

# FROM SPECIALITY TO A CONSTITUTIONAL SENSE OF PURPOSE: ON THE CHANGING ROLE OF THE OBJECTIVES OF THE EUROPEAN UNION

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**Abstract** After the Lisbon Treaty, the objectives of the European Union are more numerous and ambitious than ever. But what is their importance and function within the ‘thickening’ legal order of the EU? Combining insights from both the law of international organizations and comparative constitutional law, the article traces the diverging role of objectives for, on the one hand, a traditional international organization marked by the principle of ‘speciality’ and, on the other, a maturing legal order increasingly exhibiting ‘constitutional’ traits. It argues that in the case of the EU, objectives and competences have developed into two related but distinct norm categories. While objectives serve to bolster arguments to shape such powers, they no longer represent a rationale in their own right for founding competences. The EU no longer justifies its existence solely by striving for a particular set of goals. Rather, these norms represent an entrenched duty to pursue these objectives through the actors, structures and procedures available, regardless of the Union’s ultimate form (*finalité*). Today, the EU stands for certain values and has been endowed with powers, the exercise of which is guided by promoting these various aspects of the ‘common good’.

**Keywords:** comparative constitutional law, conferral, constitutionalization, *finalité*, flexibility clause, law of international organizations, objectives of the European Union, principle of speciality, teleological interpretation, *ultra vires*.

## I. INTRODUCTION

When reading through the EU Treaties after the Lisbon reform, EU citizens—and perhaps even the world at large—could rejoice in the many promises enshrined therein and await their realization with pleasant anticipation. After all, the Union boldly states as its overall aim ‘to promote peace, its values and the well-being of its peoples’.<sup>1</sup> This includes, internally, offering an ‘area of freedom, security and justice’<sup>2</sup> as well as an economically prosperous and competitive internal market.<sup>3</sup> Regarding ‘its relations with the wider world’,

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<sup>1</sup> Art 3(1) EU.

<sup>2</sup> Art 3(2) TEU.

<sup>3</sup> Art 3(3), first subpara TEU.

the EU vows to contribute to, among a number of other things, ‘the sustainable development of the Earth’, ‘free and fair trade’, ‘eradication of poverty and the protection of human rights’, and ‘the strict observance and the development of international law’.<sup>4</sup>

Whatever one may think of these goals as political desiderata, and however optimistic (or not) one may see the chances of them being lived up to, a legal question imposes itself which the present article seeks to answer by harnessing insights from both the law of international organizations and comparative constitutional law: what place do these objectives—as norms codified in EU primary law—assume within the Union legal order? The argument advanced here is that this position is now markedly different from that of the tasks enshrined in the original European Communities, and even the pre-Lisbon Community and Union, due to the maturing nature of the EU’s legal order. In essence, today more objectives do not equal more power—much less the need for a complete revamping of the Union’s power structure and nature. Rather, they entail more obligations and guidance for the exercise of power.

Scholarly interest in Union objectives has dwindled in recent years, undisturbed by the surge in literature on the Lisbon Treaty.<sup>5</sup> This is surprising for at least two reasons. First, the objectives of the Union and its predecessors have proliferated considerably with each round of treaty reform, and figured as a topic of vivid discussion at the Convention on the Future of Europe

<sup>4</sup> Art 3(5) TEU. In addition to these general objectives of the EU, the Treaties contain numerous policy specific objectives pertaining to, for instance, its environmental policy (art 191(1) TFEU), external action (art 21 TEU), and as a part of the latter, its trade (art 206 TFEU) and development policies (art 208 TFEU).

<sup>5</sup> Notable analyses, albeit many now dated, include H-J Glaesner, ‘Les objectifs de la Communauté économique européenne: origine et développements’ in *L’Europe et le droit: Mélanges en hommage à Jean Boulois* (Daloz 1991) 285; C Calliess, ‘Kollektive Ziele und Prinzipien im Verfassungsrecht der EU: Bestandsaufnahme, Wirkungen und Perspektiven’ (2003) 92 *Archiv für Rechts- und Sozialphilosophie (Beiheft)* 85; F Reimer, ‘Ziele und Zuständigkeiten: Die Funktionen der Unionszielbestimmungen’ (2003) *Europarecht* 992; M Kotzur, ‘Die Ziele der Union: Verfassungsidentität und Gemeinschaftsidee’ (2005) 58 *Die öffentliche Verwaltung* 313; F Sorrentino, ‘The purposes of the European Union according to the Constitutional Treaty’ in HJ Blanke and S Mangiameli (eds), *Governing Europe under a Constitution: The Hard Road from the European Treaties to a European Constitutional Treaty* (Springer 2006) 123; and W Drescher, ‘Ziele und Zuständigkeiten’ in A Marchetti and C Demesmay (eds), *Der Vertrag von Lissabon: Analyse und Bewertung* (Nomos 2010) 59. Note, however, the analysis of the Treaty articles on Union objectives in German(-style) and French commentaries, eg K-P Sommermann, ‘Article 3 [The Objectives of the European Union]’ in HJ Blanke and S Mangiameli (eds), *The Treaty on European Union (TEU): A Commentary* (Springer 2013) 157; PC Müller-Graff, ‘Verfassungsziele der Europäischen Union’ in M Dausess, *Handbuch des EU-Wirtschaftsrechts* (loose-leaf commentary, 33rd edn, CH Beck, September 2013); M Pechstein, ‘Art. 3 (ex-Art. 2 EUV) [Ziele der Union]’ in R Streinz (ed), *EUV/AEUV: Vertrag über die Europäische Union und Vertrag über die Arbeitsweise der Europäischen Union* (2nd edn, CH Beck 2012) 18; and F-X Priollaund and D Siritzky, *Le Traité de Lisbonne: Texte et commentaire article par article des nouveaux traités Européens (TUE-TFUE)* (La Documentation Française 2008) 35–6.

of 2002/03.<sup>6</sup> Following the entry into force of the Lisbon Treaty in 2009, the EU Treaties exhibit more numerous and audacious goals than ever before. Second, in national constitutional scholarship of certain major jurisdictions, animated debates have taken place on such objectives as constitutional norms, yielding a number of authoritative treatises on the subject.<sup>7</sup> In the United States, the constitution of which does not include explicitly state objectives, voices have been raised nonetheless for a ‘redemptionist’ or ‘aspirationalist’<sup>8</sup> approach to constitutional interpretation. According to these scholars, constitutions also expound, in addition to existing institutional structures and individual rights, ‘a set of principles that critiques present political arrangements and that we must try to realise over time’.<sup>9</sup> Strikingly, in the course of the ‘Eurocrisis’, the Treaty on Stability, Coordination and Governance obliges its parties to include, preferably in their constitutions, commitments to keep their public debt in check.<sup>10</sup> Such ‘Golden Rules’ are none other, in form and function, than constitutional objectives obliging States to strive for a balanced budget.<sup>11</sup>

Hence, objectives, at both the national and EU level, are on the rise in constitutional design. The present article aims to revive and develop further the scholarship on EU objectives by bringing to bear the scholarship on national constitutional objectives, positing that it is better suited for the Union legal order than the appraisal of ‘tasks’ of international organizations hailing from public international law scholarship.

Thus, in order to come to terms with such prominent norms in the highest laws of the post-Lisbon EU, an appropriate starting point is the idea of *Zielbedarf*, coined in 1972 by Hans Peter Ipsen.<sup>12</sup> This concept translates literally to the ‘need for objectives’, which according to Ipsen was an inherent

<sup>6</sup> P Norman, *The Accidental Constitution: The Story of the European Convention* (2nd edn, EuroComment 2005) 65; and A Pilette and E de Poncins, ‘Valeurs, objectifs et nature de l’Union’ in G Amato, H Bribosia and B de Witte (eds), *Genesis and Destiny of the European Constitution* (Bruylant 2007) 287, 298.

<sup>7</sup> For Germany, see K-P Sommermann, *Staatsziele und Staatszielbestimmungen* (Mohr Siebeck 1997); for France, see P De Montalivet, *Les objectifs de valeur constitutionnelle* (Dalloz 2006); for India, see N Kumar, *Judiciary on Goals of Governance: Directive Principles of State Policy* (Anamika Publishers 2005); or O Chinnappa Reddy, *The Court and the Constitution of India: Summits and Shallows* (OUP 2010) ch 9.

<sup>8</sup> See R West, ‘The Aspirational Constitution’ (1993) 88 NorthwestULRev 241; M Dorf, ‘The Aspirational Constitution’ (2009) 77 GeoWashLRev 1631.

<sup>9</sup> J Balkin, ‘Original Meaning and Constitutional Redemption’ (2007) 24 *Constitutional Commentary* 427, 464; further J Balkin, *Constitutional Redemption: Political Faith in an Unjust World* (Harvard University Press 2011).

<sup>10</sup> Treaty on Stability, Coordination and Governance, signed 2 March 2012 and entered into force on 1 January 2013, <[http://european-council.europa.eu/media/639235/st00tscg26\\_en12.pdf](http://european-council.europa.eu/media/639235/st00tscg26_en12.pdf)> art 3.

<sup>11</sup> See amended constitutional provisions such as art 109 of the German Basic Law, art 135 of the Spanish constitution or art 81 of the Italian constitution, which impose a general obligations to maintain a balanced budget, to which usually certain exceptions apply and the realization of which is to be specified through legislation. See further F Fabbrini, ‘The Fiscal Compact, the “Golden Rule” and the Paradox of European Federalism’ (2013) 36 *BCIntl&CompLRev* 1.

<sup>12</sup> HP Ipsen, *Europäisches Gemeinschaftsrecht* (JCB Mohr 1972) 995.

and existential characteristic of the European Community. That same year, Pierre Pescatore concluded in a similar vein that the Treaties were ‘entièrement pétris de téléologie’, ie entirely imbued with teleology.<sup>13</sup> At first glance, given the manifold and wide-ranging objectives in the current EU Treaties, this would seem to ring all the more true today.

However, this piece argues that in fact the opposite is the case. As the legal order of the Union ‘thickens’<sup>14</sup> into one with more complex features, objectives have come to coexist with a variety of other ‘constitutional principles’<sup>15</sup> in the law of the EU. Consequently, the pre-eminence of, and indeed the very ‘need for objectives’—in any existential sense—has decreased. This entails furthermore that objectives have lost their original function—inherited from the principle of ‘speciality’ of international organizations—to establish powers for the Union. Today, the objectives of the Union no longer determine the limits of the powers of the Union or call for self-perpetuating deeper integration. Instead, they oblige the institutions to continuously pursue these objectives in the exercise of their powers and may serve as an interpretive lens favouring legal arguments pushing for the marginal extension of power, the limits of which were not entirely clear and need judicial clarification. Unsurprisingly, it is usually the EU institutions which hope to benefit from such arguments when invoking them in court.

In order to elaborate on this argument, the article first revisits the function of objectives in the charters of international organizations. It then turns to the widening of EU powers and goals over time, and delves into the changing nature of the Union legal order and the effects this has on the role assumed by the objectives enshrined in its primary law as well as on the specific question of the EU’s *finalité*. A conclusion will sum up the findings.

## II. ‘SPECIALITY’ AND ‘FUNCTIONALITY’ OF INTERNATIONAL ORGANIZATIONS

As the point of departure for discerning the position of objectives in EU primary law, it is useful to revisit the codified tasks of international organizations. After all, today’s EU has its historical origins in specialized international organizations, ie the European and Steel Community (ECSC)

<sup>13</sup> P Pescatore, ‘Les objectifs de la Communauté européenne comme principes d’interprétation dans la jurisprudence de la Cour de justice’ in *Miscellanea W. J. Ganshof van der Meersch: Studia ab discipulis amicisque in honorem egregii professoris edita* (Bruylant 1972) 325, 327.

<sup>14</sup> Drawing on Joseph Raz’s terminology, J Raz, ‘On the Authority and Interpretation of Constitutions: Some Preliminaries’ in L Alexander (ed), *Constitutionalism: Philosophical Foundations* (CUP 1998) 152.

<sup>15</sup> K-P Sommermann, ‘Herkunft und Funktionen von Verfassungsprinzipien in der Europäischen Union’ in H Bauer and C Callies (eds), *Verfassungsprinzipien in Europa/Constitutional Principles in Europe/Principes constitutionnels en Europe* (Sakkoulas/Berliner Wissenschaftsverlag/Bruylant 2008) 15.

and the European Economic Community (EEC).<sup>16</sup> According to the usual definition, international organizations are entities based on an international agreement and governed by international law, with States (and/or other organizations) as their members and equipped with at least one organ with a will of its own.<sup>17</sup> They are conceived of as derivative subjects of international law wielding only a limited set of powers, in contrast to States as the original and complete subjects of international law.<sup>18</sup> The purposes for which such organizations are founded are crucial to establishing the limits of their powers. In other words, they represent the border line between what is to be considered *intra* and *ultra vires*.

Unlike States, which have the capability to establish their own competences (in German known as *Kompetenz-Kompetenz*), the powers of international organizations are restricted to those that have been attributed to them. This accords special importance to the goals which the organization is charged to pursue. According to Schermers and Blokker, they have ‘no unlimited power unconnected to the pursuance of specific objectives’.<sup>19</sup> They are quintessentially functional entities as their powers only ‘stretch far enough to include all acts indispensable for the performance of the functions of the organization’.<sup>20</sup>

In the Opinion of the Permanent Court of International Justice from 1927 on the *Jurisdiction of the European Commission of the Danube*, this characteristic functionality was brought to the fore:

As the European Commission is not a State, but an international institution with a special purpose, it only has the functions bestowed upon it by the Definitive Statute with a view to the fulfilment of that purpose, but it has power to exercise these functions to their full extent, in so far as the Statute does not impose restrictions upon it.<sup>21</sup>

<sup>16</sup> The European Atomic Energy Community continues to be a separate legal entity. See M Cremona, ‘The Two (or Three) Treaty Solution: The New Treaty Structure of the EU’ in A Biondi, P Eeckhout and S Ripley (eds), *EU Law After Lisbon* (OUP 2012) 40. In addition, the EU has taken over the tasks of the Western European Union, which was dissolved in 2011, see Western European Union, Statement of the Presidency of the Permanent Council of the WEU on behalf of the High Contracting Parties to the Modified Brussels Treaty, Brussels, 31 March 2010.

<sup>17</sup> H Schermers and N Blokker, *International Institutional Law* (4th edn, Martinus Nijhoff 2003) 36–47; see also P Sands and P Klein, *Bowett’s Law of International Institutions* (5th edn, Sweet & Maxwell 2001) 16–17.

<sup>18</sup> See M Shaw, *International Law* (6th edn, CUP 2008), 261; N Quoc Dinh, P Daillier and A Pellet, *Droit International Public* (7th edn, LGDJ 2002) 574; V Epping, ‘Völkerrechtssubjekte’ in K Ipsen (ed), *Völkerrecht* (5th edn, CH Beck 2004) 55, 57–8.

<sup>19</sup> Schermers and Blokker (n 17) 158.

<sup>20</sup> *ibid*; see also E Klein, ‘Die Internationalen und die Supranationalen Organisationen’ in W Graf Vitzthum (ed), *Völkerrecht* (5th edn, De Gruyter 2010) 263, 276; and Shaw (n 18) 1306–9.

<sup>21</sup> *Jurisdiction of the European Commission of the Danube* (1927) PCIJ. Series B, no 14, 64; see also A Campbell, ‘The Limits of the Powers of International Organisations’ (1983) 32 ICLQ 523. Though note also de Witte, who points out that the European Commission of the Danube had ‘very extensive powers’ for an international organization at that time in history, B de Witte, ‘The European Union as an international legal experiment’ in G de Búrca and JHH Weiler (eds), *The Worlds of European Constitutionalism* (CUP 2011) 19, 23.

Subsequently, the International Court of Justice (ICJ), re-emphasized the link between goals and powers in its own case law. In the *Reparation for Injuries* case, it stressed that '[w]hereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and function'.<sup>22</sup> This has been termed the 'principle of speciality', which according to the ICJ means that international organizations 'are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them'.<sup>23</sup>

Consequently, the objectives of the organization become the most important, if not the only, factor for determining which actions would be *ultra vires*. In the *Certain Expenses* Opinion of 1962, the ICJ ruled that for any act 'which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization'.<sup>24</sup> Hence, for all practical purposes, it is accurate to conclude that 'the definition of the objectives of the organization forms the only constitutional limit on the scope of operational activities'.<sup>25</sup> Hence objectives and competence norms can be seen as largely identical, forming a single type of norm to be found in the founding charters of international organizations.

Turning to the outset of European integration and the predecessors of what is the post-Lisbon EU, it is possible to identify, at least superficially, that very same situation. The ECSC and the later EEC were set up by States through international agreements. These were governed by international law and established organs with a distinct will from the Member States in order to pursue certain specific objectives spelt out in the founding treaties. However, over time it became apparent that with deepening integration, the Communities evolved in certain respects away from ordinary international organizations, with repercussions for the nature of their legal order as well as their objectives. As Pierre Pescatore put it, behind these seemingly technical objectives, above all the establishment of the common market, loomed 'a more distant *finalité*, that of political union'.<sup>26</sup>

This dynamic is a central element in the traditionally influential integration theory of (Neo-) Functionalism.<sup>27</sup> While in the law of international

<sup>22</sup> *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Rep 1949 (April 11) at 174, 180.

<sup>23</sup> *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Rep 1996 (July 8) at 66, para 25.

<sup>24</sup> *Certain Expenses of the United Nations*, Advisory Opinion, ICJ Rep 1962 (July 20) at 151, 168 (italics in the original).

<sup>25</sup> Schermers and Blokker (n 17) 766.

<sup>26</sup> (In the original: 'se profile une finalité plus lointaine, celle de l'unité politique') Pescatore (n 13) 327.

<sup>27</sup> See seminaly E Haas, *The Uniting of Europe: Political, Social, and Economic Forces 1950–1957* (Stanford University Press 1968); also W Sandholtz and A Stone Sweet, 'Neofunctionalism and Supranational Governance' in E Jones, A Menon and S Weatherill (eds),

organizations the term 'functional' denotes the limited, derivative nature of organizations as opposed to States, which are by contrast not confined to any particular 'function' or 'task', the theory of Neofunctionalism sought to theoretically grasp the so-called 'Monnet method'. The original objectives of the Communities, uncontroversial because largely economic, according to that narrative, were seen as propelling European integration further as the pursuit of these only seemingly specific and circumscribed functions would ultimately necessitate deeper integration in other, more politically charged domains. Thus, 'spillovers' would occur with the effect of ultimately transforming the nature of the Communities in view of these expanding functions.

Whether one subscribes to the explanatory value of this theory or not, in terms of legal appreciation the question arises, first, to which extent the objectives of the European Union can still be regarded through the lens of strict 'functionality' and 'speciality' of international organizations given the progressing and deepening process of integration; and second, whether in a Union consolidated in the course of more than half a century, its objectives can still be seen as harbouring a 'more distant *finalité*' yet to be achieved.

### III. BEYOND 'SPECIALITY': THE EXPANDING AMBIT OF THE EU

In the course of the past decades, the scope of action of the EU and its predecessors has expanded significantly.<sup>28</sup> This expansion renders the understanding of the EU as an organization endowed with specific functions within a particular subject area, which is characteristic of traditional international organizations, increasingly inappropriate.<sup>29</sup> Instead, the Treaties have come to exhibit a more general purpose encapsulating a 'European common good'<sup>30</sup> through a kaleidoscope of different aspects of it.

This shift becomes evident when revisiting the evolution of the primary law over time. The 1951 Treaty Establishing the European Coal and Steel Community states in its first Article that the Community is to be 'based on a common market, *common objectives*, and common institutions'.<sup>31</sup> It identifies clearly the Member States as Masters of the Treaty, which create an international organization for specific purposes.

Concerning the objectives in particular, the 'task' of the ECSC is spelt out in Article 2 of its founding treaty, viz. 'to contribute to economic expansion,

*The Oxford Handbook of the European Union* (OUP 2012) 18; and B Rosamond, *Theories of European Integration* (Macmillan 2000) 31–42 on Functionalism and 50–73 on Neofunctionalism.

<sup>28</sup> See for a historic overview also Glaesner (n 5).

<sup>29</sup> Sommermann (n 5) 159.

<sup>30</sup> See further on this notion C Calliess, 'Gemeinwohl in der Europäischen Union. Über den Staaten- und Verfassungsverbund zum Gemeinwohlverbund' in W Brugger, S Kirste and M Anderheiden (eds), *Gemeinwohl in Deutschland, Europa und der Welt* (Nomos 2002) 172.

<sup>31</sup> Art 1 Treaty establishing the European Coal and Steel Community (ECSC Treaty) (emphases added).

the development of employment and the improvement of the standard of living in the participating countries through the institution, in harmony with the general economy of the member States, of a common market'.<sup>32</sup> This is subsequently linked to more specific goals in Article 3 ECSC, such as ensuring 'the orderly supply to the common market'<sup>33</sup> or promoting 'the growth of international trade'.<sup>34</sup>

However, the ECSC Treaty already reveals intimations of a wider and more ambitious project. In its preamble, one can find next to references to fostering peace and prosperity the intention to use the ECSC as the starting point for a more ambitious integration trajectory.<sup>35</sup> Echoing the Schuman Declaration,<sup>36</sup> it underlines 'the fact that Europe can be built only by concrete actions which create a real solidarity and by the establishment of common bases for economic development'.<sup>37</sup> The preamble of the ECSC Treaty then points to a future based on 'a broader and deeper community among peoples long divided by bloody conflicts' endowed with 'institutions which will give direction to a destiny henceforth shared'.<sup>38</sup>

The same observations can be made with regard to the 1957 Treaty Establishing the European Economic Community, ie both as an organization created for a specific purpose (economic integration through the common market) and as evidence of expanding the project of integration through opening up new fields of common action. Article 1 EC highlights that an international treaty is the basis of the EEC, Article 2 sets out its 'task'<sup>39</sup> (in the singular), and Article 3 then continues with a list of activities linked to this task. At the same time, already the original 1957 version of the EEC Treaty makes clear that the integration project is meant to evolve, not least by evoking at the beginning of the preamble the idea of 'an *ever closer union* among the European peoples'.<sup>40</sup>

Over the course of various Treaty revisions, these provisions on the tasks and activities of the Community have been extended significantly in scope, reflecting the growing fields of Community action and advancing integration.<sup>41</sup> Whereas the main aim enshrined in Article 2 of the EEC Treaty of 1957 still

<sup>32</sup> Art 2, first subpara ECSC Treaty.

<sup>34</sup> Art 3(f) ECSC Treaty.

<sup>36</sup> Schuman Declaration, 9 May 1950.

Treaty.

<sup>39</sup> This task is related to the common market, which appears rather as a means to an end here 'The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of the Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.'

<sup>40</sup> First recital of the preamble, EEC Treaty (original version) (emphasis added); even clearer in terms of continuous evolution is the French version ('union sans cesse plus étroite').

<sup>41</sup> This development has also been designated as 'competence creep', see eg S Weatherill, 'Competence Creep and Competence Control' (2004) 23 YEL 1.

<sup>33</sup> Art 3(a) ECSC Treaty.

<sup>35</sup> Fifth recital of the preamble, ECSC Treaty.

<sup>37</sup> Third recital of the preamble, ECSC

<sup>38</sup> Fifth recital of the preamble, ECSC Treaty.



focussed on the common market and economic integration, the same provision in the version of the Nice Treaty of 2001 makes the widening and deepening that occurred in the meantime evident by referring—beyond the economic aspects of integration—to monetary union, sustainability, social aspects, gender equality, solidarity and environmental protection.<sup>42</sup> This can also be gleaned from the longer list of activities and more numerous policies of the Community. While Article 3 EEC of the Rome Treaty listed 11 such activities, almost all of an economic character,<sup>43</sup> the Article as it appears after the Nice reform catalogues no fewer than 21 activities and policies, including environmental, health and energy policies.<sup>44</sup>

The Maastricht Treaty added to the aims of the Community the objectives of the European Union. In addition to what used to be called the ‘first pillar’, ie the Community, this concerns the former second and third pillars, ie the Common Foreign and Security Policy (CFSP) and the Justice and Home Affairs (later Police and Judicial Cooperation in Criminal Matters after the 1997 Amsterdam Treaty). Article 1 of the TEU expresses the fact that an international treaty remains the basis of the Union. However, it includes the idea that the ‘task’ of the Union ‘shall be to organise, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples’.<sup>45</sup> This task is much wider and clearly transcends the strictly economic sphere of action.

Article 2 TEU subsequently lists the ‘objectives’ of the Union, which serve as an illustration of the width which EU activities had assumed by that time. These include, among others, promoting ‘economic and social progress and a high level of employment’, ‘the establishment of economic and monetary union’, asserting the Union’s ‘identity on the international scene’, ‘the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union’ and maintaining ‘an area of freedom, security and justice’.<sup>46</sup>

In addition to these, the more specific objectives of the second and third pillars need to be considered as well. These consisted of, in the case of the CFSP:

- to safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter;
- to strengthen the security of the Union in all ways;

<sup>42</sup> Art 2 EC.

<sup>43</sup> But note already art 3(i) and (k) EEC (original version), on the establishment of a European Social Fund and cooperation with the overseas countries (also in terms of social development), respectively.

<sup>44</sup> Art 3 EC. For the concurrent expansion of Community powers beyond the Treaty text, taking also into account its interpretation by the institutions, see D Wyatt, ‘Is the European Union an Organization of Limited Powers?’ in A Arnall *et al.* (eds), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Hart 2011) 3.

<sup>45</sup> Art 1(3) TEU (Nice version).

<sup>46</sup> Art 2 TEU (Nice version).

- to preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter, as well as the principles of the Helsinki Final Act and the objectives of the Paris Charter, including those on external borders;
- to promote international cooperation;
- to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms.<sup>47</sup>

The objectives of Police and Judicial Cooperation in Criminal Matters are defined as providing ‘citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia’.<sup>48</sup> This entails more specifically ‘preventing and combating crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud’.<sup>49</sup> The codification of these objectives, ranging from combatting crime to spreading democracy across the globe, are at any rate not evidently linked to the common market anymore. As a result, this changes the originally predominantly economic character of the Treaty objectives.<sup>50</sup>

However, by no means do the Treaties represent the Union as the final step in the integration process. The TEU post-Nice states in the preamble that the Union constitutes ‘a new stage in the process of European integration’. It expresses furthermore the resolve ‘to continue the process of creating an ever closer union among the peoples of Europe’ and points to ‘further steps to be taken in order to advance European integration’.<sup>51</sup>

The latest step in this widening of the objectives of the Union is the Lisbon Treaty, which entered into force on 1 December 2009.<sup>52</sup> The failure of the Treaty Establishing a Constitution for Europe notwithstanding, the Lisbon Treaty incorporates many if not most of the changes envisaged by the Constitutional Treaty, including with regard to objectives. The Community has been absorbed into the single legal personality of the Union.<sup>53</sup> The EU now

<sup>47</sup> Art 11 TEU (Nice version).

<sup>48</sup> Art 29(1) TEU (Nice version).

<sup>49</sup> Art 29(2) TEU (Nice version). Even though these are worded as means rather than actual objectives (‘That objective shall be achieved by’), it would appear more appropriate to consider them as specifications of the general objective. The means to these ends are contained in the measures listed subsequently in that provision (ie closer cooperation between police forces judicial and customs authorities as well as approximation of rules in criminal matters).

<sup>50</sup> See Calliess (n 5) 90.

<sup>51</sup> Thirteenth recital of the preamble TEU (Nice version).

<sup>52</sup> Subsequent amendments to the primary law have thus far left unaffected the objectives of the EU, such as the Treaty and Act concerning the accession of Croatia to the EU [2013] OJ L112/7 or the amendments regarding the European Stability Mechanism adopted by virtue of the simplified revision procedure of art 48(6) TEU (European Council Decision 2011/199/EU of 25 March 2011 amending art 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro [2011] OJ L91/1).

<sup>53</sup> Art 1(3) TEU (Lisbon version).

represents an integrated structure, having abandoned the rather confusing pillar structure introduced by Maastricht.<sup>54</sup>

Nonetheless, it remains based on a set of treaties instead of one constitutional document.<sup>55</sup> This is reflected still in the first Articles of both the TEU and TFEU.<sup>56</sup> Moreover, Article 1 TEU now stipulates that the Union is not simply established, as the previous versions stated,<sup>57</sup> but that the Member States confer competences on it ‘to attain objectives they have in common’.<sup>58</sup> These changes seem to hark back to the principle of speciality of international organizations and emphasize the role of the Member States as ‘master of the treaties’.

However, for the first time the values on which the EU is founded are placed before its objectives.<sup>59</sup> Yet, this relegation of the objectives of the Union after the values was not accompanied by narrowing them down. To the contrary, the Lisbon reform led to both further expansion and streamlining of the objectives of the EU. The overall expression of these can now be found in Article 3 TEU. This provision includes the overall aim of promoting ‘peace, its values and the well-being of its peoples’,<sup>60</sup> providing for an area of freedom, security and justice,<sup>61</sup> the competitive and prosperous internal market combined with ‘sustainable development of Europe’, social justice equality and solidarity as well as diversity,<sup>62</sup> the economic and monetary union,<sup>63</sup> as well as the general objectives of EU external relations, including defending the Union’s interests internationally whilst spreading human rights, democracy and the rule of law abroad.<sup>64</sup>

Given that ‘the new list focuses on non-economic goals to a far greater extent than the EC Treaty’,<sup>65</sup> a turn from predominantly economic goals to an overarching range of objectives is undeniable. In other words, there is no ‘speciality’ to the EU anymore according to its highest laws. This general set of goals continues to be complemented by numerous objectives related to specific policy areas and even sub-areas. These include, for example, the particular aims of environmental (Article 191(1) TFEU), energy (Article 194(1) TFEU) and foreign policy (Article 21 TEU). The latter is even further subdivided into

<sup>54</sup> J-C Piris, *The Lisbon Treaty: A Legal and Political Analysis* (CUP 2010) 65–9; and P Van Elsuwege, ‘EU external action after the collapse of the pillar structure: In search of a new balance between delimitation and consistency’ (2010) 47 CMLRev 987. <sup>55</sup> Cremona (n 16).

<sup>56</sup> Art 1(1) TEU, and in particular art 1(2) TFEU: ‘This Treaty and the Treaty on European Union constitute the Treaties on which the Union is founded.’ See also M Pechstein, ‘Art. 1 (ex-Art. 1 EUV) [Gründung der Europäischen Union; Grundlagen]’ in R Streinz (ed), *EUV/AEUV: Vertrag über die Europäische Union und Vertrag über die Arbeitsweise der Europäischen Union* (2nd edn, CH Beck 2012) 7, 11.

<sup>57</sup> Compare art 1 EC and art 1(1) TEU (Nice version).

<sup>58</sup> Art 1(1) TEU.

<sup>59</sup> Art 2 TEU; and previously art 6 TEU (Nice version). See further on the importance of values in the evolving EU legal order *infra* section IV.

<sup>60</sup> Art 3(1) TEU.

<sup>61</sup> Art 3(2) TEU. <sup>62</sup> Art 3(3) TEU. <sup>63</sup> Art 3(4) TEU. <sup>64</sup> Art 3(5) TEU.

<sup>65</sup> K Lenaerts and P Van Nuffel, *European Union Law* (3rd edn, Sweet & Maxwell 2011) 107; also M Ruffert, ‘Art. 3 (ex-Art. 2 EUV) [Ziele der EU]’ in C Calliess and M Ruffert (eds), *EUV/AEUV Kommentar* (4th edn, CH Beck 2011) marginal no 6; and Drescher (n 5) 67.

different fields of external action with their own objectives, such as trade policy (Article 206 TFEU) or development cooperation (Article 208 TFEU).

This development of primary law language in the course of time reveals, on the one hand, that objectives have always figured prominently in the primary law of the Union and its predecessor organizations. On the other, while they were rather limited and focussed on specific areas at the outset, as the Union became ‘ever closer’, they expanded far beyond their original remit. While it was still plausible to situate the ECSC and EEC among classic international organizations marked by functionality, this has become increasingly inappropriate over time with regard to the EU. If the Union is supposed to be a ‘functional’ entity, those functions are now manifold, and not at all ‘specialized’ and confined to one single area of activity anymore. According to Gráinne de Búrca, while it started ‘as a kind of pilot project of limited economic integration with a view to securing greater peace and prosperity for the Member States, the EU has evolved into something much larger, more complex and more ambitious’.<sup>66</sup> This raised level of ambition alone, however, is not the only or even most important expression of the changing nature of the EU over time. More important is its increased complexity—its ‘transformation’ or ‘constitutionalization’. This was due a more profound change in the legal order of the EU, which will be explored in the next section. This transformation, in turn, affects how the objectives codified in the Treaties operate as legal norms within such a transformed, ‘thickened’ legal order.

#### IV. THE CHANGING ROLE OF OBJECTIVES IN A MATURING LEGAL ORDER

With integration advancing, the objectives of the EU expanded from rather narrowly defined economic ones into a large variety of areas. Viewed in isolation, however, this would merely amount to an international organization with an unusually large catalogue of functions, with no bearing on their operation as legal norms. Today, other contemporary international organizations do not shy away from enshrining wide-ranging, audacious goals into their charters either.<sup>67</sup> What sets the EU apart as a legal order is that the nature of the Union itself is understood as having transformed.<sup>68</sup> It is argued here that this transformation—this ‘constitutionalization’—has had a profound effect on the role of objectives of the Union as norms within its legal order.

Into what exactly the Union and its legal order have changed remains a source of controversy and debate, with opinions ranging from a merely

<sup>66</sup> G de Búrca, ‘Europe’s *raison d’être*’ in D Kochenov and F Amtenbrink, *The European Union’s Shaping of the International Legal Order* (CUP 2014) 21, 21.

<sup>67</sup> cf ASEAN Charter, signed 20 November 2007, art 1; Constitutive Act of the African Union, signed 11 July 2000, art 3.

<sup>68</sup> See the seminal contribution JHH Weiler, ‘The Transformation of Europe’ (1991) 100 *YaleLJ* 2403.

enhanced international organization to a quasi-federal entity with its own constitution.<sup>69</sup> Moreover, given that integration remains an ongoing process, the end point of integration or what the Union is to become eventually remain contentious issues which the Lisbon Treaty did not resolve, and controversy over which is kindled by the current turmoil on economic and financial governance.<sup>70</sup> This concerns the question of *finalité* of the Union, which, as is argued here, is today a matter distinct from the question of the legal function of Union objectives.

Whether the Union legal order has transformed to such an extent that one could properly speak of a ‘constitutional’ order depends of course on the definition and criteria applied to the notion of ‘constitution’ and ‘constitutionalism’.<sup>71</sup> This has raised issues of whether only States can have ‘real’ constitutions,<sup>72</sup> and to which extent a people—a *demos*—is required for a political community and the constitutional credentials of its legal order.<sup>73</sup> Beyond such exclusionary criteria, the argument here employs the sliding scale between ‘thin’ and ‘thick’ constitutionalism. While the EU certainly is not a State, and while it may be difficult to discern a European *demos*, in the eyes of many scholars its primary law has nonetheless assumed the role that a constitution fulfils in the legal order of a State.<sup>74</sup> Despite not being a State and lacking a ‘people’, the EU legal order has undeniably come to acquire

<sup>69</sup> For an overview of some of the more prominent labels used to describe the Union and its legal order, see N Walker and S Tierney, ‘Introduction: A Constitutional Mosaic? Exploring the New Frontiers of Europe’s Constitutionalism’ in N Walker, M Shaw and S Tierney (eds), *Europe’s Constitutional Mosaic* (Hart 2011) 1, 7–8; and N Walker, ‘The Place of European Law’ in G de Búrca and JHH Weiler (eds), *The Worlds of European Constitutionalism* (CUP 2011) 57, 78–9.

<sup>70</sup> See E Chiti and PG Teixeira, ‘The constitutional implications of the European responses to the financial and public debt crisis’ (2013) 50 CMLRev 683; and K Tuori, ‘The European Financial Crisis: Constitutional Aspects and Implications’ (2013) EUI Working Paper Law 2012/28.

<sup>71</sup> The concept of the ‘constitutionalization’ of Union itself is a matter of debate with many currents. For a useful overview see M Avbelj, ‘Questioning EU Constitutionalisms’ (2008) 9 German Law Journal 1.

<sup>72</sup> For historical examples to the contrary, see E Tanchev, ‘The Lisbon Treaty within and without Constitutional Orthodoxy’ in I Pernice and E Tanchev (eds), *Ceci n’est pas une Constitution – Constitutionalisation without a Constitution?* (Nomos 2009) 22; and L Besselink, ‘The Notion and Nature of the European Constitution After the Lisbon Treaty’ in J Wouters, L Verhey and P Kiiver (eds), *European Constitutionalism beyond Lisbon* (Intersentia 2009) 261, 262, who ranks the constitutional law of the EU among what he terms ‘the non-revolutionary, historical types of constitutions’.

<sup>73</sup> See on the ‘no *demos*’ thesis, JHH Weiler, ‘Does Europe Need a Constitution? *Demos*, *Telos* and the German Maastricht Decision’ (1995) 1 ELJ 219; for further references to the constitutionalization literature see R Streinz, ‘European Integration through constitutional law’ in H-J Blanke and S Mangiameli (eds), *Governing Europe under a Constitution: The Hard Road from the European Treaties to a European Constitutional Treaty* (Springer 2006) 1, 9 (fn 65).

<sup>74</sup> See eg Müller-Graff (n 5) marginal no 78; R Schütze, *European Constitutional Law* (CUP 2012) 3–5; R Streinz, C Ohler and C Herrmann, *Der Vertrag von Lissabon zur Reform der EU: Einführung mit Synopse* (3rd edn, CH Beck 2010) 16; D Grimm, ‘Ursprung und Wandel der Verfassung’ in J Isensee and P Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland* (3rd edn, C.F. Müller 2003) vol 1 (*Historische Grundlagen*) 3, 41; and M Claes and M de Visser, ‘Reflections on comparative method in European constitutional law’ in M Adams and J Bomhoff (eds), *Practice and Theory in Comparative Law* (CUP 2012) 143, 149, who note that the

numerous features evidencing a rather ‘thick’ form of constitutionalism,<sup>75</sup> which will be elaborated upon below. From this point of view, the term ‘constitutional’ can be applied to EU primary law. Since this assessment is based on observable features, the fact that the European Council claimed to have abandoned the ‘constitutional concept’<sup>76</sup> following the failure of the Treaty Establishing a Constitution for Europe to enter into force cannot in itself abrogate this ‘constitutional’ nature thus defined.

The Court of Justice of the EU (ECJ) usually appears as the main protagonist in effecting and elaborating upon the evolution of the Union legal order.<sup>77</sup> It famously declared the Treaties and the legal order they established as representing ‘a new legal order of international law’.<sup>78</sup> In the following, the narrative of transformation will be revisited with a particular regard as to what this entails for the objectives enshrined in the Treaties.

Whence and towards where the EU legal order has evolved can be expressed in the form of two archetypical opposing positions: on the one hand, the classic international organization as a derivative subject of international law, created to perform certain functions, which exists by virtue of this very functionality and, as outlined above, whose powers are delimited by these functions; on the other, a matured, constitutionalized legal order endowed with ‘constitutional objectives’. To recall the classic distinction: States, given their all-encompassing *Kompetenz-Kompetenz*, do not need objectives—they do not have an existential *Zielbedarf*. From comparative constitutional law, we learn that constitutional objectives as such do not establish any competences. These are regulated elsewhere in the constitution by other norms.<sup>79</sup> This all-encompassing power to allocate one’s own competences and lack of *Zielbedarf* notwithstanding, there is a clear trend in constitutional design for States to include objectives in their highest laws.<sup>80</sup> However, as legal norms within a domestic legal order, they retain a rather low degree of force<sup>81</sup> and are only expected to be pursued within the bounds of what is materially possible.<sup>82</sup> Rather than hard-and-fast obligations, they operate as more fluid principles,

composite of Member State and EU constitutional norms performs ‘the function which in a national legal system is fulfilled by constitutional law’.

<sup>75</sup> P Craig, ‘Constitutions, Constitutionalism, and the European Union’ (2001) 7 *ELJ* 125, 126–35.

<sup>76</sup> European Council, Presidency Conclusions of the Brussels European Council 21 and 22 June 2007, 20 July 2007, 11177/1/07 REV 1, Annex I: IGC mandate, 15 (pt 1). Discounting this ‘proclamation’ for the debate on the constitutional approach are eg S Griller, ‘The Reform’s Typology: Treaty or Constitution?’ in I Pernice and E Tanchev (eds), *Ceci n’est pas une Constitution: Constitutionalisation without a Constitution?* (Nomos 2008) 44, 52–5; and A von Bogdandy and J Bast, ‘The Constitutional Approach to EU Law’ in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (2nd edn, Hart/CH Beck 2011) 1, 1–3.

<sup>77</sup> See here seminally E Stein, ‘Lawyers, Judges, and the Making of a Transnational Constitution’ (1981) 75 *AJIL* 1; and more critically H Rasmussen, *European Court of Justice* (Gadjura 1998).

<sup>78</sup> Case 26/62 *van Gend & Loos* [1963] ECR English special edition 1, para 10.

<sup>79</sup> Sommermann (n 7) 366.

<sup>80</sup> *ibid* 198–252; De Montalivet (n 7) 53–63.

<sup>81</sup> De Montalivet (n 7) 563.

<sup>82</sup> Sommermann (n 7) 224.

which serve to reconcile between, for instance, different individual rights,<sup>83</sup> or as ‘optimization requirements’, as defined by Robert Alexy, for various aspects of State activity.<sup>84</sup> Due to their rather weak legal force, they serve primarily as a means for interpreting other constitutional norms and secondary law.<sup>85</sup>

With these two opposing positions in mind, it is essential, then, to enquire what the transformation of the EU to something ‘more than an international organization (as reflected by the judicially recognized doctrines of supremacy, direct effect etc.) but less than a federal state (no welfare state, insufficient resources, no army etc.)’<sup>86</sup> entails for the role of its objectives as legal norms within the primary law.

For the former European Communities, objectives could be considered of existential importance for the first decades of their history. This reflects their original conception as international organizations and was the reason why Hans Peter Ipsen coined the term *Zielbedarf* as a defining trait of these organizations.<sup>87</sup> The existential nature of the objectives also becomes apparent in the judgment of the ECJ of 1987 in *Gimenez Zaera*. The Court, noting that ‘Article 2 of the Treaty describes the task of the European Economic Community’, ruled that ‘the aims laid down in that provision are concerned with the *existence* and functioning of the Community’.<sup>88</sup>

Prior to this judgment, the ECJ considered that former Article 2 EC ‘is placed at the head of the general principles which govern [the Treaty]’.<sup>89</sup> Generally, the objectives have played a significant role in the legal process of integration, above all in view of the distinctly teleological interpretation employed by the Court aimed at ensuring the greatest practical effectiveness of EU law (its *effet utile*).<sup>90</sup> This emphasis on objectives by the Court, however, was then used as the interpretive point of departure for distinguishing the EEC

<sup>83</sup> B Faure, ‘Les objectifs de valeur constitutionnelle: une nouvelle catégorie juridique?’ (1995) No 21 *Revue française de droit constitutionnel* 47.

<sup>84</sup> Sommerman (n 7) 360–1; see on the concept R Alexy, *A Theory of Constitutional Rights* (OUP 2002) 47.

<sup>85</sup> Reddy (n 7) 73; TK Tope, *Constitutional Law of India* (2nd edn, Eastern Book Company 1992) 353; and DK Singh, *V.N. Shukla’s Constitution of India*, sixth edition (6th edn, Eastern Book Company 1975) 180; Sommermann (n 7) 5; P Badura, ‘Arten der Verfassungsrechtssätze’ in J Isensee and P Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland* (3rd edn, CF Müller 2003), vol VII 33, 42; De Montalivet (n 7) 454; H Roussillon, *Le Conseil constitutionnel* (5th edn, Dalloz 2004) 82–3.

<sup>86</sup> C Barnard, ‘Introduction: The Constitutional Treaty, the Constitutional Debate and the Constitutional Process’ in C Barnard (ed), *The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate* (OUP 2007) 1, 3.

<sup>87</sup> Ipsen (n 12) 995. <sup>88</sup> Case 126/86 *Giménez Zaera v Institut Nacional de la Seguridad Social and Tesorería General de la Seguridad Social* [1987] ECR 3697, para 10 (emphasis added).

<sup>89</sup> Case 167/73 *Commission v France* [1974] ECR 359, para 18. The German version of the judgment uses even stronger language. It speaks of ‘vertragsprägende allgemeine Grundsätze’, ie ‘general principles which characterize the Treaty’.

<sup>90</sup> Calliess (n 5) 85; and Pescatore (n 13) 327; see also M Pollack, *The Engines of European Integration: Delegation, Agency, and Agenda Setting in the EU* (OUP 2003) 189.

Treaty from traditional international agreements and the Community from ordinary international organizations. As a result, paradoxical as it may seem, this would eventually result in decreasing the need of the Union legal order to rely on objectives as an existential feature and deprive them of their competence founding nature.

Already in the *van Gend & Loos* judgment, the Court highlighted the ‘objective of the EEC Treaty, which is to establish a Common Market’ but noted at the same time that its functioning ‘is of direct concern to interested parties in the Community’.<sup>91</sup> This objective, coupled with the observation that sovereign rights had been transferred to the Community institutions, led the ECJ to conclude that the EEC Treaty was in fact ‘more than an agreement which merely creates mutual obligations between the Contracting States’.<sup>92</sup>

Tracing the different milestones in the case law of the Court that underpin the transformation thesis, other norms and features come to the fore which in turn qualify the importance of Treaty objectives. In its landmark judgement in *Les Verts* of 1986, the ECJ famously found that ‘the European Economic Community is a Community based on the rule of law’ and equipped with a ‘basic constitutional charter, the Treaty’.<sup>93</sup> In Opinion 1/91, the Court did not only reiterate the constitutional claim, but now expressly distinguished the Community from international organizations: ‘In contrast, the EEC Treaty, *albeit* concluded in the form of an international agreement, *none the less* constitutes the constitutional charter of a Community based on the rule of law.’<sup>94</sup> It furthermore highlighted primacy and direct effect as ‘essential characteristics of the Community legal order’.<sup>95</sup> Objectives, on their part, not long before deemed existential, were not mentioned as essential characteristics.

Of particular significance regarding this ‘thickening’ of the legal order is the much-discussed judicial ‘discovery’ of fundamental rights as general principles of Community law by the Court.<sup>96</sup> This was subsequently (partially) codified in Article 6 TEU (Nice version), which stated the values on which the Union was founded.<sup>97</sup> This development took place against the backdrop of challenges from highest national courts, which challenged the ECJ by claiming the power to review the validity of Community acts against the standard of fundamental rights protection enshrined in their respective national

<sup>91</sup> *van Gend & Loos* (n 78) para 9.

<sup>92</sup> *ibid.* Hallstein, *Die Europäische Gemeinschaft* (5th edn, Econ Verlag 1979) 53, described the Treaties as ‘acts of creation’ (‘Schöpfungsakte’) and not just ‘a batch of rights and duties of the contracting parties’ (‘einem Bündel von Rechten und Pflichten der vertragschließenden Staaten’).

<sup>93</sup> Case 294/83 *Parti écologiste ‘Les Verts’* [1986] ECR 1339, para 23.

<sup>94</sup> Opinion 1/91 (*EEA*) [1991] ECR I-6079, para 21 (emphases added).

<sup>95</sup> *ibid.* See also A Rosas and L Armati, *EU Constitutional Law: An Introduction* (Hart 2010) 3.

<sup>96</sup> Case 29/69 *Stauder* [1969] ECR 419; generally and for further case law see eg Schütze (n 74) 409–19.

<sup>97</sup> Art 6(1) TEU (Nice version). Post-Lisbon, art 6(1) TEU refers to the Charter of Fundamental Rights, which is of the same legal rank as the Treaties, representing the detailed codification of the fundamental rights within EU primary law.



constitutions.<sup>98</sup> The inclusion of fundamental rights as general principles of Community law is generally seen as a response to these challenges, which was then answered by an overall acceptance of the primacy of Community law by the constitutional courts of the Member States.<sup>99</sup> After all, it was the ‘constitutional traditions common to the Member States’<sup>100</sup> from which the ECJ drew inspiration for its fundamental rights jurisprudence. This development, arguably more than anything else, heralds the departure from a functional association governed by public international law towards what in German is known as an *objektive Wertordnung*, ie ‘an objective order of values’.<sup>101</sup>

In this vein, beyond fundamental rights as such, the EU Treaties now explicitly include a statement of the values on which the ‘Union is founded’ and which ‘are common to the Member States’.<sup>102</sup> For Stelio Mangiameli, it is this provision from the TEU which ‘finally leads the EU out of the group of international organizations having an economic nature and, thanks to its basic values, the constitutional nature of the Union’s identity was strengthened in spite of the fact that the intention of the Council was to exclude any reference to the very notion of Constitution in the new Treaty’.<sup>103</sup> It was introduced with the Treaty of Amsterdam, which, however, still referred to ‘principles’ rather than values.<sup>104</sup> As observed earlier, after Lisbon, the values of the Union are also now placed before the objectives of the Union. The order of provisions, of course, has no bearing as such on their legal weight. Nonetheless, it symbolizes a paradigm shift from a legal entity that, in the first place, exists to strive for certain goals to one which, above all, expounds what it stands for.

This distinction becomes clearer when considering the references to values in terms of accession to the EU and suspending the rights of a Member State, respectively. Concerning the former, a European State can only join the EU if it ‘respects the values referred to in Article 2 [TEU] and is committed to promoting them’.<sup>105</sup> This means the State must already, at the moment of

<sup>98</sup> Note in this context the *controlimiti* doctrine of the Italian Constitutional Court, in particular, *Corte costituzionale*, Decision of 18 December 1973, Sentenza N. 183/1973 (*Frontini*); and the German *Solange I* decision, *Bundesverfassungsgericht*, Decision of 29 May 1974, BVerfGE 37, 271 (*Solange I*).

<sup>99</sup> See eg *Bundesverfassungsgericht*, Decision of 22 October 1986, BVerfGE 73, 339 (*Solange II*); and *Corte costituzionale*, Decision of 5 June 1984, Sentenza N. 170/1984 (*Granital*). Further J Kühling, ‘Fundamental Rights’ in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (2nd edn, Hart/CH Beck 2011) 479.

<sup>100</sup> Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, para 4. This was later supplemented by international sources, in particular the ECHR, see Case 4/73 *Nold v Commission* [1975] ECR 491, para 13.

<sup>101</sup> The term was introduced in *Bundesverfassungsgericht*, Decision of 15 January 1958, BVerfGE 7, 198, 205 (*Lüth*), para 27.

<sup>102</sup> Art 2 TEU.  
<sup>103</sup> S Mangiameli, ‘Article 2 [The Homogeneity Clause]’ in HJ Blanke and S Mangiameli (eds), *The Treaty on European Union (TEU): A Commentary* (Springer 2013) 114 (original emphases omitted).

<sup>104</sup> Treaty of Amsterdam art 1(8); subsequently art 6 TEU (Nice version). On the detailed genesis of this provision see Mangiameli (n 103) 110–15.

<sup>105</sup> Art 49(1) TEU.

accession, be in compliance with these values. Being committed to respecting them in the future is not enough, which would be the language used with regard to objectives. As to the latter, in cases where the European Council has determined 'a serious and persistent breach by a Member State of the values referred to in Article 2 [TEU]',<sup>106</sup> the Council may suspend certain rights of the Member State in question, including voting rights in the Council.<sup>107</sup> Hence, in order to belong to the Union, and in order to retain one's voice within it, Member States need to respect the values of the Union. The same cannot be said for the pursuit of Union objectives, which, in this vein, may explain why they now take a back seat in the Treaties behind the Union's values.

Through this process of 'thickening' of the EU legal order, in other words through its 'constitutionalization', the role of objectives within the EU legal order changed profoundly. As the ECJ asserted in *Internationale Handelsgesellschaft*, the protection of fundamental rights would henceforth have to 'be ensured within the framework of the structure and objectives of the Community'.<sup>108</sup> Thus, with the increasing 'thickening' of the legal order, objectives had to be contextualized with other emerging norms and normative elements.

In addition to features such as direct effect and primacy, this turn from functionality to overarching goals, and the emergence of normative foundations, in particular fundamental rights, was for many scholars a sign of the constitutionalization of the Union.<sup>109</sup> For Armin von Bogdandy, then, the rise of such founding principles goes hand in hand with a declining importance of objectives. He argues that only initially were the objectives enshrined in the Treaties 'at the centre of efforts to develop an "overarching conception"'.<sup>110</sup> Subsequently, he concludes that due to the 'multiplication of these objectives this approach, however, lost its persuasiveness'.<sup>111</sup> More strongly, Franz Reimer contends that the concept of *Zielbedarf* proffered by Ipsen, which served both as the 'vanishing point and source of legitimacy for all Community action while at the same time a sign for the lacking *Kompetenz-Kompetenz* of the Communities', has disappeared altogether.<sup>112</sup> He argues that as a unitary legal person aiming to be understood as a 'community of destiny and values',

<sup>106</sup> Art 7(2) TEU.

<sup>107</sup> Art 7(3) TEU.

<sup>108</sup> *Internationale Handelsgesellschaft* (n 100) para 4 (emphasis added).

<sup>109</sup> In this context J d'Aspremont and F Dopagne, 'Two Constitutionalisms in Europe: Pursuing an Articulation of the European and International Legal Orders' (2008) 68 *ZaöRV* 939, 943–50, distinguish between 'substantive' constitutionalism, ie value-based, and 'systemic' constitutionalism, eg direct effect and primacy.

<sup>110</sup> A von Bogdandy, 'Founding Principles of EU Law: A Theoretical and Doctrinal Sketch' (2009) 16 *ELJ* 95, 99.

<sup>111</sup> *ibid.* He sees the replacement of the former 'specific objectives' of Articles 2 and 3 EC by current art 3 TEU as evidence for this.

<sup>112</sup> (In the original: 'Fluchtpunkt und Legitimationstitel allen Gemeinschaftshandelns, zugleich Ausdruck fehlender Kompetenz-Kompetenz der Gemeinschaften') Reimer (n 5) 992. He writes with regard to the (then) looming Constitutional Treaty. His findings can, overall, be transferred to the primary law as amended by the Lisbon Treaty.

the EU is defined rather by catalogues of values and fundamental rights than by provisions on objectives.<sup>113</sup> Moreover, in view of the competence catalogues now contained in the Treaties, he argues that objectives have lost their ‘competence-enabling function’ (*zuständigkeitseröffnende Funktion*), which he considers a paradigm shift.<sup>114</sup>

This shift in role and importance of objectives in the course of progressing ‘constitutionalization’ should not be confused with the obsolescence of Union objectives or as them not being constitutional norms. It is not mutually exclusive to assert the ‘thick’ or ‘constitutional’ quality of the EU legal order while at the same time acknowledging the remaining, albeit diminished, significance of objectives within it. The ‘duty to observe’<sup>115</sup> Union objectives today represents a constitutional obligation. They still are ‘binding and must be read together if they are to be properly applied’.<sup>116</sup> They remain a cardinal interpretive device. As the ECJ ruled repeatedly, EU law is to ‘be interpreted and applied in the light of’ the Treaty objectives.<sup>117</sup> This is still valid, as evidenced by the recent case law of the ECJ which draws on Union objectives in a variety of contexts, including disputes regarding the correct legal basis and justifications for restrictions of fundamental freedoms.<sup>118</sup>

However, while the EU still lacks a *Kompetenz-Kompetenz*, the crucial difference, compared to the outset of the integration process, is that primary law objectives do not serve anymore as an independent source of, and boundaries to, the powers of the Union. Acting beyond the boundaries of the powers conferred upon the Union, ie acting *ultra vires*, is not the same thing as acting outside of its goals. This applies to both general and specific objectives. The Treaties require the Union and its institutions to take them into account in the various policy fields<sup>119</sup> but allows for wide discretion as to the measures

<sup>113</sup> (In the original: ‘Schicksals- und Wertegemeinschaft’) *ibid*.

<sup>114</sup> *ibid* 993, also 1009, referring to the failed Constitutional Treaty.

<sup>115</sup> Case 8/57 *Groupement des hauts fourneaux et aciéries belges v High Authority* [1958] ECR English special edition 245, para 8.

<sup>116</sup> *ibid*; see also Case 6/72 *Continental Can* [1973] ECR 215, para 23. Arguing for the binding nature of the objectives also Pechstein (n 5) 19 (marginal no 3); Reimer (n 5) 997; and Calliess (n 5) 90.

<sup>117</sup> Joined Cases 6 and 7/73 *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission* [1974] ECR 223, para 32. See also eg Case 53/81 *Levin* [1982] ECR 1035, para 15; and Case 15/81 *Gaston Schul Douane Expediteur BV v Inspecteur der Invoerrechten en Accijnzen* [1982] ECR 1409, para 33. In this vein also A Dashwood *et al.*, *Wyatt & Dashwood’s European Union Law* (6th edn, Hart 2011) 24.

<sup>118</sup> eg Case C-130/10 *Parliament v Council* [2012] OJ C295/2, paras 61–65 (concerning the proper legal basis for certain counterterrorism measures, in which the objectives of the AFSJ and the CFSP were invoked by the parties); Case C-202/11 *Anton Las v PSA Antwerp NV* [2013] OJ C164/3, paras 26–27 (concerning the free movement of workers and the objective of preserving the linguistic diversity in the EU according to art 3(3) TEU); and Joint Cases C-274/11 and C-295/11 *Spain and Italy v Council* [2013] OJ C164/3, para 48 (stressing that enhanced cooperation is to further the ‘objectives of the Union’ according to art 20(2) TEU); and Case C-137/12, *Commission v Council* (ECJ, 22 October 2013) para 56 (concerning scope of the Common Commercial Policy).

<sup>119</sup> See eg Case C-268/94 *Portugal v Council* [1996] ECR I-06177, para 23; and Case C-166/07 *Council v Parliament (International Fund for Ireland)* [2009] ECR I-07135, para 45.

to be taken,<sup>120</sup> especially where different objectives may be clashing.<sup>121</sup> Instead, they become goals which shape and guide the exercise of powers defined elsewhere and embedded in a more sophisticated, ‘thickened’ legal order, much in the same way as constitutional objectives found in national legal orders.

This is reflected in the evolution of Treaty language over time, which captures the move away from the functional international organization and towards national constitutional orders with regard to the role of objectives as legal norms. Until the Lisbon Treaty reform, there was no unified competence catalogue in the Treaties as there is now in Articles 2 to 6 TFEU.<sup>122</sup> Even the ‘implied powers’ doctrine, according to which the EU acquires external powers where common rules have been adopted or where these are necessary to complement existing internal powers,<sup>123</sup> has been included in the post-Lisbon Treaties.<sup>124</sup>

By contrast, the 1957 EEC Treaty contained ‘aims’ (Article 2) and ‘activities’ (Article 3) but did not explicitly refer to conferral of competences. In the later TEC, as amended by the Maastricht Treaty, the principle of conferral was codified by stipulating that ‘[t]he Community shall act within the limits of the powers conferred upon it by this Treaty *and* of the objectives assigned to it therein’.<sup>125</sup> According to this formulation, the competences of the Community were circumscribed by *both* conferred powers and objectives.

In the post-Lisbon version of the Treaties, however, it is stated that ‘the Union shall act only *within the limits of the competences* conferred upon it by the Member States in the Treaties *to attain the objectives set out therein*’.<sup>126</sup> Thus, objectives are no longer, in their own right, a source for establishing the powers of the Union.<sup>127</sup> Today, objectives and powers of the Union are

<sup>120</sup> See eg Case C-268/94 *Portugal v Council* [1996] ECR I-06177, para 37.

<sup>121</sup> Case 112/80 *Dürbeck* [1981] ECR 01095, para 44.

<sup>122</sup> The clarification of competences, until then provided by rather scattered Treaty provisions and through ECJ case law, had been a major issue on the agenda ever since the Nice Treaty. To which extent this cataloguing in the TFEU was a success is, however, debateable. See Piris (n 54) 74–8; T Tridimas, ‘Competence after Lisbon: The Elusive Search for Bright Lines’ in D Ashiagbor, N Countouris and I Lianos (eds), *The European Union after the Treaty of Lisbon* (CUP 2012) 47; and rather sceptically R Schütze, ‘Lisbon and the Federal Order of Competences: A Prospective Analysis’ (2008) 33 *ELRev* 709.

<sup>123</sup> Starting with Case 22/70 *Commission v Council (ERTA)* [1971] ECR 263; clarified in Opinion 1/03 (*Lugano Convention*) [2006] ECR I-1145; see further M Cremona, ‘External Relations and External Competence of the European Union’ in P Craig and G de Búrca, *The Evolution of EU Law* (2nd edn, OUP 2011) 217–68.

<sup>124</sup> Art 3(2) TFEU; art 216(1) TFEU.

<sup>125</sup> Art 3b(1) EC (1992 consolidated version) (emphasis added). Note also art 3b(3) EC (1992 consolidated version): ‘Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.’ These formulations remained also after the Amsterdam and Nice revisions. The ECJ endorsed this formulation in *Opinion 2/94* [1996] ECR I-1759, para 23.

<sup>126</sup> Art 5(2) TEU (emphases added).

<sup>127</sup> This conclusion challenges the position maintained by some authors that acts beyond the objectives of the Union would have to be considered *ultra vires*, rather than looking at competence norms. See Müller-Graff (n 5) marginal no 179; similarly Reimer (n 5) 992–3; but cf

set apart. Union competences, now catalogued elsewhere, are to be exercised with a view of pursuing the objectives. This is confirmed by other provisions in the Treaties. According to Article 3(6) TEU, '[t]he Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties.'<sup>128</sup> According to Loïc Azoulai, '[t]his clearly indicates a change of perspective',<sup>129</sup> given that now 'objectives are made subject to the competences listed in the Treaties'.<sup>130</sup> In this same vein, Article 13(2) TEU distinguishes between boundaries imposed by powers and a conformity requirement with regard to objectives: 'Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them.'

Objectives and competences now appear as two related yet distinct constitutional norm categories, next to other archetypical ones such as individual rights, procedural norms or constitutional commands.<sup>131</sup> While keeping in mind that EU competences are still conferred and not inherently all-encompassing, this mirrors the position of objectives in the national constitutional order rather than that of a functional international organization.

A conduit between objectives and competences exists in the form of the 'flexibility clause' now found in Article 352 TFEU (ex 308 EC). In case EU action becomes necessary 'within the framework of the policies defined in the Treaties to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers', such powers can be created following a special procedure, which requires unanimity in the Council and the consent of the European Parliament.<sup>132</sup> This provision has been used generously in the past, which was sanctioned by and large by the ECJ.<sup>133</sup> As Joseph Weiler already noted in the pre-Lisbon context, this interpretation 'meant that it would become virtually impossible to find an activity which could not be brought within the objectives of the Treaty'.<sup>134</sup>

P Craig, 'The ECJ and *ultra vires* action: A conceptual analysis' (2011) 48 CMLRev 395, who defines EU action *ultra vires* in terms of competences alone rather than drawing on objectives.

<sup>128</sup> Art 3(6) TEU (emphasis added).

<sup>129</sup> L Azoulai, 'Introduction: The question of competence' in L Azoulai (ed), *The Question of Competence in the European Union* (OUP 2014) 1, 11.

<sup>130</sup> *ibid* 12.  
<sup>131</sup> For the latter, note, for instance, art 6(2) TEU on the accession of the EU to the ECHR. On the typology of norm categories in constitutional law see Badura (n 85) 46 and Sommermann (n 7) 362–73.

<sup>132</sup> Art 352(1) TEU. Note also Declarations No 41 and 42 on art 352 of the Treaty on the Functioning of the European Union, attached to the Lisbon Treaty.

<sup>133</sup> See eg Case 8/73 *Massey-Ferguson* [1973] ECR 897, para 4; Case 242/87 *Commission v Council (Erasmus)* [1989] ECR 1425; Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat* [2008] ECR I-6351, para 235. See further S Douglas-Scott, *Constitutional Law of the European Union* (Longman 2002) 155–63; Lenaerts and Van Nuffel (n 65) 122–4.

<sup>134</sup> Weiler (n 68) 2446; for post-Lisbon, see Rosas and Armati (n 95) 21, who similarly state that 'the breadth of these objectives make [sic] it difficult to imagine areas where the Union clearly has no authority to go.'

It would be misguided, however, to consider this as evidence that the Union's objectives, in their own right, today still serve as the outer limits of its powers. It is not the objectives that create competences here by virtue of their own legal force, but the special procedure established in the Treaties by virtue of the flexibility clause. While used generously in the past, at a time when there were no comprehensive competence catalogues, both the case law of the Court of Justice and the Lisbon reform have endeavoured to circumscribe its use. In Opinion 2/94, the ECJ stressed that this clause 'is designed to fill the gap where no specific provisions of the Treaty confer on the Community institutions express or implied powers to act, if such powers appear none the less to be necessary to enable the Community to carry out its functions with a view to attaining one of the objectives laid down by the Treaty'.<sup>135</sup> It cannot, at any rate, serve to effect a disguised amendment of the Treaties or upset any of its features deemed 'of constitutional significance'.<sup>136</sup>

Moreover, by virtue of the Lisbon Treaty, the flexibility clause 'was substantially amended precisely with a view to minimizing the risk of its abuse in contravention of the spirit of the principle of conferral'.<sup>137</sup> The Treaties now stress that the Commission 'shall draw national Parliaments' attention to proposals based on this Article', making use of the new monitoring mechanisms for the subsidiarity principle of Article 5(3) TEU (the so-called 'yellow card' procedure).<sup>138</sup> In addition, it is now specified that the clause 'cannot serve as a basis for attaining objectives pertaining to the common foreign and security policy'.<sup>139</sup> Moreover, according to Declaration No 41 attached to the Lisbon Treaty on Article 352 TFEU, '[t]he Conference declares that the reference in Article 352(1) of the Treaty on the Functioning of the European Union to objectives of the Union refers to the objectives as set out in Article 3(2) and (3) of the Treaty on European Union and to the objectives of Article 3(5)' with respect to non-CFSP areas of external action. It continues by stating that '[i]t is therefore excluded that an action based on Article 352 of the Treaty on the Functioning of the European Union would only pursue objectives set out in Article 3(1) of the Treaty on European Union', ie the most general of EU objectives ('promote peace, its values and the well-being of its peoples').

Thus, it emerges that it is the flexibility clause which is the basis for establishing additional powers of the Union, to the extent that this is not of 'constitutional significance'. In order to counter the risk of 'competence creep', a number of limits as to the use of this mechanism apply, including subsidiarity

<sup>135</sup> *Opinion 2/94* [1996] ECR I-1759, para 29.

<sup>136</sup> *ibid* para 35. See also Declaration No 42 on Article 352 of the Treaty on the Functioning of the European Union, which reiterates this idea.

<sup>137</sup> Dashwood *et al.* (n 117) 110.

<sup>138</sup> Art 352(2) TFEU. Art 352(3) states in addition that the clause cannot be used to the effect of harmonizing Member State laws or regulations 'in cases where the Treaties exclude such harmonisation'.  
<sup>139</sup> Art 352(4) TFEU.

control, judicial control of disguised treaty amendments and the exclusion of more general objectives and CFSP objectives. If objectives in their own right could serve as a legal basis for the extension of Union powers in the current setting, there would be no need for all these safeguards here. In fact, there would be no need for a 'flexibility clause' in the first place. This is confirmed, *a contrario*, by the absence of similar clauses in the charters of international organizations. As far as they are concerned, by contrast, the truth continues to hold that 'the definition of the objectives of the organization forms the only constitutional limit on the scope of operational activities'.<sup>140</sup>

In sum, the nature of the Union remains in a state of limbo between classic international organization and sovereign State. However, with specific regard to its objective and their role as legal norms, the EU has ventured far from what can be termed a purely *functional* entity.<sup>141</sup> Recalling the example used at the outset, the EU today has evolved into something quite different from the European Commission of the Danube, with regard to which the Permanent Court of International Justice emphasized that it was 'an international institution with a special purpose' and with 'functions bestowed upon it by the Definitive Statute with a view to the fulfilment of that purpose'.<sup>142</sup> With regard to the EU today, there is not one 'special purpose' or even a discrete set of objectives pertaining to a particular policy area that may still have been discernible in the earlier Community Treaties.<sup>143</sup> Instead, the overall purpose of the Union, as the post-Lisbon TEU formulates it with the broadest of brushes, is 'to promote peace, its values and the well-being of its peoples'.<sup>144</sup> This purpose may be interpreted as the fostering of a European 'common good', which is then crystallized further through a range of more specific objectives. More importantly though, the EU legal order has 'thickened', ie it has acquired sophisticated features such as primacy, direct effect, and normative foundations, which make it more akin to a 'constitutional' than a 'functional' entity.

This has two main consequences for Union objectives as legal norms. On the one hand, the EU's existence is no longer defined entirely by the need to serve

<sup>140</sup> Schermers and Blokker (n 17) 766.

<sup>141</sup> See Rosas and Armati (n 95) 12–17 on the State-like and non-State like features of the Union. On the former, they conclude that these features 'are not normally associated with intergovernmental organisations, or, if they are, they are to be seen as exceptions or even anomalies' (14). Similarly, Douglas-Scott (n 133) 260, who concludes that 'even if the EEC did conform to the status of international organisation in its early days (which is unlikely) it has now moved well beyond that.'

<sup>142</sup> *Jurisdiction of the European Commission of the Danube* (n 21) 64.

<sup>143</sup> See also, commenting on the general objectives of the failed Constitutional Treaty, L Azoulay, 'Article I-3' in L Burgorgue-Larsen, A Levade and F Picod (eds), *Traité établissant une Constitution pour l'Europe* (Bruylant 2007) vol 1, 60, 62: 'On ne saurait, reconnaissons-le, être plus généreux et moins sélectif dans la promesse de bienfaits sublunaires.' Similarly, Piris (n 54) 73, states that the objectives of art 3 TEU, 'when compared with the past Treaties, go in the direction of respecting human values and caring for the well-being of the people'.

<sup>144</sup> Art 3(1) TEU.

certain functions. It does not only *strive* for particular future deliverables, it also *stands* for certain values. In other words, its *Zielbedarf* has decreased. On the other, with a view to promoting these manifold facets of the ‘common good’, the EU cannot automatically claim any powers, or take whatever measure it pleases. Objectives and competences have grown into two distinct norm categories of EU primary law. While the former can inform and serve the interpretation of the latter, objectives neither create nor delimit competences any longer. Through the ‘thickening’ of the Union legal order, such pursuits must be made with the powers conferred elsewhere in the Treaties, and must be compatible with the overall structure of EU law and in consistence with the normative foundations of the constitutional law of the EU.

#### V. THE END(S) OF EUROPE: *ZIELBEDARF* AND *FINALITÉ*

As outlined above, the EU legal order has matured into what can be termed a ‘constitutionalized’ entity. This has consequences for the legal properties of the Union’s objectives as legal norms. As was argued, Union objectives and competences have evolved into two distinct norm categories. This section argues that in addition, a distinction must be made between the pursuit of Union objectives as a constitutional duty and the pursuit of particular future form of the Union.

The EU is unlikely to have reached its end point yet, but continues to evolve. In other words, the question of its *finalité* is still an open one. To recall Pescatore’s observation from 1972, it was behind the objectives of the then Community that ‘a more distant *finalité*, that of political union’ loomed.<sup>145</sup> This then raises the question whether the pursuit of the Union’s objectives is also propelling it, as a legal construct, into a certain direction. *Finalité* has been a prominent topic in EU scholarship, especially when linked to the constitutionalization debate in the EU.<sup>146</sup> While to some the question of *finalité* and the pursuit of Union objectives may appear as one and the same, upon closer inspection they must be recognized as distinct.

Using a formulation with clear Kelsian undertones, Matthias Ruffert calls Article 3 TEU the ‘basic norm of the programme of integration’.<sup>147</sup> He contends that even though EU objectives are very closely related to

<sup>145</sup> Pescatore (n 13) 327.

<sup>146</sup> See eg C Joerges, Y Meny, JHH Weiler (eds), *What Kind of Constitution for What Kind of Polity? Responses to Joschka Fischer* (European University Institute 2000), which also reproduces Joschka Fischer’s speech at the Humboldt University in Berlin on 12 May 2000 entitled ‘From Confederacy to Federation: Thoughts on the Finality of European Integration’ (19–30); N Walker, ‘After *Finalité*? The Future of the European Constitutional Idea’ in G Amato, H Bribosia and B de Witte (eds), *Genèse et destinée de la Constitution européenne* (Bruylant 2007) 1245; also Walker (n 69) 100; and A Follesdal, ‘Towards a stable *finalité* with federal features? The balancing acts of the Constitutional Treaty for Europe’ (2005) 12 JEPP 572.

<sup>147</sup> (In the original: ‘Grundnorm des Integrationsprogramms’) Ruffert (n 65) marginal no 1.



national constitutional objectives, within the Union legal order they have a more important role to play, as they point the integration process into a particular direction.<sup>148</sup> Similarly, Christian Calliess observes that objectives, representing this basic norm of the integration programme, impose a 'standstill' obligation which prohibits the progress achieved in the pursuit of the objectives from being undone.<sup>149</sup> He furthermore points to the teleological interpretation of the ECJ as using objectives to advance integration.<sup>150</sup> For him, integration thus represents a one-way process, in which the pursuit of Union objectives requires, if anything, more integration.

However, such views intermingle the pursuit of Union objectives as a standing constitutional obligation with the changing structure and nature of the EU, as well as with the vertical allocation of powers between Union and Member States. This disregards the objectives of the Union as being part of the constitutional law of the Union as it stands. These norms neither exhaust themselves in creating momentum for deepening integration nor do they necessarily require it. Whether the existential 'need for objectives' characteristic of international organizations will become altogether obsolete depends on reaching a terminus of integration. It would not, however, abrogate the *constitutional duty* to pursue Union objectives through whichever kind of 'final' format the EU would assume.

If this end point were to be a (federal) State, then the existential need for objectives would vanish entirely. In this sense, *finalité* signals the end of *Zielbedarf*. In terms of its nature, the Union would have crossed the line demarcating statehood. However, even in that case, it would remain bound to pursue its constitutional objectives in much the same way. The important difference here is that the Union would be equipped with a *Kompetenz-Kompetenz*, ie in theory it would become the site of allocating competences freely so as to optimize the effective pursuit of its objectives. Nevertheless, as in any federal State (assuming the EU would not become a centralized State), competences would remain divided between the federal level and the subunits, and constitutional rules would continue to exist which govern the division of competences.<sup>151</sup>

<sup>148</sup> *ibid*, marginal no 2.

<sup>149</sup> Calliess (n 5) 91; referring to Joined Cases 80 and 81/77 *Société Les Commissionnaires Réunis SARL v Receveur des douanes* [1978] ECR 927, para 36: 'Any prejudice to what the Community has achieved in relation to the unity of the market moreover risks opening the way to mechanisms which would lead to disintegration contrary to the objectives of progressive approximation of the economic policies of the Member States set out in Article 2 [TEC]'.

<sup>150</sup> Calliess (n 5) 85.

<sup>151</sup> Rosas and Armati (n 95) 16 stress that the principle of conferral 'is not unknown in the constitutions of certain federal states and it is therefore open to debate whether the principle of conferral amounts to a state or a non-state feature'. See further on the federalist paradigm in EU law, R Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (OUP 2009); and E Cloots, G De Baere and S Sottiaux (eds), *Federalism in the European Union* (Hart 2012).

If, on the contrary, one employs the term *finalité* as ‘a negative check on any further integration’,<sup>152</sup> then the EU would continue to retain certain core characteristics of an international organization, including importantly that of attributed powers. Nevertheless, even in a state of arrested integration, the Union would still be bound to the objectives already present in primary law and be obliged to pursue them, albeit in a way that would not necessitate further integration.

What unites these reflections on *finalité*, as Neil Walker rightly underlines, both the ones arguing in favour of more and those arguing for less integration, ‘is a somewhat static view of the political community’,<sup>153</sup> which also sits rather uneasily with the evidence of a more dynamic understanding of constitutional law in general, not only concerning the EU. Even in an allegedly ‘final’ politico-legal construct, a constant duty to optimize the set-up of the polity and its active pursuit of the common good in its various facets continues to exist.

A more nuanced approach to the issue of *finalité* and Union objectives requires distinguishing ‘integration goals’ from substantive constitutional objectives. Müller-Graff, for instance, identified in the pre-Lisbon primary law specific ‘integration objectives’ (*integrationspolitische Ziele*).<sup>154</sup> For him, these were the evocation of ‘economic and social cohesion and solidarity among Member States’<sup>155</sup> and the task of the Union ‘to organise, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples’,<sup>156</sup> which has to be viewed in conjunction with the notion of the ‘ever closer union among the peoples of Europe’.<sup>157</sup>

This view suggests that further integration would be necessary for the ‘effective’ pursuit of certain other, substantive objectives.<sup>158</sup> This entails that integration *tout court* is not an end in itself. As Ruffert underlines, the goal is not integration for the sake of integration, but the achievement of certain goals *through* integration.<sup>159</sup> But integration, then, should be understood rather as a *means* to pursue constitutional objectives better—and not the only way, as not all Union objectives have to be pursued through deeper integration at all times. Whether more integration is necessary remains a question as to which level

<sup>152</sup> Walker (n 146) 1253, who points out the rather diverse positions that have been connected to *finalité*.<sup>153</sup> *ibid* 1254.

<sup>154</sup> P-C Müller-Graff, ‘Verfassungsziele der EG/EU’ in M Dausen (ed), *Handbuch des EU-Wirtschaftsrechts* (loose-leaf commentary, 27th edn, CH Beck, October 2010) marginal no 119. However, the current edition does not include this distinction anymore, Müller-Graff (n 5). Also P Dollat, *Droit européen et droit de l’Union européenne* (3rd edn, Sirey 2010) 113 speaks of ‘objectifs politiques internes de l’intégration de l’Union’.

<sup>155</sup> Art 2 EC. Note that art 3(3), third subpara TEU uses a slightly different formulation (‘economic, social and territorial cohesion, and solidarity among Member States’).

<sup>156</sup> Art 1(3) EC; this formulation is not reiterated in the post-Lisbon Treaties.

<sup>157</sup> First recital of the preamble TEC; in the Lisbon version, it is referred to in the preambles of both the TEU and TFEU, as well as in the operative part in art 1(2) TEU.

<sup>158</sup> The term ‘effective’ is used here in the sense of ‘goal attainment’, drawing on the definition elaborated by O Young, *International Governance: Protecting the Environment in a Stateless Society* (Cornell University Press 1994) 144–5.<sup>159</sup> Ruffert (n 65) marginal no 3.

of governance offers the best platform for the pursuit of objectives, ie a question of competence allocation and the use of existing Union competences as ‘governed by the principles of subsidiarity and proportionality’.<sup>160</sup> Drawing again on the terminology of Robert Alexy, integration can be perceived as one way of ‘optimizing’ the distribution of powers with a view to the most effective pursuit of constitutional objectives.<sup>161</sup> Only in the case where the Union level would be deemed preferable, yet competences remain wanting, would questions of conferral of additional powers upon the EU and thus of further integration arise. This, however, would require sufficient political will to make use of the flexibility clause (Article 352 TFEU) or to amend the Treaties (Article 48 TEU). Reliance on constitutional aspirations alone, while being a valid argument in this endeavour, will not suffice in itself to bring about a revamping of the EU and its order of competences.

In sum, the usefulness of the concept of *finalité* resides in the potential for justifying major shifts in the allocation of competences between the Union and the Member States. However, this leaves unaffected the continuous duty to pursue Union objectives, as they are codified in the Treaties, within the existing framework and distribution of powers. Just as any political community, including States, the EU is under constant pressure to adapt to forces and developments from both within and without in living up to the goals enshrined in its highest laws.

#### VI. CONCLUSION

Having taken the principle of ‘speciality’ from the law of international organizations as the point of departure, and having contrasted this subsequently with the widening of the goals of the EU as well as the maturing of its legal order in the course of history, this article observed a shift in the position assumed by the objectives enshrined in the highest laws of the Union. This shift can be summed up in three main points.

First, Union objectives are more numerous and ambitious than ever. There is nothing ‘functional’ or ‘specialized’ about the EU anymore. Instead of an international body set up with a specific task or delimited field of activity in mind, the Treaties now mandate the EU to cater to the general wellbeing of its citizens, as well as to ‘good global governance’<sup>162</sup> in the world at large.

Second, the increased number and audacity of Union objectives notwithstanding, and because of the ‘thickening’ of the EU legal order, the Union is less than ever dependent on objectives in order to justify its very existence. This does not mean that the existential need for objectives—the

<sup>160</sup> Art 5(1) TEU.

<sup>161</sup> Alexy (n 84) 47.

<sup>162</sup> Art 21(2)(h) TEU. On the additional conundrums that this raises, see J Larik, ‘Entrenching Global Governance: The EU’s constitutional objectives caught between a sanguine world view and a daunting reality’ in B Van Vooren, S Blockmans and J Wouters (eds), *The EU’s Role in Global Governance: The Legal Dimension* (OUP 2013) 7.

*Zielbedarf*—has vanished altogether for the EU. As Gráinne de Búrca rightly argues, ‘the EU in its current state of evolution remains significantly dependent not just on input and output legitimacy, but also on its mission legitimacy.’<sup>163</sup> However, as the retracing of the evolution of EU law has shown, while it is not a State with an overarching *Kompetenz-Kompetenz*, its legal order has come to increasingly exhibit constitutional features, including values and fundamental rights, which show what the EU stands for, and not merely what it is to strive after. Most importantly from a legal point of view, in the course of this ‘thickening’ of the legal order, objectives and competences have evolved into two distinct norm categories in EU law, which is akin to the situation usually found in national constitutional law. While the former continue to serve an important purpose for interpreting the Treaties, including at times the outer contours of competences, on their own they are no source for EU competences. Instead of creating powers under the rationale of the need to fulfil a certain ‘task’, they provide a sense of purpose as to the exercise of these powers through the structures of the constitutionalized legal order. This interpretive function is now their hallmark and characterizes their continued significance within the legal order.

Third, as Union objectives on their own cannot create any new powers for the Union, they equally cannot propel it as a polity towards a particular ‘final’ format. The guidance they provide as constitutional principles is continuous and is to be distinguished from the question of the ultimate form of the Union, its *finalité*. While the effective pursuit of these objectives can (but does not have to) serve as an argument for more integration, integration for the sake of integration is certainly not a constitutional objective.

In the Nobel Peace Prize Lecture in December 2012, Commission President Barroso remarked that European unity ‘is not an end in itself, but a means to higher ends’.<sup>164</sup> These can today be found, rather fittingly, in the highest laws of the Union—its ‘constitutional charter’. But while these ‘higher ends’ call upon the EU’s institutions to foster various aspects of the common good, they are not a call to more power.

<sup>163</sup> In this respect, de Búrca (n 66) 36.

<sup>164</sup> ‘From war to peace: A European tale’, Nobel Peace Prize Lecture on behalf of the European Union by Herman Van Rompuy, President of the European Council and José Manuel Durão Barroso, President of the European Commission, Oslo, 10 December 2012.