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Romance and divorce between international law and EU law:

Implications for European competence on direct taxes

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Abstract *This article investigates European competence to harmonize provisions of direct taxes of Member States that are inconsistent with the functioning of the single European market. Explicitly, the EU law, since its inception to date, does not confer powers to the Union to harmonize income taxation of Member States. The sole express reference to income taxes in EU law was an Article of the Treaty establishing the European Community (Article 293 EC) that was repealed during the Lisbon revision. The repealed provision urged the Member States to abolish double taxation by using tools of public international law, that is, outside the EU legal framework. The study explores the potential implications this repeal may have for EU tax mandate: (a) whether it implies an end to the EU tax powers at all in the realm of direct taxes? (b) Whether it is a neutral amendment with no consequences to whatsoever EU tax authority was already put in place? Or, (c) whether the deletion of the sole income tax reference meant for Member States to proceed under the public international law in effect enhances implicit ‘federal’ competence of the Union to intervene in national tax codes for establishment of a true European economic market?*

The article analyses the demise of the clause in a legal evolutionary paradigm at the interface of international law and EU law. In metaphor, I describe the changing evolutionary relationship between the European and international law regimes as a tale of romance and divorce. The two laws meet curiously during the 1950s; feelings grow and a bond develops between the two regimes; the romance between the two legal regimes attains its peak during the Maastricht phase; strains appear in their relationship after the Amsterdam revision; the split goes deeper after the Nice amendments and the two finally divorce at the Lisbon revision. Based on this ever-changing relationship framework between the two legal regimes, the article concludes (a) that the deletion of Article 293 EC indicates growing reliance of the integration project on European legal order rather than trusting inter-state treaties based on public international law and (b) an inherent growth in the European ‘federal’ mandate to take broad-range actions to harmonize direct taxes in single market during the post-repeal period.

Keywords European tax competence, international law and EU law, tax harmonization, Article 293 EC, EU integration, legal evolution

1. Introduction

From their inception to date, the European treaties ('constitutional charter' of Europe¹) have not explicitly empowered the European Union (EU) to formulate direct tax policy – an area left generally to Member States. The limited EU-level intervention witnessed to date in this policy sector, besides the requirement of unanimous consensus of Member States, may also be attributable to this competence allocation between national governments and the EU. While it has long been acknowledged that the EU could impliedly intervene in national tax systems if they infringe the single market principles,² the state-suprastate division of tax powers are often surrounded by legal uncertainties caused by the unspoken character of European tax competence. In fact, the EU law made only one express reference to direct taxes under Article 293 of the Treaty establishing the European Community (Art. 293 EC).³ This sole reference to direct taxation has also been repealed during the Lisbon revision that became effective as of 1 December 2009.⁴ The repealed clause urged the Member States to cooperate

¹ In this article, the treaties governing European communities (now European Union) over time are interchangeably referred to as EU law, European law, Community law or EU constitution. The European Court of Justice (ECJ) also hold the governing treaties as EU 'constitutional charter'; see e.g. ECJ Case 294/83, *Les Verts v. Parliament* (1986) E.C.R. 1339, para 23.

² The notion of a single, common or internal European market is a constitutional obligation under Article 26 of the Treaty on the Functioning of the European Union (Art. 26 TFEU). The key freedoms guaranteed under the EU law to establish the single market include free movement of goods (Art. 28 TFEU), services (Art. 56 TFEU), labour (Art. 45 TFEU), capital (Art. 63 TFEU), and the right to establishment (Art. 49 TFEU) together with principle of non-discrimination (Art. 18 TFEU).

³ Art. 293 EC [earlier it existed as Art. 220 of the Treaty establishing the European Economic Community (EEC)] comprised four sub-parts (paragraphs or indents) that persuaded Member States to negotiate with each other to integrate four policy areas to benefit their nationals, that is, inter-state cooperation under public international law on (i) protection of rights of individuals (ii) elimination of double taxation (iii) mutual recognition of legal status of firms and (iv) reciprocal recognition and enforcement of decisions of national courts and tribunals.

⁴ The existing EU law known as the Lisbon Treaty operative from December 1 2009, comprises the Consolidated Versions of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) (see consolidated versions as set out in O.J. 2012, C 326/1, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012M/TXT>). On pre-Lisbon versions of EU law, see e.g. (1) the Consolidated Versions of the Treaty on European Union (TEU pre-Lisbon) and the Treaty Establishing the European

under the public international law to abolish double taxation (besides urging cooperation in three other policy areas) for better functioning of the common European market.

This article investigates the rationale behind the demise of this provision in the EU constitutional construct along with its potential implications for European legal order and, in particular, EU powers to integrate direct tax systems of 28 Member States. *Prima facie*, the removal of the clause that authorized Member States to complement the institution of the single market (albeit outside the EU legal framework i.e. under public international law) may seem a counter-integrative measure. In particular, the repeal appears inconsistent with the European integration project that otherwise underpins a gradual rise in constitutional provisions over time to harmonize different policy areas of Member States to institute an internal single market. It raises the questions: whether removal of the clause represents a retreat from the harmonization strategy in the area of income tax policy that otherwise remains unspoken in EU law? Whether deletion of this clause is an outlier to the rising trend of integration that remains the cornerstone of EU law, or in fact a sign of a shift to ultimately achieve greater integration? No official explanation was provided as to the rationale of this repeal at the time of the Lisbon revision.⁵ Much of the existing scholarship on abolition of the clause views it from a single dimension in relation to EU-level competence on harmonization of direct taxes. Broadly, the tax-related debate on the repeal of the clause can be categorized

Community (EC); O.J. 2006, C 321 E/1. (2) Treaty of Nice amending the Treaty on the European Union (TEU-Nice revision), the Treaty Establishing the European Communities and Certain Related Acts (Nice Treaty 2001); O.J. 2001, C 80/1. (3) Treaty of Amsterdam amending the Treaty on the European Union, the Treaties Establishing the European Communities and Certain Related Acts (Amsterdam Treaty 1997); O.J. 1997, C 340/1. (4) Treaty on European Union Together with the Complete Text of Treaty Establishing the European Community (Maastricht Treaty 1992); O.J. 1992, C 224/1. (5) Single European Act; O.J. 1987, L 169/1. (6) Treaty Establishing the European Economic Community (EEC or Treaty of Rome 1957), 25 March 1957, 298 U. N. T. S. 11.

⁵ Hinnekens, Luc (2009), 'The Uneasy Case and Fate of Article 293 Second Indent EC', *INTERTAX* 37(11): 602–609, at 606. Later, in 2011, the Commission shed some light on removal of the clause in response to a citizen enquiry; on the Commission's response and its analysis, see *infra* note 90 and accompanying text.

into three approaches. (1) Some legal scholars observe it as an omission in EU law,⁶ equivalent to a setback to integration of direct taxes – an unspoken policy domain in EU law that is generally considered as a members’ terrain. (2) A segment of tax scholarship views disappearance of the clause as a neutral act with little consequences to supranational EU tax competence;⁷ (3) others, however, argue its removal in favour of a wider scope for EU-level actions to eliminate double taxation in the single market.⁸ In any case, the debate on repeal to date revolves mainly around the monistic-agenda offering insights on implications for European legislative powers on tax harmonization.⁹

This study takes a different path. It seeks to investigate whether the amendment causing repeal of Article 293 EC is an isolated event or whether it is part of a bigger process in the evolution of European legal system at the interface of EU law and international law regimes. The study draws on an all-inclusive, multi-dimensional approach seeking reasons behind repeal of Article 293 EC and its consequences. I do not exclude the familiar EU-level tax competence debate from this analysis but rather seek to go beyond and employ holistic perspective to view it through the lens of over-all construct of *acquis communautaire*. I also seek to explore the demise of the clause within a wider constitutional design without losing

⁶ See, for example, Lehner, Moris (2005), ‘A significant omission in the Constitution for Europe? Does the new constitution for Europe disengage member states from their obligations to prevent double taxation?’, *British Tax Review* 2005(4): 337–339.

⁷ See, for example, Hoffman, H. (2011), ‘Double tax Agreements: Between EU Law and Public International Law’, in Rust, A. (ed.) *Double Taxation within the European Union* (Alphen aan den Rijn: Kluwer Law International), pp. 75–86, at 81–83.

⁸ See, for example, Kemmeren, Eric (2008), ‘After repeal of Article 293 EC Treaty under the Lisbon Treaty: the EU objective of eliminating double taxation can be applied more widely’, *EC Tax Review* 17(4): 156–158; Pistone, Pasquale (2011), ‘Double Taxation: Selected Issues of Compatibility with European Law, Multilateral Tax Conventions and CCCTB’, in Rust, A. (ed.), *supra* note 7, pp. 187–210, at 200–201.

⁹ For literature focusing debate on repeal of Art. 293 EC to direct taxation in the EU, see *supra* notes 5–8; see also Reimer, E. (2011), ‘The Abolition of Article 293 EC: Comments on Hofmann’s Analysis’, in Rust, A. (ed.), *supra* note 7, pp. 87–96; Terra, Ben and Wettel, Peter (2012), *European Tax Law*, 6th edn (Alphen aan den Rijn: Kluwer Law International), at 14–16; see also Khan Niazi, Shafi and Krever, Richard (2015), ‘Is integration of taxation possible in the EU?’, *Australian Tax Forum* 30(2): 455–470; Daxkobler, K. and Huisman, H. (2013), ‘*Levy & Sebbag*: The ECJ has once again been asked to deliver its opinion on juridical double taxation in the single market’, *European Taxation* 53(8): 400–405, at 403–404.

sight of the broad contours of European legal evolution and developments of law-making processes and paradigmatic to EU constitutional construct. The findings of this study indicate that deletion of Article 293 EC does not frustrate the integration agenda. Rather, its removal accords with the conjecture that the European legal system has grown up adequately. That is, the European order is *coming of age* in terms of departure from the traditional international law regime and developing to maintain its own autonomous standing. The study concludes that the repeal (a) indicates growing reliance on European order, (b) inherits potential for wider EU actions against dual taxation to institute single economic and fiscal market in the true sense, (c) reinforces the differentiated integration notion in (tax) legislation and (d) seeks to avoid undesired (or over-) fragmentation within the sub-systems of an expanding Union territory.

2. Flexibility in EU integration through inter-state conventions

Since the founding times, intra-Community cooperation at the sub-Union level has remained a characteristic embedded in the EU law.¹⁰ Prior to the Lisbon revision of EU law, besides four policy areas set out under Article 293 EC,¹¹ the possibility of bilateral or multilateral inter-state conventions or flexible integration also existed outside the European legal framework through public international law tools.¹² All these provisions having potential to induce flexibility or cause policy variation among Member States at the sub-central level *inter alia* remain part of the Lisbon law or attain more sophistication under the EU law. The only

¹⁰ On historical insights, see, for example, Koller, Boglarka (2012), 'The Takeoff after Lisbon: The Practical and Theoretical Implications of Differentiated Integration in the EU', *World Political Science Review* 8(1): 1–19, at 1–5.

¹¹ For four policy areas set out under Art. 293 EC (including income taxation) where Member States were prompted to integrate flexibly outside EU law, see *supra* note 3.

¹² For other instances in EU law allowing bilateral or multilateral sub-systems in EU, see regional integration of Benelux nations (Belgium, Netherlands and Luxembourg) set out under Art. 306 EC (now Art. 350 TFEU) and cooperation in areas specified under Art. 34(2)(d) TEU (abolished under the Lisbon revision); for more details, see text accompanying *infra* notes 19, 20; see also Table 1 on provisions of EU law in Table 1 that promote intra-Community (inter-state) cooperation through public international law.

conspicuous exception being part of the Article 293 EC on direct taxes that has been deleted without any express substitute for it under the current EU law.¹³

Before exploring the logic behind the demise of the clause in question, I begin with setting the contextual framework of European integration project and the chemistry between public international law and the EU law. To this end, first I examine gradual developments taking place over time in subsets of EU (differentiated or flexible integration) at the interface of EU and public international legal regimes. Then, I undertake a detailed analysis of the rationale for, and practical consequences of, the deletion of the clause in question.

As described in the introductory section in relation to Article 293 EC, the integration project was not confined to the instruments originating solely from the legislative powers conferred under the EU law. Rather the integration plan could also be supplemented by intergovernmental agreements under public international law. These latter instruments arising from the *inter se* cooperation¹⁴ between two or more Member States are based on the classical international relations model. The Member States always could – and still can – enter into *inter se* cooperation by virtue of their status as nation-states. For the purpose of the analysis at hand, however, we confine our argument to those *inter se* actions that albeit fall in the spheres of the international arena yet, in the course of EU political and legal evolution, have been promoted (explicitly or otherwise) by the European legal system. This indeed is the kind of flexibility regime wherein resided the variation potential based on Article 293 EC.

¹³ As mentioned in *supra* note 3, four policy areas are set out under four indents of Art. 293 EC. The second indent concerning direct taxes is argued here as an exception in the sense that it disappeared without any explicit replacement to integrate direct taxation within or outside EU framework. This is unlike the other three indents of Art. 293 EC that represent policy areas for which substituting legal bases to integrate these areas within the EU framework have grown explicit over time; see e.g. Arts 18–25 TFEU (on non-discrimination and citizenship of the Union), Chapters III, IV of Title V of TFEU (on mutual recognition and enforcement of judgements in civil and criminal matters). Besides Art. 293 EC, another analogous notable repeal under the Lisbon revision is that of Art. 34(2)(d) TEU on integration of areas under former Justice and Home Affairs (JHA); this clause too disappeared only after attainment of sufficient legal bases that gradually evolved in EU law to legislate in the fields falling under the Area of Freedom, Security and Justice (AFSJ). For more details on the JHA and the AFSJ, see *infra* Section 3 and Figure 1.

¹⁴ In this article, I borrow the term *inter se* cooperation/agreement from De Witte, *infra* note 21, and use it for all kinds of international conventions between Member States.

Broadly, I label this mode as a notion of flexibility that, notwithstanding its existence outside the European framework, has been persuaded, prompted, supported or defended by EU law itself at one point of time or the other. Put differently, the underlying logic of such *inter se* policy-creation within the sub-systems (or even if extendable to the entire system) is to complement the core integration project. Table 1 highlights the noticeable European clauses added to (or deleted from) the body of EU law over time to encourage (or discourage) *inter se* cooperation among EU subsets in various policy areas.

In fact, this feature of flexible or differentiated integration based on the bilateral and multilateral cooperation between the Member States outside the EU law is frequently ignored in the European literature.¹⁵ The structuring of this cooperative relationship between Member States though falls outside the EU legal framework yet it often aims at complementing the European integration agenda. Indeed this aspect of the European flexibility debate was largely ignored by scholars since 2004 (post-Treaty of Nice revision to EU law)¹⁶ until its recent rebirth in post-crisis Europe when a subset of members (Eurozone) concluded inter-state

¹⁵ De Witte, Bruno (2001), 'Chameleonic Member States: Differentiation by Means of Partial and Parallel International Agreements', in De Witte, B., Hanf, D. and Vos, E. (eds), *The Many Faces of Differentiation in EU Law* (Antwerpen: Intersentia), pp. 231–267, at 232.

¹⁶ For some of the pre-Nice literature on the inter-state element of flexibility outside the EU framework, see, e.g., De Witte, B., Hanf, D. and Vos, E. (eds), *The Many Faces of Differentiation in EU Law* (Antwerpen: Intersentia); De Burca, G. and Scott, J. (eds), *Constitutional Change in the EU: From Uniformity to Flexibility* (Oxford: Hart Publishing); Tuytschaever, F. (1999) *Differentiation in EU Law* (Oxford: Hart Publishing). Save for the recent political and legal debate on instruments adopted pursuant to the Euro-crisis, in particular, the adoption of the ESM and the resulting litigation that concluded in the ECJ ruling in *Pringle* (Case C-370/2012, *Pringle v. Government of Ireland, Ireland and the Attorney General*, judgement of 27 November 2012, not yet reported), it is rare to find substantial academic discourse in the last decade that explores flexibility in European integration at the interface of international and EU legal tracks. On fewer debates involving flexibility through the inter-state conventions in the post-Nice periods (other than crisis and the Pringle-related debate), see literature on Prum; e.g. Balazacq, T. and Hadfield, A. (2012), 'Differentiation and trust: Prum and institutional design of EU security', *Cooperation and Conflict* 47(4): 539–561; Kral, David (2008), *Multi-speed Europe and the Lisbon Treaty: threat or opportunity?*, EUROPEUM (Institute for European Policy), pp. 1–8, at 4, 5, 8, available at <http://www.europeum.org/doc/pdf/895.pdf> (accessed 28 July 2015).

pacts, in particular the European Stability Mechanism (ESM).¹⁷ In exploring the flexibility induced by the inter-state agreements and the resultant interplay between the EU and international law regimes, this work confines to framing a legal evolutionary model to investigate part of the question raised on Article 293 EC. To that end, I do not extend analysis to the post-crisis intersect of the two legal regimes though I offer brief insights on the prospects and theorize their possible future relationship in Section 3.4.

¹⁷ As of 1 May 2013, the ESM is part of EU law pursuant to European Council Decision 2011/199 of 25 March 2011 amending Article 136 TFEU with regard to a stability mechanism for Member States whose currency is the euro (O.J. 2011, L 91/1); however, the ESM took off as an international pact prior to the treaty revision [addition of para (3) to Article 136 TFEU] came into force; Craig, Paul (2013), 'Pringle and the Use of EU Institutions outside the EU Legal Framework: Foundations, Procedures and Substance' *European Constitutional Law Review* 9(2): 263–284.

On the 'rebirth' of differentiation-related debate at the interface of the EU framework and the international law track, see political and legal discourse induced by the adoption of ESM and the consequential *Pringle* case; for example, De Witte, Bruno and Beukers, Thomas (2013), 'The Court of Justice Approves the Creation of European Stability Mechanism: Pringle', *Common Market Law Review* 50(3): 805–848;; Peers, Steve (2013), 'Towards a new Form of EU Law?: the Use of EU Institutions outside the EU Legal Framework', *European Constitutional Law Review* 9(1): 37–72; Beck, Gunnar (2014), 'The Court of Justice, Legal Reasoning, and the Pringle Case-Law as the Continuation of Politics by Other Means', *European Law Review* 39(2): 234–250; (2013); Adams, Stanislas and Parras, Francisco J. M. (2013), 'The European Stability Mechanism through the Legal Meanderings of the Union Constitutionalism: Comment on Pringle', *European Law Review* 38(6): 848–865; Koedooder, Chris (2013) 'The *Pringle* Judgement: Economic and/or Monetary Union?', *Fordham Journal of International Law* 37(1): 111–146; Chatzistavrou, Filippa (2014), 'Is Flexible Integration Harming the Prospect of a Common Acquis?', *The International Spectator: Italian Journal of International Affairs* 49(1): 98–112.

Table 1: An overview of clauses in EU law that promote *inter se* conventions between Member States (*Rome 1957 to Lisbon 2007*)¹⁸

<i>Rome (1957)</i>	<i>Maastricht (1992)</i>	<i>Amsterdam (1997)</i>	<i>Nice (2001)</i>	<i>Lisbon (2007)</i>
Art. 233 EEC: Benelux inter-state cooperation	Art. 233 EC: Benelux inter-state cooperation	Art. 306 EC: Benelux inter-state cooperation	Art. 306 EC: Benelux inter-state cooperation	Art. 350 TFEU: Benelux inter-state cooperation
Art. 220 EEC: Inter-state cooperation on (i) protection of rights of individuals (ii) elimination of double taxation (iii) recognition of legal status of firms and (iv) recognition and enforcement of judicial decisions	Art. 220 EC: Inter-state cooperation on (i) protection of rights of individuals (ii) elimination of double taxation (iii) recognition of legal status of firms and (iv) recognition and enforcement of judicial decisions	Art. 293 EC: Inter-state cooperation on (i) protection of rights of individuals (ii) elimination of double taxation (iii) recognition of legal status of firms and (iv) recognition and enforcement of judicial decisions	Art. 293 EC: Inter-state cooperation on (i) protection of rights of individuals (ii) elimination of double taxation (iii) recognition of legal status of firms and (iv) recognition and enforcement of judicial decisions	-
-	TEU Title VI: (i) Art. K.3(2)(c) on customs, police and judicial cooperation in criminal matters; (ii) Art. K.7 on bilateral/multilateral cooperation in JHA	TEU Title VI: Art. 34(2)(d) on police and judicial cooperation in criminal matters	TEU Title VI: Art. 34(2)(d) on police and judicial cooperation in criminal matters	-

¹⁸ Similar provisions on Common Security and Foreign Policy (CSFP) [e.g. Art. J.4(5) TEU Maastricht version; renumbered as Art. 17(4) TEU (Amsterdam version) and retained until its deletion under the Lisbon amendments] are not accounted for in Table 1. Amongst others, two reasons to exclude the CSFP clause from the current analysis are that the study seeks to (1) explore EU legal order based on internal competences rather than those meant for external relations, and (2) develops an evolutionary framework built on those European inter-state cooperation clauses that evidence common legal and political origin rather more explicitly (e.g. Figure 1 and *infra* note 90).

The possibility to conclude intergovernmental conventions at the interface of EU and public international law could broadly be classified into four groups: those based on (a) the former Article 293 EC, (b) the Benelux cooperation clause (c) the ex-provisions meant to achieve aims set out in Title VI (former Justice and Home Affairs – JHA) regime,¹⁹ and (d) those *inter se* conventions that have been concluded without employing any explicit legal basis from the governing treaties but implicitly either appear to have affinities with Article 293 EC or the JHA regime or operate in a manner that complements the treaty objectives in general.²⁰

The clauses categorized here into four groups inherently carried the potential to introduce variation in the integration process. The *inter se* conventions could cultivate flexibility in the European construct at two levels. The first is the possibility in policy variation among subsets that existed at the sub-central level based on conventions not applicable to all Member States. The second level of variation remained embedded in its character to create a legal cleavage in EU structure by virtue of applying principles of public international law instead of standard EU law.²¹ *Sensu stricto*, the flexible policy tools so created did not fall within the EU framework. Prior to their assimilation (if any) into EU law, the *inter se* instruments could not be overseen by EU legislative and executive organs i.e. the European Parliament and the European Commission. Nor could such *inter se* conventions be subject to judicial review at the European Court of Justice (ECJ).²²

¹⁹ Art. 34(2)(d) TEU (Pre-Lisbon); inserted earlier as Art. K.3(2)(c) TEU, Title VI on JHA (Maastricht revision).

²⁰ For example, the Schengen (before integrating into EU framework), the Dublin, the Prum, etc. (see Figure 1); on agreements based on Art. 293 EC (ex-220 EEC) without explicit reference to this clause, see Convention of 19 June 1980 on the Law Applicable to Contractual Obligations (Rome Convention) (O.J. 1980, L 266/1), entered into force on 1 April 1991.

²¹ De Witte, Bruno (2000), 'Old-fashioned Flexibility: International Agreements between Member States of the European Union', in De Burca, G. and Scott, J. (eds), *Constitutional Change in the EU: From Uniformity to Flexibility* (Oxford: Hart Publishing), pp. 31–58, at 33.

²² Of the four groups on possible flexible integration under the public international law, the instruments based on the provisions of the former JHA regime could be termed as 'mix combines'. Certain *ifs and buts* have been inserted (since the Amsterdam revision) to keep the international law tools *in touch with* EU framework. See the role of the European Commission, ECJ and the Council highlighted in Table 2; see also the requirements for adoption of at least half of the Member States to bring the conventions into force under Art. 34(2)(d) TEU (the Nice revision).

I argue that the European phenomenon to produce inter-state instruments that originated at different points of time in EU constitutional evolution have had at least two salient features. First, the legal provisions shaping the *inter se* conventions have a certain degree of common political and legal origin. Second, amongst others, one good reason behind *evacuation* of these clauses from the constitutional plan lies in the fact that either an analogous system within the folds of the European law takes firm roots or the EU authority in the given policy areas becomes explicit (See Section 4.2.5). The tale of ex-Article 293 EC including its sub-part on taxation – a component of the *inter se* legal regime – also does not deviate much from the main characteristics of the regime. In the next section of the article, I review the origin and evolution of provisions in EU law that promoted adoption of international law instruments over time. Once overall evolutionary construct of this flexibility mode becomes evidenced, I then turn to the deletion of 293 EC in the section thereafter.

3. Origin and evolution of convention-based flexibility in the European order

I seek to trace the legal and political logic behind origin and then the historical changes in this *primitive* flexibility mode (called by De Witte as ‘old-fashioned flexibility’²³) by making paradigmatic analysis of temporal developments. The probe based on this particular model may in general provide an evolutionary charter to demonstrate the holistic rationale behind the existence (or removal) of the old-styled regime. This in turn may offer key insights on conceptualizing some of the crucial reasons behind abolishing Article 293 EC – a clause that existed among the first-born components of the regime.

European structure was founded on the (international) treaty law paradigm. Historically, the polity itself was creature of a series of diplomatic treaties under public international law in the 1950s.²⁴ Constitutional ingredients (e.g. direct effect, primacy and other European doctrines) and democratic components (such as EU Parliament, majoritarian voting system) were

²³ De Witte, *supra* note 21, at 31–58; see also De Witte, *supra* note 15, at 232.

²⁴ In the foundational context, EU ‘came into being as a creature of international law’; see e.g. De Witte, Bruno (2012), ‘The European Union as an international experiment’, in De Burca, G. and Weiler, J. H. H. (eds) *The Worlds of European Constitutionalism* (Cambridge: Cambridge University Press), pp. 19–56, at 19

missing in the foundational times.²⁵ Thus the polity in the initial period represented something akin to a traditional international organization striving for a common economic market. International law paradigm was therefore inherently embedded in the foundations of constitutional documents and had strong roots in the EU (the then Community) law. A certain degree of kinship between the EU and international law regimes still manifests itself at the time of treaty revisions besides some exceptional situations.²⁶

For tracking the evolutionary path of convention-based flexibility in EU law, analysis in this section however does not consider the developments taking place at the time of treaty revisions. Rather, the investigation takes into account the possibility of inter-state cooperation classified into four groups in the previous section. These *inter se* instruments have analogies to adoption of secondary law albeit concluded outside the European framework. To investigate the evolutionary process on how and why EU law provided space to Member States to enter into *inter se* agreements, the remainder of this section seeks to capture phase-wise (*primitive to advance*) relationship between international and EU legal regimes.

3.1. The founding phase

In the early stages, the EU (then Community) structure conceivably had a higher empathy to accommodate international law. At the starting point, features evidencing their close nexus included the intactness of ‘full-flagged’ national sovereignty (in practical terms) albeit sharing some of their powers (in theory) at the EU (Community)-level. Other key characteristics of the newly-founded order, for example, also included relatively less understood legal bases for supranational actions and hence scanty legislation (secondary law) in various policy areas. The process of ‘communautairization’ was therefore not rooted as firmly as witnessed at the subsequent stages of the polity. At the embryonic phase, actions based on the tested model of

²⁵ The process of European constitutionlaization unfolded at later stages; for one influential discourse on how Europe transformed during the period around first three decades, see Weiler, J. H. H. (1991), ‘The Transformation of Europe’, *Yale Law Journal* 100(8): 2403–2483.

²⁶ Although EU law has much developed and constitutionalized in the current ‘federal-like’ structure, certain specific situations of EU politics and law may give rise to exceptional developments at the interface of two legal regimes ending up in *inter se* instruments devised exclusively for the integration agenda. See, for example, inter-state cooperation in euro area to conclude the ESM; for the rekindled debate on relation between the two regimes after the conclusion of the ESM, see *supra* note 17; see also text accompanying *infra* note 48.

international relations between Member States to trigger the process of reciprocity in various policy domains must have remained one of the strategic integrative tools. *Inter se* actions complementary to the objectives of the foundational constitutional document (EEC Treaty) could therefore play a crucial catalytic role in bringing coordination (initial harmonization) to the given policy areas in the newly established European (then Community) order.

In explicit treaty terms, the Benelux clause authorized half of the (then six) members to advance regional integration in any policy domain under the public international law.²⁷ Likewise, all other signatories were also encouraged to initiate harmonization measures beyond the Community framework in four specified policy fields (Art. 293 EC). The spectacular European cooperation created an atmosphere in which the convention-based bond became the order of the day in the 1950s and 1960s²⁸ – supplementing the integration objectives in several ways often without any explicit reference to the legal bases in the EU (then Community) law.

Textually, no *provisio* or any other conditionality was imposed on this primitive mode meant for *inter se* cooperation. It could be construed inherently that the outcome of the cooperation should not be detrimental to the broader integration scheme set out in the foundational charter (EEC Treaty). Yet, in the absence of any substantive case law coupled with the nascent EU order in the founding periods, the *inter se* flexibility could convey rather wider meaning towards the integration program than that emerged at the later stages (see final segment of this section). An expanded scope of *inter se* actions is thus plausible at the founding stage since the exercise of EU-wide supranational competences had yet to fully unfold. In legal terms, when the EU (then Community) powers ‘occupied a little room’ and the doctrine of pre-

²⁷ For instance, the document establishing the Benelux Economic Union (signed on 3 February 1958) was drawn under the public international law. The Benelux Union became functional in 1960 and served as a pioneering subset of the common market with free movement of labour, goods and services. Later, border control between the Benelux nations was also abolished in 1970, much before the establishment of the Schengen border free area.

²⁸ On environment of intense intergovernmental relations and groupings of the early periods, see Wallace, Helen (2000), ‘Flexibility: A Tool of Integration or a Restraint on Disintegration?’, in Neunreither, K. and Wiener, A. (eds), *European Integration After Amsterdam: Institutional Dynamics and Prospects for Democracy* (Oxford: Oxford University Press), pp. 175–191, at 176. In the words of Professor Bruno de Witte, ‘Of these hundred “European flowers” planted in the 1950s and early 1960s, quite a few survive in the shadowy parts of the European garden’; see *supra* note 21, at 34.

emption was yet to take shape,²⁹ the field remained fairly open to inter-state cooperation. In the constitutive phase, to lay the foundations of common market, the tested model of *inter se* arrangements between the sovereigns could aptly serve as the first port of call to cultivate ‘mutual understanding’ of rules prior to indoctrination of ‘mutual recognition’ under the EU system.³⁰

As the next segment highlights, we see the interaction between the international and EU law takes several turns – and so does the leeway integral to constitutional clauses on *inter se* cooperation including Article 293 EC. In metaphor, I describe the evolution of changing relationship between the European and international law regimes as *a tale of romance and divorce*. The two laws meet curiously in the 1950s; feelings grow and a bond develops between the two legal frameworks; the romance attains peak during the Maastricht phase; strains appear in their relationship during the Amsterdam revision; the split goes deeper after the Nice amendments and the two finally divorce at the time of Lisbon revision.

3.2. The Maastricht phase: Romance between the two regimes at peak

Prior to the Maastricht Treaty, the *inter se* cooperation produced some of the remarkable integrative tools that otherwise might have been unthinkable within the EU (then Community) framework. To name but one flagship project of those times is the Schengen Agreement. Besides constitutional amendments (revision under the Single European Act 1986), it may not be an overstatement that the Schengen instrument on creation of borderless Europe remains one of the most influential documents of the initial three decades of the polity.

National borders had always remained significant notion of sovereignty³¹ – as does the idea of core state powers today.³² Despite some of the constitutional clauses extending (in theory)

²⁹ On doctrine of pre-emption, see generally, De Witte, *supra* note 21, at 41–45; for more details, see Section 4.2.2.

³⁰ The significance of concept of ‘mutual recognition’ emerged later in the foundational phase in the landmark decision of the ECJ Case 120/78, *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* (1979) E.C.R. 649; for further details on this principle, see generally Armstrong, Kenneth (2002), ‘Mutual Recognition’, in Bernard, K. and Scott J. (eds), *The Law of the Single European Market: Unpacking the Premises* (Oxford: Hart Publishing), pp. 225–267.

³¹ In those times, some of the rulings of ECJ were strongly criticised and conceived as equivalent to weakening of national powers on controlling the entry and residence of foreigners; see Guild, Elspeth (2002), ‘The Single

rights to workers and self-employed individuals on free movement (borderless market),³³ analogous actions under the EU legislative system were nevertheless hard to achieve in practice. The European Court of Justice also issued a series of rulings in the 1970s against national obstacles to free movement of workers and individuals.³⁴ Nevertheless, collaborations on creation of a borderless Europe remained a problematic and almost unattainable mission within the institutional framework. Eventually, it was under the inter-state apparatus in the mid-1980s when a subset of five (of the then ten) EU members laid down the foundations of the phenomenal borderless regime of today's Europe.

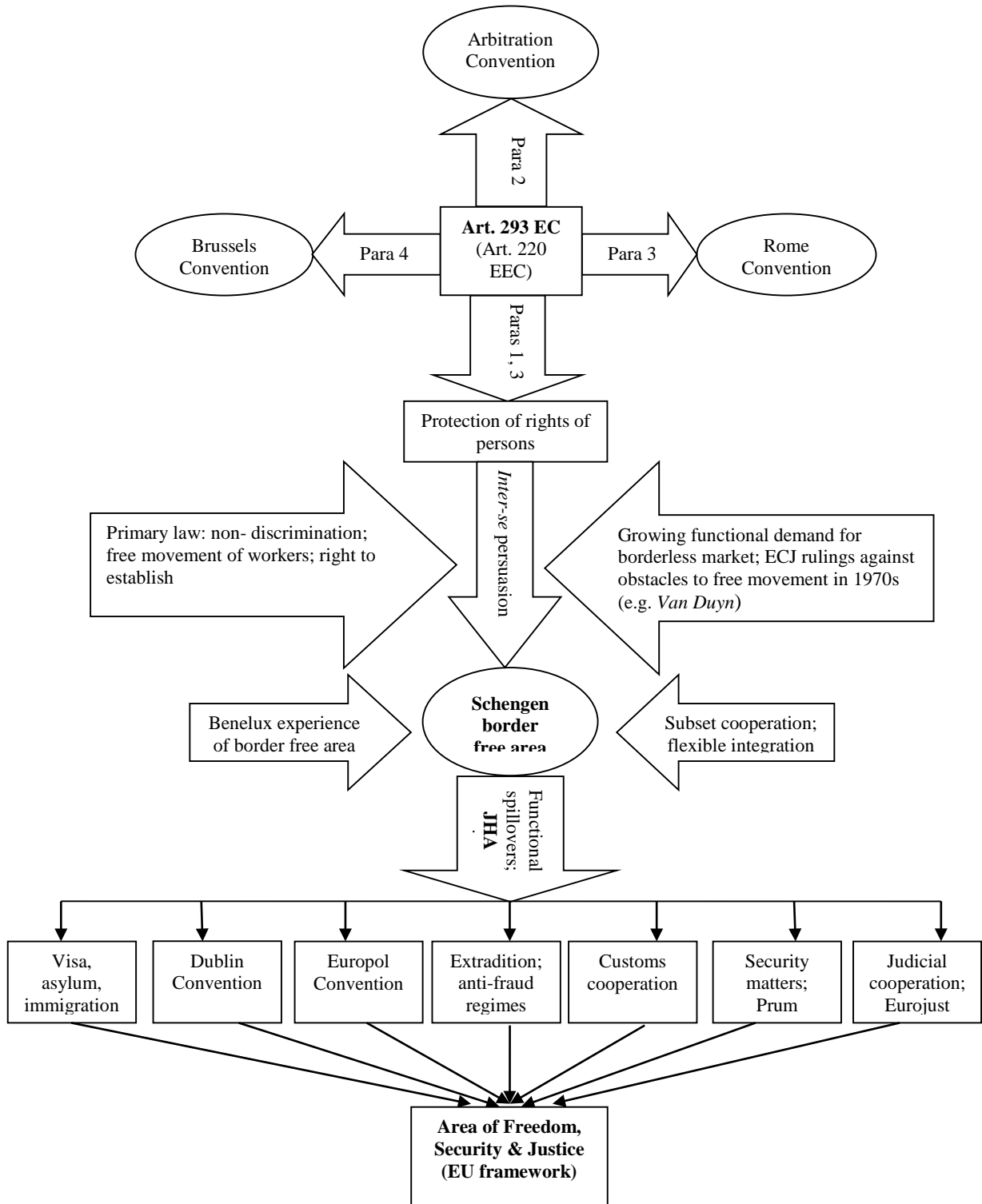
Market, Movement of Persons and Borders' in Bernard, Catherine and Scott, Joanne (eds), *The Law of the Single European Market: Unpacking the Premises* (Oxford: Hart Publishing), pp. 295–310, note 7, at 297 [citing D. O'Keeffe (1982), 'Practical Difficulties in the Application of Article 48 EEC Treaty', *Common Market Law Review* 19(1): 35–60].

³² On the notion of core state powers of today's Europe, see Rittberger, Leuffen and Schimmelfennig, 'Differentiated Integration of Core State Powers' in Genschel and Jachtenfuts (eds), *Beyond the Regulatory Polity?: The European Integration of Core State Powers* (Oxford Scholarship Online, 2014), pp. 189–208.

³³ See, for example, Treaty of the EEC: Arts 7 (prohibition of discrimination on the grounds of nationality), 48–51 (free movement of workers) and 52–58 (right to establishment).

³⁴ ECJ Cases: 41/74, *Van Duyn v. Home Office* (1974) E.C.R. 1337; 67/74, *Bonsignore* (1975) E.C.R. 297; 36/75, *Rutili v. Minister for the Interior* (1975) E.C.R. 1219; 48/75, *Procureur du Roi v. Royer* (1976) E.C.R. 497; 118/75, *State v. Watson and Belmann*, (1976) E.C.R. 1185; 8/77, *Sagulo, Brenca and Bakhouché*, (1977) E.C.R. 1495; 30/77, *R. v. Pierre Bouchereau*, (1977) E.C.R. 1999.

Figure 1: An illustration of (a) the genesis of Schengen border free area and its functional spillovers and (b) common thread in *inter se* cooperation in Europe



The Schengen process in due course did not confine itself to the single policy area of free movement of persons. Rather, it proved to be a cornerstone of the EU project and extended well beyond the simple free movement notion to an array of allied policy areas. The Schengen regime led to creation of functional demand in societal as well as public domains for further changes and opened a floodgate to integrative processes in several related policy areas. Its spillover effect extended to the realms of visa matters, asylum, immigration, security, and cooperation in police, judicial and criminal matters.³⁵ While the entire saga of Schengen-led processes is beyond the scope of this article, some of the crucial functional spillovers – within and outside the EU framework – incidental to European free boarder regime – are illustrated in Figure 1.³⁶

Against this backdrop, the treaty revision process under the Maastricht in the early 1990s could not remain insulated to the impacts of the *inter se* cooperation apparatus, in particular the Schengen-driven imperatives in related policy sectors. I submit that the Schengen progress was the linchpin to the induction of Justice and Home Affairs regime under the Maastricht revision.³⁷ In the entire history of the EU law, the largest-ever space was allocated to the clauses on *inter se* cooperation under the Maastricht revision (see Table 2). Customs, police and judicial cooperation in criminal matters were added to the scope of inter-state agreements.

³⁵ On the Schengen process and related policy spillovers, see, for example, Huysmans, Jef (2000), ‘The European Union and the Securitization of Migration’, *Journal of Common Market Studies* 38(5): 751–777.

³⁶ Amongst others, developments on JHA were the conspicuous ones. On these developments within and outside EU framework, see, for example, Papagianni, Georgia (2000), ‘Flexibility in Justice and Home Affairs: An Old Phenomenon Taking New Forms’, in De Burca, G. and Scott, J., *supra* note 36, pp. 101–128; Peers, Steve (2011), ‘EU Justice and Home Affairs Law (Non-Civil)’, in Craig, P. and De Burca, G. (eds), *The Evolution of EU Law*, 2nd edn (Oxford: Oxford University Press), pp. 269–297. On how the once inter-state dominated model of the JHA finally ended up in current Area of Freedom, Security and Justice, see Peers, Steve (2014), ‘Justice and Home Affairs Law since the Treaty of Lisbon: A Fairy-Tale Ending?’, in Acosta Arcarazo, D. and Murphy, Cian (eds), *EU Security and Justice Law: After Lisbon and Stockholm* (London: Hart Publishing), pp. 17–37.

³⁷ In addition to the new Title VI on JHA under the Maastricht revision, some earlier steps taken along the same lines also underscore a potential spillover nexus with the Schengen dynamics; see, for example, insertion of Art. 100C EEC (Single European Act) on harmonization in visa requirements for the third country nationals, and Dublin Convention (signed on 15 June 1990) on harmonization of asylum policies.

Table 2: An analysis of the inner core of European clauses on *inter se* cooperation

	<i>Founding phase (EEC system)</i>	<i>Maastricht phase</i>	<i>Amsterdam phase</i>	<i>Nice phase</i>	<i>Lisbon phase</i>
<i>Provisions on inter se cooperation</i>	(i) <u>Art. 220 EEC</u> : individuals' rights; double tax removal; recognition of legal status of firms; recognition of judicial decisions (ii) <u>Art. 233 EEC</u> : Benelux integration	The initial phase clauses (i), (ii) carried forward; (iii) <u>Art. K.3(2)(c) TEU</u> : customs, police and judicial cooperation in criminal matters (iv) <u>Art. K.7 TEU</u> : bilateral/multilateral cooperation in JHA	The previous phase clauses (i), (ii) carried forward; (iii) replaced with <u>Art. 34(2)(d) TEU</u> : police and judicial cooperation in criminal matters below; (iv) <u>Art. K.7 TEU</u> abolished;	Similar to Amsterdam phase	All clauses abolished except the Benelux integration clause (Art. 350 TFEU)
<i>Whether ECJ holds explicit jurisdiction to review conventions</i>	No	<u>For Art. K.3(2)(c):</u> ECJ may have jurisdiction only if members explicitly mention <u>For Art. K.7:</u> cooperation not subject to ECJ jurisdiction	ECJ shall have jurisdiction to conventions based on Art. 34(2)(d) TEU	Similar to Amsterdam phase	
<i>Any role to Commission or the Council</i>	No	<u>For Art. K.3(2)(c):</u> (i) conventions can be initiated only by Member States; (ii) procedural frame to adopt conventions as per constitutional obligations of Member States (iii) no limit to number of participating Member States; (iv) explicitly stated that conventions are in addition to Art. 220 conventions;	<u>For Art. 34(2)(d):</u> (i) conventions can be initiated both by Member States or the Commission ; (ii) procedural frame for conventions set by the Council (iii) unless otherwise stated, conventions come into force when adopted by half of the Member States; (iv) implementing measures in the Council by two-third majority of parties involved	Similar to Amsterdam phase	

		(v) unless conventions stated otherwise, implementing measures in the Council by two-third majority of parties involved. <u>For Art. K.7:</u> no role of EU institutions in bilateral/multilateral cooperation	<u>Art. K.7 abolished</u>		
<i>Option for analogous flexibility within EU legal system</i>	No	No	Closer cooperation: For the first time in EU law, more than 50 per cent members could initiate flexible or differentiated integration in secondary law of all policy areas non-exclusive to EU (Arts 43–45 TEU; Art. 11 EC)	Enhanced cooperation The Amsterdam regime amended, Europeanized; minimum one-third (8) members could initiate differentiated integration in secondary law of all policy areas non-exclusive to EU (Arts 27a–27e, 43–45 TEU; Arts 11, 11a EC)	Enhanced cooperation institutionalized; 9 out of 27 members could trigger differentiated integration (Art. 20 TEU; Arts 326–334 TFEU). Also judicial cooperation in criminal matters as per Art. 82(3), para 2 TFEU

Compared to the next phase (Section 3.3), EU law hardly posed any constraint on bolstering the integration program through conclusion of instruments under the public international law. Rather, the Member States had free hands to enter into *inter se* agreements with no restriction on the number of participating states. The European Commission (an organ empowered to propose legislation under EU law) had no role in the process of drafting or initiating the conventions. The only space for lawful intervention (unlike Art. 293 EC conventions) was

allocated in EU law to the Council for issuing the implementing measures provided that the conventions stated it in express form. This was not yet the end of the story. In addition, the Maastricht revision also inserted a catch-all *inter se* clause (Art. K.7 TEU). This provision liberally entitled Member States to conclude bilateral or multilateral agreements in all spheres of JHA including asylum, immigration, and combating drugs and fraud. These amendments indicate the highest degree of *trust* posed by EU law on the public international law for advancing the integration project – an association that we earlier symbolized as the peak of romance between the two regimes. The situation however did not last long as we move to the next evolutionary phase.

3.3. *The Amsterdam – Nice phase: A cleavage appears and the ways part*

The Maastricht paradigm soon shifted in 1999 when the Amsterdam revision came into force which set the pendulum in motion to the opposite direction. For the first time in categorical terms, the existence of constitutional provisions persuading Member States to advance the integration agenda through traditional international law were called into question. The new amendments raised question marks on the *cordial* relations between the two laws in several ways.

First, the *inter se* cooperation in the JHA domain was subject to institutional ‘nuts and bolts’ through assigning possible roles to European organs under the Amsterdam changes. Later, this role was further refined (under the Nice revision) and converted into an obligatory mandate for the EU organs to scan over the *inter se* cooperation (see Table 2). Thus the intergovernmental cooperation on JHA in the post-Nice phase underwent changes akin to a transitory regime capable of producing hybrid instruments of *mixed nature* rather than tools of true public international law character. No such modifications were explicitly made in the text of Article 293 EC, however. Yet, I contend that the changes codified to oversee the JHA *inter se* cooperation were in part drawn on lesson learnt from the connotations implicit to the evolving character of Article 293 EC – as show certain changes introduced over time to some of the conventions based on the latter.³⁸

³⁸ This assumption builds on at least two arguments: First, when the JHA *inter se* cooperation [then Art. K.3(2)(c) TEU] was put in place under the Maastricht revision, it explicitly referred to Art. 293 EC (then Art. 220 EC), an indication to common legal origin and functions of the two *inter se* clauses. Second, although Art.

Second, the blanket approach adopted under Article K.7 TEU to promote bilateral / multilateral conventions in all areas under Justice and Home Affairs was abolished altogether. Third, and indeed the most significant paradigmatic constitutional change, was that the EU law also introduced a European track in the form of a closer cooperation clause – a potential substitute for international law track. The European track was not limited to the policy areas specified under the JHA or 293 EC but rather extended beyond to offer a much wider and catch-all platform to institute closer cooperation in almost all policy areas (except those which fell within the exclusive competence of EU). Introduction of this change in EU law created a new path of cooperative law-making among subsets of Member States and was also subject to the same institutional mechanism under the oversight of EU organs which was otherwise in place for the standard secondary law. The only difference from the standard legislation being that the law based on closer cooperation laid down the condition of a ‘critical mass’ (at least more than fifty percent of members) with applicative jurisdiction confined to the participating Member States. Thus a system along the lines of convention-based flexibility set out for the JHA and policy areas of Article 293 EC theoretically became possible among subsets within the charter of EU institutions. The space in EU law earlier allocated entirely to international law for creating flexible secondary law-like instruments was shrinking and in part was now also shared by the European framework to craft comparable tools. The seeds were hence sown to ‘empower’ EU law through the additional mechanism of (secondary) law-making at the expense of ‘de-powering’ international law through occupying part of the latter’s territory. A split (in the once closer association of the Maastricht phase) between the two regimes became evident that kept growing over time.

The Nice Treaty further deepened the cleavage when it imposed the condition that *inter se* conventions might come into force only when at least half of the Member States would adopt them. Simultaneously, the condition of critical mass to induce policy variation through enhanced cooperation within the EU system was redefined (Table 2) from simple majority to

293 EC did not assign any explicit supervisory role to EU organs, possible interpretative role was later extended to ECJ on some of the tools built on this clause; e.g. the 1968 Brussels Convention (ECJ jurisdiction added later through a Protocol in 1971) and 1980 Rome Convention (ECJ role assigned later through a Protocol in 1988); on these Conventions and Protocols, see O.J. 1990, C 27/1– 53. On another analysis indicating possible common origin of the two clauses (meant for the JHA conventions and Art. 293EC), see Figure 1 and also *infra* note 90.

one-third (eight of the soon to be twenty five) of the Member States. In addition, the ‘problematic and dysfunctional aspects’ of the Amsterdam clauses on closer cooperation were also streamlined.³⁹ Changes were also crafted in the system for an easier recourse of subsets to institutional framework by introducing qualified majority voting (except for common foreign and security policy).⁴⁰ The result being that EU *craving* to look back time and again for seeking *rescue* from international law tools in order to further the integration process in difficult areas of European construction was progressively diminishing.

3.4. *The Lisbon phase: Separation takes place?*

The Lisbon revision proved to be a termination point for the long association spread over five decades between the two regimes. Table 2 shows that (save the Benelux clause) during the Lisbon phase, EU law almost fully got rid of ‘outsider clauses’ that promoted intergovernmental tools under traditional public international law.⁴¹ At the same time, the European path to flexibility was also further institutionalized through fine-tuning of enhanced cooperation clauses (Arts 326–334 TFEU).⁴² The cooperative path along the European

³⁹ For some of the detailed work by a single author in this context, see Shaw, Jo (2003), ‘Flexibility in a “Reorganized” and “Simplified” Treaty’, *Common Market Law Review* 40(2): 279–311; Shaw, Jo (2001), ‘Enhancing Cooperation after Nice: Will the Treaty Do the Trick?’, in Usher, J. and Andenas, M. (eds), *The Treaty of Nice* (Oxford: Hart Publishing), pp 207–237; Shaw, Jo (2000), ‘Relating Constitutionalism and Flexibility in the European Union’, in De Burca, G. and Scott, J. (eds), *Constitutional Change in the EU: From Uniformity to Flexibility* (Oxford: Hart Publishing), pp. 337–358.

⁴⁰ De Witte, Bruno (2002), ‘Anticipating the Institutional Consequences of Expanded Membership of the European Union’, *International Political Science Review* 23(3): 235–248, at 245.

⁴¹ Professor Joseph Weiler views intergovernmental cooperation outside EU framework such as JHA, Common Defence and Security etc. as ‘alien bodies’ grafted in the EU law; see Weiler, J. H. H. (2011), ‘60 years since the first European Community – Reflections on Political Messianism’, *European Journal of International Law* 22(2): 303–311, at 309. Likewise, Professor Pierre Pescatore, a former judge of the ECJ, also observes *inter se* agreements pursuant to Art. 293 EC as ‘foreign bodies’ within the Community legal system; see Pestacore, P. (1970), ‘International Law and Community Law – A Comparative Analysis’, *Common Market Law Review*, 7(2): 167–183, at 180.

⁴² For a brief overview on Lisbon provisions and a relatively greater signal to encourage enhanced cooperation, see Craig, Paul (2013), ‘Enhanced Cooperation, Amendment, and Conclusion’, in Craig, P. (ed.), *The Lisbon*

institutional lines that was cultivated (parallel to *inter se* cooperation) more than a decade ago under the Amsterdam revision was never put into practice. It is the contemporary Lisbon phase which for the first time witnessed the application of enhanced cooperation regime to produce differentiated secondary law.⁴³ *The pioneering mission of the alternate path crafted long ago was finally accomplished!*⁴⁴ The creation of such law within the institutional framework heralds a new era of European legislative construct. It can funnel an integration sentiment prevalent in a subset of (around one-third) Member States in a given policy area into flexible secondary legislation with doors open to the remainder Member States to join at late stages.

In this separation framework of EU and international law, the Benelux cooperation clause seems as an odd survivor in the post-Lisbon world. What prevented the clause from removal? On its existence in the Lisbon phase, borrowing terminology from biological evolution, I tag it as *vestigial remains* of the primitive flexibility mode attached to the present corpus of EU law. The Benelux nations were the fore-runners of the integration process; they pioneered in putting the fundamental freedoms into practice and also attained border free area much before the remainder of the Schengen zone.⁴⁵ The territorial spillovers and precedential worth

Treaty, Revised Edition: Law, Politics, and Treaty Reform (Oxford: Oxford University Press), pp. 437–456, at 441.

⁴³ See e.g. Kroll, Daniela and Leuffen, Dirk (2014), ‘Enhanced cooperation in practice. An analysis of differentiated integration in EU secondary law’, *Journal of European Public Policy* 22(3): 353–373.

⁴⁴ The notion ‘mission accomplished’ here certainly does not suggest that ‘all is done’ but rather refers to the heralding of the new *modus operandi* to adopt (differentiated) secondary law; see e.g. *ibid* on policy areas concerning European divorce, European patents and initiatives in some other domains;. This form of differentiated integration indeed can be currently termed as at an embryonic stage and may go a long way in EU law and politics in the times ahead. One must also concede that judicial clarity on a range allied issues incidental to application of this *modus* is yet to see the day light; also, this flexible integration is likely to see plenty of litigation from the ‘outsider members’ as is evident from recent disputes decided by the ECJ, for example, in Joined Cases C-274/11 & C-295/11, *Kingdom of Spain and Italian Republic v. Council of the European Union*, judgement of 16 Apr. 2013, not yet reported; C-209/13, *United Kingdom of Great Britain and Northern Ireland v. Council of the European Union*, judgement of 30 Apr. 2014, not yet reported.

⁴⁵ Of the six founding nations, the Benelux countries also promptly and readily accepted the doctrine of primacy; De Witte, Bruno (2011), ‘Direct Effect, Primacy, and the Nature of Legal Order’, in Craig, P. and De Burca, G. (eds), *The evolution of EU law*, 2nd edn (Oxford: Oxford University Press), pp. 323–362, at 348.

attached to the Benelux flexibility clause for the European project was pre-eminent in the foundational periods. The clause, as observes Professor Bruno de Witte, ‘has run its course’.⁴⁶ I maintain that the Benelux clause is prone to repeal at any revision in the future. Its current worth is hardly more than acknowledging the pre-Community cooperative efforts of the three smaller states⁴⁷ and a sort of a symbolic tribute to them for serving as a template for European construction.

In concluding the evolutionary debate on the interplay between EU and international law, I revisit the *divorce* metaphor used earlier for their relationship in the post-Lisbon law. The separation between the two regimes signifies the sufficiency of the European system and adequacy of competences to operate independently of international law. It nonetheless may not be interpreted as abandonment on the part of EU law of the patronage of international law in absolute terms. The process of evolution at the interface of the two regimes is ongoing and in hypothetical terms has to remain in one form or another until the ‘United States of Europe’. I seek to symbolize the future relations of the two regimes again by borrowing a phrase from biological evolution – *ontogeny recapitulates phylogeny*.⁴⁸ In an environment of changing needs and unforeseen situations, one may not rule out the occurrences of a phenomenon in which the *evolved species* (EU law) *might sometimes recall and manifest its earlier forms of ancestral species* (international law). In the same vein, I also add that whenever the integration project might face this *recap* experience, the ancestral (international framework) form would exist only for a limited time before it eventually develops (integrates) into the

⁴⁶ De Witte, *supra* note 21, at 37.

⁴⁷ On background of Benelux states and their economic cooperation since 1922, see e.g. Jones, Eric (2005), ‘The Benelux Countries: Identities and Self Interest’, in Bulmer, S. and Lequesne, C. (eds) *Member States and the European Union* (Oxford: Oxford University Press), pp. 164–184.

⁴⁸ The phrase ‘ontogeny recapitulates phylogeny’ is borrowed from Haeckel, Ernst (1897) *The Evolution of Man: A Popular Exposition of the Principal Points of Human Ontogeny and Phylogeny*, Volumes 1 and 2 (English Translation) (New York: D. Appleton and Company); the phrase denotes Haeckel’s 19th century hypothesis of biological evolution where an embryo of an organism undergoes processes which manifest its shapes similar to earlier ancestral forms wherefrom the organism actually originated in the remote past. The hypothesis remains as a side-note rather than dogma in life sciences; however, the notion metaphorically draws some interesting analogies to developments at the interface of EU and international law in the post-Lisbon Europe. Besides this, on an ongoing role of international law in bilateral tax matters, also see *infra* note 63 and accompanying text.

advanced (EU constitutional framework) form.⁴⁹ The developments at the intersection of two frameworks in founding the ESM perhaps offer the best insights on this notion amongst the dramatically changing imperatives of law and politics in the post-crisis Europe.⁵⁰

The bigger picture drawn in this section based on temporal analysis and legal evolution model of *inter se* regime evidences some of the vital contours of the rationale behind the policy variations spread over six decades. To this effect, it also develops a framework for seeking in part the broad response to our original question on the logic behind the demise of Article 293 EC – a question to which I finally turn in the next section.

4. Repeal of Article 293 EC and the post-Lisbon EU order

The discursive analysis of the previous section provides a broad explanatory framework on the relationship between consolidation of European legal order and phasing out of *inter se* apparatus – Article 293 EC being part of the latter. The analysis therefore offers a conceptual basis to search response to our question on reasons behind removal of the clause. Drawing on this framework, I examine causes of disappearance of the clause in the first segment in general. In the second segment, I attempt to explore consequences of *absentia* of the provision in EU law particularly its implications for European competence to legislate direct tax policy.

⁴⁹ As can be noted, for example, from the Fiscal Compact, a post-crisis instrument of international law signed on 2 March 2012. The Fiscal Compact sets out a period of five years to incorporate its substance into European legal framework; see Art. 16 of the Treaty on the Stability, Cooperation and Governance in the Economic and Monetary Union. Available at http://europa.eu/rapid/press-release_DOC-12-2_en.htm (last accessed 29 October 2015).

⁵⁰ See literature cited in *supra* note 17. Interestingly, during the recent saga of whether or not to bailout Greece for a third time, the intent shown by EU heavyweights [(e.g. that of German Finance Minister Wolfgang Schäuble as reports the New York Times (2015), *Germany's Tone Grows Sharper in Greek Debt Crisis*, July 12)] on the idea of possible 'temporary Grexit' (before the Greek parliament said yes to the bailout deal on 16 July 2015) also hints towards yet another likely 'recapitulation' to international law path. This proposition builds on the presumption that a temporary Greek exit from Eurozone could potentially trigger events leading partly to adoption of an international legal track, in particular, within the Eurozone governance.

4.1. Rationale behind the repeal and general consequences

Several factors contributed to the emergence of a schism between the international and EU law. Of these, at least three dominate our discussion to follow within the evolutionary discourse analysis. First, after the disintegration of the Soviet Union, it became evident that the biggest-ever accession of ten new Member States (Eastern enlargement) was fast approaching. In the founding phase, for example, even a bilateral cooperation would mean one third of the (then six) Member States, or at the time of Schengen initiation, even five nations represented half of the (then ten) Member States. This *luxury* was gradually being lost and would no longer be available in the EU-25 membership. The looming accession of ten new members was bound to impact the flexibility dynamics and posed two critical problems. The Eastern enlargement would bring the former Soviet bloc states into EU folds. These states had little exposure to the values of the West European democratic politics and open market economy – the core traditions of the EU market. An open handed strategy to negotiate treaty objectives outside the European legal system as devised for the Maastricht era could pose serious threats to the EU order of falling apart.

With an expanding Union, increased heterogeneity is also inevitable. Leaving the integration process to grow outside the European system with the expanded membership could induce a parallel legislative regime. The rationale of seeking initial levels of ‘mutuality’ or reciprocity from the tools of international law was proven in the growing phases. However, travelling far along this path ‘unattended’ also had the potential risk to upset the integration process and backfire. The likelihood of such disruptions grows higher with accession rounds, in particular with the size and volume of that of the Eastern enlargement.⁵¹ With new and more diversified membership, cooperation in subsets is indeed more prone to getting derailed from European route unless subject to institutional monitoring. It is conceivable that new entrants in the pursuit of increased leverage for national interests might also enter into conventions that otherwise could be incompatible or even rivals to the EU order. Resultantly, as documented earlier, the concept of a critical mass of membership together with European *ifs and buts* to

⁵¹ On possibility of having dissidents and disputes consequential to extension in membership and increase in numbers, see e.g. Wallace, *supra* note 27, at 179–188.

keep the flexible integration in proximity to the European path was inevitable. Sooner or later, the relevant clauses on the JHA and 293 EC were fated to depart in this framework.

Secondly, even otherwise, for an autonomous order taking the form of independent entity with a state-like constitution and functional organs (judiciary, executive and legislature), seeking a support from an outsider framework gradually grows untenable. Rather, cooperative approaches in smaller subsets based on a piecemeal approach under international relations model could possibly cause rifts in the communitarization process. With this in mind, the profound impact of the post-Schengen developments might also have given rise to a second but more calculated long term realization. Despite some valued lessons learnt for advancing the integration program in bits and pieces in difficult areas, the Schengen experiment underpinned some critical challenges hidden in the sub-systems growing beyond EU order. For example, there was no codified constitutional apparatus to contain any possible *inter se* cooperation emerging on counter integration lines. Likewise, no institutional mechanism was in place to divert integrative sentiment attained through *inter se* cooperation into EU orbit, or to funnel it into the European system. What would happen if an instrument (with an impact as that of Schengen), for example, develops into a competing rather than a complementing regime to the EU law? The fixes to the problem would unambiguously include a caution signal against a blanket approval for *inter se* cooperation and a call for constitutional ‘check and balance’ to monitor the instruments of intergovernmental character developing outside the European institutions.⁵²

Thirdly, another significant reason behind the decreasing reliance on international law tools lies in the argument that the European legal system was becoming increasingly self-sustainable. To this end, I argue a *sufficiency principle* in EU legal order. The character of European competences is mobile and ever-changing.⁵³ Hence the EU powers were gradually

⁵² According to an EU official (writing under a pseudonym Kortenbergh), if the instances similar to the Schengen model take place frequently, threats could emerge to the EU order in terms of rifts pursuant to possible competition between cooperative regimes along the line of two distinct legal frameworks; see Kortenbergh, Helmut (1998), ‘Closer Cooperation in the Treaty of Amsterdam’, *Common Market Law Review* 35(4): 833–854, at 835.

⁵³ See e.g. Stone Sweet, A. and Sandholtz, W. (1997), ‘European integration and supranational governance’, *Journal of European Public Policy* 4(3): 297–317, at 299 observing that the way supranational governance has

growing and the system was attaining sufficient autonomy from public international law. The EU-level influence was increasingly becoming evident by virtue of extension ('functional spillover') to new policy areas either through new legal basis added during treaty revisions⁵⁴ or due to the emergence of (implicit) competences within the existing EU law.⁵⁵

In theory as well as practice, an autonomous order governing a given jurisdiction requires its own legal and administrative tool-kit. The European order moved slowly but persistently from international relations model to attain a unique *sui generis* status over time. In due course, executive, judicial and legislative functions sharpened and the governing treaties constitutionalized. To this end, the treaty provisions meant for tools of public international law were destined to become *endangered species* at one stage of the evolution or another of the European law and politics. As an 'alien' apparatus⁵⁶ meant for devising 'outsider' tools, Article 293 EC was also no exception.

From the holistic and all-inclusive approach adopted so far, I conclude that the departure of provisions on *inter se* cooperation generally indicates an advanced and autonomous stage of EU law. It represents a phase when the system frames or refines its own legal structure and

evolved in EU, seeking an answer to the question 'who governs?' changes over time (cited by Khan Niazi and Krever, *supra* note 9, at 457). For legal insights into 'mobile' character of EU law observed in the first few decades, see e.g. Tizzano, A. (1983), 'The Powers of Community', in Tizzano, A. (ed.) in Commission of the European Communities, *Thirty Years of Community Law* (Luxembourg: Office of Official Publications of European Communities), pp. 43–67. See also Section 4.2.5.

⁵⁴ In a period of decade or so, supranational influence extended to a range of new policy areas. For example, the Single European Act (SEA) added Arts 102a(2) (in conj. with 236), 118a, 130a–130e, 130r, 130s EEC (respectively, on economic and monetary policy, laying down criteria for national laws on health and safety of workers, roles in regional development and economic and social cohesion, research and technological development, and field of environment). Likewise, the European Commission reports that pursuant to the Maastricht revision, as many as twenty or so activities became open to EU-level actions; see Commission's Report of 24 November 1993 on the Adaptation of Community Legislation to the Subsidiarity Principle, COM (93) 545 Final, at 1.

⁵⁵ In 1990, for example, the first-ever substantive EU legislation (Directives 90/434/EEC and 90/435/EEC) in the field of corporate taxes was adopted after more than three decades since the EEC Treaty; the (implicit) competence to legislate these directives *emerged* without any textual amendment to the treaty. On sub-textual character and mobility in Union powers under the EU law, also see Section 4.2.5.

⁵⁶ As labelled by Weiler, *supra* note 41.

becomes self-sustainable to travel on European route without seeking *life* from public international law – be it the case of cooperation under the JHA, 293 EC or other similar provisions.

4.2. *Implications for EU competence on direct taxes*

Taxation was one of the four areas set out under Article 293 EC for inter-state cooperation to abolish double taxation. While the literature also explores the remaining three areas,⁵⁷ the repealed clause, however, inquisitively has attracted most of the scholarly attention of European legal discourse on double taxation in the single market.⁵⁸ The clause has also been perhaps cited more frequently in the rulings of the ECJ on double taxation disputes than those in the allied three areas set out thereunder.⁵⁹ Reference to the provision in the judgements can be found in litigation on double taxation even in the post-repeal period.⁶⁰

The main reason behind the extensive emphasis (one may name it obsession) for European tax literature on the repealed provision is that it presented the sole explicit reference to direct

⁵⁷ On mutual recognition of legal form of companies as set out under Art. 293 EC, see e.g. Ringe, Wolf-George (2005), 'No Freedom of Emigration for Companies', *European Business Law Review* 16(3): 621–642, at 625–633; Borg-Barthet, Justin (2009), 'European private international law of companies after *Cartesio*', *International and Comparative Law Quarterly* 58(4): 1020–1028, at 1021–1026. On mutual recognition of court decisions under the repealed clause, see e.g. Kotuby, Charles (2001), 'External Competence of the European Community in the Hague Conference on Private International Law: Community Harmonization and Worldwide Unification', *Netherlands International Law Review* 48(1): 1–30, at 18, 21–22.

⁵⁸ See e.g. literature cited in *supra* notes 5–9.

⁵⁹ See e.g. ECJ Cases: C-336/96, *Gilly v. Directeur des services fiscaux du Bas-Rhin* (1998) E.C.R. I-2793, paras 1, 12–17, 23, 30; C-307/97, *Compagnie de Saint-Gobain, Zweigniederlassung Deutschland v. Finanzamt Aachen-Innenstadt* (1999) E.C.R. I-6161, para 57; C-376/03, *D. v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen* (2005) E.C.R. I-05821, paras 49, 50; C-513/04, *Mark Kerckhaert and Bernadette Morres v. Belgische Staat* (2006) E.C.R. I-10967, para 21; C-374/04, *Test Claimants in Class IV of the ACT Group Litigation v. Commissioners of Inland Revenue* (2006) E.C.R. I-11673, para 51; C-298/05, *Columbus Container Services B.V.B.A. & Co. v. Finanzamt Bielefeld-Innenstadt* (2007) E.C.R. I-10451, para 44; C-128/08, *Jacques Damseaux v. État belge* (2009) E.C.R. I- E.C.R. I-6823, paras 1, 13, 28; C-67/08, *Margarete Block v. Finanzamt Kaufbeuren* (2009) E.C.R. I-0883, para 29.

⁶⁰ See e.g. ECJ Case C-540/11, *Van Daniel Levy Carine Sebbag v. Etat Belge, SPF Finances*, judgement of 19 September 2012, not yet reported.

taxes in the EU law. The clause therefore attracted considerable amount of scholarly attention since EU competence in direct taxes is of unspoken character and remains submerged in the single market principles. In terms of balance of power, taxation being central to national fiscal autonomy of Member States represents one of the most controversial areas in European law and politics. In delineating the nature and scope of EU mandate to abolish double taxation in the single economic market, EU power has always been one of the leading contentious terrains of European constitutional discourse. The studies exploring state-suprastate power equilibrium in taxation lies at the heart of European fiscal federalism debates.⁶¹ This is because in EU law, direct taxation (a) generally is a territory of Member States besides being (politically) central to their national sovereignty and (b) remains an unspoken ‘federal mandate’ developing in the undergrowth of market principles. A segment of the post-crisis literature also seeks to add new dimensions in theorizing opening of a need-driven window for EU-level mandate for direct tax policymaking.⁶² The policy area nevertheless resides high on agenda of national governments and thus European tax competence continues to be surrounded by legal and political complexities.

4.2.1. *In general*

In arguing for an enhanced legal space for EU intervention to approximate national tax provisions of Member States incidental to the single market in the remainder of this section, I do not claim that removal of one scanty reference to income taxation, a sub-part of Article

⁶¹ See e.g. Avi-Yonah, R., Hines, J. and Lang, M. (eds) (2007), *Comparative Fiscal Federalism: Comparing the Court of Justice and the US Supreme Court’s Tax Jurisprudence* (Alphen aan den Rijn: Kluwer Law International); Gassner, W., Lang, M., and Lechner, E. (eds) (1997), *Tax Treaties and EC Law* (London: Kluwer Law International); Isanbaert, M. (2010), *EC Law and Sovereignty of the Member States in Direct Taxation*, IBFD Doctoral Series (Amsterdam: IBFD); Cerioni, Luca (2015), *The European Union and Direct Taxation: A solution for difficult relationship* (Abingdon, Oxon: Routledge).

⁶² See e.g. Vanistendael, F. (2011), *Revisiting Taxation in the Wake of the Crisis: Between National Tax Sovereignty and Tax Harmonization*, 14 Madariaga Paper (College of European Foundation); Vanistendael, F. (2010), ‘The Crisis: A Window of Necessity for EU Taxation’, *European Taxation* 50: 394–401; Sting, Anna (2014), ‘Company Tax Integration in the European Union in the Crisis – Why and How?’, *Erasmus Law Review* 7: 39–49. Also on the indirect tax side, the Council Decision authorising enhanced cooperation on financial transaction tax (O.J. 2013, L 22/11) is an initiative primarily led by the financial crisis.

293 EC, settles the delineation of tax power issues once and for ever. Nor do I argue that in the post-Lisbon period, augmentation of European tax competence may take place in the short run and beyond any dispute. It is also conceded that model tax conventions – the international law tools – still have a long way to govern the intra-EU bilateral tax matters.⁶³ Likewise, the repeal is unlikely to spontaneously impact the current national tax politics and would not trigger any dramatic change to adopt, for example, a sweeping tax directive in the short term. Nevertheless, in what follows, I submit that conceptually there lies a case for an increasing room for EU tax powers within the constitutional design coupled with differentiated tax integration in subsets in the post-repeal phase.

Unlike the remaining three policy areas set out under Article 293 EC, no direct tax-specific or specialized legal basis exists for EU-level actions in the current EU law.⁶⁴ Any Union-wide action on direct tax policymaking requires invocation of Article 115 TFEU.⁶⁵ According to this constitutional provision, achieving unanimous consensus among 28 Member States is obligatory in order for it to proceed – a quest often considered as the biggest hurdle to adopting EU tax legislation. This notion remains central to direct taxes and is hardly disputable. Nevertheless, in this policy area of high politics requiring unanimity, one possible alternative now exists. And it is none other than the new mode of flexibility – enhanced

⁶³ As long as Art. 293 EC existed, the international law-based intra-EU bilateral tax treaty network had an express constitutional backing. This is no longer available post-repeal. The repeal certainly does not take away the national (tax) powers of Member States to enter into bilateral tax conventions with each other. I however submit that the repeal may allocate additional supranational legal space to validate wider Union actions in the times ahead against those tax treaty provisions which undermine the single market principles. This may also extend to bilateral tax treaties of Member States with the third (non-EU) countries; e.g. the latest infringement decision of the European Commission requiring the Netherlands to amend the ‘limitation on benefit’ clause in the Dutch-Japanese tax treaty (came into force on 1 Jan. 2012); see Commission’s fact sheet of November 2015 infringement package, available at http://europa.eu/rapid/press-release_MEMO-15-6006_mt.htm (accessed 23 Nov. 2015).

⁶⁴ In addition to double taxation, the other three areas set out under Art. 293 EC are rights of individuals, mutual recognition of legal status of firms and reciprocal recognition and enforcement of decisions of national courts; legal basis for the three areas evolved and gradually became explicit in treaty revisions over time. Currently, legal basis to act in these areas are placed under Title V of the TFEU (Area of Freedom, Security and Justice).

⁶⁵ Article 115 TFEU is a general legal basis in EU law meant for adopting legislation for ‘..... approximation of such laws.....of the Member States as directly affect the establishment or functioning of the internal market.’

cooperation – that indeed has its legal origins embedded in the old mode of flexibility (including Art. 293 EC – see Section 3). The marked difference between the two modes resides in the factum that the former operates under EU dictates as opposed to the latter which follows an outsider legal path.

The possibility of experimenting construction of (differentiated) secondary law in difficult areas including taxation in the laboratory of enhanced cooperation has been argued since the pre-Lisbon times.⁶⁶ I however submit that the presence of ‘outsider’ tools (Art. 293 EC) in EU law could possibly jeopardise the ‘insider’ apparatus for cooperation on tax matters within the subsets. In presence of the repealed clause, the controversies surrounding the principle of ‘occupation of the field’ inherited potential challenges to direct tax legislation within the EU framework (see next segment). Dual taxation and other tax-related factors inducing economic distortions or countering the single market notion could in the post-Lisbon period be better handled through enhanced cooperation – the exclusive device that now occupies the entire space on flexible secondary legislation in EU law. Once a critical mass (nine members under the Lisbon law) proceeds in this framework, the laggards have the option to join at a later stage to extend the applicative jurisdiction of secondary law in taxation. Possibility exists that this hypothetical notion could and in practice would also be lost if EU law itself offers an option of an alternate (international law) track to members in a policy area often marred by sovereignty concerns. The repeal of the clause in question however seeks to block this option in favour of tax legislation within the constitutional framework.

4.2.2. *From the pre-emption principle perspective*

The principle of pre-emption is a notion that generally serves as a measure for courts to allocate balance of powers among the national and supranational orders.⁶⁷ In the judicial context, pre-emption is an emerging principle in EU.⁶⁸ Under this principle, the entire space is

⁶⁶ See e.g. Shaw (2003), *supra* note 39, at 303.

⁶⁷ Cross, E. D. (1992), ‘Pre-emption of Member State Law in the European Economic Community: A Framework for Analysis’, *Common Market Law Review* 29(3): 447–472, at 447.

⁶⁸ See e.g. Schutze, R. (2006), ‘Supremacy without Pre-emption? The Very Slowly Emergent Doctrine of Community Pre-emption’, *Common Market Law Review* 43(4): 1023–1048.

occupied by EU law within the territory of the Union's exclusive powers.⁶⁹ In areas of non-exclusive EU powers, the national governments are free to act to the extent that the space is not occupied by the Union.

It is thus a generally established notion that when EU law moves in and occupies certain space in a given policy arena, national governments to that extent accordingly lose powers to act. As long as Article 293 EC existed, it remained a source of potential conflict for the Union actions to occupy the field imperative for approximation of national tax provisions that directly impact the functioning of the single market.

In this context, the conclusion of the Arbitration Convention in 1990⁷⁰ offers one but a pertinent instance. In the history of European tax legislation, Member States at the crossroads of 'who occupies the field' seemingly acted in derogation to the pre-emption principle. Hardly any precedent is available in EU history when an inter-state convention moved in and occupied the field virtually replacing an entire EU legislative action. Exploiting the *inter se* cooperation (based on Art. 293 EC), the (then) twelve members concluded the Arbitration Convention while a similar legislative proposal was already adopted by the European Commission and was awaiting approval of the legislature since 1976.⁷¹ Although Article 293 EC 'was never interpreted as limiting the use of [EU] instruments to deal with the matter listed therein [...]',⁷² yet the Member States placing reliance on the repealed clause acted *inter se* to restrain the proposed EU legislation against a specified form of double taxation. It is not abundantly clear whether this type of pre-emptive action by Member States on arbitration convention that substituted EU legislation in entirety constitutes an act of joint breach. A Commission official at that time did not rule out the possibility of contesting the convention

⁶⁹ De Witte, *supra* note 15, at 241.

⁷⁰ Arbitration Convention (90/436/EEC) on the elimination of double taxation in connection with the adjustment of transfers of profits between associated enterprises; O.J. 1990, L 225/10.

⁷¹ See proposal of the European Commission to the Council to adopt Directive on the elimination of double taxation in connection with the adjustment of transfers of profits between associated enterprises; O.J. 1976, C 301/4.

⁷² De Burca, Grainne and De Witte, Bruno (2002), 'The Delimitation of Powers Between the EU and its Members', in Arnull, Anthony and Wincott, Daniel (eds) *Accountability and Legitimacy in the European Union* (Oxford: Oxford University Press) pp. 201–222, at 220.

(joint action of members) before the ECJ;⁷³ however, no (infringement) proceedings were ever initiated.

For De Witte, the solution to such conflicts is probably not to be sought in the pre-emption doctrine but rather through the commitment of the Member States set out in EU law to refrain from taking measures that jeopardise the achievement of Union objectives (current Article 4(3) TEU).⁷⁴ In any case, the ‘shelter’ available to the conjectures of Member States under Article 293 EC on retaining joint national power to act multilaterally to replace in entirety a legislative proposal on taxes is no longer available post-repeal. As long as the clause existed, it cast shadows of controversy inherited from the experience of arbitration convention. Its deletion therefore accords with the removal of potential ambiguity for EU actions on elimination of double taxation in the single market.

Yet another analysis also suggests expansive impact of the repeal on EU powers in taxation. It goes as follows. If Member States, for example, based on Article 293 EC had the primary power to abolish double taxation from the internal market as held by some legal scholars,⁷⁵ it has gone with the repeal. Accordingly, it would now mean that implicit EU (secondary?) competence in this area is no more constrained by explicit national (primary?) competence. This in turn would assign an unambiguous supremacy to EU (legislation) initiatives in this policy area.

4.2.3. *The subsidiarity dimension*

In legal terms, the repeal of the clause can be construed as having an expansionary effect on the constraint posed by subsidiarity notion.⁷⁶ At the time of adoption of this notion under the

⁷³ Schelpe, D. (1995), ‘The Arbitration Convention: its Origin, Its Opportunities and Its Weaknesses’, *EC Tax Review* 4(2): 68–77, at 71.

⁷⁴ De Witte, *supra* note 15, at 241.

⁷⁵ See e.g. Lehner, M (1997), ‘EC Law and the Competence to Abolish Double Taxation’, in Gassner, W., Lang, M. and Lechner, E. (eds), *supra* note 61, at 23 referring to a number of citations in footnote 12 (in conj. with footnote 5) holding similar views; see also Hoffman, *supra* note 7.

⁷⁶ Subsidiarity is an EU constitutional principle ([Art. 5(3) TFEU] that for legislation in areas of concurrent powers states: ‘...Union shall act only if and in so far as the objectives of the proposed action cannot be achieved by Member States.....but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.’

Maastricht revision, the concept of differentiation in secondary law did not exist in EU law. As discussed in Section 3.2 (Maastricht phase), almost the entire amount of flexibility was meant for outsider legal tools; it did not encompass secondary legislation within EU framework at all. The subsidiarity calculus designed to determine the scope of insider (EU) actions essentially extended to all Member States so as to quantify whether objectives of an action can (sufficiently) be achieved at national level or otherwise (can be better attained at EU level).⁷⁷

The transformation of flexibility from *inter se* mode to European mode in essence brings new attire for the subsidiarity concept – a flexible or ‘differentiated subsidiarity’.⁷⁸ Pursuant to the evolved flexibility, to initiate EU legislation, the subsidiarity test would take into account the participating Member States only. The result may appear in the form of possibilities of secondary legislation in the sub-system such as the recent progress on financial transaction tax – an appreciation of the subsidiarity notion that otherwise ‘might have been unthinkable’.⁷⁹

Conversely, if the repealed provision assigned Member States a supplementary integrative task, its demise would still impact the subsidiarity function to administer the legislative scope. The repeal would reinforce the *signpost* assigning a *give way* connotation in favour of supranational action on against double taxation pursuant to departure of controversial aspects discussed earlier (Section 4.2.1). Through indoctrinating a so called principle of *absentia*,⁸⁰ the demise of the clause would, in any case, theoretically generate a legal space for action(s) to prevent double taxation in the jurisdiction. The vacuum, in essence, would now be filled by the EU or, for and on its behalf, by (a minimum of) nine Member States in the guise of

⁷⁷ Tuytschaever, *supra* note 16, at 240.

⁷⁸ The term used in *ibid.*, at 241.

⁷⁹ Khan Niazi and Krever, *supra* note 9, at 460 referring to changing understanding of subsidiarity in the context of financial crisis in Europe and its possible response in European sub-systems.

⁸⁰ The parlance ‘principle of *absentia*’ in its specific connotations is not being cited from the existing literature, and is being used here subjectively in the given EU constitutional context. This notion used in its given framework broadly enfolds a legal principle that may infuse utilitarian or operational activism into one set of legal provisions or enhance their applicative scope – without amending it – by virtue of repeal (or *absentia*) of another set of provisions in the same law.

enhanced cooperation clause to adopt supranational legislation. Overall, this could now – in the post-repeal period – be fairly construed as having an expansionary effect on the subsidiarity application to a Union action in a policy area based otherwise on implied powers.

4.2.4. *Changing paradigms: constitutionalization of law and neofunctional politics*

The demise of Article 293 EC also corresponds to the paradigmatic theories of recent times that unfold the legal and political processes of European transformation. In conceiving the constitutional construct and supranational governance, at least two leading concepts have gained currency since the 1990s and indeed revitalized literature that offers explanatory frameworks of European legal and political integration. One is the legal dimension that offers influential discourse on transformation of the governing treaties into an autonomous legal order.⁸¹ The second is a political model that provides empirical evidence on how transnational actors and EU organs can play a role in shaping supranational politics alongside and beyond intergovernmental politics.⁸² A common thread running along both these legal and political conceptions has grown more evident in the last couple of decades.⁸³ The legal-political concurrence is rooted in particular in (a) the profound impacts of ECJ rulings that shaped a constitution using international treaty law as a precursor and (b) activities at level of European Commission that transformed an international organization into a federal-like structure.

The deletion of Article 293 EC is a scanty yet integral part of this bigger picture and corresponds to both recent notions of law and politics of European construct. In terms of law, as posited earlier (Section 3.3), an alternate devise superior to the repealed clause has been

⁸¹ One detailed and powerful instance comes from Weiler, *supra* note 25.

⁸² Amongst others, Stone Sweet and Sandholtz, *supra* note 53 are conspicuous in theorizing the new version of neofunctional political thesis on integration originally advanced by Hass, E.B. (1958), *The Uniting of Europe: Political, Economic and Social Forces, 1950–1957* (Stanford: Stanford University Press); on empirical work in support of the integration model, see Stone Sweet, Alec (ed.) (2004), *The Judicial Construction of Europe* (Oxford: Oxford University Press).

⁸³ On growing understanding of the new European legal-political embrace, see e.g. Kelemen, Daniel and Stone Sweet, Alec (2013), *Assessing the Transformation of Europe: A View from the Political Science*, SelectedWorks of Alec Stone Sweet, Yale University, available at http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5631&context=fss_papers (accessed 25 Sep. 2015).

crafted in EU law in the form of enhanced cooperation. The substitute has constitutional features that capture the integration sentiment scattered across the EU jurisdiction in a range of policy areas (including taxes) and to convert it into (differentiated) legislation. In political terms in the same vein, a segment of power that was once entrusted upon the inter-state politics (Art. 293 EC) is now regulated through EU organs under the influence of supranational politics. The alternate option rather lies particularly in proximity to those policy areas where legislation is constrained by national politics on sovereignty and unanimous consensus of Member States – with taxation being ideal candidate in both cases.⁸⁴ The argument also finds support from some of the ongoing developments and the future tax agenda declared by the European Commission,⁸⁵ the organ responsible for drafting European legislation.

4.2.5. *The sub-textual growth of legal basis*

One might concede that a puzzle in relation to direct taxes and the repealed provision, one aspect yet seems to remain unresolved. Unlike income taxation, hardly any policy area of *inter se* cooperation exists that went missing from EU law unless its corresponding legal basis is refined or a more concrete legal basis is inserted. On the contrary however, as pointed out earlier (Section 4.2.1), direct taxes *prima facie* continue to remain unspoken in EU law and

⁸⁴ For example, Jean-Claude Piris, a former DG of Council Legal Service, observes taxation amongst those few policy areas where the Eurozone members could possibly make use of enhanced cooperation in the future to forge closer relationship (flexible or differentiated integration) within the sub-system of EU; Piris, Jean-Claude (2012), *The Future of the Europe: Towards a Two-Speed EU?* (Cambridge: Cambridge University Press), at 111, 122. For insights on application of enhanced cooperation in the adoption of CCTB, see Cerioni, *supra* note 61, at 21–217; Cerioni, Luca (2006), ‘The Possible Introduction of Common Consolidated Corporate Base Taxation via Enhanced Cooperation: Some Open Issues’, *European Taxation* 46(5): 187–196.

⁸⁵ The European Commission, for example, in its recent Action Plan for fundamental reforms in business taxation, has included re-launch of proposal for Common Consolidated Corporate Tax Base in 2016. It hints at enhanced cooperation among sub-system if unanimity is not achieved; see PricewaterhouseCoopers (2015), ‘News Alert: EU Direct Group’, available at http://www.pwc.com/en_GX/GX/tax/newsletters/eu-direct-tax-newsalerts/assets/eudtg-newsalert-commisison-action-plan-on-business-tax-reform-in-the-eu.pdf (accessed 18 Jun. 2015). Likewise, in another development on the indirect tax side, the ongoing progress on financial transaction tax is also based on enhanced cooperation among 11 Member States; see Council Decision 2013/52/EU (of 22 Jan. 2013) authorizing enhanced cooperation on a financial transactions tax.

Union actions in this policy area still rely on a general legal basis (Art. 115 TFEU) similar to the pre-repeal period. Is there any possible explanation for this riddle within the frame of reference of European legal developments?

Strong insights with respect to this puzzle can be had, again, in none other than the evolutionary construct of EU competences⁸⁶ – the way various legal bases for an array of policy areas were designed in the EU law over time. To cite but one pre-eminent instance is that of a catch-all general legal basis of the founding period, Article 100 EEC, meant for approximation of national laws incidental to the common market. This enabling clause also required stringent adherence to the unanimous consensus to legislate. Gradually, the functional capacity of this legal basis could not carry along the unfolding imperatives of the market agenda, and split into two legal bases during the first major treaty revision (SEA), that is, 100 EEC (now Art. 115 TFEU) and newly inserted 100a EEC (now Art. 114 TFEU). The new legal basis, also general in character, embedded wider potential for EU-level actions to cover almost all policy areas (except fiscal matters) due to its flexible design and majoritarian voting system. At the same time, powers also expanded to encompass certain specified policy areas.⁸⁷ In due course, a number of specialized legal bases for several policy areas also emerged.⁸⁸ One can posit that several legal bases (in theory) gradually bud off from the womb of once a single general enabling clause in accordance with the functional imperatives of the single market at different points in time.

The crux of the matter is that a general competence clause in theory can perform all the functions to an extent. Yet new specialized legal bases on the legal evolutionary path become inevitable and emerge in the EU system. This implies that with the expansion of transnational activity over time, the legal strength of the general enabling clause also accordingly changes below the static legal text. The market demand accrues underneath the general legal basis. Hypothetically, when the force in the undergrowth of the general legal basis reaches a certain

⁸⁶ On crucial relations between legal evolution and EU powers, Khan Niazi and Krever (*supra* note 9, at 457), for example, observe that ‘The only way perhaps to make sense of the legislative regimes of the EU law is in the light of evolutionary developments of power equilibrium.’

⁸⁷ See e.g. additions to the EU law under the SEA, *supra* note 54.

⁸⁸ See e.g. European Commission, *supra* note 54 on new EU powers added under the Maastricht revision; and EU powers so forth added under subsequent revisions.

threshold, it cannot sustain carrying along the accumulated legal force for a given policy area and a new, relatively specialized, legal basis hatches from its womb.

In this framework, the sub-textual competence vested in the catch-all legal basis (Art. 115 TFEU) is not static. Rather, it varies at different points in time and thus grows along the temporal continuum depending upon the phase of the single market. The submerged powers for hazy or unspoken policy areas gradually emerge (in neofunctional terms, spillover). One must concede that several other factors might bolster (e.g. supranational actors) or constrain (e.g. national sovereignty concerns) these processes. Yet the neofunctional drive acts as a locomotive and leads the process of *competence creation* in European structure.⁸⁹ To this end, the enhanced scope or sub-textual growth of EU-level powers vested in Article 115 TFEU to integrate parts of the national tax policies incidental to single market is also unavoidable.⁹⁰ In addition, the demise of Article 293 EC, a tool of intergovernmental politics operating in a

⁸⁹ On a recent account of the neofunctional integration model, see e.g. Sandholtz, Wayne and Stone Sweet, Alec (2013), 'Neo-functionalism and Supranational Governance', in Jones, E., Menon A. and Weatherill, S. (eds), *The Oxford Handbook of the European Union* (Oxford: Oxford Hand Books Online).

⁹⁰ The sole possible explanation behind the repeal of Article 293 EC comes from the view of the Commission that also accords with this premise. According to the Commission, legal bases for the policy areas set out under Art. 293 EC gradually appeared in substantive form with treaty revisions thus rendering the use of conventions obsolete; see Commission's response of 24 May 2011 to the citizen enquiry in case ID363543, available at <http://ec.europa.eu/dorie/fileDownload.do?docId=992403&cardId=992402> (accessed 5 May 2015). In addition, the Commission also places reliance on views expressed by Jean-Claude Piris, the DG of the Council Legal Service, in his speaking note (of 17 Oct. 2002) to Working Group IX on "Simplification of legislative procedures and instruments" of the Convention on the future of the European Union. In this note on rationalization of Union's legal instruments, Piris observes that one aspect of EU legal complexity rests in the multiplicity (fifteen) of forms of legal instruments (e.g. directive, regulation, decision, recommendation, opinion, joint action, convention, common strategy, framework decision etc.), and therefore proposes reduction of legal tools to five only as provided under Art. 249 EC (now Art. 288 TFEU). In proposing elimination of legal instruments, Piris deals with the clauses meant for conventions under JHA and Art. 293 EC together. The note, amongst others, hints towards at least two implicit notions: (a) common legal and political origins of *inter se* cooperation under JHA and Art. 293 EC, and (b) an explicit or relatively visible legal space for adoption of relevant legislative tools (directive, regulation etc.) set out under Art. 249 EC (now Art. 288 TFEU); see speaking note of Jean-Claude Piris (English translation) received in personal communication with the European Commission (Commission's letter of 5 May 2015 on file with author).

non-EU environment, does nothing but only bolsters the neofunctional dynamics seeking enhanced room for EU-level actions in taxation.

5. Conclusion

The study explored the rationale and repercussions of the repeal of Article 293 TEC, in particular, its second paragraph, the sole explicit reference to income taxation in the EU constitution on elimination of double taxation through public international law tools. To understand the underlying legal consequences of the competence allocation in taxation between EU and Member States, the study built on a legal evolutionary model.

The investigation adopted a bigger picture approach taking into account developments taking place over time in European constitutional construct at the interface of EU and international law with Article 293 TEC being a tool of the latter. For this purpose, the study took an excursion into various constitutional clauses that remained part of the EU legal system at different points in time to promote cooperation between the Member States in several difficult policy areas under the auspices of public international law. The excursion into legal evolutionary discourse developed an explanatory framework which provides three take away messages that are equally applicable to the demise of the clause in question.

First, in areas where harmonization of national systems remained hard to achieve under the constitutional charter in the (growing) common market, international legal regime often served as the first port of call. It gradually (and often inevitably) paves the way towards 'Europeanization' in the given policy domains. Second, when international tools cultivate a degree of harmony in the national systems, constitutional spillover to bring European rule of law becomes attainable in these areas of high politics. That is, either new legal bases are added to EU constitution or the existing legal bases become more explicit for taking legislative actions under the European framework. This in turn renders the earlier constitutional clauses on *inter se* cooperation in given policy domain redundant. Third, depending upon the change in phase of integration in the European single market, the relationship between EU and international law is ever-evolving. The more the European constitution relies on international law regime in a given policy area, the less the EU order is autonomous in that particular field, and vice a versa. Thus, *cleansing* the European constitution of clauses (alien bodies) on *inter se* cooperation in given policy domains

generally underpins the fact that the EU law has become *mature* and seeking autonomy from international legal order in those particular areas. This also applies to the flexibility regime existing in EU law to adopt differentiated legislation in sub-systems, that is, the procedure to adopt legislation applicable to a specified group of Member States. The same explanatory framework is also extendable to the causal logic behind the demise of Article 293 TEC. Repeal of a tiny clause, widely debated in scholarship on EU income taxation, is thus not an isolated event but rather part of a bigger process in the evolution of the European legal system at the cross-roads of two legal regimes.

Specialized legal bases for adopting legislation emerged in the constitution over time in the case of three of the four policy areas (protection of persons' rights, mutual recognition of legal persons and court rulings) set out under the repealed clause. For the fourth area (income taxation) listed under the clause, no express legal basis hitherto exists to harmonize those provisions of national tax codes that are violative of the single market principles. Yet, as this study posits from various political and legal dimensions, the general legal basis for approximation of national (tax) provisions affecting single market has sufficiently grown up in the subtext. A wide-ranging legislative proposal on the CCCTB initiated in 2011, and its re-launch announced by the European Commission in its press release of 17 June 2015, also upholds this premise. Regardless of political challenges posed in particular by unanimity rule to adopt EU-wide tax legislation, the post-Lisbon EU constitution embraces at least two big promises in tax policy area. The first is an ever-wider scope to initiate EU-level tax policymaking and, second, a single legislative track left out for flexible or differentiated integration along the European lines that can also circumvent the unanimity rule in the garb of the enhanced cooperation regime. In sum, the repeal (a) indicates growing reliance on European order, (b) inherits wider powers to take EU-level actions against tax-induced distortions in the single market, (c) reinforces the differentiated or flexible integration notion in (tax) legislation and (d) seeks to shun unfettered fragmentation within the sub-systems along the international law path in an expanding Union territory.