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Study on
The Åland Islands in International and European Union Law: Present Situation and (Potential) Problems

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Abstract: The Åland Islands archipelago enjoys a special international status *sui generis,* which essentially encompasses demilitarisation, neutralisation, and autonomy. This status is guaranteed under international law by the agreements of 1921, 1940, and 1947, which are still in force. Furthermore, there are convincing reasons to assume that the Åland Islands regime has grown into European customary law. By virtue of her international (treaty) obligations, Finland cannot unilaterally change this status under the present conditions, irrespective of domestic (constitutional) decisions. While integration into NATO's collective defence system and the EU's Common Security and Defence Policy structures is compatible with the special status of the Åland Islands, care must be taken by Finland and her partners to ensure that the obligations arising from these developments are fulfilled in accordance with the demilitarised and neutralised status of the archipelago. This includes that the use by Finnish troops for preventive defence, beyond the exceptions laid down in the 1921 Åland Agreement, is only permitted in the case (of threat) of an immediate and clearly identifiable attack.

The autonomous character of the Åland Islands was established under a League of Nations dispute settlement and implemented, inter alia, in Finnish legislation. Its essence even grew into customary law. The arrangements of 1921, however, do not constitute a bilateral treaty between Finland and Sweden. The UN assumes that the international mechanism to protect Åland's autonomy did not become obsolete with the demise of the League of Nations, but was only "suspended until such time as an express decision has been taken by the United Nations to put it back into force"[1]. A corresponding proposal could be submitted, in any case, both by Finland and/or Sweden or possibly even by any other UN member state, for discussion in the Sixth Committee. However, the final decision to re-activate this special mechanism would have to be adopted by the UN General Assembly.

EU Law applies to the Åland Islands in principle; however, Finland's Accession Treaty to the EU to which Protocol No. 2 on the Åland Islands was annexed, established a number of specific rules which are still in force today. This, most notably, results in the limited application of value added tax and excise duties in the Åland Islands. Therefore, the rules on customs procedures apply with respect to the movement of goods to and from the Åland Islands. In addition, other provisions of Union law, in particular those relating to fundamental freedoms and European state aid law, may be relevant in view of the special fiscal status of the Åland Islands. However, assessing individual cases would require further information and in-depth studies. Irrespective of the requirements set out in the said Protocol, the EU is obliged to respect the national identity of Member States pursuant to Article 4 para. 2 TEU; this obligation includes respect for the special status of the Åland Islands under both international and Finnish constitutional law.

1 UN Economic and Social Council, Study on the Legal Validity of the Undertakings Concerning Minorities, 7 April 1950, E/CN.4/367, p. 69.

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Abbreviations

Abbreviation	Meaning
AEUV	Vertrag über die Arbeitsweise der Europäischen Union
ÅFS	Författningssamling
AIEM	Arbitrio sobre Importaciones y Entregas de Mercancías en las Islas Canarias
BGBl	Bundesgesetzblatt
CJEU	Court of Justice of the European Union
CRII	Coronavirus Response Investment Initiative
CSDP	Common Security and Defence Policy
CUP	Cambridge University Press
EC	European Community
EEC	European Economic Community
EEC	European Economic Community
EMCS	Excise Movement and Control System
EU	European Union
EUV	Vertrag über die Europäische Union
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Studies
ICRC	International Committee of the Red Cross
IHL	International Humanitarian Law
ILC	International Law Commission
LoN	League of Nations
NATO	North Atlantic Treaty Organization
OCTs	Overseas countries and territories
OJ	Official Journal
OUP	Oxford University Press
PoUS	Proof of Union Status
STZ	Special Tax Zone
TEC	Treaty on European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UCC	Customs Code of the European Union
UN	United Nations
USSR	Union of Soviet Socialist Republics
UTP	Union Transit Procedure
VAT	Valued Added Tax
VCLT	Vienna Convention on the Law of Treaties

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I. Scope and Structure of the Study

1 The present study had been commissioned by the government of the Åland Islands in reaction to current developments which have or might have an impact on the special status of the Islands both under public international law and European Union law. The study was submitted on 2 November 2023. It is structured in three parts. *Firstly,* it examines the (possible) implications of Finland's accession to the North Atlantic Treaty Organization (NATO) on 4 April 2023, based on the Accession Protocol signed on 5 July 2022, and the country's future integration into the EU's Common Security and Defence Policy (CSDP) on the demilitarised and neutralised status of the Åland Islands (Part I). *Secondly,* it assesses the question of whether there is an international obligation to safeguard the Swedish character of the Islands and whether it is possible to (re-)activate the international mechanism for monitoring Finland's fulfillment of her obligations with regard to the autonomous character of the Åland Islands, which was foreseen, *inter alia,* in the arrangements made in 1921 between the representatives of Finland and Sweden (Part II). *Thirdly,* it addresses the special status of the Åland Islands under EU law (Part III). This includes in particular issues arising from EU tax, customs, and state aid legislation. Furthermore, it sets out the legal framework for considering the special character of the Islands under such EU legal provisions that allow for a certain room for national identities and national interests.

II. Geographical and Historical Context

2 The unique location of the Åland Islands at the southern end of the Gulf of Bothnia between Finland and Sweden has always caused special geostrategic desires of various Baltic Sea states throughout history.[2] While Åland was initially under Swedish rule, the archipelago belonging to the Grand Duchy of Finland became part of the Russian Empire as a result of the Russo-Swedish War in 1809 and remained under Russian rule until the outbreak of the 1917 Revolution. Shortly after Finland proclaimed its independence, a

[2] For a detailed account of the historical events, see M. Ackrén, The Åland Islands: 100 years of stability, in B. C.H. Fong and A. Ichijo (eds), *The Routledge Handbook of Comparative Territorial Autonomies* (London, Routledge, 2022), pp. 107-118.

dispute arose between Finland and Sweden over sovereignty over Åland. On Great Britain's initiative, the Council of the League of Nations sought to resolve this dispute[3] and ultimately upheld Finnish sovereignty over the Åland Islands, while at the same time recommending in its Resolution of 24 June 1921[4] that the demilitarised and neutralised status, as already established under the 1856 Paris Peace Treaty System, as well as the fairly extensive autonomy for the islands shall be guaranteed as part of a holistic solution. While this status was largely respected, there were also times when the islands were fortified. Despite the said 1856 Paris Peace Treaty, Åland was fortified by Russia during World War I (with the approval of France and Great Britain), then occupied by Sweden and Germany in 1918.[5] In the course of World War II, there were plans to fortify the islands (e.g., the Stockholm Plan), but these were neither implemented nor was Åland involved in active hostilities. The Islands were only fortified by Finland for defence purposes.[6]

III. Terminology

3 The special status of the Åland Islands is often described as resting on two pillars, namely "*demilitarisation* and *neutralisation* on the one hand, and political and cultural *autonomy* [i.e., the 'Swedishness' of the Islands] on the other."[7] Before going into the details, some general issues related to the mentioned concepts should be clarified. According to general understanding, the concept of **demilitarisation**

> "denotes the reduction or even total abolishment of armament (Disarmament) and military presence in a specific geographic area. In operational terms it implies the

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[3] On the reports of the two expert groups, see G. Nolte, Some Observations on the 1920 and 1921 Expert Reports Regarding the Åland Islands Question, in P.B. Donath et al. (eds), *Der Schutz des Individuums durch das Recht* (Springer, Berlin, Heidelberg, 2023), pp. 93-100.

[4] The Resolution is reprinted in L. Hannikainen and F. Horn (eds), *Autonomy and Demilitarisation in International Law: The Åland Islands in a Changing Europe* (Kluwer, The Hague et al., 1997), pp. 297-8.

[5] See, e.g., L. Hannikainen, The Continued Validity of the Dernilitarised and Neutralised Status of the Åland Islands, 54 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1994), pp. 617-8; S. Spiliopoulou Åkermark, S. Heinikoski and P. Kleemola-Juntunen, *Demilitarization and International Law in Context: The Åland Islands* (New York, Routledge, 2018), at Chapter 2.4.

[6] Cf. Hannikainen, *supra* note 5, p. 618.

[7] A. Rosas, The Åland Islands as a Demilitarised and Neutralised Zone, in L. Hannikainen and F. Horn (eds), *Autonomy and Demilitarisation in International Law: The Åland Islands in a Changing Europe* (Kluwer, The Hague et al., 1997), p. 23, emphasis added.

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dismantlement of arms, ammunition, and armed forces in order to put them beyond military use."[8]

4 In essence, demilitarisation can be understood as a restriction of national sovereignty, as it aims at limiting state powers in certain (military) respects.[9] This does not imply, however, that the state exercising sovereignty over the respective territory may not defend it by resorting to military means.[10] According to a conceivably rough categorisation, demilitarised regimes can be distinguished with regard to the extent of their qualitative and quantitative restrictions, as well as with regard to the duration of and legal basis for their validity.[11] Such special regimes are often established by international treaties (which may develop into customary law), but they can also be imposed by UN Security Council resolutions or international court decisions.[12] Examples of demilitarised areas are:[13] Spitsbergen/Svalbard, the Kuwait-Saudi Neutral Sector, particular zones between North and South Korea, between Israel and its neighbouring states or between Iraq and Kuwait, the 'secure havens' in the former Yugoslavia, Cyprus, particular Greek Islands and the entire Antarctica.

5 The notion of **neutralisation**, although closely interwoven with the above concept,[14] can be described as an

„institution in international law through which a given area is removed from the ambit of lawful armed hostilities. The precise meaning of the concept varies

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8 K. Kingma and N. Schrijver, Demilitarization, in A. Peters (ed.), *Max Planck Encyclopedia of Public International Law* (online edn., OUP, October 2015), para. 1. Similar notions are being used by Hannikainen, *supra* note 5, p. 616; Rosas, *supra* note 7, p. 23; C. Ahlström, Demilitarised and Neutralised Zones in a European Perspective, in L. Hannikainen and F. Horn (eds), *Autonomy and Demilitarisation in International Law: The Åland Islands in a Changing Europe* (Kluwer, The Hague et al., 1997), p. 42.

9 Ahlström, *supra* note 8, p. 43, who also points at another possible understanding in legal doctrine as a "limitation on the States' capacity to act" (ibid.).

10 Hannikainen, *supra* note 5, p. 616.

11 Ahlström, *supra* note 8, p. 42.

12 See, with further examples, Kingma and Schrijver, *supra* note 8, paras 6 *et seq*.; J. Crawford, *Brownlie's Principles of Public International Law* (9th edn., OUP, Oxford, 2019), pp. 197-8.

13 Ahlström, *supra* note 8, pp. 46-8; J. Goldblat, *Arms Control. The New Guide to Negotiations and Agreements* (SAGE Publications, London et al., 2002), pp. 187 *et seq.*; Kingma and Schrijver, *supra* note 8, paras 6 *et seq*. Further examples can be found in the ICRC's IHL database at https://ihl-databases.icrc.org/en/customary-ihl/v2/rule36, visited on 16 February 2024.

14 Rosas, *supra* note 7, p. 23: "border-line between the two concepts is not clear-cut".

considerably […], but there is agreement about its utility as a technical term in international law.“[15]

6 Demilitarisation and neutralisation often accompany each other which may lead to the effect of a “positive multiplier”[16]. Generally speaking, such a combination can be understood as an expression of the firm desire to keep the respective area free of all conflicts.[17]

7 **Autonomy** – just like the above concepts – cannot be described by a uniform definition. The notion usually refers to a form of self-government in a

> “territorially circumscribed singular entity in what otherwise would be a unitary State, introducing thereby an asymmetrical feature in the State, through transfer of exclusive law-making powers on the basis of provisions, which often are of a special nature, so that the State level remains with the residual powers, while the sub-State level relies on enumerated powers.”[18]

8 In addition to this territorial connotation, there are also forms of cultural, functional and personal autonomy, i.e., non-territorial concepts.[19]

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[15] E. Afsah, Neutralization, in A. Peters (ed.), *Max Planck Encyclopedia of Public International Law* (online edn., OUP, February 2011), para. 1. Similar notions are being used by Hannikainen, *supra* note 5, p. 616; Rosas, *supra* note 7, p. 23.

[16] Ahlström, *supra* note 8, p. 43.

[17] Hannikainen, *supra* note 5, p. 616.

[18] M. Suksi, Autonomy, in A. Peters (ed.), *Max Planck Encyclopedia of Public International Law* (Online edn., OUP, April 2021), para. 2. See also the characteristics described by H. Hannum and R. Lillich, The Concept of Autonomy in International Law, 74 *American Journal of International Law* 74(1980), pp. 886 *et seq.;* Y. Dinstein, Autonomy regimes and international law, 56 *Villanova Law Review* (2011), p. 437.

[19] Suksi, *supra* note 18, para. 15.

IV. Part I: Demilitarised and Neutralised Status of the Åland Islands

1. Recent Developments in Finnish Security and Defence Policy

9 On 4 April 2023, Finland joined the North Atlantic Treaty Organization (NATO), ending decades of non-alignment policies. As the Accession Protocol[20] signed on 5 July 2022 does not contain any special provisions for the Åland Islands, Finland, which has exercised sovereignty over the archipelago since 1921, became a full member to the defence alliance within her internationally recognised borders, including the Åland Islands. This, *inter alia,* results in the unrestricted validity of the core provision of Article 5 of the NATO Treaty[21] with regard to the Åland Islands, meaning that an armed attack (within the meaning of Article 6 NATO Treaty) on the islands would trigger the other NATO members' obligation to assist Finland "by taking forthwith […] such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area" (Article 5 NATO Treaty). In such a case, Finland would exercise her natural right to self-defence, as codified in Article 51 UN Charter[22], collectively in alliance with her NATO partners to protect the islands as an integral part of Finland's territory.

10 In the context of Finland's NATO accession, the country's defence capabilities became a point of discussion and some voices have been raised (again[23]) to consider more flexibility for deploying Finnish military personnel on the Åland Islands.[24] Although this is not (yet) reflected in official Government positions[25], according to a 2022 poll cited by the Finnish

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[20] Protocol to the North Atlantic Treaty on the Accession of the Republic Finland of 5 July 2022, available at https://www.nato.int/cps/en/natohq/official_texts_213294.htm, visited on 16 February 2024.

[21] North Atlantic Treaty of 4 April 1949 and its Protocols, available at https://www.nato.int/cps/en/natohq/official_texts_17120.htm, visited on 16 February 2024. See, on Art. 5 NATO Treaty, T. Marauhn, North Atlantic Treaty Organization (NATO), in A. Peters (ed.), *Max Planck Encyclopedia of Public International Law* (Online edn., OUP, July 2016), para. 15.

[22] Charter of the United Nations of 26 June 1945.

[23] This has already been discussed in a different context. See for example the comprehensive analysis of L. Hannikainen, The Continued Validity of the Dernilitarised and Neutralised Status of the Åland Islands, 54 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1994), pp. 614-651.

[24] See, e.g., the opinions expressed by Pekka Toveri on Euronews. Cf. D. Mac Dougall, 'Arming an archipelago: Is time running out for Europe's oldest DMZ?' via Euronews, https://www.euronews.com/2023/04/24/arming-an-archipelago-is-time-running-out-for-europes-oldest-dmz, visited on 16 February 2024. For a more comprehensive account of the earlier debate on Finland's (possible) NATO membership, see Spiliopoulou Åkermark, Heinikoski and Kleemola-Juntunen, *supra* note 5, at Chapter 4.4.

[25] The government programme of June 2023 does not contain any indication of the intention to change the

daily *Keskisuomalainen*[26], 58% of Finns would even support some sort of military presence on the islands, while only 16% were against and 26% remained undecided. This raises several questions regarding the current situation and (unilateral) disposability of the demilitarised and neutralised status of the Åland Islands under international law.

11 Against this backdrop, the normative content of the special status of the Åland Islands is recalled (at 2.) before the scope of such military measures compatible with the special status of Åland (at 3.) and possibilities, if any, to alter the current *status quo* are assessed (at 4.). Subsequently, possible effects of Finland's accession to NATO and the country's integration into the EU's CSDP will be examined (at 6.).

2. Applicable Law

a) International Treaties

12 Åland's demilitarised and neutralised status has been codified in a number of international agreements.[27] The first of its kind was the *Convention between France and Great Britain and Russia respecting the Aaland Islands* of 30 March 1856 (hereinafter: the 1856 Åland Convention) which was annexed to the *Peace Treaty between Great Britain, France, the Ottoman Empire, Sardinia and Russia* of the same day (hereinafter: the 1856 Paris Peace Treaty). The 1856 Paris Peace Treaty, which ended the Crimean War (1854-56), confirmed the "force and validity" of the 1856 Åland Convention "as if it formed a part"[28] of the Treaty. Article 1 of the said Convention stipulated:

> "that the Åland Islands shall not be fortified, and that no military or naval establishments whatsoever shall be maintained or created there."

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status of the Åland Islands in this respect, cf. The Finnish Government, A strong and committed Finland Programme of Prime Minister Petteri Orpo's Government, 20 June 2023, available at https://valtioneuvosto.fi/en/governments/government-programme#/, visited on 16 February 2024.

[26] 'USU-gallup: Enemmistö kansasta sallisi sotilaallisen läsnäolon Ahvenanmaalla' via Keskisuomalainen, https://www.ksml.fi/uutissuomalainen/4640326, visited on 16 February 2024.

[27] For an overview, see Hannikainen, *supra* note 5, pp. 614-615; Rosas, *supra* note 7, pp. 25-29; S. Harck, Åland Islands, in A. Peters (ed.), *Max Planck Encyclopedia of Public International Law* (online edn., OUP, January 2008), paras 3 *et seq.*; Spiliopoulou Åkermark, Heinikoski and Kleemola-Juntunen, *supra* note 5, at Chapter 2.

[28] Art. XXXIII of the 1856 Peace Treaty of Paris.

13 Although the 1856 Åland Convention is considered as still in force,[29] greater weight[30] is generally attached to the *Convention Relating to the Non-Fortification and Neutralisation of the Aaland Islands* of 20 October 1921[31] (hereinafter: the 1921 Åland Convention), which to this day is the most detailed international agreement on the special status of the Åland Islands and, measured by the number of contracting parties[32], the most far-reaching in geographical terms. Under Article 1 of the 1921 Åland Convention, Finland is obliged

> "not to fortify that part of the Finnish Archipelago which is called 'the Aaland Islands.'"

14 Article 6 of the 1921 Åland Convention further states:

> „In time of war, the zone described in Article 2 shall be considered as a neutral zone and shall not, directly or indirectly, be used for any purpose connected with military operations."

15 As the Preamble points out, the 1921 Åland Convention was concluded to implement a corresponding recommendation formulated in the Council of the League of Nations *Resolution on the Aaland (Åland) Islands* of 24 June 1921[33] as a result of the dispute

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[29] Rosas, *supra* note 7, pp. 25, 36 (at note 13) refers to the preamble of the 1856 Åland Convention which indicates that the Convention would not prejudice "the obligations assumed by Russia in the Convention of March 30, 1856, regarding the Aaland Islands". Similar Hannikainen, *supra* note 5, p. 619.

[30] Hannikainen, *supra* note 5, p. 619 seems to attribute this to the fact that with regard to the obligations set out by the 1856 Åland Convention, all parties have assumed "later conventional obligations" (ibid.) in the sense of a *lex posterior*. Furthermore, it could be added that those later conventional obligations are more specific compared to the general terms used in the 1856 Åland Convention. Similar: Rosas, *supra* note 7, p. 25; Spiliopoulou Åkermark, Heinikoski and Kleemola-Juntunen, *supra* note 5, at Chapter 2.1, adding: "As a result of its detailed content and wide range of states parties, it [the 1921 Åland Convention] is understood as being the hub of the demilitarisation and neutralisation of the Åland Islands."

[31] An English translation of the 1921 Åland Convention is reprinted in L. Hannikainen and F. Horn (eds), *Autonomy and Demilitarisation in International Law: The Åland Islands in a Changing Europe* (Kluwer, The Hague et al., 1997), pp. 304-308.

[32] The ten signatory states of the 1921 Åland Convention are (in alphabetical order): Denmark, Estonia, Finland, France, Germany, Italy, Latvia, Poland, Sweden, and the United Kingdom.

[33] The Resolution is reprinted in L. Hannikainen and F. Horn (eds), *Autonomy and Demilitarisation in International Law: The Åland Islands in a Changing Europe* (Kluwer, The Hague et al., 1997), pp. 297-8.

settlement mentioned at the beginning.[34] Article 2 of the 1921 Åland Convention provides for some territorial definitions, whereas Articles 3, 4 and 5 set out a detailed description of such conduct which is prohibited in relation to the defence of the island in times of war and peace. These provisions are of great importance in determining the permissible scope of military activities not precluded by the demilitarised status of the Åland Islands (at 3.). Article 6 establishes the neutralised status described above. Article 7 sets up a mechanism within the framework of the League of Nations to ensure compliance with the obligations set out in the Convention.[35] In addition, it describes Finland's obligation to defend the Åland Islands ("shall take necessary measures") in the event of an armed attack. Article 8 underlines the continued validity of the agreement even in the face of changing circumstances in the Baltic Sea. Articles 9 and 10 contain some procedural and general provisions.[36]

16 As far as the legal force of the 1921 Åland Convention is concerned, the overwhelming opinion of international legal scholars is that it continues to exist today.[37] What speaks in favour of the continued validity of the 1921 Åland Convention is that it was not only concluded (one must add: deliberately) without a termination clause, but that Article 8 of

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[34] Cf. Hannikainen, *supra* note 5, p. 620.

[35] However, this provision lost its meaning with the demise of the League of Nations, cf. Rosas, *supra* note 7, p. 34.

[36] For a general overview of the main provisions of the 1921 Åland Convention, see Hannikainen, *supra* note 5, pp. 620-21; Goldblat, *supra* note 13, pp. 189-90; Spiliopoulou Åkermark, Heinikoski and Kleemola-Juntunen, *supra* note 5, at Chapter 2.2.

[37] Cf. H. Rotkirch, The Demilitarization and Neutralization of the Åland Islands: A Regime 'in European Interests' Withstanding Changing Circumstances, 23 *Journal of Peace Research* (1986), p. 372; M. Lehto, Restrictions on Military Activities in the Baltic Sea: A Basis for a Regional Regime?, 2 *Finnish Yearbook of International Law* (1991), p. 57; Hannikainen, *supra* note 5, p. 623 (including further references at note 25); Rosas, *supra* note 7, p. 25, 26 (including references at note 23); Goldblat, *supra* note 13, pp. 189-90; Harck, *supra* note 27, para. 14; Y. Poullie, Åland's Demilitarisation and Neutralisation at the End of the Cold War – Parliamentary Discussions in Åland and Finland 1988–1995, 23 *International Journal on Minority and Group Rights* (2016), p. 181; Spiliopoulou Åkermark, Heinikoski and Kleemola-Juntunen, *supra* note 5, at Chapter 2.1. Only a few doubts were raised against this assessment, e.g., by E. Castrén, Die Entmilitarisierung und Neutralisierung der Alandinseln, in F.A. Frhr. v.d. Heydte, K. Zemanek et al. (eds), *Völkerrecht und rechtliches Weltbild, Festschrift für Alfred Verdross* (Springer, Vienna, 1960), p. 107; T. Modeen, Völkerrechtliche Probleme der Åland-Inseln, 37 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1977), p. 607. These doubts essentially stem from what are perceived to be significant changes in circumstances since the conclusion of the treaty, as well as the failure to apply the system created in the Convention during the fortification of the islands in the course of World War II. As has been correctly analyzed, e.g., by Hannikainen, *supra* note 5, p. 637; Rosas, *supra* note 7, p. 25; Modeen, *op. cit.,* p. 607, these arguments can be captured in legal terms under the *rebus sic stantibus* resp. the *desuetudo* principle.

the Convention even decouples the validity of its arrangements from any external change in circumstances:[38]

> "The provisions of this Convention shall remain in force in spite of any changes that may take place in the present status quo in the Baltic Sea."

17 There are good reasons to conclude that the contracting parties, by inserting this clause, intended to exclude or even effectively excluded the application of the *rebus sic stantibus* principle.[39] According to this principle, which enjoys customary law status[40], the Parties to a treaty may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from the treaty. Whether it would be correct to assume, however, that such an exclusion of the *rebus sic stantibus* principle, even if originally intended by the Parties to the 1921 Åland Convention, could still continue to exist under all conceivable and future circumstances and despite of possible changes in state practice can be left open at this point.[41] In any case, it seems safe to assume that the mentioned principle could only be considered, if at all, under the strictest conceivable conditions, which would not have been fulfilled in the past, neither by the plans for the fortification of the islands of 1939 (which were opposed by the Soviet Union) nor by the temporary (however uncontested) fortification of the islands during World War II or a later change in the geopolitical environment.[42]

18 Another strong argument for the continued legal force of the 1921 Åland Convention is that none of the parties to the Convention have ever explicitly renounced it. On the contrary, they have even confirmed its legal force on various occasions:[43] In 1953, for example, the Federal Republic of Germany declared its intention to re-apply the 1921 Åland Convention as one of the treaties concluded by the German Reich.[44] The

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[38] Cf. Hannikainen, *supra* note 5, pp. 621, 636; Rosas, *supra* note 7, p. 25.
[39] On this discussion, cf. Hannikainen, *supra* note 5, pp. 636 et seq.
[40] T. Giegerich, Art. 62, in O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties, A Commentary* (2nd edn., Springer, Berlin, 2018), paras 103 *et seq.*; W. Heintschel von Heinegg, Treaties, Fundamental Change of Circumstances, in A. Peters (ed.), *Max Planck Encyclopedia of Public International Law* (online edn., OUP, March 2021), paras 4 *et seq.*
[41] *Supra* note 39.
[42] Cf. Hannikainen, *supra* note 5, pp. 622-3, 636-7; Rosas, *supra* note 7, p. 25-6.
[43] Cf. Hannikainen, *supra* note 5, pp. 623 *et seq.*; Rosas, *supra* note 7, p. 26.
[44] Bekanntmachung vom 13. März 1953 über die Wiederanwendung von Vorkriegsverträgen, BGBl. 1953

original term *Wiederanwendung* (re-application) implies that the Convention remained in force. Furthermore, in 1992, the Government of Latvia notified the UN Secretary-General, who assumed the functions of depositary of the 1921 Åland Convention, of the following: "The Ministry of Foreign Affairs declares, in conformity with article 8 and article 10 of the Convention [...] that the said Convention is still binding for the Republic of Latvia and the provisions so accepted shall be observed in their entirety."[45] In the same year, the Government of Estonia declared: "The Ministry of Foreign Affairs of the Republic of Estonia [notifies] the declaration of continuity by Estonia regarding the [said] Convention."[46] In addition, the well-documented controversies between the Finnish Navy and the Ålandic government regarding the interpretation of certain aspects of the 1921 Åland Convention demonstrate that Finland, in principle, considers herself bound by the said Convention.[47] Furthermore, Finland's accession to the European Union, which at the time included five[48] of the ten signatory parties to the 1921 Åland Convention, was based on the understanding that the Convention would continue to exist.[49] In the early accession procedure, the European Commission stated that "the present status was defined in the Treaty on demilitarisation and neutralisation of the Aland islands concluded in 1921, under the auspices of the League of Nations."[50] In similar vein, the

> "special status that the Åland islands enjoy under international law"[51]

II, S. 117; Hannikainen, *supra* note 5, p. 623.

45 Notification of the Government of Latvia received by the UN Secretary-General on 14 April 1992, available at https://treaties.un.org/pages/LONViewDetails.aspx?src=LON&id=579&chapter=30&clang=_en, visited on 16 February 2024.

46 Notification of the Government of Estonia received by the UN Secretary-General on 21 July 1992, available at https://treaties.un.org/pages/LONViewDetails.aspx?src=LON&id=579&chapter=30&clang=_en, visited on 16 February 2024. Cf. Spiliopoulou Åkermark, Heinikoski and Kleemola-Juntunen, *supra* note 5, at Chapter 2.2.

47 Cf. Rosas, *supra* note 7, pp. 26-7, 32-3; Poullie, *supra* note 37, p. 205.

48 Prior to the accession of Finland and Sweden (in 1995), Denmark, Germany, France, Italy, and the United Kingdom were at the same time EU member states and signatory parties to the 1921 Åland Convention.

49 Cf. Hannikainen, *supra* note 5, pp. 624; Rosas, *supra* note 7, pp. 26; Spiliopoulou Åkermark, Heinikoski and Kleemola-Juntunen, *supra* note 5, at Chapter 2.2.

50 *The challenge of enlargement. Commission opinion on Finland's application for membership. Document drawn upon the basis of SEC (92) 2048 final,* 4 November 1992, Bulletin of the European Communities, Supplement 6/92, p. 24.

51 Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the

has been recognised in the Preamble of the *Finnish Accession Protocol* of 1994.[52] Nevertheless, the operative part of the Protocol does not contain any further reference to the scope of this special status under international law, which is why disagreements arose in particular as to whether this should also touch upon Åland's demilitarised and neutralised status.[53] However, this question would at most have an impact on the application of certain provisions of EU law, but would not alter the demilitarised and neutralised status of Åland as such. This view is further supported by Article 351 TFEU (formerly: Article 234 para. 1 EEC-Rome, Article 234 para. 1 EC-Maastricht/Nice)[54] which states:

> "The rights and obligations arising from agreements concluded before 1 January 1958 […] shall not be affected by the provisions of the Treaties."

19 As a result, there are no doubts that the 1921 Åland Convention is still in force.

20 Åland's demilitarised status was further codified after the end of the Winter War (1939-40), which was caused by the Soviet invasion of Finland, in the *Treaty between Finland and the Union of Soviet Socialist Republics concerning the Åland Islands* of 11 October 1940 (hereinafter: the 1940 Åland Treaty).[55] Under Article 1 of the 1940 Åland Treaty

> "Finland pledges to demilitarise the Åland Islands, not to fortify them, and not to put them at the disposal of the armed forces of foreign states."

21 In addition to reaffirming the special status of the archipelago, Article 3 of the 1940 Åland Treaty grants the Union of Soviet Socialist Republics (USSR) the

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Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded, Protocol No 2 – on the Åland islands, OJ C 241, 29 August 1994, p. 352.

[52] One the Accession Protocol, see N. Fagerlund, The Special Status of the Åland Islands in the European Union, in L. Hannikainen and F. Horn (eds), *Autonomy and Demilitarisation in International Law: The Åland Islands in a Changing Europe* (Kluwer, The Hague et al., 1997), pp. 227-8; Harck, *supra* note 27, para. 20.

[53] Cf. Fagerlund, *supra* note 52, p. 228.

[54] On the predecessor provision, cf. Hannikainen, *supra* note 5, pp. 647-8.

[55] See, in more detail, Hannikainen, *supra* note 5, pp. 622-3; Harck, *supra* note 27, para. 11.

> "right to maintain an own consulate on the Åland Islands that beyond usual consular functions supervises the fulfilment of the commitments stated in Article 1 in this treaty concerning the non-fortification and demilitarization of the Åland Islands."

22 The continuation of the 1940 Treaty was later confirmed by the *Protocol between the Government of the Russian Federation and the Government of the Republic of Finland concerning Inventory of the Judicial Basis for the Bilateral Relations between Finland and Russia* of 11 July 1992.[56] Following the Allied victory over Nazi Germany, with which Finland had cooperated during World War II, the most recent international codification concerning the special status of the Åland Islands can be found in the *Treaty of Peace with Finland* of 1947 (hereinafter: the 1947 Peace Treaty).[57] It provides in its Article 5 that:

> "The Aaland Islands shall remain demilitarised in accordance with the situation as at present existing."

23 To conclude, the persuasive and overwhelming view among international legal scholars considers the 1921 Åland Convention as well as the 1940 Åland Treaty and the 1947 Peace Treaty to be in force.[58] As a Contracting Party, Finland is bound by the obligations assumed in these Treaties.

b) Customary Law Nature of the Åland Regime

24 In addition to the treaty basis of the demilitarised and neutralised status of the Åland Islands, some legal scholars have argued that the Åland regime has grown into the status of (European) customary law.[59] This would have the consequence that even non-contracting states have to refrain from all actions that run counter to the demilitarisation and neutralisation of the archipelago.[60] Under general international law,

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[56] Hannikainen, *supra* note 5, p. 623; Rosas, *supra* note 7, p. 25; Harck, *supra* note 27, para. 13.
[57] Hannikainen, *supra* note 5, p. 623; Rosas, *supra* note 7, p. 25; Harck, *supra* note 27, para. 12.
[58] Harck, *supra* note 27, para. 14.
[59] See, e.g., Rotkirch, *supra* note 37, p. 373; Hannikainen, *supra* note 5, p. 626; Rosas, *supra* note 7, pp. 29, 35 (including at note 41); Poullie, *supra* note 37, p. 205; Spiliopoulou Åkermark, Heinikoski and Kleemola-Juntunen, *supra* note 5, at Chapter 4.1.
[60] Cf. Rosas, *supra* note 7, p. 35.

the emergence of such a customary law norm requires for the following two elements: (1) a general state practice (*consuetudo*), which is (2) accepted as law (*opinio iuris sive necessitatis*).[61]

25 (1) With regard to the practice required for the establishment of a customary law rule, it can be observed that the Åland regime has existed in its current form for over 100 years.[62] The corresponding practice of keeping the Åland Islands largely free of military use was established by the contracting parties to the treaties of 1856, 1921, 1940 and 1947 and was in any case accepted, if not supported, by the other Baltic Sea states[63]. The crucial question is whether the uniformity and consistency of the mentioned practice could be contested by the fact that there were periods in history (albeit comparatively short) when the islands were fortified or prepared for military purposes[64]. As the ICJ stated in its *Nicaragua Case*,

> "[i]t is not to be expected that in the practice of States the application of the rules in question should have been perfect […]. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule."[65]

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[61] Art. 38 para. 1 lit. b ICJ Statute. On the concept, see *North Sea Continental Shelf (Federal Republic of Germany/Netherlands; Federal Republic of Germany/Denmark),* ICJ Reports 1969, p. 3, 43; T. Treves, Customary International Law, in A. Peters (ed.), *Max Planck Encyclopedia of Public International Law* (online edn., OUP, November 2006); A. Verdross and B. Simma, *Universelles Völkerrecht: Theorie und Praxis* (3rd edn., Berlin, Duncker & Humblot, 2012), paras 549 *et seq.*; Report of the International Law Commission, Sixty-eighth session (2 May-10 June and 4 July-12 August 2016), A/71/10, Chapter V, pp. 74 *et seq.*; J. Crawford, *Brownlie's Principles of Public International Law* (9th edn., Cambridge, CUP, 2019), pp. 21 *et seq.*

[62] This temporal aspect is emphasised, e.g., by Rotkirch, *supra* note 37, p. 373.

[63] Cf. Hannikainen, *supra* note 5, p. 626 speaks of that status of the islands as "one of the stabilising factors in the politics" (id.) in that area.

[64] Finland fortified the Åland Islands in the course of the Winter War (1939-40) and the Continuation War (1941-44), without, however, the islands being involved inactive hostilities. Cf. Hannikainen, *supra* note 5, pp. 622-3.

[65] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Merits, Judgment, ICJ Reports 1986, p. 14, para. 186; Treves, *supra* note 61, para. 37.

26 Therefore, the fact that the Åland Islands were used for military purposes during the World Wars does not *a priori* preclude the emergence of a rule of customary law. Rather, the fact that the respective parties returned to the non-fortified and neutralised status of the islands after the cessation of the respective hostilities and even made it part of the treaties subsequently concluded can be seen as a (re-)affirmation of a general rule. Defining the exact content of this rule is rather complicated, but it seems reasonable to assume that it covers the demilitarised and neutralised status of the islands as such, as well as certain exceptions that are widely respected in the practice of the Baltic Sea States.[66]

27 (2) The proof of the subjective element, *opinio iuris,* is known to be associated with some difficulties, as it is not always clear whether states are engaging in a certain practice and thus expressing the legal opinion of being bound by a general rule or just follow a pattern of behaviour which they feel they could change at any time if they so which.[67] In the Åland case, things may be clearer, since it can be assumed that the respective states, notwithstanding they have always acted in fulfilment of their respective treaty obligations, have maintained and constantly reaffirmed their practice over the past 100 years, thereby expressing the view that the demilitarisation and neutralisation of the Åland Islands are of indispensable importance for the overall security situation in the Baltic Sea. It therefore seems justified to assume that the 1921 Convention, which at the same time forms the basis of this state practice and contains the most detailed regulations, should now largely be regarded as a codification of customary law rules.

c) A Permanent Settlement?

28 The question of whether the Åland regime has grown into a *permanent settlement* or an *objective regime* with the consequence to create binding legal effects vis-à-vis all States (*erga omnes*), has been discussed in earlier legal writings.[68] The origin of this discussion in relation to the Åland Islands dates back to the 1920 Report of the Committee of Jurists, which was one of the two groups of experts[69] entrusted with the task of clarifying the

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[66] Cf. Rosas, *supra* note 7, p. 29.
[67] See, generally, Treves, *supra* note 61, para. 9.
[68] For an overview, see Hannikainen, *supra* note 5, p. 624; Rosas, *supra* note 7, p. 28.
[69] On the reports of the two expert groups, see Nolte, *supra* note 3, pp. 93-100.

status of the archipelago under the aegis of the League of Nations, that – in relation to the 1856 Treaty of Paris – spoke of 'the objective nature of the settlement of the Aaland Islands question'.[70] Although this concept had several proponents, the International Law Commission (ILC) did not include it into its final draft for the 1969 Vienna Convention on the Law of Treaties[71] (VCLT) and, given the "somewhat obscure and controversial"[72] doctrine surrounding it, it cannot be considered as forming part of contemporary international law. Therefore, it seems appropriate not to address this principle any further in the context of this study.

3. Military measures compatible with the Special International Status of Åland

29 Before examining the possibilities of changing the *status quo* of the Åland Islands, a closer look should be taken at exceptions within the demilitarised and neutralised regime in place. In this respect, the exceptions formulated in the 1921 Åland Convention are considered decisive:[73] For Times of peace, it determines that the

> "right to enter the archipelago and to anchor there temporarily cannot be granted by the Finnish Government to more than one warship of any other Power at a time" (Article 4 para. 2 lit. b).

30 Without limiting this to specific states, Article 5 permits

> "innocent passage through the territorial waters".

31 Article 4 para. 2 lit. a allows Finland

> "[i]n addition to the regular police force […] if exceptional circum- stances demand, send into the zone and keep there temporarily such other armed forces as shall be strictly necessary for the maintenance of order."

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[70] C. Ryngaert, Objective Regime, in A. Peters (ed.), *Max Planck Encyclopedia of Public International Law* (online edn., OUP, May 2023), para. 15.
[71] United Nations Treaty Series, vol. 1155, p. 331; Rosas, *supra* note 7, p. 28.
[72] Ryngaert, *supra* note 70, para. 15.
[73] On the exceptions described below, see Rosas, *supra* note 7, pp. 30 *et seq.*

32 Under Article 4 para. 2 lit. b Finland

> "reserves the right for one or two of her light surface warships to visit the islands from time to time. These warships may then anchor temporarily in the waters of the islands. Apart from these ships, Finland may, if important special circumstances demand, send into the waters of the zone and keep there temporarily other surface ships, which must in no case exceed a total displacement of 6000 tons."

33 Article 4 para. 2 lit. c allows Finland to

> "fly her military aircraft over the zone, but, except in cases of *force majeure,* landing there is prohibited."

34 In contrast to the aforementioned provisions, which apply in peacetime, Article 6 para. 2 addresses the case of a war involving the Baltic Sea, and allows Finland,

> "in order to assure respect for the neutrality of the Aaland Islands, temporarily to lay mines in the territorial waters of these islands and for that purpose to take such measures of a maritime nature as are strictly necessary."

35 In the case of "a sudden attack either against the Aaland Islands or across them against the Finnish mainland" Article 7 section II obliges Finland to

> "take the necessary measures in the zone to check and repulse the aggressor until such time as the High Contracting Parties shall in conformity with the provisions of this Convention be in a position to intervene to enforce respect for the neutrality of the islands."

36 In the past, some controversies arose over the interpretation of these exemption provisions or the prohibitions regulated in the Convention. This concerned, among other things, the status of the Finnish Coast Guard or the visiting rights for Finnish light surface warships.[74] The Finnish Coast Guard, although subordinate to the Ministry of the Interior as part of regular border control, did for a certain time operate vessels within the

[74] Cf. Rosas, *supra* note 7, p. 32-3.

demilitarised and neutralised zone that could be considered warships under a formal notion, although never used for this purpose.[75] The other issues concerned the Finnish Navy's anchoring and mooring rights on the Åland Islands.[76]

4. Legality of Measures Altering the *Status Quo*

37 Against this background, the question arises whether it would be permissible to unilaterally change the demilitarised and neutralised status of the Åland Islands. Apart from the rather obvious observation that the aforementioned agreements do not provide for the option of a withdrawal or termination,[77] unilateral treaty changes could only be achieved by invoking a fundamental change in circumstances (*rebus sic stantibus* principle).[78] This issue has already been examined in detail in earlier works[79] with regard to the developments in the years following the entry into force of the 1921 Åland Convention up to World War II and beyond that to the global political changes brought about by the collapse of the Soviet Union. In view of the above-described intention of the contracting parties to the 1921 Åland Convention to limit the invocation of *rebus sic stantibus* by means of Article 8, it must at least be assumed that the mentioned principle could only be considered, if at all, under the strictest conceivable conditions.[80] Since the above-mentioned works convincingly conclude that earlier changes of circumstances were not sufficient to unilaterally renounce the fundamental obligations regarding the demilitarisation and neutralisation of Åland, it remains to be answered whether this would be assessed differently today. In this respect, the unlawful war of aggression waged by the Russian Federation against Ukraine and the resulting change in the global security

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[75] Cf. Rosas, *supra* note 7, p. 32.

[76] Cf. Rosas, *supra* note 7, p. 33.

[77] As Hannikainen, *supra* note 5, p. 632, pointed out, this is in principle codified by Art. 56 VCLT, which of course applies by virtue of its customary law nature. On the customary contents of the said provision, see T. Giegerich, Art. 56, in O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties, A Commentary* (2nd edn., Springer, Berlin, 2018), paras 52-3.

[78] Even though the *rebus sic stantibus* principle has been codified in Art. 62 VCLT, the said provision does not apply to the Åland agreements of 1921, 1940, and 1947 due to the non-retroactivity of the VCLT (Article 4). However, the principle applies on a customary law basis, cf. Hannikainen, *supra* note 5, p. 636. In general on the customary law nature of the said principle, see T. Giegerich, Art. 62, in O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties, A Commentary* (2nd edn., Springer, Berlin, 2018), paras 103 *et seq.*; Heintschel von Heinegg, *supra* note 40, paras 4 *et seq.*

[79] Hannikainen, *supra* note 5, pp. 631 *et seq.*; Rosas, *supra* note 7, pp. 25 *et seq.*

[80] *Supra* note 42.

situation must be considered. Even if the strategic importance of the Åland Island and the question of whether its demilitarisation and neutralisation make Finland particularly vulnerable to a possible attack can be argued about, it must at least be taken into account from a legal point of view that the conduct of hostilities of this war do not extend to the Baltic Sea region. It can even be argued that a possible attack against the archipelago has become somewhat less likely since Finland joined NATO on 4 April 2023. While such threats, fortunately enough, seem remote at present, it should also be emphasised that military precautions may well be taken in case of threat of an immediate and clearly identifiable attack. However, such action must not be done by unilaterally denouncing existing treaty obligations, but rather as a permissible exception to the existing treaties on demilitarised and neutralised status (see above at 3.).

38 In addition, it should be noted that the above comments refer only to the possibilities of changing the status of the Åland Islands under the *law of treaties*. Since the status of the Islands has become part of (European) *customary law*, mere consensus of the respective contracting parties would not be sufficient to change the legal status of the archipelago. Although customary law rules may be subject to change or can even dissolve[81], given the more than 100-year existence of the special status of the Åland Islands, which is essentially respected by all Baltic Sea states, any possible change of customary law could only be considered under a high threshold. In particular, it seems justified to set the requirements for the consistency of the relevant state practice and the necessary *opinio juris* comparatively high, since the Aland regime has a very well-established basis in customary law, the reversal of which presupposes an at least equally strong practice and legal conviction by (at least) all Baltic states.

39 Due to its treaty and customary law basis, Finland cannot unilaterally change the status of the Åland Islands.

[81] In general, see Treves, *supra* note 61, para. 85.

5. Special Issues Related to the Russian Consulate in Mariehamn

40 While it is generally acknowledged that under Article 4 in conjunction with Article 20 of the 1963 Vienna Convention on Consular Relations[82] (VCCR) every state is free to decide on the size and staff of consular missions, the situation might be different with regards to the Åland Islands. There is a bi-lateral treaty obligation of Finland based on Article 3 of the 1940 Åland Treaty, which provides that the Soviet Union had the right to maintain a consulate on the Islands that beyond usual consular functions would supervise the fulfilment of the commitments stated in this Treaty concerning the non-fortification and demilitarisation of the archipelago. The exact size and staffing of the consulate is not clear from this provision. Therefore, it could be argued that while the host State, Finland, cannot unilaterally deprive the Russian Federation (as legal successor of the Soviet Union) of the right to maintain a consulate to monitor the demilitarised and neutralised status of the islands, it could very well, in the exercise of its treaty obligations in good faith, reduce the size of this consulate in accordance with the common principles of diplomatic relations. As these particular matters do not comprise the customary law part of the broader Åland regime, such an approach may reach its limits where the objectives set out in the Convention are compromised. Provided that Finland takes this into account, it may determine the size of the embassy subject to the provisions of Article 20 VCCR[83]. This provision states:

> "In the absence of an express agreement as to the size of the consular staff, the receiving State may require that the size of the staff be kept within limits considered by it to be reasonable and normal, having regard to circumstances and conditions in the consular district and to the needs of the particular consular post."

[82] United Nations Treaty Series, vol. 596, p. 261.

6. Finland’s integration into NATO and the EU’s Common Security and Defence Policy

41 Even though the issues arising from (1) Finnish NATO membership and those related to the country’s (2) integration into the EU’s Common Security and Defence Policy (CSDP) differ with regard to the corresponding treaty basis, the relevant issues that need to be considered here can be described together in somewhat abstract terms. These include, as has been correctly summarised, e.g., by *Sia Spiliopoulou Åkermark*, “planning and conduct of military exercises to remain outside Åland, ensuring that military overflights do not violate the demilitarised zone, that all digital systems are updated with the coordinates of the demilitarised zone and that all NATO staff concerned is aware of the regulations pertaining to the Åland Islands.”[84] These and other activities that require closer examination concern military precautionary measures taken for defence purposes by Finland and her allies.

42 (1) As noted at the outset, the Accession Protocol[85] signed on 5 July 2022 does not contain any special provisions for the Åland Islands. However, in view of the public discussion on the situation of the Åland Islands even before Finland’s accession, it cannot be assumed that the members of the NATO Treaty wanted to leave a legal vacuum on this point. Therefore, it seems plausible to assume that the contracting parties were firmly convinced that the special status of the Åland Islands would continue to be in force without any changes after the country’s accession[86], as it was not the continuation of a well-established rule that would require special codification, but rather any deviation from it.

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[84] S. Spiliopoulou Åkermark, New Contexts for Old Questions – The Centenary of the Åland Islands Solution in a Troubled World, 10 August 2022, via vifanord, available at https://portal.vifanord.de/blog/new-contexts-for-old-questions-the-centenary-of-the-aland-islands-solution-in-a-troubled-world/, visited on 16 February 2024.

[85] Protocol to the North Atlantic Treaty on the Accession of the Republic Finland of 5 July 2022, available at https://www.nato.int/cps/en/natohq/official_texts_213294.htm, visited on 16 February 2024.

[86] This also reflects the position of Finland, which declared in the context of NATO accession talks in the North Atlantic Council that it is still bound to the demilitarised and neutralised status of Aland under international law. See the exchange of letters between the Finnish Minister for Foreign Affairs Pekka Haavisto (letter of 5.7.2022) and the Premier of Åland Veronica Thörnroos (letter of 19.8.2022, ÅLR 2022/5820).

43 At present, it is not apparent that Finland's integration into NATO's collective defence alliance could not be accomplished while maintaining the demilitarised and neutralised status of the Åland Islands. There are no specific treaty obligations that require the use of Åland in a certain (military) way or to dispose of its special status. In this context, it should be recalled that there is already an example of a demilitarised and neutralised area within the NATO area; namely Spitsbergen/Svalbard, which is under the sovereignty of Norway – one of the founding members of NATO.[87] The special status of Spitsbergen is internationally guaranteed by the *Treaty between Norway, The United States of America, Denmark, France, Italy, Japan, the Netherlands, Great Britain and Ireland and the British overseas Dominions and Sweden concerning Spitsbergen*[88] (hereinafter: the 1920 Spitsbergen Treaty) of 9 February 1920.[89] The provisions of the 1920 Spitsbergen Treaty, despite some differences, establish a system quite similar to the Åland regime.[90] As far as defence issues are concerned, Article 9 of the 1920 Spitsbergen Treaty[91] stipulates that the military use of the archipelago shall be "[s]ubject to the rights and duties resulting from the admission of Norway to the League of Nations". Following the demise of the League of Nations, it is now understood that Article 9 of the 1920 Spitsbergen Treaty makes military use subject to the rights and duties arising from membership of the United Nations (as legal successor to the League of Nations).[92] It can therefore be assumed that the prohibition of military use of Spitsbergen does not *per se* prevent integration into the NATO alliance, as long as all actions concerning Spitsbergen by Norway or its allies are limited to individual or collective self-defence (Article 51 UN Charter) of the archipelago.[93]

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[87] Cf. Hannikainen, *supra* note 5, p. 649 *et seq.;* T. Tiilikainen, Åland in European security policy, in A. J.K. Bailes, G. Herolf and B. Sundelius (eds), *The Nordic Countries and the European Security and Defence Policy* (Oxford, OUP, 2006), p. 353. Other examples would include several Greek islands (e.g., Corfu, Paxoi and the Ionian Islands), cf. ibid.

[88] League of Nations Treaty Series, vol. 2, p. 7.

[89] For a more comprehensive account of the legal situation, see G. Ulfstein, Spitsbergen/Svalbard, in A. Peters (ed.), *Max Planck Encyclopedia of Public International Law* (online edn., OUP, September 2019).

[90] Tiilikainen, *supra* note 87, p. 353.

[91] On this issue, see Ulfstein, *supra* note 89, para. 36.

[92] Cf. Ulfstein, *supra* note 89, para. 36.

[93] Cf. Ulfstein, *supra* note 89, para. 37.

44 With regard to the issues at hand, a comparison between Spitsbergen and Åland seems appropriate for the following reasons: First, as in the case of Finland's NATO accession, no special provisions have been included in the NATO treaty regarding the special status of Spitsbergen. Secondly, both areas enjoy a similar status under international law, which even found its treaty basis around the same time in history. In the event of an armed attack on the respective islands, the 1920 Spitsbergen Treaty and the 1921 Åland Convention have come to a different legal arrangement, which, however, ultimately leads to comparable results. While in the Spitsbergen case the right to (individual and collective) self-defence under Article 51 of the UN Charter can be addressed under Article 9 of the Treaty, the 1921 Åland Convention assumes in Article 7 section II that in the event of an attack on Åland, Finland

> "shall take the necessary measures in the zone to check and repulse the aggressor until such time as the High Contracting Parties shall in conformity with the provisions of this Convention be in a position to intervene to enforce respect for the neutrality of the islands."

45 This is tantamount to codifying the inherent right of (individual or collective) self-defence of Finland and her allies.[94] In the light of practice following the entry into force of the UN Charter, it can be assumed that the inclusion of the Åland Islands in the NATO territory is thus possible without any amendment to the relevant treaties, as long as the military engagement is solely for the purpose of defending against an attack and does not go beyond this purpose in time. While it is clear from the above that Finland would be obliged under the 1921 Åland Convention to defend the islands in the event of an armed attack, and would be allowed to do so within the framework of a collective defence alliance such as NATO without violating the exceptions set out in the Convention, the question remains as to the role of the other High Contracting Parties to the 1921 Åland Convention in the case of such sudden attack.

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[94] Similar Hannikainen, *supra* note 5, p. 650.

46 The wording of Article 7 Section II of the 1921 Åland Convention seems to make a distinction[95] between Finland's obligations on the one hand and those of the other High Contracting Parties on the other, which are staggered both in time and in scope. Only Finland "shall take the necessary measures in the zone to check and repulse the aggressor until" the other High Contracting Parties "be in a position to intervene to enforce respect for the neutrality of the islands". By using the word "until" to connect the two parts of the above sentence, the Convention added a temporal element to the effect that Finland (as a sovereign) appears to be the first state to defend the islands until other assistance arrives. With regard to Finland's role, the Convention uses a specific language that clearly includes military measures ("necessary measures […] to check and repulse the aggressor"). With regard to the other parties, the Convention speaks of intervening "to *enforce* respect for the neutrality of the islands" (emphasis added). Based on the language later used in the UN Charter, the concept of *enforcement* could indeed include military means. However, the obligation to enforce respect for the neutrality of the islands could also be sufficiently met, for example, by verbal condemnations or diplomatic notes demanding compliance with Åland's neutralised status.

47 Moreover, if one compares the 1921 Åland Convention with the pre-UN Charter or pre-NATO treaties in which the parties commit themselves to each other's military defence, the wording chosen there could be interpreted as an indication that if the contracting states had wanted to establish a more concrete obligation to provide military assistance under international law, they would have done so explicitly. Article II of the *Triple Alliance Treaty (Dreibundvertrag) of 20 May 1882 between Germany, Austria-Hungary and Italy*[96], for example, requires that the party under attack be given aid and assistance to the best of the other parties' ability ("mit allen ihren Kräften Hilfe und Beistand zu leisten").

48 It could therefore be concluded that while Finland is under an obligation to take immediate military action, the other High Contracting Parties are under an obligation to take

[95] Cf. Rosas, *supra* note 7, p. 34.
[96] Translation by the Authors. The German text is made available at https://germanhistorydocs.ghi-dc.org/pdf/deu/607_Dreibund_187.pdf, visited on 16 February 2024.

supporting measures, which may include military action but does not necessarily require it.[97] The 1921 Åland Convention does not appear to impose any (military) obligations on the other High Contracting Parties that go beyond the mutual assistance clause of Article 5 of the NATO Treaty. Article 7 Section II of the 1921 Åland Convention could only be of additional value with regard to Sweden, as long as its NATO membership is still pending.

49 While the above considerations relate to the case of an immediate attack, Finland's NATO membership may (again[98]) raise the question of the extent to which the 1921 Åland Convention permits military preparations for defence against an armed attack. According to a study by *Mikaela Björkholm* and *Allan Rosas*[99], this question has been answered quite broadly in earlier Finnish military manuals and guidelines. Without re-evaluating these materials, the question remains in particular whether a situation of (perceived) threat would suffice to take military action within the zone defined by Article 2 of the 1921 Åland Convention. This question differs from the debate on a pre-emptive first strike conducted under the notion of self-defence and therefore requires applying different principles. What is at issue here are those measures that do not violate the prohibition of the use of force or violate the territorial integrity of another state, but conflict with the prohibition norms that establish the demilitarised and neutralised status of the Åland Islands, so that they would require an exception. Such exception may be found in Article 7 section II of the 1921 Åland Convention that obliges Finland to "take the necessary measures in the zone to check and repulse the aggressor".[100] The wording implies the existence of an aggression. According to today's understanding of the term, as it is used in the definition of aggression in the UN General Assembly's Resolution 3314[101], this already requires some sort of concrete attacks or at least the deployment of armed forces directed against the territory concerned. This understanding speaks for a rather narrow interpretation of the above exception, which would prohibit preparatory measures for defence in the demilitarised zone that are far in advance. In addition, by reference to the

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[97] Cf. Rosas, *supra* note 7, p. 34.
[98] On the discussion in earlier literature, cf. Hannikainen, *supra* note 5, p. 640; Rosas, *supra* note 7, p. 34.
[99] M. Björkholm and A. Rosas, *Ålandsöarnas demilitarisering och neutralisering* (Åbo, Åbo Akademis förlag, 1990), pp. 109-10.
[100] Cf. Rosas, *supra* note 7, p. 34.
[101] A/RES/3314 (XXIX) of 14 December 1974 with annex.

"neutrality of the zone" Article 7 section II of the 1921 Åland Convention adds a territorial element. This could imply that enemy penetration of the defined zone is required. Furthermore, the provision speaks of a "sudden attack", which could describe an event that has already occurred immediately in time. The word "repulse" also has an active condition according to its ordinary meaning[102], which does not describe preparation against an attack, but its direct push back. Whether this is really required can certainly be questioned in view of the current state of warfare and modern weaponry. Nevertheless, following Allan Rosas' analysis, it still seems appropriate to require that the threat of an attack triggering the Article 7 exception must be "imminent and clearly identifiable."[103] The more far-reaching deployment of troops, as sometimes undertaken at NATO external borders in times of tension, appear inadmissible under the current state of the Åland regime.

50 It should also be noted that Finland is also constrained by the 1921 Åland Convention in that it cannot readily make Aland available for NATO manoeuvres or for the defence of another NATO member. Article 1 of the said Convention clearly states:

> "Finland pledges to demilitarise the Åland Islands, not to fortify them, and *not to put them at the disposal of the armed forces of foreign states*." (emphasis added)

51 (2) As for the European Union, the last Treaty amendment of Lisbon (2009) has introduced, among other things, a mutual assistance and a solidarity clause[104], as well as other measures to promote the integration of defence capabilities of the member states within the framework of its CSDP. Article 42 para. 7 sentence 1 of the Treaty on European Union (TEU)[105] stipulates:

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[102] The Cambridge Dictionary describes it as follows: "to push away or refuse something or someone unwanted, especially to successfully stop a physical attack against you", see at https://dictionary.cambridge.org/dictionary/english/repulse?q=to+repulse, visited on 16 February 2024.

[103] Rosas, *supra* note 7, p. 34. Hannikainen, *supra* note 5, p. 640 holds that the mere "threat of such a sudden attack" (ibid.) would suffice.

[104] Article 47 para. 7 TEU. On this provision in detail, see T. Ramopoulos, Art. 42 TEU, in M. Kellerbauer, M. Klamert and J. Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford, OUP, 2019), pp. 281 *et seq*.

[105] Consolidated version of the Treaty on European Union, OJ C 326, 26 October 2012, pp. 13-390.

"If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter."

52 Primary law contains, especially under Title V of the TEU, detailed provisions[106] on future military integration in the CSDP area. It should be noted, however, that this policy area is guided (above all) by respect for national particularities regarding questions of security and defence. This can already be seen in the sentence that directly follows the mutual assistance and solidarity clause, as it emphasises that it "shall not prejudice the specific character of the security and defence policy of certain Member States" (Article 42 para. 7 sentence 2 TEU). This fundamental decision finds its more general form in the provision of Article 42 para. 2 subpara. 2 TEU which states the following:

"The policy of the Union in accordance with this Section shall not prejudice the specific character of the security and defence policy of certain Member States […]".

53 This provision, which is commonly referred to as the Ireland clause, stipulates a principle of "non-encroachment"[107] and is considered to address the particular situation of states, which have traditionally remained neutral in defence policy matters. Regarding the issue at hand, it should be pointed out that the commentary literature, when discussing Finland, predominantly refers to its (former) non-alignment policy[108], but there are no reasons to assume that the "specific character of the security and defence policy of certain Member States" (Article 42 para. 7 subpara. 2 TEU) would not equally include Åland's well-established status under international law, as it shaped Finland's defence policies for over 100 years. On the contrary, it can be assumed that this clause continues to perform an independent function in this context, even after Finland's NATO accession. This line of thoughts is confirmed when one considers how Union law deals with international

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[106] Worth highlighting are: Art. 2(4), 28, 42(6), 43, 44, 46 TEU.

[107] Ramopoulos, *supra* note 104, para. 10. On the previously mentioned clause in the context of the Maastricht Treaty, see Hannikainen, *supra* note 5, p. 645.

[108] E.g., Ramopoulos, *supra* note 104, para. 10; H.-J. Cremer, Art. 42 EUV, in C. Calliess and M. Ruffert (eds), *EUV/AEUV. Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta* (6th edn., C.H. Beck, Munich, 2022), para. 14; W. Kaufmann-Bühler, Art. 42 EUV, in E. Grabitz, M. Hilf and M. Nettesheim (eds), *Das Recht der Europäischen Union* (C.H. Beck, Munich, supplement 79, Mai 2023), para. 29.

treaties concluded by a Member State before the entry into force of the EU founding treaties. In this context, Article 351 TFEU[109] should be recalled:[110]

> "The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties."

54 All treaties concerning the special status of the Åland Islands were concluded before the date mentioned in the first half-sentence and are therefore considered 'Old Agreements' within the meaning of the above provision. Moreover, by virtue of its *ratio* as well as the pro-international law attitude of Union law, Article 351 TFEU can be applied analogously to norms of customary international law.[111] To the extent that Åland's special status has therefore become part of (European) customary law, it enjoys additional protection. However, even in cases of the existence of such old agreements, this does not necessarily result in a complete exemption from obligations under Union law. On the contrary, the Court of Justice of the EU (CJEU) has formulated significant exceptions to this rule in its case law. According to the Court, Article 351 TFEU "cannot […] be understood to authorise any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU as a foundation of the Union."[112] However, none of these exceptions apply to the Åland situation.

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[109] Formerly: Article 234 para. 1 EEC (Rome), Article 234 para. 1 EC (Maastricht), Article 307 para. 1 EC (Nice).

[110] On the predecessor provision in the present context, cf. Hannikainen, *supra* note 5, pp. 647-8. More generally on this provision, see M. Kellerbauer and M. Klamert, Art. 351 TFEU, in M. Kellerbauer, M. Klamert and J. Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford, OUP, 2019), pp. 2065 *et seq*.

[111] K. Schmalenbach, Art. 351 AEUV, in C. Calliess and M. Ruffert (eds), *EUV/AEUV. Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta* (6th edn., C.H. Beck, Munich, 2022), para. 4.

[112] *Kadi and Al Barakaat International Foundation v Council and Commission,* Joined Cases C-402/05 P and C-415/05 P, Judgment of the Court (Grand Chamber) of 3 September 2008, ECLI:EU:C:2008:461, para. 303.

55 Finally, it should be noted that within the framework of the European Security Policy there is at least one additional guarantee for the preservation of the demilitarised and neutralised status of the Åland Islands that is procedural in nature: namely, the unanimity requirement that applies to this policy area.[113] In decision-making in the relevant fora (i.e., the European Council), Finland would have to vote, also by virtue of its obligations under international (and constitutional) law, in a way that respects the status of Åland. Admittedly, this guarantee is not self-sufficient, at least insofar as it depends on Finland's treaty-abiding behaviour. However, given the thoroughly positive stance of Finland in this regard, the risk should be low at present. Moreover, like Finland, the other parties to the 1921 Åland Convention that are also members of the EU, such as Estonia, France, Germany, Latvia, Poland, and Sweden, would be obliged under international law to exercise their voting rights in the Council on security and defence issues in a way that preserves the demilitarised and neutralised status of Åland.

7. Conclusions on Part I

56 *The Åland Islands' demilitarised and neutralised status is guaranteed under international law by the agreements of 1921, 1940 and 1947, which are still in force. Furthermore, there are convincing reasons to assume that the Åland Islands regime has grown into European customary law. By virtue of her international (treaty) obligations, Finland cannot unilaterally change this status under the present conditions, irrespective of domestic (constitutional) decisions. While integration into NATO's collective defence system and the EU's Common Security and Defence Policy structures is compatible with the special status of the Åland Islands, care must be taken by Finland and her partners to ensure that the obligations arising from these developments are fulfilled in accordance with the demilitarised and neutralised status of the archipelago. This includes that the use of Finnish troops for preventive defence, beyond the exceptions laid down in the 1921 Åland Agreement, is only permitted in the case (of threat) of an immediate and clearly identifiable attack.*

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[113] Cf. Art. 31 para. 1 TEU. With reference to the norms applicable under the Maastricht Treaty, see Hannikainen, *supra* note 5, p. 645.

V. Part II: International Guarantees* for the Autonomy of the Åland Islands

1. Identification of Relevant Issues

57 The following considerations are expressly limited to the international law dimension of the Ålandic autonomy. In particular, it will be assessed whether Finland is under an *international* obligation to guarantee the 'Swedishness' of the Islands and whether such an obligation could be invoked under any internationally established mechanism.[114] The domestic obligations under Finnish legislation, as result from the Finnish Constitution[115], the 1991 Act on the Autonomy of Åland[116] and the Act on the Acquisition of Real Property in Åland[117], will not be considered here.[118]

2. Discontinuity of the Minority System Established under the League of Nations

58 As is well known, the origins of Åland's autonomy, "often referred to as the oldest existing autonomy in the world"[119], can be traced back to the settlement of the Finnish-Swedish dispute over the Islands under the League of Nations.[120] In its *Resolution on the Aaland (Åland) Islands* of 24 June 1921[121] that recognised the Finnish sovereignty over the

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* The notion of 'guarantees' is not used here in the legal sense, but is referred to as a generic term for those (possible) obligations that Finland assumed not only by virtue of her domestic law, but rather on the basis of international obligations, so they would be detached from future political developments within Finland. In addition, the term is also intended to cover international procedural safeguards (if any).

[114] On these issues, see also the comprehensive analyses by Modeen, *supra* note 37, pp. 607 *et seq.*; L. Hannikainen, The International Legal Basis of the Autonomy and Swedish Character of the Åland Islands, in id. and F. Horn (eds), *Autonomy and Demilitarisation in International Law: The Åland Islands in a Changing Europe* (Kluwer, The Hague et al., 1997), pp. 57 *et seq.*

[115] Sec. 120 and Sec. 75 of the Finnish Constitution (*Suomen perustuslaki/Finlands grundlag*). Cf. Harck, *supra* note 27, para. 15.

[116] An English translation of the *Ahvenanmaan itsehallintolaki/Självstyrelselag för Åland* (FFS 1144/1991) is available at https://www.finlex.fi/en/laki/kaannokset/1991/en19911144, visited on 16 February 2024. A new autonomy act will enter into force in 2024, cf. Ackrén, *supra* note 2, p. 116.

[117] The *Jordförvärvslag för Åland* (ÅFS 1975/7, FFS 3/1975) is available at https://www.lagtinget.ax/sjalvstyrelsen/andra-viktiga-lagar/jordforvarvslag-aland#:~:text=Jordförvärvslagen%20på%20Åland%20begränsar%20rätten,om%20jordförvärvstillstånd%20hos%20Ålands%20landskapsregering, visited on 16 February 2024.

[118] On the constitutional legal situation, see S. Palmgren, The Autonomy of the Åland Islands in the Constitutional Law of Finland, in L. Hannikainen and F. Horn (eds), *Autonomy and Demilitarisation in International Law: The Åland Islands in a Changing Europe* (Kluwer, The Hague et al., 1997), pp. 85 *et seq.* On the evolution of the autonomy solution of Åland see, M. Suksi, Explaining the Robustness and Longevity of the Åland Example in Comparison with Other Autonomy Solutions, 20 *International Journal on Minority and Group Rights* (2013), pp. 51-66.

[119] Suksi, *supra* note 18, para. 10.

[120] On these developments, see Hannikainen, *surpa* note 114, pp. 58 *et seq.*

[121] The Resolution is reprinted in L. Hannikainen and F. Horn (eds), *Autonomy and Demilitarisation in*

Islands the Council found it necessary, in the "interests of the world, the future of cordial relations between Finland and Sweden, the prosperity and happiness of the Islands themselves", that "certain future guarantees are given for the protection of the Islanders […]"[122]. As the Council continued, these new

> "guarantees to be inserted in the autonomy law should specially aim at the preservation of the Swedish language in the schools, at the maintenance of the landed property in the hands of the Islanders, at the restriction, within reasonable limits, of the exercise of the franchise by new comers, and at ensuring the appointment of a Governor who will possess the confidence of the population"[123].

59 Furthermore, the Council held that these guarantees "will be more likely to achieve their purpose, if they are discussed and agreed to by the Representatives of Finland with those of Sweden"[124] and went on to state that it would "would itself fix the guarantees"[125] should the Finnish and Swedish efforts fail.[126] The League of Nations had thus expressed its commitment to monitor the effective implementation of the special status of the Åland Islands. These expectations of the Council were essentially fulfilled when the Finnish and Swedish representatives agreed on the following in the text attached to the Resolution of 24 June 1921:[127]

> "The Council of the League of Nations shall watch over the application of these guarantees. Finland shall forward to the Council of the League of Nations, with its observations, any petitions or claims of the Landsting of Aaland in connection with the application of the guarantees in question, and the Council shall, in any case

International Law: The Åland Islands in a Changing Europe (Kluwer, The Hague et al., 1997), pp. 297-8.

[122] Resolution on the Aaland (Åland) Islands of 24 June 1921, *supra* note 121, at 2.

[123] Resolution on the Aaland (Åland) Islands of 24 June 1921, *supra* note 121, at 3; Hannikainen, *surpa* note 114, p. 58.

[124] Resolution on the Aaland (Åland) Islands of 24 June 1921, *supra* note 121, at 4.

[125] Resolution on the Aaland (Åland) Islands of 24 June 1921, *supra* note 121, at 4.

[126] Cf. Hannikainen, *surpa* note 114, p. 58.

[127] Cf. Hannikainen, *surpa* note 114, pp. 58-9.

where the question of a juridical character, consult the Permanent Court of International Justice."[128]

60 This complaint mechanism (as well as the autonomous status) was later incorporated into Finnish domestic legislation.[129] However, it had never been activated when the League of Nations ceased to exist soon after the end of World War II and with it large numbers of the minority treaties concluded under its aegis.[130] With regard to Åland, there is a special feature which will be discussed later (at 4.). First, the nature of the agreement between the representatives of Finland and Sweden will be discussed (at 3.).

3. Nature of the Arrangements made between Finnish and Swedish Representatives

61 Both parties, Finland and Sweden, had subsequently taken the position, albeit for different (apparently domestic) reasons, that the arrangements reached by consensus were not a treaty under international law. Finland in particular took the position that it had only committed itself to granting Åland corresponding autonomy rights.[131] However, due to the changing balance of power in the 1940s and the decline of the League of Nations, Sweden became increasingly concerned about the situation of the islands and changed its opinion to the view that Åland's international status arose from a binding treaty between the two parties concluded in 1921, which in turn was not explicitly opposed by Finland.[132]

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[128] The *Agreement between the Negotiators of Finland and Sweden on the Guarantees for the Autonomy and Swedish Character of the Aaland (Åland) Islands on 27 June 1921 at the League of Nations* annexed to the Council of the League of Nations, Resolution on the Aaland (Åland) Islands of 24 June 1921 (*supra* note 121) is reprinted in L. Hannikainen and F. Horn (eds), *Autonomy and Demilitarisation in International Law: The Åland Islands in a Changing Europe* (Kluwer, The Hague et al., 1997), pp. 298-9. Modeen, *supra* note 37, pp. 6079 points out that the agreements reached on 27 June 1921 were negotiated by the Finnish and Swedish representatives, but never signed or ratified by them.

[129] With regards to the complaint mechanism, see the Guarantee Act of Åland of 11 August 1922. Cf. Hannikainen, *surpa* note 114, p. 59; Suksi, *supra* note 18, para. 10.

[130] Cf. Hannikainen, *surpa* note 114, p. 60.

[131] For a more detailed account of the developments, see Modeen, *supra* note 37, pp. 609 *et seq.*; Hannikainen, *surpa* note 114, p. 60-3.

[132] Modeen, *supra* note 37, pp. 611-2; Hannikainen, *surpa* note 114, p. 62.

62 The predominant, albeit not entirely unanimous[133], opinion among legal scholars tends to regard the arrangements made in 1921 not as a binding international treaty[134], even though it can be assumed that Finland's firm and long-standing practice, which is rooted in the international settlement of the League of Nations, has led to the emergence, at least in the region, of a customary law norm requiring full respect from Finland for the autonomous status of Åland.[135]

4. (Re-)Activating an International Mechanism of Protection

63 In 1950, the UN Secretary-General prepared a study on the legal validity of the undertakings relating to the protection of minorities placed under the guarantee of the League of Nations. Interestingly, while the study considered the overwhelming majority of international obligations to be terminated as a result of the cessation of the existence of the League of Nations, it found the following in relation to Åland:

> „The obligation undertaken by Finland towards the Council of the League of Nations as representative of the international community is *suspended* until such time as an express decision has been taken by the United Nations to put it back into force."[136]

64 As Finland had never denied the existence of international guarantees vis-à-vis the League of Nations, they can be considered part of the above-mentioned obligations. Although, the 1950 Study clearly suggests that the international mechanism could be re-activated upon decision by the UN, it did not elaborate on the more detailed conditions for this to happen, nor are there any provisions in the procedural law of the United Nations on this matter. It should also be recalled that the VCLT provisions which deal with the

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[133] T. Modeen, *De Folkrättsliga garantierna för bevarandet av Alandsöarnas nationella karaktär* (Mariehamn, Ålands kulturstiftelse, 1973); Dinstein, *supra* note 18, p. 448: "The autonomy of the Aaland Islands was engendered by a bilateral agreement between Finland and Sweden, concluded in 1921".

[134] Hannikainen, *supra* note 114, p. 66 attributes this essentially to the lack of a corresponding will to enter into a treaty obligation. According to him, the absence of the representatives' signatures has an indicative effect, which cannot be refuted by other documentation of a corresponding contractual intention.

[135] Hannikainen, *supra* note 114, p. 66-9.

[136] UN Economic and Social Council, Study on the Legal Validity of the Undertakings Concerning Minorities, 7 April 1950, E/CN.4/367, p. 69, emphasis added. Cf. Hannikainen, *surpa* note 114, pp. 60-1.

suspension of treaty obligations[137] are inapplicable due to formal grounds.[138] In addition, since the reasons for such a suspension as well as the corresponding practice are quite diverse,[139] no general legal rule can be derived with regard to the suspension at issue here. This leads to the assumption that the UN General Assembly, provided there is a corresponding competence provision, could decide on the re-activation at its own discretion. Such a competence could be construed through the general provision of Article 10 of the UN Charter, as long as it would not be exclusively assigned to the Security Council. Under Article 10 UN Charter, the General Assembly

> “may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.”

65 Furthermore, it could be argued that the international mechanism for securing Åland’s autonomy can be linked to at least one of the statutory purposes of the United Nations, such as the peaceful settlement of disputes (Article 1 para. 1 UN Charter). A corresponding proposal could be submitted, in any case both by Finland and/or Sweden or possibly even by any other UN member state, for discussion in the Sixth Committee, which deals with legal issues. However, the final decision to re-activate this special mechanism would have to be adopted by the UN General Assembly.

5. Alternative Fora?

66 Lastly, the question arises whether there would be other fora to claim any violations of Åland’s autonomy rights. Since Åland, as a non-state actor, has no legal standing before the International Court of Justice or other international quasi-judicial bodies, this could be

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[137] E.g., Art. 42, 57, 72 VCLT. See, in general on these provisions, I. Cameron, Suspension, Treaties, Suspension, in A. Peters (ed.), *Max Planck Encyclopedia of Public International Law* (online edn., OUP, December 2020).

[138] Firstly, the 1921 Arrangements are not an international treaty in the sense of the VCLT. Secondly, they pre-date the VCLT.

[139] On the corresponding practice, see Cameron, *supra* note 137, paras 6 *et seq*.

only achieved through individual complaints mechanisms under general human rights treaties. It would be conceivable, for example, to assert a violation of the Swedish character of the islands as a kind of special minority regime within Finland via Article 27 ICCPR[140]. This provision states:

> "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

67 It would have to be argued here that the special autonomy regime (or individual elements thereof), as established under the League of Nations and as it has grown into (regional) customary law, can be read into the provision of Article 27 ICCPR. This could be achieved by the method of systemic integration as expressed in Article 31 para. 3 lit. c VCLT.

6. Conclusions on Part II

68 *The autonomous character of the Åland Islands was established by a dispute settlement under the League of Nations and implemented in good faith, inter alia, by Finnish domestic legislation, the essence of which grew into customary law. The arrangements of 1921, however, do not constitute a bilateral treaty between Finland and Sweden. The UN assumes that the international mechanism to protect Åland's autonomy did not become obsolete with the demise of the League of Nations, but was only* "suspended until such time as an express decision has been taken by the United Nations to put it back into force"[141]. *A corresponding proposal could be submitted, in any case both by Finland and/or Sweden or possibly even by any other UN member state, for discussion in the*

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[140] International Covenant on Civil and Political Rights, United Nations Treaty Series, vol. 999, p. 171. Finland ratified the ICCPR on 19 August 1975 and accepted the Optional Protocol to the ICCPR. Cf. UN Treaty Body Data Base, available at https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=61&Lang=EN, visited on 16 February 2024. For a detailed account on Art. 27 ICCPR, see P.M. Taylor, *A Commentary on the International Covenant on Civil and Political* Rights (Cambridge, CUP, 2020), pp. 787-823.

[141] UN Economic and Social Council, Study on the Legal Validity of the Undertakings Concerning Minorities, 7 April 1950, E/CN.4/367, p. 69.

Sixth Committee, which deals with legal issues. However, the final decision to re-activate this special mechanism would have to be adopted by the UN General Assembly.

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VI. Part III: European Union Law and the Åland Islands

69 The third part of this study examines the special status of the Åland Islands under EU law, in particular those issues arising from tax, customs, and state aid legislation. While the considerations on tax and custom related aspects refer to existing EU legislation, the discussion on state aid legislation points to possible problems that might arise if such special legislation were to be adopted by the Finnish or Ålandic legislator. Furthermore, this part sets out the legal framework for considering the special character of the Åland Islands under such legal provisions that allow for a certain room for national identities and national interests.

1. Territorial Scope of European Union Law

70 The territorial scope of application of the EU Treaties is being defined by Article 52 of the Treaty on European Union (TEU) which follows a general principle of international law according to which international treaties are binding for all contracting parties on their entire territory (cf. Article 29 VCLT).[142] Pursuant to Article 52 para. 1 TEU, the Treaties do also apply to Finland, while its paragraph 2 refers to Article 355 of the Treaty on the Functioning of the European Union (TFEU) which specifies the details of the territorial scope. The said provision, Article 355 TFEU, contains a detailed definition of the territorial scope[143]. It has a clarifying effect in this respect and extends/restricts the territorial scope of Union law in certain areas.[144] The impact of Article 355 TFEU thus depends on the status of a particular territory.

71 The following types of territories can be distinguished: Article 355 para. 1 TFEU in conjunction with Article 349 TFEU pertains to the non-European territories, more commonly known as 'outermost regions'. These territories include the Azores, Canary Islands, French Guiana, Guadeloupe, La Réunion, Madeira, Martinique, Mayotte, and

[142] W. Heintschel von Heinegg, Art. 52 EUV, in C. Vedder and W. Heintschel von Heinegg (eds), *Europäisches Unionsrecht* (Munich, Beck, 2nd edn., 2018), para. 2.
[143] On the reasons for the various exceptions: D. Kochenov, Art. 355 TFEU, in M. Kellerbauer et al. (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford, OUP, 2019), para. 3.
[144] Kochenov, Art. 52 TEU, in M. Kellerbauer et al. (eds), *supra* note 143, paras 2, 5; C. Calliess, Art. 4 EUV, in C. Calliess and M. Ruffert (eds), *EUV/AEUV* (Munich, Beck, 6th edn., 2022), para. 2.

Saint-Martin. Paragraph 1 expressly confirms applicability of Union law for these regions/territories, disallowing deviations in the territorial scope of application. However, Article 349 TFEU is not affected by this provision and provides for certain privileges which will be examined later.[145]

72 Article 355 para. 2 TFEU, in conjunction with Annex II, defines the overseas countries and territories (OCTs) associated with the European Union. With the exception of Part IV of the TFEU (Association of Overseas Countries and Territories, Article 198 *et seq.* TFEU), the Treaties do not apply to the OCTs. Following the withdrawal of the United Kingdom from the EU, these territories include Aruba, Bonaire, Curaçao, French Southern and Antarctic Lands, Greenland, New Caledonia, Saba, Saint Barthélemy, Saint Pierre and Miquelon, Sint Eustatius, and Wallis and Futuna.

73 Further modifications apply, according to paragraphs 4 and 5, to the (European) territories of the Member States which are not directly covered by paragraphs 1 and 2 and which can therefore be described as *sui generis* territories. These 10 special cases form – except the Faroe Islands (see Article 355 paragraph 5 lit. a TFEU) – part of the EU but usually have *ad hoc* arrangements with the EU, often including provisions resulting in the non-application of VAT rules and possible exemptions from customs or excise duties. These territories are the Åland Islands (which are specifically referred to in Article 355 para. 4 TFEU), Büsingen am Hochrhein, Campione d'Italia, Ceuta, Faroe Islands, Heligoland, Livigno, Melilla, Mount Athos, and the UN Buffer Zone in Cyprus.

74 Finally, it should be noted that the scope of application of secondary law follows the territorial application of the Treaties.[146] However, for the territories within the meaning of Article 349 TFEU, modifications may also be laid down in secondary law.[147] For the areas covered by Article 355 paras 4 and 5 TFEU, the restrictions of the respective accession

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[145] Schmalenbach, Art. 355 AEUV, in C. Calliess and M. Ruffert (eds), *supra* note 144, para. 2.
[146] Court of Justice of the European Union (CJEU), C-132/14, ECLI:EU:C:2015:813, judgment of 15.12.2015, para. 77; D. Kochenov, Art. 52 TEU, in M. Kellerbauer et al. (eds), *supra* note 143, para. 1; L. Jaeckel, Art. 355 AEUV, in E. Grabitz et al. (eds), *Das Recht der Europäischen Union* (Munich, Beck, 79th Ed., May 2023), para. 12.
[147] CJEU, C-132/14, ECLI:EU:C:2015:813, judgment of 15.12.2015, para. 79.

treaties are also relevant for secondary legislation, including further exceptions which must be laid down in each individual case.[148]

a) The Special Status of Territories Covered by Article 349 para. 1 TFEU

75 Article 349 TFEU (ex Article 299 TEC) is the basic provision for the outermost regions.[149] These are territories and regions that lie outside the European continent but are nevertheless (historically) linked to certain Member States of the EU.[150] Article 355 para. 1 TFEU declares Union Law to apply to those regions as well.[151] However, Article 349 TFEU grants them special rights that correspond to their particular economic and social situation within the EU.[152] According to Article 349 para. 1 TFEU, the Council, acting on a proposal from the Commission and after consulting the Parliament, may adopt specific measures for the economic development of the areas referred to in this provision; according to Article 349 para. 2 TFEU, these measures relate to several areas, in particular areas such as customs and trade policies, fiscal policy, free zones, agriculture and fisheries policies, conditions for supply of raw materials and essential consumer goods, State aids and conditions of access to structural funds and to horizontal Union programs.

76 Article 349 para. 1 TFEU provides that specific measures may be adopted for the areas mentioned, which relativise the territorial scope (Article 355 para. 1 TFEU).[153] These are structural measures to compensate for disadvantages caused by permanent social and territorial factors listed in the said provision.[154] It is therefore a compensatory mechanism

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[148] U. Becker, Art. 355 AEUV, in J. Schwarze et al. (eds), *EU-Kommentar* (Baden-Baden, Nomos, 4th edn., 2019), para. 9; Jaeckel, *supra* note 146, para. 20.

[149] D. Kochenov, The Application of EU Law in the EU's Overseas Regions, Countries, and Territories after the Entry into Force of the Treaty of Lisbon, 20 *Michigan State International Law Review* (2012), pp. 669 *et seq.*

[150] A. Tryfonidou, The Free Movement of Goods, the Overseas Countries and Territories, and the EU's Outermost Regions: Some Problematic Aspects, 37 *Legal Issues of Economic Integration* (2010), p. 317.

[151] N. Mazur-Kumrić, Post-Covid-19 Recovery and Resilience-Building in the Outermost Regions of the European Union: Towards a new European Strategy, 6 *EU and Comparative Law Issues and Challenges Series* (2022), p. 551.

[152] Mazur-Kumrić, *supra* note 151, p. 551.

[153] Kochenov, Art. 349 TFEU, in M. Kellerbauer et al. (eds), *supra* note 143, paras 5, 8; Becker, Art. 349 AEUV, in J. Schwarze et al. (eds), *supra* note 148, para. 4.

[154] See also Tryfonidou, *supra* note 150, p. 320.

that allows a differential treatment in order to take into account the specific situation of these regions.[155] All structural and compensatory measures are limited by the integrity and coherence of the Union's legal order (paragraph 3), i.e., they must be necessary, proportionate and precisely defined.[156] This does not, however, affect the scope of application of Union law.

77 The Canary Islands may serve as an example: The Arbitrio sobre las Importaciones y Entregas de Mercancías en las Islas Canarias (AIEM) is a tax levied on imported goods or products. The system also provides for tax exemptions for local products.[157] The economic performance of the Canary Islands is largely characterised by the service and tourism sector, so that the AIEM is intended to promote the autonomous development of sectors of the commercial economy. In the view of the Council, the necessity of this measure lies in the existing disadvantages that the Canary Islands are subject to with regard to their insolation, the acquisition of raw materials and energy, the manufacturing processes, and the disposal of industrial and toxic waste.[158] The aim of the AIEM is to achieve greater competitiveness for locally manufactured products.[159] In order to ensure consistency with the Union's legal order and, in particular, to guarantee free and undistorted competition in the internal market, the scope of the tax exemptions is limited to a list of sensitive products.[160] According to the relevant Council Decision, the maximum permissible tax exemptions for these industrial products range between 5% and 15%, depending on the sector and product (cf. Article 1 para. 2 of the Council Decision of 20 June 2002, 2002/546/EC).[161]

78 The Council's measures are also limited in time and are subject to an impact assessment.[162] The AIEM was initially applied for 10 years, then extended for two years

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[155] Tryfonidou, *supra* note 150, p. 321 with reference to COM(2004) 343, p. 1; Schmalenbach, *supra* note 145, para. 1.

[156] Kochenov, Art. 349 TFEU, M. Kellerbauer et al. (eds), *supra* note 143, para. 10; Schmalenbach, Art. 349 AEUV, in C. Calliess and M. Ruffert (eds), *supra* note 144, para. 2; furthermore, cf. recitals 2 and 3 of Council Decision of 20 June 2002, 2002/546/EC.

[157] Recital 6 of the Council Decision of 20 June 2002, 2002/546/EC.

[158] Recitals 8-11 and 3 of the Council Decision of 20 June 2002, 2002/546/EC.

[159] Mazur-Kumrić, *supra* note 151, p. 565; Tryfonidou, *supra* note 150, p. 323.

[160] Recital 15 of the Council Decision of 20 June 2002, 2002/546/EC.

[161] Recital 17 of the Council Decision of 20 June 2002, 2002/546/EC.

[162] Tryfonidou, *supra* note 150, p. 321.

in 2011[163] and in December 2013 again extended for another six months[164] and for a further period until 31 December 2020 in 2014.[165] By decision of 16 November 2020, the AIEM tax was adjusted in such a way, that only a maximum tax reduction of 15% and a total volume of 150 million euros per year were established (cf. Article 1 para. 2 and 3 of Decision (EU) 2020/1792). Explicitly referring to the principle of subsidiarity (cf. recitals 15 and 16), the Spanish authorities should now be able to "to decide upon the appropriate percentage for each product". Although certain criteria for determining the tax differentials are laid down (cf. recitals 16 and 17 and Article 2 of Decision (EU) 2020/1792), overall greater flexibility is granted to the Spanish authorities. The Decision will expire on 31 December 2027.

79 In addition to the AIEM, there are other specific measures that have temporarily suspended the autonomous Common Customs duties on certain capital goods, raw materials, parts and components.[166] In principle, this is determined in accordance with Article 56 para. 2 of the Customs Code of the European Union (Regulation (EU) No 952/2013, hereinafter: UCC) in a Combined Nomenclature in Regulation (EEC) No. 2658/87, which is amended or adapted annually. Another method of implementing the objectives described by the special regulation of Article 349 TFEU are the instruments of cohesion policy[167] and, more recently, specific measures under the Coronavirus Response Investment Initiative, which include the CRII Regulation (EU) 2020/460 and the extension of the EU Solidarity Fund.[168]

b) Application to the Åland Islands

80 The Åland Islands fall within the scope of application of Union law as an integral part of Finland. In addition, they are directly covered by Article 355 para. 4 TFEU, since Protocol No. 2 on the Åland Islands was included in the Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the

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[163] Art. 1 Council Decision No. 895/2011/EU.
[164] Art. 1 Council Decision No. 1413/2013/EU.
[165] Art. 1 Council Decision No. 377/2014.
[166] Council Regulation (EU) No 1386/2011, extended by Council Regulation (EU) 2021/2048.
[167] Mazur-Kumrić, *supra* note 151, p. 552.
[168] Mazur-Kumrić, *supra* note 151, p. 557.

Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded.[169] A separate provision on the validity of this Protocol within Article 355 para. 4 TEU would not have been necessary due to its primary law character, but it is not detrimental. Accordingly, Union law does not apply without restrictions. Instead, the modifications brought about by the Protocol must be taken into account. National regulations on regional citizenship status (*hembygdsrätt*), the right of establishment (Article 1 of the Protocol No. 2) and VAT or excise duties (Article 2 of the Protocol No. 2) on the Åland Islands therefore remain in force.[170] The Åland Islands and their tax exemption are protected by primary law, unlike those regions covered by Article 349 para. 1 TFEU.

81 In the absence of an explicit list in Article 349 TFEU and due to the lack of the 'outermost region' characteristic, this provision cannot be used as a basis for (further) special arrangements for the Åland Islands. Whether the socio-economic situation of the Åland Islands is comparable cannot be assessed here. Nevertheless, further derogations can be negotiated under primary or secondary law.[171] Whether this is politically desirable and, if so, feasible, cannot be assessed here either; from the perspective of EU law, there would be no obstacles to such further special regulations/arrangements being justified under secondary law.

2. Special Requirements in the Application of European Tax Law

82 This section deals with the specific tax law consequences of the classification of territories under Article 355 TFEU.

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[169] OJ C 241, 29 August 1994, p. 352.

[170] See, in general, N. Fagerlund, The Special Status of the Åland Islands in the European Union, in L. Hannikainen and F. Horn (eds), *Autonomy and Demilitarisation in International Law: The Åland Islands in a Changing Europe* (Kluwer, The Hague et al., 1997), pp. 205-27.

[171] Kochenov, Art. 355 TFEU, M. Kellerbauer et al. (eds), *supra* note 143, para. 22.

a) General Principles of European Tax Law

83 In the European Union, tax issues largely remained under national sovereignty of Member States.[172] Taxation is generally considered to be an important instrument of policy making.[173] With regard to the design of taxes, a distinction can be drawn between direct and indirect taxes. Direct taxes are those levies where the taxpayer bears the tax burden – in particular income, corporate and property taxes. In the case of indirect taxes, the tax burden may be shifted from the tax debtor to third parties, as is the case with value added taxes, turnover taxes and other excise duties.[174] It should also be noted that tax collection (or determination of tax liability) is often based on the place of taxation, the country of destination or the country of origin.[175] The European Union has its own legal basis for turnover taxes, excise duties and other indirect taxes (Article 113 TFEU), based on which this field has been largely harmonised.[176] This harmonisation aims at creating a level playing field which safeguards the free internal market and creates a so-called 'level playing field'.[177]

b) Harmonisation Effect regarding Indirect Taxation

84 The main legal acts in the field of indirect taxation are the VAT Directive (Directive 2006/112/EC)[178] and the Excise Duty Directive (Directive (EU) 2020/262)[179]. The following section illustrates the basic features of these two types of tax, as they – or their

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[172] P. Farmer, Direct Taxation and the Fundamental Freedoms, in D. Chalmers and A. Arnull (eds), *Oxford Handbook on European Union Law* (Oxford, OUP, 2015), Chapt. 31, p. 813; S. Pieper, Steuerrecht, Steuerharmonisierung, in J. Bergmann (ed.), *Handlexikon der Europäischen Union* (Baden-Baden, Nomos, 6th edn., 2022).

[173] D.-E. Khan, Art. 110 AEUV, in R. Geiger et al. (eds), *EUV/AEUV* (Munich, Beck, 7th edn., 2023), para. 1.

[174] S. Pieper, Steuerrecht, Steuerharmonisierung, in J. Bergmann (ed.), *supra* note 172.

[175] C. Waldhoff, Art. 113 AEUV, in C. Calliess and M. Ruffert (eds), *supra* note 144, paras 14 *et seq.*

[176] J. Kokott, EU Tax Law (Munich, Beck, 2022), § 1, para. 2; M. Kellerbauer, Art. 113 TFEU, in M. Kellerbauer et al. (eds), *supra* note 143, paras 8 *et seq.*

[177] E. Traversa, Implementation of regional taxing powers and EU law: recent cases and future challenges, in V. Simonart, Fiscal federalism in the European Union (2011), p. 58; Kellerbauer, *supra* note 176, paras 3, 5.

[178] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax OJ L 347, 11 December 2006, pp. 1-118

[179] Council Directive (EU) 2020/262 of 19 December 2019 establishing the general arrangements for excise duty (recast) OJ L 58, 27 February 2020, pp. 4-42.

predecessor provisions – are also covered by Article 2 of Protocol No. 2 on the Åland Islands.

aa) Value Added Tax (Directive 2006/112/EC)

85 Directive 2006/112/EC (hereinafter: the VAT Directive) establishes the common system of value added tax in the European Union (cf. Article 1 para. 1). The scope of application is relatively broad; according to Article 2, in principle, all transactions involving the importation, supply or purchase of goods or services for consideration are subject to VAT. Two fundamental principles apply: Firstly, the principle of VAT neutrality, which is understood as an equal treatment[180] and burden neutrality principle.[181] Due to the abolition of border controls in the internal market, tax or fiscal controls are only carried out domestically (at the level of the companies).[182] In the case of cross-border transactions of goods, the tax is generally levied at the place of consumption, i.e. at the final consumer (cf. Article 40 VAT Directive). For services, the principle of origin applies (cf. Article 44 VAT Directive). The formal obligations of the tax debtor vis-à-vis the tax administration of the respective Member State concerned, which ensure the collection of VAT, are set out in detail in Articles 206-280 VAT Directive. Due to the continuing digitalisation, a one-stop shop procedure (Article 14a Directive (EU) 2017/2455 of 5.12.2017) has been introduced, which entered into force on 1.7.2021 and enables businesses to simplify their VAT obligations when selling goods via an online platform/marketplace (introduction of so-called fictitious supply relationships).[183] Member States may also apply simplified modalities for taxation and collection, in particular flat-rate schemes, for small enterprises, Article 281 *et seq.* VAT Directive. In addition, there are further possibilities for special regulations by the Member States in individual areas.[184] Furthermore, it follows from Article 401 that the VAT Directive in principle allows competing levies.[185] Therefore, it

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[180] Kokott, *supra* note 176, § 3, paras 19 *et seq.*; L. Dobratz, Mehrwertsteuer, in H. Schaumburg and J. Englisch (eds), *Europäisches Steuerrecht* (Cologne, Dr. Otto Schmidt, 2nd edn., 2020), paras 19.17-8.
[181] Kokott, *supra* note 176, § 3, paras 20 *et seq.*; Dobratz, *supra* note 180, para. 19.19.
[182] Khan, Art. 113 AEUV, R. Geiger et al. (eds), *supra* note 173, para. 9.
[183] Cf. https://vat-one-stop-shop.ec.europa.eu/index_en, visited on 16 February 2024.
[184] Cf. on these: C. Gröpl, J. Steuerrecht, in M. Dauses and M. Ludwigs (eds), *Handbuch EU-Wirtschaftsrecht* (Munich, Beck, 53th edn., March 2023), para. 552
[185] Kokott, *supra* note 176, § 7 Indirect Taxes, para. 16.

does not prevent the maintenance or introduction of other taxes of a non-tax nature or a tax which does not have the essential characteristics of VAT.[186] Other taxes may thus be authorised by the Member States, provided that they do not acquire character of a (general) turnover tax.[187]

bb) Excise Duties (Directive 2020/262/EU)

86 VAT is often considered to be a general consumption tax.[188] One of the differences between special consumption taxes and VAT is often the basis of assessment, which in the case of special consumption taxes is usually not based on the price of the goods, but on their characteristics, in particular their weight or volume.[189] However, the harmonisation of excise duties has not progressed as far as that of VAT. The relevant legal basis is the now revised Directive 2020/262/EU (Excise Duty Directive), which entered into force on 13 February 2023 (cf. Article 55 para. 1 subpara. 2 Excise Duty Directive). Member States are free to set the specific tax rates above the minimum tax rates (cf. Article 8 para. 2 Excise Duty Directive), which is why excise duties can continue to cause distortions of competition despite the extensive harmonisation of the tax bases.[190] In addition, Member States may also levy excise duties on other (further) goods, the taxation of which is not harmonised, according to their own rules (cf. Article 1 paras 2 and 3 Excise Duty Directive).[191]

87 According to Article 6 para. 2 of the Excise Duty Directive, excise duty becomes chargeable when the goods are released for consumption. The types of releasing for consumption are listed in Article 6 para. 3 Excise Duty Directive, whereby the main case of application is the removal of the excisable goods from the duty suspension procedure (lit. a). According to Article 6 para. 3 lit. b, further circumstances in which excise duty may become chargeable are the holding of excise goods outside a duty suspension

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[186] Kokott, *supra* note 176, § 7 Indirect Taxes, para. 16.
[187] Gröpl, *supra* note 184, para. 448.
[188] Kokott, *supra* note 176, § 7 Indirect Taxes, para. 654 et seq; L. Dobratz, Verbrauchssteuern, in H. Schaumburg and J. Englisch (eds), *supra* note 180, para. 20.2.
[189] Kokott, *supra* note 176, § 7 Indirect Taxes, para. 652; Dobratz, *supra* note 188, para. 20.2.
[190] M. Fehling, Entwicklung und Stand der Harmoninisierung, in H. Schaumburg and J. Englisch (eds), *supra* note 180, para. 10.17.
[191] Kokott, *supra* note 176, § 7 Indirect Taxes, para. 662; Dobratz, *supra* note 188, para. 20.4.

arrangement, according to Article 6 para. 3 lit. c the manufacture of the goods outside the duty suspension arrangement and according to Article 6 para. 3 lit. d the importation of goods not placed under the duty suspension arrangement.[192] According to Article 8, it is up to each Member States to organise the collection procedure.[193]

88 Since the final consumer is the person liable to pay the excise duty and the funds for the payment of the tax are only available when the final consumer pays for the goods, the obligation to pay the tax must be placed as close as possible to the final distribution stage of the goods in order not to burden the manufacturing and distribution companies with the interim financing of the tax in advance.[194] Therefore, Articles 14 *et seq*. Excise Duty Directive set out the applicable tax suspension procedure.

89 In addition to the possibility of producing, storing or transporting excise goods under suspension of excise duty, there is also the possibility of cross-border trade in goods already taxed in a Member State. According to Article 16 para. 1 Excise Duty Directive, a movement under a duty suspension agreement can only take place in a tax transit procedure.[195]

90 In these cases, a distinction is made as to whether private individuals or persons acting as buyers are engaged in an independent economic activity. Between traders, the goods must be transported with an administrative document, Articles 20-31 Excise Duty Directive.[196] Details on the procedure and content of the electronic administrative document are regulated by Commission Regulation (EC) No. 684/2009 of 24 July 2009 implementing Council Directive 2008/118/EC as regards computerised procedures for the

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[192] Kokott, *supra* note 176, § 7 Indirect Taxes, paras 663 *et seq.*; Gröpl, *supra* note 184, para. 596

[193] H. Jatzke, Verbrauchssteuer-System-RL (Richtlinie 2020/262/EU des Rates vom 19. 12. 2019 zur Festlegung des allgemeinen Verbrauchsteuersystems), in A. Musil and H. Weber-Grellet (eds), *Europäisches Steuerrecht* (Munich, C.H. Beck, 2nd edn., 2022), para. 7.

[194] CJEU, C-395/00, ECLI:EU:C:2002:751, judgment, 12.12.2002, para. 42 – Cipriani; CJEU, C-230/08, ECLI:EU:C:2010:231, judgment, 29.04.2010, para. 78 – Dansk Transport og Logistik; Gröpl, *supra* note 184, para. 597; Jatzke, *supra* note 193, para. 8.; Kokott, *supra* note 176, § 7 Indirect Taxes, paras 671 *et seq.*

[195] Kokott, *supra* note 176, § 7 Indirect Taxes, paras 675 et seq; Jatzke, *supra* note 193, para. 8.

[196] Cf. Jatzke, *supra* note 193, para. 11.

movement under duty suspension arrangements of products subject to excise duty (EMCS Regulation).

91 Where excise goods are supplied by or on behalf of the consignor to private individuals in another Member State (mail order), the consignor has to register his or her identity and guarantee payment of the excise duty with the competent office specifically designated and under the conditions laid down by the Member State of destination; pay the excise duty after the excise goods have been delivered and keep accounts of deliveries of excise goods, Article 44 para. 4 Excise Duty Directive.[197]

92 When goods that have already been taxed in one Member State are transported to another Member State, it must be ensured that the tax is paid in the country of destination; Articles 32 *et seq.* of the Excise Duty Directive. Therefore, goods taxed in the Member State of departure are also transported together with an administrative document when transported to the Member State of destination (Articles 36 *et seq.* Excise Duty Directive). The details of this administrative document are regulated by Commission Regulation (EEC) No. 3649/92 of 17.12.1992. According to Article 35 of the System Directive, transport is now also possible by means of an electronic administrative document.

cc) Corporate Taxes

93 The rules on company taxation are excluded from this Study. Direct harmonisation can be found in Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (Parent-Subsidiary Directive); Directive 2003/49/EC on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (Interest and Royalty Directive) and Directive 2009/133/EC on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the

[197] Cf. Jatzke, *supra* note 193, para. 11.

transfer of the registered office of an SE or SCE between Member States (Merger Directive).

c) Application to the Åland Islands

94 The following section describes the specific application of the VAT and Excise Duty Directives to the Åland Islands. The aim of the exemption is to provide tax-free shopping, at least on ferry routes between Finland and Sweden.[198]

aa) Value Added Tax

95 According to Article 6 para. 1 lit. d VAT Directive, the VAT Directive does not apply to the Åland Islands. The Directive neither apply to the Canary Islands (lit. b) nor to the French territories mentioned in Article 349 and Article 355 para. 1 lit. c TFEU. The Azores, for example, are not excluded from the territorial scope of the Directive.[199]

96 However, Article 274 of the VAT Directive provides that Articles 275, 276 and 277 apply to the importation of goods in free circulation which are brought into the Community from a third territory forming part of the customs territory of the Community. Article 275 of the VAT Directive therefore provides that: "The formalities relating to the importation of the goods referred to in Article 274 shall be the same as those laid down by the Community customs provisions in force for the importation of goods into the customs territory of the Community." Article 276 of the VAT Directive states:

> "Where dispatch or transport of the goods referred to in Article 274 ends at a place situated outside the Member State of their entry into the Community, they shall circulate in the Community under the internal Community transit procedure laid down by the Community customs provisions in force, in so far as they have been the subject of a declaration placing them under that procedure on their entry into the Community."

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[198] Fagerlund, *supra* note 170, pp. 214-5; M. Ackrén, The Aland Islands: 100 years of stability, in B. Fong and A. Ichijo (eds), *The Routledge Handbook of Comparative Territorial Autonomies* (London, Routledge, 2022), p. 115.

[199] There is a decision pursuant to Art. 349 para. 1 TFEU, cf. Council Decision 2008/417/EC.

97 Articles 279 and 280 apply to the export of goods in free circulation which are dispatched or transported from a Member State to a third territory forming part of the customs territory of the Community. According to Article 279 of the VAT Directive,

> “[t]he formalities relating to the exportation of the goods referred to in Article 278 from the territory of the Community shall be the same as those laid down by the Community customs provisions in force for the exportation of goods from the customs territory of the Community.”

98 It should be noted that provisions of the Customs Code of the European Union apply. In addition, it should also be noted that pursuant to Article 8 VAT Directive, the Commission is entitled to make new appropriate proposals if it considers the provisions of Articles 6 and 7 of the Directive “particularly in terms of fair competition or own resources” to be no longer necessary.

bb) Excise Duty

99 According to Article 4 para. 2 Excise Duty Directive, this Directive as well as Directives 92/83/EEC, 92/84/EEC, 2003/96/EC and 2011/64/EU do not apply to the Åland Islands (lit. c). This derogation also applies to the Canary Islands (lit. a) as well as the French territories referred to in Article 349 and Article 355 para. 1 lit. b TFEU. Under Article 4 paras 4 and 5 Excise Duty Directive, Spain and France may give notice by means of a declaration for the Canary Islands and the French overseas departments

> “that this Directive and Directives 92/83/EEC, 92/84/EEC, 2003/96/EC and 2011/64/EU shall apply [...] in respect of all or some of the excise goods referred to in Article 1, from the first day of the second month following deposit of such declaration”.

100 However, the formalities laid down in the Customs Code of the European Union also apply mutatis mutandis to special excise duties. According to Article 2 paras 1 and 2 Excise Duty Directive, the formalities provided for in the Customs Code apply mutatis mutandis to the entry of excise goods from a special territory into the European Union or to the exit of excise goods from the European Union into one of the special territories. Pursuant to

recital 6 of the Directive certain formalities must be carried out when excise goods are moved between territories which, although considered to be part of the customs territory of the Union, have been excluded from the scope of this Directive and territories to which this Directive applies. The particularity of Åland Islands is that, according to Article 2 para. 3 Excise Duty Directive, Finland is authorised to apply the same procedures to movements of excise goods between Finland and the Åland Islands as it applies to movements within Finland.

d) Application of the Provisions of the Customs Code

101 Article 1 para. 3 of the UCC confirms that certain customs provisions, including the simplifications for which it provides, shall apply to the trade in Union goods between parts of the customs territory of the Union to which the provisions of VAT-Directive or of Excise Duty Directive apply and parts of that territory where those provisions do not apply, or to trade between parts of that territory where those provisions do not apply. According to Article 4 para. 1 UCC, the Åland Islands are part of the customs territory of the European Union – but, as explained above, not part of the tax territory.

102 According to Article 1 para. 3 UCC, the scope of application thus also covers the movement of goods within the customs territory of the Union to or from territories which although not part of the tax territory, are part of the customs territory of the Union.[200] It follows that, in principle, an export declaration must be lodged at the time of dispatch and an import declaration (and, if necessary, an additional transit declaration) at the time of arrival in order to facilitate the levying of taxes or granting of tax relief.[201] Article 2 UCC allows – as also suggested by Article 1 para. 3 – to lay down the rules for this as well as simplifications compared to the general customs regulations in a delegated act.[202] When goods of the Union are moved, no customs regulations would actually have to be observed because these goods are in free circulation in the Union as goods of the Union

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[200] Cf. R. Stein, Art. 1 UZK, in P. Witte (ed), *Zollkodex der Union* (Munich, C.H. Beck, 8th edn., 2022), para. 17.
[201] M. Lux, Art. 1 UZK, in H. Krenzler et al. (eds), *EU-Außenwirtschafts- und Zollrecht* (Munich, C.H. Beck, 21st edn., April 2023), para. 16.
[202] Lux, *supra* note 201, para. 16.

or after payment of customs duty.[203] However, insofar as these goods are subject to excise duties or VAT, these movements of goods must be registered.[204]

aa) General Remarks on the Customs Code

103 According to Article 29 TFEU, all goods imported from non-Member States are treated uniformly when they are cleared through customs in the EU. Once the goods have been presented to and released for free circulation by the customs authorities in a Member State, the goods circulate freely within the EU Customs Union without any further duties, charges or procedures being imposed on them.[205] After release for free circulation, they may circulate freely.[206] The UCC further specifies the requirements of Article 29 TFEU.[207]

104 In general, goods are classified according to the same Combined Nomenclature that is used for foreign trade.[208] This also makes sense because once the goods have entered the EU, they also enter free circulation and, thus, lose their characteristica as "imports" into the EU.[209] Using this coding, as well as the country codes for the shipment and arrival of the goods, national authorities record and report data in a system called INTRASTAT.[210]

105 The UCC contains a wide variety of provisions relating to the various customs procedures that apply according to Article 1 para. 1 UCC when goods are brought into or out of the Union territory. The UCC is supplemented by Delegated Regulation (EU) 2015/2446, Implementing Regulation (EU) 2015/24473 and Delegated Regulation (EU) 2016/341 with transitional provisions. In principle, therefore, the goods must have been brought into or out of the customs territory of the Union. The term is not defined by European Union law.

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[203] K. Roth, Art. 1 UZK, in Dorsch (ed), *Zollrecht* (Bonn, Stollfuß, 218th supplement, July 2023), para. 50.
[204] Roth, *supra* note 203, para. 50.
[205] M. Klamert and A. Lewis, Art. 28 TFEU, in M. Kellerbauer et al. (eds), *supra* note 143, para. 8.
[206] L. Gormley, *EU Law of Free Movement of Goods and Customs Union* (Oxford, OUP, 2010), 5.45 *et seq*.
[207] M. Jarvis, Scope: Subject matter, in Oliver (ed), *On Free Movement of Goods in the European Union* (Oxford, Hart, 5th edn., 2010), p. 23.
[208] K. Armstrong, Governing Goods: Content and Context, in D. Chalmers and A. Arnull (eds), *supra* note 172, Chapt. 20, p. 512.
[209] Armstrong, *supra* note 208, Chapt. 20, p. 512.
[210] Armstrong, *supra* note 208, Chapt. 20, p. 512.

It is only a question of crossing the Union border; the way in which the border is crossed, i.e. whether by land, sea, rail, air or pipeline, is irrelevant.[211]

106 Article 5 No. 16 UCC distinguishes between three customs procedures under which goods can be transferred.[212] The customs procedure serves to monitor/control the transfer. These are[213]:

- Release for free circulation (Articles 201 *et seq.* UCC);
- Special procedures; and
- Export (Articles 263 *et seq.* UCC).

107 According to Article 210 UCC, the special proceedings are divided into four types with their respective subtypes:

- Transit (includes internal and external transit as well as Union transit);
- Storage (includes storage in customs warehouse and free zones);
- Specific Use (includes temporary admission and end-use); and
- Processing (includes inward and outward processing).

108 Title IV governs the entry of goods into the customs territory (Articles 127 *et seq.* UCC). According to Article 134 para. 1 UCC, goods brought into the customs territory of the Union are subject to customs supervision from the moment of their entry. Article 139 para. 1 UCC requires immediate presentation. Presentation is defined in Article 5 No. 33 UCC and describes the notification to the customs authorities that goods have arrived at the customs office or at another place designated or approved by the customs authorities and are available for customs controls.

[211] Stein, *supra* note 200, para. 17.
[212] For the purpose of customs procedures, see Art. 3 UCC.
[213] On the procedures, see A. Thoma et al., *Zoll und Umsatzsteuer* (Berlin, Springer, 4th edn., 2021).

109 In principle, the general provisions in Articles 153 *et seq.* UCC apply to all proceedings. First and foremost, this means that all goods in the customs territory of the Union are presumed to be Union goods (Article 153 para. 1 UCC). Article 5 para. 23 UCC defines Union goods as goods wholly obtained in the customs territory of the Union and not incorporating goods imported from countries or territories outside the customs territory of the Union; (lit. a), which have been brought into the customs territory of the Union from countries or territories outside that territory and released for free circulation (lit. b), or which have been obtained or produced in the customs territory of the Union, either solely from goods referred to in point (b) or from goods referred to in points (a) and (b); (lit. c). However, according to Article 153 para. 2 of the UCC, there are also exceptions to the presumption, which can be found in particular in Article 119 of Regulation (EU) 2015/2446.

110 If a good has been brought into the customs territory as Union goods, it must be placed under a customs procedure (cf. Articles 158 *et seq.* UCC), for which a corresponding custom declaration must first be made (cf. Article 158 para. 1 UCC). The transit procedure shortens the procedure at the border and basically shifts the customs formalities. Within this transit procedure, the customs status of the goods determines whether they are placed under the T1 (external transit procedure) or T2/T2F procedure when they are declared for transit. There is also the common transit procedure.[214] A transit procedure for the transportation of Union goods is not necessary in general, unless when leaving the customs territory. Release for free circulation under Articles 201 *et seq.* UCC is the most frequently used customs procedure. It is regularly carried out when non-Union goods brought into the customs territory of the Union or originating from a special procedure are finally to enter the internal market of the Union. Thus, they become Union goods and custom supervision ends.[215]

bb) Proof of the Status for Union Goods

111 As previously seen, there are cases in which the presumption of Union goods does not apply. If Union goods have to be transported outside an UTP/T2 (especially in maritime

[214] Agreement on a Common Transit Procedure, OJ L 226, 13 August 1987, p. 2.
[215] Thoma et al., *supra* note 213, p. 15.

transport), the internal market presumption of Article 153 para. 1 UCC does not apply. Consequently, the Union character of a good must be proven in a different way and in the appropriate legal form, as it is done under the conditions of Articles 123 *et seq.* of Regulation (EU) 2015/2446. The possible forms of proof are listed in Article 199 Regulation (EU) 2015/2447. The main form of proof is the T2L/T2LF according to Article 205 Regulation (EU) 2015/2447. The status document (T2LF), Copy No. 4 of the Single Administrative Document is used for the proof of status of Union goods, which can also be transported between customs territories of the Member States with it, the proof T2LF is valid for the traffic between a Member State of the EU and a special tax territory.

112 The IT system "Proof of Union Status (PoUS)" will be made available in the future (from 2024) for the electronic exchange of information on documents proving the Union status of goods in accordance with Article 128 para. 1 Regulation (EU) 2015/2446.

cc) Special Provisions of Regulation (EU) 2015/2446 in Case of Special Fiscal Territories

113 Delegated Regulation (EU) 2015/2446 regulates various aspects of the relevant sections of the customs procedure. It also contains special provisions for the movement of goods in the case of special fiscal territories. According to Article 1 No. 35 of Regulation (EU) 2015/2446, a "special fiscal territory" is a part of the customs territory of the Union in which the provisions of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (former VAT Directive) or Council Directive 2008/118/EC of 16 December 2008 on the general arrangements for excise duty (former Excise Duty Directive) do not apply. This also applies to the subsequent provisions which have replaced these acts. Although no customs duties are payable in the special fiscal territories, the rules of the customs procedure apply accordingly to take account of the corresponding VAT or excise duties.

114 It should be noted, however, that due to the mandate of the study, the following remarks are limited to situations where goods move within the EU internal market. The provisions of the Customs Code apply without restrictions to imports from third countries to Aland

and exports from Aland to third countries not belonging to the customs territory of the EU (cf. Article 4 UCC).

(1) Cases of Article 114 para. 1 Regulation (EU) 2015/2446

115 Article 114 para. 1 of Regulation (EU) 2015/2446 governs the movement of Union goods from a special fiscal territory to the EU customs territory that is not in the same Member State as the special fiscal territory, as well as the movement from an EU customs territory to a special fiscal territory that is not in the same Member State (Sweden-Åland, Åland-Sweden). In these cases, Member States shall apply Articles 115-118 of Regulation (EU) 2015/2446 and Articles 133 to 152 of the UCC (Arrival of goods, Chapter 2 of Title IV) for the arrival of the goods. Articles 133 to 152 UCC contain provisions concerning the arrival of goods. In detail, they govern the declarations to be made upon arrival of goods, the scope of customs supervision, the transport to the customs authorities, the presentation of the goods including their unloading and inspection, as well as the temporary storage of the goods. The obligation to make an entry summary declaration is suspended.

(2) Cases of Article 114 paras 2 and 3 of Regulation (EU) 2015/2446

Article 114 para. 2 Regulation (EU) 2015/2446 addresses the movement of goods within the same Member State. It is a special regime for Union goods sent from a special fiscal territory to a customs territory belonging to the same Member State (Åland to Finland). Article 114 para. 3 Regulation (EU) 2015/2446 deals with the movement of goods from a customs territory to a special fiscal territory in the same Member State (Finland to Åland). In these cases, the requirement for an entry summary declaration does not apply. According to Article 114 para. 4, in both cases, the goods are to be placed immediately and only the customs provisions of Article 134 Regulation (EU) 2015/2446 shall apply.

(3) Article 134 Regulation (EU) 2015/2446

116 Pursuant to Article 134 para. 1 of Regulation (EU) 2015/2446, the following rules apply mutatis mutandis to trade in Union goods pursuant to Article 1 para. 3 of the UCC:

(a) Title V, Chapters 2, 3 and 4 of the UCC (Placing goods under a customs procedure, Verification and release of goods, Disposal of goods, Article 158-200);

(b) Chapters 2 and 3 of Title VIII of the UCC (Transit and Storage);

(c) Title V, Chapters 2 and 3 of this Regulation (Article 134-154);

(d) Title VIII, Chapters 2 and 3 of this Regulation (Article 246-249).

117 In the context of trade in Union goods referred to in Article 1 para. 3 UCC in the same Member State, the customs authorities of that Member State may, in accordance with Article 134 para. 2 Regulation (EU) 2015/2446, allow a single document to be used to declare the dispatch (dispatch declaration) and the introduction (introduction declaration) of the goods to, from or between special fiscal territory(ies). Pending the improvements to the national import systems referred to in the Annex to Implementing Decision (EU) 2016/578, the customs authority of the Member State concerned may authorise the use of an invoice or transport document instead of the dispatch or introduction declaration in the context of trade in Union goods referred to in Article 1 para. 3 of the Code taking place in the same Member State.

(4) Article 188 Regulation (EU) 2015/2446

118 Article 188 concerns special fiscal territories and the transit procedure. According to Article 188 para. 1 Regulation (EU) 2015/2446, where Union goods are moved from a special fiscal territory to another part of the customs territory of the Union which is not a special fiscal territory and that movement ends at a place outside the Member State where the goods entered that part of the customs territory of the Union, those Union goods shall be moved under the internal Union transit procedure referred to in Article 227 of the UCC.

119 In situations other than those covered by paragraph 1, the internal Union transit procedure may be used for Union goods moving between a special fiscal territory and another part of the customs territory of the Union, in accordance with Article 188 para. 2 of Regulation (EU) 2015/2446. As these territories have their own VAT rules as well as excise duty rules, the UCC must also be applied to Union goods to safeguard the VAT and excise

duty. This can be done – as far as possible – with UTP/T2 for Union goods. Otherwise, the proof of status must be made with T2L(F).[216]

(5) Internal Union Transit Procedure according to Article 227 UCC

120 Article 227 of the Customs Code governs the internal Union transit procedure. While the code "T1" is used for the external Union transit procedure according to Annex B, Title II 1.3 of the Implementing Regulation (EU) 2015/2447, the code "T2" is assigned to the internal EIA ("T2F" if special fiscal territories as defined in Article 188 of the Regulation (EU) 2015/2446 are involved).[217] NCTS, an IT tool for the administration and control of transit procedures, is generally used. It should be emphasised that – besides T2L(F) – the status as Union goods can also be proven by using the UTP.

dd) Export

121 According to Article 4 of the UCC, the special fiscal territories are part of the customs territory of the Union. In principle, therefore, they are not subject to the customs export procedure. However, they are still considered as third territories to which the rules can be applied accordingly. This applies, for example, to the corresponding application of the provisions on the Union transit procedure and, in the cases of Article 134 of Regulation (EU) 2015/2446 (trade), the provisions of Article 267 *et seq.* of the UCC (inter alia, the customs declaration) with the modifications contained in Article 134.

ee) Customs Duty Exemption Regulation

122 Regulation (EU) No. 1186/2009 includes specific provisions for customs duty exemption (refer to Article 1). Some goods are subject to VAT or special excise duties when imported into the Union. However, Regulation (EU) No. 1186/2009 exempts import duties as per Article 5 No. 20 UCC or export duties under the Common Agricultural Policy. Other duties imposed on the basis of importation, such as import turnover tax or special excise duties,

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[216] H. Kampf, 5.11.4 Ausnahmen nach Art. 188 UZK-DelVO, in P. Witte (ed), *Praxishandbuch Export- und Zollmanagement* (Köln, Reguvis Fachmedien, 2023).

[217] K. Pier-Eiling, Art. 227 UZK, in P. Witte (ed), *supra* note 200, para. 18; cf. also Transit Manual, TAXUD/A1/TRA/005/2020-1-EN.

are not covered by this article.[218] However, it is necessary to further examine to what extent these provisions are applied to the corresponding VAT and excise duties in Finland or the Åland Islands. Article 41 provides for the exemption of goods contained in the personal luggage of travellers from third countries, on condition that the imported goods are exempt from VAT and excise duties in accordance with national legislation based on Council Directive 2007/74/EC of 20 December 2007 concerning the exemption of goods imported by individuals from third countries.

ff) Application to the Åland Islands and Comparison

123 These rules show the different formalities that apply to trade of Union goods between a special fiscal territory and the rest of the customs territory of the European Union as compensation for the non-application of the system of VAT and Excise Directives. It is not possible to assess the extent to which there is potential for optimisation in the implementation of this measure, as it is possible that Finland has made use of the option provided for in Article 2 para. 3 of Directive (EU) 2020/262. However, the application of the provisions of the Customs Code does not mean that a customs duty is levied on the transport of goods within the customs territory of the EU. The extent to which a tax is payable or refundable can only be assessed in the context of the specific facts of the above-mentioned directives, which may give rise to refund claims. Accordingly, a case-by-case assessment is unavoidable. Each individual case must be examined with regard to organisational implementation deficits. It should be noted that according to Article 5 No. 1 UCC, the Member States are responsible for determining the competence of the competent customs authorities[219], so that national (Finnish) law also decisively determines the distribution of competence between the Finnish and Åland (customs) authorities. However, with regard to the relationship between Åland and Finland (and vice versa) a special exception applies in the field of excise duties whereby they can apply the regulations set out in the Excise Duty Directive, obviating the need to apply customs regulations.

[218] T. Möller, Einführung VO Zollbefreiungen, in Dorsch (ed), *supra* note 203, para. 15.
[219] K. Göcke, Art. 5 UZK, H. Krenzler et al. (eds), *supra* note 201, para. 8.

124 In general, it should be noted that the above remarks apply mutatis mutandis to the Canary Islands and the French Overseas Departments because of their defined scope. It could therefore be useful to establish contacts at working level with representatives of the customs authorities in these territories in order to initiate an exchange of experience on "best practices". A comparison with Northern Ireland shows a different result: The Northern Ireland Protocol provides for the application of the VAT and excise duty provisions to Northern Ireland in its Annex III, which implies that the VAT Directive and Excise Duty Directive continue to apply in principle, so that Northern Ireland is therefore considered to be a Union territory in this respect.[220]

e) Possible Further Limitations of National Tax Regulations under Union law

125 According to general principles, national tax regimes must also be in accordance with primary law. This applies in particular to all territories falling within the scope of Union law (which is the case for the Åland Islands). In the following, we will therefore discuss the relevant standards arising from Article 110 TFEU, the fundamental freedoms of the TFEU and the law on state aid (Articles 107 *et seq.* TFEU).

aa) Article 110 TFEU

126 Article 110 TFEU guarantees the neutrality of internal taxation.[221] It prohibits discrimination with regard to taxes on the import of goods compared to domestic goods and, in a mirror image, also for the export of goods.[222] The design of national tax regulations must under all circumstances and in any case exclude the possibility that imported goods are taxed more heavily than similar domestic goods.[223] Unequal treatment can result, among other things, from a higher tax rate, from the possibility of tax

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[220] Cf. Art. 8 and Annex 3, Protocol on Ireland/Northern Ireland OJ L 029, 31 January 2020, p. 102.

[221] M. Kellerbauer, Art. 110 TFEU, in M. Kellerbauer et al. (eds), *supra* note 143, para. 1.

[222] CJEU, C-142/77, ECLI:EU:C:1978 :144, judgment, 29.06.1987 – Statens Kontrol; Khan, *supra* note 173, para. 21; C. Waldhoff, Art. 110 AEUV, in C. Calliess and M. Ruffert (eds), *supra* note 144, para. 16; Kellerbauer, *supra* note 221, para. 7.

[223] CJEU, C-228/98, ECLI:EU:C:2000:65, judgment, 03.02.2000 – Charalampos Dounias; Khan, *supra* note 173, para.14; Kellerbauer, *supra* note 221, para. 2.

concessions or from a different tax base.[224] The purpose of the provision is to ensure that a domestic tax is completely neutral in terms of competition between domestic and imported products.[225] The term tax is to be interpreted broadly and includes, for example, indirect taxes on goods, contributions, fees, levies, charges and special expenses.[226]

127 Article 110 TFEU and Article 107 TFEU can be applied cumulatively.[227] A distinction must be made between Article 110 TFEU and Article 30 TFEU. According to the case law of the Court of Justice of the EU (CJEU), there is an exclusive relation between the two provisions[228], which results from the different legal consequences. While under Article 30 TFEU the levying of duties or charges having equivalent effect is prohibited, Article 110 TFEU only requires the abolition of discrimination.[229] Duties equivalent to customs duties within the meaning of Article 30 TFEU are exclusively financial charges in connection with the border crossing of goods. Domestic duties within the meaning of Article 110 TFEU, on the other hand, are (only) those duties that are part of a general domestic duty system that applies equally to domestic and imported goods.[230] However, this distinction does not help if the domestic tax system also applies to imported goods. According to the case law of the CJEU, only those financial charges that are determined according to their own criteria, which are not comparable to those used to measure the charges borne by similar domestic products, constitute duties having equivalent effect.[231] The CJEU has ruled that duties with equivalent effect exist when products are given preferential tax treatment on

[224] CJEU, C-327/90, ECLI:EU:C:1992:206, judgment, 12.05.1992 – Commission v. Greece; CJEU, C-68/96, ECLI:EU:C:1998:299, judgment, 17.06.1998 – Grundig; Khan, *supra* note 173, para. 18.

[225] Khan, *supra* note 173, para. 5; Waldhoff, *supra* note 222, para. 5; Kellerbauer, *supra* note 221, para. 3; B. Killmann, Art. 30 TFEU, in Kellerbauer, *supra* note 221, para. 10.

[226] Khan, *supra* note 173, para. 11; Kellerbauer, *supra* note 221, *supra* note 143, para. 5.

[227] Established case law since: CJEU, C-47/69, ECLI:EU:C:1970:60, judgment, 25.06.1970, paras 11/14 – France v. Commission; Khan in R. Geiger et al. (eds), *supra* note 173, para. 10; Kellerbauer, *supra* note 230, para. 10.

[228] CJEU, 57/65, ECLI:EU:C:1969:27, judgment, 24.06.1969 – Lütticke GmbH/Hauptzollamt Saarlouis; CJEU, 25/670, ECLI:EU:C:1969:27, judgment, 24.06.1969 – Milch-, Fett- und Eierkontor/Hauptzollamt Saarbrücken; CJEU, C-90/94, ECLI:EU:C:1997:368, judgment, 17.07.1997, para. 19 – Haahr Petroleum; CJEU, C-213/96, ECLI:EU:C:1998:155, judgment, 2.04.1998, para. 19 – Outokumpu; Kellerbauer, *supra* note 221, para. 8.

[229] C. Waldhoff, Art. 30 AEUV, in C. Calliess and M. Ruffert (eds), *supra* note 144, para. 11; A. Brigola, C.I. Grundregeln, in M. Dauses and M. Ludwigs (eds), *supra* note 184, para. 68.

[230] Kellerbauer, *supra* note 221, para. 8; Khan, *supra* note 173, para.8.

[231] Kellerbauer, *supra* note 230, para. 8.

the basis of their origin and not on objective reasons.[232] On the other hand, a domestic levy – which is permissible in principle – exists if the charges in question are part of a general domestic levy system that systematically covers domestic and imported products on the basis of the same characteristics.[233]

bb) General Significance of the Fundamental Freedoms

128 As shown above, the EU is only vested with a comprehensive harmonisation competence in the area of indirect taxation. In the area of direct taxes, only the general harmonisation competence of Article 115 TFEU can be used, to which, however, the principle of unanimity applies.[234] There are no other provisions of primary law directly affecting direct taxation.[235]

129 It should be noted, however, that while the CJEU recognises that direct taxation falls within the competence of the Member States[236], it has also held that the latter must exercise their powers also in this area in compliance with Union law and, in particular, Article 18 TFEU and the fundamental freedoms.[237] The application of the fundamental freedoms limits the tax autonomy of the Member States to a certain extent, but ensures the enforcement of the central prohibition of discrimination under Union law in certain cases.

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[232] CJEU, C-163/90, ECLI:EU:C:1992:326, judgment, 16.07.1992, para. 12 – Legros.

[233] CJEU, C-517/04, ECLI:EU:C:2006:375, judgment, 8.06.2006, para. 16 – Koornstra; CJEU, C-221/06, ECLI:EU:C:2007:657, judgment, 8.11.2007, para. 31 – Stadtgemeinde Frohnleiten and Gemeindebetriebe Frohnleiten; CJEU, C-198/14, ECLI:EU:C:2015:751, judgement, 12.11.2015, paras 51-54 – Visnapuu, on this, cf. Brigola, *supra* note 229, paras 70 *et seq.*; Kellerbauer, *supra* note 230, para. 9.

[234] Kellerbauer, *supra* note 176, para. 3; Kokott, *supra* note 176, § 6, para. 1; Farmer, *supra* note 172, Chapt. 31, p. 810.

[235] Farmer, *supra* note 172, Chapt. 31, p. 810; S. Hindelang and H. Köhler, Der Einfluss der Grundfreiheiten auf direkte Steuern, 54 *Juristische Schulung* (2014) , p. 405; L. Adamczyk and A. Majdanska, The Sources of EU Law Relevant for Direct Taxation, in M. Lang et al. (eds), *Introduction to European Tax Law on Direct Taxation* (Vienna, Linde-Verlag, 5th edn., 2015), para. 43.

[236] CJEU, C-250/95, ECLI:EU:C:1997:239, judgment, 15.5.1997, para. 19 – Futura Participations SA.

[237] CJEU, C-279/93, ECLI:EU:C:1995:3, judgment, 14.02.1995, para. 21, 26 – Schumacker, CJEU, C-80/94, ECLI:EU:C:1995:271, judgment, 11.08.1995, para. 16 – Wielockx; CJEU, C-42/02, ECLI:EU:C:2003:613, judgment, 13.11.2003, para. 18 – Lindman; Farmer, *supra* note 172, Chapt. 31, pp. 813 *et seq.*; Kokott, *supra* note 176, § 3, paras 113 *et seq.*

130 In general, direct taxes are charged either at the residence of taxpayers or at the source of their income.[238] Thus, there are decisions of the CJEU, which have also found inadmissible discrimination in the area of direct taxation, even if they initially emphasises the (supposed) principle[239] that residents and non-residents are not in a comparable situation which could allow unequal treatment.[240] Comparability could, however, be assumed for the reason that the non-resident earned his (at least almost) entire world income in one state and that it was difficult in the state of residence to still sufficiently take into account personal and family circumstances due to a lack of assets.[241] The CJEU has stated that the fundamental freedoms could otherwise be undermined.[242] However, there is no general prohibition of restrictions that applies to fundamental freedoms in general in the area of taxation.[243]

131 In addition, justifications are possible – even despite the existence of discrimination – which can be derived from numerous categories of cases such as, for example, the prevention of tax evasion (tax avoidance, tax fraud), the effectiveness of tax supervision, the coherence (internal consistency) of the tax system and the preservation of the balanced distribution of taxation powers.[244]

cc) Cross-border Situations as a Necessary Precondition?

132 The application of the fundamental freedoms (freedom of movement of goods, freedom to provide services, freedom of movement of workers, freedom of establishment, and

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[238] Farmer, *supra* note 172, Chapt. 31, p. 812.
[239] Critical of calling this a principle, J. Kokott, *Das Steuerrecht der Europäischen Union* (Munich, C.H. Beck, 2018), § 3 Der Gleichheitssatz als Fundament des Steuerrechts para. 126. See also A. Randelzhofer and U. Forsthoff, Vorbemerkung zu den Art. 39-55 EGV, in E. Grabitz and M. Hilf (eds), *Das Recht der EU* (Munich, C.H. Beck, 40th edn., 2009), para. 211.
[240] E.g., CJEU, C-270/83, ECLI:EU:C:1986:37, judgment, 28.1.1986, paras 19 et seq. – Avoir fiscal; CJEU, C-279/93, ECLI:EU:C:1995:3, judgment, 14.02.1995, paras 36 et seq. – Schumacker; cf. on this K. Tiedtke and M. Mohr, Die Grundfreiheiten als zulässiger Maßstab für die direkten Steuern, 19 *Europäische Zeitschrift für Wirtschaftsrecht* (2008), p. 424; V. Englmair, The Relevance of the Fundamental Freedoms for Direct Taxation, in M. Lang et al. (eds), *supra* note 235, para. 230.
[241] Cf. Hindelang and Köhler, *supra* note 235, p. 406.
[242] Gröpl, *supra* note 184, para. 97.
[243] Cf. Kokott, *supra* note 176, § 3, paras 107 et seq; Hindelang and Köhler, *supra* note 235, p. 407.
[244] Englmair, *supra* note 240, paras 270 *et seq.*; Gröpl, *supra* note 184, paras 98, 118 *et seq.*; Hindelang and Köhler, *supra* note 235, p. 407.

freedom of capital and payments) requires, in principle, a cross-border dimension.[245] Purely domestic situations therefore do not trigger the material scope of the fundamental freedoms, which means that reverse discrimination or discrimination against nationals, understood as a worse position of domestic compared to cross-border situations, is generally not prohibited under EU law.[246]

133 However, the rulings of the CJEU on the special tax "octroi de mer" in the French overseas departments are relevant in this regard. The special tax "octroi de mer" has a similar objective for the French overseas departments as the AIEM has for the Canary Islands. In the early 1990s, the CJEU dealt with a case concerning the import of goods to Réunion on the basis of a preliminary ruling. A corresponding Council decision within the meaning of Article 349 para. 1 TFEU (ex Article 227 EEC Treaty) was not yet available at the time of the original dispute.[247] However, the CJEU ruled that the "octroi de mer" levied on goods from other Member States was an unlawful charge having equivalent effect to a customs duty.[248] It is undisputed in this case that the necessary cross-border link existed.

134 Two years later, the CJEU dealt with another case concerning the "octroi de mer" tax. The tax regime was challenged by René Lancry SA, which distributes flour in Martinique that originates from mainland France, as no flour is produced in Martinique.[249] A number of other companies also brought actions for reimbursement of the "octroi de mer" tax, which they had to pay on goods brought into the respective overseas departments from France and other member states. The Council argued in the case that the cross-border link did not exist precisely in those cases where the "octroi de mer" was applied to goods coming

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[245] Cf. P. Oliver, Measures of Equivalent Effect I: General, in Oliver (ed), *On Free Movement of Goods in the European Union* (Oxford, Hart, 5th edn., 2010), p. 84; U. Becker, Art. 34 AEUV, in J. Schwarze et al. (eds), *supra* note 148, para. 19; M. Ludwigs, E. I. Grundregeln, in M. Dauses and M. Ludwigs (eds), *supra* note 184, para. 36; M. Klamert et al., Art. 34 TFEU, in M. Kellerbauer et al. (eds), *supra* note 143, para. 19.

[246] See also CJEU, Case 355/85, ECLI:EU:C:1986:410, judgment, 23.10.1986, para. 8 *et seq*. – Cognet; CJEU, C-451/03, ECLI:EU:C:2006:208, judgment, 30.03.2006, para. 29 – Servizi Ausiliari; Klamert et al, Art. 34 TFEU, in M. Kellerbauer et al. (eds), *supra* note 143, para. 19.

[247] See CJEU, C-163/90, ECLI:EU:C:1992:326, judgment, 16.07.1992, para. 9 – Legros.

[248] CJEU, C-163/90, ECLI:EU:C:1992:326, judgment, 16.07.1992, paras 16 et seq. – Legros; on this Tryfonidou, *supra* note 150, p. 326; Oliver, *supra* note 245, p. 84.

[249] See CJEU, C-363/93, C-407/93, C-409/93 and C-411/93, ECLI:EU:C:1994:315, judgment, 9.08.1994, para. 10 – Lancry and others v Direction générale des douanes and others.

from other parts of French territory.[250] However, the CJEU did not follow this approach. The CJEU reasoned that, firstly, a charge with equivalent effect linked to the crossing of a border constitutes an obstacle to the free movement of goods[251], secondly, a charge at a regional border is just as serious as a charge at a border of a Member State[252] and, thirdly, that this circumstance hinders the free movement of goods just as much as a similar charge on products from another Member State.[253] In addition, the CJEU recognises the argument that the situation is not one "which takes place entirely within a Member State"[254]. This case law has been confirmed by the CJEU on several occasions.[255]

135 This case law thus represents a certain deviation from the traditional position of the CJEU, according to which a cross-border situation is required for the application of the fundamental freedoms.[256] This means that specific levies, e.g., also in the relationship between the Åland Islands and Finland, are generally prohibited under Article 30 TFEU. Exceptions are only permissible under strict conditions and would have to be examined on a case-by-case basis.[257]

f) State Aid Law

136 Another primary law standard is the state aid law, which is mainly regulated in Articles 107 *et seq.* TFEU. As shown above, the non-application of the VAT Directive and the

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[250] See CJEU, C-363/93, C-407/93, C-409/93 and C-411/93, ECLI:EU:C:1994:315, judgment, 9.08.1994, para. 23 – Lancry and others v Direction générale des douanes and others.

[251] CJEU, C-363/93, C-407/93, C-409/93 and C-411/93, ECLI:EU:C:1994:315, judgment, 9.08.1994, para. 25 – Lancry and others v Direction générale des douanes and others.

[252] CJEU, C-363/93, C-407/93, C-409/93 and C-411/93, ECLI:EU:C:1994:315, judgment, 9.08.1994, paras 26 et seq. – Lancry and Others v Direction générale des douanes and Others.

[253] CJEU, C-363/93, C-407/93, C-409/93 and C-411/93, ECLI:EU:C:1994:315, judgment, 9.08.1994, para. 27 – Lancry and others v Direction générale des douanes and others.

[254] CJEU, C-363/93, C-407/93, C-409/93 and C-411/93, ECLI:EU:C:1994:315, judgment, 9.08.1994, para. 30 – Lancry and others v Direction générale des douanes and others.

[255] CJEU, C-485/93, 486/93, ECLI:EU:C:1995:281, judgment, 14.09.1995, paras 25 et seq. – Simitzi; CJEU, C-72/03, ECLI:EU:C:2004:506, judgment, 09.09.2004, paras 22 et seq. - Carbonati Apuani; CJEU, C-293/02, ECLI:EU:C:2005:664, judgment, para. 26 - Jersey Produce Marketing Organisation, see: Oliver, *supra* note 245, p. 84.

[256] E. Traversa, Implementation of regional taxing powers and EU law: recent cases and future challenges, in V. Simonart, *Fiscal federalism in the European Union* (2011), p. 63; Oliver, *supra* note 245, p. 84.

[257] U. Haltern, Art. 30 AEUV, in M. Pechstein et al. (eds), *Frankfurter Kommentar EUV/GRC/AEUV* (Tübingen, Mohr Siebeck, 2017), paras 37 *et seq.*

Excise Duty Directive under secondary law alone does not lead to a situation that is incompatible with the state aid provisions.

137 In general, however, national tax regulations that establish individual tax advantages may fulfil the definition of aid in Article 107 para. 1 TFEU. To determine whether a company has received an advantage a comparison is drawn between with the situation before the state has adopted the measure in question.[258] The economic advantage, which is a prerequisite for the state aid definition, includes not only positive benefits such as subsidies, but also measures that reduce the burdens normally borne by an undertaking.[259] In the case of tax advantages, the state forgoes revenue that it would otherwise obtain.[260] Although they do not involve a transfer of state resources, they place the beneficiaries in a better financial position than other taxpayers.[261] It does not matter whether the national scheme is called or perceived as a "tax" in the member state; what matters is that it is an economic advantage which may arise, for example, from indirect or direct taxes.[262] This may occur at the level of tax assessment, in the collection of taxes or in the selective application of any exemptions.[263]

138 In general terms, the Åland Islands can be considered to be a special tax zone[264] (hereinafter: STZ), which according to *Claudio Cipollini* is described as an area in which some territorial tax advantages are granted in the field of direct or indirect taxation.[265] The aim of such STZs is to stimulate the region's economy and employment.[266] According to

[258] T. Rusche, Art. 107 TFEU, in M. Kellerbauer et al. (eds), *supra* note 143, para. 19.
[259] CJEU, C-518/13, ECLI:EU:C:2015:9, judgment, 14.01.2015, paras 32 et seq – Eventech; CJEU, C-5/14, ECLI:EU:C:2015:354, judgment, 04.06.2015, paras 71 *et seq.* – Kernkraftwerke Lippe-Ems; CJEU, C-164/15 P, C-165/15 P, ECLI:EU:C:2016:990, judgment, 21.12.2016, paras 40 *et seq.* – Air Lingus, cf. also Kokott, *supra* note 176, § 3, para. 126.
[260] C. Panayi, *Advanced Issues in International and European Tax Law* (Oxford, Hart, 2015), p. 253.
[261] Kokott, *supra* note 176, § 3, paras 126, 127; C. Cipollini, *Special Tax Zones and EU Law* (Alphen aan den Rijn, Wolters Kluwer, 2019), pp. 52, 54 *et seq.*
[262] Kokott, *supra* note 176, § 3, para. 126; M.-A. Kronthaler and Y. Tzubery, The State Aid Provisions of the TFEU in Tax Matters, in M. Lang et al. (eds), *supra* note 235, paras 411 *et seq.*
[263] Panayi, *supra* note 260, p. 252.; Kokott, *supra* note 176, § 3, paras 143 *et seq.*; Kronthaler and Tzubery, *supra* note 262, paras 411 *et seq.*
[264] This also includes the special fiscal territories under the UCC.
[265] Cipollini, *supra* note 261, pp. 26 *et seq.*, 200 *et seq.*
[266] Cipollini, *supra* note 261, pp. 2, 10.

the Finnish Self-Government Act (*Självstyreselag*), the Åland Islands have a certain fiscal autonomy in relation to Finland.

139 As shown above, tax schemes can thus open up the scope of the state aid element within the meaning of Article 107 para. 1 TFEU. However, the characteristic of selectivity is particularly important for the determination of a fundamentally prohibited aid. A favourable measure may be either territorially selective (i.e., only applying to a part of the reference area) or materially selective (i.e., only bringing benefits for a certain sector of the economy or certain enterprises).[267] Other conditions are the distortion of competition and the effect on trade between Member States, which will not be discussed further.

aa) Characteristics of Selectivity

140 The characteristic of selectivity aims at distinguishing general economic policy measures from those that only benefit certain enterprises or branches of production.[268] The decisive factor is that a state measure under a certain legal regime is likely to favour certain undertakings or branches of production compared to other undertakings which are in a comparable factual and legal situation with regard to the objective pursued by the measure in question.[269] This is a discrimination test.[270] The proof of a *de facto* disadvantage would suffice in that regard.[271] Selectivity is often established by means of a three-step test[272], starting with the determination of the frame of reference to be applied in the specific case. In the case of taxes, the frame of reference is based on elements such as the tax base, the taxpayers, the taxable event and the tax rates.[273]

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[267] Panayi, *supra* note 260, p. 254; E. Traversa, Implementation of regional taxing powers and EU law: recent cases and future challenges, in V. Simonart, Fiscal federalism in the European Union, 2011, p. 57 (71).

[268] C. Arhold, Part I, 107 TFEU, in F. J. Säcker and F. Montag (eds), *European State Aid Law* (Munich, C.H. Beck, 2016), para. 362; A. Bartosch, *EU-Beihilfenrecht* (Munich, C.H. Beck, 3rd edn., 2020), Art. 107(1) TFEU, para. 135; T. Rusche, Art. 107 TFEU, in M. Kellerbauer et al. (eds), *supra* note 143, para. 57.

[269] Cf., in general, CJEU, C-143/99, ECLI:EU:C:2001:598, judgment, 8.11.2001, para. 41 – Adria-Wien Pipeline; Bartosch, *supra* note 268, para. 135.

[270] Rusche, Art. 107 TFEU, in M. Kellerbauer et al. (eds), *supra* note 143, para. 60.

[271] T. Jaeger Part. VII, Tax Measures, in F. J. Säcker and F. Montag (eds), European State Aid Law (Munich, C.H. Beck, 2016), para. 40; Bartosch, *supra* note 268, para. 135.

[272] Kronthaler and Tzubery, *supra* note 262, paras 387 *et seq.*

[273] Cipollini, *supra* note 261, p. 56.

141 In addition, it must be established that undertakings in a comparable legal and factual situation benefit from this advantage to a different extent[274], i.e., the measure in question constitutes a deviation from the reference system which leads to undertakings which are in a comparable legal and factual situation being treated differently[275]. A deviation from "normal market conditions" or an exception to a general frame of reference do not constitute a selective advantage if the measure in question is in principle accessible to any undertaking and is thus not intended to favour a particular group of undertakings but a group of economic transactions.[276]

142 Thirdly, it must be determined whether such a derogation is justified by the nature or general scheme of the reference system. If the derogation is justified by the nature or general scheme of the system, it is not considered selective and will therefore fall outside the scope of Article 107 para. 1 TFEU.[277]

bb) Territorial Selectivity

143 As shown above, selectivity can also result from the territorial limitation of an economic advantage. The question of the extent to which the exercise of tax autonomies correlates with selectivity is particularly relevant for STZ. This is important because a selective advantage can only be established in relation to "normal taxation" applicable in the geographical area constitutes the frame of reference.[278] The relevant principles were established by the CJEU in its so-called *Azores* ruling.[279] Several cases must be distinguished:

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[274] CJEU, C-15/14 P, ECLI:EU:C:2015:362, judgment, 04.06.2015, para. 59 – MOL; CJEU, C-524/14 P, ECLI:EU:C:2016:971, jdugment, 21.12.2016, para 58 – Commission/Hansestadt Lübeck; CJEU, C-374/17, ECLI:EU:C:2018:1024, judgment, 19.12.2018, para. 22 – Finanzamt B/A Brauerei; H. Schweitzer and E.-J. Mestmäcker, Art. 107 Abs. 1 AEUV, in U. Immenga and E.-J. Mestmäcker (eds), Wettbewerbsrecht (Munich, C.H. Beck, 6th Ed. 2022), para. 168;

[275] Cipollini, *supra* note 261, p. 56; Rusche, Art. 107 TFEU, in M. Kellerbauer et al. (eds), *supra* note 143, para. 63; Panayi, *supra* note 260, p.254

[276] Schweitzer and Mestmäcker, Art. 107 Abs. 1 AEUV, in U. Immenga and E.-J. Mestmäcker (eds), *supra note* 269, para. 168.

[277] Bartosch, *supra* note 268, para. 137; Cipollini, *supra* note 261, p. 56; Panayi, *supra* note 260, pp. 254 et seq; Kronthaler and Tzubery, *supra* note 262, paras 388 *et seq.*

[278] CJEU, C-88/03, ECLI:EU:C:2006:511, judgment, 06.09.2006, para. 56 - Portugal v Commission.

[279] CJEU, C-88/03, ECLI:EU:C:2006:511, judgment, 06.09.2006 – Portugal v Commission. Bartosch, *supra* note 268, para. 156; Panayi, *supra* note 277, pp. 256 *et seq.*

144 If a central government unilaterally decides to apply a low tax rate in a certain geographical area, this is territorially selective.[280] If, on the other hand, the legislative competence does not lie with the central government, but rather with public bodies of this Member State which are on a lower hierarchical level (for example, local or regional authorities), the fact that a more favourable regulation (for example, a lower tax rate) is applied to one area of competence than to another cannot be considered as a selective advantage, since no uniform frame of reference can be determined.[281] If, however, a regulation defining the frame of reference exists at the central level, but this central government has left autonomous powers to a specific region, then the tax regulation adopted by the autonomous region can exclude territorial selectivity on the basis of the relevance of this regulation to the frame of reference, if the legislative competence that the region has is also autonomous in qualified sense.[282] This case law has now been incorporated into the guidelines of the European Commission.[283]

145 This presupposes that the relevant regional or local body has been constitutionally granted its own political and administrative status vis-à-vis the central government (institutional autonomy); that the regulation was adopted without the central government having the possibility of directly influencing its content (procedural autonomy); and that the regulating region bears the political and financial consequences of the measure adopted, in particular that the financial effects of the reduction of the national tax rate for companies in the region are not offset by grants or subsidies from the other regions or from the central government (political, economic and financial autonomy).[284]

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[280] Cipollini, *supra* note 261, p. 56; Panayi, *supra* note 277, p. 257.

[281] CJEU, C-88/03, ECLI:EU:C:2006:511, judgment, 06.09.2006, para. 64 - Portugal v. Commission; Bartosch, *supra* note 268, para. 157.

[282] See Bartosch, *supra* note 268, para. 15; Panayi, *supra* note 277, p. 257.

[283] Commission Notice on the concept of State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union (2016/C 262/01), para. 142 *et seq.*

[284] CJEU, C-88/03, ECLI:EU:C:2006:511, judgment, 06.09.2006, para. 67 - Portugal v. Commission; Schweitzer and Mestmäcker, Art. 107 Abs. 1 AEUV, in U. Immenga and E.-J. Mestmäcker (eds), *supra* note 269, para. 203; Bartosch, *supra* note 268, para. 157; Rusche, Art. 107 TFEU, in M. Kellerbauer et al. (eds), *supra* note 143, para. 69; Panayi, *supra* note 260, p. 257.

146 With regard to the situation in the Azores, in the original case the CJEU rejected the qualified autonomy of the Azores for lack of sufficient financial autonomy on the basis of a principle of national solidarity.[285]

147 The criteria for qualified autonomy were confirmed and further developed by the CJEU in the *UGT Rioja* case concerning the autonomous Basque Country.[286] It can be assumed that the mere reference to financial regulations for the implementation of a national principle of solidarity can no longer exclude the corresponding financial autonomy.[287] However, the causal link between relevant fiscal regime and the financial allocations by the central government must be examined on a case-by-case basis and for each region individually. The extent to which qualified autonomy exists with regard to the Åland Islands requires further investigation, but it is likely to be the case with regard to § 18 (5) *Självstyrelselag*. The existence of such financial autonomy is assumed by Suksi,[288] for example.

cc) Material Selectivity Despite Qualified Autonomy?

148 Even if territorial selectivity can be ruled out, the tax regime can still be considered selective from a material point of view.[289] Therefore, even in the case of sufficiently qualified autonomy, tax measures must always be designed for meeting the situation of all companies in a legally and factually comparable situation that are established in the territory of a STZ, in order not to be considered as (harmful) material selectivity.[290]

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[285] Cf. CJEU, C-88/03, ECLI:EU:C:2006:511, judgment, 06.09.2006, paras 71 *et seq.* – Portugal v. Commission.

[286] CJEU, C-428/06 and C-434/06, ECLI:EU:C:2008:488, judgment, 11.09.2008 - Unión General de Trabajadores de la Rioja; see also Bartosch, *supra* note 268, paras 161, 162.; Panayi, *supra* note 260, pp. 257 *et seq.*

[287] Bartosch, *supra* note 268, para. 162.

[288] M. Suksi, Funding of and Public Spending in the Autonomous Aland Islands, 17 *Academia Puertorriqueña De Jurisprudencia Y Legislación* (2020), p. 98.

[289] General Court, T-95/21, ECLI:EU:T:2022:567, judgment, 21.09.2022, paras 56 *et seq.* – Portugal v. Commission; Court of Justice, Commission v. Gibraltar, paras 100-102; E. Traversa, Implementation of regional taxing powers and EU law: recent cases and future challenges, in V. Simonart, *Fiscal federalism in the European Union,* 2011, p. 73; Schweitzer and Mestmäcker, Art. 107 Abs. 1 AEUV, in U. Immenga and E.-J. Mestmäcker (eds), *supra note* 269, para. 203; Panayi, *supra* note 260, pp. 259-260.

[290] General Court, T-95/21, ECLI:EU:T:2022:567, judgment, 21.09.2022, paras 57 *et seq.* – Portugal v. Commission; Cipollini, *supra* note 261, p. 71.

g) Conclusions on Section 2

149 Against this backdrop, it can be concluded that the Protocol No. 2 does not limit the application of Articles 26 *et seq.*, 34-36, 110 or 107 TFEU. State aid law may also have a normative character in STZ and must always be taken into account when adopting tax measures. In addition, it should be noted that even if the prohibition of state aid under Article 107 para. 1 TFEU applies, a justification pursuant to Article 107 para. 3 lit. a TFEU or Article 107 para. 3 lit. c TFEU as well as on the basis of the block exemption regulations seems conceivable for STZ.[291] The transfer of further taxation powers would have to be combined with the transfer of substantive legislative powers from the Finnish Parliament to the Åland Islands Legislative Assembly.[292] Protocol No. 2 does not directly affect the provisions governing the economic relations between the self-governing unit and the Finnish state.[293]

3. Importance of National Interests and Structures in Union Law

150 First of all, it must be emphasised that according to Article 5 para. 1 TEU, the European Union is subject to the principle of conferral, i.e., it has no *Kompetenz-Kompetenz*[294]. According to this principle, the Union will act only within the limits of the competences conferred upon it by the Member States as the "masters of the Treaties" for the realisation of the objectives laid down therein. All competences not transferred to the Union remain with the Member States, cf. Article 5 para. 2 sentence 2 TEU.

151 In general, the division of competences between the European Union and the Member States may also have an impact on the division of competences within States.[295] In principle, in the absence of a general attribution to the European Union, the enforcement

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[291] See also Guidelines XX; Kronthaler and Tzubery, *supra* note 262, paras 411 *et seq.*
[292] Suksi, *supra* note 288, p. 82.
[293] Suksi, *supra* note 288, p. 95.
[294] Cf. A. von Bogdandy and J. Bast, The Federal Order of Competences, in A. v. Bogdandy and J. Bast (eds), *Principles of European Constitutional Law* (Munich, C.H. Beck, 2nd. Ed. 2009), pp. 275 *et seq.*; C. Callies, Art. 5 TEU, in C. Calliess and M. Ruffert (eds), *supra* note 144, para. 7; G. Lienbacher, Art. 5 TEU, in J. Schwarze et al. (eds), *supra* note 148, para. 7.
[295] R. Streinz, Auswirkungen der Kompetenzverteilung zwischen Union und Mitgliedstaaten auf die Kompetenzordnung in den Mitgliedstaaten, in A. Gamper et al. (eds), *Föderale Kompetenzverteilung in Europa* (Baden-Baden, Nomos, 2016), p. 663.

of Union law falls within the Member States' domain.[296] Insofar as Union law does not provide for any norms, the Member States' national law determines such enforcement. Furthermore, according to the principle of institutional and procedural autonomy[297], the Member States themselves determine in principle which authority is competent and define the relevant procedure.[298] However, the remedies must not be less favourable than those governing similar matters governed by national law (principle of equivalence) and must not render the exercise of rights conferred by Union law practically impossible or excessively difficult (principle of effectiveness).[299]

152 However, the Treaties provide for some normative room for the self-governments in the Member States and attach special importance to it.[300] This report does not deal with the debate on the extent to which the regions should be given a greater role for and in European integration.[301] Although there is no binding concept of regions in Union law[302], parts of the literature understand it broadly and include areas with common characteristics, which can be of a geographical, historical-cultural, confessional, economic, planning or political-administrative nature.[303] In the "Declaration on Regionalism in Europe" adopted by the Assembly of European Regions (AER) in 1996, the region is ideally conceived as a territorial entity under public law directly below the level of the state, recognised by constitution or law and having its own political identity, administration, staff, finances and symbols (Article 1). With regard to the Committee of the Regions, the term "regional and local authorities" (Article 300 para. 3 TFEU) is deliberately left open, leaving Member States a wide margin to take into account

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[296] CJEU, Joined cases 205 to 205/82, ECLI:EU:C:1983:233, judgment, 21.9.1983, para. 17 – Milchkontor.
[297] On the term M. Ludwigs, Die Verfahrensautonomie der Mitgliedstaaten, 37 *Neue Zeitschrift für Verwaltungsrecht* (2018), p. 1417.
[298] Settled case law: CJEU, C-39/70, ECLI:EU:C:1971:16, judgment, 11.2.1971, paras 4 *et seq.* – Fleischkontor.
[299] Cf. CJEU, C-177/20, ECLI:EU:C:2022:175, judgment, 10.03.2022, para. 49; A. von Bogadndy, Founding Principles, in A. von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law* (Munich, C.H. Beck, 2nd. Ed. 2009), pp. 40 *et seq.*
[300] See M. Klamert, Art. 300 TFEU, in M. Kellerbauer et al. (eds), *supra* note 143, para. 10.
[301] Cf. P. Hilpold et al. (eds), *Europa der Regionen* (Heidelberg/Berlin, Springer, 2016); C. Jeffrey, *The Regional Dimension of the European Union. Towards a Third Level in Europe?* (London, Routledge, 1997).
[302] H.-J. Blanke, Art. 300 TFEU, in E. Grabitz et al. (eds), *supra* note 146, para. 83.
[303] A. Obermüller, Vor Art. 305 AEUV, in H. v.d. Groeben et al. (eds), *Europäisches Unionsrecht* (Baden-Baden, Nomos, 7th edn., 2015), para. 3.

heterogeneous situations.[304] According to scholarly writings, "territorial authority" presupposes a definable territorial unit with a minimum of administrative or legislative powers.[305] The European Union has explicitly recognised the regions in other places, for example in Article 4 para. 2 TEU and Article 5 para. 3 subpara. 1 TEU. Furthermore, according to Article 16 para. 2 TEU, it is possible that members of the governments of a Member State can also be possible representatives of the Member State in the Council. As sub-national bodies, the regions – in contrast to the Member States – do not have a privileged right of action under Article 263 para. 2 TFEU[306], but can establish a right of action under the conditions of Article 263 para. 4 TFEU.[307]

a) Subsidiarity Principle, Article 5 para. 3 TEU

153 The principle of subsidiarity is enshrined in Article 5 para. 3 TEU. According to the said provision the Union may take action in areas which do not fall within its exclusive competence, i.e., shared competences (Article 4 TFEU) as well as supporting, coordinating and complementary measures (Article 6 TFEU), only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States (negative criterion) but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level (positive criterion).[308] Protocol No. 2 also sets out in its Article 5 the guidelines for determining whether these conditions are met.[309] Self-

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[304] O. Suhr, Art. 300 AEUV, in C. Calliess and M. Ruffert (eds), *supra* note 144, para. 29; Blanke, Art. 300 AEUV, in E. Grabitz et al. (eds), *supra* note 146, para. 83.

[305] Suhr, Art. 300 AEUV, in C. Calliess and M. Ruffert (eds), *supra* note 144, para.. 29; M. Kotzur, Art. 300 AEUV, in R. Geiger et al. (eds), *supra* note 173, para. 6.

[306] CJEU, C-180/97,ECLI:EU:C:1997:451, judgment, 1.10.1997 - Regione Toscana v Commission; CJEU, C-95/97, ECLI:EU:C:1997:184, judgment, 21.03. 1997 - Walloon Region v Commission, [1997] ECR I-1787.

[307] CJEU, C-142/00 P, ECLI:EU:C:2001:623, judgment, 21.11.2001, para. 51 – Nederlandse Antillen v Council; CJEU, C-417/04 P, ECLI:EU:C:2006:282, judgment, 2.5.2006, para. 24 – Regione Siciliana v Commission; cf. C. Perathoner, Die Regionen der Europäischen Union. Ist-Zustand und Ausblick, in P. Hilpold et al. (eds), *Europa der Regionen* (Heidelberg/Berlin, Springer, 2016), pp. 78-9.

[308] CJEU, C-508/13, ECLI:EU:C:2015:403, judgment, 18.06.2015, para. 44 - Estonia v. Parliament and Council; W. Obwexer, Kontrolle und Interpretation der Kompetenzverteilung in der EU, in A. Gamper et al. (eds), *supra* note 295, p. 703; C. Calliess, Art. 5 EUV, in C. Calliess and M. Ruffert (eds), *supra* note 144, paras 28 *et seq.*; M. Klamert, Art. 5 TEU, in Kellerbauer et al. (eds), *supra* note 143, paras 23 *et seq.*; P. Craig, Subsidiarity: A Political and Legal Analysis, 50 *Journal of Common Market Studies* 50 (2012), 72-87.

[309] CJEU, C-508/13, ECLI:EU:C:2015:403, judgment, 18.06.2015, para. 44 - Estonia v. Parliament and Council; CJEU, C-176/09, ECLI:EU:C:2011:290, judgment, 12.05.2011, para. 76 - Luxembourg v Parliament and Council.

governing bodies are significant in that the determination of the negative criterion must explicitly be based on the fact that the objectives cannot be sufficiently achieved either at central level or at regional or local level.

154 Where a legal act pursues several objectives, the interaction between the objectives may also lead to a finding of subsidiarity, even if not all the objectives equally fulfil the requirements of Article 5 para. 3 TEU.[310] Furthermore, it is not each individual provision that is decisive for the subsidiarity test, but the entire legal act in each case.[311] Moreover, according to the case law of the CJEU, the principle of subsidiarity cannot lead to the invalidity of an entire measure because of the specific situation of a Member State.[312]

b) Respect for National Identities, Article 4 para. 2 TEU

155 Article 4 para. 2 TEU calls on the Union to

> "respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, including regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State."

156 The purpose of Article 4 para. 2 TEU is often described as a safeguard clause for national interests.[313] Furthermore, it is argued that the explicit inclusion of regional and local self-government in the wording of Article 4 para. 2 TEU means that Union law should also be open to the participation of the institutions of such self-government, insofar as the

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[310] Cf. CJEU, C-508/13, ECLI:EU:C:2015:403, judgment, 18.06.2015, para. 48 - Estonia v. Parliament and Council.

[311] CJEU, C-508/13, ECLI:EU:C:2015:403, judgment, 18.06.2015, para. 51 - Estonia v. Parliament and Council.

[312] CJEU, C-508/13, ECLI:EU:C:2015:403, judgment, 18.06.2015, para. 53 - Estonia v. Parliament and Council.

[313] On this interpretation, see Folz, Die Kompetenzverteilung zwischen der Europäischen Union und ihren Mitgliedstaaten nach föderalen Maßstäben, in A. Gamper et al. (eds), *supra* note 295, p. 652.

system of the EU as an integration community makes this possible.[314] It is convincing to assess that Article 4 para. 2 TEU generally aims at making the EU legal order permeable for normative contents of the national legal order in the sense of permeability[315].[316]

157 In order to ensure the effectiveness of Union law, the EU must rely on the cooperation of its Member States in the application of Union law.[317] It follows that, for example, it is up to the Member States to decide which national authorities should transpose directives, at what level and by what legal means, provided that the content of the directives is correctly applied.[318] It is also precisely because of Article 4 para. 2 TEU that national diversity is guaranteed in institutional terms.

aa) Functions and Effect of Article 4 para. 2 TEU

158 The functions of this provision are manifold[319], some consider Article 4 para. 2 TEU to be an obstacle to the exercise of competence by the European Union in favour of the Member States, which, however, has not yet been developed in any proceedings.[320] It is clear that according to Article 4 para. 2 TEU, a national measure can justify a restriction of fundamental freedoms.[321] This function has also been confirmed by the CJEU.[322] Another central function is attributed to Article 4 para. 2 TEU in the proceedings before the CJEU,

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[314] Streinz, Auswirkungen der Kompetenzverteilung zwischen Union und Mitgliedstaaten auf die Kompetenzordnung in den Mitgliedstaaten, in A. Gamper et al. (eds), *supra* note 295, p. 684.

[315] M. Wendel, *Permeabilität im europäischen Verfassungsrecht* (Tübingen, Mohr Siebeck, 2011).

[316] A. Schnettger, Article 4(2) TEU as a vehicle for national constitutional identity in the shared European legal system, in C. Calliess and G. v.d. Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge, CUP, 2019), pp. 13 *et seq.*

[317] B. De Witte, Article 4(2) TEU as a Protection of the Institutional Diversity of the Member States, 27 *European Public Law* (2021), pp. 560 *et seq.*

[318] De Witte, *supra* note 317, p. 562.

[319] Calliess, *supra* note 144, para. 54 *et seq.*; M. Dobbs, Sovereignty, Article 4(2) TEU and the Respect of National Identities: Swinging the Balance of Power in Favour of the Member States?, 33 *Yearbook of European Law* (2014), pp. 298–334.

[320] Obwexer, *supra* note 308, p. 715; S. Schrill and C. Krenn, Art. 4 EUV, in E. Grabitz et al. (eds), *supra* note 146, para. 45.

[321] B. Guastaferro, Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause, 31 *Yearbook of European Law* (2012), pp. 290 *et seq.*; Schnettger, *supra* note 316, pp. 34 et seq; Schrill and Krenn, *supra* note 320, para. 21; M. Klamert, Art. 4 TEU, in Kellerbauer et al. (eds), *supra* note 143, para. 21.

[322] Cf. CJEU, C-36/02, ECLI:EU:C:2004:614, judgment, 14.10.2004, paras 33 *et seq.* – Omega; CJEU, C-112/00, ECLI:EU:C:2003:333, judgment, 12.06.2003, paras 71 *et seq.* – Schmidberger; CJEU, C-208/09, ECLI:EU:C:2010:806, judgment, 22.12.2010 – Sayn-Wittgenstein; CJEU, C-391/20, ECLI:EU:C:2022:638, judgment, 7.09.2022 – Boriss Cilevics u.a.

which deal with the interpretation of secondary law in accordance with the protection of national constitutional identity.[323]

159 Moreover, Article 4 para. 2 TEU can also constitute a justification for a selective non-application of secondary law.[324] Indeed, the CJEU has consistently held that a Member State may not invoke provisions, practices or situations of its internal legal order to justify non-compliance with its obligations under EU law.[325] On the other hand, Article 4 para. 2 TEU requires as an obligation under Union law to take into account the national identity with which the application of secondary law may conflict. It is therefore possible in individual cases, via Article 4 para. 2 TEU, to develop national identity with regard to individual secondary law or even primary law in appropriate constellations and to take national identities into account.[326] The individual deviation follows normatively from Union law and not from Member State concepts of identity.[327] However, the decisive factor in each individual case is a substantive balancing of the various interests resulting from the non-application of a Union law provision with the interests of protection resulting from the respective national identity.[328] Such a legal consequence, however, is not an exception to the primacy of application of Union law, but merely limits the unity of the EU legal order in the specific case.[329] It is not a blanket provision for derogation from Union law obligations.[330]

160 This effect can be observed, for example, in the case law on the selectivity of state aid schemes (see above) or in public procurement law. In the latter, Article 4 para. 2 TEU has a special significance in the case law of the CJEU regarding in-house procurement. The case concerns the award procedure in the city of Pori, in which public transport services

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[323] Schnettger, *supra* note 316, pp. 30.
[324] Schrill and Krenn, *supra* note 320, paras 44, 47.
[325] CJEU, C-423/00, ECLI:EU:C:2002:32, judgment, 17.01.2002, para. 16 – Commission v Belgium; CJEU, C-205/96, ECLI:EU:C:1997:63, judgment, 06.02.1997, para 10 – Commission v Belgium; CJEU, C-473/13 and C-514/13 ECLI:EU:C:2014:2095, judgment, 17.07.2014, paras 30, 31 – Bero; cf. T. Weber, *Bundesstaatliche Identitäten und ihre Achtung im Unionsrecht* (Baden-Baden, Nomos, 2022), p. 65; M. Klamert, Art. 4 TEU, in Kellerbauer et al. (eds), *supra* note 143, para. 20.
[326] Schnettger, *supra* note 316, pp. 26 *et seq.*
[327] Schnettger, *supra* note 316, p. 33.
[328] Schnettger, *supra* note 316, p. 34.
[329] Schnettger, *supra* note 316, p. 34; Calliess, *supra* note 144, para. 8.
[330] I. Gillich, *Die integrierte Staatlichkeit der Länder* (Tübingen, Mohr Siebeck, 2022), p. 428.

for health services were awarded in-house to a private company, wholly owned by the city of Pori. This award was challenged by a competitor and a number of questions concerning the award modalities were referred to the CJEU. It is important to know whether the situation in question is really a public contract falling under secondary public procurement law or whether it is rather a transfer of (public) competences that is secured by Article 4 para. 2 TEU (sometimes also referred to in the literature as self-execution in the narrower sense)[331].[332] The allocation of competences to a Member State is thus part of the national identity. In this context, the CJEU has already ruled in several cases that Article 4 para. 2 TEU also refers to the national reorganisation of competences, which excludes the application of public procurement law – and thus also secondary procurement law.[333] However, the assumption of such a transfer of competences is not without preconditions. According to the case law of the CJEU, it is necessary

> “that the public body to which a competence is delegated has the power to organise the performance of the tasks deriving from that competence and to establish the legal framework relating to those tasks. Furthermore, it must have a financial independence that allows it to ensure the financing of these tasks. This is not the case, on the other hand, if the body originally responsible retains primary responsibility for these tasks, reserves financial control over them or has to agree in advance to the decisions that the body it calls in wants to take.”[334]

161 The importance of Article 4 para. 2 TEU is also illustrated by the *Digibet* case, which dealt with the regulation of betting and gambling in Germany. The Maltese gambling company *Digibet* argued before the CJEU that German legislation infringed EU law on the free movement of services because the restrictions on gambling varied from one *Land* to another. This inconsistency arose from the fact that the regulation of gambling falls within

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[331] N. Eisentraut, Der Grundsatz der Ausschreibungsfreiheit der Eigenerledigung, 33 *Europäiscch Zeitschrift für Wirtschaftsrecht* (2022), p. 981.

[332] CJEU, C-51/15, ECLI:EU:C:2016:985, judgment, 21.12.2016, paras 40, 41 – Remondis; CJEU, C-328/19, ECLI:EU:C:2020:483, judgment, 18.06.2020, para 45 – Porin kaupunki.

[333] CJEU, C-51/15, ECLI:EU:C:2016:985, judgment, 21.12.2016, para. 41 – Remondis; CJEU, C-328/19, ECLI:EU:C:2020:483, judgment, 18.06.2020, para 46 – Porin kaupunki.

[334] CJEU, C-51/15, ECLI:EU:C:2016:985, judgment, 21.12.2016, para. 49 – Remondis; CJEU, C-328/19, ECLI:EU:C:2020:483, judgment, 18.06.2020, para 48 – Porin kaupunki.

the competence of the *Länder*, which means that they can take different measures in this area and impose different restrictions on the provision of gambling services by operators from other EU countries. The Court argued that "the division of competences between the Länder cannot be called into question, since it benefits from the protection conferred by Article 4(2) TEU"[335]. Furthermore, the CJEU ruled that the existence of such divergences was not in itself contrary to EU law.[336]

162 In another case concerning the implementation of an obligation to establish special detention facilities for detainees awaiting deportation, the CJEU ruled that in federal states, the obligation does not go so far as to require the establishment of special detention facilities in each federal subdivision if no such facilities exist there.[337] This application also shows that there needs to be leeway in implementing secondary legislation in federal states.[338] Although the EU's prohibition on encroaching on Germany's autonomy does not release Germany from its obligations under Union law, it remains free to find a solution that respects its internal division of competences in fulfilling these obligations.[339]

163 In this system, Article 4 para. 2 TEU fulfils its function of optimising the interplay between EU law and national law[340] by providing an effective solution to the relevant conflict of laws problems.[341]

164 The identity clause aims to protect an individual situation and is applied to a normative conflict between a provision of Union law and a national legal provision.[342] In this way,

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[335] CJEU, C-156/13, ECLI:EU:C:2014:1756, judgment, 12.06.2014, para. 34 – Digibet.
[336] CJEU, C-156/13, ECLI:EU:C:2014:1756, judgment, 12.06.2014, paras. 36 et seq. – Digibet.
[337] CJEU, C-473/13 and C-514/13, ECLI:EU:C:2014:2095, judgment, 17.07.2014, paras. 30 et seq. – Bero and Bouzalmate.
[338] D. Fromage, National Constitutional Identity and Its Regional Dimension Post-Lisbon as Part of a General Trend Towards Multilevel Governance Within the EU, *European Public Law 27* (2021), p. 511.
[339] Fromage, *supra* note 338, p. 511.
[340] C. Calliess and A. Schnettger, The Protection of Constitutional Identity in a Europe of Multilevel Constitutionalism, in C. Calliess and G. van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge, CUP, 2019), p. 354.
[341] Calliess and Schnettger, *supra* note 340, p. 361; F-X. Millet, Successfully Articulating National Constitutional Identity Claims: Strait Is the Gate and Narrow Is the Way, 27 *European Public Law* (2021), p. 595.
[342] See Schnettger, *supra* note 316, p. 28.

Article 4 para. 2 TEU also differs from the principle of subsidiarity, which only examines an entire legal act - and precisely not individual provisions – for its subsidiarity.[343] The identity clause thus complements the subsidiarity principle by specifically protecting the Member States' areas of competence (national identity) in a common European legal order.[344] In this respect, Article 4 para. 2 TEU also concretises the principle of proportionality with regard to the protection of an individual situation as a consideration to be taken into account.[345]

bb) Concept of national identity

165 The concept of national identity in Article 4 para. 2 TEU is a concept of Union law and thus fundamentally independent of the legal systems of the Member States.[346] However, it is a vague concept.[347] The decisive factor is that the regulation or the issue concerned, which the Member State considers to be covered by Article 4 para. 2 TEU, must be fundamental to its constitutional and political identity.[348] According to *Maximilian Fritsch,* the content of the core principles protected by Article 4 para. 2 TEU is to be derived from the constitutional traditions of the Member States[349], but does not go beyond what is guaranteed by national constitutional law.[350] Nor is "every constitutional national peculiarity" protected, but only the fundamental political and constitutional structures of each Member State.[351] The decisive factor here is an objective consideration, whereby

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[343] Schnettger, *supra* note 316, p. 28; CJEU, C-508/13, ECLI:EU:C:2015:403, judgment, 18.06.2015, para. 52 – Estonia v. Parliament and Council; Opinion of AG Kokott of 23.12.2015, Estonia v. Parliament and Council, C-508/13, ECLI:EU:C:2015:848, para. 145.

[344] Schnettger, *supra* note 316, p. 28.

[345] Schnettger, *supra* note 316, p. 28; Gillich, *supra* note 330, p. 439.

[346] Schrill and Krenn, *supra* note 320, para. 15; M. Polzin, Constitutional Identity as a Constructed Reality and a Restless Soul, 18 German Law Journal (2017), pp. 1596 *et seq.*

[347] P. Faraguna, Constitutional Identity in the EU—A Shield or a Sword?, 18 *German Law Journal* (2017), pp. 1622 *et seq.*; A. Kaczorowska-Ireland, What Ist he European Union required to Resepct under Art 4(2) TEU?: The Uniqueness Approach, 25 *European Public Law* (2019), pp. 57 *et seq.*

[348] A. Kaczorowska-Ireland, What Ist he European Union required to Resepct under Art 4(2) TEU?: The Uniqueness Approach, 25 *European Public Law* (2019), pp. 70 *et seq.*; A von Bogdandy and S. Schill, Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty, 48 *Common Market Law Review* (2011), pp. 1432 *et seq.*

[349] M. Fritsch, *Europa der Regionen* (Baden-Baden, Nomos, 2020), p. 77.

[350] Fritsch, *supra* note 349, p. 78; Weber, *supra* note 325, p. 121.

[351] Schrill and Krenn, *supra* note 320, para. 18; R. Geiger and L. Kirchmaier, Art. 4 EUV, in R. Geiger et al. (eds), *supra* note 173, para. 3; for a comprehensive view on the concept, see Weber, *supra* note 325, pp. 112 *et seq.*

the results of comparative federalism research can also be used for the individual assessment.[352]

cc) Addressees

166 The addressees of Article 4 para. 2 TEU are first and foremost the Union and all its institutions and bodies, including the CJEU.[353] According to its wording, Article 4 para. 2 TEU is not directly addressed to the Member States themselves. Nevertheless, it is discussed whether obligations of the Member States result from Article 4 para. 2 TEU to inform or warn about Union acts potentially having effects on the national identity of a Member State, especially in the legislative process.[354] According to *Christian Calliess,* it follows from the Member States prerogative to determine the content of the identity clause within the European framework that they are obliged to inform the EU of a possible conflict as soon as they become aware of it.[355]

167 It is still unclear whether the structures of regional and local self-government, which are explicitly safeguarded by Article 4 para. 2 TEU, can be granted their own claim to respect for these structures by the institutions of these self-governments vis-à-vis the European Union.[356] In any case, this has not been established in the case law of the CJEU. The question also remains open whether Member States are also obliged to respect national identity in their relations with each other on the basis of Article 4 para. 2 TEU.[357] This applies in particular to cases in which the Member States would act on the basis of their remaining competences, but the consequences of their actions would also affect other Member States – and their identity concerns.[358] Although the majority of the literature rejects this,[359] parts of the literature consider a violation of the principle of sincere

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[352] Weber, *supra* note 325, p. 127.
[353] Calliess, *supra* note 144, para. 62; Weber, *supra* note 325, pp. 135 *et seq.*
[354] Cf. comprehensively: Weber, *supra* note 325, pp. 136-7.
[355] Calliess, *supra* note 144, para. 63; Schnettger, *supra* note 316, p. 32; rejecting as a duty Weber, *supra* note 325, p. 137.
[356] Schrill and Krenn, *supra* note 320, para. 19.
[357] A. Hatje, Art. 4 EUV, in J. Schwarze et al. (eds), *supra* note 148, para. 6.
[358] Hatje, *supra* note 357, para. 6.
[359] Schrill and Krenn, *supra* note 320, para. 6; Calliess, *supra* note 144, para. 63, discussing: Hatje, *supra* note 357, para. 6; affirmatively, however: W. Obwexer, Art. 4 EUV, in H. v.d. Groeben et al. (eds), *supra* note 303, para. 48.

cooperation in Article 4 para. 3 TEU conceivable in certain constellations.[360] Finally, it is questionable whether Article 4 para. 2 TEU also implies a positive obligation of the European Union to support Member States in the event of threats to their fundamental state functions over and above the existing obligations to provide assistance (cf. Article 222 TFEU).[361] First of all, the wording speaks against this; moreover, Article 4 para. 2 TEU cannot have the effect of establishing a competence in favour of the EU.[362] Within the framework of competences, however, it is argued that the European Union should exercise its discretion in favour of intervention to assist the Member States, since the Union is dependent on the functioning of its Member States for its own functioning.[363]

c) Conclusions on Section 3

168 In some places, the Treaties contain normative provisions aimed at protecting the national identities and competences of the Member States. However, their application, especially with regard to Article 4 para. 2 TEU, can only be assessed on the basis of a specific case of application. However, the presentation of corresponding national identity concerns is also decisive. Article 4 para. 2 TEU does not function as an absolute and rigid rule, but must always be rebalanced.[364] Measures taken by the EU that would have the effect of limiting the self-government of the Åland Islands, for example, could be challenged pursuant to Article 263 para. 2 TFEU by Finland – but not by the islands themselves; the island may invoke Article 263 para. 4 TFEU, provided that they are opposed to an act addressed to them or which is of direct and individual concern to them bearing in mind, however, the high standards set for these requirements by the CJEU – before the CJEU with a good chance of succeeding, referring to Article 4 para. 2 TEU. It is a question of Finnish constitutional law, not Union law, whether the islands would be entitled to bring such an action against the Finnish government within the Finnish judicial structures (or to take political action against such (planned) measures). On the other hand, it seems difficult to establish a claim under Union law of the Åland Islands against the EU on the

[360] Schrill and Krenn, *supra* note 320, para. 6; Calliess, *supra* note 144, para. 63.
[361] Cf. Schrill and Krenn, *supra* note 320, para. 48; Obwexer, *supra* note 359, para. 55.
[362] Schrill and Krenn, *supra* note 320, para. 48; Obwexer, *supra* note 359, para. 55.
[363] Schrill and Krenn, *supra* note 320, para. 48.
[364] Gillich, *supra* note 330, pp. 440 *et seq*.

basis of Article 4 para. 2 TEU to take action against measures of Finland that endanger or restrict the autonomy of the Åland Islands. Irrespective of this, there will always be a need for evidence of the impairment of national identity in the context of such proceedings.

4. Conclusions on Part III

169 *The Law of the European Union applies to the Åland Islands in principle. However, in the course of Finland's accession to the EU, a number of adjustments were agreed in a Protocol, which are still in force today. One of the main features is the limited scope of application of value added tax and excise duties in the Åland Islands. As a result of this derogation, it is necessary to apply rules on customs procedures to the movement of goods with reference to the Åland Islands. In addition, other provisions of Union law applicable to the Åland Islands, in particular those relating to fundamental freedoms and European state aid law, may be relevant in view of the special fiscal status of the Åland Islands. However, questions relating to individual cases require further examination. Irrespective of the requirements of the Protocol, the European Union is obliged to respect the national identity of Member States pursuant to Article 4 para. 2 TEU; national identity in this sense includes constitutional law features such as, for example, the autonomous status of the Åland Islands.*

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