

Introduction to the Research Handbook on General Principles in EU Law

General principles of EU law are powerful norms, ranking amongst primary EU law. They are an important element for the constitutionalisation of EU law, giving the Court of Justice of the European Union (CJEU) flexibility to shape specific aspects and whole areas of EU law and to construct the EU legal order overall. They are tools to fill gaps, can determine how other norms are interpreted or even displace them – facilitating the internal coherence and evolution of the integration process. They also allow for openness of the EU legal order with other legal orders in international law and of States. This has been demonstrated famously by the development of fundamental rights as referred to in Article 6(3) TEU and now codified in the EU Charter of Fundamental Rights. New general principles have been recognised or claimed, drawing from international legal standards and/or the common constitutional traditions of the Member States. Yet, there is considerable uncertainty about concept, methods of recognition, risks and theoretical justification of general principles in EU law, and how they relate to other norms of the EU legal order.

To address these issues, this Research Handbook explores the CJEU’s case law, as well as scholarly approaches to and theories about general principles. It does so both from the internal perspective of the EU (including its relationship with its Member States) by analysing a diverse range of specific general principles in discrete areas of EU law (‘zooming in’) and from external, wider perspectives on the notion of a general principle of law in international law, comparative law, and legal theory (‘zooming out’).

Part I, in particular, reflects the ‘zooming out’ perspective in considering how far the general and specific definitions of general principles in EU law are placed in a broader, possibly universal, context. The relationship between general principles of (EU) law and the notion of ‘general principles of law recognised by civilised nations’ in Article 38(1)(c) of the Statute of the ICJ is paid particular attention. The Handbook also examines whether the CJEU considers such principles to be general principles of law or general principles of EU law. The analysis,

therefore, contributes towards a more refined methodological and doctrinal understanding of general principles in the EU legal order.

Chapter 1, by Päivi Neuvonen and Katja Ziegler, maps these questions, as a possible starting point for contributors to engage. It reflects on definition, function, roles and the theoretical justification of the use of general principles. Chapter 2, by Paul Craig, scrutinizes the legal, historical, and normative foundations of general principles, considering issues of formal and substantive legitimacy, and reflecting on the close connection between general principles and fundamental rights. Chapters 4 and 5, by Alexander Orakhelashvili and Giuseppe Martinico respectively, analyse the international legal norms and the common constitutional traditions of the Member States that are ‘received’ in EU law through the vehicle of general principles, reflecting on the role of comparative law and how EU institutions apply international law within the EU legal order. They also explore general principles as expressions of values and dynamic elements in the processes of integration and constitutionalisation. Andreas von Arnould then considers their harmonising force, positing, in Chapter 3, that this is due to their normative properties, which give coherence, direction, and inspiration to the further development of the law, fostering the advancement of the EU project at large.

The Handbook ‘zooms in’ to consider the existence and use of general principles in discrete areas of EU law. This reveals the extent of their use and whether definition and content cohere across different fields of EU law. First, the Handbook discusses specifically recognised general principles in the EU legal order, in both the institutional and the constitutional context. Chapters in Part II by Monica Claes, Marcus Klamert and Sébastien Platon, respectively, discuss the implications of the specifically enumerated principles of equality of the Member States (Chapter 6), of loyalty and solidarity (Chapter 7), and of institutional balance (Chapter 8), grappling with their content, scope, and effects from the perspective of conferral, competence, sovereignty, and allocation of powers. These chapters critically engage with questions of delineation and enforceability in light of the current state of CJEU case law.

Part III, addresses unenumerated principles of a formal and structural character: supremacy, direct effect, proportionality, autonomy, and procedural justice. Clara Rauchegger, in Chapter 9, appraises the principle of supremacy/primacy in the post-Lisbon landscape, identifying several functions beyond its role as a rule of conflict between EU law and the national law of the Member States. In Chapter 10, Nicole Lazzarini, assesses the potential

horizontal direct effect of general principles, analysing developments since the *Mangold* judgment. Chapter 11, by Eirik Bjorge and Jan Zglinski, examines proportionality in EU law and its application in the Member States, considering the origins of the principle, its structure, use, and the intensity with which it is applied, establishing its effects on domestic legal systems. Simona Demková and Herwig Hofmann turn to general principles of procedural justice, looking in tandem at the right to good administration and the right to an effective remedy, tracing their development as EU principles on account of their central role as guarantors of the rule of law in Chapter 12. Violeta Moreno-Lax and Katja Ziegler close the section, in Chapter 13, with a methodological analysis why ‘autonomy’ is not a general principle, and with a critique of the implications of declaring autonomy a general principle.

Part IV complements the preceding section of the Handbook by exploring the founding values in Article 2 TEU and their character as fundamental constitutional principles of EU law. Dora Kostakopoulou addresses the value-principles of liberty and democracy in Chapter 14, while Päivi Neuvonen examines the limits of the general principle of equality as a value-commitment in EU law in Chapter 15. Katja Ziegler and Aristi Volou reflect on the ‘Europeanisation’ of human rights through the medium of general principles into fundamental rights and assess their relationship with the codification of fundamental rights by the EU Charter after the Lisbon Treaty (Chapter 18). Finally, Theodore Konstadinides, on the one hand, and Xavier Groussot and Johan Lindholm, on the other hand, contemplate the significance of the rule of law as the overarching constitutional basis of EU law at large in Chapters 16 and 17, respectively. While Konstadinides considers the rule of law to be the foundation of general principles, Groussot and Lindholm contemplate the possibility of treating general principles as ‘the embodiment of the rule of law and general principle itself.’

When ‘zooming in’, the Handbook also analyses the use of general principles in specific subject areas of EU law, including less explored areas. The Handbook thus provides a starting point to reflect more widely on the definition, content, recognition, use (and potential abuse) of general principles in specific contexts and across legal fields. Chapters in Parts V to IX collectively aim to determine the existence of and recourse to general principles in discrete sectors of the EU legal order in a bid to reveal, on the one hand, the extent of their use and possible ‘specialisation’ and, on the other hand, potentially different contents, scopes, or effects.

Part V covers equal treatment and non-discrimination as a distinct area of EU law, with contributions by Christa Tobler (Chapter 19) on the multifaceted nature of equal treatment and non-discrimination on grounds of racial or ethnic origin, religion or belief, disability, age, and sexual orientation as a general principle; and by Jule Mulder who explores specifically the EU general principle of equality between men and women (Chapter 20). Part VI turns to the EU internal market. Jukka Snell examines the applicability (and application) of general principles in free movement law and explores their relationship with the four freedoms in Chapter 21. Max Hjærtström and Julian Nowag investigate the use and content of the general principles of effectiveness, proportionality and non-discrimination in EU competition law (Chapter 23), while Oana Stefan analyses general principles in EU state aid law, including the area-specific market investor principle (Chapter 24), and Sylvia de Mars assesses their scope, effect, and function within EU public procurement law in regard to equal treatment and transparency (Chapter 25). Graham Butler and Karsten Engsig Sørensen discuss the cross-cutting prohibition of abuse of EU law as a ‘special’ general principle, in that its primary use has not been to protect individuals, but to restrict their rights, demarcating legitimate use from illegitimate abuse of EU law (Chapter 22). In Part VII, Lucinda Miller (Chapter 26) and Federico Mucciarelli (Chapter 27) add private law to the discussion of general principles, analysing their role and specific sensitivities in this context and uncovering sector-specific general principles, especially in the field of EU corporate and insolvency law.

Part VIII turns to the rapidly evolving Area of Freedom, Security and Justice (AFSJ), which the Lisbon Treaty has transformed profoundly. Ester Herlin-Karnell, in Chapter 28, traces the meaning of general principles and their application in the field of EU criminal law, investigating whether any sector-specific principles can be distinguished. Cristina Sáenz Pérez grapples with one such principle in Chapter 29: the principle of mutual trust, which, jointly with the principle of mutual recognition, has been characterised as a driver of integration in the AFSJ, acquiring (quasi)constitutional status after the CJEU’s *Opinion 2/13*. In Chapter 30, Wouter Van Ballegooij continues to explore general principles within the AFSJ, discussing their relationship with data protection, which is cast as an individual right in the EU Charter, but holds also the potential to become a general principle in its own right. Iris Goldner Lang concludes Part VIII, in Chapter 31, examining the legal nature of ‘the best interest of the child’, which is recognised in a number of EU legal and policy documents, but has yet to be pronounced a general principle of EU law.

Finally, Part IX of the Handbook encompasses three contributions on EU external relations law. Chapter 32, by Anne Thies, sets the ground, examining the role that selected general principles of EU law have played in shaping the legal framework for EU external action, investigating the extent to which they may strengthen the political and judicial accountability of the EU as a global actor. Ewa Żelazna, in Chapter 33, focuses on the application of the principle of conferral in the area of the common commercial policy, evaluating how the catalogue of competences introduced in the Lisbon Treaty and its application by the CJEU have contributed towards alleviating some of the tension that existed in the area of external trade between the Union and the Member States. Chapter 34, by Ramses Wessel, closes the collection with a contribution on general principles in the EU Common Foreign and Security Policy (CFSP), analysing the extent to which general principles of EU law are applicable to the CFSP and how limits to the CFSP are evolving also through general principles of EU law.

The different analytical layers built into this Handbook intend to shed light on whether general principles are defined by the different contexts in which they apply, both in regard to specific areas of EU law and to specific subjects, that is, in relation to EU institutions, Member States and private actors; whether general principles are in practice leading to more coherence between different areas of EU law; what challenges follow from this diversity for the EU legal order; and how these challenges differ from those faced by other (international or national) legal orders. Contributors were invited to engage with these questions (mapped in Chapter 1) as appropriate for their respective topics. Through the structure, method, and international and comparative approach, the Handbook not only revisits well-chartered terrain, but also enlarges the focus, tracking the expansion of general principles and identifying new contenders. Our dual ‘zoom in’ / ‘zoom out’ perspective allows to explore systematically the breadth and depth of general principles across and within discrete sectors of EU law. They may serve as subject-specific laboratories where the role, function, and impact of general principles can be scrutinized in detail. This enables a thorough examination of the use, definition, content, and methodological questions, including within fields that traditionally do not attract as much attention in mainstream EU legal debates.

The Handbook does not argue for a single closed definition of what a general principle of law in the EU legal order must look like. Rather, it identifies conceptual, theoretical, and legal parameters within which the doctrine of general principles can be meaningfully discussed

and contested in EU law, capturing their complexity and flexibility, and opening up new spaces to critically reflect on their role, significance, and limitations.

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