, executive and adjudicative functions, which results in the duplication of functions. Another consequence of such an allocation of competences is that there is no need for a strong representation

of the constituent units at the federal level, *i.e.* in the central government. Therefore, the second chamber is structured according to the senate principle — an important feature distinguishing the dual from the cooperative model, where the federal council principle applies. This in turn means that each constituent unit is represented by an equal number of senators, irrespective of the size of territory and the size of population. Hence, the upper chamber does not represent territorial interests but the interests of the electorate and the political parties that directly elect their representatives. In such a model cooperation prevails, usually conducted within inter-governmental conferences. Moreover, such an institutional autonomy favours fiscal independence of the constituent units and this fiscal autonomy allows them to levy taxes and dispose of independent sources of revenue. On the other hand, the German model which is an *exemplum* of the cooperative federalism emphasizes cooperation both as far as competences and finances are concerned.

The cooperative federal model is based on a functional division of competences among all levels of government (at least two). The result of a functional division of competencies is apparent in the federal law making and the constituent units law implementing. However, there is no strict division of competences, on the contrary, the competencies overlap, hence we are dealing with shared, concurrent and complementary competencies. This implies a strong representation of the constituent units at the federal level what can be clearly seen in strong rights in the federal decision-making process. This in turn means that the major policies require the consent of both the federal government and the constituent units, *e.g.* lands, cantons, provinces, regions, states, *etc.* Thus the upper chamber, *i.e.* the chamber of the territorial representation is organized according to the federal council principle, where the constituent units are represented by the governments, according to the size of the territory but above all to the size of the population. It should be noted that in such a system

smaller units are usually overrepresented. Furthermore, sharing of competences is complemented by a joint tax system that results in a redistribution of revenues between the constituent units and a flow of money from the stronger to the weaker units — the so-called fiscal equalisation. This functional and fiscal interdependence gives rise to a joint decision-making and interlocking politics, known as an executive federalism — a political system where policies are formulated and implemented by both levels of government.

Principles of cooperative federalism provide an additional instrument that allows for an improvement of mutual relations between the federation and the constituent units. The cooperative federalism means a flexible system of mutual cooperation between the federation and the constituent units at all levels where by way of negotiations and cooperation, often in the form of cooperation agreements, common policy goals are carried out. Particularly preferred is cooperation in the legislative field, both when it comes to a framework legislation, where the federation (in the EU context — the Union) sets a general framework, which is then 'filled' by the legislation of the constituent units (respectively the member states), and when the federal legislation is implemented by the constituent units. Cooperation is also present at other levels and in many different bodies and fora of both a formal and informal character.

#### **The European Union between dual and cooperative federalism**

As it was already mentioned, there is no one federal system; however, there are two leading models, *i.e.* dual and cooperative federalism. The European Union is an example where elements of both federal models are present. Like in most federal systems, so in the European Union, we have a mixture of different federal solutions. However, in most cases we are dealing with two leading models, one that is characteristic for the U.S. federal system the other for the German federal system. Thus, depending on the intensity of one

or the other elements, we can speak about dual or cooperative federal system.

There are many areas where we can look for elements of both the dual and the cooperative federalism. One of them is the domain of competences. The division of competences between the European Union and the member states is essential for the identification of federal elements drawn from the leading federal models, since the presence of exclusive competences in the European Union indicates that we are dealing with the dual federalism, whereas the existence of shared and complementary competencies indicates that the adopted solutions originate in the cooperative federalism. However, in case of shared competences a certain problem arises, for these are the competences to which aspires at the same time the legislator of the Union and the member states. Hence, it is difficult to say in advance whether we are dealing with the cooperative or a dual federal model in a given case. However, when it comes to the field preemption by the European Union, then we can assume that *de facto* we are dealing with an exclusive competence of the Union, and *ipso facto* with the dual federalism. In another case we should assume the dominant influence of the cooperative federalism. So, as Robert Sch tze rightly observes, the doctrine of preemption shifts the boundaries of jurisdiction and establishes the federal balance in policy areas.<sup>18</sup>

The doctrine of preemption is important for each federal structure, so also for the two leading models of dual and cooperative federalism. The classic doctrine of preemption means an exclusion of the constituent units from legislating in a given area, which is then governed by the federation. This is the case of the just mentioned field preemption that is characteristic of the dual federalism and which amounts to the maintenance of two mutually exclusive areas of authority. This in turn prevents the exercise at the same time and in the same area of competences of both the federation and the constituent units.

The Lisbon treaty specifies and orders exclusive and shared competencies as well as

competences to support, coordinate or supplement the actions of the member states.<sup>19</sup> Taking into account what was said, the conclusion can be drawn that the European Union finds itself somewhere *in between* the dual and the cooperative federalism, since it contains the elements characteristic for both models. The solutions adopted may on the one hand point to the dual federalism when we are dealing with the exclusive competencies and the principle of conferral,<sup>20</sup> whereas on the other to the cooperative federalism when we are dealing with the complementary competences and the principle of subsidiarity.<sup>21</sup>

An element which encourages cooperation and which is an inherent feature of federal arrangements, in particular of the cooperative federalism is the principle of federal loyalty. The principle of federal loyalty can be defined as an obligation — both of the national (federal) government and the governments of the constituent units — to respect mutual interests and to take them into account when acting. The federal loyalty is associated *inter alia* with the fact that the constitutional division of power in federal states is limited to the assignment of responsibility without stating how tasks are to be carried out. Thus, the underlying principle of *Bundestreue* represents a *modus operandi* where two levels of government, as federal partners, use the constitutionally assigned powers and functions in a way that takes into account the good of the whole country. The principle of federal loyalty is also present in the European Union, however, it operates under the sincere (loyal) cooperation.<sup>22</sup>

Another element that speaks for federal arrangements is the principle of supremacy, which is also present in the European Union. The supremacy principle was not included in the treaty provisions but it was stated in the case law of the European Court of Justice. Although the European Union structure differs from the fully-fledged federal arrangements, the effect as to supremacy is federal — the federal law trumps the law of the constituent units,<sup>23</sup> whereas in the

European Union (previously the European Community) context the Community law prevails over inconsistent national law.<sup>24</sup> The principle of supremacy of the European law in the legal orders of the member states is an important element of a fully-fledged federal system for it concerns the hierarchy of legal norms.<sup>25</sup>

Another principle that speaks for the federal structure is the principle of subsidiarity. Subsidiarity is a general rule of conduct, applicable to the democratic structures, especially to federal arrangements. The principle of subsidiarity operates at different levels and applies to relations between the state and the citizens, the organizational structures of higher and of lower level as well as between the member states and the European Union. The principle of subsidiarity is a political and a legal directive, since it concerns, on the one hand, the allocation of powers between different levels, on the other, the exercise of concurring powers. As it was already mentioned, the majority of competencies in the European Union create a category of shared competences; only a small part has been allocated to the Union as exclusive competences. And it is the domain of non-exclusive competences where the principle of subsidiarity applies, the principle that was introduced for the first time as a general rule under the provisions of the Maastricht treaty (1992).<sup>26</sup> The principle of subsidiarity has always been associated with a federal form of government and is widely regarded as an inherent feature of federalism. The subsidiarity principle is important in the context of the examined federal models, since it applies to the shared and the complementary competences, characteristic for the cooperative federalism. The principle of subsidiarity is — not without reason — considered as a political guarantee of federalism in the European legal order. The Lisbon treaty having entrusted the national parliaments with the task to ensure compliance with the subsidiarity principle, strengthened the federal and the democratic guarantees in Europe.<sup>27</sup>

### Concluding remarks — the European Union as a federation

As was already mentioned, depending on the perspective chosen the European Union can be seen as a loose structure, an intergovernmental organization or a confederation, or a more integrated entity, a federation, a *quasi*-state or a state in the making. However, from the perspective of comparative politics, the European Union is a federation.

In the academic literature most of the authors agree that the European Union is a 'hybrid' structure. It reveals features that are characteristic for an international organization, a federal state and those that are just typical only for the Union. At the present stage of development the European Union is closest to the federation, but federation understood not as a federal state but a federation as an alternative to the federal state, a federation where member states retain their sovereign status, while at the same time accept a new entity with an international legal personality, based neither on the treaty (as is

the case for a confederation) nor on a constitution (as is the case for a federal state) but on a constitutional treaty, which in material terms resembles a constitution, a federation, which is neither based on a hierarchical order, nor dispose of a competence-competence, and where the federal law is supreme only in those areas in which it has competence to take actions, a federation without a federal state, *i.e.* the European federation that requires neither the creation of the state nor the emergence of the European nation.<sup>28</sup>

In the studies on the European integration a shift can be observed from the research based on the international relations theories towards the use of comparative methods. The research based on the theories of international relations was justified at the initial stage of the European integration. However now, when the European Union reveals features that are characteristic for the state structure, although it still remains an international organisation, the comparative method seems to be more desirable.

<sup>1</sup> In principle nation is defined in ethnic terms. Relying on Kielmansegg's definition (*community of memory, communication and experience*), we cannot speak about the European nation, since at least two conditions are not met. However, nation can be also defined in civic terms, *i.e.* people (or precisely societies, peoples) sharing ideas and values with regard to democracy, economy, solidarity, respect for human rights and political freedoms and the joint problem solving; see: Kielmansegg P.G. *Integration und Demokratie/ Europäische Integration*, M. Jachtenfuchs, B. Kohler-Koch (Hrsg.), Laske+Budrich, Opladen 1996. P. 55; see also: Kielmansegg P.G., *Lässt sich die Europäische Union demokratisch verfassen?/ Die Verfassung Europas. Perspektiven des Integrationsprojekts*, F. Decker, M. Höreth (Hrsg.), VS Verlag für Sozialwissenschaften, Wiesbaden 2009. P. 228.

<sup>2</sup> In fact, the European Union does not dispose of its own territory. It is the territory of the member states on which the European Union (previously the European Community) law is applicable. Hence, it changes with each enlargement of the European Union. Recently the accession treaty has been signed with Croatia, which will allow Croatia to become the 28<sup>th</sup> member of the European Union on 1 July 2013, in case the ratification process is successful.

<sup>3</sup> Many academic writings are devoted to the question of sovereignty. With the membership in the European Union (earlier the European Community) the sovereignty question arises: does a state loose sovereignty or preserve it. The answer varies depending on the definition adopted. According to Bodin's definition (Bodin J. *Les Six Livres de la République* (1576)) sovereignty is undivided, hence there can be only one sovereign, on the other hand according to Althusius's definition (Althusius J. *Politica methodice digesta* (1625)) sovereignty can be divided and is embodied in the nation, not in a person, *i.e.* a monarch. The concept of sovereignty changes, hence the question what nowadays makes a state sovereign: the possibility to regulate and control all affairs both in an internal as well as in an external sphere, or an influence, a state can exert on other states? In case of the European Union, it is the sovereign right of each state to participate in the integration processes. When a member, the state 'gives up' sovereign rights or in other words allows the others to have a say in the exercising of state's sovereign rights. In the European parlance we are speaking about pooling of sovereignty. What's even more important, in the Lisbon treaty there is a provision, which makes possible to withdraw the membership, thus 'regaining' sovereignty (see: art.50 TEU). We have to bear in mind that the European Union is a derivative structure whose competences are

- limited by the principle of conferral and the competence-competence belongs to the sovereign member states.
- 4 This slightly changed with the Lisbon treaty. Art.24 TUE (ex art.11 TEU) states that the Union's competence shall cover all areas of foreign policy and all questions relating to the Union's security, including the progressive framing of common defence policy that might lead to common defence. Moreover, new posts were created, namely the President of the European Council who shall ensure the external representation of the Union on issues concerning common foreign and security policy (art.15(6) TUE), and the High Representative of the Union for Foreign Affairs and Security Policy whose task is to contribute to the development of common foreign and security policy as well as conduct political dialogue with third parties on the Union's behalf and express the Union's position both in international organisations and at international conferences (art.27(1)(2) TUE). However, despite significant changes provisions on common foreign and security policy have an intergovernmental character.
  - 5 Kabat D., Rudnicki Z. "Integracja międzynarodowa: Problemy konceptualizacji i definicji" Prace z zakresu spraw europejskich i międzynarodowych, Zeszyty Naukowe nr 795, Uniwersytet Ekonomiczny w Krakowie, Kraków 2009. P. 57-101.
  - 6 See also: Pollack M.A. *Theorizing the European Union: International Organization, Domestic Polity, or Experiment in New Governance*/ Annu. Rev. Polit. Sci. — 2005. — Vol. 8. P. 380 *et seq.*
  - 7 In the literature we can encounter more or less accurate labels describing the European Union, such as: „a member-state-dominated political arrangement, see: Morgan G. *The Idea of a European Superstate. Public Justification and European Integration*. Oxford, Princeton: Princeton University Press, 2005. P. 14; „a constitutional order of sovereign States” and „a federation of sovereign States”, see Dashwood A. *The Relationship Between the Member States and the European Union/European Community/ A Review of Forty Years of Community Law. Legal Developments in the European Communities and the European Union*. Ed. by A. McDonnell. The Hague: Kluwer Law International, 2005. P. 38; „Res Publica Europea”, see: Giegerich T. *Europäische Verfassung und Deutsche Verfassung im transnationalen Konstitutionalisierungsprozess: Wechselseitige Rezeption, konstitutionelle Evolution und föderale Verflechtung*. Berlin, Heidelberg, N.Y.: Springer, 2003. P. 620; as well as „supranational Union”, see: Bogdany A., *Die Verfassung der europäischen Integrationsgemeinschaft als supranationale Union/ Die Europäische Option. Eine interdisziplinäre Analyse über Herkunft, Stand und Perspektiven der europäischen Integration*. Baden-Baden: Nomos, 1993. P. 119 *et seq.*
  - 8 See: Elazar D.J. *The Federal Polity*. New Brunswick, New Jersey: Transaction Books, 1974. P. 4; see also: Forsyth M. *Union of States: The Theory and Practice of Confederation*. Leicester: Leicester University Press, 1981. P. 2.
  - 9 See: Watts R.L. *Federalism, regionalism and political integration/ Regionalism and Supranationalism. Challenges and Alternatives to the Nation-State in Canada and Europe*. Ed. by D.M. Cameron. Montreal: Institute for Research and Public Policy, 1981. P. 4-5.
  - 10 See: Abromeit H. *Contours of a European Federation*// Regional and Federal Studies. 2002 (Spring). Vol. 12. No. 1. P. 5.
  - 11 See: Watts R.L. *Origins of Cooperative and Competitive Federalism/ Territory, Democracy and Justice. Regionalism and Federalism in Western Democracies*. Ed. by S.L. Greer. N.Y.: Palgrave Macmillan, 2006. P. 201–202; see also: Watts R.L. *Comparing Federal Systems*. 3rd ed. Montreal, Kingston, London, Ithaca: McGill-Queen's University Press, 2008. P. 8.
  - 12 See: Elazar D.J., Greilsammer I. *Federal Democracy: The USA and Europe Compared. A Political Science Perspective/ Integration through Law. Europe and the American Federal Experience*. Ed. by M. Cappelletti, M. Seccombe, J. Weiler. Vol. 1, *Methods, Tools and Institutions*, book 1, *A Political, Legal and Economic Overview*. N. Y.: Walter de Gruyter, Berlin, 1986. P. 90.
  - 13 It can be clearly seen now, in the time of crises, when in order to save the Eurozone the member states agreed to lend some money to the special fund. To this end an international agreement will be signed, however, it will not be based on the provisions of the treaty since not all member states agreed to contribute to and to participate in.
  - 14 It has to be mentioned that the treaties did not regulate the issue of the division of competencies, an important question from the standpoint of federal models. However, the situation changed with the Lisbon treaty where different categories of competencies were listed, *i.e.* exclusive, shared and to support, coordinate or supplement the actions of the member states.
  - 15 Harmonization of member states' laws primarily took place when an internal market program was being implemented that referred to four freedoms (of people, goods, services, capital) to constitute an area without internal borders (see: art.8a TEEC). The legal instrument, which was then widely used was a directive. Members states prefer directives to other legal instruments (regulations, decisions), since a directive as an instrument of international law does not interfere in national legal orders, for it binds upon each member



state to which it is addressed as to the result to be achieved, leaving to the national authorities the choice of form and methods (see: art.288 TFUE). The directive has to be transposed to national legal orders, and, in principle, operates *via* national legislation, thus it is an instrument of indirect legislation. On the European Community/Union legislative instruments see more: Schütze R. *The Morphology of Legislative Power in the European Community: Legal Instruments and Federal Division of Powers/* Yearbook of European law. 2006. Vol. 25. P. 91-151.

- <sup>16</sup> See: art.2 TFUE till art.6 TFUE. Under the Lisbon treaty there is no distinction between the Community and the Union, since the Union replaced and succeeded the European Community and became its legal successor (see: art.1 TUE).
- <sup>17</sup> See: Gunlicks A. *The Länder and German Federalism*. Manchester, N.Y.: Manchester University Press, 2003. P. 385.
- <sup>18</sup> Schütze R. *From Dual to Cooperative Federalism. The Changing Structure of European Law*. Oxford: Oxford University Press, 2009. P. 100.
- <sup>19</sup> See art.2 TFUE till art.6 TFUE.
- <sup>20</sup> Art.5(2) TUE states that 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, whereas competences not conferred upon the Union in the treaties remain with the member states. Thus, the Union can only act within the limits of the competencies conferred upon by the member states that dispose of the competence-competence and remain 'masters of the treaties'.
- <sup>21</sup> Art.5(3) TUE states that in areas which do not fall within the exclusive competence, the Union shall 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, regional or local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at the Union level. The principle of subsidiarity is used for allocation of competences not for carrying them out.
- <sup>22</sup> According to art.4(3) TUE the Union and the member states shall, in full mutual respect, assist each other in carrying out tasks which flow from the treaties, the member states shall take any appropriate measure, general or particular, to ensure fulfillment of the obligations arising out of the treaties or resulting from the acts of the institutions of the Union and shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of the Union's objectives.
- <sup>23</sup> The supremacy clause is clearly stated in the German constitution in art.31 GG „Bundesrecht bricht Landesrecht” as well as in the U.S. Constitution in art.VI cl.2 „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; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding”.
- <sup>24</sup> (...) the transfer by the states from their domestic legal systems to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail”. Judgment in the case *Costa v. ENEL*, case 6/64 (1964) ECR 585.
- <sup>25</sup> See: Starr-Deelen D., Deelen B. *The European Court of Justice as a Federator/* Publius. — 1996 (Fall). — Vol. 26. No. 4. P. 83.
- <sup>26</sup> See: fn. 21.
- <sup>27</sup> See: Protocol (no 1) on the role of national parliaments in the European Union (Lisbon treaty).
- <sup>28</sup> See: Pech L. *The European Union and its constitution: from Rome to Lisbon*. Dublin: Clarus Press, 2008. P. 89-90.