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§ 9
Sovereigns in chains? Art. 4(2) sent. 3 TEU and EU law constraints on the use of AI in national security contexts*

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Bibliography: Abiri, 'Moderating from Nowhere', BYU L. Rev. 2022 (47), 757; Anders, 'Europäische Integration als Ausdruck einer Strategie zur Ausweitung exekutiver Handlungsspielräume?', ZPol 2018 (28), 343; Azoulai, 'The Complex Weave of Harmonization' in Arnull/Chalmers (eds), The Oxford Handbook of European Union Law, Oxford 2015, p. 589; Benn, 'The Uses of Sovereignty' Political Studies 1955 (3), 109; Benrath, Die Konkretisierung von Loyalitätspflichten, Tübingen 2019; von Bogdandy/Bast, 'The Federal Order of Competences' in von Bogdandy/Bast, Principles of European Constitutional Law, 2nd edn, Oxford/Munich/Baden-Baden 2010, p. 275; von Bogdandy/Hering, 'Die Informationsbeziehungen im europäischen Verwaltungsverbund' in Voßkuhle/Eifert/Möllers (eds), Gundlagen des Verwaltungsrechts I, Munich 2022, p. 1799; Botta, 'Die Förderung Innovativer KI-Systeme in der EU zum Kommissionsvorschlag der KI-Reallabore', ZfDR 2022, 391; Bumke/Voßkuhle, German Constitutional Law, Oxford 2019; Calliess/Ruffert (eds), EUV/AEUV – Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta, 6th edn, Munich 2022; Cohen, 'Regulating Manipulative Artificial Intelligence', Journal of Law, Technology and Society 2023 (20), 203; Craig/de Búrca, EU Law – Text, Cases, and Materials, 7th edn, Oxford 2020; Dieter, 'The new raison d'état as a problem for democracy in world society', Eur. J. Int. Relat. 1999 (5), 333; Djeffal, 'The Normative Potential of the European Rule on Automated Decisions: A New Reading for Art. 22 GDPR', ZaöRV 2020 (80), 847; Ebers/Hoch/Rosenkranz/Ruschemeier/Steinrötter, 'The European Commission's Proposal for an Artificial Intelligence Act – A Critical Assessment by Members of the Robotics and AI Law Society (RAILS)', J 2021 (4) 589; Egbert/Krasmann 'Predictive policing: not yet, but soon preemptive?', Policing and Society 2020 (30), 905; Fabbrini, 'The Principle of Subsidiarity' in Schütze/Tridimas (eds), Oxford Principles of European Union Law I, Oxford 2018, p. 221; Galetta/Hofmann/Schneider 'Information Exchange in the European Administrative Union: An Introduction', EPL 2014 (20), 65; Geiger/Khan/Kotzur (eds), European Union Treaties, Portland/Munich 2014; Gerstner, 'Predictive Policing to Prevent Residential Burglary – Findings from the Pilot Project P4 in Baden-Württemberg, Germany', Eur. J. Secur. Res. 2019 (3), 115; Guastaferro, 'Sincere Cooperation and Respect for National Identities' in Schütze/Tridimas (eds), Oxford Principles of European Union Law I, Oxford 2018, p. 350; Hills, 'Against Preemption: How Federalism Can Improve the National Legislative Process', N.Y.U. L. Rev. 2007 (82), 1; Höffler/Meyer/Möller, 'Risk-Assessment–the Key to More Security? Factors, Tools, and Practices in Dealing with Extremist Individuals', Eur. J. Crim. Policy Res. 2022 (28), 269; Isensee, Das Volk als Grund der Verfassung, Opladen 1995; Kahn, Sovereignty – Four New Chapters on the Concept of Sovereignty, New York 2012; Karpenstein/Sangi, 'Nationale Sicherheit im Unionsrecht: Zur Bedeutung von Art. 4 II 3 EUV', GSZ 2020, 162; Klamert, The Principle of Loyalty in EU Law, Oxford 2014; Korzenov, 'The New Format of the *Acte Claire* Doctrine and its Consequences', Common Market Law Review 2016 (53), 1317; Kramer, 'Understanding Federalism', Va. L. Rev. 1994 (47), 1485; Krommendjik, National Courts and Preliminary References to the Court of Justice, Cheltenham 2021; Kuner/Bygrave/Docksey (eds), The EU General Data Protection Regulation (GDPR) – A Commentary, Oxford 2020; Kühling/Buchner, DS-GVO/BDSG Kommentar, 3rd edn, Munich 2020; Lenaerts, 'Constitutionalism and the Many Faces of Federalism', AJCL 1990 (38), 205; Lenartes/Maselis/Gutman, EU Procedural Law, Oxford 2014; von Lewinski, 'Europäisierung des Datenschutzrechts', DuD 2012 (36), 564; Lisken/Denninger, Handbuch des Polizeirechts, 7th edn, Munich 2021; Mahler, 'Between risk management and proportionality: The risk-based approach in the EU's Artificial Intelligence Act Proposal' in Colona/Greenstein (eds), Nordic Yearbook of Law and Informatics 2020-2021. Law in the Era of Artificial Intelligence, Sweden 2021, p. 247; Marsch, 'Artificial Intelligence and the Fundamental Right to Data Protection' in Wischmeyer/Rademacher (eds), Regulating Artificial Intelligence,

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Heidelberg/New York/Dordrecht/London 2020, p. 33; Masing, 'Verfassung im internationalen Mehrebenensystem' in Herdegen/Masing/Poscher/Gärditz (eds), Handbuch des Verfassungsrechts, Munich 2021, p. 61; Mendoza/Bygrave, 'The Right not to be Subject to Automated Decisions based on Profiling', University of Oslo Faculty of Law Research Paper 2017 (20), 1; Mitsilegas/Guild/Kuskonmaz/Vavoula, 'Data retention and the future of large-scale surveillance: The evolution and contestation of judicial benchmarks', ELJ 2022, 1; Nettesheim, 'Kompetenzen' in von Bogdandy/Bast, Europäisches Verfassungsrecht, 2nd edn, Berlin/Heidelberg 2009, p. 389; Nettesheim, 'Kompetenzkonflikte zwischen EuGH und Mitgliedsstaaten', ZRP 2021, 222; Nguyen, 'Die Subsidiaritätsrüge des Deutschen Bundesrates gegen den Vorschlag der EU-Kommission für eine Datenschutz-Grundverordnung', ZEuS 2012, 277; Ortlep and Verhoeven, 'The principle of primacy versus the principle of national procedural autonomy', NALL 2012, 1; Pechstein/Nowak/Häde (eds), Frankfurter Kommentar zu EUV, GRC und AEUV I, Tübingen 2017; Peers/Hervey/Kenner/Ward (eds), The EU Charter of Fundamental Rights, 1st edn, Oxford/Munich/Baden-Baden 2014; Peuker/Ruffert, Inhalte und Grenzen unionsrechtlicher Regelungskompetenzen im Bereich nationaler Sicherheit, 2023, Gutachten für das Bundesministerium des Inneren und für Heimat, (manuscript on file with author); Rademacher, Realakte im Rechtsschutzsystem der Europäischen Union, Tübingen 2014; Rademacher, 'Artificial Intelligence and Law Enforcement' in Wischmeyer/Rademacher (eds), Regulating Artificial Intelligence, Heidelberg/New York/Dordrecht/London 2020, p. 225; Raposo, 'Ex machina: preliminary critical assessment of the European Draft Act on artificial intelligence', Int. J. Law Inf. Technol. 2022 (30), 88; Schmitt, Political Theology – Four Chapters on the Concept of Sovereignty, transl. by Georg Schwab, Chicago 2005; Schneider, 'Stand und Perspektiven des Europäischen Datenverkehrs- und Datenschutzrechts', Die Verwaltung 2011, 499; Schneider, 'Informationssysteme als Bausteine des Europäischen Verwaltungsverbunds', NVwZ 2012, 65; Schneider, 'Information exchange and its problems' in Harlow/Leino/della Cananea (eds), Research Handbook on EU Administrative Law, UK 2017; Schneider, Die Durchsetzung von Normenkontrollentscheidungen, Tübingen 2022; Schoch/Schneider (eds.), Verwaltungsrecht, Munich 2022; Schulze, Verschränkung von europäischem Verordnungsrecht und nationalen Normen, Tübingen 2022; Schütze, From dual to cooperative federalism: the changing structure of European law, Oxford 2009; Schütze, 'EU Competences: Existence and Exercise' in Arnull/Chalmers (eds), The Oxford Handbook of European Union Law, Oxford 2015, p. 75; Slaughter, 'Global Government Networks, Global Information Agencies, and Disaggregated Democracy', MJIL2003 (24), 1041; Sommerer, Self-imposed Algorithmic Thoughtlessness and the Automation of Crime Control, Baden-Baden 2022; Sonka/Meier/Rossegger/Endrass/Profes/Witt/Sadowski, 'RADAR-iTE 2.0: Ein Instrument des polizeilichen Staatsschutzes', Kriminalistik 2020 (6), 386; Spiecker gen. Döhmann/Eisenbarth, 'Kommt das "Volkszählungsurteil" nun durch den EuGH? – Der Europäische Datenschutz nach Inkrafttreten des Vertrags von Lissabon', JZ 2011, 169; Stone Sweet/Brunell, 'The European Court and the national courts: a statistical analysis of preliminary references, 1961–95', JEEP 1998 (5), 66; Sydow/Marsch, DS-GVO/BDSG Handkommentar, 3rd edn, Baden-Baden 2022; Szpunar, 'Procedural Autonomy and Private Law', ZEuP 2018, 1; Tomada, 'Start-ups and the Proposed EU AI Act: Bridges or Barriers in the path from Invention to Innovation?', J. Intellect. Prop. Inf. Technol. E-Commer. Law 2022 (13), 53; Tridimas, 'The Principle of Proportionality' in Schütze/Tridimas (eds), Oxford Principles of European Union Law I, Oxford 2018, p. 243; Trute, 'Die demokratische Legitimation der Verwaltung' in Voßkuhle/Eifert/Möllers (eds), Grundlagen des Verwaltungsrechts, Munich 2022, p. 551; White, 'Constitutionalizing the EU in an Age of Emergencies', JCMS 2023 (61), 781; de Witte, 'Non-market values in internal market legislation' in Shuibhne (eds), Regulating the Internal Market, Cheltenham,/Northampton 2006, p. 61; Wolff/Brink/v. Ungern-Sternberg, BeckOK Datenschutzrecht, 44th edn, Munich 2023; Zarza, Exchange of Information and Data Protection in Cross-border Criminal Proceedings in Europe, Heidelberg/New York/Dordrecht/London 2015.

A. Giving content to Member States' national security reserve

1 Almost 15 years after the entry into force of the Lisbon Treaty, the meaning and content of Art. 4(2) sent. 3 TEU remain largely unchartered territory.[1] This may well have something to do with the provision having been prompted by Member States'

[1] For rare exceptions prior to writing, see Karpenstein/Sangi, GSZ 2020, 162; ECJ 6.10.2020 – case C-151/73, ECLI:EU:C:2020:791 para. 135 – *La Quadrature du Net and Others v. Premier minstre and Others*.

sovereignty concerns,[2] since the demands of sovereignty are notoriously elusive and disputed.[3] To shed more light on the issue, it may help to leave this abstract question aside for a moment and turn to the more concrete.

In the following, I discuss the Union law boundaries imposed on Member State policy and action concerning the use of artificial intelligence (AI) by their security agencies. After getting a sharper picture of the restrictions EU law imposes on Member States' AI-related toolkits and security policies, we will be able to judge more reliably whether and to what extent it conflicts with Member States' 'sole responsibility' for national security. **2**

B. Art. 4(2) sent. 3 TEU in a nutshell: overlapping powers, duties to coordinate, instruments of coordination

Before taking this inductive approach, I must begin by roughly sketching out my (preliminary) understanding of the meaning, function and legal requirements that derive from Art. 4(2) sent. 3 TEU. **3**

I. Art. 4(2) sent. 3 TEU in the context of the treaties' conception of competitive federalism

In my opinion, the origin of the provision, the regulatory context and its wording argue against an understanding that establishes exclusive competence to regulate the specific subject matter or field of 'national security' in which only one authority – in this case the respective Member State – may act. **4**

1. General functioning of Union competences

Such an understanding of the order of competences as a system of mutually exclusive spheres of regulation, which, wherever possible, do not overlap, does not generally correspond to the way in which competence titles function in EU law.[4] Instead, EU law requires a sufficient basis for Union action in one of the regulatory titles listed in the Treaties. Based on those competence titles, EU action can often have regulatory effects on the same subjects and areas of life that Member States also regulate. The two competing claims to competence then need to be reconciled on the basis of the rules set out in the Treaties. **5**

If this were any different, many titles of EU competence, such as those relating to data protection and internal market regulation, would make no sense at all. That is **6**

[2] The UK government pushed for the adoption of Art. 4(2) sent. 3 TEU; see, e.g., Peuker/Ruffert, p. 34 (manuscript on file with author). Art. 4(2) sent. 3 TEU has been characterized as a new attempt to create a robust guarantee of Member State powers in the domain of national security; see Schütze in Arnull/Chalmers, The Oxford Handbook of European Union Law, p. 81 et seqq.

[3] See, notoriously, Schmitt, p. 1 et seqq; for a critical appraisal of Schmitt's obscure and inscrutable text, see Kahn, p. 1; see also Benn, Political Studies 1955, 109 (122): 'there would seem to be a strong case for giving up so Protean a word.' Similarly, the use of popular sovereignty as a legal standard has been described by Isensee, p. 73 as a fairytale for lawyers ('*Klapperstorchmärchen für Volljuristen*').

[4] This certainly holds for shared competences. The Member States are only pre-empted to the extent that the EU has decided to exercise its competence. On the limited extent of pre-emption in shared competences, see Craig/de Búrca, p. 114 et seq.

because regulating these issues will inevitably affect countless areas of law, politics and life on a cross-sectional basis.[5] Therefore, the competence rules and practices set out in the Treaties stay close to the political origins of any federal division of competences in conflicts between several actors who compete for (regulatory) powers. Of course, this way of conceptualising and operationalising the federal division of powers is dependent on moderation as well as mutual restraint and respect in the exercise of structurally overlapping powers.[6] Consequently, the moderating principles of proportionality and subsidiarity[7] are clear evidence of the Treaties' leaning towards an understanding of the federal division of powers that focuses on mutual coordination rather than on the sharp delineation of regulatory powers.[8]

2. Specific reasons that support this reading of Art. 4(2) sent. 3 TEU

7 This general understanding of the division of EU regulatory powers is confirmed by the specific context of Art. 4(2) sent. 3 TEU. Its close textual connection to the principle of loyal cooperation (Art. 4(3) TEU)[9] speaks to understanding Art. 4(2) sent. 3 TEU as a rule on how to coordinate and harmonize overlapping competences, not as a rule that constitutes a reserved and completely separate area or sphere of regulation.[10] The same results from the systematic connection to the other content of Art. 4 TEU: The provision sets the ground rules and lays the foundations for the relationship between the EU and Member States, but it does not enumerate and demarcate concrete regulatory spheres and powers on both sides. The concrete regulatory competences of the EU – and some specific domains that are reserved to the Member States (e.g. securing their energy supply (Art. 194(2) TFEU)) – are set out in various provisions throughout the TFEU. Delineating and enumerating concrete powers in a directly operational way is not the function of the TEU, which only establishes general principles and institutions. Finally, the wording of Art. 4(2) sent. 3 TEU also speaks

[5] The EU's competence as regards harmonising the internal market has been defined very broadly and has often been used to achieve non-market goals; see Azoulai in Arnull/Chalmers, The Oxford Handbook of European Union Law, p. 602; see, generally, regarding non-economic objectives being pursued based on the EU internal market competences, de Witte in Shuibhne, Regulating the Internal Market, p. 61.

[6] For an extensive account of this reading of EU federalism, see Schütze, p. 1 et seqq. Strictly delineating spheres of legislation is a dualist approach that one can find in US and German constitutional law. Even in the United States, the dual federalism approach is not uncontested; see, e.g., Hills, N.Y.U. L. Rev. 2007, 1. As regards the EU, it has been argued that a clear division of competences is not feasible (Nettesheim in Bogdandy/Bast, Europäisches Verfassungsrecht, p. 400).

[7] See, e.g., Craig/de Búrca, p. 125 et seqq.; Fabbrini in Schütze/Tridimas, Oxford Principles of European Union Law I, p. 221; Tridimas in Schütze/Tridimas, Oxford Principles of European Union Law I, p. 243.

[8] Schütze, p. 241 et seqq.

[9] On the principle of loyal cooperation, see Klamert, p. 1 et seqq.; Benrath, esp. p. 129 et seqq.; this principle presupposes overlap and cooperation, not sharp delineation and separation. In this respect, the principle of loyalty is similar to the principle of good faith in international law and to federal fidelity in federal states or unitary regional states; see Guastaferro in Schütze/Tridimas, Oxford Principles of European Union Law I, p. 351, 359 et seqq.

[10] Whether sole responsibility for national security is an independent feature or just an annex to and aspect of respect for national identities in Art. 4(2) TEU is a disputed matter; see Calliess in Calliess/Ruffert, EUV Art. 4 mn. 40. In any case, Art. 4(2) TEU calls for respect for the Member States and their fundamental features, which ultimately means that the EU cannot encroach disproportionately on them; see Franzius in Pechstein/Nowak/Häde, EUV Art. 4 mn. 55. Consequently, in its jurisprudence on national identity, the ECJ has not determined what encompasses national identity but treats the claims on a case-by-case basis. It attempts to harmonise conflicting interests by reviewing whether a Member State can substantiate its claim of national identity (see, e.g., ECJ 22.12.2010 – case C-208/09, ECLI:EU:C:2010:806 para. 81 et seqq. – *Sayn-Wittgenstein v. Landeshauptmann von Wien*, in which the Court holds that the abolition of nobility is part of the Austrian national identity that is a justifiable obstacle to freedom of movement).

against understanding it as a true competence reserve, i.e. as a substantive area or 'sphere' that is to be completely exempt from EU intervention. The term 'competence' is not used in the provision, rather Member States are said to have 'sole responsibility' for national security. The fact that Member States bear this responsibility 'alone' does not necessarily mean that only they may lay down rules that may in some situations also affect the task of ensuring national security.

In view of this, I do not think there are any good reasons to regard Art. 4(2) sent. 3 TEU as an exception to the general functioning of competing and overlapping competences under the Treaties.[11] On the contrary, it is more appropriate to understand the provision in line with its position in the Treaties (the TEU, not the TFEU; general coordination rules, not enumeration of concrete regulatory powers) as well as with the general logic according to which the Treaties imagine and operationalize the federal division of powers. **8**

II. Functions and normative demands of Art. 4(2) sent. 3 TEU

According to this interpretation, Art. 4(2) sent. 3 TEU is primarily a rule that addresses moments and institutions of lawmaking and the political negotiation processes involved in that.[12] Acknowledging the Member States' sole responsibility for their national security functions as an additional political asset. Member States can and should use this asset against EU regulatory projects that are within the general purview of EU competences but which are deemed to be too far-reaching. Moreover, Member States can invoke the provision to better shield their own national security measures from Union challenges. For example, Art. 4(2) sent. 3 TEU may provide a reason, based in EU primary law, not to problematize certain national policies for being incompatible with EU law, to interpret Union law in a way that respects Member State sovereignty in the field of national security[13] or to refrain from initiating infringement proceedings (Art. 258 et seq. TFEU).[14] Member States may invoke this reason at all stages of the legislative process and whenever EU law is being applied and put into action. This way of using and invoking Art. 4(2) sent. 3 TEU is standard procedure, as seen, for example, in each of the referral decisions leading up to the judgment of the Court of Justice of the European Union (CJEU) in the *Quadrature du Net* case.[15] Given this universal applicability in the processes of forming and applying EU law, Art. 4(2) sent. 3 TEU to some extent counterbalances an inbuilt centripetal tendency of the EU federal division of **9**

[11] For the contrary view that interprets Art. 4(2) sent. 3 TEU as constituting and delineating a sphere of exclusive Member State competence, see Peuker/Ruffert, p. 35 (manuscript on file with author); Karpenstein/Sangi. GSZ 2020, 162 (164).

[12] For a similar interpretation of Art. 4(2) sent. 3 TEU → 8.

[13] Peuker and Ruffert stress that Art. 4(2) sent. 3 TEU is a rule that guides legal interpretation in national security contexts; see Peuker/Ruffert, p. 52 (manuscript on file with author); Karpenstein/Sangi. GSZ 2020, 162 (166).

[14] For the Treaties' infringement proceedings, see Lenaerts et al., p. 159 et seqq.; the political element and large room for manoeuvre when it comes to implementing these proceedings are illustrated in Schneider, p. 54 et seqq.; this political dimension of infringement proceedings became particularly clear after the German Federal Constitutional Court's PSPP decision, BVerfG 5.5.2020 – 2 BvR 859/15, NJW 2020, 1647. The European Commission chose to initiate, but not go through with, the proceedings (see European Commission <https://ec.europa.eu/commission/presscorner/detail/en/inf_21_6201> (last accessed: 18.9.2023)), which has been acknowledged as a sound decision to resolve the issue in the political arena; see Nettesheim, ZRP 2021, 222 (224).

[15] Conseil d'État 26.7.2018 – case no. 393099, ECLI:FR:CECHR:2018:393099.20180726, para. 6; *Privacy International v. Secretary of State for Foreign and Commonwealth Affairs* [2017] IPT/15/110/CH, para. 4.

powers. This tendency arises in many federations on account of the fact that the federal level can regularly refer to a list of enumerated powers, while the Member States can only claim the unspecified 'remainder' for themselves.[16] Titles explicitly reserved to the Member States may thus help to re-establish balance in the competition between opposing or overlapping regulatory pretensions.

10 In addition to these effects on the making and application of EU law, Art. 4(2) sent. 3 TEU establishes a legal duty of consideration on the part of the Union when exercising its competences. In accordance with Art. 4(2) sent. 3 TEU, the EU is required to exercise its regulatory powers in such a way that Member States can still fulfil their responsibility to guarantee national security. This legal obligation is, of course, limited in terms of its justiciability. However, the same is true of other legal duties of consideration and respect – such as the principle of loyal cooperation (Art. 4(3) TEU) [17] and the German principle of federal loyalty.[18] Violation of such duties of respect cannot be determined in the abstract based on given EU rules or activity alone. Instead, the possibility that a violation may have occurred only arises against the background of concrete regulatory projects and other measures[19] that a given Member State regards as central to guaranteeing its national security. This results in the strong proceduralization and situational dependence of the standard established by Art. 4(2) sent. 3 TEU.[20] Moreover, the content of this legal standard is so limited and specific that it will hardly ever be successfully invoked.[21]

III. Instruments for managing competence overlap: the example of the GDPR

11 Given this limited role as a legal standard that is operational in its own right, it seems more interesting to analyse the role and functioning of Art. 4(2) sent. 3 TEU under normal circumstances. Rather than looking at its immediate legal effects in the theoretical case of mutual incompatibility, I would like to take a closer look at the moderating techniques and strategies by which EU secondary law tries to avoid and reduce in practice the power conflict that is inherent in the provision. To that end, I will first illustrate these instruments of moderation using the example of the EU General Data Protection Regulation (GDPR). Based on this example, I will consider

[16] Kramer, Va. L. Rev 1994, 1485 (1488): 'The Court tells us, for example, that states are protected by the limitation of federal powers to those enumerated in Art. I, stunningly ignoring that the practical effect has been all but obliterated in the years since the New Deal.'

[17] Klamert, p. 1 et seqq.; Benrath, esp. p. 129 et seqq.; Guastaferro in Schütze/Tridimas, Oxford Principles of European Union Law I, p. 351, 359 et seqq.

[18] The principle of federal loyalty obligates the German federal states and the federation to execute their competences in a federalism-friendly manner. It creates no self-standing obligations, but has an accessory character that moderates the exercise of existing rights and powers; for the relevant case law, see Bumke/Voßkuhle, p. 341 et seqq.

[19] For this perspective, which does not focus on the duty, but on the instances of its breach, see Benrath, p. 283 et seqq.

[20] The Treaties reference the Member States' security concerns multiple times. The case law of the CJEU is quite clear in that security exemptions, such as Art. 36, 45, 52, 65, 72, 346 and 347 TFEU require more than simply invoking security concerns. The Member States have the burden of proof; ECJ 2.4.2020 – case C-715/17 (joined with C-718/17 and C-719/17), ECLI:EU:C:2020:257 para. 43–147 – *Commission v. Poland*. This procedural approach could be adopted in Art. 4(2) sent. 3 TEU, see Peuker/Ruffert, p. 49 (manuscript on file with author).

[21] For a more categorical approach (though before the Treaties of Maastricht and Lisbon), see Lenaerts, AJCL 1990, 205 (220): 'The residual powers of the Member States have no reserved status. […] There simply is no nucleus of sovereignty that the Member States can invoke, as such, against the Community.'

how EU law uses these instruments in relation to Member States' AI practices in the context of national security.

1. Choice of instrument: regulation v directive

As a first instrument of moderation, EU law can deflate conflicts of competence by *choosing between directives and regulations as regulatory instruments* (Art. 288 TFEU). If the EU restricts itself to a directive,[22] this already rules out many serious conflicts between EU policy and design and Member States' national security reserve. The exemption of criminal prosecution and crime prevention from the scope of the GDPR (Art. 2(2)(d) GDPR)[23] must thus be understood as a means of respecting Member States' special claim to sovereignty in this field. This choice brings these issues under the more flexible regulatory framework of the JHA Directive,[24] thus deflating possible conflicts. Depending on which instrument is chosen, Member States keep considerable legislative latitude to adopt measures in line with their understanding of public interests, especially regarding national security. **12**

2. Determining the scope of EU legislation (scope exceptions)

Carving out the scope of application of EU secondary legislation is another means of managing power conflicts. Art. 2(2)(a) and (b) GDPR is an example of this. It exempts from the GDPR activities outside the scope of Union law and within the framework of the EU Common Foreign and Security Policy.[25] **13**

3. Opening clauses

Opening clauses in EU regulations are another instrument of moderation. For example, Art. 85 GDPR (media privilege) entrusts to national political processes the difficult task of reconciling journalistic freedom with general data protection and privacy interests.[26] In this way, the provision leaves room for Member State policies and political culture in relation to a crucial question that is no less important for and characteristic of their political identity[27] than the ways in which Member States understand and enforce their 'national security'. **14**

[22] See Art. 288(3) TFEU; on the heuristic character of the choice of instrument for Member States' remaining legislative latitude, see BVerfG 6.11.2019 – 1 BvR 276/16, NJW 2020, 314 (315 para. 38).

[23] Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, 1.

[24] Directive (EU) 2017/541 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, OJ L 88, 31.3.2017, 6.

[25] See Recital 16 GDPR. The ECJ has found that the exceptions to the material scope of the GDPR in Art. 2(2)(a) and (b) and Recital 16 are partly a continuation of the former Directive 95/46, which had equally exempted from its scope Member State action outside the scope of Community law and operations concerning public security, defence and state security, ECJ 22.6.2021 – case C-439/19, ECLI:EU:C:2021:504 paras. 63–67 – *Latvijas Republikas Saeima*. On the adoption of this understanding, see OVG Münster 28.7.2021 – 16 B 1733/19, ZD 2022, 67 (67 para. 7), a ruling that states that security vetting is part of national security concerns and, therefore, falls under the scope exception in Art. 2(2)(a) GDPR.

[26] Kranenborg in Kuner/Bygrave/Docksey, GDPR Art. 85 mn. 1202 (1204): 'The reconciliation of the rights of privacy and data protection with the right to freedom of expression and to receive and impart information is a matter which the Union legislator has basically preferred to leave to Member States.'

[27] On the importance of speech norms to a political community and its identity, see Abiri, BYU L. Rev. 2022, 757. *Abiri* highlights the importance of social norms regulating speech in a political community. Prior to the Internet, the mass media were able to practically exclude most forms of hurtful speech from

4. Permissive standards

15 Another means of managing the conflict inherent in Art. 4(2) sent. 3 TEU is using techniques of permissive or generous EU standard-setting. There are EU regulations and policies whose regulatory content is so open-ended and permissive that it cannot seriously impair Member States' performance of their tasks. An example of this are the legal bases of the 'fulfilment of a legal obligation' (Art. 6(1)(c) GDPR) or the 'performance of public services' (Art. 6(1)(c), (2) and (3) GDPR) required to process personal data. This is because, in these cases, the substantive reasons for data processing are ultimately defined by the Member States.[28] By prompting the EU legislator to set permissive or delegatory standards such as these, the national security reserve in Art. 4 (2) sent. 3 TEU can become operational even within the scope of application of EU secondary legislation. This is the case wherever the EU law frameworks to be applied are such that the Member States retain sufficient options for action.

5. Enhancing national security policy

16 Last but not least, EU law can avoid conflicts in relation to Art. 4(2) sent. 3 TEU by reinforcing Member State policies and task fulfilment in the field of national security. In these cases, the thrust of EU activities coincides with the objectives of the national security reserve that the Member States claim. Due to such goal alignment, EU measures such as the EU Data Retention Directive[29] cannot come into conflict with Art. 4(2) sent. 3 TEU. Of course, some Member States might object to such 'enhancing' EU measures as overly intrusive and imbalanced in their pursuit of national security interests. However, the type of arguments levelled against such EU interventions would revolve around fundamental rights or other foundational normative commitments on the part of the Member States. Given the origins, context and current argumentative use of Art. 4(2) sent. 3 TEU, few people would cite the national security reserve as an argument *against* such security-affirming EU measures.[30]

C. The case of AI regulation: EU law constraints on Member States' use of AI in the context of national security policy

17 Against this background, let us look at the EU law pertaining to the Member States' development and use of AI systems in the context of national security. In my view, the relevant EU law meets the requirements to be derived from Art. 4(2) sent. 3 TEU. In a nuanced manner and through a mix of moderating instruments, EU secondary law

reaching a wide audience. *Abiri* is sceptical that global platforms can perform a similar function, since they are not rooted in a particular society and its speech norms (at 762–765).

[28] Kotschy in Kuner/Bygrave/Docksey, GDPR Art. 6 mn. 321 (340).

[29] Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, OJ L 105, 13.4.2006, 54. The ECJ held that the Directive was invalid in ECJ 8.4.2014 – cases C-293/12 and C-594/12, ECLI:EU:C:2014:238 – *Digital Rights Ireland Ltd. v. Ireland*.

[30] This one-sided, security-centred interpretive practice is another argument against understanding Art. 4(2) sent. 3 TEU as constituting a sphere that is exempted from any kind of EU intervention: If this were so, the competence reserve would have to go both ways, i.e. would have to block both EU enhancement/support and restrictions on national security measures.