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Some Observations on the Equality and National Identity of Member States and the Principle of the Rule of Law

The purpose of this short text is to discuss from a legal perspective the status of small Member States like Finland in the European Union, the national identity of Member States, and especially the reason why it is important in the EU to emphasise the rule of law. Equality among the Member States and the respect for the national identities of Member States are both stated in Article 4(2) TEU, so I will review these issues first in their dedicated paragraphs. I will also discuss the values of the EU, the concept of the rule of law, and the effects of the observance of the rule of law on the equality of the Member States.

1. On the Equality of the Member States

In a small Member State, the political influence in the EU may be seen in relation to how much voting power a country has or how many parliamentarians are selected into the European Parliament. For example, before Brexit Finland only has 7 votes out of a total of 352 in the Council, and only 13 Members of the European Parliament out of a total of 751. It must be noted, however, that the current double majority specified in Article 238 TFEU and Article 16 TEU (55 % of Council members and 65 % of the population of the Union) somewhat complicates this picture, because each Member State only receives one vote in the Council for the 55 % majority threshold. In practice, it takes 16 Member States out of the 28 to pass the 55 % threshold (before Brexit). Finland's votes in the Council and seats in the Parliament are few, but it must be taken into account that Finland's share of the entire EU population is only slightly more than one percent before Brexit (1.07 %). There is thus no reason to even expect that a country of 5.5 million inhabitants could have more formal influence in the European Union.

The Member States each have one vote in the European Council. The European Council makes unanimous decisions, unless otherwise decreed in the Treaties. If a Member State of the European Council abstains from voting, this shall not be counted as a vote against pursuant to Article 235(1) TFEU. In issues where decision-making requires unanimity, decisions may be halted due to the wishes of even relatively small population groups. A good example of this is the holding back of the CETA approval between the EU and Canada by Belgian Wallonia in 2016. A perhaps even better example is the ratification crisis of the Maastricht Treaty in 1992 and 1993, when the small Denmark

was able to influence the final form of the Treaty by their resistance. For example, the development of the principle of subsidiarity, currently apparent in Article 5(3) TEU, progressed precisely as a consequence of the Maastricht Treaty ratification crisis. Attention should therefore also be paid to how a Member State—whether big or small—uses its voting power, meaning that the “voice” matters as well as the “vote”.

Article 4 TEU defines the position of the Member States in the Union. The first section of Article 4 TEU introduces the so-called principle of conferral. This states that powers that have not been conferred to the Union in the Treaties shall remain with the Member States according to Article 5 TEU. The mandated powers of the EU are thereby determined in accordance with the principle of conferral, but the use of the powers is determined by the principles of proportionality and subsidiarity.¹ The second section of Article 4 TEU expresses the equality between the Member States and the respect for the national identities. The third section presents the so-called principle of sincere cooperation.² It holds that the Union and the Member States must respect and assist each other in the fulfilment of the tasks specified in the Treaties. Interpreting by the wording, this includes both a positive and a negative obligation. When interpreted word for word, the principle of sincere cooperation constitutes a binding effect on the Member States, and is therefore well suited as a basis for claims concerning violations of the obligations of the Member States pursuant to Articles 258 and 259 TFEU.³ Nowadays the obligation of sincere cooperation is however extended to apply to the relations between the institutions of the EU as well.⁴ It has also been thought that the principle of mutual trust governing the relations between the Member States can be seen as a part of the principle of sincere cooperation in Article 4(3) TFEU.⁵

The equality between the Member States is expressed as follows in Article 4(2) TEU:

“The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.”

Interpreted literally, the equality of the Member States relates to the application of the Treaties. I take this to mean that Member States have the same basic rights and obligations in terms of the Treaties, even though it is known that in practice the EU has set exceptions for the obligations of different Member States, for example in relation to the European Monetary Union or the Schengen Area. The so-called flexibility principle and its associated enhanced cooperation must also be taken into account, which can be implemented in areas where the principle of subsidiarity can be applied. According to Article 20(1) TEU, the enhanced cooperation applies to other areas than those under the exclusive jurisdiction of the EU. Not all Member States need to take part in all deeper integration projects in all sectors of EU policy. According to Articles 20(2) TEU and 329(1) TFEU, enhanced cooperation

¹ See more on the application of the subsidiarity and proportionality principles in Protocol No 2 of the Lisbon Treaty.

² See about recent cases concerning Article 4(3) TEU e.g. C-620/17 *Hochtief Solutions*, ECLI:EU:C:2019:630, paras. 56-60 (*res judicata* and sincere cooperation), C-31/18 “*Elektrozpredelenie Yug*”, ECLI:EU:C:2019:868, paras. 60-61 (implementation of a directive and consistent interpretation) and C-55/18 *OCOO*, ECLI:EU:C:2019:402, paras. 68-70, (implementation of a directive and consistent interpretation).

³ See 240/86 *Commission v. Greece*, ECLI:EU:C:1988:173.

⁴ See 204/86 *Greece v. Council*, ECLI:EU:C:1988:173, section 16 and especially C-65/93 *European Parliament v. Council*, ECLI:EU:C:1995:91, para. 23.

⁵ See *Prechal, Sacha*: Mutual Trust Before the Court of Justice of the European Union, European Papers, Vol. 2, 2017, N:o 1, pp. 75-92, especially p. 92 as well as C-359/16 *Altun*, ECLI:EU:C:2018:63, para. 40, in which the Court states: “Indeed, the principle of sincere cooperation also implies that of mutual trust.”

requires permission by the Council and participation by no fewer than nine Member States.⁶ These exceptions, specific to the Member States, do not however nullify the premise that the Member States are equal in relation to the Treaties, as it could rather be thought that the principle of flexibility and the so-called multi-speed Europe actually safeguard the equality between the Member States by providing legitimate means for allowing differences between the Member States in the promotion of integration.

As examples of the Equality of the Member States, one could consider the voting rights of the European Council or the EU's linguistic equality, that is the linguistic regime consisting of all official languages. Perhaps at a deeper level, the equality of the Member States can be related to for example the immediate effects of European law. Case *Van Gend en Loos*⁷, related to its emergence, concretised the equality of the Member States in its own way. Back then, in the early 1960s, all Member States had to commit equally to the central objective of the founding treaty of the Economic Community, which was the creation of a customs union. This is why it was not permissible in the context of case *Van Gend en Loos* to allow separate customs tariff agreements between individual Member States. One dimension of the equality of the Member States in relation to the Treaties is that it commits the Member States to the goals of the EU in a consistent way.

Behind the equality of the Member States is the idea that the EU is governed by law, not by force. That is why both big and small Member States have to submit to the application area of the primarily interpreted European law and allow the EU Court to interpret EU law on the basis of its system of preliminary rulings in a way that is binding on the Member States. In practice, it is of course possible to problematise the assumption that the Member States are perfectly equal when it comes to for example the functioning of the judiciary. One may here make reference to for example the Solange rulings of the German Constitutional Court⁸, which it used to set limits on the interpretation of the principle of primacy in the era of the Economic Community.⁹ Another example is case *Omega Spielhallen*¹⁰, where the EU Court had no interest even in terms of securing fundamental freedoms to interfere with the interpretation of the German Constitutional Court on human dignity, assumed over the course of decades and safeguarded by § 1 of the German Constitution. The threat here was a tension between the legal practices of the EU Court and the German Constitutional Court¹¹, where an *ordre public* ruling would apparently have been possible in the German judiciary.¹² The equality of the Member States therefore does not eliminate the need for sensitivity as regards features typical of a certain society, as is demonstrated on the one hand by the respect for national identity specified in Article 4(2) TEU and by the fact that each Member State shall be responsible for its own national security on the other. It must be noted that a degree of sovereignty is also exemplified in national

⁶ For examples of enhanced cooperation, see Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ No L 324, 29.12.2010, p. 10, or Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (EPPO), OJ No L 283, 31.10.2017, p. 1.

⁷ See 26/62 *Van Gend en Loos*, ECLI:EU:C:1963:1.

⁸ See case *Solange I Internationale Handelsgesellschaft*, (1974) 2 CMLR 511 and case *Solange II Wünsche Handelsgesellschaft*, (1987) 3 CMLR 225.

⁹ See more details on the rulings of the German Constitutional Court in e.g. *Da Cunha Rodrigues, José Narciso: National Identity and European Construction*, in Lenaerts Koen, Bonichot Jean-Claude, Kanninen Heikki, Naomé Caroline and Pohjankoski Pekka (eds.): *An Ever-Changing Union?, Perspectives on the Future of EU Law in Honour of Allan Rosas*, Oxford, Hart Publishing, 2019, pp. 35-50, especially p. 37, (*Da Cunha Rodrigues* 2019).

¹⁰ See C-36/02 *Omega Spielhallen*, ECLI:EU:C:2004:614.

¹¹ See e.g. BVerfG 30, 173 (1971) *Mephisto* and BVerfG 64, 274 (1981) *Peep Show*.

¹² See about the national *contra legem* interpretation from the EU law perspective e.g. C-385/17 *Hein*, ECLI:EU:C:2018:1018, para. 51.

security and defence policy by the so-called security exemption in Article 346 TFEU, which however needs to be interpreted with an eye on the Directive 2009/81/EC on defence and security contracts.¹³

2. Some Observations on the National Identities of the Member States: Sayn-Wittgenstein and Bogendorff von Wolffersdorff

The respect for national identity is not specifically defined in Article 4(2) TEU, although its wording connects it to the political and constitutional structures of each Member State. As a consequence, the respect for national identity can be seen to relate to *ordre public* situations. A typical case-law example relating to various *ordre public* arguments pertains to gambling, where more attention can be paid to national moral, religious and cultural characteristics when limiting the trade of goods and services between the Member States on the basis of public order.¹⁴ However, there is not much case-law in which the concept of “national identity” have been referred to explicitly, but there are indications that it has gained increasing significance in the Court’s argumentation recently.¹⁵ The Court has maintained in its case law that the preservation of national identities of the Member States is a legitimate aim respected by the legal order of the European Union.¹⁶

After coming into force of the Lisbon Treaty the concept of “national identity” has been referred to in case Sayn-Wittgenstein¹⁷, as that was about implementing equality in a way appropriate in the legal culture of Austria. In this case, an Austrian woman, 47 years old and living in Germany, had been adopted into Germany and her name had been registered in Austria as “Ilonka Fürstin von Sayn-Wittgenstein”. The Austrian consular authorities operating in Germany had granted her a passport with this noble name, and she owned a business which had been entered into the German trade register by the name Ilonka Fürstin von Sayn-Wittgenstein.

In Austria, nobility has been abolished in 1919 by an act applying the equality principle, and, pursuant to the transposition of the regulations pertaining to this act, no family names of Austrian citizens may exhibit any signs of nobility. The Austrian Constitutional Court has issued a ruling in a similar case in 2003, finding that a constitutional act on the abolition of nobility prevents the taking of an old noble family name by an adoption process which is carried out by a German citizen and who has a such a name legally. Thus, citizens of Austria were not allowed to take noble names even when these originated from abroad. On the basis of this ruling, the Austrian authorities changed Ilonka Fürstin von Sayn-Wittgenstein’s name in the population register to Ilonka Sayn-Wittgenstein in 2007.

Ilonka Sayn-Wittgenstein appealed this ruling, because the use of different family names in different Member States constitutes an actual obstacle to the free movement of persons, violating Article 21

¹³ See Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security and amending Directives 2004/17/EC and 2004/18/EC, OJ No L 216, 20.8.2009, p. 76.

¹⁴ See e.g. C-275/92 *Schindler*, ECLI:EU:C:1994:119, paras. 60 and 61, C-42/07 *Liga Portuguesa*, ECLI:EU:C:2009:519, para. 57, C-447/08 & C-448/08 *Sjöberg and Gerdin*, ECLI:EU:C:2010:415, para. 37 and C-212/08 *Zeturf*, ECLI:EU:C:2011:437, para. 39.

¹⁵ See also e.g. *Da Cunha Rodrigues* 2019, pp. 35-50 and the cases C-C-51/15 *Remondis*, ECLI:EU:C:2016:985, paras. 40-41, C-128/17 *Republic of Poland v. European Parliament and Council of the European Union*, ECLI:EU:C:2019:194, paras. 120-131 and C-317/18 *Correia Moreira*, ECLI:EU:C:2019:499, paras. 61-63. Additionally, Advocate-General Sharpston has interestingly analysed Article 4(2) TEU in the context of the case C-715/17 *European Commission v. Republic of Poland*, ECLI:EU:C:2019:917, paras. 224-227, (Opinion of Advocate General Sharpston delivered on 31 October 2019).

¹⁶ See C-51/08 *Commission v. Luxembourg*, ECLI:EU:C:2011:336, para. 124. The idea was to ensure the use of the Luxembourgish language in the performance of the activities of the notaries.

¹⁷ See C-208/09 *Sayn-Wittgenstein*, ECLI:EU:C:2010:806.

TFEU. She also thought that the demand to change her family name violates her right to respect for family life, safeguarded by Article 8 of the European Convention on Human Rights, especially as she has been able to use the name Fürstin von Sayn-Wittgenstein for approximately 15 years. The Austrian authorities on their behalf denied that the changes to the population register entry would cause such significant harm to Sayn-Wittgenstein as would constitute a violation of Article 21 TFEU. The authorities furthermore justified their decision by the argument that if the legislation abolishing nobility would be bypassed, this would be a severe violation of the values grounding the Austrian legal system, especially the principle of equality.

The EU Court ruled that Article 21 TEU does not constitute an obstacle to the refusal of the Austrian authorities to recognise the noble family name of an Austrian citizen, taken in adoption and accepted in Germany. The actions of the Austrian authorities were deemed justified for reasons related to public order and the principle of equality. The Austrian interpretation was also made according to the principle of proportionality. In the grounds of the judgment, the EU Court stated the following as concerns national identity: “It must also be noted that, in accordance with Article 4(2) TEU, the European Union is to respect the national identities of its Member States, which include the status of the State as a Republic.”¹⁸ Here, one can see a connection to the *Omega Spielhallen* ruling, mentioned earlier, where it was explicitly stated that special circumstances relating to the protection of public order may vary reasonably from one country and era to another.¹⁹

A similar situation was present in case *Bogendorff von Wolffersdorff*²⁰. In this case, the German citizen Nabel Bagdadi first changed his name in Germany and then in the UK, so that his final name according to British law was Peter Mark Emanuel Graf von Wolffersdorff Freiherr von Bogendorff. He also received British citizenship. He and his spouse moved from Britain to Germany, where their daughter Larissa Xenia Gräfin von Wolffersdorff Freiin von Bogendorff was born. The daughter was granted a passport with this name in both the UK and Germany by decision of the Oberlandesgericht Dresden. Graf von Wolffersdorff Freiherr von Bogendorff wanted the German regional authorities to enter his legal British names into the population register, as a consequence of which he could then verify his name in Germany. He had been registered by different names in Germany and Britain, which caused some passport-related confusion and constituted an obstacle to movement between Member States in violation of Article 21 TFEU. On the other hand, confusion was caused by the fact that the father and the daughter had different family names in Germany, because the Oberlandesgericht Dresden had allowed the noble family name for the daughter, but as the family moved within Germany, the Amtsgericht Karlsruhe rejected the name change for the father. Ever since the constitution of the Weimar Republic, all birth- and status-related privileges had been abolished in Germany, however so that no “old” noble names still existing at the time of the adoption of the constitution were outlawed.

By my interpretation, this is also an interesting reflection of the differences between East Germany (Oberlandesgericht Dresden) and West Germany (Amtsgericht Karlsruhe). The city officials of Karlsruhe refused the registration of the new name, because the seemingly noble new family name would violate the German take on the equality of citizens and thereby the foundations of the German legal system. One might wonder on the basis of this curious case, whether it possible to conclude that national identity is not always easy to define, not even by the administrative or judicial practices of the Member States themselves?

¹⁸ Ibid, paragraph 92.

¹⁹ See C-36/02 *Omega Spielhallen*, ECLI:EU:C:2004:614, paragraph 31.

²⁰ See C-438/14 *Bogendorff von Wolffersdorff*, ECLI:EU:C:2016:401.

After the legal proceedings that ensued, the EU Court confirmed in reference to case Sayn-Wittgenstein that EU law does not require that such family names be registered as violate German law.²¹ Thus, in this case too, the right of free movement between Member States, confirmed in Article 21 TFEU, turned out to be a less weighty argument than equality. Like in Sayn-Wittgenstein, in case Bogendorff von Wolffersdorff the concept of “national identity” based on Article 4(2) TFEU was explicitly mentioned.²² Both of these cases seem to reflect issues such as noble names in a way that hardly could emerge in every Member State.

3. Observations on the Value Base of Article 2 TEU in Relation to the Equality and Identity of the Member States as Outlined in Article 4(2) TFEU

3.1. Observations on European values, the Finnish EU Presidency, and the Rule of Law

The kind of equality of the Member States and respect for national identity as is intended in Article 4(2) TEU and was broadly defined above can be interpreted in relation to the value base of the EU as described in Article 2 TEU. It can be thought that the influence that a small Member State like Finland has is not so much related to their formal votes in the Council or seats in the European Parliament, but rather something that can be obtained by promoting the shared values of the EU. Without a shared value base, the mutual trust between the Member States is jeopardised. Article 2 TEU has the following to say on our shared values:

“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

The essential emphasis on Article 2 TEU is on seeing the rule of law, democracy, and respect for human rights as a legal trinity in the EU, so that these three components constitute the interpretative context for each other. I have here employed the metaphor of a musical triangle. A triangle can only make a sound if all three of its corners are connected to each other, thereby connecting the sides of the triangle. The principle of the rule of law outlined in Article 2 TEU is in harmony with how the rule of law is understood in Finland. During its EU Presidency, Finland has strongly emphasised the significance of the value base and rule of law in Article 2 TEU for the development of the EU.²³ Democracy, the rule of law, and the actualisation of fundamental and human rights in particular are connected together into a trinity where all the components form preconditions for the others. To illustrate this, one may cite the conclusions of the Finnish presidency 2019, issued at the Conference on democracy, the rule of law, and fundamental rights²⁴, held in Helsinki on the 10th and 11th of September 2019:

“Democracy, the rule of law and fundamental rights have a high symbolic value and practical importance. Expressed in legal norms they are crucial for the proper functioning of our societies and the policies of the Union. The respect for these values and principles reinforces the credibility and unity of the Union and the trust between the Member States’ authorities, and influences directly the operating environment of companies and the daily lives of citizens. Furthermore, these three values

²¹ Ibid., paras 77-84.

²² Ibid., para. 64.

²³ Presidency conclusions, Council document 12044/19 and e.g. the home pages of the president state www.eu2019.fi. e

²⁴ Presidency conclusions, Council document 12128/19

and principles are a precondition for sound public finances. Our common values are also the bedrock of resilience. Shortcomings in this area make our societies and the Union more vulnerable both internally and externally.”

When evaluating this quote, it must be kept in mind that the EU has developed several institutions for the promotion of the rule of law even before the Finnish Presidency. For example, the Commission established an operational framework for the rule of law in 2014²⁵, and the EU Court has recognised its significance for its judicial practice²⁶. In October 2016, the Parliament issued a statement on an EU system governing democracy, the rule of law, and fundamental rights, encouraging the Commission to establish monitoring and an annual reporting period for all Member States and the EU executive institutions, and to issue recommendations for the actualisation of the rule of law.²⁷ Thus, Finland has begun its Presidency by supporting the policies that reinforce the rule of law, and which the Parliament has been promoting and the Commission has argued should be reinforced in the EU in the spring of 2019.²⁸ Finland has also been active in the promotion of the Commission’s regulation proposal concerning the protection of the Union’s budget in situations where general shortcomings can be detected in the observation of the rule of law in the Member States.²⁹ As further background, it should be noted that the development of the rule of law in Poland and Hungary in particular has been critically evaluated in both the Commission and the EU Court. The EU Court has had to take a stance in defence of the rule of law, especially in contexts relating to the impartiality of the courts.³⁰ The Commission initiated the proceedings specified in Article 7(1) TEU against Poland in December 2017³¹, and the Parliament did the same with Hungary in September 2018.³² The proceedings according to Article 7(1) TFEU are initiated if a clear danger of violating the rule of law exists.

3.2 Debating the Meaning of the Rule of Law

Finnish rule of law policies have been criticised somewhat, although Finland has during its EU Presidency presented communications which have mostly only supported policies outlined by the

²⁵ (See Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, COM (2014) 158 final.) See Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, COM (2014) 158 final.

²⁶ See C-619/18 R, *Commission v. Poland*, ECLI:EU:C:2018:1021, paragraphs 81-84.

²⁷ See European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights, 2015/2254 (INL).

²⁸ See Communication from the Commission, Further strengthening the Rule of Law within the Union, COM (2019) 163 final.

²⁹ See Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union’s budget in case of generalised deficiencies as regards the rule of law in the Member States, COM (2018) 324 final. This proposal is legally grounded in Article 322(1a) TFEU, i.e. the financial management rules issued by the Parliament and the Council by means of regulations. This is to protect the EU budget and promote the implementation of the rule of law pursuant to Article 2 TEU in all Member States.

³⁰ See e.g. case Portuguese judges C-64/16 *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas*, ECLI:EU:C:2018:117, section 30, 36 and the issues concerning Poland C-216/18 PPU, *LM*, ECLI:EU:C:2018:586, section 48, C-619/18, *Commission v Poland*, ECLI:EU:C:2018:910, section 21, C-619/18 R, *Commission v. Poland*, ECLI:EU:C:2018:1021 and C-192/18 *Commission v Poland*, ECLI:EU:C:2019:924. Claims relating to the rule of law are pending for Hungary, referring here to cases C-78/18 *Commission v. Hungary*, C-66/18 *Commission v. Hungary* and C-718/17 *Commission v. Hungary*.

³¹ See Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, COM (2017) final.

³² See European Parliament resolution of 12 September 2018 on the proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty of European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, 2017/2131 (INL).

Commission and the Parliament in Article 2 TEU, as described above. For example, Hungarian Prime Minister Viktor Orbán questioned Finland's role as a critic of the progress of the rule of law in Hungary in a speech he gave on 27.7.2019. He was critical of Finland's rule of law by making reference to the fact that there is no constitutional court in Finland, only a constitutional council consisting of politicians. He further described how judges are appointed by the President of the Republic as recommended by the Minister of Justice, creating the impression that the appointment process for court judges is political in character.

Without going into detail here, it must be observed that the progress of the rule of law in Finland has not been criticised by the EU, unlike in Hungary. It must also be stated that a constitutional court and a constitutional council cannot be directly compared, as a constitutional council is not a court of law. A constitutional council carries out the advance monitoring of the constitutionality of legislation. For example, when the European Stability Mechanism was agreed on, Finland could influence the contents of Article 4(4) of the ESM agreement while simultaneously protecting Finland's ability to calculate the financial liabilities constituted by the loans and guarantees, pursuant to § 82 of the Constitution of Finland.³³

A more demanding criticism has been targeted at the problem of how the contents of the principle of rule of law cannot be defined precisely in advance, making it unfair to interfere in the internal affairs of Member States for vague political reasons by appealing the rule of law. By my interpretation, this argument has been found erroneous as well. The principle of the rule of law is not merely a "rhetorical balloon" void of any normative content.³⁴ In the context of Finland and other Member States, it must be interpreted in connection with Article 2 TEU. This has been brought up in the Commission communication dated 3.4.2019 as follows:

"The rule of law is enshrined in Article 2 of the Treaty on European Union as one of the founding values of the Union. Under the rule of law, all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts. The rule of law includes, among others, principles such as legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibiting the arbitrary exercise of executive power; effective judicial protection by independent and impartial courts, effective judicial review including respect for fundamental rights; separation of powers; and equality before the law. These principles have been recognised by the European Court of Justice and the European Court of Human Rights."³⁵

This definition is actually quite similar to the report by the Venice Commission on the principle of the rule of law³⁶, where the rule of law is closely tied in with democracy and the requirement of protecting human rights. The legal praxis of the EU Court indicates that the rule of law includes certain tangible prerequisites for legal decision-making in its EU legal context.³⁷ From the perspective

³³ See e.g. PeVL 14/2011 vp.

³⁴ See *Raitio* 2017, p. 133.

³⁵ See Communication from the Commission: Further strengthening the rule of law within the European Union, COM (2019) 163 final., p. 1-2.

³⁶ See European Commission for Democracy Through Law (Venice Commission), Report on the Rule of Law, Adopted by the Venice Commission at its 86th plenary session, Venice 25-26 March 2011, Strasbourg, 4 April 2011, Study No. 512/2009, CDL-AD(2011)003rev.

³⁷ See 8/55 *Fédéchar* (1954-56) ECR 292, particularly p. 299 and the cases concerning the rule of law that concern indemnity beyond the EU law 5/71 *Schöppenstedt* (1971) ECR 975, 59/72 *Wünsche Handelsgesellschaft* (1973) ECR 791, 20/88 *Roquette frères* (1989) ECR 1553, C-152/88 *Sofrimport* (1989) ECR I-2477, C-104/89 & C-37/90 *Mulder*

of European law, one may speak of the "*Thick concept of Rule of Law*", which emphasises not only formal legality, but also substantiality due to individual legal protections and basic human rights.³⁸ It must be noted here that in the broader context of international and comparative law, the concept of the rule of law is given contents which deviate from this European interpretation³⁹, but I have here purposefully focused on the rule of law as is based on European law.

3.3. Can the definition of the rule of law connected with Article 2 TEU be contradicted by the equality of the Member States and the respect for national identity mentioned in Article 4(2) TEU?

The answer to the titular question is clearly negative. The interpretative context for Article 4(2) TEU must be constituted by Article 2 TEU, describing the value base of the EU. For example, no national actions violating the independence of the courts can be allowed by European law. This must be kept separate from situations depicting national sensitivities, of which I offered case *Omega Spielhallen*⁴⁰ as an example, and situations of national identities as in the cases *Sain-Wittgenstein* and *Bogendorff von Wolffersdorf*⁴¹. Thus, interpretations may vary somewhat among Member States when it comes to the equality of citizens relating to the inviolability of human dignity or democracy. On the other hand, the equality of the Member States and the respect for national identities do not mean that the EU is obliged to blindly trust in the rule of law of the Member States or their appropriate levels of protection for fundamental rights.⁴² There are examples of legal practice which indicate that the EU does not trust its Member States blindly. For example, in cases of repatriating asylum seekers in relation to the Dublin system, it must be verified that the conditions in the homeland of the repatriated persons provide for human dignity.⁴³ In Timmermans' words, sometimes trust in the protection of fundamental rights must be abandoned in order to ensure the protection of those rights.⁴⁴

4. Conclusion

It may seem far-fetched to ponder the connection between the equality of the Member States pursuant to Article 4(2) TEU and the discussion on the rule of law relating to Article 2 TEU. The background of this article is constituted by the issues and discussions of the comparative law conference arranged in Greifswald, Germany on the 19th to the 21st of September 2019 (Tagung für

(1992) ECR I-3061 and C-282/90 *Vreugdenhill* (1992) ECR I-1937. C-284/16 *Achmea*, ECLI:EU:C:2018:158, Section 34 can be mentioned as an example of recent legal praxis.

³⁸ See, for example, *Von Bogdandy, Armin – Antpöhler, Carlino – Ioannidis, Michael*: Protecting EU Values, Reverse *Solange* and the Rule of Law Framework, in the publication Jacob, András – Kochenov, Dimitri (eds.): *The Enforcement of EU Law and Values*, Oxford: Oxford University Press, 2017 p. 226, which states: "*This general orientation towards a "thick" concept of Rule of Law is in principle reaffirmed in the decision to submit Poland to the Framework, which notes that the Rule of Law is a constitutional principle with both formal and substantive components. Nevertheless, when it comes to the actual reprimands against Polish reforms, priority is accorded to the formal dimension*".

³⁹ See e.g. *Husa, Jaakko*: Nordic Law and Development – See No Evil, Hear No Evil?, *Scandinavian Studies in Law*, 2015, pp. 1-16, and *Husa, Jaakko*: Advanced Introduction to Law and Globalisation, Cheltenham, Edward Elgar, 2018, pp. 49-63.

⁴⁰ See C-36/02 *Omega Spielhallen*, ECLI:EU:C:2004:614, section 31.

⁴¹ See C-208/09 *Sayn-Wittgenstein*, ECLI:EU:C:2010:806 and C-438/14 *Bogendorff von Wolffersdorf*, ECLI:EU:C:2016:401.

⁴² See e.g. *Lenaerts, Koen*: La vie après l'avis: Exploring the principle of mutual (yet not blind) trust, *Common Market Law Review* 54, 3/2017, pp. 805-840.

⁴³ See e.g. C-411/10 & C-493/10, *N.S.*, ECLI:EU:C:2011:865.

⁴⁴ See more thoroughly about the "mutual trust" in *Timmermans, Christiaan*: How Trustworthy is Mutual Trust? Opinion 2/13 Revisited, in in *Lenaerts Koen, Bonichot Jean-Claude, Kanninen Heikki, Naomé Caroline and Pohjankoski Pekka* (eds.): *An Ever-Changing Union?, Perspectives on the Future of EU Law in Honour of Allan Rosas*, Oxford,, Hart Publishing, 2019, pp. 21-34, especially p. 34.

Rechtsvergleichung⁴⁵). For a large Member State such as Germany, the equality mentioned in Article 4(2) TEU seems connected to for example issues of how decisions are made in the EU. If the equality of the Member States is viewed from such a formal and political perspective, issues relating to the rule of law may seem minor.

If the perspective is however shifted to that of a smaller Member State, the question of whether any other guarantees besides the unanimity requirement for decision-making and the formal legal protection guarantees exist, whereby smaller Member States can trust that their status as EU Member States is protected? I think that this highlights the significance of the value base and the rule of law according to Article 2 TEU. When the EU is governed by law rather than political force according to the principle of rule by law⁴⁶, its governance may be considered legitimate and in agreement with jointly shared values. This must also apply in the governance of individual Member States, so that mutual trust can be maintained between the Member States. In principle, it should be irrelevant whether this message of the shared values of the EU is conveyed by a small or large Member State on for example the agenda of a EU Presidency, if all Member States are truly committed to the value base of Article 2 TEU.

It may be considered important that the citizens and national authorities trust in the actualisation of the rule of law of the Member States, in order for the EU to reach its essential objectives and act as a supranational legal system where the authorities of the Member States implement EU law.⁴⁷ The equality of the Member States requires that both small and large Member States submit to upholding and achieving the shared values and objectives of the EU. This is of course also required of countries that are seeking to become Member States, pursuant to Article 49 TEU. Equality is likewise implemented by the principle that all EU applicants are subjected to the same criteria where small and large countries are bound by the same rules. Whether in terms of practical EU policy it is the case that the Member States are equal or that all Member States are committed to the value base of Article 2 TEU is another question for political scientists to attempt to answer.

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⁴⁵ See <https://aidc-iacl.org/37-tagung-fur-rechtsvergleichung-2019-greifswald-gleichheit-19-21-09-2019/>

⁴⁶ See differences on the principles of the rule of law / rule by law in e.g. *Raitio, Juha*: The Rule of Law in Contemporary Finland, Not Just a Rhetorical Balloon, in *Bakardjieva Engelbrekt, Antonina & Groussot Xavier* (eds.): *The Future of Europe, Political and Legal Integration Beyond Brexit*, Swedish Studies in European Law, Vol. XIII, Oxford: Hart Publishing, 2019, pp. 195-208.

⁴⁷ See Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, COM (2014) 158 final, paragraph 2, “Why the rule of law is of fundamental importance for the EU”.