

§ 3 The State as a member of the European Union

I. The unaffected sovereignty of the state

1) The concept and the significance of sovereignty

- Sovereignty (in the sense of public international law) is the underived and independent, unlimited legal capacity of the state to act in all domestic and external affairs.

2) "Shared sovereignty" or "sovereignty in limbo"?

- the DOCTRINAL DISPUTE about sovereignty in supranational integration
- indivisibility of sovereignty, subsisting legal status as state, ⇒ unaffected sovereignty of the member states

3) The effects of the unaffected sovereignty of the member state

- state retains unlimited public power
- state enjoys unlimited legal capacity at public international law
- pouvoir constituant in the state remains unlimited
- excursion: the ultimate responsibility [Letztverantwortung] of the state

II. The member states as the "masters of the treaties" ["Herren der Verträge"]

- only the collectivity of the member states, not the individual member state!
- in particular: the power of the member states to dissolve the Union

III. The basic rights and duties of the member state

1) The duties

- to comply with Union law and to implement, execute and enforce it on the national territory (cf. art. 4(3) sub-sect. 2 EU Treaty)
- to cooperate with and within the Union's institutions and with the other member states
- to evince loyalty and solidarity towards the union and other member states (principle of **loyalty within the Union**, of sincere cooperation, art. 4(3) EU Treaty)

2) The rights

- to participate in the Union's institutions
- to participate in any enhanced cooperation (art. 20 EU Treaty, 326 et seq. FEU Treaty)
- to enjoy the *solidarity* of the Union and the other member states (principle of loyalty within the Union)
 - e.g. within the Common Foreign and Security Policy (cf. art. 32(1) EU Treaty)
 - e.g. in the case of terrorist attacks or disasters (solidarity clause, art. 222 FEU Treaty)
 - e.g. in the case of a serious economic or financial emergency (→ ESM Treaty)
- to the respect of the **equality of member states** before the Treaties (art. 4(2) EU Treaty)
- to the **respect of the national identity** (art. 4(2) EU Treaty)

IV. The accession of new member states (art. 49 EU Treaty)

1) Backgrounds

- the need for homogeneity in a supranational union
- no right to accession (political discretion of the Union and the member states)

2) Conditions

a) European state

b) Commitment to the fundamental values of the Union (cf. art. 2 EU Treaty)

- see for the details § 6 of this course
- note that in the *society* (not just in the law) pluralism, non-discrimination (also with regard to sexual minorities), tolerance, justice, solidarity and equality between women and men must prevail

c) Compliance with the Copenhagen Criteria (European Council, 22.06.1993)

- aa) Criteria of political homogeneity: stable institutions guaranteeing democracy, rule of law, human rights and respect for and protection of minorities
- bb) Criteria of economic homogeneity: functioning market economy and capacity to cope with competition and market forces in the EU
- cc) Criterium of the *acquis communautaire*: ability to take on and implement effectively the obligations of membership, including adherence to the aims of political, economic and monetary union.

3) Procedure

a) Initiation

- application to the Council, preliminary opinion of the Commission, Council decision about the opening of negotiations

b) Negotiations

- New member states must accept the whole *acquis communautaire* (entirety of existing EU law, including soft law and ECJ jurisprudence). However, the condition of its adoption, implementation and enforcement can be negotiated.
- The process starts already during the negotiations and is monitored by the Commission with regard to 35 different policy fields ("chapters"). The negotiations refer to these "chapters". They are completed when all "chapters" are "closed".
- The EU may support the necessary reforms financially and technically via the *Instrument for Pre-accession Assistance* (IPA II, Regulation 231/2014).

c) Final decisions

- *unanimous Council decision* after consultation of the Commission and consent of the European Parliament (art. 49(1))
- conclusion of an **accession treaty** between the member states and the accession state (art. 49(2) phrase 1)
- *ratification* of the accession treaty *in every member state* and the accession state (art. 49(2) phrase 2)

V. The secession and expulsion of member states

1) The right to secession (art. 50 EU Treaty)

- explicitly guaranteed in art. 50 but deriving also from the nature of the Treaties as integration treaties (cf. art. 56(1) lit. b VCLT)
- only in accordance with the state's own constitutional requirements
- details shall be arranged in a *withdrawal agreement* between the state and the Union

2) The possibility to be expelled in case of material breach of treaty (art. 60(2) lit. a Vienna Convention on the Law of Treaties)

- a necessary collateral to the unaffected sovereignty of the member states
- no competence of the Union to expel but a right of the other member states to terminate the Treaties
- only *as a last resort after* having recourse to the ECJ and a temporary *suspension* of the Treaties
- cases: persistent or recurrent non-implementation, non-execution or non-enforcement of important parts of Union law; persistent or recurrent serious violations of the principle of loyalty within the Union; permanent abandonment of the common fundamental values (cf. art. 2 EU Treaty) while sanctions under art. 7 EU Treaty prove to be ineffective