



HAL
open science

Interoperability Case Study: The European Union as an Institutional Design for Legal Interoperability

Félix Tréguer

► **To cite this version:**

Félix Tréguer. Interoperability Case Study: The European Union as an Institutional Design for Legal Interoperability. 2012. halshs-01306613

HAL Id: halshs-01306613

<https://shs.hal.science/halshs-01306613v1>

Preprint submitted on 25 Apr 2016

HAL is a multi-disciplinary open access archive for the deposit and dissemination of scientific research documents, whether they are published or not. The documents may come from teaching and research institutions in France or abroad, or from public or private research centers.

L'archive ouverte pluridisciplinaire **HAL**, est destinée au dépôt et à la diffusion de documents scientifiques de niveau recherche, publiés ou non, émanant des établissements d'enseignement et de recherche français ou étrangers, des laboratoires publics ou privés.



Berkman

The Berkman Center for Internet & Society
at Harvard University

Research Publication No. 2012-18
September 2012

Interoperability Case Study
The European Union as an Institutional Design
for Legal Interoperability

Félix Tréguer

This paper can be downloaded without charge at:

The Berkman Center for Internet & Society Research Publication Series:

<http://cyber.law.harvard.edu/publications>

The Social Science Research Network Electronic Paper Collection:

<http://ssrn.com.ezp-prod1.hul.harvard.edu/abstract=2148543>

Interoperability Case Study

**THE EUROPEAN UNION AS AN INSTITUTIONAL DESIGN
FOR LEGAL INTEROPERABILITY**

Félix Tréguer

September 2012

Preface: The Interoperability Case Study Series
September 2012

This case study is part of an ongoing series developed in support of a larger text on interoperability by John Palfrey and Urs Gasser *Interop: The Promise and Perils of Highly Interconnected Systems* (Basic Books, June 2012).

The book is an extension of their 2007 study and paper, “Breaking Down Digital Barriers: When and How ICT Interoperability Drives Innovation”ⁱ (Berkman Center Research Publication, 2007). *Interop: The Promise and Perils of Highly Interconnected Systems* focuses on the relationship between interoperability and innovation in the Information and Communication Technology (ICT) environment and beyond. Palfrey and Gasser seek to sharpen the definition of interoperability and identify its relevance for consumers, companies, governments, and the public by examining its driving forces and inhibitors, while considering how it can best be achieved, and why.

Authored by research assistants at the Berkman Center for Internet & Society in close collaboration with the authors, the series examines real-world examples where interoperability has played or continues to play a decisive role—in ICT and other sectors, including transportation, retail, and energy. Each case explores how forces such as law, policy, technology, economic incentives, and market innovations drive, or in some cases inhibit, interoperability, and what industry stakeholders seek to achieve via interoperability.

Some cases explore well-known innovations, such as the bar code and the UPC system, air traffic control, and the QWERTY keyboard layout. Others touch on more recent examples, including efforts to standardize cell phone chargers in the E.U., the evolution of electronic data interchange systems, and digital rights management (DRM) systems. The nature of interoperability and its attendant challenges are also explored in less-traditional contexts, including commons-based knowledge creation models, which require large-scale collective efforts, and complex, next-generation models, like the Internet of Things, cloud computing, and the Smart Grid.

ⁱ Urs Gasser and John Palfrey, “Breaking Down Digital Barriers: When and How ICT Interoperability Drives Innovation,” Berkman Center Research Publication No. 2007-8 (2007), available at <http://ssrn.com/abstract=1033226>.

1. Introduction: The Legal Layer

The cross-border flow of people, goods, services, and information that characterizes globalization has put increased pressure on national legal systems, and underscored the need for policymakers to address the costs associated with regulatory fragmentation. Legal interoperability is a concept that enables us to assess the capacity of legal systems to work with one another, and is a critical building block towards establishing an international order that can accommodate the interconnected nature of the world in which we live.

What is Legal Interoperability?

Whereas interoperability between different information and communications technologies (ICT) allows for data to move across distinct information systems, legal systems can be said to be interoperable when the cost of regulatory fragmentation is low enough for people, goods and services subject to regulation to easily move between them. It allows for jurisdictional diversity while avoiding lock-in effects of legal subjects within a given system.

There are similarities between the expected benefits of ICT interoperability and legal interoperability. If we consider the objectives of free trade – arguably the main policy goal of legal harmonization in the European Union (EU) and a big chunk of international public law – and that of ICT interoperability, we see similar goals: consumer empowerment, competition, and innovation. Analogous arguments could be made regarding the benefits of legal interoperability when it aims to foster the free movement of people: ideally, the latter should allow for greater personal autonomy, cultural diversity, and social innovation. If this were accurate, such benefits would provide a justification for increasing the interoperability of certain branches of civil law, such as contract law or family law¹. Whether we consider legal or ICT systems, interoperability seems to foster similar types of positive externalities.

As with ICT interoperability, legal interoperability is not a binary concept, and is best understood on a spectrum. Where a given legal system actually sits along that spectrum is a function of the cost associated with cross-jurisdictional operation for any given legal subject that we consider. For instance, a US-based patent holder will find it relatively easy to operate in the European Union, where his or her assets will be protected by a set of laws and enforcement methods that are much like US ones. In this example, the legal risk, and therefore the cost, of cross-jurisdictional operation is quite low as a result of similar standards and implementation methods between the US and the EU. On the other hand, and despite a growing body of international law aimed at harmonizing intellectual property (IP) regimes worldwide, the same patent holder might face a greater risk of patent infringement in a country where IP standards are not as favorable to rights-holders (e.g., if the host country's IP laws encourages technology transfers from foreign to domestic companies). Then, from the patent-holder's perspective, the risk associated with a weaker protection of IP rights might prove to be a disincentive to cross-jurisdictional operation.

When facing low levels of interoperability between legal systems, a given subject will have to engage in context-specific adaptation strategies to cope with the regulatory environment of the host country.

¹ Harmonization of civil law is increasingly developing in the European Union, which protects the free circulation of people across member states. For an overview of the recent E.U. initiative in this area, see European Commission, *Judicial Co-operation Between Member States in Civil and Commercial Matters is a European Community Policy Linked to the Free Circulation of People* (2010), http://ec.europa.eu/justice_home/fsj/civil/fsj_civil_intro_en.htm.

The more consequential these “adaptation costs,” the less interoperable the legal systems will be. If these costs are deemed too high, the subject might renounce cross-jurisdictional operation altogether, which may result in opportunity costs for individuals at the microeconomic level, as well as society as a whole at the macroeconomic level, since the latter would miss out on the positive externalities that legal interoperability generates.

Institutional Designs for Legal Interoperability

Many aspects of international law stem from the understanding that legal harmonization is necessary to reduce the costs of cross-jurisdictional operation in order to foster interactions between world economies. For example, trade policies supervised at the international level by the World Trade Organization are designed to lower two forms of costs hindering cross-border flows: direct costs, such as tariff barriers, and indirect adaptation costs or opportunity costs ensuing from regulatory fragmentation.

However, greater legal interoperability is effectively achieved when regulatory fragmentation is reduced not only in theory, but also in practice. In theory, global policy-making forums provide institutional mechanisms for maximizing the efficiency of negotiations among states with competing interests by pushing the outcome of these negotiations closer to Pareto-optimality. To the extent that negotiations successfully decrease the average costs of cross-jurisdictional operation for the legal subjects they will eventually impact, they foster legal interoperability. In practice, however, the level of legal interoperability provided by these forums might not be guaranteed due to a lack of proper enforcement of the original agreement. This sort of free riding, where a state agrees to the outcome of an interstate negotiation but fails to implement it comprehensively, is far from uncommon in international relations. In a world still largely organized according to national sovereignty, international law often collides with state prerogatives and international institutions often lack the power, legitimacy, or resources to ensure efficient implementation and enforcement of agreed-upon levels of interoperability.

The European Union as a Prime Example of Legal Interoperability

Although the European Union has many of the traditional attributes of both states and international organizations, it is ontologically distinct from previous or existing political institutions. In many respects, the EU is unrivaled as an institutional system seeking to achieve legal interoperability, due to its ability to adopt and effectively enforce a supranational legal order.

The goal of this brief case study of the EU institutional machinery is to understand the unique features of the EU model for achieving both “in-the-books” and “in-action” legal interoperability, the enablers and tools it has developed to that end, as well as the systemic tensions that result from this process. It begins by placing legal interoperability at the core of the EU’s founding project, which makes economic collaboration a chief policy objective to foster solidarity among Europe’s nation states. The example of the EU personal data protection directive highlights the idea that EU legal interoperability goes beyond the objective of greater economic integration of member states to encompass larger policy goals – in this case, the protection of the fundamental right of privacy. It then turns to the institutional mechanisms that sustain legal interoperability and impede free-riding behaviors. Finally, we discuss select court cases that have epitomized the resistance of national jurisdictions to EU law, suggesting that maintaining high levels of interoperability may disturb the legal principles of state sovereignty.

2. Legal Interoperability as a Means to Create European Vision: Working Together for Peace and Prosperity

The Vision behind Legal Interoperability

To understand the goal that EU legal interoperability seeks to achieve, it is important to realize that it is a means towards a larger vision. On May 9th, 1950, Robert Schuman, then French Foreign Minister who had a strong and intimate relationship with Germany,² gave a speech in which he laid out a plan that would eventually shape the future of the entire European continent. Schuman's idea was simple, yet extremely ambitious. Just a few years after a ferocious war, he proposed that peace be achieved through the construction of a supranational institutional order setting forth economic collaboration: the pooling of coal and steel production between France and Germany as well as other European countries willing to participate in this venture. The vision was deemed to be a "first step in the federation of Europe," and would make war "not merely unthinkable, but materially impossible," Schuman noted. Interdependency was to lead to a "*de facto* solidarity" that would enhance the economic and social welfare of the peoples of Europe. In the following decade, a series of treaties were created to expand the initial scope of the project, turning the vision into a reality. With the 1957 Treaty establishing the European Economic Community (also known as the Rome Treaty), which has become the foundation for much of today's EU institutions, European interdependency was based on the principle of free trade among member states.

Sixty years after Schuman's speech, the European Union has fulfilled its central objectives through the creation of *sui generis* institutions³ in order to exercise its ever-increasing competencies, as well as by accommodating the growing number of countries taking part in this historical endeavor. Whether it is to establish a custom union, create a single market, or to guarantee the rights attached to the EU citizenship (proclaimed in 1993 with the entry into force of the Maastricht treaty), policymakers have sought to use European law to support the vision of Europe's founding fathers as set forth in the founding treaties of the European Union.

The Goal of EU Legal Interoperability

Derived from the idea that economic integration would create "*de facto* solidarity," much of EU law seeks to foster cross-border trade. In the process, it also addresses other policy goals, such as protecting the environment, minimum social standards, and fundamental rights. For example, consider the 1995 directive "on the protection of individuals with regard to the processing of personal data and on the free movement of such data."⁴ Its two main objectives granted the EU a legal basis to legislate in this field: the development of the internal market on the one hand,⁵ and the protection of

² Schuman grew up in then German region of Alsace-Lorraine. He studied law, economics, political philosophy, theology and statistics in various universities across Germany. He became a French citizen when Alsace-Lorraine was returned to France after the 1919 Versailles Treaty.

³ The main EU institutions are the European Court of Justice of the European Union (hereafter abbreviated ECJ), the Commission (executive organ), as well as of two legislative bodies: the Council of the European Union (comprised of national government officials and often referred to as the Council of Ministers) and the European Parliament, whose members are elected by direct universal suffrage every 5 years.

⁴ European Parliament and Council Directive 95/46/EC, 1995 O.J. (L 281) 31–50, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:EN:NOT>.

⁵ Treaty on the Functioning of the European Union, Dec. 1, 2009, O.J (C 83). The treaty provisions that provide a "legal basis" for the directive are article 2 and article 3 of the Treaty on European Union. Article 2 provides that "the Union is

fundamental rights on the other. In the early 1990s, economic and technological trends made clear that diverging national approaches to privacy protection would undermine these objectives. This led EU authorities to go ahead with a new piece of legislation. The first of these trends is the adoption of a new treaty in 1987, the Single European Act (SEA), and the following intensification of regulatory efforts aimed at creating a single market across member states, which led to increased intra-regional trade. Second was the growing adoption of information systems, which decreased the costs of collecting and processing data on consumers and citizens at large. Considering the importance of the fundamental right of privacy in Europe, the objective of the data protection directive was therefore to protect the latter while ensuring that regulatory fragmentation would not hinder the cross-border flow of personal data in the internal market, since some member states had started to adopt diverging regimes of privacy protection. To be sure, achieving legal interoperability of privacy laws through the harmonization of European international norms would reduce the adaptation costs faced by companies handling personal data and operating across several member states, fostering free trade within the single market in due respect of fundamental rights.

Enablers of Interoperability: Common Values and soft-laws

Recognizing the general importance of having different legal systems work with each other so as to allow economic actors as well as private individuals to move across different jurisdictions is one thing. But it is another to agree on the basic policy principles that should drive the move towards legal interoperability in a particular area. EU legal interoperability relies on important external factors that greatly facilitate the incremental process of integration that the bloc has been pursuing for more than half a century.

First, and arguably the most important driver we see behind the unrivaled degree of cooperation between sovereign states in Europe, EU countries share a common history as well as particular values and worldviews. This is especially clear in the realm of privacy, where the conceptions of Europeans were shaped by the dreadful events of World War II and the surveillance policies carried out under communist regimes in Eastern Europe.

After World War II, this shared awareness of the importance of enforcing fundamental rights also led to the creation of international organizations to serve as key enablers of legal interoperability. In this respect, the Council of Europe (CoE), created in 1949, is of particular relevance given that the adoption of the European Convention of Human Rights – whose Article 8 protects privacy – and the creation of the European Court of Human Rights have had the effect of binding its members⁶ to the same case law. The CoE, along with the Organization for Economic Cooperation and Development (OECD), originated in 1948, plays a significant role in fostering the debate on emerging issues and building a common European approach to solving them.

As fears grew regarding the potential of information and communications technologies to infringe upon people's privacy, these two organizations issued guidelines on the topic. In 1980, the OECD adopted its "Guidelines on the Protection of Privacy and Transborder Flows of Personal Data,"⁷ while

founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights[.]" Article 3 provides that "the Union shall establish an internal market[.]"

⁶ Although all 27 EU member states are also members of the Council of Europe, the latter includes many other European countries. The CoE has now 47 member states.

⁷ Organization of Economic Cooperation & Development (OECD), "Recommendation of the Council Concerning Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data," September 23, 1980, available at

a year later, the CoE came up with a “Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data,”⁸ to which the 1995 directive explicitly refers. While the EU has achieved an unrivaled degree of interoperability among its member states, it is also undeniable that the process of integration relies to a great extent on the works carried out by a wide range of international organizations that feed into EU policymaking.

The Directive: A flexible instrument towards legal interoperability

Among the regulatory tools provided in the founding of the Treaties of the European Union, directives are central instruments in the achievement of legal interoperability. According to article 288 of the Treaty on the Functioning of the European Union, directives “shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.”

Once a directive is adopted at the EU level, member states must transpose it into national law through their own policy-making procedures before a predetermined “transposition date.”⁹ Depending on their nature, the articles of a given directive will be transposed through national laws and/or administrative regulations by member states. Going back to the example of privacy law, it is interesting to note that, while most European countries used legislative channels to transpose the 1995 directive, in Italy, the Data Protection Commission was established in June 2003 through a set of executive directives issued by the Italian President (the Italian Data Protection Code was later enacted in January 2004).¹⁰

The transposition process allows for the constitutional orders and legal traditions of member states to be taken into account, to amend preexisting and conflicting regulation at the same time as EU law is transposed should it be deemed necessary, and more generally to decide on the best way to adapt the country’s legal and institutional systems to the provisions of the directive. From the transposition date onward, all of the national legal systems are supposed to conform with the directive. To be sure, not all European law rests on this flexible approach. In particular, European regulation – another legislative-like legal instrument provided by article 288 – has “general application” and “shall be binding in its entirety and directly applicable in all Member States.” Regulations thereby amount to some sort of total harmonization; they do not require any transposition measures, as they override any national laws that might conflict with them and are, therefore, more powerful instruments.

By comparison, directives are more akin to a common standard. They are in essence the recognition that perfect harmonization is not necessary to achieve the stated objective of legal interoperability. Rather, giving flexibility to the components of a given system can be a pragmatic way of accommodating the diversity that exists within it.

3. Sustaining Interoperability through Collaboration and Effective Enforcement

When Harmonization Failure Endangers Interoperability

http://www.oecd.org/document/20/0,3343,en_2649_34255_15589524_1_1_1_1,00.html.

⁸ Council of Europe [CoE], “Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data” (January 28, 1981), available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/108.htm>.

⁹ The data protection directive was adopted on October 24th, 1995. It had to be transposed by October 24th, 1998 (as mandated by article 32 of the directive).

¹⁰ Avner Levin & Mary Jo Nicholson, “Privacy Law and the Middle Ground,” 2 U. Ottawa L. & Tech. J. 357, 377 (2005).

To ensure sufficient legal interoperability in the long run, several systems work to eliminate any discrepancy that may arise between a member state's national law and EU law. For the data protection directive, the transposition process has been particularly difficult. For example, the European Parliament lamented in its 2004 report that "the fact that the tardy implementation of the directive by the member states and the continuing differences in the way in which it is applied at national level have prevented economic operators from drawing maximum benefit from it, and have blocked some cross-border activities within the European Union."¹¹ In this case, legal interoperability of national privacy laws remained too low because of a failure to properly implement the directive.

The European Commission: "Guardian of the treaties"

In order to avoid harmonization failures, it is the European Commission's responsibility to closely monitor the transposition of EU directives in member states. For the 1995 directive, the Commission devised a strategy aimed at bringing national legislatures fully in line with the requirements of the directive where inconsistencies remained, by maintaining a continuous dialogue and exchanging best practices.¹²

When such a collaborative approach fails to achieve sufficient results, the Commission has the power to launch a noncompliance procedure, starting with a pre-litigation phase whereby it issues a formal notice to the member state at fault and requests it to comply with EU law within a given time limit. On June 24, 2010, the European Commission – the European Union's executive body – publicly threatened the UK government to take legal action before the European Court of Justice (ECJ) if it did not come up with a plan to reinforce the power of its data protection national authority, as required by a 1995 legislation protecting privacy across the EU. "Data protection authorities have the crucial and delicate task of protecting the fundamental right to privacy. EU rules require that the work of data protection authorities must not be unbalanced by the slightest hint of legal ambiguity. I will enforce this vigorously," warned Viviane Reding, EU Commissioner for Justice, Fundamental Rights and Citizenship. Such a threat, coming from an unelected official,¹³ and directed at the government of a supposedly sovereign country, may seem odd to anyone who is not familiar with the complex mechanics of the EU. It is, however, only one of the many examples where the Commission is reminding EU member states of their legal obligations.

If the member state fails to comply, the Commission may refer the case to the ECJ, thereby formally opening the litigation procedure. The ECJ may hold that the member state violated EU law and sentence it to a fine. Several lawsuits were brought against member states regarding the data protection directive.¹⁴ According to the Commission, one of the major concerns over the transposition of the directive was the respect for the requirement that data protection supervisory authorities act in full independence and are endowed with sufficient powers and resources to exercise their tasks.¹⁵ Very recently, in March 2010, Germany was condemned by the ECJ for failing to guarantee the

¹¹ "European Parliament Report on the First Report on the Implementation of the Data Protection Directive," PE 339.591, 8, February 24, 2004, available at http://ec.europa.eu/justice/policies/privacy/docs/lawreport/ep_report_cappato_04_en.pdf.

¹² "Commission Communication on the Follow-up of the Work Programme for Better Implementation of the Data Protection Directive," COM(2007) 87 final, March 7, 2007, available at <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52007DC0087:EN:NOT>.

¹³ EU Commissioners are nominated by member states and the full college of Commissioners go through confirmation hearings and a subsequent vote by the European Parliament. There is no direct or even individual election of Commissioners.

¹⁴ For an overview of relevant case law, see http://ec.europa.eu/justice_home/fsj/privacy/law/index_en.htm#caselaw.

¹⁵ See Commission of the European Communities, *supra* note 11, 5.

independence of its national supervisory authority.¹⁶

Even when member states have correctly transposed a directive, the Commission remains wary of the potential drawbacks that come with the inherent flexibility of such a normative instrument. Without necessarily violating EU law, divergences can arise between the national transpositions of measures across member states, thereby failing to ensure a sufficient level of interoperability. Although the transposition process of the data protection directive suffered a number of problems, flexibility was never one of them. In a report on the implementation of the directive, the European Commission underlined that, even if it is true that “a number of provisions that are broadly formulated and, explicitly or implicitly, leave member states a margin of maneuver in adopting national legislation,” these divergences did not “prevent enterprises from operating or establishing themselves in different member states,” nor did they “call into question the commitment of the European Union and its member states to the protection of fundamental rights.”¹⁷

The Collaboration of National Enforcement Agencies

Another method of sustaining interoperability is through the collaboration of national enforcement agencies. In certain fields, national regulatory agencies cooperate at the EU level to hold workshops, exchange best practices and coordinate their policies. For instance, the data protection directive has established a EU-wide working party – called the Article 29 Data Protection Working Party – comprised of the heads of the national data protection authorities. The goals of the Working Party are to advise the Commission, make recommendations and promote the uniform application of the general principles across the EU. The Working Party can also initiate synchronized enforcement actions, such as in March 2006 when national data protection authorities launched a joint investigation on the processing of personal data in the private health insurance sector. Other such bodies can be found in other areas, such as the recently formed Body of European Regulators for Electronic Communications.

Interpreting EU Law Day-to-Day

The last and most often-used means for sustaining interoperability is the cooperation of national judges with the ECJ, which ensures that EU law is interpreted in the same manner all across the EU.¹⁸ In a particular case, a national judge may have to apply the provisions of a directive—for instance if the latter confers individual rights on nationals of member states and has not been transposed properly; or if a national transposition measure must be interpreted in light of a directive. In such instances, the court can petition the ECJ for a preliminary ruling in which the ECJ will give guidance as to how a particular aspect of EU law should be interpreted. This ensures that EU law is applied consistently across the EU, fulfilling the objective of high legal interoperability.

¹⁶ Case C-518/07, Commission supported by European Data Protection Supervisor v. Federal Republic of Germany, 2010 E.C.U.E 00000, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007J0518:EN:NOT>.

¹⁷ See Commission of the European Communities, *supra* note 11, 6.

¹⁸ Article 267 of the Treaty on the Functioning of the European Union provides that: “The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union; Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decision there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court. If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.”

Although strong enforcement is necessary to avoid free-riding behaviors and to ensure that legal interoperability is practically effective, it can have negative effects. Indeed, with the enforcement of interoperability potentially comes one of its traditional drawbacks: lock-in effects. Once a supranational regulation aiming at a higher level of interoperability is adopted, implemented and enforced, it might prevent national lawmakers from developing more efficient regulations. To the extent that supranational law is often the product of fragile compromises resulting from complex negotiations between states, legal interoperability may risk of crowding out better regulatory approaches and foreclosing competition among national jurisdictions.

4. Overcoming the Long-term Obstacles to Legal Interoperability

Law as an Obstacle to Legal Interoperability

If supranational law can make diverse legal systems work together, law itself can also be an obstacle to achieving interoperability. Indeed, the international order is still based on the concept of state sovereignty, which is traditionally defined as the power of a state to enact and apply its own legal rules. And although international law – in the form of treaties and conventions – is nothing new, the emergence of a lawmaking supranational entity granted with effective enforcement power is quite revolutionary. When member states ratify treaties granting the EU the power to enact and apply its own rules in its field of competence, they are deliberately abandoning parts of their sovereignty. But what if an EU-enacted directive were to violate the constitutional principles of one of the member states? Unsurprisingly, as the EU has gained competence and has had to affirm its authority to impose legal harmonization to nation-states, important legal conflicts have taken place.

The EU: An independent and supreme source of law

The growing assertion of the supremacy of EU law over that of member states has been supported by the European Court of Justice through case law relying on a so-called “teleological interpretation” of the treaty (teleological derives from the Greek “telos,” meaning end or result). Thus, when the Court faces a difficulty in interpreting a given provision of the treaty, it will look at the whole context in which the provision appears in order to deduce its exact meaning. Such a method has led the Court to distill important principles that are not explicitly stated by the treaties. Critics denounce this practice as “judicial activism.”¹⁹

Among the legal principles asserted by the Court is that of the supremacy of EU law over that of member states. In 1964, in a landmark decision, the ECJ ruled that, by creating the European community, “member states have limited their sovereign rights and have thus created a body of law which binds both their nationals and themselves. . . . The law stemming from the treaty, an independent source of law, could not – because of its special and original nature – be overridden by domestic legal provisions without being deprived of its character as a community law and without the legal basis of the community itself being called into question,” the Court said.²⁰ In 1978, in the *Simmenthal* decision, the ECJ went even further by making clear that this supremacy also applies to national constitutions.²¹ The Court saw the supremacy of EU law as the condition for successful legal

¹⁹ Paul P. Craig & Gráinne de Búrca, *EU Law: Text, Cases, and Materials* 74 (Cambridge: Oxford University Press, 2008).

²⁰ Case 6/64, *Flaminio Costa v. ENEL*, 1964 E.C.R. 00614, available at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=6196400006&lg=en.

²¹ Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, 1978, E.C.R. 00629, available at <http://eur->

interoperability.

However, national judges did not welcome this interpretation of supremacy. From their point of view, their national constitution or fundamental law is the supreme norm, and the fact that EU law could override it was quite hard to accept, especially when their legal order was based on the principle of total national sovereignty. Nevertheless, the political will was such that, where and when judges ruled it necessary, constitutions were amended to recognize the constitutional nature of EU law and to allow for the targeted transfer of more sovereign powers to the EU.²² Thus, a major obstacle to legal interoperability was solved.

But even then, another, perhaps more difficult legal question arises regarding the consequences of EU law supremacy. Most, if not all, modern constitutions do not stop at channeling national sovereignty by organizing the relationships between political institutions (think of the US constitutional checks and balances). They also limit the powers of these institutions by listing a set of principles and fundamental rights to be respected (this would be the Bill of Rights). But the EU legal order lacked such rights protections. In 1974, the German Constitutional Court held that, although Germany's fundamental law allowed for the transfer of sovereign powers, it could not entrust the ECJ to carry on an appropriate judicial review of EU law given that EU treaties lacked any protection of fundamental rights.²³ In consequence, the German court held that it would not renounce its right to uphold German fundamental rights in the event of a conflict with EU law, holding that in such cases it would deem ECJ rulings inconclusive.

This decision directly challenged the supremacy of EU law and prompted the ECJ to take into account fundamental rights as general principles of EU law in its subsequent decisions, thereby reinforcing the reach of EU judicial review. This, in turn, led the German court to rule that it would not itself examine the compatibility of EU law with Germany's fundamental law "as long as" the European Court of Justice would adequately protect fundamental rights, thus conciliating the national constitutional order with EU law supremacy. The German court also paved the way for other constitutional courts in the EU to follow, and similar decisions were rendered in other countries.

Ad hoc Solutions to Legal Obstacles: The dialogue between judges

Since then, the dialogue between European and national judges has allowed for the conciliation of the EU legal order with national ones, making them compatible, thus ensuring the application of EU law all across member states and guaranteeing legal interoperability. In particular, the European Court of Justice has been willing to give some margin of appreciation to national constitutional courts, out of respect for their constitutional traditions. For instance, in 2004,²⁴ the ECJ ruled that German courts were entitled to ban a violent video game (and violate the free movement of goods across the EU) by invoking the principle of respect of human dignity enshrined in Germany's fundamental law. The

lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61977J0106:EN:HTML (accessed August 10th, 2010).

²² It was the case in France. Following the adoption of the 1992 Maastricht Treaty. France's constitution was amended after the adoption of constitutional law n°92-54 of June 25, 1992, available at http://www.legifrance.gouv.fr/affichTexte.do;jsessionid=326543970BA69FBF2C04DB5071B364A6.tpdjo09v_2?cidTexte=LEGITEXT000006079317&dateTexte=20100811.

²³ Internationale Handelsgesellschaft von Einfuhr und Vorratsstelle für Getreide und Futtermittel ("Solange I"), Bundesverwaltungsgericht [BverwFG] [Federal Constitutional Court], May 29, 1974.

²⁴ Case C-36/02, Omega Spielhallen- und Automatenaufstellungs GmbH v. Oberbürgermeisterin der Bundesstadt Bonn, 2004 E.C.R., available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002J0036:EN:HTML>.

European judges recognized that, for historical reasons, Germany's special requirements were legitimate. In a similar ruling, the ECJ also agreed with the British government's decision to give to Commonwealth citizens residing in Gibraltar and not having citizenship of the Union the same voting rights as British nationals and EU citizens at European elections. The ECJ eventually regarded the granting of the right to vote to Commonwealth citizens as one of the constitutional traditions of the United Kingdom, and found it to be consistent with EU law.

This ongoing dialogue shows that although the construction of a supranational legal order is a good way to achieve legal interoperability between diverse countries, it can also run counter to some of the most fundamental legal principles of these political entities. Law itself is therefore also an obstacle to legal interoperability, and there is no simple answer to this problem. Rather, the EU example shows that, where and when the political context calls for further integration, it is the inventiveness and open-mindedness of judges that allows for *ad hoc* legal solutions to be found and put in practice to enable legal interoperability.

5. Conclusion: Can the European Union Be a Governance Model for a Globalized World?

“Although it is still in its adolescence, the European Dream is the first transnational vision, one far better suited to the next stage in the human journey. Europeans are beginning to adopt a new global consciousness that extends beyond, and below, the borders of their nation-states, deeply embedding them in an increasingly interconnected world.”

–Jeremy Rifkin²⁵

In today's globalizing world, traditional notions of state sovereignty are called into question by increasingly interconnected economic, cultural, and technological trends. Against this backdrop, new institutional frameworks need to be designed to allow governments, businesses and private individuals alike to work together across borders. More than just an international organization, yet not quite a federation, the EU provides an interesting example to follow as the fates of polities across the world become increasingly intertwined. Through an inventive and rather complex institutional framework, this supranational entity has become a relatively integrated economic, legal and – although to a lesser extent – political space composed of a diverse array of countries.

But while the progress made since the birth of the European Union in 1957 is impressive, there are also clear hurdles in this process of integration. The ripple effects of the public debt crisis in Greece or the rejection of the project for a European constitution in 2005, are evidence of ongoing tensions. These debates originate in part within the institutional design described in this brief overview, and they suggest that the most important driver behind legal interoperability is in fact politics. It is politics which determines in the first instance the institutional design, its accountability and democratic legitimacy; it is also politics that shapes the nature and effectiveness of the supranational law used to achieve interoperability. While it may be true that the EU has developed adequate tools and institutions to create and sustain legal interoperability between nation-states, such processes further unsettle traditional political mechanisms centering on the concept of national sovereignty. Despite the optimism of Jeremy Rifkin, it appears that even though there are obvious benefits to creating effective institutions for legal interoperability, our representation of political communities as sovereign nations

²⁵ Jeremy Rifkin, “The European Dream,” UTNE READER, September/October 2004, available at <http://www.utne.com/2004-09-01/the-european-dream.aspx>.

may be the biggest obstacle to working together on a global scale.