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Teodora Ladić

## The Impact of European Integration on the Westphalian Concept of National Sovereignty



Rheinische  
Friedrich-Wilhelms-  
Universität Bonn

Center for European  
Integration Studies

Genscherallee 3  
D-53113 Bonn  
Germany

Tel.: +49-228-73-1810  
Fax: +49-228-73-1818  
<http://www.zei.de>

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Teodora Lađić obtained a BSs and a Spec.sci in International Relations at the University of Montenegro (2012-2016) and completed the “Master of European Studies – Governance and Regulation” at the Center for European Integration Studies (ZEI) of Bonn University (“Class of 2017”). Currently Ms. Lađić is working for the Montenegrin Pan-European Union.

*Teodora Ladić*

## **The Impact of European Integration on the Westphalian Concept of National Sovereignty**

### ***Introduction***

After World War II, the creation of unprecedented international organization for controlling production of coal and steel in 1951, the European Coal and Steel Community (ECSC), the understanding of the concept of national sovereignty would never be framed in the same manner as before. Throughout the process of European integration, the dilemmas over preserving or pooling sovereignty were in focus in respect to the constant interplay of intergovernmental or supranational approaches of constructing institutional and legal architecture of the Communities later, the European Union (EU). Hence, Member States, especially larger ones were very keen on retaining their sovereignty vis-à-vis European institutions, which on the other hand, intended to enhance integration in a wide range of fields through centralizing power at the core of the Union. Nevertheless, the strong stance of leading supranational institutions, such as the European Commission (EC) and the European Court of Justice (ECJ), with the help of continuously questioning Member States, has led to formation of a solid European Union which aims to provide one voice in the world regarding range of issues, while at the same time ensuring wealth, peace, stability and progress among European citizens. Thus, while allowing and giving more discretion to the institutions of the EU, Member States have by default given up some parts of their sovereignty, and the question here is to what extent and how it is manifested? Does it mean that the concept of national sovereignty has changed? Recent crises have again

cast light on this specific issue, which has always been present, but which has erupted mostly with the emergence of challenging times in the European integration process. The financial crisis that hit Eurozone still has enormous implications on EU's financial governance system and mechanisms, as well as a visible impact on the substance and nature of national sovereignty and the balance between EU institutions and Member States. Hence, not only did the aftermath of the financial crisis have an effect on the sovereignty, but it also affected the pace of European integration.<sup>1</sup> Moreover, populism, the refugee crisis, terrorism and Brexit have all deeply influenced the erosion of the idea of a unified Europe and have strengthened the need for preservation and return of strong sovereignty within a strong state.

We must not forget the period in which we are living, because only by understanding and analyzing the context will it be possible to argue a resurgence of sovereignty and the level of impact of European integration. The post-modern era and globalized inter-dependent world force us to contemplate in different manner, where global issues are only possible to be resolved by cooperation and deeper integration that largely extends the boundaries of national system and its framework of operating. Thus, it is crucial to understand that, in such an environment, the European Union must be formed on important elements of cooperation, negotiation, integration and compromise. This structure must be based on pluralism in order for all Member States to be satisfied and have equal voice. Moreover, in order to be able to sustain such system, it is necessary to organize legitimate transfer of sovereignty in order to be capable of adapting to the requirements of globalization on basis of shared values and interests deeply founded on the Treaties, so that all members are on board.<sup>2</sup>

- 1 Venizelos, Evangelos, *State Transformation and the European Integration Project: Lessons from the financial crisis and the Greek paradigm*, CEPS, February 2016, online at: <https://www.ceps.eu/publications/state-transformation-and-european-integration-project-lessons-financial-crisis->; last accessed: 27.07.2017.
- 2 Conference Report, Europe and sovereignty: Reality, limits and outlook; Foundation Robert Schuman, 29th September 2016; online at: <http://www.robert-schuman.eu/en/european-issues/0410-europe-and-sovereignty-reality-limits-and-outlook>; last accessed: 27.07.2017.

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Even though, the membership in the European Communities/Union has always been on voluntary basis, the complicated issues over primacy of competences between Member States and institutions of the Communities vested in the concept of sovereignty have been constantly present, sometimes jeopardizing further integration. The path of reforms continued up until the Lisbon Treaty reform which marked the current period of allowing enormous discretion of EU institutions in developing further the idea of *united in diversity* in a wide variety of areas. This has all had an enormous impact on issues of Member State sovereignty, some of which have been attempting to restore it; by investigating current actions of the UK, Hungary and Poland, who strive towards paths of individuality, it could be stated that the interplay between pulling or preserving sovereignty has been again put to the fore. The core of the paper focuses on the different kind of relation that the EU strives to sustain and develop with three different countries, which have diverse positions and roles in and with the EU. Furthermore, it will be analyzed how that specific relation affects these particular countries' sovereignty, whether we can raise questions of transformation of the concept or not.

Due to the limits of this paper, the study will be centered on analyzing how countries have reacted to pulls on sovereignty at the EU level in order to bring wealth to its citizens. Germany, Switzerland and Montenegro, all have different roles and different levels of integration with the EU, but they are all obliged to respect specific conditions or rules if they want to sustain or further develop that particular relation. This particular fact brings to the fore the implications of the process of European integration through that specific relationship (membership obligations, bilateral agreements or accession conditionality) on these countries' sovereignty. By answering key research questions posed here, it is considered that it will be able to derive conclusions of the state of concept of Westphalian sovereignty in 21<sup>st</sup> century where supranational organizations, such as the EU, have strong competences. However, the purpose of the paper goes in two directions which are mutually dependent; firstly, it is of high interest to examine the character of the EU's system of governance and regulation following the changes of Lisbon Treaty, and secondly to analyze the implications of the

EU's institutional and legal architecture of arrangements with three countries on their sovereignty. The main focus of the analysis will be on five key questions:

- 1) How the EU is institutionally and legally framed under Lisbon Treaty, since there are claims of loss of sovereignty or at least of its transformation?
- 2) Is the EU a unique organization that has captured huge vast of Member States' sovereignty through process of integration, allowing it to exercise enormous impact on countries' setup?
- 3) What are different arrangements that the three countries pursue in order to avoid larger transfers of sovereignty and how they approach the need to pull sovereignty?
- 4) How visible is the impact of European integration on German, Swiss and Montenegrin sovereignty, if it exists, and does it modify the Westphalian model of sovereignty?
- 5) Have we come to the era of a post-Westphalian concept of sovereignty; if so, how can we assess the transition into looser forms of sovereignty on a gains and losses spectrum?

It is crucial to explain the notion of Westphalian sovereignty and the concept of European integration, as it will be then possible to further develop idea of the impact of European integration on national sovereignty, understood under the Westphalian system, which would allow us to make a comparison with current state of sovereignty, deprive final conclusions and confirm or reject the starting hypothesis.

“The Westphalian sovereignty is defined as an imminent characteristic of a state, and no other unit, higher or lower, can become a sovereign but a state. When a state ceases to exist, its sovereignty also ends. And, contrarily, it emerges when a new state comes into a being. The existence of a plurality of sovereign structures on one territory is in this approach unthinkable.”<sup>3</sup>

No matter how vintage this definition seems, it lasted for many years after Westphalian Peace was established in 1648 in Münster and Osnabrück

3 Hamulak, Ondrej, *National Sovereignty in the European Union-View from the Czech Perspective*, Springer International, Cham, 2016: 55.

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following the Thirty Years War. It confirmed the supremacy of state power over specifically defined territories and created a system of equal states. The question is how stable this definition could be in today's world of interdependence and broad range of state and non-state actors with varieties of competences. If we consider the EU, the abolition of internal borders, the creation of a supranational legal system and the appearance of a European demos, opposes and departs notably from classical notion of sovereignty. On the other hand, the concept of European integration has been widely used in many studies, although very little has been explained. Integration as a notion is a fluid concept and it comprises many things in a very long period of time; this could be said from the creation of first Communities, where contextual circumstances and inter-play of different factors interfered in its creation. In the White Paper, recently formed by European Commission, Robert Schuman's statement has been recalled, which perfectly explains:

“Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity.”<sup>4</sup>

The only plausible definition that could be found is the one offered in the Oxford dictionary which states that:

“European integration is the formation of European states into the world's closest regional association, which has assumed many of the characteristics of the statehood.”

However, European integration is a process of constant and diversified economic, social, cultural and political integration of large, medium-sized and small states into complex network of interchangeable system, on top of which supranational institutions govern in its exclusive competences, covered by subsidiarity among different layers. The implications of *ever closer Union* require seeing integration through a mirror of deepening and widening processes, which require more diversified angles of research.

The explicit setting of the hypothesis is crucial for the purpose of the paper and for creating scientific added value. The key argument here is that, throughout the years, European integration has had enormous impact on the

4 White Paper on the Future of Europe – Reflections and Scenarios for the EU27 by 2025, European Commission, March 2017: 4.

Westphalian concept of national sovereignty in terms of adjusting it and transforming to the contemporary situation, allowing for different actors to participate in decision-making processes. The main aim of the paper is to contribute to the comprehensive research on this topic, from a different angle and to bring added value while answering the research questions posed. Due to limitations of this paper, analysis will focus on three states which have different connection with the EU system and which will allow us to understand the plethora of this specific issue. Also, it is vital to present, for methodological reasons, a brief summary of the following chapters. In the first chapter, the intention is to explain key elements of the EU's institutional, legal and political architecture, to find the reasons as to whether it could be considered as *differentia specifica* and, if we come to the conclusion that is unique, to find the implications to the notion of state's sovereignty. Furthermore, the second chapter focuses on the German Constitution, as the best indicator of one country's sovereignty, to show how Germany tried to adjust it, mostly through its Federal Constitutional Court's interpretation, in order to be able to acquire all the obligations of EU membership and the growing transfer of sovereignty in different fields. The third chapter, deals with the specific relationship between the EU and Switzerland, which is unique comparing to the broad range of EU correspondence with third countries, but gives a clear example of how, even those countries who tried to avoid surrendering parts of its sovereignty, in the end must do it in order to receive the benefits from participating in some EU activities. Finally, fourth chapter will deal with young, small, but decisive country-Montenegro, and will try to explain the process of accession to the EU and how the EU affects the sovereignty of the acceding countries through the framework of conditionality.

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## **1. *Post-Lisbon architecture of the EU – differentia specifica and issue of national sovereignty***

The aim of this chapter is not to introduce some specific sort of a grand theory and discussion about the characteristics of the EU, but to provide factual aspects of uniqueness and special features that the EU upholds considering thoughts of both Euro-advocates and Euro-skeptics and further relating it to the issue of national sovereignty, analyzing whether that particular structure has an influence on the traditional concept of Westphalian sovereignty. In more general terms, the intention is to establish difference in the EU operation from other similar organizations and to deprive conclusions in respect to the functioning of the state today—the multitude actors, in comparison to the world of dominant countries under the Westphalian system of governance.

Hence, it has been established that in globalized world countries are undeniably forced to transfer and abandon to some extent their sovereignty, pressured by factors of interdependence in all spheres of life. Interestingly, *to be sovereign and to be dependent are not contradictory conditions* – which has been proven through integration processes within the EU system, where countries, in order to compensate loss of independency in conducting policies, have transferred parts of sovereignty to the EU institutions in order to attain greater importance in the international scene.<sup>5</sup> If we look at all 28 (27) Member States of the EU, we must be assured that Italy or France does not resemble Nebraska of the United States in federalist terms; this has been acknowledged many times through different referendums during Maastricht, Nice or Lisbon approval procedure. On the other hand, it is not possible to reject that the EU has established a new era of understanding the role of the State due to the fact that around 70-80% of the, mostly economic regulations, Article 3, Treaty on the Functioning of the EU (TFEU), comes from the EU and are incorporated in national

5 *The EU and Member States Sovereignty*, AALEP, 2016, online at: <http://www.aalep.eu/eu-and-member-states-sovereignty>; last accessed: 27.07.2017.

systems.<sup>6</sup> However, the organization that was established in the 1952 brought constant frictions and inter-play between supranational forces and preservation of national sovereignty and confirmed that fundamentals known at that date would be transformed to its core.<sup>7</sup> The uniqueness of the EU could be found in its institution-organizational structures where in comparison to other organizations, a multitude of different players on different layers bound by distinctive decision-making arrangements construct the mere essence of what the EU is. Furthermore, the EU in its corpus provides and sustains a broad range of competences which in some areas implicitly, while in others explicitly show the supranational characteristics of its internal processes.<sup>8</sup>

One of the key features that forms a distinctive part inherent to the EU is the level of the power transferred to the European supranational institutions in spheres which were previously thoroughly regulated on the national level. Not only do supranational institutions (such as European Commission and European Court of Justice, mostly) have the ability to enrich the regulatory system of the EU by adopting a wide specter of policy documents with binding force, but they also have jurisdiction over implementing measures which commit Member States and other actors to comply with rules and conditions laid down, unlike many other international organizations. Of course, we cannot argue that parts of countries' sovereignty have been transferred to the institutions of the EU only in order to attain specific goals and that is also what creates the *differentia specifica* of the EU.

More specifically, if we go in depth and analyze the particular supranational institutions of the EU we would be able to understand why

6 Llorente, R. ,Francisco, *Constitutionalism in the "Integrated" States of Europe*, Jean Monnet Center for International and regional Economic Law & Justice, 2014; online at: <http://www.jeanmonnetprogram.org/archive/papers/98/98-5-.html>; last accessed: 27.07.2017.

7 Bosoni, Adriano, *Sovereignty, Supranationality and the Future of the EU Integration*; Stratfor WorldView, 2013; online at: <https://worldview.stratfor.com/weekly/sovereignty-supranationality-and-future-eu-integration>; last accessed: 28.07.2017.

8 Nugent, Neill, *The Government and Politics of the European Union*, MacMillan Press LTD, Fourth Edition, London, 1999: 521-522.

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they are so different from institutions we see in other organizations or even in states. The European Commission has been considered as an institution which has central role in accomplishing greater integration among Member States and in representing the EU with one supranational voice. Hence, Member States have transferred to it some key functions of framing the decision-making process through initiating proposal measures, executing EU policies through specific mechanisms in particularly defined areas, and providing a comprehensive framework of compliance procedures for Member States to safeguard the provisions from the Treaties. Furthermore, the ECJ as Supreme Court of the EU has had very important role to set precedents by interpreting provisions of the EU legislative corpus and assuring that they are applied accordingly to the highest law – the Treaties. In the end, we must not forget the European Parliament (EP), which has witnessed growing influence in the decision-making process, positioning itself side by side to the Council, having competence in shaping and adopting budget, and supervisory competence through mechanism to control the Commission and appoint or dismiss it; strengthening its role within reforms under the Lisbon Treaty allowing for a higher level of democratic legitimization of EU actions as the only directly elected body. It is visible from above, that these institutions-modernly called supranational by neofunctionalist scholars- have enormous discretionary rights and enjoy significant independence and sovereignty from Member States and their governments in exercising their competences.<sup>9</sup> Interestingly, some argue that the mere transfer or delegation of specific jurisdiction or competence does not mean that sovereignty is transferred as well, due to the circumstance that States still preserve all power in their hands and are able at any time to exercise it if national interest is at stake. *The foundational presupposition of the EU is pragmatic sovereignty*, which implies that it could be withdrawn any time. However, the EU has constructed such a complex and indispensable system that absorbs different kind of actors,

9 Tallberg, Jonas, *European Governance and Supranational Institutions: Making States Comply*, Routledge, Abingdon, 2003: 2-14.

dragging them into a framework which must shape them and change in entirety or partially.<sup>10</sup>

The form and material of the EU as we know it today is established on grounds of Treaty revision made in Lisbon, capital of Portugal, following the failed attempt to create Constitution of the EU. The Lisbon Treaty (entered into force in 2009) amended the previous Treaty establishing the European Community and the Treaty on the European Union (TEU) with goals of improving democracy and efficiency of decision-making process, providing firmer, simpler, faster and united adoption of crucial decisions.

Important modifications of the Lisbon Treaty are mostly transposed from the Constitutional Treaty, leaving behind all provisions which had federal connotations and symbolized construction of the EU as having state features. Thus, the abolishment of the famous Maastricht pillar structure and creating the function of President of the European Council and High Representative for Foreign and Security Policy aimed at strengthening the EU position on the international stage and providing personification of unified voice in two positions among its Member States. However, one significant leap towards full-fledge Union in conducting its competences is considered to be the introduction of specific clause in the Treaty on the European Union which allows it to have legal personality, meaning even more detaching sovereignty from its Member States. But, fortunately or not, it still lacks the *power of sword* and *power of purse*, by not having competence to extend its power towards fiscal policies and lacks stronger enforcement mechanisms. However, the system of the EU under the Treaty of Lisbon, more accurately, the Treaty on the Functioning of the EU (TFEU) and Treaty on the European Union (TEU), is not constrained only on some specific, narrowly defined economic spheres and organized in limited and distributive manner through different layers. Currently the EU has continually broadened its powers, in metaphorical terms behaving like octopus and stretching its tentacles to every possible area and sector. Indeed, it moved from regulating organizational functions within systems to influencing and shaping the everyday life of ordinary citizens of the

10 Hayward, Jack/Wurzel, Rüdiger, *European Disunion: Between Sovereignty and Solidarity*, Palgrave MacMillan, London, 2012: 65-68.

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EU's Member States and beyond; inevitably bound by principles of proportionality, conferral and subsidiarity (Article 5, TEU) as crucial clauses which constrain and mould every action made by EU institutions.<sup>11</sup>

If we take into consideration the configuration of the EU's institutions, we would come to a conclusion that not all institutions share the principle of equal representation in order to respect countries' sovereignty and confirm that each country in the EU is same and has equal rights and obligations.

Addressing the issue of the influence on national sovereignty exercised by institutions of the EU cannot pass without paying attention on questions of representation, arrangement of voting system and degree of influence on European legislation. According to that, the EU Council, EC and ECJ are institutions which respect the principle of equal representation and more or less equal voting rights if we calculate majority of policies where decisions of members are made, as well as taking into consideration the specific features of each institution.

But, on the other hand, in the EP and the Council, the seats in the previous and votes in the later are assigned according to a country's population, creating huge discrepancies between countries – where one country could be stronger and could override smaller in important decisions, while constraining the sovereign right to decide on equal footing.<sup>12</sup>

The proclamation of the Charter of Fundamental Rights as binding and making it part of the primary law system according to which all other legislative acts adopted by Member States and EU's institutions must be in accordance, is one of the greatest improvements brought by reforming Lisbon Treaty. Hence, following this novelty many issues with national systems of protection of human rights guaranteed by Constitutions have arisen. Furthermore, extending the competence of the EU in the field of home and justice affairs, or more specifically under Title V of TFEU the

11 D'Atena, Antonio, *The European Union After Lisbon: Constitutional basis, Economic Order and External Action*, Springer, 2012: 58-61.

12 Lancaster University, *Does Membership to the European Union undermine national sovereignty?* 2015: 6-7; online at: <https://cogitariumlancaster.files.wordpress.com/2012/06/does-membership-of-the-eu-undermine-national-sovereignty.pdf>; last accessed: 28.07.2017.

area of freedom, security and justice, highlighted the penetration of EU norms in a field previously reserved for Member States; by improving the cooperation in specifically defined areas of judicial and police cooperation in criminal and civil matters, as well as joint system of collaboration in border checks, immigration and asylum.

An enormous impact on the constellation of relations within the EU institutional structure and functional mechanism is the extension of qualified majority voting and by default the diminishing use of veto in Council of Ministers, which theoretically and practically limits Member State sovereignty in terms that they must comply with policies and legal acts adopted without their consent. Moreover, in conjunction with that, the increase in power of supranational institutions is a source of major limitation to national sovereignty; thus, the EC has significantly increased its influence on certain policy outcomes mostly in respect to the EU Single Market, on the other hand, the EP has strengthened its position in ordinary legislative procedure in respect to wide range of policy areas.<sup>13</sup>

Importantly, there is necessity to again stress the role of the Commission due to the fact that it is preeminent in all national and international institutional structures. This particular institution impact enormously on each Member State's sovereignty because it is centrally included in decision-making process in all possible forms. According to Professor Nugent, the Commission lies at the heart of the Union due to the circumstance that it is only institution capable of providing coherent and structured leadership not divided by different national interest. It is important to highlight the fact that the Commission does not only have competences envisaged in the Treaties, but it has progressively expanded responsibilities in accordance with practical developments and necessities of the EU system as such; mostly characterized as having impact on sovereignty through competences of proposing and developing policies in all critical junctures periods and challenges in integration, the Commission

13 AALEP, op. cit.

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was the driving force in encouraging the continuation of stronger and more inclusive Community/Union.<sup>14</sup>

Additionally, the legal system grounded by the European Court of Justice (ECJ), using its interpretive power to influence substantially national legislative corpus, presently under the Lisbon Treaty gains confirmation of autonomy which cannot be compared to any typical international nor national system; following that, some legal forms are directly applicable and are in position of supremacy from national measures, at the same time giving rights and obligations not only to Member States but also to individuals (legal or natural) within their systems, which is significant leap towards confirming the hypothesis of a modification of the concept of national sovereignty.

Nevertheless, the key fields which are the personification of the Member States' sovereignty are still strongly attached to national government jurisdiction. Notably, Common Foreign and Security Policy (CFSP) and Area of Freedom Security and Justice (AFSJ) policies are those where Member States have been careful in promoting further integration by transferring limited competence to create in some strict aspects unified voice of the EU. However, due to strong significance and impact that these policies could have on their sovereignty, the centralization has happened only within Council structure, where national representatives have the final word. Hence, both areas with questions of sovereignty have strengthened the role of executive actors at the expense of judicial or legislative institutions.<sup>15</sup> On the other hand, if we analyze Articles 101-109 in the Treaty on the Functioning of the EU (TFEU), we would without any doubts conclude that the EU has enormous discretionary rights given by the Lisbon reforms, to monitor, investigate and sanction not only Member States, but also companies and even beyond to the extent that its competences apply to firms that only operate on EU territory but come from third countries (competition policy).

14 Nugent, *op. cit.*, 101-123.

15 Stetter, Stephan, *EU Foreign and Interior Policies: Cross pillar politics and the social construction of sovereignty*, Routledge, Abingdon, 2007: 1-10.

In order to be able to understand the real implication of Lisbon reform on the structure of the EU and on national sovereignty, it is necessary to stress that the provisions envisaged, especially in TFEU, show that Member States have secured enough rights to constrain further uncontrolled expansion of EU competencies. More specifically, the measures to invoke an action of annulment against measures adopted by the EU institutions under the Article 263, as well as, failure to act Article 265 and Union liability under Article 268, TFEU, have the explicit intention to safeguard national sovereignty from free interpretation of conferral principle. Crucially, under Article 4, Treaty on the European Union (TEU), secured the idea that the masters of the further integration process are still the Member States, as EU institutions must respect essential functions of each Member State. Moreover, the role of national parliaments is strengthened through yellow and orange mechanisms in ordinary legislative procedure, allowing the increased inclusion of national controlling mechanisms; thus certifying that under the Lisbon Treaty the EU is still considered partially as a federal entity with high constraints held by Member States.<sup>16</sup>

Nevertheless, the inclination of Member States in a majority of policy areas to sustain and foster interest of the EU as a whole, more eagerly than national interests itself is present. Which brings us to the idea that the EU is built up to this point due to the deliberate intention of its Member States which see benefits from unified and coherent integration processes and have on voluntary basis limited their sovereign capabilities. On the other hand, the very important amendment within TEU is Article 50, which provides Member States with tools to regain their sovereignty completely (if it is possible today in world of globalized forces) through withdrawing their membership within the Union.

In the context of the issue of national sovereignty and changes brought with the Lisbon Treaty, it is now possible to argumentatively demonstrate that visible and strong erosion can be marked regarding all criteria of the sovereign statehood (government, territory, population). Due to profound penetration of the EU system, shared, transferred or constrained national

16 Piris, Jean-Claude, *The Lisbon Treaty: A Legal and Political Analysis*, Cambridge University Press, 2010: 327-329.

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sovereignty where *Member States are no longer fully sovereign, but the EU is not a state either*, has marked a new post-Westphalian system of cohabitation of strong states affected by enormous direct or implicit influence from non-state actors.<sup>17</sup>

Thus, the EU is undoubtedly a unique and specific entity which cannot be compared to any other by mechanisms that engage states in *joint* action to create *common* policies and formulate *binding* decisions, strengthening both small and large states equally.<sup>18</sup>

It would not be an objective analysis if we would prematurely conclude and derive some answers to posed research questions or even if we would lead same thread through the whole paper arguing that EU integration has brought major changes and understanding of sovereignty, without examining several issues in following chapters.

### **2. Constitutional law adjustment vis-à-vis pulling of sovereignty through membership of the EU – case study Germany**

It is necessary to examine whether reforms brought with the Lisbon Treaty penetrate the highest expression of Member States' sovereignty, the Constitution and more importantly the interpretation of the Constitutional Courts, which make decisions which articulate the path of country's further involvement in EU affairs. The core idea is to use comparative analogy in parts where it is necessary to collect more arguments for specific analytical thoughts, while involving different Member States with different constitutional features in respect to the EU system and comparing it to the German Constitutional European structure which is considered to be a paradigm for all other countries' maneuvers in respect to explicitly keeping or implicitly delegating more powers to the EU institutions. Hence, a number of constitutions have some reference in respect to EU membership

17 Albi, Anneli/Elsuwege van, Peter, *The EU Constitution, national constitutions and sovereignty*, European Law Review, Sweet & Maxwell and Contributors, 2004: 756-757.

18 Nugent, op. cit., 505-506.

and integration, but also usually there are very minimal or implicit modifications which lead to possible clashes with the EU legal system due to constitutional limits of the further delegation of sovereign powers. Following the last enlargement and reform Treaty, the substance of constitutional authorization for the European involvement has become much more diverse.<sup>19</sup>

The constitution is the supreme legal expression of people power and over the territory they reside. It defines the relation between different political branches and sets fundamental conditions to constrain them and provide balance for legitimate exercise of their power. Interestingly, European integration alters the balance founded by national constitutions in terms of the defined relation among central government, regional and local authorities due to special characteristic of the EU to influence a multitude of system structures. Because of this it is necessary to provide adequate constitutional basis, since the legitimacy of respective states would be questioned if these radical changes would be carried out contrary to their constitutions. On the other hand, the Union also relies on the well-articulated constitutional basis in respect to the Europeanization given the fact that the power transferred to it by its Member States is based on the principle of conferral and that would be impossible to legitimately exercise without having support in the constitution by which indirectly it is bound.<sup>20</sup>

Until this date, all Member States of the EU have ratified treaties that have established or reformed Communities/Union which should imply that the defined transfer of competences to the supranational Union level should in essential and formal terms be identical. However, the harmonization of phrases and legal formulation as the expression of the will to transfer specific powers to the institutions of the EU is not visible in Constitutions of Member States. Most common are general provisions aiming at confirming conformity with partially transfer of competences to international organizations. On the other hand, a very limited number of constitutional texts have direct reference to the EU. For instance, in Italy and France the clear wording for the transfer of competences to the other

19 Albi/Elsuwege van, op. cit., 742-744.

20 Llorente, op.cit., <http://www.jeanmonnetprogram.org/archive/papers/98/98-5-.html>.

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international entities is the *limitation of sovereignty*; in Spain *the transfer of competences for common exercise by the European institutions* and lastly *the transfer of sovereign powers* in Germany. If we closely analyze, the key concept of modern constitutions is the open statehood which indicates that sovereignty is not preserved anymore in terms of Westphalian strong and absolute statehood but it is limited and transferred to the degree where we cannot argue its abandonment. Implicitly or not, the constitutional setup of the Member States form the essential foundation for further European integration, the balance of national autonomy and supranationality, which indicates the source of stability in the Union.<sup>21</sup>

Furthermore, if we take closer look and analyze the period of pre-accession in the Central and Eastern Europe Partnerships (CEE) countries and compare it to the period of being inside the EU as members, we could conclude that huge modifications of constitutional provisions aiming at securing larger parts of their sovereignty from being transferred to the EU institutions have occurred. Hence, we could state that many countries have a huge appetite before entering the EU and promising a lot, but while being pushed and outvoted in some areas of policy decision-making, countries strive to show that the real strength and sovereignty comes only from the states.

In respect to Germany, several modification of constitutional law exist due to several major reforms brought by European integration which require more cautious formulation in the Constitution, called Basic Law, following a higher degree of unification and extension of the powers towards supranational institutions. Hence, direct effect and applicability of the EU law as well as its supremacy have been confirmed within the German legal system, but not in absolute terms, which was exemplified through many judgments brought in regard of preserving constitutional identity by the Federal Constitutional Court. Pursuant to the Article 23 in the Basic Law, the Federal Republic of Germany is allowed to take part in processes of European integration and to perform its role within the Union while transferring its *sovereign powers* to the supranational institutions. This is

21 Arnold, Rainer, *Limitations of National Sovereignty through European Integration*, Springer, Dordrecht/Heidelberg/New York/London, 2016: 3-4.

personification of the open statehood method which has established essential elements for profound German integration within the EU system and which has opened previously closed system through *constraining its sovereignty by renouncing the normative exclusivity of national law within its territory*. Interestingly, famous Federal Constitutional Court (FCC) decisions regarding adjustment of the constitutional framework to newly Lisbon Treaty, listed the most significant elements of German heritage which cannot be submitted to any kind of delegation to other entities or constrained (which was accused of too harsh interpretation of the Basic Law normative text preventing further deeper integration within the EU). However, those elements, so called *finalities* in Article 23, describe the whole meaning of the German constitutional framework and how to transfer power to the EU without endangering the core sovereignty of the Federal state; due to their high importance, a few significant lines of this paragraph should be devoted to this. First, it is stated that in order to respect the traditional concept of open statehood it is necessary to transfer defined extent of competence to the EU. Secondly, certain mechanisms must be assured to safeguard the proper exercise of the transferred powers in respect to the core fundamentals of the democratic, federal and social Germany and to the essential principles of subsidiarity and rule of law, especially directed to the high protection of human rights at the degree provided by the German constitutional system. Thirdly, the eternity clause provided by the Basic Law totally forbids any transfer of competence or limitation of application of human dignity, democracy, constitutional structure, social state and federalism even in formal constitutional reform, especially directed towards further integration within the EU framework.<sup>22</sup>

The Basic Law clearly states that Germany is an independent and sovereign country which cannot be constrained, changed or amended by any other constitutional provision. The famous Federal Constitutional Court's (FCC) Maastricht decision sets seven criteria for respecting the above mentioned statement in the German Constitution. The foremost important criterion which sets conditions for any further element of introduction of Europeanized values into constitutional framework, proclaims that the

<sup>22</sup> Ibid, 1-2.

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Masters of the Treaties are still Member States and that any change in respect of competences for the EU should be subjected to undeniable unanimous confirmation from Member States. It further emphasized the important role of the Member States' legal authorities to have jurisdiction over interpreting and adjudicating in conflicts of legal systems, due to the specific fact that Germany has transferred limited powers which have been set in *sufficiently clear and foreseeable manner*. Interestingly, it was defined in the fourth provision of this Maastricht decision that the EU has exclusive competences only in economic areas and by default severely limiting it to exercise further powers to fields which are characterized to have high importance for question of state's sovereignty such as foreign or security policy. Lastly, one paragraph affirms that EU's democratic legitimacy is derived from the national level, notably from the constitutional normative texts.<sup>23</sup> It is clearly visible how Germany, considered by many as the core of the EU and the driving force of any further integrative path, is very begrudgingly saving its sovereignty and does not intend to extend EU's competences in fields where it has the inherent right to provide development. The decision brought on June 2009 in regard to the adoption of the Lisbon Treaty which has set the structural and legal framework of current EU's functioning is much more significant; the effect of that Treaty as seen in the previous chapter is very substantial and should be important to see how Germany and its Federal Constitutional Court have reacted in order to secure key constitutional fundamentals.

The Federal Constitutional Court confirmed even more rigorously some of the provisions of the Maastricht decision, explicitly stating that people in terms of European demos cannot exist due to the clear fact that citizens are constituent element of each EU's Member State, and as such should not be considered as citizens of the EU, regardless of the implication of EU citizenship. In elaboration of many discussions provoked by this Lisbon decision, maybe the most controversial one was raised around the repeated confirmation that the EU is nothing but an intergovernmental organization which strives to accomplish goals set by its founders, the Member States. The exercise of certain powers by German institutions cannot be

23 Albi/Elsuwege van, op. cit., 745-746.

constrained by further development of the EU, and importantly, the obligatory requirement presumes further transfer of the powers to the respective EU institutions via German federal parliament. As the final provision, which clearly indicates the level of importance to preserve the national constitutional identity and by that meaning national sovereignty, states if the EU institutions exercise their competences to excess, the worst case scenario would apply – meaning that Germany is completely free to unilaterally reverse its participation from the EU.<sup>24</sup>

In the Lisbon decision, the Federal Constitutional Court has explicitly announced its competence in highly important policies for preservation of German sovereignty and other fundamentals listed, but on the other hand, it also has an obligation to submit the preliminary ruling reference to the European Court of Justice (ECJ) and make it familiar with the issue, while simultaneously participating in preserving uniformity of interpretation of the European legal values. However, due to circumstance that there has usually been disagreement between those two courts, the judges have developed the special mechanism in the legal jurisprudence, to interpret national laws as far as viable in the light of the European legal provisions and values, and that this is a special obligation of the Federal Constitutional Court.<sup>25</sup>

Nevertheless, German legal experts have embodied the constitutional text with the reference to the EU membership and have emphasized great devotion to the further progress in the European integration process with the aim of enhancing values that are common to all people in Germany. It is crucial to underline that the moment of becoming part of the EU does not mean that automatic loss of the sovereignty is completely under the way, but the adjustment. We can undeniably argue that Germany still remains the major source of power in the realm of the EU competences and is still in charge over its territory, people and system in overall terms. In addition, the Federal Constitutional Court confirms that the EU cannot be considered as having sovereignty, but it is regarded as *the association of the states*

24 Piris, op. cit., 142-143.

25 Arnold, op. cit., 5-8.

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(Europäischer Staatenverbund) which decides only on matters conferred to it by Member States (the only ones enjoying sovereignty).<sup>26</sup>

The Lisbon judgment made by the Federal Constitutional Court established a visible threat to further development of the European integration process in respect to Germany, but it is also dangerous due to the specific role of the Germany in the EU and even more in respect to Federal Constitutional Court whose decisions usually serve as a model for other constitutional courts. Also, how the Federal Constitutional Court has brought its verdict in that direction in a country such as Germany is very specific, where federalism has played an important role in creating a new history for German people in a strong and prosperous country and even more when “Länder” as federal units, have a wide range of competences and to some extent sovereignty. However, the EU is not only consisted from provisions in the Treaties, it is much more beyond it and in that respect interpretation of any norms should be conducted with regard to a broader sense of values, traditions and practices applied, not only the mere letter in one legal act.<sup>27</sup> Thus, the Westphalian concept of national sovereignty is clearly abandoned when it comes to Germany, it could be argued due to specific features of its participation in the EU.

“...the return to a view of the state authority of the individual state which regards sovereignty as freedom that is organized by international law and committed to it, the German Constitution is directed towards opening the sovereign state order to peaceful cooperation of the nations and towards European integration.”<sup>28</sup>

The significant level of human rights protection brought with Lisbon Treaty incorporating the binding Charter of Fundamental Rights has been seen as one of the most important achievements in 21<sup>st</sup> century in realm of the EU. Interestingly, this issue has been a stumbling stone in European Court of Justice and Federal Constitutional Court relations in terms of

26 Hamulak, op. cit., 3-4; 45-56.

27 Jansen, Thomas, *The German Constitution in the future of the European Union after the judgment of the Federal Constitutional Court on the Lisbon Treaty*, Perspectives on Federalism, vol. 2, issue 1, 2010: 3-7, online at: [http://www.on-federalism.eu/attachments/054\\_download.pdf](http://www.on-federalism.eu/attachments/054_download.pdf); last accessed 29.07.2017.

28 Federal Constitutional Court Judgment on June 2009, Bundesverfassungsgericht, online at: [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630\\_2bve000208en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html); last accessed 29.07.2017.

supremacy over jurisdiction and involving issues of sovereignty, due to decisive and radical Federal Constitutional Court judgments that the protection of fundamental rights must be treated the same on the national level or more, before the EU legal framework would be put into effect.

Considering this analysis, typically four issues arise between German Federal Constitutional Court and European Court of Justice, but in more general terms with other constitutional courts which follow this path. The national interpretation of supremacy of the EU legal system, the level of fundamental rights protection, as stated above, third issue develops in the area of the competence of deciding on the transfer of power on the EU level and last the adjustment of the constitutional provisions and values with respect to Area of Freedom Security and Justice (AFSJ). However, the Lisbon Treaty brought major reforms and contentious legal discussion, but only France has introduced amendments to its Constitution. Some countries like Spain, interestingly, are in the process of framing a package of modifications for a longer perspective. Thus, none of the member states considers that this new reform treaty has significant impact on their respective constitutions, as there is no need for any modifications or even for questioning the implications on the sovereignty and possibility for excessive composition of the treaty provisions.<sup>29</sup>

The German constitutional order is considered as friendly and open towards the EU system, and the constitutional identity is set outside the scope of the EU legal framework, by default the Constitution is considered as *total*, using bottom-up mechanisms to integrate within the EU.<sup>30</sup> Moreover, for a better understanding of how Germany has reacted to a pulling of sovereignty to the EU level, especially in terms of the last reform Treaty, another comparative analogy with German the constitutional

29 Lehmann, Wilhelm, *The European Democracy, Constitutional identity and Sovereignty*, European Parliament, DG for Internal Policies, 2010: 12-15, online at: [http://www.europarl.europa.eu/RegData/etudes/note/join/2010/425618/IPOL-AFCO\\_NT\(2010\)425618\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2010/425618/IPOL-AFCO_NT(2010)425618_EN.pdf); last accessed: 29.07.2017.

30 Schyff, Gerhard, *EU Member State Constitutional Identity: A comparison of Germany and Netherlands as Polar Opposite*, Max-Planck-Institute, 2016: 182-183, online at: [http://www.zaoerv.de/76\\_2016/76\\_2016\\_1\\_a\\_167\\_192.pdf](http://www.zaoerv.de/76_2016/76_2016_1_a_167_192.pdf); last accessed 29.07.2017.

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system would be useful, utilizing Hungary, a country that relatively recently joined the EU in the largest enlargement period of 2004. These days it has been a strong advocate for higher expression of national sovereignty and jurisdiction supremacy in terms of migration policy and education. However, most importantly for this topic is the clause inserted by the National Assembly in the Hungarian Constitution in the period of anticipation of full-fledged membership where it is precisely stated that competences derived from the constitution would be exercised in accordance with the European values envisaged in the founding treaties and manifested in harmonized approach with other member states. Furthermore, the Hungarian Constitutional Court has come to the same conclusion in respect to the Lisbon Treaty, that even with certain and evident reforms the postulates of independence and sovereignty have not been put in danger.<sup>31</sup>

Intentionally, the constitutional order of each state has evolved into new cohabitation of the forms of supranationality on the one side, and the national self-preservation and autonomous constitutional framework, on the other. In the so called *system of legal pluralism*,<sup>32</sup> it is of crucial importance to form such mechanisms which will hold different values and different structures under one roof, providing suitable ground for harmonious expression of both, while at the same time extracting the best from both, keeping their uniqueness in perfect symbiosis.

Undoubtedly, the European normative corpus has created enormous impact on each member state's constitutional identity, changing the capacity and substance from the inside-out of the most important legal act of one country, the Constitution. In that respect, it is necessary to quote an interesting paragraph of the study conducted by EP's Directorate General, which will perfectly explain the relation between constitutions and EU legal order, most notably in terms of analysis of the German constitutional framework.

31 Arnold, op. cit., 110; 121.

32 Arnold, op. cit., 17.

”...transformation of the Union into a “governing body” is perceived as an intrusion on longstanding traditions and legal autonomy: the domestic constitution can no longer fulfill its claim to comprehensively regulate acts of public authority on domestic territory. The national constitutions are still relevant when a state transfers powers to the EU, but once they are transferred, their exercise is no longer determined by the national constitution.”<sup>33</sup>

Only a few Member States have brought significant modifications to the respective constitutions with reference to the EU as whole, legal order or membership, but each of them has specifically defined and constrained the extent of the transfer of the powers to the EU institutions. Hence, Germany has strongly supported European processes, but has also strictly responded to necessity to pull sovereignty on the EU level, keeping it still strongly in the realm of national prerogative. Nevertheless, constitutional provisions of all Member States have served as the main entrance of the EU legal order within national systems, thus it is interesting to analyze the degree of influence the EU legal system has on countries which only partially participate in European development and integration.

### ***3. The impact of European integration on third countries – how the relationship between the EU and Switzerland impacts on Swiss sovereignty?***

Switzerland has been reluctant to membership of the EU and has its own unique path engaging in the international environment. Upholding its principle of neutrality as a symbol of successful development of the nation and country has created a special place in political science analysis. Once the Helvetic Republic, nowadays the Swiss Confederation proclaims itself as European, but not to the extent to endanger its national sovereignty and participate in comprehensive supranational European project; considering the huge importance of the EU, Switzerland insists on sustaining and incrementally developing a special relationship, which has been built on bilateral grounds over the years. Switzerland is a very interesting case in comparison to other European Free Trade Association (EFTA) countries,

33 Lehmann, op. cit., [http://www.europarl.europa.eu/RegData/etudes/note/join/2010/425618/IPOL-AFCO\\_NT\(2010\)425618\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2010/425618/IPOL-AFCO_NT(2010)425618_EN.pdf).

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due to its specific situation that it has never directly applied for full-fledged membership of the EU and has never decided to let the people's will be expressed in referendum regarding Swiss integration; unlike Norway, or Iceland which began negotiating chapters with the EU, but then withdrew its application. This all goes to the strong argument that throughout the years different Swiss governments have stood by the aim of sovereignty preservation in terms of specific principles envisaged in its constitutional framework which, if we look at the evolution of the Swiss-EU relations, has not remained intact under the influence of bilateral relations.

Interestingly, Switzerland is the country more integrated with the EU processes than any other third country and to some extent could be argued in respect to some Member States in specific policy areas. The relationship is usually labeled as paradoxical due to the Swiss not having any pretensions towards EU membership, but sustaining a broad range of bilateral agreements that have heavily established compliance of the Swiss legal framework with the EU's and allowing for the high Europeanization of the government's policy direction. There have been several phases of this complex relation that are analytically possible to disentangle providing for an impartial overview of different arrangements present in different contextual periods. First of which could be marked as multilateral phase characterized by many failures to frame solid connection with the Communities from 1955-1972, followed by period up to 1990s which is seen as a period of non-progress and visible stagnation due to specific circumstances happening on international stage, concluding with the fruitful period from 1993 to 2005 as a phase of comprehensive and strengthened bilateral relations, not taking into consideration the contemporary period which could be characterized by intensive collaboration and possible consideration of application for membership.<sup>34</sup> Hence, the key arrangements from each of the phases that have significantly contributed to the development of the Swiss-EU relation could be precisely traced, starting with the Free Trade Agreement signed in 1972 enabling the construction of a free trade zone for industrial products,

34 Church, H., Clive, *Switzerland and the European Union: A close, contradictory and misunderstood relationship*, Routledge, Abingdon, 2007: 1; 38.

following by the Insurance Agreement which has specifically defined extent liberalized insurance market, concluding with most substantial and comprehensive package of two Bilateral Agreements in 1999 and 2004 which extended the area of collaboration to significant parts of Europeanized policies such as security, asylum and environment.<sup>35</sup> Important to note is that citizens of Switzerland are the main source of sovereignty which is not only proclaimed as one of the principles in the legal order but it is often visible through direct participation on referendums keeping their government constrained and cautioned on undertaking radical changes in Swiss political, legal or economic system. However, voters of the Swiss confederation have never explicitly cast their ballots on the issue of application to join the EU, even though their government has expressed significant approval and tendency towards possible full-fledged integration on many occasions. One of the closest attempts to submit the question to a referendum about membership to the EU was in 1992, when the Swiss government intended to enter the European Economic Area (EEA) together with other remaining European Free Trade Association (EFTA) countries and afterwards to link it with the accession application to the EU. However, this was rejected by citizens and from that moment Switzerland came closer to the EU framework only through bilateral agreements.

These bilateral agreements have integrated Switzerland much more than anyone could imagine. Statistically looking only at economic data, 80% of imports and around 60% of Swiss exports are derived from and to the EU, making it the third most significant trading partner of the Union. Moreover, it accounts for around €150 billion on annual basis in the extent of the bilateral trade as well in terms of investments. However, some of these figures show that the degree of the integration with the EU is much stronger than many Member States among each other. In terms of migration policy, the transit and passage of huge number of people crossing the borders between the EU countries and the Switzerland could be marked

35 American Swiss Foundation, *Switzerland and the European Union*, 2016, online at: [http://www.americanswiss.org/resources\\_and\\_publications/switzerland-and-the-european-union/](http://www.americanswiss.org/resources_and_publications/switzerland-and-the-european-union/); last accessed: 29.07.2017.

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on a regularly basis, while more than 20% of the people living in Swiss cities are EU citizens.<sup>36</sup>

The comprehensive, constantly evolving and becoming wider and broader European integration had gradually directed its effect towards the legal setup as well as governance framework of Switzerland, putting it under pressure and under the inevitable scenario of accommodating its constitutional organization of the Confederation to a level acceptable for attaining the objectives agreed on the bilateral level. However, after the Second World War the priority of Switzerland was to unconditionally preserve the principle of neutrality, which was considered to be safeguard only to the level of the sovereignty held by Swiss authorities on federal or cantonal level. Regardless of the European Coal and Steel Community (ECSC) formation in 1952, with the aim of assuring permanent peace and security among European countries, the Swiss government and people considered that the path of integration was contrary to principles inherent to Swiss Confederation; not the mere content of the integrative policies, but future aim of accomplishing *ever closer union*, which as a political aim was welcomed in Swiss public opinion.

In 1960s, Switzerland found an alternative to the growing influence of the developing Communities was to enhance its economic performance in the creation of the European Free Trade Association (EFTA). Very soon, however, this was considered as not enough, comparing to the very fast economic advancement of Member States of the Communities in that period. Hence, the Federal Council, twenty years later, published a report on the possible creation of the European Economic Area (EEA), underlining that Communities must guarantee total protection of principle of neutrality, direct democracy and federalism if they want Switzerland to join. The agreement was signed in 1992 and only a few days later the application for joining the EU was submitted. However, the constellation of the relation on the international stage and factors within Switzerland have influenced the citizens who, according to the rights given in the

36 Vahl, Marius/Grolimund, Nina, *Integration without Membership*, Center for European Policy Studies, 2006: 5, online at: <https://www.ceps.eu/system/files/book/1304.pdf>; last accessed: 30.07.2017.

Constitution, voted on the EEA Agreement in a referendum, and notably refused it. Many reports recognized that this rejection was only the consequence of the application towards full-fledged membership and not due to a badly negotiated EEA Agreement. However, the Swiss decided to retain their sovereignty without having any aims of transferring competences to the EU institutions, but, knowingly or not, the agreement was not fully considered as the best solution. Currently, this is especially confirmed in the discussion raised by the Brexit.<sup>37</sup> However, the EEA Agreement was considered a good solution for Switzerland in terms that it would not constrain its general principles and would allow access to the benefits of the single market in respect to the four freedoms, but on the other hand had a very important effect which would have put the Swiss in the position of considering possible constraints on their sovereign rights in respect to the exclusion from decision-making process on those matters.

Thus, the nature of the bilateral agreements was adjusted to the principles that have been a major source of shaping internal and external policy direction of Switzerland – neutrality, federalism and direct democracy, whose strong net has been lenient enough to let these agreements pass on the mandatory referendum with a majority of cantons voting in favor. Hence, there are two packages of bilateral agreements which deal with a wide range of economic policies heavily regulated on the EU level, but to a certain extent embodied with political integrative perspective. Truly, it is inevitable to preserve sovereignty when the integrative path of Switzerland is under the EU's, to certain extent limited, but still strong influence. The first package of provisions in Bilateral I Agreement deals with wide range of sectors, particularly important for the Swiss government to have access to single market, in terms of land transport, public procurement, technical barriers to trade, research and to some not so attractive, but necessary to sustain whole agreement, free movement of persons and agriculture. On the other hand, Bilateral II deals with statistics, environment, education, but most importantly has incorporated provisions from the Schengen Agreement and Dublin Regulation.

<sup>37</sup> Ibid, 8-11.

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The implications of these agreements differ, but the most notable one is the deliberate sector reformation due to the necessity to adjust to the EU system in order to be able to pull significant benefits from the provisions agreed to. However, the Swiss have tried to avoid it with principle of *integration à la carte* where they have been able to sustain relations with the EU up to the level of its conformity.<sup>38</sup> Nevertheless, even with the incremental approach towards integration in specifically defined sectors, the Swiss cannot completely argue that they keep direct control of their sovereignty. Interestingly, the comparative study was conducted where Swiss officials were examined on the specific feature of their role while implementing provisions from these bilateral agreements into Swiss legal framework in comparison to the implementation of the Swiss national policies. This questionnaire helped to come to a conclusion of the extent of EU influence on the internal Swiss structure and the manner of functioning. Hence, the implementation procedure through EU-Swiss Joint Committee heavily impacted Swiss *having a say* through expertise of different European interest groups and working units. Moreover, the room for maneuver of Swiss officials was severely constrained by the mere fact that any voluntary decision would put in danger whole bilateral project.<sup>39</sup>

The level of actual independence of the Swiss government is questioned by several factors derived from substantially close relations with the EU; notably, the indirect effect on the Swiss decision-making process, the Swiss contribution to the EU budget and adherence to the EU legal order. Even though, Switzerland contributes to the EU budget and to certain extent participates in the EU funded projects, it cannot receive any funding for development of the least developed regions to improve their infrastructure and to keep up with the rest of the Europe. Moreover, the Swiss legal system is comprehensively influenced by the EU legal provisions in those areas which are defined in the bilateral agreements, and to some extent indirectly to those where there is no explicit measure, through more than

38 Church, op. cit., 103.

39 Pusterla, Elia, *Swiss claims of sovereignty within the implementation of Swiss-EU bilateral agreements*, University of Geneva, 2015: 12-14, online at: <https://ecpr.eu/Filestore/PaperProposal/5a162312-1d42-4de2-bf55-0e513d24c9c9>. Pdf; last accessed: 31.07.2017.

100 bilateral agreements. The perfect phrase was coined in order to explain how influential EU legislative mechanism is on the Swiss internal functioning which adapts its measures to the EU up to the point where it is possible to declare it a *fax democracy*. However, until now it is proven that the legislative acts adopted in the EP and Council are of strong importance even for third countries; the strongest argument which can sustain the statement regarding strict and visible impact on the Swiss sovereignty is the lack of voting powers in those main legislative EU institutions and impossibility to contribute and give its own input in order to express interest and adapt it to the domestic needs.<sup>40</sup>

Moreover, with these bilateral agreements Switzerland had only negotiated parts of the EU single market, not covering the most important part of the service sector for the Swiss, the banking departments; which exercise huge pressure on that sector, moving it outside the Swiss environment, forcing banks to set subsidiaries in the EU and by default moving job positions, tax contributions and value creating outside Switzerland. Another barrier for complete utilization of the benefits from the established bilateral relation is the static nature of the agreements preventing the Swiss legal system to immediately adopt to the changes relating to single market.

Another attempt which exemplified the nature of EU authority and the benefits Switzerland receives from the bilateral agreements that provide for non-negotiable compliance with the EU framework, is shown in the situation which occurred in 2014, when Swiss citizens voted in a referendum to restrict immigration, following Swiss government's obligation to comply. In response to this situation the EU suspended high-valued research grants, the Erasmus student exchange program and participation in Horizon 2020. The Swiss government knew that it could not completely and explicitly respond to the people's choice (prevailed slightly above 50% with low turnout), due to a specific clause inserted in the bilateral agreements, the so called *guillotine clause*, which meant that if

40 Bailey, James, *Switzerland and Norway an Alternative to the EU Membership*, One Europe, 2013, online at: <http://one-europe.net/switzerland-and-norway-an-alternative-to-eu-membership>; last accessed: 31.07.2017.

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any of the provisions was violated all of them would be condemned to failure, confirming Swiss dependency on the EU decision-making system.<sup>41</sup>

“Those rules are not set in Bern. When EU leaders in Brussels discuss banking regulations or provisions on the EU’s passport-free Schengen Area – rules that directly affect Switzerland, the Swiss president is absent. The Swiss ambassador doesn’t get farther than the press room.”<sup>42</sup>

This quotation perfectly addresses the reality in Swiss-EU relations where certain expressions of constraints of sovereignty is undeniable. Hence, this crisis between the EU and Switzerland lasted for almost two years, and it ended by the Swiss having to satisfy the EU demands, but of course not explicitly refusing wish of the people. According to the prominent newspaper dealing with the EU affairs, the EU Observer, the bill was adopted by the Swiss Parliament but without quotas imposed on the immigrants.

Until now, bilateralism has constantly provided solutions for balancing the interest of the Swiss in terms of maintaining equilibrium between the extent of the integration and sovereignty, however, the time for sustaining that wise strategy of increasing the benefits from economic integration and at the same time minimizing the political disadvantages, has passed. It is important that Swiss citizens and officials have in mind that not joining the EU or abandoning current arrangements would not support recovery of already lost sovereignty. In the end, it is up to them to continue bilateral relations or to enhance the integration arrangements, bearing in mind that the EU has the stronger bargaining power.

41 Wintour, Patrick, *EU tells Swiss no single market access if no free movement of citizens*, The Guardian, 2016, online at: <https://www.theguardian.com/world/2016/jul/03/eu-swiss-single-market-access-no-free-movement-citizens>; last accessed: 31.07.2017.

42 Gruyter, Caroline, *The Switzerland Fantasy*, Carnegie Europe, 2015, online at: <http://carnegieeurope.eu/strategieurope/?fa=60433>; last accessed: 31.07.2017.

#### ***4. Path of conditionality towards full-fledged membership – implications of the accession process on Montenegrin sovereignty***

This chapter will serve as a perfect concluding remark for analyzing the degree and intensity of EU integration on national sovereignty, how conditions set before candidate countries impact their sovereignty. Even though countries thrive to preserve their sovereignty, the constellation of international relations sets plethoric conditions of inter-dependency which disables countries to conduct their policies alone and requires them to surrender part of sovereignty for larger benefits and safety. Hence, for a small country, like Montenegro, the intensity of globalized forces is felt much harder, there is no room for behaving only according to the government or citizens' interest, but what bigger countries aim to achieve has to be taken into account. Long ago, in 2006 after regaining independence, the government of Montenegro set as the main aim for a bright Montenegrin future and survival, the path of European integration with a crucial focus on becoming an EU Member State.

Montenegro's first direct contact with the EU, after the independence referendum supervised by the EU (which was characterized as a very successful expression of democracy and the only one which resulted in peaceful separation on Balkan Peninsula), was the signing of the Stabilization and Association Agreement in 2007. It was the primary and comprehensive mechanism of EU conditionality and penetration in the national legal system, the specific feature of this agreement's foundation consisted of the core provisions of the *acquis* comprising not only the EU primary legislation, but also the EU institutions' acts as secondary legislation. Hence, the most prominent measures are prohibitions against custom duties, quantitative restrictions on exports and imports and for instance, competition rules. Thus, it is visible that the agreement framed the relation between the EU and third country, Montenegro, and has already shaped the principal-agent situation, where agent-Montenegro has agreed to pursue conditionality-compliance arrangements taking into account that it could invoke supranationality features and constrain its newly regained

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sovereignty.<sup>43</sup> However, the accession process is an extremely long and exhaustive path of plethoric nature of legal, economic and political conditions and provisions which in a given transitional period have to be incorporated into the national system, to be in accordance with the EU legal order. The Montenegrin path of conditionality officially started with the statement given at the EU Thessalonica Summit in 2003 that Serbia and Montenegro, as one state before, could apply for membership and become full-fledged members through a process of accession and compliance with necessary conditions.<sup>44</sup> Important here is, that Montenegro, following the proclamation in the Declaration of Independency (2006), agreed to persist on the path of conditionality through the EU integration in order to be able to transform its society and system, to bring wealth, prosperity and security, and to provide strong pillars for the construction of democratic and independent institutions; decided to respect core EU values and surrender implicitly or explicitly part of its sovereignty.

However, Montenegro cannot be withdrawn from the wider framework of other Balkan states, due to specific approach of the EU towards *Western Balkan* enlargement package. The same conditions will be applied in accession negotiations with other countries representing WB (Western Balkans)-6 group, notably Serbia, followed by Albania, Former Yugoslav Republic of Macedonia, Bosnia and Herzegovina and Kosovo, will be applied as well, now on a Montenegrin accession attempt. That is why it is necessary to understand the environment in which Montenegro is trying to construct its state and to integrate into the wider community of developed countries, in order to be able to consider and analyze the conditions set as they are. The Balkans has a long history of ethnic conflicts and is considered a place of turmoil on the European continent. In respect of the dissolution of the Federal Republic of Yugoslavia, Europe saw unimaginable bloodshed and destruction, leaving behind weak states incapable of carrying out recovery mechanisms to protect citizens and build from scratch broken institutions and inter-cultural relations. However, the

43 Arnold, *op. cit.*, 183-196.

44 Dick, Leonard, *The Guide to the European Union*, The Economist, 9th Edition, 2005: 275-279.

EU did not have mechanisms to prevent this, but eventually the offer which it has set before Balkan countries has changed their sense of thinking and has given them the motivation to persist on a path of transformation of their respective countries in terms of achieving democratic and economic standards cherished by the EU, in order to be able to reach the prize of membership. However, the conditions are stricter than ever before and any non-compliance is regarded as moving step away from the full-fledge participation in the EU project.

“The EU conditionality can be more intrusive as it can intervene in the sovereignty of an aspiring candidate suggesting a redefinition of internal and/or external statehood structures.”<sup>45</sup>

Moreover, it is interesting to analyze the role of the EU institutions which are involved in the accession process, exemplifying the supranational character of the European integration process through setting clear opinions for Montenegrin behavior in respect to its fulfillment of the conditions set before it. Hence, the Commission and the European Council are considered as major sources of political pressure exerted on the Montenegrin government, society and other stakeholders having interest, through providing opinion on Montenegrin progress and allowing for further steps in the negotiation process; it is obvious that the role of these institutions describes the exact nature of the Montenegrin (but also other countries’) accession path embodied in the high interference of an external entity enabling the limitation of sovereign powers.

The main objective of the involvement of the EU into complex issues among Balkan neighbors is to provide peaceful solution for building states and ethnic reconciliation. In that regard, the EU conditionality system is supported by a wide range of requirements set by other organizations, in the Montenegrin case the North Atlantic Treaty Organization (NATO), which erodes even more national sovereignty by duplicating the framework of conditions (mutually not exclusive) and the extent of interference in

45 Noutcheva, Gergana, *EU Conditionality, State Sovereignty and the Compliance Patterns of Balkan States*, Center for European Policy Studies, 2006: 1, online at: <http://www.jhubc.it/ecpr-istanbul/virtualpaperroom/055.pdf>; last accessed: 31.07.2017.

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national affairs. However, the EU accession path consists of the costs incurred on the short run and benefits on the longer term and not every state is ready to unconditionally obey and carry out obligations, especially in case when political costs in the short run are too big such as completely reforming state institutions, while reducing possibilities of public servants to exert illegitimate powers from their positions.<sup>46</sup> The EU power which it exerts on accession countries is enormous, but only up to the point of country's approval; which implies equally to the issue of sovereignty.

The submission of membership application (which Montenegro did in 2008) is embodied with several sets of criteria, which have been comparatively developed throughout a long period. However, the progress on the path of accession for Montenegro is paved with progress on specific internal structures reformation as well as two main conditions which cannot be circumvented by any derogation, the enhancement of regional cooperation as a prerequisite for reconciliation of previously intolerant neighbors and on the other hand, the maintenance of the cooperative relation with the International Criminal Tribunal for the former Yugoslav countries. But, the long list of the conditions set before Montenegro to be conducted in good faith does not end here; the well-known Copenhagen criteria are basis of the whole EU enlargement process, that defines necessity of each candidate country to achieve recognizable degree of stability of its institutions which cherish human rights, rule of law and democracy; also to provide market driven economy which will be able to respond to competitive pressure that the EU's single market sustains; last but not least, to be capable of undertaking necessary tasks in order to cope with obligations that come with membership. Following the year of 1995, new criterion were added in the Madrid Summit and it is most visible now in 2017 as 5<sup>th</sup> year since Montenegro has opened its negotiation chapters, the absorption capacity of the Union, which according to President Juncker, currently is considered as negative. Finally, the Commission gave the green light for the membership application, but stressed the focal points on which Montenegro must work together with the EU institutions if it aspires

46 Ibid, 16-23.

towards membership; notably, issues with corruption, organized crime and deficiencies in the functioning of mechanism for implementing the legislation in the institutions having trouble with democratic principles.<sup>47</sup>

Remarkably, the accession of Montenegro, as well other Balkan countries, has been even more intensified, with the introduction of specific condition to primarily open 23<sup>rd</sup> and 24<sup>th</sup> chapters. This would create comprehensive mechanisms to efficiently and effectively incorporate Montenegro's reform measures, but at the same time to ensure that core problems characterized by this enlargement period would be eradicated from the beginning, preventing the situation such as with Bulgaria or Romania from happening. These chapters are dealing with fundamental rights, domestic security and justice, and if progress on these chapters is not visible to a desired extent, other chapters could be delayed in opening, due to specifics of these chapters that have to be closed last.<sup>48</sup>

The following 7<sup>th</sup> enlargement wave the process is very complex, with never ending requirements needed to be accomplished; so called *Enlargement Plus Process* with enhanced mechanisms founded on seven major principles which serve as guiding values of the negotiation procedure. Hence, Montenegro was the first country in this new enlargement period to enter the negotiation process under these newly defined conditions, principles and rules within the EU framework. The additional principles, called *seven C*, emphasize the priority of deepening that has been fostered, instead of widening as was in focus in previous accession negotiation periods. Among the first principles set are *communication*, *consolidation* and *conditionality* defined in 2005, which have strengthened the commitments specified in the enlargement process, enhanced the conditionality that became stricter and more comprehensive

47 European Commission, Communication from the Commission to the European Parliament and Council, *Commission's Opinion on Montenegro's application for membership of the European Union*, 2010: 2-11, online at: [https://ec.europa.eu/neighbourhoodenlargement/sites/near/files/pdf/key\\_documents/2010/package/mn\\_opinion\\_2010\\_en.pdf](https://ec.europa.eu/neighbourhoodenlargement/sites/near/files/pdf/key_documents/2010/package/mn_opinion_2010_en.pdf); last accessed: 31.07.2017.

48 German Federal Foreign Office, *EU enlargement: Montenegro*, 2016, online at: [http://www.auswaertiges-amt.de/EN/Europa/Erweiterung\\_Nachbarschaft/Erweiterung/Montenegro.html](http://www.auswaertiges-amt.de/EN/Europa/Erweiterung_Nachbarschaft/Erweiterung/Montenegro.html); last accessed: 31.07.2017.

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and also have induced mechanisms for improving the communicational framework directed towards citizens aiming at providing information with regard to the enlargement process. On the other hand, the last four were defined in period 2009-2013 within different enlargement strategies stressing the importance of *credibility* of enlargement process; *crisis* which brings new focus of the Montenegrin accession and sets economic features at the fore, as a consequence of the financial crisis; moreover, *concrete results* are highly important if Montenegro wants to join the EU, it has to show improvement in areas defined with reform framework through track-record mechanisms specified by the EU institutions; and lastly, the *common priorities* casting more light on reformation in fields of fundamental rights and media expression. Undoubtedly, Montenegro is considered *primus inter pares* when it comes to the level of accomplishment of the aims set in negotiation process and reforms conducted, in comparison to other countries that are negotiating or preparing for negotiations with the EU, emphasizing quality before speed.<sup>49</sup>

However, Montenegro has shown enormous persistence on building strong and collaborative relations; with respect to that, it is the only country in the region which has not had any larger or serious conflict with any of its neighbors and it is usually said that it is currently the only country that is still in the game for prospective membership by representing a rare bright mark during very hard times for the EU. On top of all conditionality analyzed in the previous pages, it is also important to mention the powerful and supranational role of the EU Commission, which at the end of each year composes reports on Montenegro's progress and unilaterally directly imposes further measures and rules that should be followed in order to receive positive opinion and possibility to move towards closure of the negotiation process.

Hence, in regard to that, in the last 2016 report the Commission has marked Montenegrin progress on each area analyzed positively, however it also strictly emphasized the need for more comprehensive work on fighting

49 Djurovic, Gordana, *Montenegrin accession talk in the prism of the new negotiating rules*, Center for Southeast European Studies, 2014, online at: <http://www.suedosteuropa.uni-graz.at/biepag/node/66>; last accessed: 01.08.2017.

against organized crime and corruption, which are seen as major issues in the Montenegrin society, while, at the same time stressing the need for undertaking more austere measures to reduce public debt threatening to put in danger fiscal stability.<sup>50</sup> Thus, as it is not highly important for the analysis of this matter, the thorough elaboration of the report is not necessary, its purpose here is to show the extent of the implications of the EU framework and power of the EU institutions that are exerted on Montenegro and how that affects Montenegro's internal system. The EU Commission with its authority clearly sets new direct conditions in terms of the necessary improvements that should be done and specifically defining them in order to be able to join the EU, which straightforwardly impose enormous burdens on country's sovereignty, having to oblige and comply – due to free decisions made – to approach the community of developed countries.

The statement made by the current ambassador of the EU in Montenegro, Mr. Orav, exemplifies the real reach of the EU institutional and legal setup into Montenegro's national internal system, clearly arguing in favor of the starting assumption that the process of joining to some limited extent transforms or constrains sovereignty,

“...thanks to the EU rules applied here in Montenegro, the food has become safer, and also toys for children. Through the introduction of the anti-corruption agency, Montenegrins have a dedicated address to turn to report corruption, while better equipment for farmers helps to increase the agricultural productivity”.

This notes the degree of benefits brought by that process which clearly offset the costs incurred by the change in respect to the understanding of sovereignty.

Montenegro has opened two new chapters on the intergovernmental conference in Luxembourg, namely 1 and 22, which deal with the freedom of movement of goods and regional policies, making the Montenegrin path through the negotiation process very close to the end, at least in regard of the opening of all chapters. Thus, indicating that for five years of

50 European Commission, *Montenegro 2016 Report*, Brussels, 2016, online at: [https://ec.europa.eu/neighbourhoodenlargement/sites/near/files/pdf/key\\_documents/2016/20161109\\_report\\_montenegro.pdf](https://ec.europa.eu/neighbourhoodenlargement/sites/near/files/pdf/key_documents/2016/20161109_report_montenegro.pdf); last accessed: 01.08.2017.

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exhaustive negotiations with the EU, Montenegro has opened 28 from 35 chapters, aligning itself completely with the rules applied in the EU in terms of trade, development and humanitarian aid, it is considered in those matters, as de facto part of the EU.<sup>51</sup>

The EU has high and crucial significance for small countries, such as Montenegro. Indeed, the EU's path of conditionality for providing full-fledged membership to third countries (Montenegro) has a significant impact on country's sovereignty, but on voluntary basis, and it is always possible to stop this process, as Iceland did. For Montenegro, the mere pulling of sovereignty on the EU level represents in symbolic terms greater gains of recognition of its sovereignty powers and rights, in so far as to prevent that 1918 never happens again – when Montenegro lost its independency and much more. As 2019 is approaching, the year of the EU elections in the EP and further the new Commission's composition will be set, which represents a huge opportunity for Montenegro to specify the final year of the end of a long negotiation process, even more when Montenegro has shown its persistence on the path of NATO integrations and has become member, securing its path towards developed and progressive countries of the Europe.

### ***Conclusions and Future Prospects***

Hence, four chapters have given explicit response to the posed research questions, undoubtedly setting the scene for arguing that the era of the Westphalian system and sovereignty has passed, leaving behind a plethora of interplay among supranational and statehood entities, where the concept of sovereignty has been fading, allowing for a multilevel decision-making system. The EU is undeniably a specific and unique organization which radically changed the arrangements on which the states have been functioning for centuries, directly and implicitly transforming the functional idea and concept of national sovereignty. Thus, the far-reaching role of the EU's institutions, most notably, the Commission and the ECJ,

51 Conclusions derived from the official site of Montenegrin Ministry of European Affairs, online at: <http://www.mep.gov.me/en/minister>; last accessed: 01.08.2017.

have significantly contributed to the development of the legal system which is characterized by the principle of supremacy over national legal systems and which undoubtedly interfere within national domain of powers. Indeed, with its own exclusive powers and also in those areas where it shares competences with Member States, the EU sets rules and conditions which are submitted for compliance and incorporation by national authorities, providing for a harmonized framework of legal interpretation and application. Why is it argued that it has come to transformation and not to complete loss? The post-Westphalian era stopped in the very moment when first Communities were formed, marking the sovereignty a fluid concept, adjustable to the forces created in international sphere, still held strongly by the States, but to a significant extent shaped by decisions made from other entities, notably the EU. Hence, States cannot adopt laws and decisions anymore, without considering positions of the EU and other Member States, their neighbors, due to the high level of interdependency of all actors in this globalized world. This is the best explanation of how the concept of Westphalian sovereignty as a personification of unbreakable power of states, has come to the much looser forms of having several sovereigns within one territory.

The analysis conducted in three chapters dealing with concrete examples of states influenced by the EU legal and institutional framework through different relations they thrive to maintain, has shown the great degree of the EU's impact on the respective states internal architecture and by default, on their sovereignty. Hence, Germany has reacted on the need to pull sovereignty, through adjusting its Constitutional framework to the level where fundamentals of its constitutional and statehood identity would not be put in danger. Fostering European integration and its values, allowing a significant level of supranational influence resulting in a transformation of its sovereignty, but still holding main powers for itself. On the other hand, interestingly, Switzerland has maintained a different kind of contact with the EU, but still is undoubtedly been exposed to the impact of the EU legal order, especially in terms of trade and migration. However, the bilateralism to which the Swiss have pursued, has not prevented the substantial erosion of Swiss sovereignty, leading to the argument that even states that did not

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want to enter the EU with the aim of preserving their sovereignty, cannot be left untouched by some provisions established on the EU level. Last, but not least, the fourth chapter points out that countries attempting to join the EU, such as Montenegro, under the framework of constant and complex conditionality, is directly submitted to the legal provisions envisaged in primary and secondary legislation of the EU, which have to be directly transposed into national systems and conducted a plethora of reforms in order to be able to fulfill long list of criteria needed to become full-fledged member of the EU; influencing Montenegrin sovereignty in a significant manner that allows for opening of the internal system for the supranational order which in the end is benefits Montenegrin citizens.

The hypothesis of the transformation of sovereignty under European integration has been confirmed, and the best exemplification is the following statement, which has significantly adjusted the concept of national sovereignty:

“Sovereignty is a manifestation of the new order in a globalized world where economies and decision-making processes become interdependent and some responsibility has shifted from the national states to another centers of governance. State sovereignty, acquires a new dimension in connection with European integration. Today, a sovereign should be well able to organize the performance of the society, to tolerate the realms of fragmentation, integration and globalization.”<sup>52</sup>

Nevertheless, changes in the European Union are happening very fast, rendering it almost impossible to predict the long-term future prospects. However, theoretically, it is possible to assume that crises that have hit the EU are going to have strong implications on the future understanding of sovereignty and it is highly likely that the structure and function of the EU will be changed, by default impacting relations with the Member States and other third countries. Indeed, the financial crisis, due to which we even now see the phases of recovery, terrorist attacks which are continuing, migration problems and well-known Brexit, all exert decisive impact on the perceived degree of delegation of powers among Member States to the EU institutions, where we more and more have to consider problems of withdrawing sovereignty through incremental steps, most notably seen

52 Hamulak, op. cit., 60-61.

through the actions of Poland and Hungary. However, the only possible path towards offsetting these issues is envisaged in the unfading motto of the EU – *united in diversity*.

This paper will avoid any possible speculations about future prospects, it will only recall the existence of five scenarios composed by the Commission in the White Paper emerging as potential directions for further developments by 2025; which could allow for opening new chapter of analysis with regard to the impact of the EU integration on sovereignty, due to specific feature of each of five scenarios and the volume of different implications to the Member States' sovereignty. However, in the end, the window of opportunities is open, now it is up to the Member States and the EU to define further their framework of functioning.

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