The EU as a Confederal Union of Sovereign Member Peoples: Exploring the potential of American (con)federalism and popular sovereignty for a constitutional theory of the EU

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3 The EU as an inverted confederation with a federate superstructure: The strengths of a modified confederal form

1 Introduction: Three general propositions on the nature of the EU

So where do these comparative findings leave us? Switching to a more analytical mode this chapter further refines the semi crude results of our comparison. The central aim is to better extract and test any explanatory power for the EU they might hold.

To that end this chapter brings together the different comparative insights into three more general *propositions*. First, how the EU may be understood as an *inverted* confederation, which has reversed the traditional confederal focus from the external to the internal. Second, how the EU has adapted the confederal form by *reinforcing and burdening its confederal basis with a partially federalized superstructure*. Third, how this inverted and adapted structure *heavily relies on a rule by law*, and therefore on the very stable legal and administrative systems of its Member States. The term 'modified confederation' will be used to refer to these three propositions and the modernized system they jointly create more generally.

To expound and test these propositions they will be applied to the EU. In line with the overall objectives of this thesis the question thereby is whether these confederal propositions help us to better understand the nature and functioning of the EU. More specifically it will be examined if these propositions help us to better comprehend some of the surprising strengths of the EU, as well as some of its weaknesses.

To this end this chapter first introduces each proposition, and discusses how they flow from the comparative findings in the previous chapter. For each proposition, and the modifications underlying it, it will then be explored if they help explain some of the remarkable *strengths* of the EU's constitutional set-up. After all, confederal systems are not exactly known for their robustness, so it must be wondered how the EU has managed to survive so far. Has it, for instance, managed to remove or compensate for some of the structural weaknesses traditionally associated with confederal systems? Approaching the EU through these confederal propositions may, therefore, help to expose some of the hidden pillars of EU stability. Pillars which could then be further developed, or at least guarded from accidental demolition.

Subsequently it must also be examined if the modified confederal system of the EU, as captured in these propositions, may help to better understand the obvious *weaknesses* of the EU's constitutional structure. For several well-known ailments of the EU may be partially understood as logical consequences of its modified (con)federal set-up. Ailments which either can be traced back to the traditional weak spots of the confederal form, or which may have been newly created by the EU modifications to the traditional confederal form.

It should be noted that the analysis in this chapter remains descriptive. Although no longer based on a structured comparison alone, the analysis aims to describe and understand the EU constitutional system as it is, including both its strengths and weaknesses. It does not yet concern the question whether a (modified) confederal system is also an option that should be normatively desired.

1.1 Structure

In light of these aims this chapter is structured as follows. Section 2 first introduces the first proposition on the inverted nature of the EU confederal form, and subsequently explores its potential contribution to strengthening the constitutional framework of the EU. Sections 3 and 4 then do the same for the other two propositions on the federate superstructure of the EU and its reliance on a rule by law. Combining these three propositions, sections 5 and 6 then return to the withering criticism levelled by Madison against confederal systems: Do the modifications described help to alleviate the confederal ailments he diagnosed?

1.2 Caveats and limits

Clearly the comments in this section are equally affected by all the limitations of the comparison it rests on. In light of the type of analysis, its restricted scope, and the vast, multifaceted problems under study the limitations of these conclusions must again be stressed. Different conclusions and propositions, furthermore, could be selected for discussion, and even within the confederal perspective suggested much more work is required than can be done here.

Based as they are on a limited comparison, furthermore, and on the relatively abstract discipline of constitutional theory, the conclusions developed here cannot proof direct, specific causality, if only because they lack the empirical foundation such claims would require. Nor can they claim to be sufficient explanations, as many other factors relevant for objects and processes under study cannot be taken into account here. Rather, any conclusions drawn suggest likely relations and consequences based on the analytical, comparative approach followed. By themselves these might form the

basis for more specific research in the future. At the same time it is nevertheless claimed that the proposed conclusions are sufficiently likely, and offer a constructive framework to approach and understand the EU constitutional order. A claim at least made likely by the fit between some of the generally acknowledged strengths and weaknesses of the EU, and those indeed predicted by the propositions developed here.

2 The inverted confederation: Europe as Impire

Traditionally confederations were primarily focussed externally. Their main objectives and competences lay in defence and foreign policy.[1] Internally, their role was limited, and the members' internal organization was left relatively intact.[2] The US Confederation followed this traditional pattern. It had exclusive war competences as well as general external competences. Legally it removed the states from the international plane, as under the Articles these were no longer allowed to conduct independent external relations.[3] Its internal competences, on the other hand, were limited. Most importantly it lacked the power to regulate trade internally, even though the Articles explicitly contained prohibitions we would now qualify as negative integration. A lack of internal competences that, as discussed above, contributed to its overall instability.[4]

The EU *inverted* this traditional confederal pattern. It lacks the external, and especially the military, focus and competences of the Confederation. Instead its primary focus is *internal and economic*.[5] With its mutually reinforcing

1 The United Provinces of the Netherlands, for instance, originated *de facto* in the wartime alliance that was the Union of Utrecht of 1579, and its main powers remained in external relations, defence and crucially the navy. The original Swiss confederation (1291(or 1315)-1798) also was defensive in origin. The restored Swiss confederation (1815-1848) was aimed at both 'economic and military affairs', though its main focus was defensive as well. The economic dimension largely related to the attempted unification during the Helvetic Republic, which could not be undone. Rather, it was only after the more federate constitution of 1848 that the central union really entered the field of welfare and economy. The German Bund of 1815 was also mainly focussed on security and defence, even if this security focus was also focussed internally. Hence the later separate development of the *Zollverein*. Carl Schmitt even defines a confederation as an '*alliance*', being a 'contractual relation that obligates a state to go to *war* in a particular instance.' Schmitt (2008), 383. See further Lenaerts (1990), 233. Forsyth (1981), 17, 27, 29, 48, and 160, 190, and Elazar (2006), 7.

2 Jensen (1970), 133.

3 The fact that in practice the states often blatantly violated this obligation does not detract from the legal or constitutional focus of the Articles.

4 See chapter 1, section 5. A pattern also born out by its institutional development. The departments that were relatively developed were war, foreign affairs, and finances.

5 See also Forsyth (1981), 5.

objectives of European peace and prosperity its centre of gravity lies with the internal organization of its Member States and its market.[6]

The primary *instrument* chosen to achieve the objectives of peace and prosperity reflects this internal focus: economic integration, which is not just an end in itself but also fosters interdependence via peace-dependent wealth.[7][8] Not incidentally this instrument involves the creation of one *internal* market.[9] Constructions which Elazar pertinently defines as 'forms of confederation emphasizing shared economic rather than political functions', and as such form a 'postmodern application of the federal principle.'[10] Logically, the specific competences of the EU match its internal focus. As discussed above its key competences concern the development of an internal market, and other related internal objectives.[11]

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6 Chalmers, Davies and Monti (2010), 12, 676, Van Middelaar (2009), 224-225. M.P. Maduro, 'Reforming the Market or the State? Article 30 and the European Constitution: Economic Freedom and Political Rights' 4 *European Law Journal* (1997), 55 or Elazar (2006), 53: 'because the countries of Western Europe had mature economies, economic integration was the most logical way for them to proceed. In doing so, they invented a new way to confederate, through the Union of specific functions rather than through a general act of confederation.'

7 Cf already the Schuman declaration of 9 May 1950 and its openly federal vision: 'The solidarity in production thus established will make it plain that any war between France and Germany becomes not merely unthinkable, but materially impossible. The setting up of this powerful productive unit, open to all countries willing to take part and bound ultimately to provide all the member countries with the basic elements of industrial production on the same terms, will lay a true foundation for their economic unification.' See in this regard also the neo-functionalist hopes underlying integration, which were based on the functionalist theories as developed by *inter alia* Mitrany and Haas. See D. Mitrany. 'The Prospect of Integration: Federal or Functional', 4 *Journal of Common Market Studies* (1966), 119, E. Haas, *Beyond the Nation State: Functionalism and International Organization* (Stanford University Press 1964) and P. Schmitter, 'Three Neo-Functional Hypotheses about International Integration' 23 *International Organization* (1969), 562.

8 Cf Habermas (2001a), 5, 7 and 13: 'EU elites have replaced the original aims (of integration) with an ambitious economic agenda'. Of course, as he states, this focus also is a weak point for legitimacy: 'Economic expectations are not a strong enough motivation to induce the population to give their political support to the risk-filled project of the creation of a "Union" that would be deserving of the name. for that we need a common value orientation.' and the problem therefore lies in 'disparity between dense economic and weak political interpenetration.'

9 See for instance the language in the Treaty of Rome where the customs union, free movement, and transport are all grouped in title II, appropriately called: '*The Foundations of the Community*'. See also case 26/62 *Van Gend en Loos*, where the Court unequivocally states that: 'The objective of the EEC Treaty, which is to establish a common market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states.' Also see H. Lindahl, 'Sovereignty and Representation in the European Union', in: N. Walker (ed), *Sovereignty in transition* (Hart Publishing 2006), 104.

10 Elazar (2006), 7.

11 See especially art. 3-5 TFEU, yet also art. 21 TEU, and above chapter 2, section 4.3.3.

On the other hand the EU plays a far less prominent role in general external relations, especially of the 'high politics' kind.[12] Its role is even more limited in defence and national security, especially when compared with the Confederation. Not incidentally the EU was created after two devastating wars *between* European nations. Europe had to be protected against its own (once) powerful armies and the nationalist ambitions and emotions that had inspired their use.[13] The luxury of this internal focus was of course made possible only by American (nuclear) protection,[14] which sheltered the EU from a more Spartan upbringing it might not have survived.[15] The fact that even the Russian threat and the heated fears of the Cold War, realistic or not, did not lead to more far-reaching military cooperation underscores this internal focus of the European project, and its lack of a strong external, and certainly military, dimension.[16] The failure of the European Defence Community and the Political Union further completes this picture.[17]

12 Art. 24(1) TEU not incidentally maintains a separate status for this area. See also E. Cannizzaro, 'Unity and Pluralism in the EU's Foreign Relations Power', in: C. Barnard, *The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate* (OUP 2007), 232.

13 This transformation of nationalism into an enemy by itself may also have assisted in the non-military focus of the EU. After all military might is of no use against such an ethereal enemy, but might only help to increase it.

14 Cf. S. Hoffmann, 'Obstinate or Obsolete? The fate of the Nation-State and the case of Western Europe' , 95 *Daedalus* (1966), 3. Of course the US also had their own aims and uses for European integration. These included, *inter alia*, a strong western European block against Russia. See on this point T. Schwartz, 'The Skeleton Key: American Foreign Policy, European Integration, and German Rearmament, 1949-54' 10 *Central European History* (1986), 369, as well as the express desire of the Americans, already in 1949, for the Europeans to establish some form of 'supranational institutions, operating on a less than unanimity basis for dealing with specific, economic, social and perhaps other problems' (Minister Acheson to his European ambassadors, letter of 19 October 1949, in A. Milward, *The Reconstruction of Western Europe, 1945-1951* (Methuen & Co 1984), 391.

15 The cold-war reality of course also meant that the nations of Europe could not even have conducted much of an independent foreign policy even if they had united for that purpose. Cf Habermas as cited in J. P. McCormick, *Weber, Habermas and Transformations of the European State* (CUP 2007), 198.

16 The fact that some of the most dominant Member States disagreed significantly in world views also prevented joint action externally of course. Furthermore this is not to deny the clear threat that the six perceived Russia to be. Adenauer, for instance, saw a German-French cooperation as a clear means to protect western Europe against Russia (Cf his statements in J. Koch, 'Konrad Adenauer und der Schuman-Plan. Ein Quellenzeugnis', in: K. Schwabe (ed), *Anfänge des Schuman-Plans 1950-1951* (Bruylant 1988), 131 et seq. The more limited point here is that they nevertheless did not feel a sufficient need to set up an external defense capacity, such as in the US Confederation, to counter this threat.

17 The European Defence Community was a clear failure, and the WEU has equally never really played any role of significance. See for instance Dwan (2001), 141.

2.1 *The relevance of the external for the EU…*

Clearly these findings do not deny the increasing, and increasingly important, external dimension of the EU, also in 'high' politics.[18] Since the Treaty of Rome the EU has seen an impressive increase in its external objectives and powers.[19] The fall of the Berlin wall also pushed the EU further onto the international stage: one could say that before 1989 the wall also kept part of the high politics *out* of European integration.[20]

Especially with Maastricht and Lisbon, therefore, the EU has become an increasingly important international actor.[21] The establishment of the European External Action Service,[22] and the creation of the High Representative,[23] together with the 'incorporation' of the former third pillar are only recent, though significant, developments in this ongoing process.

In addition to these explicit external competences, furthermore, the external has become increasingly enmeshed with the 'internal' and economic competences. To begin with, and largely due to the progressive case law of the Court of Justice, the EU is externally competent where this is necessary to effectively pursue an internal competence or objective,[24] wherever it is provided for in a legally binding Union act,[25] or where the external act is likely

18 Cf in this regard also the 'Declaration on The European Identity' published by the Nine Foreign Ministers on 14 December 1973 in Copenhagen, especially point 6: 'Although in the past the European countries were individually able to play a major rôle on the international scene, present international problems are difficult for any of the Nine to solve alone. International developments and the growing concentration of power and responsibility in the hands of a very small number of great powers mean that Europe must unite and speak increasingly with one voice if it wants to make itself heard and play its proper rôle in the world.'

19 Under the Treaty of Rome, for instance, there were 86 treaty articles dealing with specific competences and decision-making rules. Under Nice this had already grown to 254, and Lisbon has only increased this number. See A. Maurer *Committees in the EU system: A deliberative perspective*, 8. Available via: http://www.sv.uio.no/arena/english/research/projects/cidel/old/Workshop_Firenze/contMaurer.pdf.

20 Cf also Van Middelaar (2009), 186, 190, and 255 et seq.

21 Most certainly so in areas where it has exclusive competences, such as in the CCP. See art. 206-207 TFEU and already Opinion 1/75 [1975] ECR 1355. Here the EU forms a strong block.

22 Art. 27(3) TEU, Council Decision of 26 July 2010 establishing the organisation and functioning of the European External Action Service (2010/427/EU) *OJ* (2010) L 201/30. Blockmans and Hillion (2013).

23 Art. 18 TEU.

24 Now also see art. 216(1) TFEU. Case 22/70, *AETR*, and for recent application the open skies cases, including case C-467/98 *Commission v Denmark* ('Open Skies') [2002] ECR I-9519.Further for the elaborate development of this principle P. Eeckhout, *The External Relations of the European Union: legal and Constitutional Foundations* (OUP 2004), ch. 3.

25 Opinion 1/94 *World trade Organization Agreements* [1994] ECR I-5267, para. 95, Opinion 2/92 *Third Revised Decision of the OECD on National Treatment* [1995] ECR I-521 par. 33 and Case C-476/98 *Commission v. Germany* (Open Skies) [2002] ECR I-9855 par. 109.

to affect common rules or alter their scope.[26] The internal competence, so to say, begets the external competence as well. These internal-external competences are, furthermore, flanked by the doctrine of loyal cooperation.[27] Even where the Member States remain competent to act, and even where the area concerned does not fall within the competence of the EU at all, their actions may not interfere with any EU measures in place. In this way EU measures affect the external activity of Member States in areas where the EU has no competence at all.[28]

Lastly, and conversely, the external relevance of the internal achievements of the EU should not be underestimated. Precisely by forming one coordinated block internally the external relevance of the EU and its members is enhanced. Larger Member States, who can with some credibility claim to speak on behalf of 'Europe' externally, may in this way enhance their external relevance, or at least somewhat reduce the loss of external relevance *vis-à-vis* upcoming powers. In this sense the EU can be seen as a *replacement* for Empire instead as the creation of an impire.[29] Smaller Member States may (jointly) acquire some influence on the international plane, which would be wholly absent without the EU. Lastly, the presence of a strong Europe on the multi-polar chessboard might be welcomed by different external actors, albeit for different reasons.

2.2 …but the primacy of the internal and economic

The inverted focus of the EU, therefore, does not imply the absence of an external dimension. Just as the American Confederation did have an internal dimension, the EU does have an external dimension, and one that is becoming increasingly important. In fact, just as one major challenge for the Confederation became to establish an adequate internal policy, one mayor challenge of the EU is to *add* a sufficiently strong and coherent external policy to its internal powers without overstepping the limits inherent in its (confederal) form. Yet, as the US Confederation illustrates at the same time, a strong unified external representation is not impossible in a confederation at all. Quite the reverse, in fact, as historically confederations were aimed externally, not internally.

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26 See especially Opinion 1/03 *Lugano Convention* [2006] ECR I-1145.

27 Though of course based in the Treaties. Since Lisbon see art. 4(3) and 24(3) TEU.

28 Art. 4(3) TFEU. See further Opinion 1/03, par. 119, and case C-459/03 *Commission v Ireland* [2006] ECR I-4635, par. 174. Also see C. Hillion, 'Mixity and Coherence in EU External Relations', in: C. Hillion and P. Koutrakos (eds), *Mixed Agreements Revisited* (Hart Publishing 2010), 91. For an especially broad application of this normally already immodest principle see the PFOS judgment, case C-246/07 *Commission / Sweden* (PFOS) [2010] ECR I-3317.

29 Although generally the non-core parts of an empire did not have voting rights or veto's.

Nevertheless, these important external dimensions of the EU do not alter the EU's *primary* internal focus, and certainly not its focus on market over military.[30] A quantitative overview of the *Acquis* provides a clear illustration. A 2009 study, for instance, found that of all EU legislation in force on 1 July 2008, 42.6% concerned agriculture, and another 20% the internal market, including legislation on free movement. External relations, on the other hand, accounted for approximately 10%.[31]

Even though such a quantitative overview may ignore the qualitative importance of specific pieces of legislation, as well as non-legislative activities, and even though the fields of agriculture and the internal market have external implications, the overall trend is clear. Conversely, furthermore, and partially due to the linkage of internal and external competences, even most EU external competence are aimed at trade and commerce, and not at defence or general external relations. A fact nicely born out by comparing the role of the EU in international organizations. In trade related international organisations such as the WTO, the EU plays a dominant role, whereas it remain the Member States that dominate in organizations such as the UN or NATO.[32]

Above all, even when the external powers of the EU are duly taken into account, they do not come close to the exclusive external, and especially military, competences of the Confederation.[33] The Articles completely removed its members from the international plane and gave Congress the power to declare and wage war by qualified majority. At least comparatively, therefore, the EU has an internal and economic focus.

30 E-U. Petersmann, 'From State Sovereignty to the 'Sovereignty of Citizens' in the International Relations of the EU?', in: N. Walker (ed), *Sovereignty in Transition* (Hart Publishing 2006), 152. Cf also the description by Joshka Fischer of the EU's foreign policy given to Van Middelaar: 'Vergeleken met vroeger is het heel wat. Vergeleken met wat nodig is, is het niets.' (compared to the early days it is quite something. Compared to what is needed, it is nothing.' Van Middelaar (2009), 292.

31 Y. Bertoncini, 'La législation nationale d'origine communautaire: briser le mythe des 80%', 'Notre Europe, Les Brefs No. 13 May 2009, available at http://www.notre-europe.eu/uploads/tx_publication/Bref13-YBertoncini_01.pdf. Also see for similar conclusions C. Grønnegaard, 'EU Legislation and National Regulation: Uncertain Steps Towards a European Public Policy', *Public administration* (2010), 3 et seq.

32 Also see below chapter 4, section 3.1. on the limited reach of confederations in general in areas where law and civil servants play a more limited role.

33 See in this regard also art. 42(2) TEU and the 2008 Declaration of the European Council: 'The Treaty of Lisbon does not prejudice the security and defence policy of Member States, including Ireland's traditional policy of neutrality, and the obligations of most other Member States. (Presidency Conclusions of 11 and 12 December 2008, EU Council 17271/08 REV 1. See also Rosas and Armati (2010), 7 and 198.

2.3 Inverting the confederal pattern

Where the main objectives and competences of the Confederation, therefore, lay in external relations and war but were lacking in trade, the EU has *reversed* this pattern. The centre has acquired near federate powers to regulate all kinds of subjects as long as a certain connection to the internal market is present.[34] Defence, on the other hand, remains firmly with the Member States. The EU can therefore be seen as a *mirror-image of the Confederation* in terms of focus, objectives and competences. To borrow a term from Ferguson, Europe has been constructed as an *Impire*, with an internal focus on peace and prosperity, not an Empire with external military fears or ambitions.[35]

As the EU forms one of the most powerful economic blocks in the world, and taking into account the paramount importance of economic performance today, this might not be a bad choice.[36] The only point made here, with all caveats that accompany such a generalization of complex entities, is the general picture of an EU grounded in exactly the opposite arena of governmental functions and objectives as the US Confederation.

2.4 The constitutional benefits of inverted confederalism

It is submitted that this shift in focus and foundation – infusing a confederal basis with internal market objectives – has been an important modification of the confederal model, and that this modification has strengthened the constitutional framework of the EU in several ways. The next sections will discuss four of these structural benefits of inversion, being the more constant impetus for cooperation it provides (2.4.1.), the structural-institutional benefits of inversion (2.4.2.), the self deepening effect of an inverted focus

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34 As long as this dimension is present, even areas in which the EU does not have legislative competence as such may be addressed, even where an explicit ban on harmonisation has been included in the Treaty. Case C-376/98 *Tobacco Advertising I*, case C-380/03 *Tobacco Advertising II*, and case C-210/03 *Swedish Match*. M. Kumm, 'Constitutionalising Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union' 12 *European Law Journal* (2006), 503.

35 See N. Ferguson, *Empire* (Basic Books 2004).

36 See also J. Huysmans, 'Discussing Sovereignty and Transnational Politics', in: N. Walker (ed), *Sovereignty in Transition* (Hart Publishing 2006), 218. Currently, furthermore, it seems the stock market seems a far more efficient way to acquire another nation than military conquest, and of course endless money has always been the sinews, or veins, of war. At the same time the ascending military might of China, estimated to have a fully modernized army by 20202, including modern aircraft carriers, stealth airplanes, cyber warfare capabilities and anti-satellite missiles, combined with the declining military might of the United States might seem a worthy cause of concern. Cf. The perhaps not fully objective 2011 U.S. Defense Department's annual assessment to Congress on the Chinese military, available via: http://www.reuters.com/article/2011/08/25/us-usa-china-idUSTRE77N5TY20110825.

(2.4.3.), and the coalescence of this inverted focus with a shift from state to market more generally (2.4.4.).

2.4.1 A constant impetus for cooperation

Most centrally it is suggested that its internal and economic focus has provided the EU with a more *constant* impetus for continued loyal cooperation than a focus on external relations and defence could have. It provided a better engine, or fuel cell, to power the continuous cooperation that is required to keep a confederal system moving and to prevent it from stalling or even disintegrating.[37]

One of the major problems for confederations always lay in the lack of effectiveness and enforcement. As soon as the benefits of the confederation became more remote, the temptation to pursue individual state interests increased, even where this would be detrimental to the whole, or even statal self-interest on the longer run. With a focus on defence, for instance, this meant that in times of peace or less direct threats effectiveness suffered, often to the breaking point.[38] The US Confederation is a clear case in point, as was duly captured by Madison

> 'The close of the war however brought no cure for the public embarrassments. The States relieved from the pressure of foreign danger, and flushed with the enjoyment of independent and sovereign power (…) persevered in omissions and in measures incompatible with their relations to the Federal Gov't and with those among themselves.'[39]

The internal market, on the other hand, provides *constant benefits* and constant opportunities for more future benefits. It also creates a constant risk of economic damage if a state ever becomes excluded, especially once its economy has come to depend on the internal market. Exclusion not just limits its access to the internal market itself, but also means that a state will have to compete on its own in a world increasingly organized in large economic blocks.[40] The cost of collapse or exclusion, furthermore, increases with integration itself: the further integration has progressed, the higher will be

37 Cf also Van Middelaar (2009), 38 on the internal dynamic of the EU's internal sphere.
38 Wood (1969), 359 and 361.
39 Madison (Sketch), 8.
40 This need for a European Block to compete with other blocks already formed a driving force at the establishment of the EEC. The Spaak Report, for instance, began: 'Entre les Etats-Unis qui, presque dans chaque domaine, assurent a eux seuls la moitie de la production mondiale, et les pays qui sous un regime collectiviste s etendant au tiers de la population du globe, augmentent leur production au rythme de 10 ou de 15% par an, l'Europe, qui avait autrefois le monopole des industries de transformation et tirait d' importantes ressources de ses possessions d'outremer, voit aujourd' hui ses positions extérieures s affaiblir son influence decliner, sa capacité de progres se perdre dans ses divisions.'

the costs of collapse or exclusion.[41] Crucially, this means that *the incentive to continue cooperation keeps pace with the demands made by integration*. The EMU and the sovereign debt crisis, which will be used as a test case for the confederal prism more generally below, provide a clear, if not even unnerving, example of how strong this internal impetus to cooperate has by now become in the EU.[42]

For these reasons an internal market creates a more stable basis of mutual interest, and therefore a more stable basis for cooperation and compliance, self-interest always being a preferable basis for a polity over enforced compliance.[43]

2.4.2 Structural-institutional benefits

An internal focus also appears more geared towards creating stable institutions. Once created, these institutions assist in maintaining cooperation, and more generally reduce the overall institutional weakness traditionally associated with confederalism.

An internal market entails constant interaction between Member States, individuals and institutions. This requires no army or strong international footprint, but does require more internal competences, more detailed rules guiding these contacts, and more technical administration. Importantly, the existence of multiple detailed rules, the individual interests concerned in economic integration, and the sheer number of individual interactions taking place on the market also increase the need for adjudication and accepting individuals as objects and subjects. Different from military operations, furthermore, market behaviour does fall under the normal scope of law and courts. Consequently the regulation of trade also generates far more interactions between confederal law, national legal systems and individuals than, say, conducting a military operation. Consequently the confederal centre must develop some legal-administrative capacity to deal with these interactions, and cooperation between national administrations, national courts and the confederal centre becomes more logical. Equally, doctrines of supremacy and direct effect therefore seem *more likely to develop* in such an entity focussed on internal organization.

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41 Here the relative success of the German Zollverein between 1834 and 1867 forms an interesting comparison that could be developed further. Just as an example, however, the *Zollverein*, forming a type of customs union between German states, outlived the German Bund itself. It even survived and continued to operate during the Austro-Prussian war where its members fought on different sides. Apparently the benefits of belonging to this economic union were not easily given up.

42 The embrace of the Internal Market with the Single Market Program in 1985 was, of course, also partially aimed at resolving the crisis of stagnation at the time. See the White Paper from the Commission: Completing the Internal Market COM(85)110 final.

43 Cf in this regard also our third general proposition below on the rule by law. Self-interest and the rule of law make for an effective combination.

The reasoning of the ECJ in *Van Gend & Loos* is instructive in this regard, linked as it is with the internal market objectives and protection of market parties.[44] For how to create an internal market where the actual parties that form that market cannot rely on it? The point is further illustrated by the failure of the Articles in this regard. The inverted internal focus of the EU, therefore, not only was a modification in itself, it might also have been instrumental in developing and supporting some of the other crucial federate modifications discussed above.[45]

2.4.3 The self-deepening effect of the internal focus

The focus on market and economy also adds a *self-deepening mechanism*. Once the logic of a truly internal market is accepted, every step of integration deepens and strengthens interdependence. This subsequently suggests additional measures to further develop the internal market, and to safeguard the effectiveness of the existing level of integration.[46] Once workers are allowed to move freely, for instance, regulation of diplomas and training follows, as does regulation of their remuneration, social benefits, followed by the rights of their (same-sex) partners and children, and the question how workers should unionize themselves in an internal market, and….[47]

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44 Case 26/62 *Van Gend & Loos*.

45 It also puts the overall power of the EU in perspective: yes compared to most confederations the EU has very far-reaching internal powers, yet these are offset by a lack of external powers which the Member States would not even dream of surrendering. The overall question, which had more power overall, is therefore difficult to answer, since it depends on a qualitative assessment of internal over external powers.

46 This does not deny the necessity of political will in this progress. As the stagnation before the Delors Commission and the 90's internal market program show, integration certainly was not a given. The claim is only that the logic of an internal focus is more conducive to deepening integration than an external focus.

47 Art. 45 and 49 TFEU. See amongst many others case 2/74 *Reyners* [1974] ECR 631, case C-340/89 *Vlassopoulou* [1991] ECR I-2357, case C-55/94 *Gebhard* [1995] ECR I-4165, case C-85/96 *Martinez Sala* [1998] ECR I-2691, case C-238/98 *Hocsman* [2000] ECR I-6623 case C-281/98 *Angonese* [2000] ECR I-4139, case C-224/01 *Köbler* [2003] ECR I-10239, case C-456/01, *Trojani*, [2004] Jur I-7573, case C-200/02 *Baby Chen* [2004] ECR I-9925, case C-291/05 *Eind* [2004] ECR I-10791, case C-209/03 *Bidar* [2005] ECR I-2119, (yet also see case C-158/07 *Förster* [2008] ECR I-8507), case C-60/00, *Carpenter*, [2002] ECR I-6279, case C-73/08, *Bressol*, [2010] ECR I-2735, case C-438/05 *Viking* [2007] ECR I-10779, case C-341/05, *Laval* [2007] ECR I-11767. In terms of legislation see Directive 2005/36 on the recognition of professional qualifications, *OJ* (2005) L 255/22, Regulation 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, *OJ* (1968) L/2, Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, *OJ* (2004) L 158/77. On the sensitive issue of recognizing relationships see art. 3(2) of the Citizenship Directive, as well as M. Bell, 'Holding Back the Tide? Cross-border Recognition of Same Sex Partnerships within the European Union', 5 *European Review of Private Law* (2004), 613.

The examples in the EU are endless, ranging from EMU[48] to (transcription of) names,[49] and from healthcare[50] to criminal sanctions for ship source pollution.[51] A process that itself is, of course, well known, but becomes especially relevant from a confederal perspective.[52]

This self-deepening tendency of the internal focus was further stimulated by the globalization of markets and the predominance of markets and 'the economy' over government. Privatization and liberalization, for example, expanded the reach of the market.[53] Where the scope and importance of 'the market' increases, so does the power to speak and regulate on behalf of that market. Certainly where this market is increasingly falling outside the already limited control of individual states anyway. In this sense, the Union's focus on economy and market caught the more general trend in political organization and global realities from state to market, a fourth strengthening element connected to inversion.[54]

2.4.4 Riding the market wave

Lastly, and related to the growing importance of the market, the internal focus of the EU also allowed integration to dress itself in the *seemingly value-neutral garb of economics*. Questions could be approached from, or translated into, the 'objective' science of economics. As a result the EU could adopt the powerful language of a technocratic elite that could not be disputed, especially not from the subjective, unscientific and perhaps even 'perverse'

48 See for this dynamic for instance the 1989 Delors Report on economic and monetary union (Conclusions of the Madrid European Council of 1989, *EC Bulletin* 6-1989, 1.1.11.). See further chapter 13 below.

49 Case C-148/02 *Garcia Avello* [2003] ECR I-11613, as well as more recently case C-208/09 *Sayn-Wittgenstein* [2010] ECR I-13693, and very leniently C-391/09 *Runevič-Vardyn and Wardyn* [2011] nyr.

50 Case C-159/90 *Grogan* [1991] ECR I-4685.

51 Case C-176/03 *Ship Source Pollution I* and case C-440/05 *Ship Source Pollution II*.

52 A fact that the some US Supreme Court justices were worried about as well in the development of the Commerce clause. See for instance the dissent of McReynold, J, Van Devanter, Sutherland and Butler JJ in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) 'Almost anything – marriage, birth, death, may in some fashion affect commerce.' Also see R. F. Nagel, 'The Future of Federalism', 46 *Case Western Reserve Law Review* (1996), 643, Merril (1998), 31, and McGimsey (2002), 1675.

53 Slot, Park and Cuyvers (2007).

54 See on this trend and its effect on the state J. Habermas, 'The European Nation State. Its Achievements and its Limitations. On the Past and future of Sovereignty and Citizenship' 9 *Ratio Juris* (1996), 128.

field of politics.[55] After all, who could be against efficiency and an increase in wealth?[56]

Thus clad in economics, and engaged with the technical and seemingly a-political rules that make a market, the growing impact of the EU was often not perceived as intrusive, or as affecting key political domains. As a result the internal market *Acquis*, including the inherently expansive rules and principles underlying it, could develop relatively unopposed.[57] A customs case on the smuggling of maize will not receive the same political attention as a military campaign, but may nevertheless establish a principle that eventually affects the criminal law of Member States.[58]

Were the banking and sovereign debt crises indeed to lead to a swing of the pendulum back in favour of government and politics over market and economics, which is one way of understanding the populist rise, this would affect this important mechanism.[59] Of course the opposite might also still happen, with the financial crisis illustrating the ultimate dominance of markets over government.[60] Whatever these future developments might bring,

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55 Interestingly the tactic of many politicians appears to have been to try and master the language of economics as well, indirectly contributing to the discrediting of 'politics' as such. Perhaps this has contributed to their loss of status, certainly now that economics has lost some of its magical appeal as well, and it is difficult to return to a more normative message. This has apparently laid open the field for more charismatic leadership and 'anti-establishment' movements. Cf also Van Middelaar (2009), 18 et seq. on this language and world view of functionalism, as well as his quote of Hallstein: 'the very nature of this world necessitates a redefinition of what we ordinarily mean by words like 'politics' and 'economics', and a redrawing, perhaps even elimination, of the semantic frontier between the two.' (W. Hallstein, *United Europe. Challenge and Opportunity* (Harvard University Press 1962), 58.

56 For the technocratic nature of, for instance, the Commission right from inception see K. Featherstone, 'Jean Monnet and the 'Democratic Deficit' in the European Union' 32 *Journal of Common Market Studies* (1994),149 or W. Wallace and J. Smith, 'Democracy or Technocracy? European Integration and the Problem of Popular Consent', in: J. Hayward (ed), *The Crisis of Representation in Europe* (Frank Cass & Co 1995), 140.

57 W. Sandholz and J. Zysman, '1992: Recasting the European Bargain' 42 *World Politics* (1989), 114-115.

58 See as an example the evolution from *Greek Ma*ize to *Spanish Strawberries* and *Ship Source Pollution I*, cases 68/88 *Commission / Greece (Greek Maize)* [1989] ECR 2965, C-265/95, *Commission / France (Spanish Strawberries)* [1997] ECR I-6959, and C-176/03 *Commission v Council*.

59 Alternatively one could say that economics itself is being politicized, or in a more neo-Marxist view, stripped from its supposed objectivity. As soon as 'economics' does not just steadily increases wealth for all, but also requires a redistribution of wealth, even to other Member States, it becomes political, and the political discourse takes over.

60 Two noted anecdotal but revealing examples may illustrate the point. Firstly the *daily* turnover of FOREX lies between the 4.5 and 5 *trillion* dollar. This is roughly five times the entire EU budget agreed in the multiannual financial framework for 2014-2020. The entire US debt of $16.5 trillion is matched easily every four days. Second, and perhaps more graphic and gripping, was the image of US President Obama directly and publicly responding in August 2011 to Standard and Poor's downgrading the triple A status of the US. Here the immense power of a small group of market actors over the state became extremely visible.

however, the alliance between inversion and economics has certainly contributed to the development of the EU, and has so far strengthened it.

2.5 The inverted confederation: Sub-conclusion

In these four ways the inverted focus of the EU has been an instrumental modification to the confederal model, stabilizing it, supporting its development, expanding its competences, and anchoring the EU in one of the most expanding and dominant fields of our time. The crucial importance of the 1985 internal market programme for the development of the EU provides a good illustration of this internal dynamic.

Now clearly no overly simplistic or single-variable explanations can be given for such a complex phenomenon as integration. Many other factors and events impacted and guided the development of the EU. Yet it does appear realistic to claim that the clear choice to (re-)engage the internal market as the spearhead of European integration played an essential role in the revival of the European project. Through the Single European Act, it provided both focus, incentive and means for EU action. It got the internal engine going again. Once going, furthermore, it seemed to provide sufficient impetus to keep on going, often even picking up more speed.[61] The success of the internal market initiative therefore helps to illustrate the structural benefits of inversion. Conversely, a confederal perspective might help in explaining why precisely the internal market turned out to be such a fortunate choice.

61 Where such an internal focus was lacking, furthermore, integration generally did not fare as well. Consider, for instance, such areas of 'high politics' as Kosovo and Libya.

As such an internal market focus may also counter another preconception against confederations: that Confederations can only endure where there is sufficient homogeneity between the members.[62] An assumption that that has certainly taken root in the debates on the EU and its long term viability.[63] Now the potential relevance of homogeneity does not have to be denied, and a lack of homogeneity can certainly form another hurdle. At the same time it could be wondered if the internal focus of the EU, and the self-interest it generates for continued cooperation, does not undermine this virtual dogma, and with it one of the major flaws associated with confederations.[64]

3 A confederal foundation with a federalized superstructure

Our second general proposition is based on two related trends borne out by our confederal comparison. Firstly, the EU has incorporated several of the key federate modifications in what will be labelled its constitutional superstructure. For example, the EU works directly on individuals. It claims, and generally enjoys, supremacy. The scope of EU competences is determined under a very 'federate' doctrine of attributed competences by the European Court of Justice; a powerful central court which has the final say on the interpretation and validity of EU law.[65] As will be further discussed below,

62 This thesis was for instance defended by De Tocqueville in his Democracy in the United States where he held that 'all peoples who have been seen to confederate had a certain number of common interests that formed the intellectual bonds of the association. But beyond material interests man also has ideas and sentiments. In order that a confederation subsist for a long time, it is no less necessary that there be homogeneity in he civilization than in the needs of the various people that compose it.' (De Tocqueville (2002), 158. A view that remained influential, amongst other places in Germany. Carl Schmitt, for instance, referring to De Tocqueville stated that '*Bunds*' can only exist where 'there is a substantial comparability, an existential relationship, as can be the case, for example, in states with a nationally comparable and similarly disposed population (…). However, where there is homogeneity, a federation is legally and politically possible,'. Schmitt (2008), 394-395. It is, however, suggested that this is a rather weak solution to his own federal antinomies and concept of the political. Such an assumption of homogeneity de facto removes the *political* use of a bund: either there is no conflict so no need for politics, or there is a conflict and the Bund cannot act. Either way it seems redundant, and Schmitt needs to sacrifice the essence of what he sees as the political to account for the reality of federations.

63 This issue will be discussed in more detail in part II but on the strong reliance on *demos* see Kirchof (1993) and P. Kirchof, 'The European Union of States', in: A. von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law* (2nd edn. Hart Publishing 2010),739, 743 and the much debated *Maastricht Urteil* of 12 October 1993, BVerfGE 89, 155 largely inspired by the work of Kirchof.

64 Note also that for Schmitt the statal form and political principles of the different polities (for instance monarchy or republicanism) formed one key component of this homogeneity. Components on which the EU is not as diverse as when thicker notions of 'volk' are followed.

65 Börzel and Risse (2000), 9-10, 'even without the legitimate monopoly of coercive force, the European Union has acquired some fundamental federal qualities.'

these federate elements also evolved over time, gaining in strength, scope and relevance.

The second trend, however, is that the EU consistently incorporated these modifications *without matching the foundational modifications* that underlie them in the US. The EU cannot use force, cannot tax its citizens, cannot change the Treaty by majority or prevent secession. Most fundamentally the EU was not directly based on the body politic of a single sovereign people. On these fundamentals the EU remains much closer to the Confederation.

On several other important federate markers, moreover, the EU comes much closer to the confederal set-up as well. It is, for instance, fully merged with the governmental systems of the Member States , and especially lacks the strong and separate executive of the Federation. Instead of having 'internalized' the states' interest in an independent central institution, such as the Senate, this interest is represented by direct delegates of the states, as in the Confederation. These representatives, furthermore control two of the most powerful institutions, the Council of Ministers and the increasingly dominant European Council, and are even more closely tied to their home state than delegates in Congress were.

Putting the two trends together a distinctive constitutional structure emerges: a confederal undercarriage reinforced with, and burdened, by a partially federalized superstructure. In this sense the EU can indeed be seen as a hybrid: it contains elements of at least these two systems.[66]Yet crucially the different elements are *not co-equal*. Despite the importance and impact of the federate modifications the ultimate basis of the EU remains confederal.

It is proposed that precisely this unequal mix of confederal foundation and federate rebar may explain some of the distinctive features of the EU. A proposition that matches with the common intuition that the EU is federate in some ways, and yet in the end cannot be qualified as a 'real' federation.

If this proposition is correct, interesting questions arise as to what the effects are of adding federate elements to a confederal basis, and how much 'federate' weight such a basis can carry.[67] As will be further shown below, analysing the *relative* weight and position of these confederal and federate elements, as well as their interaction, can be helpful in advancing our grasp of the EU, the dynamic of its constitutional evolution, and some of the problems persistently troubling it.

66 See above chapter 1 section 2.

67 Obviously all constitutions are ultimately mixtures of multiple 'pure' models and conceptions, and in that sense constitutional chimera's. Constitutional theory is more often than not concerned with how these elements affect each other. What, for instance, happens when you add a presidential element to a parliamentary system, etc. In this sense the approach followed here follows standard constitutional theory. At the same time the specific mixture of confederal and federate elements in the EU is rather interesting, and also has the added element of occurring at supra-statal level.

For example, it becomes apparent that gap between the legitimacy capacity of a confederal basis and the legitimacy demands of a federate superstructure logically leads to legitimacy problems. In addition, these federate powers have been transplanted into a confederal context where they are freed from several federate counterweights. As a result their *relative power and influence* might be far greater than in a completely federate system, which only widens the schism between basis and superstructure. A side effect of federate transplants that might be seen as the constitutional equivalent of releasing a tiger on the Galapagos Islands.

Yet despite such side effects the federate superstructure does seem to have significantly strengthened the EU: some of the worst holes in the confederal design may have been federally plugged *without* having to fully federate. Examining these plugs may therefore help to further understand why the EU has not yet collapsed, as well-behaved confederations are supposed to do, and how a stable middle ground can be found between a classic confederal system and full federation. Three such plugs deserve specific attention here, being negative integration, which can provide a certain backbone to the confederal system (3.1), the federate competence system, which allows the EU to act (3.2), and pseudo-amendment, which further enables EU action and the process of self-deepening already described above.

3.1 Negative integration as a confederal backbone

As discussed, the free movement rights under the Articles of Confederation were strikingly similar to the prohibitions underlying negative integration in the EU. Rights, however, that remained parchment realities. They were not enforced or developed to the necessary detail required for economic actors to benefit from them.

In the EU, on the other hand, negative integration has played a vital role.[68] Now the story of negative integration, including its crucial role in judicially sustaining European Integration through its recurring crises, is well known.[69] It is a story, furthermore, which fully fits with the confederal perspective, as negative integration was largely based on the combined federate modifications of an authoritative central court, and the direct effect and supremacy of EU law developed by it.[70]

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68 See for the classic tale Weiler (1991) and J.H.H. Weiler, 'The Community System: The Dual Character of Supranationalism' 1 *YBEL* (1981), 267. The confederal prism fits fully with this history of the EU developing through law.

69 Already see on the important role of the Court for integration H. Schermers, 'The European Court of Justice: Promotor of European Integration', 22(3) *The American Journal of Comparative Law* (1974), 453.

70 Also see the third general proposition below on the importance of the rule of law more generally.

What the confederal perspective adds to this story, however, is how effective negative integration precisely reduces some of the traditional weaknesses of confederal organization. In other words, it helps to understand why negative integration was, and is, so important in sustaining a confederal basis, and how a confederal basis can be protected and reinforced by federate elements in the superstructure.

To begin with negative integration protects and promotes integration by providing a pro-integration fallback option for political inaction. The Courts famous judgments in *Dassonville*, *Cassis de Dijon* or *Defrenne* are cases in point, as is the Courts development of EU Citizenship.[71] Where the Member States took no, or only tepid, action, the Court defended and furthered what it considered the integration envisioned by the Treaties. Unlike under the Articles, therefore, political deadlock no longer equals a halt, or even a retreat, in integration. Instead political deadlock may lead to further integration, and may do so along lines of legal logic, which can deviate strongly from the political logic of compromise.

The crucial result is that inaction stops being a cost-free option for Member States. Rather, not acting may mean leaving the decision to the ECJ. A reality that can act as an effective pacemaker for stalling decision-making.

Second, and related to its pacemaker role, negative integration provides a base line for eventual action by the Member States. Legislation, after all, will not be allowed to violate primary law as interpreted by the Court. Additionally where no compromise can be reached between Member States it often makes sense to follow the line set out by the Court. Often, therefore, the case law of the Court is clearly visible in the contours of secondary legislation, which sometimes even amounts to a literal codification.[72] The extreme respect with which the four freedoms have been treated in the Lisbon Treaty provides a clear example of this mechanism even in primary law. This is not to say, of course, that the Court in its turn is not responsive to political signals.[73]

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71 See inter alia cases 8/74 *Dassonville* [1974] ECR 837, case 120/78 *Rewe v. Bundesmonopolverwaltung für Branntwein* (*Cassis de Dijon*) [1979] ECR 649, Case 43/75 *Defrenne*, C-85/96, C-415/93 *Bosman* [1995] ECR I-4921, *Martinez Sala*, C-184/99 *Grzelczyk*, C-413/99 *Baumbast and R* [2002] ECR I-7091, or C-208/09 *Sayn-Wittgenstein*.

72 See for instance Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, *OJ* (2004) L 158/77. For an a-typical example see the services directive, which appears to have managed to do less than the case law: Directive 2006/123 on services in the internal market. On its rather stormy adoption and less than stormy content see C. Barnard, 'Unravelling the Services Directive' 41 *CMLRev* (1998), 323.

73 See for instance the development from C-209/03 *Bidar* to C-158/07 *Förster*, as well as the general recognition of subsidiarity and proportionality in the case law of the Court after Maastricht and Lisbon.

In these ways effective negative integration strengthens the overall confederal set-up. By providing a fallback option negative integration reduces the *need* for decision-making. By providing an incentive and a direction, it simultaneously increases the *capacity* to make decisions as well. Allowing enforcement through individuals, furthermore, also reduces pressure on the limited confederal capacity for *enforcement*. Overall, therefore, negative integration energizes and reduces the pressure on two of the Achilles heels of confederal systems: acting and enforcing.

3.2 Determining competences

One of the major problems of the US Confederation lay in its lack of competences. To a large extent this lack was due to the very restrictive interpretation of the competence-conferring clauses in the Articles of Confederation.

Again several federate modifications that have been incorporated in the superstructure of the EU have largely addressed this problem. These firstly include the attribution of specific market competences, which as discussed above are inherently expansive. Secondly, the broad, and relatively federate, doctrine of attribution developed by the ECJ, including its teleological linkage between objective and competence, has been especially important.[74] A modification which is itself based on the further federate modification of a central court with the competence to decide on the scope of EU competences. Such a central court provides a legal, generally pro-integration, mechanism to settle disputes on competence, reducing the possibility for state representatives to block decision-making by spurious competence challenges.

Legalizing the ultimate say on competences also has as expansive impact in itself. Once a competence has been accepted in a judgment it can normally not be rejected the next time: it is there to stay. Some consistency, furthermore, has to be introduced in legal decisions on competence. This leads to the development of some general principles such as effectiveness or coherence, which may expand competences more generally. If a certain threat to the free movement of ball bearings was sufficient to justify harmonization under art. 114 TFEU, for instance, a similar threat would also justify harmonization in the regulation of gambling or prostitution. Politically, however, there is quite some difference between these competences.[75] Similarly the principle of effectiveness may be rather uncontroversial in most areas.

74 See chapter 2, section 4.2.3. on this link between objectives and competence.

75 Obviously there still needs to be a political decision to adopt secondary legislation. See for an example where such political will is lacking the field of gambling, also for an interesting reaction by the Court of Justice. S.C.G. Van den Bogaert and A. Cuyvers 'Money For Nothing: The Case Law of the EU Court of Justice on the Regulation of Gambling' 48 *CMLRev* (2011), 1175.

Yet when the legal application of this same principle of effectiveness leads to a Union competence to demand criminal sanctions legal logic suddenly stands far removed from the political one.[76] Politically, after all, such criminal sanctions form a very different kettle of fish altogether.[77] The legal and judicial determination of competences, therefore, not only prevents back treading on competences that have already been accepted, it also tends to expand competences by applying legal logic and general principles to the question when a competences exists.

Together the federate modifications of a central court, a broader doctrine of attribution, a legal determination of competences and the inherently expansive nature of internal market powers addressed another one of the key weaknesses plaguing the US Confederation: the lack of competences generally, and the lack of internal competences specifically. For the EU competences rarely seem to be the limiting factor, especially not where there is a strong political will to act.[78] A strengthening factor that is closely related to the factor of the adaptability of the EU framework through pseudo-amendment.

3.3 Adaptability and pseudo-amendment

The Confederation was unable to flexibly interpret or to alter the Articles where they were ineffective. The resulting inability of the Confederation to *adapt* to proven weaknesses or new circumstances formed another of Madison's key complaints. The many failed attempts to secure a stable income for the Confederation strongly supported his charge. Even in times of crisis there would always be one state blocking the amendments required, paralyzing the entire system as a result. Partially with this weakness in mind, the federate constitution allowed for constitutional amendment by majority.

As noted above, the EU has not incorporated the federate modification of amendment by majority. Nevertheless, the broad and judicially determined doctrine of powers has also had a crucial secondary effect in this regard.

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76 Case C-176/03 *Ship Source Pollution I* and case C-440/05 *Ship Source Pollution II* .

77 Legally, after all, these cases contain a standard application of the 'effectiveness' case law of the Court of Justice. Also these cases provide a further example of how the case law of the ECJ may prepare the way for legislative action: Lisbon has to a large extent codified the case law of the Court, and even going one step further by even removing the limit introduced by the Court in *Ship Source Pollution II*. See art. 83(2) TFEU.

78 See above chapter 2, section 4.2 and 4.3, as well as the relation between C-376/98 *Tobacco Advertising I* and C-380/03 *Tobacco Advertising II*. This does also not change the fact that it might be hotly disputed who may act or how. A question which happens to depend on the specific legal basis and competence used as well. See in addition to the Ship Source Pollution cases for instance also C-91/05 *Commission v. Council (ECOWAS)* [2008] ECR I-3651.

In addition to providing the EU with a sufficiently filled toolkit to achieve its objectives, it allowed the EU to develop and adapt within its existing Treaty framework. An ability that limited the need for frequent Treaty amendments.[79] Living instruments do not need to be amended as often, thereby reducing the importance of amendment procedures.[80] Put differently, the federate modifications in the superstructure of the EU allowed for a form of (judicial) pseudo-amendment.[81]

The development of the US constitution underscores this finding. So far it has been amended twenty-seven times. Yet some of the most important changes did not happen through amendment at all. They were realized through constitutional interpretation or through changing practices. Constitutional review was established, abortion allowed and the rights of States determined without any amendment. Most interestingly for our comparative exercise the crucial and expansive interpretation of the Commerce clause did not require an amendment either, nor was it ever blocked by an amendment.

The possibility of amendment by majority, in other words, has not been as crucial as Madison might have expected. Its function has been partially pre-empted by other constitutional mechanisms. Having incorporated some of these same constitutional mechanisms, the EU framework has therefore proven to be far more flexible and adaptable than the Articles. Adaptation and flexibility that are always crucial for survival, and reduce the need for constitutional amendment by majority.[82]

At the same time, these alternative mechanisms can only offer a partial solution. They are not capable of those fundamental changes that truly require Treaty amendment and the political legitimacy it entails. As in the US one could think of amendments that alter the representational scheme, the set-up of the institutions, or even the switch from a confederal to a federate basis itself. Such fundamental changes, fortunately, still require a Treaty amendment, and, therefore, unanimity. As has become increasingly clear,

79 The Single European Act, with its introduction of then art. 100A, clearly also played an instrumental role. Yet even this flexibilization of the procedure for legislative action would have accomplished little if the competence to be applied by that action had not been as broad.

80 Whether the EU Treaties truly form a living instrument, or only a Frankenstein animated by the ECJ, is a question left up wholly to the views of the reader.

81 The Court of Justice has, of course, held that other mechanisms, such as art. 352 TFEU, may not be used to circumvent the rules on amendment, yet this only shifts the debate to the next question when something is considered as a circumvention. Hence the term pseudo-amendment. See Opinion 2/94.

82 See chapter 4, section 3.3. on the amendment trap, as well as Van Middelaar (2009), 65, and his discussion of Rousseau and the dangers of unanimity.

especially during the decennia-long spectacle leading to Lisbon, however, unanimous Treaty change is not an effective mechanism.[83]

On the one hand, therefore, the EU has a near federate capacity to adapt and develop within its existing constitutional framework. On the other hand, it faces confederal limitations in formally amending the Treaties. Most interesting from the confederal perspective, is the dynamic that results from *combining* both elements. The capacity to adapt *without* political process, combined with the inability to do so through a political process, or to compensate for non-political adoptions, might actually be one of the dangerous imbalances caused by the federate superstructure in the longer run, as will be discussed further below.

3.4 Enabling self-deepening

Lastly, the federate superstructure, and the flexibility it offered, dovetailed with the self-deepening of the internal focus. As discussed above the internal and economic focus of the EU has a self-deepening mechanism. Broad competences, and pseudo-amendment by interpretation, further enable this self-deepening mechanism to work. Without them, after all, the increasing demands of the internal market will simply hit a competence limit.

Additionally there also is the self-deepening effect that federate elements themselves acquire in a confederal context. As noted, a federate modification in a confederal context may well become a two-eyed man in the land of the blind. The confederal elements may often not be strong enough to contain or counterbalance the federate ones. As a result, the federate elements may over time expand their relative power and influence, overshadowing the confederal elements (and foundations) of the EU. A dynamic that either overburdens the confederal basis, or may lead to a confederal counter-coup that may weaken the federate superstructure, and the stability it brings, too much.[84]

The benefits and risks of such self-deepening have not gone unnoticed, for instance with regard to the Court of Justice. By some located within its very own fairy-Duchy, by others seen as leading a legal *coup d'état*, many have asked how to control this powerful institution. Of course even in fully federate systems as the US it has proven difficult to contain the judicial power whilst at the same time respecting its necessary independence and task to

83 Dougan (2008), 617. Also see for 'surgical' treaty changes and the use of intergovernmental treaties that nevertheless concern EU primary law the discussion on the EMU crisis below in chapter 13, section 3.2.

84 The rise of the European Council, or the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (Brussels 2 March 2012) may perhaps both be understood as such counter-reactions. See further chapter 13, section 4.2.

control and limit the other powers. In the EU, however, the predominance of the Court of Justice is further reinforced, and explained, by its federate nature and its confederal context. As both the (constitutional) legislator and the executive are far more confederal in nature, the already powerful position of a court in a federal system is further increased.

This central role of the Court of Justice also leads us to our third general proposition on the rule by law and the importance of stable states for a confederation. In a sense taking a process initiated in Philadelphia to the next level, the EU seems to have taken 'laws empire' to unforeseen highs, and has done so in a way that reduces some of the executive weakness of a confederation.[85]

4 Rule by law, self-control, and the importance of stable Member States

As established in chapter three the EU constitutional framework incorporates five of the sixteen key federate modifications selected for comparison in this study. The starting point for our third general proposition lies in the fact that of these five no less than four are concerned with the status and role of law.[86] Supremacy, direct effect, the doctrine of attribution and the establishment of a central judiciary all concern the legal dimension of the constitutional framework, or in other words, the role and rule of law within that framework.[87] A finding that raises two further, related questions. First, how is it possible to solely incorporate these legal modifications without also incorporating related modifications in other areas? Second, what can

85 Also see G. Falkner and O. Treib, 'Three worlds of compliance or four' 46 *JCMS* (2008), 293 et seq., and Chalmers, Davies and Monti (2010), 323 – 325.

86 Already see, pointing to the federate nature of the legal system being developed, E. Stein, 'Lawyers, Judges and the making of a transnational constitution' 76 *American Journal of International Law* (1981), 1. 'Tucked away in the fairyland of Duchy of Luxembourg and blessed, until recently, with benign neglect by the powers that be and the mass media, the Court of Justice of the European Communities has fashioned a constitutional framework for a federal Europe.' More recently on the essential role of law, and the rule of law, for EU integration see A. von Bogdandy, 'Founding Principles' in: A. von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law* (2nd edn. Hart Publishing 2010), 28-31 and 41.

87 Obviously the important role of law for EU integration has been broadly commented upon. Here the point is not the novelty of this importance but its fit with the confederal system. See for instance already, contrasting the political and the legal, J.H.H. Weiler (1981), 267, Weiler (1999), 83 and M. Shapiro, 'The European Court of Justice', in: P. Craig and G. De Búrca (eds), *The Evolution of EU Law* (OUP 1999), 339. On the vital importance of direct effect, supremacy and the Supreme Court for the US federate system already see the analysis in 1888 by Bryce. He found that these 'mechanical contrivances' were vital for the functioning of the system, also by establishing 'a legal habit in the mind of the nation.' J. Bryce as cited in Burgess (2006), 17.

this predominance of legal modifications tell us about the role of law in a (modern) confederal system as the EU? Jointly, these questions lead us to the third proposition on *modern confederal rule by law over stable, self-limiting members*. A proposition that starts with the required context for a rule by law.

4.1 The importance of stable and well-constituted members for confederal rule

The American Confederation suffered from very weak compliance. Partially this was due to a lack of power in the centre and an inability to enforce. Another important reason for this failure, however, was the *overwhelming need to enforce*. States often and flagrantly ignored legally binding commands of Congress.[88] These violations, in turn, were largely due to the political and organizational weakness of the States themselves,[89] which made them rather unreliable partners.[90]

Revolutionary ideology was radical, distrusted central authority to the extreme, and believed in very direct democracy in small republics. The problem with this theory was that it was put to practice, and with a vengeance.[91] In varying degrees of radicalism the freshly sovereign republics embraced these revolutionary ideals in their new state constitutions. A fascinating flurry of constitution making resulted whereby innovative applications of English political theory, British constitutional law, and colonial charters were mixed together with revolutionary ideals. Although the result and practice differed per state,[92] most became far more democratic and radical,[93] especially taking the parameters of the time into account.[94]

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88 See above chapter 1 section 5.

89 Wood (1969), 467: It was 'the corruption and mutability of the Legislative Councils of the States', the 'evils operation in the States' that actually led to the overhauling of the federal government in 1787.

90 Cf Madison (Sketch), 3 and 7 where he described the states as 'feeble communities' and holds that: 'But the radical infirmity of the "Art8 of Confederation" was the dependence of Congress on the voluntary and simultaneous compliance with its Requisitions, by so many independent Communities, each consulting more or less its particular & convenience and distrusting the compliance of the others.'

91 Cf Wood (1969), 404.

92 Especially the Virginia constitution was very balanced, and played an important role in the convention. For although this period of experimentation led to some unstable states, it did provide important experiences for the Philadelphia convention. See further below, chapter 5 on the process of federation.

93 This even though almost all of the new state constitutions provided for a senate, explicitly in recognition of the need for an aristocratic element in Government so the 'contemplative and well informed' and the 'wise and learned' could check he people of which 'few [are] much read in the history, laws or politics'. An aristocratic desire already indicated by the choice for the term 'senate' itself. In most states, however, these upper houses were to weak to really balance the directly democratic lower houses. (Cf Jefferson in his "*Notes on Virginia*" in Peden (1955), 119-120. Also see Wood (1969), 209-216.

94 McDonald (1968), 101.

All states, except South Carolina,[95] for instance, held *yearly* elections for Parliament. These legislatures were often also endowed with judicial and executive powers.[96] Most radical was Pennsylvania.[97] There, for instance, all legislation had to be printed for the consideration of the people before it could become law, and the executive and judiciary were reduced to virtual non-existence.[98] All power, including that to adjudicate, rested with the legislature.

The decision making in these state parliaments, or the 'will' of the people in convention, could be swayed dramatically from one moment to the other by effective speakers.[99] 'Mob-democracy,' sometimes resulted, at least from the perspective of the propertied classes or others on the losing end of this system.[100]

These new state governments, furthermore, suddenly found themselves sovereign, and no longer bound by the framework of the Empire. The colonies had been used to significant degrees of self-rule, including democratic representation.[101] Nevertheless the step to full and unlimited sovereignty still was a significant one.[102]

This revolutionary ideology, coupled with the ballooned power of unhinged parliaments led to significant destabilization within the states.[103] One particularly important effect was the lack of protection for minorities against the unfettered will of the majority.[104]

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95 Here representatives were elected biannually, as under the current US Constitution.

96 Wood (1969), 166.

97 Wood (1969), 85-87. The radical constitution there explicitly aimed to prevent 'the danger of establishing an inconvenient aristocracy'. To put it bluntly, the aim of the second constitution could have been called 'to prevent the danger of an inconvenient democracy'! The disenchantment and disappointment with republicanism of some leading minds at Philadelphia added to this fear. Madison, for instance, had been an avid believer in abstract republicanism in 1776-77, prone as he was to theoretical purity.

98 Wood (1969), 232, 245.

99 The mutability of the laws was one of the major complaints. See for example the statement that the North Carolina laws of 1780 were 'the vilest collection of trash ever formed by a legislative body', which is especially remarkable since it came from the Attorney-General of North Carolina, James Iredell, himself charged with upholding these laws. (Wood (1969), 406).

100 Jensen (1970), 161.

101 The level depending per colonial charter and type of colony involved.

102 Many states also lacked a proper bureaucratic system. The federal bureaucracy in fact later acted as a model for several states in developing such a bureaucracy, filling the British void.

103 Wood (1969), 463.

104 McDonald (1968), 5. As Madison put his discovery of popular despotism 'It is much more to be dreaded that few will be unnecessarily sacrificed to the many.' (Madison to Jefferson, Oct. 17, 1788, Boyd (ed), *Jefferson Papers* XIV, 20.

This internal stability naturally led to problems in the functioning of the Confederation as well. Instead of being able to rely on the States, the Confederation was called upon to control them, and to become a counterforce which would confront the States.[105] This claim was especially strong amongst the 'losers' of the revolution and democratization. Predominantly these were British subjects and former colonial elites who had strong ties to the British, and who had generally controlled both politics and business before independence.

The Confederation could not provide this counterforce: it simply lacked the means and the legitimacy to do so. Its inability to provide protection further discredited it, especially in the eyes of those seeking to regain control over the states. Besides hindering the Confederation in achieving its own primary objectives, the inability to 'control excesses' in the states thereby became seen as an important 'failure' of the Articles in itself.[106]

4.2 The (more) stable basis of the EU and the capacity of self-control

Generally speaking, the EU does not have the same problem of unstable Member States. Quite the opposite: the relatively developed legal and administrative infrastructure of the Member States greatly supports it, and from the confederal analysis emerges as one of the key foundations for the relative success of the EU confederal experiment.[107] A conclusion that supports the criteria for accession as set in Copenhagen and Madrid, and even suggests that these should be further developed.[108]

Obviously not all states are equally well organized, and compliance remains an important problem within the EU. Significant improvements, furthermore, can still be made in terms of good governance and loyal application of EU law, especially when applying an ideal standard. Nevertheless the level of governmental organization, stability and compliance is incom-

105 Not coincidentally it was in South Carolina, a state where the conservatives retained most of their power, that the elites were initially less willing to support a more national government, seeing their local power was not threatened. Only when they started to loose power as well a national government suddenly became the logical solution. U.B. Phillips, 'The South Carolina Federalists I' 14 *American Historical Review* (1909), 541-542.

106 Jensen (1970), 19, Wood (1969), 463, 408.

107 Cf Habermas (1996), 128..

108 See the Presidency Conclusions, Copenhagen European Council, 21–22 June 1993, and the Presidency Conclusions, Madrid European Council, 15–16 December 1995. These conditions now include that 'the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities (…). On the practical application see Kochenov (2008) and Smith (2003), 105 et seq. For a further discussion of these points see chapter 13, par. 5.2.

parably higher than that under the Articles.[109] As a consequence, the EU is generally not called upon to correct or restrain radical Member States, or to compensate for failing government and administration.[110]

The accession of weaker states, crises such as the Roma expulsion in France, the (mal)treatment of refugees in Greece, the strain on Schengen after Italian measures granting Schengen-visa to refugees, the problematic constitutional amendments in Hungary, openly Euro-aggressive populism, and the sovereign debt crisis are troubling developments in this regard, which will be further discussed below. In general, however, the EU is not pitted against its own Member States or asked to intervene in the same way as the US Confederation was.

Most important in this regard is that the developed legal and administrative systems of the Member States provide a level of *statal self-control*. Even where states are tempted to temporarily forget their obligations under EU law, or at least prefer a technically illegal but more favourable interpretation of those obligations,[111] their own bureaucracy and courts may restrain them from doing so.[112] Even if not fail-safe, this mechanism significantly reduces the *need* for the centre to enforce, and therefore reduces the stress on the inherently weak executive dimension of confederal organization. Instead of having to confront the Member States, the EU can rely on them, or at least their own governmental apparatus, to effectuate its commands.[113] For a confederation, this appears to be of existential importance, as it cannot substitute statal cooperation by force where necessary.

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109 See in this regard also the formal requirements for EU membership which art. 49 TEU links to art. 2 TEU. It hence postulates a minimum on important rule by law values as respect for human dignity, democracy, equality, the rule of law and respect for human rights,(…).

110 A constructive relationship seems the rule, rather than conflict. See D. Curtin and M. Egeberg, 'Tradition and Innovation: Europe's Accumulated Executive Order' 31 *West European Politics* (2008), 639, 649. Such conflict may occur in he future, in which case one of the weaknesses of the underlying confederal scheme may come to light.

111 See for a somewhat embarrassing example the string of cases against the Netherlands finding Dutch legislation to limit immigration in violation of EU law. Violations that were obvious in advance, yet where the Dutch government chose to stick to a untenable but politically more convenient interpretation of EU law. See C-155/11 PPU *Bibi Mohammad Imran* (nyr) an the related judgment by a Dutch Court of 23 November 2102 finding the Dutch rules in violation of EU law (Rechtbank Den Haag, LJN: BY4171, Awb 12 / 9408), or most recently C-508/10 *Commission v. Netherlands* [2012] nyr.

112 In fact the Hungarian amendments weakening the position of the judiciary, even if more understandable from their communist heritage, are especially threatening for the EU in this regard, as they undermine this capacity for self control.

113 Cf also Majone's notion of the EU as a regulatory state, G. Majone, 'The European Community as a Regulatory State', 5 *Collected Courses of the Academy of European Law* (1994), 321.

Our third proposition points to the fact that it is through the common language of law that the EU is able to directly relate, and even plug in to, these national apparatus. Hence the central importance of law, and an effective rule of law within the Member States, for the functioning of the EU. By incorporating many of the federate modifications concerning the rule of law, the EU equipped itself to govern in the only way a confederation really can: through a rule by law, and not by force.[114] It is suggested here that this choice plays a key role in stabilizing the modified confederal system of the EU.[115]

4.3 A rule by law: The USB of confederal organization

The EU does not have the physical means to enforce its commands, nor has it ever sought to accumulate them. Were it to compete with the Member States in the dimension of force or executive power, furthermore, it would surely loose.[116] Instead it formulates its commands in the form of law, and relies on the openness and responsiveness to law and legal commands of the Member States' legal systems for the effectiveness of these commands.[117] An almost institutionally-instinctive obedience to law that, as we saw above, has two elements. First, the Member States generally consider themselves bound to respect their legal obligations under the Treaties. Second, they by and large respect the decisions of the legal and administrative machinery, both at the national and EU level, on what these obligations entail.

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114 Cf also the conclusion by Hinsley (1986), 212-13 that only after states became 'constitutional' i.e. capable of responsible self-limitation such good governance was possible. The current crisis in Greece further seems to support this conclusion. Where does one start if there is no effective administration or rule of law?

115 The rule of law very thinly defined as the habit of systems to generally follow legal rules and the judgment of courts. The EU both depends on this system being available and entrenches the rule of law by empowering courts. Cf also Watts (1999), 14 on the import role of 'respect for constitutionalism' generally within federal systems.

116 Already by sheer force of numbers. Currently, for instance, the European Commission, the main administrative hub of the EU, employs around 35.000 civil servants, including interpreters. The Netherlands alone employs close to a million civil servants, or about 12% of all employed persons in the Netherlands, and the Netherlands has a relatively small public sector compared to other EU Member States.

117 Schütze (2012), 65. Of course there are many political pressures, including self-interests of the states, which promote compliance as well. But this does not alter the fact that the EU governs through law, only that Member States have self-serving reasons to follow the law as well.

Quite surprisingly this system has worked relatively well, as EU law seems to be generally effective.[118] A reality that should affect our understanding of the confederal model, as well as the related general debate in jurisprudence on the relation between law and power.[119] For it was the lack of enforcement capacity that was traditionally depicted as a core weakness of confederations. Madison's analysis of the weaknesses of the Articles provides a telling summary of this view:

> 'A sanction is essential to the idea of law, as coercion is to that of Government. The federal[120] system being destitute of both, wants the great vital principles of a Political Constitution. Under the form of such a Constitution, it is in fact nothing more than a treaty of amity, of commerce, and of alliance, between independent and Sovereign States.'

An analysis echoed by Washington. In hoping that the states would comply with their duties under the Articles without sanction, he stated: 'We have, probably, had too good an opinion of human nature in forming our Confederation.'[121] A view that formed part of the consensus at Philadelphia as well: law needed to be backed by force to be effective, or even to be proper law.[122]

The EU seems to have defied this classical rule of political and legal theory.[123] Building on the relatively effective legal systems in its Member States it has found a type of middle road: [124] a way of managing the non-compliance plaguing confederacies, *without* having to fully federate, for instance by creating a powerful central executive and granting it the right to use force.[125]

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118 See P. Craig and G. de Búrca, *EU Law* (OUP 2011), 476, note 95, who report a 96,3% implementation of ECJ rulings.

119 Cf Habermas (2001a), 17: '…the great achievement of the modern nation state, which with its status of citizenship first created a wholly new, namely abstract, solidarity transmitted by law.' Also see Habermas 2001), 113-14: 'the medium of state power is constituted in forms of law' (…) 'modern states are characterized by the fact that political power is constituted in the form of positive law.', or Stein (1981).

120 Here referring to the Articles, see above chapter 1, section 4.2. on terminology during the Confederation.

121 Wood (1969), 472.

122 See C. Schmitt, *Political Theology: Four chapters on the concept of sovereignty* (trans. G. Schwab, University of Chicago Press 2005), xix.

123 On this reliance on normative authority rather than enforcement capacity already see A.H. Robertson, 'Legal Problems of European Integration' 91 *Recueil des Cours de L'Académie de la Haye* (1957), 143 et seq. Also see B. van Roermund, 'Sovereignty: Unpopular and Popular', in: N. Walker (ed), *Sovereignty in Transition* (Hart Publishing 2006), 37, rightly pointing out the importance of other methods than force for the effective exercise of authority.

124 See Maduro (2006), 515-16 on the crucial role of national actors and the 'bottom-up' legitimacy and authority this provided EU law with.

125 CF also Börzel and Risse (2000), 6.

It did so, it is suggested, by partially separating law from power.[126] Something it was capable of doing by 'tapping into' the rule of law tradition of the Member States, including their well-oiled legal and bureaucratic machinery.[127] The judicial and administrative systems of the Member States are organized and programmed so well, with such strong professional training and levels of independence, that they respond to legal and administrative 'input' meeting a set of formal criteria. The remarkable acceptance of direct effect and supremacy are a clear example of Member State systems respecting and applying judicial decisions that have revolutionary effects for their own legal order, yet remain within the logic and language of law.[128] Once supremacy and direct effect had been accepted, at least in sub-constitutional matters, the EU had even more unlimited access to this pool of – often relatively autonomous – professionals.[129] With its 'output' formulated in the proper form of law, the EU could directly rely on this professional backbone of the Member States' bureaucratic and legal organization.

The rule of law, in other words, had created a sort of USB-standard the EU was able to plug into: it creates a common standard via which two different entities can connect, communicate, and control.[130] The EU did not need to be welded onto national systems, but like a mouse with a USB connector could be plugged in directly. Supremacy and direct effect thereby assist in the compatibility of the interacting legal orders. Yet the fundamental step, which even precedes and enables the use of *legal* doctrines as supremacy and direct effect, is a reliance on law and the rule of law itself. Without such a rule of law, after all, legal doctrines are useless.

Now it is not suggested here that all these developments resulted from a single grand design, or even that all actors involved were actually conscious of the overall system they were developing. Together, however, the developments within the EU, including the rise of the bureaucratic and legalized welfare state, did contribute to the circumstances in which such a confederal rule by law became feasible.

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126 Or at least allowing law and enforcement power to be placed further apart, being only indirectly linked via the sanctioning power of the Member State. A move that fits in a broader trend where even within Member States law increasingly seems to depend on convincing, rather than commanding or coercing subjects. Cf Habermas (2001a), 10.

127 Cf also the importance attached to administrative developments in this regard by P.L. Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State (*OUP 2010).

128 See further chapter 10, section 8 on the discussion on the supremacy of EU law.

129 Cf in this regard the failure of art. 23 of the Union of Utrecht to explicitly recognize the supremacy of confederal law and obligations. Supremacy was simply not accorded at the provincial level, and could not otherwise be enforced either, even though the legislation of the *Staten-Generaal*, the *Placaeten* or ordinances, were published and generally enforced in the provinces.

130 Obviously this USB is not globally compatible: were ASEAN to decide that henceforth its decisions would have supremacy in all EU Member States the national courts would obviously not follow suit. The fact that this USB requires certain preconditions to be met does not mean, however, that it does not exist.

The USB of the rule by law provided the EU with a sanction for non-compliance *without the EU needing to have the power to apply that sanction*.[131] Rather, the bureaucratic and legal systems of the Member States were so independent that they were capable of providing a mechanism of self-sanctioning that actually packed a punch.[132] In a sense one could see this as a form of cloud government: the EU does not need to incorporate the hardware of government, yet can access it via the rule by law network.[133] As a result, EU law is effective, or at least habitually followed, in a way that the American Confederation could not hope to achieve.[134]

The EU reliance on the rule by law, furthermore, is safeguarded to some extent by the equal dependence on law and bureaucracy of Member States governments. Government in modern welfare states is simply too vast and complex to tackle without them.[135] Consequently, national governments cannot attack the rule by law and their own bureaucracies too directly, as this would undermine their own capacity to govern as well.[136] In this regard one could say that, merged as they are, the national governments and the EU form a Siamese (non-identical) twin, joined at the administrative hip. One could also see this as a less glorious variation of Kant's vision on perpetual peace: a stable, cooperative republic of bureaucratic states, that are so dependent on their internal bureaucracy and rule of law that they are

131 See for a separation between law and the *power-in-fact* of politics in this regard the work of Neil MacCormick. He also indicates how law both depends and enables political rule, a view which also allows one to 'negate the existence of any analytically necessary nexus between law and state.' N. MacCormick, *Questioning Sovereignty* (OUP 1999), 15. Also see p. 21 on the importance of customary acceptance of law for governing and p. 105 for his discussion of plural law.

132 Also note in this regard the important work done by the Court of Justice in opening up the national system for enforcement through the notions of equivalence and effectiveness. Two notions that counteract the principle of state procedural autonomy that might otherwise have limited the effectiveness of EU law to a dangerous extent.

133 The limitations of the comparison are noted, including the fact that here the hardware is decentralized and the user centralized instead of the other way around.

134 The relative stability of the Swiss confederation might further support the proposition developed here. Based on the relatively more stable and established Cantons, the confederal system in Switzerland was put under far less stress than the US Confederation.

135 Interestingly, therefore, the very same instrument that supported the rise of 'sovereigns' nationally now also (and logically) helps in redefining that sovereignty. See part II of this thesis on sovereignty, and for the relation between law and sovereignty in the establishment of effective government in the middle ages already also M. Loughlin (2006), 58.

136 R. Bellamy, 'Sovereignty, Post-Sovereignty and Pre-Sovereignty', in: N. Walker (ed), *Sovereignty in Transition* (Hart Publishing 2006), 172.

forced to generally respect their obligations and are prevented from at least several excesses.[137]

Obviously governments can still attempt to reduce the influence of EU law over their courts and civil servants, and this thesis in no way claims that this will always be difficult to do. Nevertheless it is inherently problematic for the rule of law once individuals or institutions start deciding for themselves which laws to apply and which not; this interferes with its rule bound nature. At the same time such an overall rejection of law and legality could precisely be one of the dangers of the heavy reliance placed on it by the EU, at least as long as additional legitimacy for such use cannot be created.[138]

4.4 Laws impire and the plural nature of the EU order

Interestingly, such a true *rule by law*, a real laws impire, was exactly the goal the American founding fathers hoped to achieve. [139] The only way they saw to do so, however, was by granting the federate government a real and physical capacity to enforce.[140] For only full possession of that capacity, and the threat that came with it, could guarantee that the central government would be obeyed.

For these reasons they rejected proposals to improve the system under the Articles along the rule by law approach now adopted in the EU. It was proposed, for instance, to stabilize the confederal system via a central court, and by explicitly granting supremacy to confederal law.[141] A suggestion that was rejected by Madison based on the experiences of the German confederal system. The Diet of the Holy Roman Empire, he argued, had known no

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137 Clearly bureaucracies, courts and the rule of law are not fool-proof either, as Nazi Germany painfully illustrates. Radbruchs 'Fünf Minuten Rechtsfilosofie' should be a rude awakening to anyone placing too much faith in law alone. (G. Radbruch, *Rechtsphilosophie* (Müller Verlag 1999), 209). At the same time more often than not law has protected certain fundamental rights in the EU, and so far appears our best bet. Cf on the ideal of Kant also Lauterpacht (1977), 25: 'However, the federation of Kant was not a federal state; it was a confederation, presupposing the continued existence of sovereign states.'

138 See further part II and III and the potential of the confederal system to provide such a basis demonstrated in chapter 10, section 6, and chapter 12.

139 The founding fathers were very aware that they were trying to change the nature and operation of public authority, and the central place they were awarding to law to this end. Wood (1969), 66. Also see McLaughlin (1918), 231 describing the US system as a 'composite empire based on law'.

140 Hamilton for instance, foresaw the coercive effect law itself could have: 'Force, by which may be understood a coertion of laws of coertion of arms' Law itself, in other words, was already seen as a type of force. He could not, however, yet perceive of law without force, only as an intermediary between force: 'A certain portion of military force is absolutely necessary in large communities' See McDonald (1968).

141 See especially the original Dickinson draft of the Articles of Confederation and the Patterson plan introduced at Philadelphia.

less than three central supreme courts, each with direct effect and supremacy. Yet the system did not work because the system lacked the power to enforce their rulings:

> 'Altho' the establishmt. of Imperial Chambers &c give a more regular form to the police of the fiefs, it is not to be supposed they are capable of giving a certain force to the laws and maintaining the peace of the Empire if the House of Austria had not acquired power eno' to maintain itself on the imperial Throne, to make itself respected, to give orders which it might be imprudent to despise, as the laws were therefore despised.'

What, according to Madison, was missing in Germany, and in the Confederation, was an effective respect for law, necessary to empower a supranational court not backed by force. Yet the EU seems to have achieved exactly this: governing through law without itself having the physical powers to enforce.[142] As such it managed to reinforce the confederal set-up by latching onto the legal systems of its Member States. Thus it softened, though clearly not fully solving, one key dilemma for confederations: how to enforce your commands effectively without accumulating central powers that exceed the confederal nature of the union? Effective *self-control* of confederal obligations seems one way to solve this puzzle: it can ensure a relatively high level of compliance, without relocating the powers of enforcement to the centre.

Such effective self-control, furthermore, also fits with the '*pluralist' feeling* of the EU legal system.[143] It can help to explain why such a heterarchichal system can be relatively stable, or even be understood as a system. For even though the Member States retain ultimate authority, it is in fact *this same authority*, exercised through the medium of law, which is turned against them and used to uphold their obligations under EU law. In other words the supreme power and effectiveness of EU law does not derive from an ultimate normative superiority of the EU over the Member States.[144] It derives from the normative power awarded to EU law by the national rule of law, and therefore from the normative power Member States in turn award to this rule of law and the almost pre-legal norms as *pacta sunt servanda* that underlie it.

This view also matches the precarious nature of this order: after all the power that binds is equal to the power that is bound. No higher federate authority exists that truly trumps the statal level, which remains primary. In this way the EU could indeed be described as a gentleman's agreement or

142 The important role of law, and then especially supremacy and direct effect of EU law, has of course been often noted. The additional insight suggested here, however, is that these instruments must be seen against the larger confederal picture, and the role that law plays therein.

143 For an overview of pluralist logic see chapter 8, section 5.

144 See below chapter 8, section 5 on the notion of popular sovereignty and the ultimate authority of the individual Member Peoples as opposed to the secondary, *pacta sunt servanda* based, authority claim of the EU.

at least as an accord between morally adult legal systems: the effectiveness of the agreement derives from the inner constitutions of the parties. And where parties allow this to happen, they can violate their inner constitutions and breach the agreement.

In light of this rule by law, furthermore, the EU system could also be seen as a further evolution within the 'government by law' revolution initiated by the federate constitution itself: it constitutes a law's impire even beyond what the Founding Fathers thought possible. One that is made possible by the stability and level of development of its members.

Clearly the role of law should also not be overstated. It is certainly not suggested here that politics, or other non-legal factors, play no role in the EU constitutional system. They do, and they do so abundantly. In the end the ultimate authority and primary legitimacy of politics will trump law.[145] Compliance in the EU, to name but one example, is also improved by the political consequences of violating one's obligation, seeing how the Member States are repeat players at the game of cooperation. Many other reasons besides the rule by law, therefore, can rightly be linked to the better compliance within the EU as compared to the Articles. In addition the relevance of the rule by law is not unique for the EU, as other forms of cooperation such as the UN or the WTO also benefit from the rule of law traditions in (some of) their members.

Nevertheless it can be claimed that the rule by law has played a significant role in EU integration, not in the least by partially addressing one of the classic weaknesses of confederalism. A claim that is at least supported by the clear failures where political mechanisms instead of legal ones have been relied on to ensure compliance. The failure of the stability and growth pact provides is an example that speaks for itself.

The reliance on law and national legal and administrative systems of course also has several limitations and weaknesses. It does not provide the same level of security as a central executive power, for instance. It is also *limited to fields susceptible to legal or administrative control.* Yet these limitations and caveats, which will be further elaborated below, do not remove the significance or value of the above analysis on the rule by law and its central role in the EU system. A role that has of course been described before, but takes on a special importance and character from the confederal perspective.

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145 See also below chapter 13 on the EMU crisis where this is clearly illustrated, as well as already Hallstein (1962), 29: 'Just as language precedes grammar, so politics precedes political theory.' See further on the political space that has been developed in the EU, especially in the middle layer, Van Middelaar (2009), 105 et seq. and Walker (2006a), 20. Also see however above chapter 3 section 4: The fact that modern power needs a legal system to be effective may explain part of Foucault's paradox of sovereignty both being political power constituting the law, and law in turn restraining that same political power on which it is based.

Our third proposition therefore points to the central importance of law and the stable legal and administrative systems of the Member States for reinforcing the confederal rule by law in the EU. A conclusion that also explains just why law has been so central to the EU project. Seeing how the executive, and directly representational columns are reserved to the Member States, the EU has reinforced the judicial column with federate elements, and embraced the rule by law as a truly confederal approach to governing.[146]

5 Back to Madison's Score Card: Evaluating the modifications

Combining our three propositions, a picture emerges of the EU as an inverted confederation with a federate superstructure that allows it to largely govern by law alone. Compared to the US Confederation, the EU has, therefore, made significant modifications. Each of these has strengthened the confederal framework in some ways.[147]

To further assess the cumulative effect of the conclusions reached above, it is useful to briefly return to the original confederal score card devised by Madison for the US Confederation. Have the modifications discussed here helped in remedying the five key confederal weaknesses bemoaned therein? [148] The answer seems to be a clear yes.

5.1 General lack of power and energy in the centre and compliance in the states

The central confederal weakness Madison identified was the general lack of power and energy in the centre and the corresponding lack of compliance in the states. Concerning energy and effectiveness in the centre, clearly the EU still suffers from some of the traditional weaknesses of confederation. Taking decisions with so many Member States is a challenge at the best of times, even with QMV and 'pure' EU institutions as the European Parliament

146 See also Timmermans (2002), 3.

147 Cf Habermas (2001), 81, 84: The inverted confederation might be one model, one perspective, to assist in the challenge to 'bring global economic networks under political control' and to do so 'in institutional forms that do not regress below the legitimacy conditions for democratic self-determination.'

148 Madison named the following eleven vices: 1. Failure of the States to comply with the Constitutional requisitions; 2. Encroachments by the States on the federal authority; 3. Violations of the law of nations and of treaties; 4. Trespasses of the States on the rights of each other; 5. Want of concert in matters where common interest requires it; 6. Want of Guaranty to the States of their Constitutions and laws against internal violence; 7. Want of sanction to the laws, and of coercion in the Government of the Confederacy; 8. Want of ratification by the people of the articles of the Confederation; 9. Multiplicity of laws in the several States; 10. Mutability of the laws of the States; 11. Injustice of the laws of the States.

and the European Commission involved. The many different interest and perspectives that have to be taken into account mean decisions can take a long time, and may end up as awkward compromises. The saga surrounding the Services directive provides a telling example.[149] The EU, furthermore, has had its share of impasses, including a veritable dark age. Indeed the EU has been declared dead or dying on multiple occasions.[150]

Obviously, therefore, the EU decision-making machinery pays a price for respecting the autonomy of its Member States up to a confederal level. Nevertheless it is far more energetic and effective than the US Confederation, and seems to suffer much less from this confederal defect than one might expect.[151] Not only has the EU survived each crisis, it always seems to have emerged stronger. Since the Treaty of Rome integration has increased impressively both in scope, depth and intensity. In addition to specific feats such as a Common Currency, Schengen, European Citizenship, REACH or a Common External Action Service, the daunting size and breadth of the *Acquis* by itself forms clear proof, in any case of the capacity to legislate.[152] Some decisions, furthermore, can be taken relatively quickly, as demonstrated by the procedure for the new environmental package.[153] This can even reach scary speeds, as in the case of decision-making on the EMU crisis. The temporary stability fund, for instance, was conceived and established in less than 48 hours, even though the decisions involved will more likely than not have far-reaching effects on European integration and concerned significant sums of money.[154]

149 Barnard (1998). 323 et seq.

150 N. Ludlow, *The European Community and the Crisis of the 1960's: Negotiating the Gaullist Challenge* (Routledge 2006), N. Ludlow, 'Challenging French Leadership in Europe: Germany, Italy and the Netherlands and the Origins of the Empty Chair Crisis of 1965' 8 *Contemporary European History* (1999), 231.

151 Elazar (2006), 54: 'Thus the Construction of common institutions proceeded in such a way as to minimize the threat to the existing states which sought – and seek – to retain independence beyond that normally allotted to Federated states and at the same time enabled the establishment of a sufficiently energetic government in limited spheres with the means to attain the ends for which it was constituted.'

152 The implicit choice to circumvent some of the confederal obstacles (and the democratic ones) when creating normative acts via comitology also contributed to this effectiveness. See for instance F. Franchino, 'Delegating Powers in the European Community' 34 *BJPS* (2004), 269 or M. Pollack, *The Engines of European Integration: Delegation, Agency and Agenda-Setting in the EU* (OUP 2003).

153 See especially the adoption of Directive 2009/29/CE of the European Parliament and of the Council to improve and extend the greenhouse gas emission allowance trading scheme of the Community, *OJ* (2009) L 140/63. Of course this speed in itself may a be seen as a problem again, for instance where the influence of the European Parliament is reduced.

154 See chapter 13, section 2 below.

Similarly, as already indicated above, the compliance of the Member States is not perfect, but clearly is incomparably higher than in the Confederation, and probably far higher than anything Madison could ever have envisioned in a confederal system.

As outlined above, several of the federate modifications at least contribute to this increased energy and compliance, or help in better grasping its causes. Inversion created a more effective, constant and self-deepening impetus to cooperate. A broad array of teleologically interpreted competences allowed this energized centre to act. Effective negative integration manned the fort and shocked the system back into action where the centre was nevertheless immobile. Rule by law over stable states, furthermore, significantly increased compliance. Even if desiring to break their EU obligations, Member States face their own bureaucratic and judicial apparatus, as well as that of the EU, which can both be seized by interested individuals.

Although improvement is obviously possible, the modifications discussed here have at least reduced the weakness noted by Madison. The fact that the EU is still standing, as well as its impressive widening and deepening over the past decades, further suggests the effectiveness of these modifications in energizing confederal cooperation.

One should also apply a realistic standard. Even a fully-fledged federation, or a unitary state for that matter, would not have perfect 'energy' or compliance.[155] The federate constitution, for instance, did aim to make the centre more energetic, yet at the same time created numerous checks and balances to control that energy.[156] The debate on US healthcare reform, or the 2011 struggle over the debt ceiling and budget in the US, for instance, hardly bespeak of perfect energy.[157] In other words, *it is not a given that a fully federate EU system would make decisions much better or faster*. In any event its effectiveness would strongly depend on the checks, balances and other restrictions built into the federate framework. Seeing how creating any type of EU federation now would certainly entail many of such restrictions, overall effectiveness might not even be served that much by federating soon.

155 The concept of 'energy' is here used in the convenient and useful shorthand meaning of the term developed in the Federalist Papers and the debates on the American Constitution more generally, including in Madison's sketch on the failures of the Confederation. It denotes the will and the capacity of the (central) government to act effectively, and to thereby achieve its objectives. It should be contrasted with the situation under the Articles where the central government clearly lacked the will and the capacity to realize any will it might have.

156 The legislative process where both House and Senate produce a proposal (sometimes even multiple ones by different Committees) and then have to agree on a joint proposal is even very similar to the negotiation committee required under the ordinary legislative procedure, and is just as tedious.

157 As the saying goes: 'Laws are like sausages, you do not want to know how they are made.' (and in the US they usually contain pork).

5.2 Weak finances and unstable states

A second key weakness lay in *finances*. The US Confederation was crippled by its incapacity to generate a sufficient income. Here as well the EU is in much better shape, even though it was not granted the right to tax. Rather, due to better compliance, the Member States simply pay their share, even if the 'net payers' do so increasingly grudgingly.[158] In addition, the rule by law, and the regulatory focus of the EU also means that it does not need that big an income, at least in relative terms.[159] As a result the EU reduces the stress on its confederal system for collecting revenue. Stress that will increase, however, as EU financial demands increase, either in fact or in national perception. Here again the financial crisis provides increasingly clear confirmation, as the EU system struggles to deal with the increasing financial implications of safeguarding the Euro.

Madison's third woe, the *unstable states* that made up the Confederation, also troubles the EU, but to a lesser degree. More contextual providence than actual modification, the relative stability of the Member States has removed some of the stressors on the confederal basis of the EU. What is more, the stability of the states has become an enabling factor for the confederal rule by law.

Enlargement, financial woes and crises in national political legitimacy may undermine this stability of the Member States, and therefore negatively affect the EU as well. As we are currently seeing this in turn raises the question to what extent the EU should be allowed to influence or control such national preconditions for its effectiveness. Preconditions which often touch on key state powers as budgets or social policy: a problem which will be addressed in more detail below.[160]

158 Security of income may also have contributed to the relative stability of the Dutch Confederation. In the United Provinces of the Netherlands the confederal center, or generality, first of all had a more stable revenue of its own (See art. 6 and 7 of the Union of Utrecht). This revenue came from taxing the shared territories (*generality lands*), but mainly from license fees imposed on merchant ships. Second, the additional levies that were needed were paid more loyally by the different provinces. Here it may have helped significantly that Holland, by far the most powerful and wealthy province, on average picked up around 57% of the tab, but in return for its payments also had significant influence in the overall government of the Republic.

159 S. Korkman, *Economic Policy in the European Union* (Macmillan 2005), 59.

160 See chapter 13, sections 3 and 4.

5.3 *Lack of competences and the inability to (make) amend(s)*

The functioning of the Articles was seriously hampered by a *lack of (internal) competences*. Again this problem has to a large extent been addressed through several federate modifications. From the perspective of an ideal internal market gaps certainly exist in the competences of the EU, and important problems remain unresolved. Improvements could, for instance, be imagined concerning services of general economic interest, the relation between market and social objectives or the many indirect problems that simply remain between multiple different legal systems. Many of these problems, however, seem more due to the impressive scope of internal powers, than to their absence. With such significant market powers the problem rather becomes the absence of *non-market competences*, which become necessary to flank and counterbalance the market ones.[161]

In addition the EU, as an inverted confederation, is troubled by a lack of external competences. Just as the US confederation was hindered in its external activities by the lack of internal competences, the EU may require additional external powers to ensure effectiveness internally as well, let alone where it is asked to be an external actor in its own right. At the same time we should wonder if it is possible to extend the external powers further without also moving to a stronger (federate) foundation for the EU; can a confederal system dominate both the internal and the external sphere, or should it necessarily leave primary control of one of these halves to its members as part of a necessary confederal balance? Despite these problems, however, the EU clearly does not suffer from the lack of internal competences in the same way as the American Confederation.

The last major flaw Madison noted in the Confederation was the *inability to amend* its own shortcomings. Again, as we saw, the modified system of the EU at least reduces this weakness. Formal amendment, in line with its confederal basis, still requires unanimity. Yet the EU system has enough internal flexibility to adapt through interpretation and convention. In addition, the internal focus, negative integration as developed by the Court of Justice, and the relative stability of the Member States have helped in achieving several important formal amendments, such as the Single European Act. Compared to the US Confederation, therefore the EU system is far more flexible and adaptable, although future challenges await, especially with close to thirty Member States and an even heavier federate superstructure.

161 See for instance cases C-341/05 *Laval* and C-438/05 *Viking*. One could of course also then recast such non-economic competences as market competences by simply adopting a broader definition of market. At some point however, this seems to become disingenuous.

6 Madison's score card: A clear pass grade

Scoring the EU against the archetypal weaknesses of the American Confederation it becomes apparent that the EU has been able to contain, or at least soften, most of them. It did so by incorporating a mix of federate modifications and utilizing its very different context. The modifications to the EU's constitutional structure, therefore, seem to have been effective in stabilizing its constitutional framework to a certain degree, and have allowed it to survive several crises. Crises which could easily have been the downfall of a more conventional confederal system, but instead cause the EU to significantly deepen and broaden integration.[162]

Yet what are the *costs* of these modifications? Can one simply place a federate superstructure atop a confederal basis, or is this the constitutional equivalent of armouring a *deux chevaux* with six inch steel plates? Can such modifications, furthermore, deal with the more fundamental weakness underlying the confederal system, such as its limited and secondary authority and legitimacy, or the limited capacity to reign in the states when cooperation is close to the breaking point?

To address these questions, and to further complete our exploration of the strengths and weaknesses of a modern inverted confederal structure, the next chapter turns to the problems that might flow from these same federate modifications and the three propositions developed so far.

162 Cf also the intuition of Lauterpacht on the potential to strengthen the confederal form. Discussing some proposed changes to the League he concludes: 'such innovations would go a long way towards realizing most of the conditions of a progressive political integration of humanity. … if adopted they would go a very long way towards removing the shortcomings of a confederation while retaining its necessary form.' Lauterpacht (1977), 16.