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# **The principles of loyalty, solidarity and equality in the EU and Hungarian particularism**

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## Abstract

This paper analyses some of the basic constitutional principles of the European Union in contrast with the autonomous policy-making activity of Member States through the example of Hungary. The foundational principles of the EU are responsible for coordinating European integration and the behaviour of Member States with the purpose of creating an inner cohesion and achieving the common, long-term goals of the European Union. However, the everyday practice of European and national policy-making shows that these principles do not always prevail in the political reality, but in some situations Member States disregard them and choose to conduct an autonomous, or in other words, particularist behaviour. Among the constitutional principles in question this paper focuses on loyalty, solidarity and equality because these are the most important ones limiting Member States' ability to pursue policies that could compromise common EU goals. The current paper examines, through the example of Hungary's policy-making in the Union, the relationship between the constitutional principles of the EU and particularist Member State behaviour, which relationship is mostly determined by the coexistence (or overlap) of different national and EU commitments. The paper argues that these constitutional principles do not impose standardization or centralization on Member States; on the contrary, there is room for diversity and decentralization, as follows from the principle of subsidiarity. However, individual Member State action must have legitimate causes, and the elbow-room for Member States to act should be found within the EU framework.

## Introduction

Besides laws, directives and regulations, the functioning of the European Union and the behaviour of its Member States are also determined by constitutional principles outlined in the Treaty on European Union (TEU). These principles are for example, freedom, democracy, equality, rule of law, pluralism, non-discrimination, tolerance, justice and solidarity (Article 2 and 3 TEU)<sup>1</sup> or loyalty (also referred to as mutual respect as seen in Article 4(3) TEU).<sup>2</sup> These foundational principles are responsible for coordinating European integration and the behaviour of Member States with the purpose of creating an inner cohesion and achieving the common, long-term goals of the European Union. They outline a certain type of behavioural pattern to which all Member States “subscribed” when they joined the EU. However, the everyday practice of European and national policy-making shows that these constitutional principles do not always prevail in the political reality, and in some situations Member States disregard them and choose to conduct an autonomous behaviour.

The study aims at examining Hungary as a small Member State in the European Union, more precisely its strategic possibilities and actions to successfully influence European policy outcomes and achieve its own policy priorities. In the past half-decade, Hungary has been conducting a non-conventional, rule-breaking behaviour within the EU, which resulted in the unprecedented attention of the European and world political scene, and can easily be labelled as particularism. The particularist Hungarian strategy will be analysed from the perspectives of loyalty, solidarity and equality because these are the most important constitutional principles limiting Member States’ ability to pursue policies that could compromise common EU goals. Particularism, from the perspective of this study, refers to the behaviour or strategy of a Member State that is based on acting individually and focusing on the country’s own interests instead of EU goals. *This study examines, through the example of Hungary’s policy-making in the Union, the relationship between the constitutional principles of the EU and particularist Member State behaviour, which relationship is mostly determined by the coexistence (or overlap) of different national and EU commitments.*

Having difficulties with abiding the laws and guiding principles of the EU and at the same time trying to conduct effective national strategies makes Member States’ life harder in the EU, and often results in a rule-breaking behaviour from them. Examining Member States from this angle is particularly challenging because it is often difficult to decide whether what we see in Member State practice can be considered legitimate diversity or illegitimate particularism. This is why this paper seeks to answer the following question: *where are the boundaries of particularist Member State behaviour in the European Union?* The study aims at finding the answer by discovering the characteristics of a certain duality which exists between legal compliance,

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<sup>1</sup> “Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union” (Official Journal of the European Union, March 30, 2010), 83/17.

<sup>2</sup> *Ibid.*, 83/18.

outlined for instance by the constitutional principles of the EU, and successful policy-making from the Member States' part, or in other words *the contrast that exists between legal obligations of Member States and political reality*.

The outline of the study is as follows. First, the theoretical background necessary for examining the Hungarian case is presented. This includes a brief outline of small state studies and academic literature on preference formation. Secondly, the constitutional principles are analysed from the perspective of how they appear as Member State obligations in the Treaties and in the jurisprudence of the European Court of Justice. Thirdly, the Hungarian case will be demonstrated, focusing on one specific case study, namely Hungary's recent policy towards Russia. Finally, the paper will conclude by summarizing the main findings.

## Theoretical framework for Member State behaviour in the EU

The Hungarian particularism, as mentioned above, is analysed from the perspective of the constitutional principles of the European Union. However, there are some theoretical angles which are indispensable to comprehend for understanding the main puzzle, which is: how can small and vulnerable Member States conduct effective national strategies without violating EU constitutional principles and legal obligations? These theoretical angles to be assessed are, small state studies in European integration literature and the scholarly literature focusing on the preference formation of states.

### Small state studies

The reason behind the choice for small state studies as a framework for analysis is that this particular discipline of European studies gives the researcher valuable insight into the behaviour of states. Some researchers are doubtful about this argument and ask whether the concept of smallness is a useful analytical tool at all.<sup>3</sup> In my view, the researcher gains a lot from turning towards small state studies and using them as a starting point because they provide a useful analytical tool or conceptual framework for analysing certain types of country strategies both individually in the international arena and in international organizations Hungary, a member of the "small state group" within the EU has been conducting a quite non-conventional, particularist behaviour within the Union in the past few years, which will be explained in detail in the case study chapter. The following paragraphs introduce and reveal the most important characteristics of the small state literature which hopefully will help better understand the Hungarian behaviour.

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<sup>3</sup> Peter R. Baehr, "Review: Small States: A Tool for Analysis," *World Politics* 27, no. 3 (April 1975): 456–66.

## Definitions of size

Due to empirical difficulties, there is no single definition to the concept of “small” states in European studies: some researchers prefer objective or quantitative definitions, while others opt for qualitative, or mixed definitions. In my research I rely on Diana Panke’s objective/quantitative understanding of smallness, determined by the votes Member States possess in the Council. Based on the allocation of votes among the states in qualified majority voting in the Council, those Member States can be considered small that have fewer votes than the EU-average (12,5).<sup>4</sup> Taking this categorization into account, currently there are twenty small Member States in the EU, and the remaining eight (Germany, France, Italy, the United Kingdom, Spain, Poland, Romania and the Netherlands) are considered large. This research adopts this approach to smallness because the distribution of votes in the Council already reflects size and population of the Member States, so it is a clear and comprehensive categorization.

## The main arguments of small state studies

Authors dealing with small states usually identify the main characteristics of small countries that put them in a special, usually more difficult situation in the international arena than their peers. These characteristics are, for example, vulnerability,<sup>5</sup> openness,<sup>6</sup> and the lack of resources.<sup>7</sup> One of the most prominent researchers of small EU Member States, Diana Panke, derives all her arguments from the presumption that small EU Member States face structural disadvantages in exerting influence in EU policy-making.<sup>8</sup> The main components of the small ones’ disadvantage, thus the most important characteristics of small states, are their lack of political power, the insufficient resources to develop policy expertise, the fact that most of them joined the EU recently and their lack of expertise or proficiency to operate as policy forerunners.<sup>9</sup>

Despite this disadvantage, there are certain conditions under which small states can successfully pursue their objectives in the EU. The main researchers of the topic outline circumstances and strategies for small Member States through which they can exercise influence in the EU. These are, in particular, being an old Member State,<sup>10</sup> possessing policy expertise,<sup>11</sup> having good

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<sup>4</sup> Diana Panke, “Small States in the European Union: Structural Disadvantages in EU Policy-Making and Counter-Strategies,” *Journal of European Public Policy* 17, no. 6 (September 2010): 801, doi:10.1080/13501763.2010.486980.

<sup>5</sup> Baldur Thorhallsson and Rainer Kattel, “Neo-Liberal Small States and Economic Crisis: Lessons for Democratic Corporatism,” *Journal of Baltic Studies* 44, no. 1 (March 2013): 89, doi:10.1080/01629778.2012.719306.

<sup>6</sup> Peter J. Katzenstein, “Small States and Small States Revisited,” *New Political Economy* 8, no. 1 (March 2003): 11, doi:10.1080/1356346032000078705.

<sup>7</sup> Panke, “Small States in the European Union,” 801.

<sup>8</sup> Diana Panke, “The Influence of Small States in the EU: Structural Disadvantages and Counterstrategies” (UCD Dublin European Institute Working Paper 08-3, May 2008).

<sup>9</sup> See for example: Gunta Pastore, “Small New Member States in the EU Foreign Policy: Toward ‘Small State Smart Strategy,’” *Baltic Journal of Political Science*, no. 2 (December 2013).

<sup>10</sup> See for example: Panke, “Small States in the European Union,” 813.

<sup>11</sup> See for example: Peter Viggo Jakobsen, “Small States, Big Influence: The Overlooked Nordic Influence on the Civilian ESDP,” *JCMS: Journal of Common Market Studies* 47, no. 1 (2008): 86.

economic, institutional or administrative capacities,<sup>12</sup> creating coalitions or partnerships,<sup>13</sup> and having a unified national position<sup>14</sup> etc. Some researchers consider institutional aspects, such as holding important positions in the EU (e.g. the Council Presidency),<sup>15</sup> having close ties with the European Commission<sup>16</sup> or applying the “community method” in decision-making<sup>17</sup> to be important. The political elites, their ideas and preferences can also play a huge part in defining the strategies of small states.<sup>18</sup> A distinct type of small state behaviour discovered in the 1990s-2000s within small state studies is the smart state strategy.<sup>19</sup> Scholars argue that smart states are able to exploit the weakness of small states as a resource for influence by having well-developed preferences, being able to present their initiatives as interests of the whole EU and being able to mediate.<sup>20</sup>

### Critics and suggestions for small state studies

Despite emphasizing the usefulness of these studies, some critical remarks for small state studies should also be made. Small state studies in general pay too much attention to objective characteristics, such as the size or the administrative capacities of a state, instead of looking at more subjective circumstances of states, like political capacities or constraints. What is even more important: they assume a rule-abiding behaviour from the examined actors which stays within the EU’s constitutional and political settlements instead of analysing rule-breaker or non-conventional behaviour as well.

I argue that small state studies are a useful analytical tool; this is why Hungary’s particularism is analysed from their perspectives in this study, but focusing on the above mentioned neglected points is essential. Moreover, I agree with Christian Lequesne who states that the relevant analytical unit in the EU should be the single Member State, so comparisons should not be made

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<sup>12</sup> See for example: Ivo Maes and Amy Verdun, “Small States and the Creation of EMU: Belgium and the Netherlands, Pace-Setters and Gate-Keepers,” *JCMS: Journal of Common Market Studies* 43, no. 2 (2005): 327–48.

<sup>13</sup> See for example: M. Keating and M. Harvey, “The Political Economy of Small European States: And Lessons for Scotland,” *National Institute Economic Review* 227, no. 1 (February 1, 2014): R59, doi:10.1177/002795011422700107.

<sup>14</sup> Annica Kronsell, “Can Small States Influence EU Norms?: Insights From Sweden’s Participation in the Field of Environmental Politics,” *Scandinavian Studies* 74 (2002): 299.

<sup>15</sup> See for example: Jonas Tallberg, “The Power of the Presidency: Brokerage, Efficiency and Distribution in EU Negotiations,” *JCMS: Journal of Common Market Studies* 42, no. 5 (2004): 999–1022.

<sup>16</sup> Simone Bunse et al., *Is the Commission the Small Member States’ Best Friend?* (Stockholm: Swedish Institute for European Policy Studies (SIEPS), 2005).

<sup>17</sup> Viljar Veebel, “The EU Institutional Reform Model and the Preferences of the Small Member States,” *Managing Global Transitions* 12, no. 2 (2014): 172.

<sup>18</sup> John L. Campbell and John A. Hall, “National Identity and the Political Economy of Small States,” *Review of International Political Economy* 16, no. 4 (October 22, 2009): 557, doi:10.1080/09692290802620378.

<sup>19</sup> Pertti Joenniemi, “From Small to Smart: Reflections on the Concept of Small States,” *Irish Studies in International Affairs*, no. 9 (1998): 61–62.

<sup>20</sup> Caroline Howard Grøn and Anders Wivel, “Maximizing Influence in the European Union after the Lisbon Treaty: From Small State Policy to Smart State Strategy,” *Journal of European Integration* 33, no. 5 (September 2011): 530, doi:10.1080/07036337.2010.546846.

between groups of states, but individual Member States.<sup>21</sup> Thus, Hungary's particularist behaviour within the EU in light of the constitutional values is examined through the lenses of small state studies because they give a deep insight into the circumstances in which Hungary operates and the options it has in exerting its national interest. Moreover, this analysis can also contribute to the field of small state studies by showing that examining the national political arena of Member States and analysing their policy-making at the European level are equally useful. This analysis tries to highlight the fact that being a successful small Member State is based on subjective evaluation, thus it is not equal to being compliant or even loyal, as Member States and EU law evaluate country actions from different perspectives.

## Preference formation

The literature focusing on the national preference formation of states is indispensable to assess for this research because it describes the motives and methods along which the strategic preferences of the states are created under certain circumstances, thus they facilitate defining what we mean by Member State strategies. In addition, examining preference formation is also useful in relation to small state studies because one can easily agree with the assumption that as small states possess different capacities and features than the large ones in the EU, their preference formation tactics might also be different. Moreover, some of the small state features outlined previously in the literature review (e.g. vulnerability) and conditions under which small states can successfully pursue their interests in the EU (such as policy expertise, coalitions, institutional capacities and the behaviour of the political elites) might also overlap with the factors explaining preference formation. Last but not least, for some researchers, size itself is seen as an explanatory factor for the preference formation of EU Member States.<sup>22</sup>

## European integration theories about preference formation

Andrew Moravcsik defines preferences as “an ordered and weighted set of values placed on future substantive outcomes ... that might result from international political interaction.”<sup>23</sup> Some parts of this definition are broadly accepted by political scientists, however there is an intense debate going on about what are those values and interactions that determine preferences.

The central tenet of the research focusing on preference formation provides different features that affect the preference formation of states. In this regard liberal intergovernmentalism (LIG) can be considered to be the dominant theory in the studies of national preference formation. Andrew Moravcsik provides an exhaustive analysis on how the domestic level matters in the states' attempts to exert national interest and influence.<sup>24</sup> For Moravcsik, state behaviour

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<sup>21</sup> Christian Lequesne, “Old vs. New,” in *The Oxford Handbook of the European Union* (Oxford: Oxford University Press, 2012), 893.

<sup>22</sup> See for example: Tim Haughton and Darina Malová, “Open for Business: Slovakia as a New Member State,” *International Issues & Slovak Foreign Policy Affairs* 16, no. 2 (2007): 3–22.

<sup>23</sup> Andrew Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Ithaca, New York: Cornell University, 1998), 24.

<sup>24</sup> MORAVCSIK, Andrew, *Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach*, *JCMS: Journal of Common Market Studies*, 1993/4. 473–524.

reflects the rational actions of governments constrained at home by domestic societal pressures and abroad by their strategic environment. Domestic economic lobbying organizations are also crucial to the process of national preference formation. This theory argues that the primary determinants of national preferences are the costs and benefits of economic interdependence. Finally, LIG claims that EU institutions actually strengthen the power of national governments because they increase the efficiency of their interstate bargaining, and they also strengthen the autonomy of the national political leaders. This can be seen as the two-level game which enhances the initiative and autonomy of national political leaders.

The most popular alternatives to LIG are the different threads of institutionalism. Closa,<sup>25</sup> for instance, rejects the claim of LIG that national governments aggregate the preferences formed in civil society through a pluralist process, and argues that the institutional environment in which the preferences are shaped may actually act as feeder of these preferences or as modeller of them. Others introduce even more nuanced threads of theories, such as rational choice institutionalism or sociological institutionalism<sup>26</sup> to provide alternatives for LIG. Rational choice institutionalism focuses on cost-benefit calculations in fulfilling national interests, while sociological institutionalism emphasizes the importance of norms, and claims that the main actors are unlikely to pursue national interests where these are different from the EU mainstream.<sup>27</sup>

This extensive academic discussion on Member State preferences draws our attention to the lack of focus on these preferences in EU “constitutional” law. As it will be shown later, individual Member State actions are not given much attention in EU law, this is why it is particularly interesting to examine when do constitutional principles, such as loyalty, enter the legal discourse and have an actual effect on Member State behaviour.

### Factors explaining national preference formation

Some researchers do not necessarily make their arguments about national preference formation strictly in line with theories. Instead, they make a specific list of factors that influence certain Member States’ preference formation process based on specific country characteristics and political circumstances. Copsy and Haugton have refurbished Moravcsik’s theory and created a synthetic framework to examine the nature of preference formation in the new Member States of the EU.<sup>28</sup> They did so because they think that there is a difference between the preference formation techniques of “old” and “new” Member States. Their framework consists of the following variables: unique historical experiences, size, dependency, ideology and powerful societal groups. The situation of these countries is different because they are weaker and more

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<sup>25</sup> Carlos Closa, “The Formation of Domestic Preferences on the EU Constitution in Spain,” *Comparative European Politics* 2, no. 3 (December 2004): 320, doi:10.1057/palgrave.cep.6110041.

<sup>26</sup> Emma C. Verhoeff and Arne Niemann, “National Preferences and the European Union Presidency: The Case of German Energy Policy towards Russia,” *JCMS: Journal of Common Market Studies* 49, no. 6 (November 2011): 1271–93, doi:10.1111/j.1468-5965.2011.02198.x.

<sup>27</sup> Ibid.

<sup>28</sup> Nathaniel Copsy and Tim Haugton, “The Choices for Europe: National Preferences in New and Old Member States,” *JCMS: Journal of Common Market Studies* 47, no. 2 (2009): 263–86.

vulnerable than their counterparts due to their economic dependency and the country's perceived place in the world.<sup>29</sup>

The most important units of analysis in the examined literature are the main actors and tools of preference formation. Several different conditions of preference formation are presented by scholars, such as the behaviour of governments on intergovernmental conferences,<sup>30</sup> the Council presidency,<sup>31</sup> or the Convention method as a tool for treaty reform.<sup>32</sup> To put it in a nutshell, the most important determining factors of national preference formation outlined by scholars are: history, dependency on the EU, size, ideology and societal groups;<sup>33</sup> vulnerability and weakness;<sup>34</sup> party positions, the consistency of domestic efforts and European demands;<sup>35</sup> the degree of foreign ownership in a state's financial sector;<sup>36</sup> powerful leaders and societal actors;<sup>37</sup> ideologies;<sup>38</sup> alliances<sup>39</sup> and identity.<sup>40</sup> I argue that national preference formation does not depend only on the EU agenda but it is also shaped by the political interests of the national governments and the relevant actors/societal groups in the domestic political field.

## Constitutional principles regulating Member State action in the EU

When joining the European Union, European countries agreed to follow common principles that guide their behaviour and policy-making in the EU in order to attain common objectives for their mutual benefit. As the EU can be considered to be a collective enterprise, the core idea of its functioning lies in the understanding that together EU Member States are able to achieve

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<sup>29</sup> Tim Haughton, "Vulnerabilities, Accession Hangovers and the Presidency Role: Explaining New EU Member States' Choices for Europe," *Center for European Studies Central and Eastern Europe Working Paper Series 68*, February 2010.

<sup>30</sup> Mark Aspinwall, "Government Preferences on European Integration: An Empirical Test of Five Theories," *British Journal of Political Science* 37, no. 01 (January 2007): 89, doi:10.1017/S0007123407000051.

<sup>31</sup> See for example: David Hine, "Explaining Italian Preferences at the Constitutional Convention," *Comparative European Politics* 2, no. 3 (December 2004): 302–19, doi:10.1057/palgrave.cep.6110037.

<sup>32</sup> See for example: Dionyssis G. Dimitrakopoulos and Hussein Kassim, "Deciding the Future of the European Union: Preference Formation and Treaty Reform," *Comparative European Politics* 2, no. 3 (December 2004): 241–60, doi:10.1057/palgrave.cep.6110042.

<sup>33</sup> Copey and Haughton, "The Choices for Europe: National Preferences in New and Old Member States," 269.

<sup>34</sup> See for example: Haughton, "Vulnerabilities, Accession Hangovers and the Presidency Role: Explaining New EU Member States' Choices for Europe."

<sup>35</sup> Ramūnas Vilpišauskas, "National Preferences and Bargaining of the New Member States since the Enlargement of the EU: The Baltic States - Still Policy Takers?," *Foreign Policy*, 2011, 9.

<sup>36</sup> Aneta Spendzharova, "Is More 'Brussels' the Solution? New European Union Member States' Preferences about the European Financial Architecture\*: Is More 'Brussels' the Solution?," *JCMS: Journal of Common Market Studies* 50, no. 2 (March 2012): 315, doi:10.1111/j.1468-5965.2011.02208.x.

<sup>37</sup> Moravcsik, "Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach."

<sup>38</sup> See for example: Aspinwall, "Government Preferences on European Integration," 37.

<sup>39</sup> Nicolas Jabko, "The Importance of Being Nice: An Institutionalist Analysis of French Preferences on the Future of Europe," *Comparative European Politics* 2, no. 3 (December 2004): 293, doi:10.1057/palgrave.cep.6110036.

<sup>40</sup> Liesbet Hooghe and Gary Marks, "A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus," *British Journal of Political Science* 39, no. 01 (January 2009): 1, doi:10.1017/S0007123408000409.

more benefits than separately or benefits that, because of cross-border interdependencies, cannot be achieved alone. Thus ideally, Member State preferences have to be synchronized for the purpose of achieving mutual benefits. This idea stems not only from political but also from economic theories, as the four freedoms, the free movement of people, goods, services and capital, are based on apparent economic reasons. Moreover, Member States also subscribed to certain legal obligations, which are enforceable and are able to constrain the political and regulatory manoeuvres of Member States, hardly giving way to particularist attempts. Due to the fact that this collective system can only function properly if the members cooperate, individual Member State behaviour which would harm attaining common goals, or particularist behaviour is not desired in it. The rules of behaviour within the community must be obeyed, which is ensured by the fact that they are laid down in the Treaties in the form of constitutional values.

Constitutional principles in the EU legal order may fulfil several different roles, such as ordering the legal material into a meaningful whole, supplying arguments for the creative application of the law, and at the same time helping to maintain and further legal infrastructure. To put it simply, they are responsible for establishing the unity of EU law.<sup>41</sup> In addition, they create legal obligations and behavioural rules for the Member States, from which they cannot diverge and which are strictly binding. The general principles of EU law are also responsible for enabling the ECJ to fill normative gaps in the EU legislature, for helping the interpretation of national and EU law, and for creating a ground for judicial review.<sup>42</sup> These principles however, appear in many different constellations in EU law. This subchapter will assess these principles as referred to in the EU Treaties, as well as how they appear, in the ECJ jurisprudence.

## EU constitutional principles in the Treaties

The loyalty principle is laid down in Article 4(3) TEU which states that “Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.”<sup>43</sup> This obligation establishes a sense of loyalty and mutual cooperation, which in principle should prevent Member States from acting autonomously. Article 1(1) TEU states that Member States establish among themselves the European Union “on which the Member States confer competences to attain objectives they have in common.”<sup>44</sup> Moreover Article 3(3) TEU establishes that “... (the Union) shall promote economic, social, and territorial cohesion, and solidarity among Member States.”<sup>45</sup> Both sentences refer to solidarity, for which to prevail, a common understanding and willingness to cooperate is needed from the Member States. Moreover, according to the

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<sup>41</sup> Armin von Bogdandy, “Founding Principles of EU Law A Theoretical and Doctrinal Sketch,” *Revus*, no. 12 (2010): 35.

<sup>42</sup> Koen Lenaerts and José A. Gutiérrez-Fons, “The Constitutional Allocation of Powers and General Principles of EU Law,” *Common Market Law Review*, no. 47 (2010): 1629.

<sup>43</sup> “Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union,” 83/18.

<sup>44</sup> *Ibid.*, 83/16.

<sup>45</sup> *Ibid.*, 83/17.

Treaties, the EU should respect the equality of Member States before the Treaties (Article 4(2) TEU),<sup>46</sup> and also its citizens have to be treated equally no matter which Member States they come from (Article 9 TEU).<sup>47</sup>

The principles of loyalty, solidarity and equality can be considered as the constitutional ramifications of the collective nature of the EU: acting according to them should be self-evident in any kind of political or economic union because they reinforce the success of the collective system. This argument should be understood within the framework of the well-known compliance/non-compliance dichotomy which characterizes Member State behaviour in the Union. Against this backdrop, the present study proposes that *the constitutional principles described above suggest avoiding particularism because not only particularist Member State behaviour undermines the Union interests, but it also jeopardises the interests of other Member States*, and even the interests of the rogue Member State. I argue that particularism and the constant insistence on sovereignty are usually based on the misperception that the collective system exploits and suppresses the members of the given community instead of achieving the most benefits for everyone. Particularism contradicts the rationale for European cooperation, and it recreates the problems and conflicts of unilateralism, which the Member States had wanted to avoid by signing up to the Treaties. Due to the high level of interdependence among Member States of the EU, one country's particularist behaviour might lead to another country acting autonomously, which could cause a downward spiral of unilateralism and would endanger achieving common goals, and at the end it would endanger the functioning of the EU as a whole.

However, the above expressed opinion does not entail that there is no room at all for individual Member State action. Sometimes a certain kind of conflict of interest arises between the national and the EU-level of policy-making, which phenomenon is recognised by the Treaties themselves too. These problems are overcome by institutional arrangements such as shared competences between Member States and the EU (e.g. the social policy, internal market and environment – Article 4 TFEU).<sup>48</sup> Moreover, the principle of subsidiarity is also a crucial constitutional guideline in the functioning of the EU. In EU policy-making subsidiarity means that decisions are taken at the level closest to the citizens and the Union only takes action if it is more effective than a decision would be on the national or other, lower, levels. So, the elbow-room in the everyday policy-making might be bigger than how it seems from the basic constitutional principles outlined in the Treaties. At first sight this would suggest that subsidiarity is contradictory to the principles analysed in this study, but that is not the case. Subsidiarity reminds Member States that sometimes the EU is not capable of acting on its own, but EU objectives might be achieved by Member States acting within their respective spheres of competence. However, these individual acts, justified by the principle of subsidiarity, should always serve the benefit of the community and can never go against EU law, as follows from Article 4(3) TEU. To put it in a nutshell, a Member State's particularist behaviour cannot be

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<sup>46</sup> Ibid., 83/18.

<sup>47</sup> Ibid., 83/20.

<sup>48</sup> Ibid., 83/52.

justified by the principle of subsidiarity because subsidiarity complements and reinforces loyalty, solidarity and equality instead of contradicting with them.

As shown in the paragraphs above, besides considering the constitutional principles to be guiding forces of European integration, we cannot disregard the phenomenon of diversity in the Union either. Due to the apparent diversity between Member States, everyday policy-making in the EU is quite frequently based on certain groupings or categorizations among them, for example large-small, old-new, net contributor-net receiver etc. The only way Member States can effectively cope with the political reality is adapting to the circumstances and trying to get the best out of their respective features. The situation is particularly difficult for the small Member States, who, despite outnumbering the large ones, might have to face several economic and administrative constraints compared to their peers, which situation can easily result in focusing on the countries' own interests and disregarding EU rules. This entails that the normative principles regulating Member State action are not always followed due to the diverse nature of the countries which practice might bring obstacles into the collective EU action. This is why, although diversity should be recognised, it cannot be used as an excuse for a particularist behaviour either. This duality between particularism and constitutional principles raises the question *whether conducting a particular Member State behaviour and strategy is justified or not when at the same time there is a normative frame bounding the countries to act in a coordinated way.*

### Core Member State obligations in the jurisprudence of the ECJ

The clearest manifestation of Member State obligations to adhere to in the EU are present in the founding jurisprudence of the European Court of Justice. One of the basic ECJ decisions, which have laid down the foundations of the nature of EU law and the possibility of its enforcement, is *van Gend en Loos*, delivered by the Court of Justice in 1963.<sup>49</sup> This case established the principle of direct effect in European law, which means that Community law enforces obligations on individuals regardless of the legislation of Member States, so EU law prevails independent of whether national law test exists in the related matter or not. Even though the principle of direct effect is the most well-known consequence of the *van Gend en Loos* case, there are other attributes which are worth mentioning for the context of this study. First of all, this is the first case in which the Court refers to the spirit and nature of the Treaties,<sup>50</sup> which implies that they are more than just agreements or legal texts imposing obligations on the contracting parties,<sup>51</sup> because they have created a “purpose-based association” and a coherent

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<sup>49</sup> “Judgement of the Court in Case 26-62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration” (eur-lex.europa.eu, February 5, 1963).

<sup>50</sup> Armin von Bogdandy and Jürgen Bast, eds., *Principles of European Constitutional Law*, 2nd rev. ed., reprinted (Oxford ; Portland, OR: Hart Pub, 2011), 15.

<sup>51</sup> “Judgement of the Court in Case 26-62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration.”

legal order.<sup>52</sup> Second, van Gend en Loos also highlights some distinct features of the EU legal order which creates both rights and obligations for its subjects.<sup>53</sup>

The other case which cannot be abandoned here is *Costa v ENEL*,<sup>54</sup> which established the foundations of the principle of supremacy or primacy of EU law. This means that a law stemming from the Treaties should be considered a strict obligation and cannot be overridden by domestic legal provisions.<sup>55</sup> “Such an obligation becomes an integral part of the legal system of the Member States, and thus forms part of their own law, and directly concerns their nationals in whose favour it has created individual rights which national courts must protect.”<sup>56</sup> These two cases “laid the legal foundations for the European Union as we know it today.”<sup>57</sup>

The meaning of the constitutional principles in question has been shaped by different ECJ decisions over the years. The principle of loyalty under Article 4(3) TEU requires Member States to take all measures necessary to guarantee the application and effectiveness of EU law.<sup>58</sup> In its earlier formulations, Article 4(3) TEU requires Member States to take all appropriate measures to ensure the fulfilment of the obligations arising out of the Treaties to facilitate the achievement of the Union’s tasks and to abstain from any measure which could jeopardise the attainment of the objectives of the Treaties.<sup>59</sup> This means, in particular, that the authorities of the Member State must take the general or particular measures necessary to ensure that EU law is complied with within that state.<sup>60</sup> In this context, Member States are allowed, however, to choose the measures which they consider appropriate, including the imposition of sanctions which may even be criminal in nature.<sup>61</sup>

Under Article 4(3) TEU, it falls to a Member State to recognise the consequences of its adherence to the Union in its internal order and, if necessary, to adapt its procedures for

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<sup>52</sup> D. Chalmers and L. Barroso, “What Van Gend En Loos Stands for,” *International Journal of Constitutional Law* 12, no. 1 (January 1, 2014): 121, doi:10.1093/icon/mou003.

<sup>53</sup> *Ibid.*, 108.

<sup>54</sup> “Judgement of the Court in Case 6-64 Flaminio Costa v E.N.E.L.” (eur-lex.europa.eu, July 15, 1964),

<sup>55</sup> Anthony Arnall and Derrick Wyatt, eds., *European Union Law*, 6th ed (Oxford ; Portland, OR: Hart Pub, 2011), 237.

<sup>56</sup> “Judgement of the Court in Case 6-64 Flaminio Costa v E.N.E.L.,” Para. 7.

<sup>57</sup> Arnall and Wyatt, *European Union Law*, 238.

<sup>58</sup> “Judgement of the Court in Case C-354/99 Commission v Ireland” (curia.europa.eu, October 18, 2001), Para 46.

<sup>59</sup> “Judgement of the Court in Case 85/85 Commission v Belgium” (curia.europa.eu, March 18, 1986), Para. 22.; “Judgment of the Court in Case 22-70 Commission v Council - ERTA” (eur-lex.europa.eu, March 31, 1971), Para. 21.; “Opinion 1/03 [2006] ECR I-0000” (eur-lex.europa.eu, 2006), Para. 119.; These components may find expression in individual Treaty provisions or in provisions of secondary law requiring the fulfilment of EU obligations or abstention from jeopardising the fulfilment of Treaty objectives. “Judgement of the Court in Case 195/90 Commission v Germany (Heavy goods vehicles)” (eur-lex.europa.eu, May 19, 1992), Paras. 36–37.; “Judgement of the Court in Case C-304/02 Commission S v France (Fisheries),” July 12, 2005; “Judgement of the Court in Case C-105/2 Commission v Germany (TIR)” (curia.europa.eu, March 21, 2002), Para. 98.; “Judgement of the Court in Case 274/83 Commission v Italy (Public works contracts)” (eur-lex.europa.eu, March 28, 1985), Para. 42.

<sup>60</sup> “Judgement of the Court in Case C-495/00 Azienda Agricola Giorgio, Giovanni e Luciano Visentin and Others v AIMA” (eur-lex.europa.eu, March 25, 2004), Para. 39.

<sup>61</sup> *Ibid.*, Para. 32.

budgetary provisions in such a way that they do not form an obstacle to the implementation of the obligations within the prescribed time-limits and the framework of the Treaties.<sup>62</sup> Basically, the Member States are prevented from relying on a particular way of regulating and administering domestic affairs or on the administrative difficulties and burdens of meeting EU obligations to justify violations of EU law.

It was made clear in the jurisprudence that direct effect and supremacy, as applied in national law (here, by the national constitutional court), are alone insufficient to ensure that the Member States meet their obligations under EU law because the contested national provisions remain part of national law. In the Court of Justice's reasoning, direct effect and supremacy "do not release Member States from their obligation to remove from their domestic legal order any provisions incompatible with Community law" as "the maintenance of such provisions gives rise to an ambiguous state of affairs in so far as it leaves persons concerned in a state of uncertainty as to the possibilities available to them of relying on Community law."<sup>63</sup>

The principle of loyalty, when read together with the Treaty provisions on fundamental economic freedoms, could lead to establishing the breach of EU law by the Member State concerned by abstaining from taking action or failing to adopt adequate and appropriate measures to deal with actions by private individuals which create obstacles to the free movement within the Union.<sup>64</sup> In other words, under the Treaty provisions on fundamental economic freedoms read together with Article 4(3) TEU, the Member States are required to take all necessary and appropriate measures to ensure that the fundamental freedoms are respected on their territory (to deal with obstacles to the fundamental freedoms which are not caused by the States).<sup>65</sup>

As to the implementation of EU directives, and previously ECSC Treaty recommendations, by the Member States, the principle holds that although Member States are free to choose the ways and means of implementation, that freedom does not affect the obligation imposed on the Member States to adopt all the measures in their national legal systems necessary to ensure that the directive (recommendation) is fully effective, in accordance with the objective which it pursues.<sup>66</sup> The obligation to achieve the result envisaged in the directive (recommendation) and the duty to take all appropriate measures, whether general or particular, to ensure the fulfilment

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<sup>62</sup> "Judgement of the Court in Case 30/72 Commission v Italy (Premiums for grubbing fruit trees)" (eur-lex.europa.eu, February 8, 1973), Para. 11.

<sup>63</sup> "Judgement of the Court in Case 104/86 Commission v Italy (Recovery of undue payment)" (curia.europa.eu, March 24, 1998), Para. 12.

<sup>64</sup> "Judgement of the Court in Case C-265/95 Commission v France (Trade barriers)" (eur-lex.europa.eu, December 9, 1997), Para. 39.

<sup>65</sup> *Ibid.*, Paras. 30–35.

<sup>66</sup> "Judgement of the Court in Case 14/83 Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen" (eur-lex.europa.eu, April 10, 1984), Para. 15.; "Judgment of the Court in Case C-341/94 Criminal proceedings against André Allain and Steel Trading France SARL" (eur-lex.europa.eu, September 26, 1996), Para. 23.

of that obligation, is binding in all authorities of the Member States including, for matters within their jurisdictions, the courts.<sup>67</sup>

Article 4(3) TEU may serve as the basis of some form of solidarity among the Member States which, in turn, serves as the basis of their obligations and prevents the adoption of unilateral measures by the Member States in breach of the Treaties.<sup>68</sup> The early jurisprudence spoke about a duty of solidarity, which was accepted by the fact of the accession to the EU and which “strikes at the fundamental basis of the Community legal order”, making a principled link between the advantages of EU membership and the obligation to respect EU law.<sup>69</sup> This duty prevents a Member State from unilaterally breaking the “equilibrium between advantages and obligations flowing from its adherence to the Community” “according to its own conception of the national interest”. This act would bring into question the equality of Member States before EU law and create discrimination “at the expense of the nationals, and above all of the nationals of the State itself which places itself outside the Community rules.”<sup>70</sup> It is unclear whether solidarity as raised here would provide a standalone constitutional basis for Member State obligations distinct from the principle of loyalty.

A failure to fulfil specific obligations under a directive, or under any other source of EU law, can consume the breach of Article 4(3) TEU, unless there is a “distinct failure” (or “specific failure”)<sup>71</sup> to observe the principle of loyalty.<sup>72</sup> Loyalty has indeed been held to be subsidiary to more specific Treaty provisions on the ground that its “wording” is “so general that there can be no question of applying” it “independently when the situation concerned is governed by a specific provision of the Treaty.”<sup>73</sup> Moreover, loyalty was held sufficient to interpret a specific provision of the Treaties alone “to provide the referring court with the reply that it needs”.<sup>74</sup>

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<sup>67</sup> “Judgement of the Court in Case 14/83 Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen,” Para. 26.; “Judgment of the Court in Case C-341/94 Criminal proceedings against André Allain and Steel Trading France SARL,” Para. 25.; “Judgement of the Court in Case C-54/96 Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH.” (curia.europa.eu, October 17, 1997), Para. 43.

<sup>68</sup> “Judgment of the Court in Joint Cases 6 and 11-69 Commission v France” (eur-lex.europa.eu, December 10, 1969), Para. 16.

<sup>69</sup> “Judgement of the Court in Case 39-72 Commission v Italy (Premiums for slaughtering cows)” (eur-lex.europa.eu, February 7, 1973), Paras. 24–25.

<sup>70</sup> *Ibid.*, Para. 24.

<sup>71</sup> E.g. failure to cooperate in the infringement procedure.

<sup>72</sup> “Judgement of the Court in Case 195/90 Commission v Germany (Heavy goods vehicles),” Para. 38.48; “Judgement of the Court in Case C-48/89 Commission v Italy (Non-fulfiment)” (eur-lex.europa.eu, June 14, 1990), Para. 13.; “Judgement of the Court in Case C-374/89 Commission v Belgium (Directive 76/491/EEC and Article 5 of the EEC Treaty)” (eur-lex.europa.eu, February 19, 1991); “Judgement of the Court in Case C-35/88 Commission v Greece (Market in feed grain)” (eur-lex.europa.eu, July 12, 1990), Para. 43.

<sup>73</sup> “Judgement of the Court in Joined Cases C-78/90 to C-83/90 Compagnie commerciale de l’Ouest and Others and Receveur principal des douanes de La Pallice Port” (curia.europa.eu, March 11, 1992), Para. 19.; “Judgement of the Court in Case C-381/93 Commission v France (Freedom to provide services)” (eur-lex.europa.eu, October 5, 1994), Para. 18.

<sup>74</sup> “Judgement of the Court in Case C-31/00 Conseil National de l’Ordre des Architectes and Nicolas Dreessen” (curia.europa.eu, January 22, 2002), Para. 30.

The general duty of loyalty under Article 4(3) TEU has a specific expression in the obligation in ex Article 292 EC (now Article 344 TFEU) to have recourse to the EU judicial system and to respect the exclusive jurisdiction of the Court of Justice.<sup>75</sup>

As to the direct applicability of EU measures, the Member States are under a duty not to obstruct the direct applicability (then, direct effect) inherent in regulations and other rules of EU law.<sup>76</sup> Strict compliance with this obligation is “an indispensable condition of simultaneous and uniform application” of regulations throughout the EU.<sup>77</sup> The Member States are, therefore, prevented from adopting or allowing national organisations having legislative power to adopt any measure which would conceal the Union nature and effects of any legal provision from the persons to whom it applies.<sup>78</sup> Furthermore, Member States are under a duty not to take any measure which might create exemptions from an EU regulation or affect an EU regulation adversely.<sup>79</sup> In assessing this, not only the express provisions of an EU regulation but also its aims and objectives must be taken into account.<sup>80</sup>

The application of Article 4(3) TEU in the available procedural avenues, such as infringement procedures against the Member States, is excluded when the particular infringement of EU law must be examined under a particular Treaty rule following a particular procedural avenue (State aid).<sup>81</sup>

Regarding the potential reciprocal nature of the obligations of the Member States and the EU institutions under Article 4(3) TEU, it was held that any breach by the EU institutions of Article 4(3) TEU “cannot entitle a Member State to take initiatives likely to affect Community rules promulgated for the attainment of the objectives of the Treaty, in breach of that State’s obligations” which may arise, among others, under Article 4(3).<sup>82</sup> Consequently, a Member State may not unilaterally adopt, on its own authority, corrective or protective measures designed to obviate any breach by an institution of rules of EU law.<sup>83</sup>

Importantly, the territorial extension of a common policy as a result of the unification of a Member State or of the accession of a new Member State “constitutes a new material fact which does not have the effect of releasing Member States from their obligation to take all appropriate measures for guaranteeing the operation and efficacy of the Community law

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<sup>75</sup> “Judgement of the Court in Case C-459/03 *Commission v Ireland (MOX plant)*” (curia.europa.eu, May 30, 2006), Para. 169.

<sup>76</sup> “Judgment of the Court in Case 50-76 *Amsterdam Bulb BV v Produktschap voor Siergewassen*” (eur-lex.europa.eu, February 2, 1977), Para. 5.

<sup>77</sup> *Ibid.*, Para. 6.

<sup>78</sup> *Ibid.*, Para. 7.

<sup>79</sup> *Ibid.*, Para. 8.

<sup>80</sup> *Ibid.*, Para. 9.

<sup>81</sup> “Judgement of the Court on Case 290/83 *Commission v France (National Agricultural Credit Fund)*” (eur-lex.europa.eu, January 30, 1985), Para. 16.

<sup>82</sup> “Judgement of the Court in Case C-45/07 *Commission v Greece (IMO)*” (eur-lex.europa.eu, February 12, 2009), Para. 26.

<sup>83</sup> *Ibid.*

applicable at the material time.”<sup>84</sup> This also applies to the obligation on national courts to penalize breaches of EU law in the absence of corresponding EU provisions.<sup>85</sup>

## The Hungarian strategy within the EU in the past years

Hungary’s particularist behaviour as a small Member State within the EU can serve us to demonstrate the difficulties in finding the boundaries of particularism. With its Treaty of Accession Hungary undertook the obligations of an EU Member State which, as in case of other Member States, greatly restricted its political and legal manoeuvrability even in cases which are of high importance to the local economy and society, making it a generally compliant Member State. However, in the last few years, Hungary has adopted a particular strategy as a Member State in the EU which is significantly different from its previously pursued strategy, and which is also unconventional among Central and Eastern European EU members. Since 2010, Hungary has been in the centre of political attention as it began to embrace a markedly more self-centred and autonomous behaviour which is more conscious about Member State opportunities, and not afraid of taking up legal and political conflicts with the EU by claiming more room for manoeuvring and freedom to act individually.

Since the victory of the centre-right Fidesz party in 2010, there has been an apparent change in the Hungarian attitude and strategy towards the European Union. This change is clearly visible if we compare the current foreign policy strategy of Hungary to that of the 1990s, when a determined commitment towards European values and the trans-Atlantic relationship was present<sup>86</sup> and the 2000s, when the main goal was to accommodate to EU membership as smoothly as possible.<sup>87</sup> In the official foreign policy strategy of the second Orbán-government (2011) a much bigger emphasis has been put on achieving the country’s national and economic interests than in the previous documents, moreover the document mentions Hungary’s sovereignty and territorial integrity as the most important national values of the country’s foreign policy.<sup>88</sup> The main goal of the Hungarian EU policy in the period of 2010-2014 (and also since then) lies in exerting the Hungarian interests as effectively as possible.<sup>89</sup>

The most visible aspect of the new Hungarian strategy at the beginning was the determined defence of national positions in the EU. This appeared in many different forms and reached its peak in the conflict with the EU over the country’s comprehensive constitutional and legal

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<sup>84</sup> “Judgment of the Court in Case C-341/94 Criminal proceedings against André Allain and Steel Trading France SARL,” Para. 28.

<sup>85</sup> *Ibid.*, Para. 29.

<sup>86</sup> János Terényi, “1989-2009: Húsz Év a Magyar Külpolitikában,” *Website of the Hungarian Ministry of Foreign Affairs*, January 2009, [http://www.mfa.gov.hu/kulkepvisolet/DE/hu/20\\_eves\\_jubileum/terenyi.htm](http://www.mfa.gov.hu/kulkepvisolet/DE/hu/20_eves_jubileum/terenyi.htm).

<sup>87</sup> “Magyarország Külkapcsolati Stratégiája” (Hungarian Ministry of Ministry of Foreign Affairs, April 21, 2008), 2, [http://ec.europa.eu/ews/UDRW/images/items/docl\\_1476\\_397538305.pdf](http://ec.europa.eu/ews/UDRW/images/items/docl_1476_397538305.pdf).

<sup>88</sup> “Magyar Külpolitika Az Unió Elnökség Után” (Hungarian Ministry of Ministry of Foreign Affairs, 2011), 4, [http://eu.kormany.hu/download/4/c6/20000/kulpolitikai\\_strategia\\_20111219.pdf](http://eu.kormany.hu/download/4/c6/20000/kulpolitikai_strategia_20111219.pdf).

<sup>89</sup> Bálint Ódor and László Sinka, “Magyar Európa-Politika 2010–2014: Kihívások És Eredmények,” *Európai Tükör* 19, no. 1 (February 2014): 4.

reforms in 2010. Prime Minister Viktor Orbán's government was given the possibility to enact fundamental changes to the country's constitution and legislation as a whole. Many of these changes had generated heated debates in Europe, and were considered to endanger the principle of checks and balances and even the democratic values of the EU e.g. the reduction of the retirement age of judges, appointing a new media-supervising authority, or simply the fact of amending the Fundamental Law (previously called Constitution) quite frequently within a short period of time. These acts resulted in a tense relationship and discussions with Brussels, including warning messages coming from different EU institutions and infringement proceedings against Hungary.<sup>90</sup> However, despite the particularist behaviour of Hungary that has led to several conflicts with Brussels, a general legal compliance with the agreed commitments was present from the part of Hungary during the course of these events, which stands in contrast with the political manoeuvring of the country.

During the autumn of 2014 a new aspect of the Hungarian strategy came to the front the main driving force of which was serving the economic interests of the country. The most significant actions of the particularist Hungarian economic policy, for instance, were taxing the banks, nationalizing utility firms or inserting taxes in the 2015 budget which were clearly directed against foreign players present in the Hungarian economy (e.g. advertisement tax). Even if the way of introducing these measures was legal, their aim, explicitly favouring national firms, was clearly against EU rules.

Recently, in 2015 a quite controversial topic emerged in the Hungarian political scene. As the Charlie Hebdo incident at the beginning of January has brought the topic of migration to the forefront of EU politics, the Hungarian government started to adapt quite a hostile rhetoric towards immigrants. Prime Minister Orbán repeatedly claimed that Hungary belongs to the Hungarians and the country will not welcome everybody who wants to settle down within its territory. Moreover, Hungary is among the harshest critiques of the EU's new agenda for handling migration as a response to the tragic accidents happening to refugees at the Mediterranean Sea and the increasing flow of immigrants arriving at the EU bordering countries. The conflict reach its peak point when Hungary got an exemption from the voluntary European "quota system" of distributing migrants among European countries, and has started to build a fence on its southern Serbian border. These events are clear indicators of the fact that Hungary is ready to question the EU's values when the government considers them to be harmful for the alleged national interest. This is proven by the fact that Prime Minister Orbán

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<sup>90</sup> For accounts of the debate between Hungary and EU officials see for example "Viviane Reding's Letter to Tibor Navracsics" (European Commission, December 12, 2011), [http://ec.europa.eu/commission\\_2010-2014/reding/pdf/news/20120109\\_1\\_en.pdf](http://ec.europa.eu/commission_2010-2014/reding/pdf/news/20120109_1_en.pdf); or Rui Tavares, "Report on the Situation of Fundamental Rights: Standards and Practices in Hungary (pursuant to the European Parliament Resolution of 16 February 2012) (2012/2130(INI))" (European Parliament, June 24, 2013), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2013-0229+0+DOC+PDF+V0//EN>.

said it outright that solidarity cannot be the main driving force of the consultation about reforming EU migration policy.<sup>91</sup>

## Hungary's policy towards Russia

Another major action of the Hungarian government, which is a good test case for examining the Hungarian particularism, is its rapprochement towards Russia since 2014. In 2014 Hungary was initiating bilateral trade negotiations with Russia despite EU sanctions against the country for its actions in Ukraine. This decision was serving the purpose of protecting Hungarian economy through foreign policy but it also questions Hungary's loyalty to the European collective enterprise. The country engaged in these negotiations based on economic motives because as a response to the EU sanctions Russia introduced an import ban on articles coming from the EU which affects Hungarian economy pretty hard. Hungary also issued state measures to support producers in order to improve the situation. As Hungary is also dependent on Russian energy, the country continued getting engaged in the South Stream pipeline project for a while, despite the fact that all related activities were suspended at EU level.<sup>92</sup>

As the motives behind the Hungarian actions are clearly economic, it can be assumed that the Hungarian government disregards the objectives behind the EU sanctions, which could be considered as the violation of the principles of loyalty, solidarity and equality<sup>93</sup> especially if we look at the declarations of the EU Treaties in the area of external relations.<sup>94</sup> This notion was reinforced by the statement of Péter Szijjártó, Minister of Foreign Economy and Foreign Affairs, who said in an interview that Hungary conducts a "Hungarian friendly" policy which is relevant to Hungarian interests. These words clearly imply disregarding the fact that Hungary is a part of a collective system.<sup>95</sup> However, it should be noted that no sanctions or official measures from Brussels were taken against these actions, either due to the unusual political and legal circumstances, or due to the fact that it was not only Hungary who kept its closer connections with Russia based on serving economic purposes.

Hungary did not only keep close ties with Russia in the field of economy, but it also established a relationship with the country through a nuclear energy deal. Prime Minister Orbán and President Vladimir Putin have signed a deal in January 2014 about the peaceful usage of nuclear energy between the two countries, which involves financing the expansion of the Hungarian nuclear power plant in Paks. The cost of the investment in the Central European country will

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<sup>91</sup> "Hungary's PM Orban Calls EU Refugee Quota Plan 'Mad,'" *Euractiv*, May 8, 2015, <http://www.euractiv.com/sections/migrations/hungarys-pm-orban-calls-eu-refugee-quota-plan-mad-314457>.

<sup>92</sup> Balázs Horváthy and Adrienn Nyircsák, "EU-Russia Sanctions War. Part II: Consequences of Restrictive Measures for Hungary - National Interests and Questions of Loyalty," *HAS CSS Lendület-HPOPs Research Group*, November 6, 2014, <http://hpops.tk.mta.hu/en/blog/2014/10/eu-russia-sanctions-war-part-ii-consequences-for-hungary>.

<sup>93</sup> *Ibid.*

<sup>94</sup> See Article 24(3) TEU in: "Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union," 83/30.

<sup>95</sup> "Szijjártó: A Diplomatakat Megilleti a Védettség, de Erről Lemondhat a Küldő Állam | Híradó," accessed December 17, 2014, <http://www.hirado.hu/2014/12/08/szijasarto-a-diplomatakat-megilleti-a-vedettseg-de-errol-lemondhat-a-kuldo-allam/>.

be 12 billion euros, out of which 80% is financed by the Russians through a credit provided for the Hungarian state for a period of 30 years. The law outlining the expansion of the Paks plant was enacted in February 2014 by the Hungarian Parliament, facing the discontent of the opposition parties. The most widely criticised aspect of the deal is the fact that in March the Hungarian Parliament has voted in favour of a law modification, which implies that the details of the power plant expansion will be concealed on grounds of national security for 30 years.<sup>96</sup> This means that the information available for the government based on which they opted for the deal, and the details of how the Russian loan will be spent will be kept secret. As a result, some opposition parties turned towards the Constitutional Court and the President of the Republic with their appeal against the decision.

As the deal about the Paks expansion was made without a tender, some questions might arise about whether the deal can be seen as a state aid or a factor limiting competition, from the point of view of international or European law. Margrethe Vestager, European Commissioner for Competition has announced in June that she is investigating whether the Paks deal can be considered as a forbidden state-aid. If the Hungarian government's response to the Commissioner's questions are not satisfactory, the next step would be to launch an infringement procedure against Hungary. The Commission has previously raised concerns about Paks in relation to the method of getting fuel for the construction, but the parties have modified the contract accordingly, so the investigation has been closed.

The nuclear deal between Hungary and Russia can be evaluated from several different angles. The Hungarian government claims that it is a fruitful business deal which serves investment, commercial and energy purposes; whereas the opposition and some experts doubt this statement arguing that based on the currently available information the deal will not be able to produce enough money to cover its own costs, so it will not be viable without a state-aid. A research group, called Energiaklub has published a scientific study supporting the latter argument.<sup>97</sup> Thus, it comes as no surprise that from another point of view, the deal can be seen as a method of Russia to buy favour with an EU Member State in a time when its reputation is in harsh decline all over Europe.<sup>98</sup> This opinion might be supported by President Putin's visit to Hungary in February 2015 which was an unusually highly anticipated event in Hungary and was received with criticism by the EU given the fact that the Russian President has recently become a persona non grata in most EU countries. Hungary's rapprochement to Russia highlights the growing distance between Hungary and its Western allies which emerges due to the country's commitment to make Hungary a „successful” European state, no matter what it takes.

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<sup>96</sup> “Hungary Makes \$14 Billion Power Plant Expansion Secret - WSJ,” *The Wall Street Journal*, March 3, 2015, <http://www.wsj.com/articles/hungary-makes-14-billion-power-plant-expansion-secret-1425396373>.

<sup>97</sup> Felsmann Balázs, “Működhet-E Paks II Állami Támogatások Nélkül? Az Erőműtársaság Vállalatgazdasági Közelítésben” (Budapesti Corvinus Egyetem - Energiaklub Szakpolitikai Intézet, Módszertani Központ, June 2015), [http://www.pakskontroll.hu/sites/default/files/documents/paks2\\_allami\\_tamogatas\\_2015jun.pdf](http://www.pakskontroll.hu/sites/default/files/documents/paks2_allami_tamogatas_2015jun.pdf).

<sup>98</sup> “Special Report: Inside Hungary's \$10.8 Billion Nuclear Deal with Russia,” *Reuters*, March 30, 2015, <http://www.reuters.com/article/2015/03/30/us-russia-europe-hungary-specialreport-idUSKBN0MQ0MP20150330>.

In light of these events it is very hard to evaluate how the EU reacts to a particularist Member State behaviour which might be diverging from the constitutional principles in question. It is not easy to find the borderline between legitimate diversity and illegitimate particularism because it is hard to trace a logical pattern in what kind of behaviour is accepted and what is condemned by the EU. After analysing the Hungarian case it is evident that some actions of the Hungarian government, for instance the bilateral trade negotiations with Russia, went “unnoticed” by the EU, or at least no institutions raised their concerns about it. Despite the EU’s reluctance to step up harshly against these actions, it is apparent from the events presented above that Hungary was contradicting its own commitments to loyalty, solidarity and equality in the EU with its recent political-economic actions. The country diverged from its EU commitments with the purpose of protecting its economy and tying bonds with another great power of world politics, in order to become a successful protagonist of the European political scene (at least based on its own judgement). In contrast, other actions, such as the modifications of the Hungarian Fundamental Law and its impacts on Fundamental Rights, or the Paks deal resulted in official scrutiny from at least one EU body. The conclusion to be drawn from this is that the EU permits some divergence from its main policy lines to the Member States when there are justified reasons to do so (a good example for this is Hungary’s close economic ties with Russia versus the EU sanctions). However, *when some common principles or goals which serve the EU collective interests are at stake* (such as the protection of the rule of law or freedom of competition) *then the European Union is ready to step up, or at least thoroughly investigate the Member State policy action.*

## Conclusion

Against this backdrop, this study proposes that the constitutional principles described above expect a compliant behaviour from EU Member States with the purpose of attaining community goals and common policies. However, it is particularly interesting to highlight that *the constitutional structure does not deal with particular Member State interests* and the ways Member States can benefit from the EU framework individually. This is why there is a pressing need for the European Union institutions to step up and enforce a compliant behaviour from the Member States, and make them follow the constitutional principles and legal obligations deriving from EU law. I argue *that it is the duty of the EU legal doctrine to provide the boundaries between legitimate and illegitimate MS conduct.*

The theoretical aspects discussed above as well as the constitutional values examined make it apparent that small, vulnerable countries in the EU have to face a dilemma in their European Union strategy: how to be an effective small country, which actively tries to exert its national preferences but at the same time being a rule-abiding, value-respecting Member State. Consequently, like it was shown by the Hungarian case, what seems to be beneficial from the perspective of governance at the national level (for instance blurry political decisions, over-emphasized flexibility, rule-breaking behaviour) could undermine its opportunities at the EU level of governance. This is especially important because a country’s, in particular a small

country's, effective promotion of national interest largely depends on the opportunities it can grab in the European political arena, and these opportunities lie in the small state strategies and preference formation tactics presented above.

To conclude, despite all difficulties they have to face, national governments should take their participation in the EU framework seriously because being engaged and shaping the common policies of the EU enables them to pursue their interests, as follows from the nature of loyalty or mutual cooperation and other constitutional values of the Union. On the other hand, *reluctance to cooperate, or disinterest in following the EU constitutional principles can jeopardize the results of the country's national preference formation.* One of the most severe consequences of Member State particularism and opportunism is the constant threat that for the sake of realising smaller political gains, the larger, long-term and socially or economically more relevant public and private benefits of collective action will fail to materialise, both on the national and European level.

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