

# The European Union's Place among the International Cooperation Venues of its Member States

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## Abstract

The architecture of international legal cooperation is complex and fragmented. For European countries, in particular, the European Union forms a central framework for their cooperation, which is relatively transparent and based on well-tested rules and routines. But other international venues for law-making, at the global, regional or bilateral level, remain available for them, and may be preferred in many instances over the “main route” of the EU. Venue choice is thus an important element of legal agenda-setting and, more broadly, a pervasive question in the politics of institutional choice in European countries. Objective factors and political preferences determine which venue is chosen in a given situation, although that choice may also be constrained by legal considerations, such as the absence of EU law-making competence in a given field, or on the contrary, the existence of an exclusive EU competence in a given area.

## I. Introduction: The Choice of the Law-Making Venue

When governments identify a problem calling for a transnational legal solution, they often face a choice between acting within the framework of the

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European Union, or acting within the context of another (regional or global) international organisation, or else acting by way of a series of bilateral negotiations with individual countries, or even through informal transgovernmental networks. This *choice of law-making venue* is sometimes denied, namely when the EU has acquired exclusive competence on a given subject matter; and even when a choice exists, it can be influenced by the activity of EU institutions, in particular by the Commission, who can propose a new piece of EU legislation in order to prevent the Member States from moving to another forum, or may, on the contrary, admit that another international venue is more appropriate and encourage the Member States to act within that other venue. But there are still many occasions in which Member State governments can make a choice of their preferred law-making venue.

In this article, attention will be paid to the political and legal factors explaining why, in a given case, a particular venue is chosen.<sup>1</sup> The analysis is limited to *law-making* taken in a broad sense, i.e., including executive standard setting, but excluding operational actions, strategies, declarations, statements and other acts resulting from foreign policy activity. The analysis is, furthermore, limited to the choices made by *governmental institutions*, although it is clear that non-governmental organisations face similar choices as to which policy-making forum to privilege in their action.<sup>2</sup> Finally, this article does not address the prior question of how a given subject matter is being defined as a social problem requiring a legal response, that is, how it is decided that the problem is of such a nature that “there ought to be a law against it”; we also do not address the question how that social problem is categorized as a transnational problem, for which adequate legal solutions cannot be found exclusively at the national level. The latter move is not necessarily, and not exclusively, determined by the objective nature of the problem, but may also be dictated by the will of governments to introduce domestic legal change “through the back door”, by using the route of European or international law-making for dealing with problems which are not inherently international, but for which domestic politics does not offer a solution. Also, governments may well disagree amongst each other on whether a given problem calls for transnational rather than domestic regulation. This is very much a question of *political* preference. There are, indeed,

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<sup>1</sup> The analysis will draw, in part, on an earlier co-authored paper: *B. de Witte/A. Thies, Why Choose Europe? The Place of the European Union in the Architecture of International Legal Cooperation*, in: B. van Vooren/S. Blockmans/J. Wouters, *The EU’s Role on Global Governance – The Legal Dimension*, 2013, 23.

<sup>2</sup> On the factors determining venue choice by domestic interest organisations, see for example *J. Beyers/B. Kerremans, Domestic Embeddedness and the Dynamics of Multilevel Venue Shopping in Four EU Member States*, *Governance* 25 (2012), 263.

very few *legal* constraints on categorizing problems as being in need of transnational law-making. There are no international law limits, and hardly any constitutional law limits, on the kinds of issues that states can regulate by means of treaties; and there are few strict limits on the European Union's law-making competences.

The next section (section II) of this article will start by sketching the fragmented international *institutional landscape* which the European states have helped to create and in which they now operate and make their venue choices. Section III will discuss the main *factors*, most of which are not primarily of a legal nature, that determine the choice for one or other legal venue in a given subject area. In section IV, we will complement that discussion by considering the *political and legal constraints* that define the scope of EU Member States' venue choice, possibly prevent them from using rival law-making fora, or determine the way in which they contribute to international law-making. Section V will complement the analysis by noting that the choice of law-making venues is often not exclusive and that there are many examples of sequential and complementary law-making by different institutional fora. Section VI will conclude this article.

## II. European Law-Making Venues: An Institutional Landscape Shaped by History

The question of which state parties should be invited to join the negotiations of a law-making treaty, and the question which among several organisations with overlapping mandates should develop new rules on a given subject matter, are traditional questions of the politics of international law. After the Second World War, the proliferation of new international organisations and the increased recognition of the need for transnational law-making multiplied the occasions for venue choice, and nowhere more so than in (Western) Europe where new organisations with ambitious mandates were set up.

Within Western Europe, the *Council of Europe* was created in the 1950s with a broad mandate to develop uniform legal rules for its Member States. The instrument selected for this purpose was not the adoption of unilateral decisions by the Council of Europe. Rather, the favourite law-making instrument was, and remains until today, the adoption of conventions, i.e. international treaties. Their adoption is facilitated by the institutional machinery of the Council of Europe, but their ratification is left to the free choice

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of each Member State.<sup>3</sup> In the course of time, the Council of Europe has thus developed a large programme of harmonisation of the laws of its Member States by means of conventions. There were 214 such instruments altogether at the latest count, but this includes some 75 protocols modifying earlier conventions, and among the conventions quite a few are “limping”,<sup>4</sup> in that they have not entered into force for lack of a sufficient number of ratifications. It has been suggested that about one-third of Council of Europe conventions are currently the “common property” of the EU Member States, in the sense that they have been ratified by all those states.<sup>5</sup>

As the legislative competences of the European Union have expanded with each of its Treaty revisions, there are ever fewer subjects dealt with by Council of Europe conventions that could not also be dealt with by means of EU directives or regulations, and the Council of Europe finds it increasingly difficult to obtain or maintain control of particular issue areas as against the EU’s legal interference. Still, there remain a number of important law-making instruments of the Council of Europe for which no EU-based rival instruments have come into existence or are being envisaged, such as the European Convention on Nationality, the Framework Convention for the Protection of National Minorities and its cousin the European Charter for Regional or Minority Languages, or the European Landscape Convention.

When the EEC Treaty was concluded, back in 1957, it was clear to all that the new Community institutions would not provide the exclusive framework for the relations between the six Member States. Apart from the Council of Europe, the Community countries were involved in *other institutional cooperation frameworks*, and wished to preserve their option of adding new ones.<sup>6</sup> In fact, the EEC Treaty terminated none of the existing bilateral or multilateral treaties between Community Member States. During the negotiation of the EEC Treaty, and in the period immediately afterwards, several such “partial agreements” were concluded, also on matters related to those covered by the EEC Treaty. A prominent example was the Treaty establishing the Benelux Economic Union that was concluded on

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<sup>3</sup> See *J. Polakiewicz*, *Treaty-Making in the Council of Europe*, 1999; *F. Benoît-Rohmer/H. Klebes*, *Council of Europe Law: Towards a Pan-European Legal Area*, 2005.

<sup>4</sup> *A. Aust*, *Limping Treaties: Lessons from Multilateral Treaty-making*, NILR 50 (2003), 243.

<sup>5</sup> *M. Bond*, *The EU and the Council of Europe: Difference, Duplication or Delegation?*, in: *D. J. Galbreath/C. Gebhard*, *Cooperation or Conflict? Problematising Organizational Overlap in Europe*, 2010, 11 (13).

<sup>6</sup> See *K. Patel*, *Provincialising European Union: Co-operation and Integration in Europe in a Historical Perspective*, *Contemporary European History* 22 (2013), 649.

3.2.1958, that is, only one month after the entry into force of the EEC Treaty. In anticipation of this, Article 233 EC (today, Article 306 TFEU) stated – and still states today – that the EEC Treaty does not preclude “the existence or completion of regional unions between Belgium and Luxembourg, or between Belgium, Luxembourg and the Netherlands (...)”. A new Benelux Treaty replacing the old one was signed in 2008 and came into force in 2012. While the original focus on economic cooperation had lost its *raison d'être*, due to the development of the EU, the new treaty extends the cooperation into new policy fields, such as the environment and justice and home affairs.<sup>7</sup>

Another organisation born in the same period as the EEC is Eurocontrol. In 1960, eight European states, including five of the six European Community countries, created Eurocontrol, an international organisation charged with common air traffic management tasks.<sup>8</sup> Although the European Community gradually developed its own aviation regulations, Eurocontrol has maintained its existence as a separate international organisation with a complex legal relation to the European Union.<sup>9</sup>

In addition to using those “rival” organisations of European cooperation, the European countries have also continued to conclude numerous specific treaties among each other in areas such as tax law, environmental protection, defence, culture and education which were not (or not immediately) of interest for the European Community. Those can be called “partial agreements” (in analogy with the terminology used within the Council of Europe) or also “*inter se* agreements”, since they entail closer cooperation between states that are members of an existing, and predominant, organisation: the European Union. The politically most prominent example of *inter se* cooperation, between some Member States only, was the Schengen cooperation regime, composed of a first Agreement signed in 1985, and an implementing Convention adopted in 1990. Schengen cooperation was started at a time when a general Community-wide consensus on abolishing the controls on persons at the intra-Community borders could not be reached. The Schengen instruments were expressly presented as an interim arrangement in preparation of a final regime at the level of the European Commu-

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<sup>7</sup> For an analysis of the new treaty, see *F. Dopagne*, *Le nouveau Benelux*, R.B.D.I. 2011, 238.

<sup>8</sup> International Convention Relating to Co-operation for the Safety of Air Navigation (1960), 523 *United Nations Treaty Series* 117. The Convention has been amended several times since, and membership has grown to include almost all European countries.

<sup>9</sup> *P. Mendes de Leon*, *The Relationship between Eurocontrol and the EC: Living Apart Together*, *International Organizations Law Review* 4 (2007), 305.

nity, rather than as a separate and rival co-operation regime.<sup>10</sup> The same reasons which justified the rule of Article 233 EEC Treaty, whereby the Benelux countries could adopt more advanced measures of integration, could be applied to Schengen.

In current practice, *inter se* agreements between EU Member States are principally used for more mundane matters. They deal with subjects that are not yet absorbed within the scope of activities of the European Union, either because they are of concern only to two or three countries and not to the European Union as a whole (this is typically the case for agreements dealing with the protection of rivers or mountain ranges) or because their subject matter lies outside EU law-making competence, as is the case with culture and education,<sup>11</sup> and (more controversially) with bilateral tax treaties. These agreements are still rather numerous but they usually do not deal with vital matters of foreign policy. However, they always remain present in the toolbox of the EU states' foreign policy, as was illustrated in the context of the reform of European economic governance, with the conclusion of the Treaty setting up a European Stability Mechanism, signed by the 17 euro area states on 2.2.2012,<sup>12</sup> and of the Treaty on Stability, Coordination and Governance in the European Union, signed by 25 EU Member States on 2.3.2012.<sup>13</sup> The adoption of those instruments has been interpreted by many observers as a deliberate turn away from the EU framework and towards traditional intergovernmental venues, although this account may be overdramatized. It rather seems that there were contingent reasons, in both these cases, leading the Member State governments to consider that action within the EU framework was not an option and the conclusion of a separate *inter se* agreement was needed instead.<sup>14</sup>

The fact that the EU Member States may, in principle, continue to conclude treaties among themselves does not mean that they are entirely free to do so as and how they wish.<sup>15</sup> *Inter se* international agreements between

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<sup>10</sup> J. Schutte, Schengen: Its Meaning for the Free Movement of Persons in Europe, CML Rev. 28 (1991), 564.

<sup>11</sup> According to Article 6 TFEU, the EU is only competent to carry out actions to support, coordinate or supplement Member States' actions in these areas.

<sup>12</sup> <<http://www.european-council.europa.eu>>.

<sup>13</sup> <<http://european-council.europa.eu>>.

<sup>14</sup> For a discussion of those reasons, see B. de Witte, Using International Law in the Euro Crisis – Causes and Consequences, ARENA Working Paper No. 4, June 2013.

<sup>15</sup> For a legal analysis of the admissibility of such agreements, see B. de Witte, Old-fashioned Flexibility: International Agreements between Member States of the European Union, in: G. de Búrca/J. Scott, Constitutional Change in the EU – From Uniformity to Flexibility?, 2000, 31. See also the study by L. S. Rossi, Le convenzioni fra gli Stati membri dell'Unione europea, 2000.

two or more Member States of the EU are allowed, but only within the limits set by EU law obligations. The practical importance of the principle of primacy of EU law over partial agreements between Member States was illustrated by a judgment of the European Court of Justice in 2006 that found the application of a Schengen Convention rule to be incompatible with the rights of free movement which third country nationals who are family members of EU citizens derive from EU law.<sup>16</sup> The Court's finding was facilitated by the fact that Article 134 of the Schengen Convention contained an express conflict rule giving priority to Community law, but the position would be the same with regard to an *inter se* agreement that does not contain such an express primacy rule. This was recently confirmed by the ECJ in the *Pringle* judgment, dealing with the ESM Treaty, in which it stated:

“the Member States have the power to conclude between themselves an agreement for the establishment of a stability mechanism such as the ESM Treaty provided that the commitments undertaken by the Member States who are parties to such an agreement are consistent with European Union law”.<sup>17</sup>

The legal situation is different, of course, for conflicts between treaties concluded between EU states and *third countries*. Although the Court of Justice seeks to affirm the prevalence of EU law also in those cases, the rights which those third countries have, under the agreement, will have to be preserved.<sup>18</sup>

Finally, the various European sites of law-making mentioned above are competing with institutionalised sites of *global law-making*, some of which pre-dated the European organisations, such as the International Labour Organization and the Hague Conference on Private International Law, whereas others were developed in the post-war period as part of the broad UN family, such as the GATT and WTO, the WIPO, the United Nations Eco-

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<sup>16</sup> CJEU, Case C-503/03, *Commission v. Spain* [2006] ECR I-1097, particularly paras. 33-35.

<sup>17</sup> CJEU, Case C-370/12, *Thomas Pringle v. Government of Ireland et al.*, judgment of 27.11.2012, n.y.r., para. 109. For discussion of this part of the *Pringle* judgment, see the annotations by B. de Witte/T. Beukers, CML Rev. 50 (2013), 805 (828 et seq.); and by S. Adam/F. J. Mena Parras, E.L.Rev. 38 (2013), 848 (861 et seq.).

<sup>18</sup> I will not discuss further the question of conflicts between EU law and norms contained in treaties between its member states and third countries. See, for a detailed analysis of this question, J. Klabbers, *Treaty Conflict and the European Union*, 2009. Currently, the most controversial area in which such conflicts arise is that of foreign investment where the recently acquired exclusive competence of the EU creates problems for the continuing application of the Member States' bilateral investment treaties with third countries; see L. Pantaleo, *Member States Prior Agreements and Newly Attributed EU Competence: What Lesson from Foreign Investment*, *European Foreign Affairs Review* 19 (2014), 307.

nomic Commission for Europe, the Codex Alimentarius Commission, etc. Both inside and outside the UN, transcontinental multilateral treaties and organisations were set up to deal with matters that came to be seen as of global concern, such as the protection of human rights, the regulation of the oceans' fishery and other resources, and the global environmental problems.<sup>19</sup>

### III. Policy Considerations: Factors Influencing Venue Choice

Turning now to the factors that determine whether the European Union is chosen, or rather some other law-making venue, it may be helpful to start with a quotation from an article by *Ludwig Krämer*, a Commission official, who offered the following justification for European Community action in the field of environmental protection – he wrote this more than twenty years ago, but his words could be repeated identically by one of his colleagues today:

“There are transnational environmental problems. Pollution of the Atlantic Ocean, the North, the Baltic or the Mediterranean Seas, air pollution, the disappearance of fauna and flora species, and other environmental problems cannot be resolved by national or regional activity alone. International conventions are not fully enforced; they lack the necessary authority on the one hand and effective enforcement procedures on the other.”<sup>20</sup>

In this extract, the author provides two separate but complementary justifications: one for preferring European Union action over separate action by its Member States or their regions; and another for preferring EU action over the adoption of international conventions. In the first case, the argument is essentially one of *scale*: the nature of the problem of pollution or environmental degradation requires action at a wider than the national level. In the second case, the argument is founded on the allegedly superior *normative quality* of Union law compared to “ordinary” international treaties. The *combination* of both factors, namely the scale at which EU law operates

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<sup>19</sup> On the processes and instruments of international law-making, see generally *A. Boyle/C. Chinkin*, *The Making of International Law*, 2007. Specifically on law-making by international organisations, see *J. E. Alvarez*, *International Organizations as Law-Makers*, 2005.

<sup>20</sup> *L. Krämer*, *Community Environmental Law – Towards a Systematic Approach*, *YEL* 11 (1991), 151.

combined with that legal order's particular qualities, may help to explain the important place that EU law has come to occupy in the European legal landscape. Indeed, action at the European Union level is often less efficient and less enforceable than action at the national level, but this disadvantage can be outweighed by the transnational scale of a problem that calls for common solutions. Conversely, action at the EU level may be less suitable than multilateral action for dealing with world-wide problems, but, then, the superior quality of European law may outweigh that limited geographical scope. It is, therefore, the peculiar mixture of a relatively large-scale scope of activity and a relatively efficient system for "producing" legal rules which has made the European Union an attractive forum for law-making and, more generally, for helping its Member States to manage globalization.

We have thus identified three relevant policy considerations in venue choice: the geographical scale of the problem, the ease of decision-making, and the effectiveness of the decisions. We will discuss those three factors in turn, and then add a fourth factor which is often crucially important, namely path dependence.

So, a first important factor in deciding whether to "use" an instrument of secondary EU law or rather an international treaty including third states is the *geographical nature of the subject matter*. The territorial scope of the problem may define which states need to be involved in its solution, and hence may also determine the law-making venue. Thus, navigation on the river Rhine or protection of the environmental quality of the Rhine water cannot be effectively regulated on the basis of internal EU acts alone; they rather require agreements with Switzerland, due to the up-stream location of that country.<sup>21</sup> Similarly, protection of the environment of the Alps requires participation of as many Alpine countries as possible, but no others, so that the choice of an international agreement with nine Contracting Parties (including the EU)<sup>22</sup> could seem more appropriate than the adoption of an EU directive whose geographical scope would anyway have been limited to part of the EU territory.

The territorial scale of the problem plays, in fact, a general and ubiquitous role in determining whether internal EU law-making makes sense. For instance, if European countries decide, for a variety of reasons, that the

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<sup>21</sup> See, on the international legal regime of the Rhine: *K. Tiroch*, Rhine River, MPEPIL, Vol. 8 (2012), 984.

<sup>22</sup> Alpine Convention, Salzburg 1991. This is a Framework Convention whose provisions have been complemented by a series of Protocols of Implementation dealing with specific issues such as mountain farming, tourism and transport (see <[www.alpconv.org](http://www.alpconv.org)>). In the literature see *M. Reiterer*, The Alpine Convention and Beyond: Recent Developments Concerning Mountainous Regions, *Austrian Review of International and European Law* 6 (2001), 241.

poor labour conditions in developing and emerging countries are a matter of their concern, this does not make EU legislation a very effective response to that concern. Rather, the European countries (and the EU itself) must give their backing to efforts at global regulation developed, principally, within the context of the ILO, or else act through external agreements with the countries concerned.<sup>23</sup> Consider the similar logic underlying the question of the security of energy supply. Although internal EU measures may go some way in avoiding disruption of energy supply in the individual countries, it was vitally important for EU countries to involve the energy producing non-EU countries in such a regime, hence their interest in concluding the Energy Charter Treaty with major energy supplying countries.<sup>24</sup> In contrast with this example, many other social problems may sensibly form the object of a “partial” regulation in the form of EU legislation even though the problem remains insufficiently addressed at the global level. Thus, for example, the adoption of the EU directive on race discrimination, in 2000,<sup>25</sup> could be seen as an effective instrument for dealing with the “internal” dimension of race discrimination, without prejudice to the possibility or the need for similar action at the global level.

The relative *ease of decision-making* is a second factor that can trigger the option for one law-making venue rather than another. Compared to EU law-making, international law-making is often more flexible as regards the selection of the participants to the decision-making process, and also allows – in the case of most international treaties – for later modification between only some of the parties to the original treaty. In most cases, therefore, international treaty-making allows for the involvement of only those states that are willing to engage in regulating a certain subject matter. For example, the Schengen Agreement (1985) and Convention (1990) could be concluded between those EU states that were willing to engage in a new step of the integration process outside the participation constraints of the EU decision-

<sup>23</sup> See *J. Kenner*, Economic Partnership Agreements: Enhancing the Labour Dimension of Global Governance?, in: B. van Vooren/S. Blockmans/J. Wouters (note 1), 306.

<sup>24</sup> Energy Charter Treaty (1994); see <[www.encharter.org](http://www.encharter.org)> for its text and state of ratifications. The hopes of involving energy producing countries were only partially fulfilled. Whereas Azerbaijan, Kazakhstan and Turkmenistan have ratified the Treaty, Russia signed it but so far refused to ratify it. For the overall argument, see *S. S. Haghighi*, Energy Security: The External Legal Relations of the European Union with Major Oil- and Gas-Supplying Countries, 2007, particularly chapters 4 and 5. On the deficiency of the Energy Charter Treaty as an energy security instrument, see *P. D. Cameron*, The EU and Energy Security: A Critical Review of the Legal Issues, in: A. Antoniadis/R. Schütze/E. Spaventa, The European Union and Global Emergencies – A Law and Policy Analysis, 2011, 125.

<sup>25</sup> Council Directive 2000/43/EC of 29.6.2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L 180/22.

making process. Indeed, within the European Union system, the participating countries are pre-defined (with the exception of the enhanced cooperation mechanism and of the flexible opt-outs from which the UK and Ireland benefit in the area of justice and home affairs), and later amendments of directives and regulations must also, in principle, apply to all EU countries without the possibility of partial modifications applying to some countries only. This rigidity of the EU's participation rules is, however, compensated by the fact that, in most areas nowadays, the applicable decision-making rules provide for qualified majority voting in the Council so that reluctant Member States can be bound against their will, both in the original enactment of a directive or regulation, and in their later amendment. Also, the European Union provides to its Member States a permanent venue for law-making with tried and tested procedures and a social environment of "repeat players" which tends to favour the adoption of compromise solutions. The very breadth of the EU's law-making powers favours decision-making also in another way, namely by allowing the building of "package deals" across different law-making projects that are simultaneously considered by the EU institutions. Compromises can be struck not only within the text of a specific instrument (as is the case with one-off international treaty negotiations), but also more broadly between different sets of Council negotiations, so that a country that is forced to give in on, say, an immigration law directive can be compensated in a parallel legislative procedure dealing with, say, transport law.

The *effectiveness* of the law-making process in terms of its outcomes, in particular the compliance and dispute settlement regimes which it puts in place, is a third important factor in the choice of legal venue. In the statement quoted above, *Ludwig Krämer* pointed out that international conventions "lack the necessary authority on the one hand and effective enforcement on the other". Although increasing efforts are made in international treaty practice to "make treaties work"<sup>26</sup> through the use of more sophisticated non-compliance mechanisms,<sup>27</sup> judicial dispute settlement is still only rarely provided by multilateral treaties and even more rarely used by the parties to those treaties. EU law is rather different in this respect. The procedure of Articles 258 and following of the TFEU, through which the Commission can call the Member States to task for suspected infringements

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<sup>26</sup> See the title of a volume that discusses some recent advances in international practice: *G. Ulfstein*, *Making Treaties Work*. Human Rights, Environment and Arms Control, 2007.

<sup>27</sup> See, for an overview of compliance strategies under international legal regimes, *E. Brown Weiss*, *Rethinking Compliance with International Law*, in: *E. Benvenisti/M. Hirsch*, *The Impact of International Law on International Cooperation – Theoretical Perspectives*, 2004, 134.

of EU law, as well as the principles of primacy and direct effect which require national courts to act as enforcement agencies of European law, lead to a situation in which states and private parties perform their obligations “in the shadow of the courts”, and in which compliance with legal obligations has become the norm, more so than for rules of public international law. In some cases, though, this may precisely be a reason for governments to *avoid* the constraints of EU law by opting for the more flexible compliance regime of international treaties.

A fourth factor that determines the choice of a particular law-making venue is *path dependence*.<sup>28</sup> The existence of a treaty on a given subject matter means that later reforms will usually be adopted in the form of protocols or modifications to that treaty rather than the adoption of legal instruments in another forum. More structurally, organisations that traditionally deal with a given subject area will often seek to protect their “legal territory” against rival organisations. An interesting example of path dependence, and of its limits, is offered by the venerable Hague Conference, the organisation that has promoted the adoption of a long list of conventions in the field of private international law.<sup>29</sup> The existence of this law-making venue with a century-old tradition and a specialised set of officials and country experts did not prevent the European Union from gradually “occupying” this legal field since the mid-1990s.<sup>30</sup> The fact that a subject matter is traditionally put on some other organisation’s agenda, or is even the sole reason of existence of that organisation (as with the Hague Conference) is obviously not a sufficient reason for the EU to keep clear of it. Conversely, the European Union may be drawn into a new field of regulation as a consequence of earlier, seemingly unrelated, developments in EU law itself. The relatively recent entry of the EU into the field of immigration and asylum law originated from the perceived need of the EU Member States to accompany the opening of the internal frontiers of the EU with a whole range of so-called “flanking measures”, in relation to the access (or non-access) to that borderless territory and then, by further extension, to a limited degree of harmonisation of the rights of third-country nationals once they are admitted on EU

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<sup>28</sup> This concept is mostly used in the political science literature. See *P. Pierson*, *Politics in Time: History, Institutions, and Social Analysis*, 2004, chapter 1.

<sup>29</sup> See for a list of the “Hague Conventions”: <<http://www.hcch.net>>.

<sup>30</sup> On the partial “displacement” of the Hague Conference by the EU, see among others: *A. Schulz*, *The Accession of the European Community to the Hague Conference on Private International Law*, *ICLQ* 56 (2007), 939; *K. Boele-Woelki*, *For Better or for Worse: The Europeanization of International Divorce Law*, *Yearbook of Private International Law* 12 (2010), 1; *J. A. Bischoff*, *Die Europäische Gemeinschaft und die Konventionen des einheitlichen Privatrechts*, 2010.

territory. The recognition, by most EU governments,<sup>31</sup> that this is an area requiring common action at the European Union level contrasts with their generally very reluctant attitude towards international law-making initiatives in this area. Here we see that the existence of legal pathways at the multilateral level (both in the UN and in the Council of Europe regime) was not sufficient to convince EU member countries to fully engage with them,<sup>32</sup> whereas they did accept to engage in EU-level harmonization, once the Union had acquired legislative competences in this area.

#### IV. Venue Choice in the European Union: Agenda Setting and Legal Constraints

In this section, I will offer a more focused view of how the policy factors delineated above play out in the framework of the European Union's activity, and how legal factors complement or modify those political preferences.

Agenda-setting processes in the European Union have been the subject of important political science studies in recent years.<sup>33</sup> Those studies highlight

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<sup>31</sup> As is well known, the United Kingdom, Ireland and Denmark have a broad "opt-out" in this area of EU law. See Consolidated Version of the TEU and TFEU, Protocol (No. 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, Protocol (No. 22) on the position of Denmark and Protocol (No. 19) on the Schengen Acquis Integrated into the Framework of the European Union.

<sup>32</sup> The *UN International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* entered into force on 1.7.2003 and currently has 47 State parties, but this number does not include a single EU country. On the reasons for their reluctance, see *E. MacDonald/R. Cholewinski*, *The ICRMW and the European Union*, in: R. Cholewinski/P. de Guchteneire/A. Pécoud, *Migration and Human Rights – The United Nations Convention on Migrant Workers' Rights*, 2009, 360. Similarly, the Council of Europe's *Convention on the Legal Status of Migrant Workers* (CETS No. 93) entered into force in 1983 but has acquired, 30 years later, only 11 ratifications, including 6 EU member states. It remains to be seen whether EU states will be more willing to ratify the ILO's *Domestic Workers Convention* (No. 189), which entered into force on 5.9.2013 and has so far been ratified by two EU Member States, Germany and Italy. Generally, on the difficult struggle to develop an international legal regime of migration governance, see *D. Thym*, *Towards International Migration Governance? The European Contribution*, in: B. van Vooren/S. Blockmans/J. Wouters (note 1), 289; and *B. Ryan*, *In Defence of the Migrant Workers Convention: Standard-Setting for Contemporary Migration*, in: S. S. Juss, *The Ashgate Research Companion to Migration Law, Theory and Policy*, 2013, 491.

<sup>33</sup> *B. G. Peters*, *Agenda-Setting in the European Union*, in: J. Richardson, *European Union: Power and Policymaking*, 2001, 77; *S. Princen*, *Agenda-Setting in the European Union*, 2009; *J. Tallberg*, *The Agenda-Shaping Powers of the EU Council Presidency*, *Journal of European Public Policy* 10 (2003), 1; *V. Guiraudon*, *European Integration and Migration Policy: Vertical Policy-Making as Venue Shopping*, *J. Common Mkt. Stud.* 38 (2000), 251; *M. Rbihard*, *Framing Europe: The Policy Shaping Strategies of the European Commission*, 2010.

that a decision-making process, on any given matter, is preceded by a phase of agenda-setting in which policies are framed, i.e. a set of social facts are identified as a problem requiring a policy response. This framing process is accompanied by discussion of the appropriate institutional framework (or venue) in which that policy response should be elaborated.<sup>34</sup> However, once a decision-making process has started, questions of venue choice do not necessarily disappear from sight. The venue in which the process has started may still be contested by some of the participants. This happens frequently in the European Union.

The Member States, in particular, are leading actors of the EU process and can express their venue preferences within that context. The European Council and the EU Council of Ministers act as major “signposting” institutions within the EU decision-making process. Since those two institutions are composed of representatives of the EU Member States, they are well positioned to decide whether to pursue an EU-law course of action proposed to them by the Commission<sup>35</sup> or, on the contrary, decide that an alternative international law-making project would be possible and preferable. In practice, Council working groups act as the institutional settings in which the vast majority of Council decisions are effectively adopted, but they are also the settings in which Commission proposals occasionally get stranded so that they never reach the higher-level echelons of COREPER and the Council of Ministers meetings. One of the reasons why Member State officials in those working groups may be unwilling to support a Commission initiative is their desire to privilege an alternative, international, law-making project in which their country is, or could be, involved. Since national officials representing their Member State in a Council working group are usually subject-matter specialists, they often simultaneously act as the national representatives in other international fora dealing with the same subject matter (for example, in the Council of Europe), and may behave as umpires who decide, together with their homologues from other Member States, on whether it is worth to pursue a regulatory project in the EU context or rather divert it to some alternative international law-making venue.

Other international organisations may, through the activity of their secretariats, try to “occupy the field”, by launching preparatory work on a law-

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<sup>34</sup> See in particular *S. Princen* (note 33), chapter 2.

<sup>35</sup> The Commission initiates almost all EU legislation, and also produces documents that explain the reasons why, in its view, EU action is justified or necessary: explanatory memoranda accompany the proposal itself but, further upstream, the Commission often seeks to “pave the way” for EU-level action by means of Green or White Papers.

making treaty and by co-opting, for that purpose, the national government officials in charge of the subject matter. Those co-opted national officials may, in turn, feel reluctant towards rival initiatives that might arise from the side of the European Commission. This may seem to be a very mundane explanation, but as a matter of fact, it regularly happens that a subject matter is randomly embedded within an organisation even though it could equally have been dealt with by another organisation. Rivalries between universal organisations, such as the UN and the ILO, or the WTO and UNESCO, are well-known, but there are similar rivalries between the EU and other organisations that operate in the same policy fields. One important consideration, in this context, is that the EU itself is not a member of many global organisations, so that it cannot effectively act to stop an initiative that is launched within those organisations. For example, the European Union, not being a member of the International Labour Organization, could not directly prevent the ILO from launching the process leading to the adoption, in June 2011, of the Convention No. 189 Concerning Decent Work for Domestic Workers; it could only have counteracted this process by acting “from the outside”, that is, by submitting a Commission proposal for legislation on the same subject. Such a proposal would have been within the scope of EU legislative competences but it would likely have raised opposition within the Council working groups composed of national experts who were – at the same time – involved in the ILO law-making process. So, the Commission preferred not to act and the EU, as an organisation, remained on the side lines of this important law-making project.<sup>36</sup>

The question of the EU's membership of international law-making fora leads us to the broader question of the *legal constraints* that may determine the choice of venue. The main legal consideration is the division of competences between the EU and its Member States. In some policy areas, law-making by the European Union is precluded, and therefore its Member States, if they want to cooperate, must do so in another international legal framework. Vice-versa, in some other policy areas, the European Union has acquired exclusive competence, which means that the Member States can no longer engage in law-making initiatives outside the EU, unless they are expressly allowed to do so by the European Union itself. In the latter case, the Member States need to act as “trustees” of the EU.<sup>37</sup> This happens, in par-

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<sup>36</sup> EU support from the side lines came in the form of a European Parliament resolution of 12.5.2011 “on the proposed ILO convention supplemented by a recommendation for domestic workers”, P7\_TA(2011)0237 which called on the EU member states to ratify and implement the convention quickly (point 1 of the resolution).

<sup>37</sup> M. Cremona, Member States as Trustees of the Union Interest: Participating in International Agreements on Behalf of the European Union, in: A. Arnulf/C. Barnard/M. Dougan/E.

ticular, when an international organisation develops a law-making initiative in a field which belongs to the EU's exclusive competence, but the EU itself is not a member of that organisation: in *Opinion 2/91 (ILO Convention)*, the Court held that where constitutional rules of the international organisation presented an obstacle to the EU's exercise of competence, such competence would need to "be exercised through the medium of the Member States acting jointly in the Community's interest".<sup>38</sup>

Most policy areas, however, fall within the vast domain of the EU's shared competences, which means, in principle, that the Member States have a discretionary choice of law-making venues between the European Union and some other international framework; and when they act on the international plane, they can do this on their own or together with the EU in the form of a mixed agreement. Yet, the legal situation is much more blurred and uncertain than what appears at first sight, due to two factors. *Firstly*, the EU's shared competences may become exclusive by being exercised to the extent of "covering the field", so that the Member States gradually lose the capacity to act on the international plane. It is often not easy to determine whether that is the case, and this gives rise to tensions between the Commission and European Parliament (who defend the exclusive role of the EU) and the Member States (who insist on preserving their own scope for external activity). For example, it is not clear at all whether the "internal" legislative activity of the Union in respect of visa policy and border control has brought about a situation where the Member States have lost the competence to act separately from the EU in those fields, which belong to the traditional domain of state sovereignty.<sup>39</sup>

The *second* source of uncertainty is the principle of loyalty, as developed by the ECJ in a number of judgments, which implies that the Member States, even when they have preserved the competence for international law-making, must exercise it with due regard to the interests of the Union.<sup>40</sup> This may involve "special duties of action and abstention" for them, which arise once there has been a "point of departure for concerted [EU] action"

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Spaventa, *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood*, 2011, 435.

<sup>38</sup> CJEU Opinion 2/91, *ILO Convention No. 170* [1993] ECR I-1061, paras. 5, 37; confirmed in C-45/07, *Commission v. Greece (IMO)* [2009] ECR I-701, para. 31.

<sup>39</sup> For a discussion of this point, see *B. Martenczuk*, *Migration Policy and EU External Relations*, in: L. Azoulai/K. de Vries, *EU Migration Law – Legal Complexities and Political Rationales*, 2014, 69 (81 et seq.).

<sup>40</sup> *M. Klamert*, *The Principle of Loyalty in EU Law*, 2014, in particular the chapters 8 and 10.

in the context of international treaty negotiations.<sup>41</sup> In the *PFOS* case, the Court concluded that Sweden had been under an obligation to refrain completely from unilateral action that could lead to the amendment of an Annex to the Stockholm Convention on Persistent Organic Pollutants.<sup>42</sup> While both the EU and its Member States are parties to this Convention – and share competence in the area of environmental policy in principle (see Article 4 (2) (e) TFEU) – the Court held that Sweden's unilateral action interfered with an existing Council strategy. In sum, the Court has identified far-reaching legal constraints of the Member States' international law-making activities where the EU and its Member States are both active in the same international forum.

## V. Sequencing and Coevolution

We have seen, so far, that the EU Member States are often able to choose between a variety of law-making venues. The nature and legal framework of the EU also lends itself to venue choices which are not exclusive but complementary, in that they involve the combined use of various law-making venues in a given time sequence. The wide scope of the EU's domestic legislative competences, and the advanced level of harmonisation (often based on existing national law of the Member States) establish a solid point of departure for the *export* of existing EU law to the international legal order. At the same time, the existing international law obligations imposed on individual EU Member States and the EU's own growing contribution to international law-making lead to the opposite phenomenon of *import* of international law into the EU domestic legal order.

The European Union generally adopts a “governance mode” in its foreign relations,<sup>43</sup> and, more specifically, seeks to export its regulatory standards to other countries, particularly those situated in its neighbourhood.<sup>44</sup>

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<sup>41</sup> CJEU C-266/03, *Commission v. Luxembourg* [2005] ECR I-4805, para. 59, and C-433/03 *Commission v. Germany* [2005] ECR I-6985, para. 65.

<sup>42</sup> CJEU C-246/07, *Commission v. Sweden* [2010] ECR I-3317; *M. Cremona*, Case Comment on C-246/07, *Commission v. Sweden* (PFOS), CML Rev. 48 (2011), 1639. The Court has been criticised for establishing a Member States' “duty to remain silent”, which could have a negative impact on international cooperation: *A. Delgado Casteleiro/J. Larik*, The Duty to Remain Silent: Limitless Loyalty in EU External Relations, E.L.Rev. (2011), 522.

<sup>43</sup> *G. de Búrca*, EU External Relations: The Governance Mode of Foreign Policy, in: B. van Vooren/S. Blockmans/J. Wouters (note 1), 39.

<sup>44</sup> *M. Cremona*, Expanding the Internal Market: An External Regulatory Policy for the EU?, in: B. van Vooren/S. Blockmans/J. Wouters (note 1), 162.

This can happen in several ways, either by the EU and/or its Member States participating in multilateral negotiations in which they promote the adoption of pre-existing EU norms, standards and values; or by means of bilateral agreements in which the EU seeks to incorporate its own regulatory norms.<sup>45</sup> The European Union also seeks to export its norms indirectly, by including rules in its *internal* legislation that apply to activities in third countries, thereby seeking to provoke changes in international standard setting or in the legislation of third countries.<sup>46</sup>

We find equally frequent examples of “downstream” sequencing, whereby international law-making is followed by EU legal implementation rather than Member State implementation. Such downstream sequencing is favoured if international institutions find channels for influencing the EU decision-making process.<sup>47</sup> It is also facilitated if the European Union is a member of the broader international organisation and can therefore, with or without its Member States, influence the content of the international norm which will then be implemented at EU level. This is, for example, the case of food standards which are set at the global level by the Codex Alimentarius Commission of which the EU has become a member in 2003.<sup>48</sup> Similarly, the recent accession of the EU to the Hague Conference on Private International Law<sup>49</sup> allows the EU (in fact: the Commission) to be more directly involved in the coordination between the “Brussels” and “Hague” tracks of private international law harmonisation; as the Commission put it in its explanatory memorandum of the accession decision,

“membership would enable the Community to fully participate in the negotiations of [Hague] conventions in areas of its competence by expressing its views

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<sup>45</sup> See for example the Agreement on the establishment of a European Common Aviation Area which the EC and its Member States concluded in 2006 with eleven European countries that were either candidates for accession or “new neighbours”, OJ 2006 L 285/3.

<sup>46</sup> The latter phenomenon has been carefully documented in a recent article: *J. Scott*, Extraterritoriality and Territorial Extension in EU Law, *American Journal of Comparative Law* 62 (2014), 87.

<sup>47</sup> For a series of case studies, from a political science perspective, of such influence, see *O. Costa/K. E. Jørgensen*, *The Influence of International Institutions on the EU – When Multilateralism Hits Brussels*, 2012.

<sup>48</sup> Council Decision 2003/822/EC of 17.11.2003 on the accession of the European Community to the Codex Alimentarius Commission, OJ 2003 L 309/14. See *M. Masson-Matthee*, *The Codex Alimentarius Commission and Its Standards*, 2007.

<sup>49</sup> Council Decision 2006/719/EC of 5.10.2006 on the accession of the Community to the Hague Conference on Private International Law, OJ 2006 L 297/1.

and positions and ensuring the consistency and coherence between its own rules and envisaged international instruments.<sup>50</sup>

Sequencing may also operate both ways, from the European to the international level and back again, within one and the same issue area. A recent example of such circular sequencing is offered by the protection of the rights of disabled persons. After having enacted, in 2000, a Directive which prohibits discrimination in employment on a number of grounds, including disability,<sup>51</sup> the EU claimed participation in the negotiation of a much broader UN instrument on the rights of disabled persons. In that negotiation arena, the EU was an active and influential participant. It sought to “export” its own internal disability regime on the international stage, but was eventually pushed by a coalition of NGOs and some other states’ delegates to accept a broader range of legal obligations which focuses on substantive entitlements rather than “just” non-discrimination.<sup>52</sup> Thereby, the UN Convention, as adopted in 2006 and ratified by the EU, now forms the basis for new implementing measures at the EU level (as well as by the EU Member States separately).<sup>53</sup>

There are, in fact, many similar cases of “coevolution”,<sup>54</sup> whereby law-making in the European Union develops in close connection with corresponding international law-making enterprises. Possibly the richest area of interplay between EU instruments and international regimes is that of environmental protection, where one finds all kinds of permutations.<sup>55</sup> Another striking example, in a very different policy area, is that of the legal regula-

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<sup>50</sup> European Commission, Proposal for a Council Decision on the accession of the European Community to the Hague Conference on Private International Law, COM (2005) 639 of 9.12.2005, 2.

<sup>51</sup> Council Directive 2000/78/EC of 27.11.2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303/16.

<sup>52</sup> *G. de Búrca*, The EU in the Negotiation of the UN Disability Convention, *E.L.Rev.* 35 (2010), 174.

<sup>53</sup> The need for implementing measures by the EU is acknowledged in the Commission’s communication *European Disability Strategy 2010–2020: A Renewed Commitment to a Barrier-Free Europe*, COM(2010) 636 of 15.11.2010. On the question of what should be done by the EU, and what should be left to the Member States, see *L. Waddington*, The European Union and the United Nations Convention on the Rights of Persons with Disabilities: A Story of Exclusive and Shared Competences, *MJ (Antwerp)* 18 (2011), 431.

<sup>54</sup> On that notion, see *S. Oberthür/T. Gebring*, Conceptual Foundations of Institutional Interaction, in: *S. Oberthür/T. Gebring*, Institutional Interaction in Global Environmental Governance: Synergy and Conflict among International and EU Policies, 2006, 19 (30).

<sup>55</sup> See a collection of essays dealing with specific areas of environmental regulation from this perspective of overlapping regulatory regimes: *S. Oberthür/T. Gebring* (note 54). See, further, the chapters by *G. Marin Duran/E. Morgera/J. Scott/L. Rajamani* in: *B. van Voorren/S. Blockmans/J. Wouters* (note 1).

tion of transfrontier television. In the late 1980s, with the advent of cable and satellite distribution of television programmes, the question arose of how to ensure the free flow of television programmes whilst allowing the single countries to preserve their autonomous media policies. The issue was put on the agenda of the Council of Europe and the European Community almost simultaneously. Parallel and rival law-making projects ensued, and it took a decision of the European Council at its Rhodes summit of 1988, to streamline both projects so that the resulting EC Directive on transfrontier television and the Council of European Convention on Transfrontier Television would contain similar and mutually compatible rules.<sup>56</sup> Since that time, the European Union directive was heavily amended on two occasions, and the Council of Europe sought to “catch up” by adapting its own Convention to the changing regulatory regime of the European Union. In this case, the coevolution is one in which the European Union has acquired a clear leadership, and the Council of Europe struggles to maintain an autonomous role.<sup>57</sup>

## VI. Conclusion

The architecture of international cooperation<sup>58</sup> is complex and rather opaque. For European countries, the European Union forms a central framework for their cooperation, which is relatively transparent and based on well-tested rules and routines. But the less obvious international venues for cooperation remain available, and may be preferred in many instances over the “main route” of the EU. Venue choice is thus an important element of “legal agenda-setting” and, more broadly, a pervasive question in the politics of institutional choice in European countries. Objective factors and political preferences determine which venue is chosen in a given situation, although that choice may also be constrained by legal considerations, such as the absence of EU law-making competence in a given field, or on the contrary, the existence of an exclusive EU competence in a given area.

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<sup>56</sup> European Council Conclusions, Rhodes 2.-3.12.1988, 8. See *J. Harrison/L. Woods*, *European Broadcasting Law and Policy*, 2007, chapter 5.

<sup>57</sup> For a recent account of the coevolution between the two legal regimes, see *U. Fink/T. Keber/P. Roguski*, *Die Zukunft der Medienregulierung im Europarat*, *Zeitschrift für Urheber- und Medienrecht* (2011), 292.

<sup>58</sup> An expression used by *K. Raustiala*, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, *Va. J. Int'l L.* 43 (2002), 1.