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The principles of constitutional government in the European Union

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**Preface**

The challenges of the new millennium have dictated the unprecedented mobilization of the authorities and powers. Addressing the challenges effectively has required much more than a society, organized as a state, could have done. Globalization results in chaos which needs types of frameworks.

In this regard, there has been an institutional challenge relating to the adequacy of existing institutions for international action, and to the potential for coordination between state and other authorities.¹

The unique consequence of the phenomena is the formation process in the continental Europe has started half a century ago, and gave rise waves of integration. The European integration nowadays is supported and is deemed to do much more – its deepening and widening. The European Union is considered as an advanced model of relations among governments and peoples.

In the long run, becoming the EU member state can be considered as a strategic objective which results in significant changes. The main reason of this is that EU requires the model of advanced democracy and liberal economy. At the same time, it enables the country to be adapted to these criteria.

Georgian people and government have already declared their aspiration to be the part of European family. Relationships with EU and its countries, whether it is a neighborhood or membership status, became the basic strategy in the foreign policy of the country.

For these purposes political directions have continuously planned and implemented, which resulted in establishment of the number of institutions in the legislature and executive, for instance the Parliamentary Committee of European integration, the State Minister of North Atlantic and EU Integration Affairs etc. The harmonization process of the Georgian legislation with the EU law has been intensively proceeding.

The legislative backup of the harmonization process are those instruments which are used by Georgia, such as:

- Partnership and Cooperation Agreement signed on 22th of April, 1996 between Georgia and European Communities and its member states, which considers the harmonization legislation with the EU law.
- The European Council decision accepting Georgia as part of the European Neighborhood and Partnership Instrument (ENPI) which meant proceeding new types of relationships.

• Eastern Partnership (EaP)\(^1\), initiated in Prague on May 7\(^{th}\), 2009, is a significant part of the Neighborhood Policy. It goes far beyond the ENPI and anticipates better opportunities for the integration.

Consequently, it’s a long and tough way for Georgia to join rapidly developing European Union. Georgian civil society needs to fully understand essence of the EU, its structure, objectives, political priorities, and the possible positive and negative results of joining the Union.

The unique process of European integration is one of the main research priorities for European Universities. Deepening the integration and the complexity of the Aquis resulted in establishment of the new domain in the science of law the so called EU Law, which is based on the body of EU law.

European scientists research the status of the EU and the integration processes from the theoretic point of view. The traditional methods of scientific research are used. Subsequently, the new attitudes are formed about the union, which resulted in modification of the one part of the traditional theories on a state and law. On the other hand, to strengthen another part of these theories. The cumulative impact of the development of the EC has changed the nature of the structure of the state.\(^2\) It has been created a good basis for development of new and viable concepts on transnational coexistence and cooperation among nations. Contours of the new form of community have been instantly improving and other positive processes are on the way. It’s desirable and even necessary for Georgia to cope with these processes in order to fully acquaint its achievements and values.

It’s obvious that integration would need the probated systems of governance of the organized society. At the same time, diversity and complexity of interests required the inevitability of reshaping these systems. All of these have embedded in the institutional architecture and governance of European Union.

The main research objective in this article is the principles of the constitutional government in the EU in which it is uniquely represented. Studying the institutional system of the EU enables to clarify number of issues which are significant to estimate the limits of constitutional nature of the EU and to assess it as a category of constitutional law. Conclusions should help to make clear the following issue: how the constitutional concepts of governance are reflected in the EU?

1. **Governance in the European Union and Institutional Relationships**

Shaping the institutional system of the Union is not an end itself. It’s a consolidated tool for achieving the joint objectives of the member states. Institutional system - it’s a shape of

\(^1\) [http://www.eeas.europa.eu/eastern/index_en.htm](http://www.eeas.europa.eu/eastern/index_en.htm);

integration, organizational body of integration process, while the EU itself is the institutional state of integration.

The aim of preventing usurpation of power is inevitable in each public authority. But in this occasion, the main goal isn’t to prevent the usurpation. Considering the democracy, security and the rule of law established in the EU excludes the threats of jeopardizing the existing democracy.¹

While shaping the institutional system in the EU the contiguous issues of usurpation power are addressed. Here it is not most important to avoid usurpation of power by the principle of checks and balances, but to find balanced combination of the competences between the member states and the union. In other words the main task is to assign the competencies in such a balanced way that excludes the possibility to make the EU institutions over-strong at the expense of the national interests of member states, and to enable the institutions only with the necessary competencies to achieve its objectives stipulated by the integration goals.²

Establishing supranational and intergovernmental institutions of the EU, defining their status, mandate and the rules of procedure creates the institutionalism of the European integration which is itself the unique model of governance.

The necessary prerequisite of integrational order is the institutional model which is appropriate for the differentiated heterogeneous societies of the Union as well as to its variable cultural, historical, ethnical and national characteristics.

The forms of governance of the society organized as a polity are well-known in constitutional law which can be differentiated by the function, role and legitimacy of the key decision-makers (branch authorities).

This issue can be the subject of dispute in the society but in our opinion the basics of public organization of the EU is a traditional state. The European integration is based on dual legitimacy: the directly expressed will of the people and the legitimacy of the nation states, which are still the framework within which European societies operate.³ Nevertheless, the institutional system of the EU isn’t the classic example of the traditional organization of state.

Recently in the development of the EU institutional system the trend of establishing the characteristics of classic model of state is visible which means the gradual departure from the approaches of the international law. It considers the separation of the functions among the branches of government, origin and survival of the branches, inter-institutional relations etc.

It’s impossible organized governance have no system shape, the conceptual axis, especially when the case is the public authority.

Institutional system of the EU has its own pattern of authority, which determines the operational rules of political institutions. The ways of implementation of political authorities

¹ Отв. ред. Л.М. Энтин, “Европейское право” – Норма, М., 2004 – с. 60;
³ ec.europa.eu/publications/booklets/eu_glance/60/en.pdf, “Europe in 12 lessons” by Pascal Fontaine Former assistant to Jean Monnet and Professor at the Institut d’Etudes Politiques
have permanently been improving during centuries within the scope of the only social institution – a state. Consequently, the main axis of the EU institutionalism is the theories of the constitutional (public) law.

Institutional models of the public governance are related to the separation of powers among government branches. The main issue here is to identify the key political players, such as president or parliament, and government in back of them, as well as to identify context of relationship among them, which has direct impact on the system functioning.

The EU is based on the institutional balance between the Council of the EU, the European parliament and the European commission. The so called institutional triangle reflects legitimation basis of integration provided by member states, represented by the Council of the EU, on the one hand, and peoples of the EU, represented by the European parliament, on the other. The European commission represents the interests of the EU itself. Based on the Lisbon Treaty, The European council added to the formal list of the EU institutions, which is unequal in terms of representation (heads of states or governments of member states) compared to the other three institutions in the triangle. Nevertheless, the following research shows that constitutional elements of the head of the state are also incorporated in it.

The uniqueness of governance of the EU is determined by the fact that its rules of governance aren’t comparable to the classic forms of regular public administration. As it’s mentioned previously, forms of government are comprehensively classified in the field of constitutional law. Considering the waves of democracy on the edge of 20-21th centuries, “founders of the EU” couldn’t suggest totally new approaches. The government pattern of the EU is basically based on the classic models of national state governance. It is the synthesis consisting of the different elements of these patterns. The content and the ration of these components in the synthesis make it possible to classify the EU governance model.

2. Formation of the Executive

2.1. The European Council

The legislative power in the EU is concentrated in the two main institutions – the European Parliament and the Council, while the executive is more scattered.

As for the Presidency (elected by the people) in the EU isn’t yet established but is considering intensively.

The main baselines for the institution to be established are existence of the politically organized society, public authority and government branches in which the President plays a role of a head of state and arbiter among them. If a state doesn’t exist, it wouldn’t have a head either. But there is an institution in the EU which has the similar functions and can be regarded as a political leader of the union.
The European Council can be regarded as a *quasi head* while considering its membership (the representation). It is a board of the formal political leaders whose decisions are than implemented by the Council of the EU. It unites the heads of the states or governments of the member states such as the presidents, prime-ministers, chancellors, etc. depending on the model of the government in member states. If the president is the principal in the government as in France, he or she is presented in the European Council. If the head of the government is the main player in the constitutional system like in Germany, UK etc, the head of government is presented. Consequently, as a supreme assembly of the high political leaders the European Council is a *collegiate head of the Union*.

Like a head of state high political leadership of the EU is assigned to the European Council. Its activities essentially influences on the overall interests of the EU. The integration law and order has been developing in line with the decision-making of the European Council. The EU treaties ascertain that the European Council doesn’t have the legislative power as it is characteristic for a classic constitutional head of state.

The Council, within its competence, represents the union on international arena, which is feature for the head of state. The President of the European Council shall, at his level and in that capacity, ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy. The High Representative is the Vice-president of the Commission elected by the European Council with the agreement of the president of the Commission.

Any constitution based on the semi-presidentialism establishes the diarchy of the two main players: the president as a head of state and the prime-minister as a head of the executive. This concept is also known as a *divided executive structure* and is best reflected in the relationships with the legislature. Particularly, the parliament has the extensive authority to dissolve one part of the executive - the government, while it doesn’t have the same power with regard to the other part - the president. Moreover, in some cases, constitutions consider the power of the head of state to dissolve the parliament.

According to the article 15 of the treaty on the EU the president of the Commission and The High Representative of the Union for Foreign Affairs and Security Policy shall take part in the European Council’s work. Furthermore, when the agenda so requires, the members of the European Council may decide each to be assisted by a minister and, in the case of the President of the Commission, by a member of the Commission. The President of the European Council shall ensure the preparation and continuity of the work of the European Council in cooperation with the President of the Commission, and on the basis of the work of the General Affairs Council. On its turn, The General Affairs Council shall prepare and ensure the follow-up to meetings of the European Council, in liaison with the President of the European Council and the

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Commission. All of these institutional links are the indications of the mixed authority pattern in the institutional system of the EU.

The Presidents of European Council and the Commission are the powerful leaders with significant executive influences which is the indication of rudiments of dual executive structure in the Union.

Formation of the one part of the executive in the EU is not depended on the institutionalization – the members of the European Council are ex officio the heads of governments or states of member countries. Thus with regard of formation of the part of executive the EU is far behind the classic public governance.

The nomination procedure of the President of the European Council is interesting. The president is elected by the qualified majority of the European Council with 2.5 years terms. According to the Lisbon Treaty the President of the European Council shall not hold a national office. It gives this institution supranational character and increases its institutional influence. It should be mentioned that it’s the only occasion when in the intergovernmental institution the supranational component is included.

2.2. The Council of the European Union

The origin of the next part of the executive - the Council of the European Union is slightly dependent on the institutionalization of the EU. The European Council makes a decision on the configuration and President of the Council (except the councils of foreign and general affairs). The European parliament doesn’t participate in this process. In formal terms it means the approval of the composition of the council by the European Council. Considering the fact that the Council is characterized not only with the legislative function but also with the executive one, implements budgetary functions and carries out policy-making and coordinating functions as laid down in the Treaties, it enables us to conclude that the approval is a kind of reflection of authority of the head of state on the formation of executive. The origin of the Council would have been closer to the presidential system where the head of state decides on the composition of the executive unless the ex officio feature of its composition.

However, the investiture procedure of the Council of the EU by the European Council is the reflection of the presidential model.

2.3. The European Commission

The origin of the third part of the executive - the European Commission is a clearer evidence of the appearance of the authority of the head of state over the formation of the executive.

The investiture of the European Commission is the key issue where the EU is substantially based on the conceptions of classic public governance. This process has gradually
been transforming into one similar to the parliamentary democracy. It has already acquired the shape of political and constitutional process.

The constitutional principles of the parliamentary democracies are enshrined in origin of the European Commission, particularly in the investiture of the Commission.

Taking into account the elections to the European Parliament and after having held the appropriate consultations, the European Council, acting by a qualified majority, shall propose to the European Parliament a candidate for President of the Commission. This candidate shall be elected by the European Parliament by a majority of its component members. If he does not obtain the required majority, the European Council, acting by a qualified majority, shall within one month propose a new candidate who shall be elected by the European Parliament following the same procedure.

In this process the European Council has the similar functions as a head of state strengthened by authority, by common accord with the President-elect, to adopt the list of the other persons whom it proposes for appointment as members of the Commission. Thus the origin of the executive in the EU is much depended on the European Council.

From the constitutional perspective the final step of the investiture of the Commission is rather interesting. Having obtained a vote of consent by the European Parliament, on the basis of this consent the Commission shall be appointed by the European Council, acting by a qualified majority. This means the authority of the European Council to reject the elected executive of the EU nominated by itself and elected by the European Parliament. Consequently, it can be concluded that the final decision on the origin of the European Commission is made by the European Council. This right is substantial to the authority pattern in the EU.

3. Survival of the Executive

Based on the theory of constitutional law the head of state politically survives in office independent of any other branches of government. This principle is characterized to the parliamentary, as well as to the presidential and semi-presidential models.

In the EU, the European Council as a collegial body also survives in office. Besides, the Council of the European Union is also free from Parliamentary control. Considering the joint survival in office of the European Council and the Council of the European Union which have significant executive authorities the essential parts of the executive in the EU is not subject to dismissal by a legislature.

The survival in office of the European Parliament is directly related to this conception. The constitutional model is meant when one of the government branches is authorized to dissolve Parliament and gives the electorate possibility of normalizing the political crises. The Treaties of the EU does not consider the legal instruments to dissolve the European Parliament.

The Configurations of survival of executive and legislative branches are typical for the presidential and semi-presidential patterns.

The presidential systems are characterized by the rules according to which both branches - chief executive and legislative branches survive in office independent of one another. The inter-
institutional relations do not require the confidence vote. This is the case in the EU regarding survival of the European Council and the Council of the European Union, on the one hand, and survival of the European Parliament, on the other, taking into account that there is no confidence vote needed for the Council of the European Union by the European Parliament.

In the semi-presidential and parliamentary systems origin and survival of the executive and legislature are fused. Fusion of origin means that the executive emerges from the assembly majority. On the dimension of survival of the authority of the executive, fusion means that if the assembly majority breaks apart, the executive falls. This means that executive needs the confidence of the legislature, and it has the ability to dismiss the executive, while the executive has the right to require the disposal of the Parliament by the head of state.

The absence of confidence vote by the European Parliament to the Council of the European Union, and of dissolution of the European Parliament and the Council of the European Union gives features of the presidential patterns of government to the EU institutional system.

All the above described have significant fundamentals different solution of which would be a constitutional novel.

The Council of the European Union does not need the confidence vote of the European Parliament for investiture as it is Ex Officio collegial institution. So far the European Parliament does not have the right of choice. Otherwise it would be necessary to change a Minister on a national level. Thus Ex Officio inter-governmentalism is the basis of this system. It should also be mentioned that the Council of the European Union takes an important part in a legislative process of the EU and thus to characterize it simply as an executive branch would not be correct.

The absence of the mechanisms to dissolve the European Parliament comes from the same reasonability. According to parliamentarism the dissolution of the legislature means to give an opportunity to the voters (the people) to make a choice between political directions of either the legislature or the executive and to change one by another. If a change of legislative majority does not mean to change the executive, re-election of legislature will be unreasonable. The origin of the Council of the European Union is separated from the European Parliament. This feature departs the European Union from parliamentary system.

Concerning the relationships between the European Parliament and the Commission, the survival of the Commission is fused with legislature and subsequently the model reflects the signs of parliamentary democracy.

According to the paragraph 8 of the article 17 of the Treaty on the European Union, The Commission, as a body, shall be responsible to the European Parliament. In accordance with Article 234 of the Treaty on the Functioning of the European Union, the European Parliament may vote on a motion of censure of the Commission. If such a motion is carried, the members of the Commission shall resign as a body.

Accordingly, the established model looks like following: The origin of the Commission is separated. After vote of consent by the European Parliament, the Commission is appointed by the European Council. Its survival is fused. It may be dismissed only by the decision of the European Parliament.
Therefore the origin of the Commission is based on the Semi-presidential model, and particularly on the premier-presidential type, where the president participates in the formation of the government, but the Prime-Minister and the Cabinet are exclusive responsible to the Parliament.

**Conclusion**

The European Council and the European Parliament are participating unequally in the formation of the Commission. To nominate the candidate for the president of the European Commission and then to appoint the Commission as a body, qualified majority of the European Council required. Thus the origin of this part of the executive is asymmetric for the benefit of the European Council. But the survival of the Commission is solely depended on the European Parliament.

One of the significant advantages the Semi-presidentialism offers is that asymmetry in the government survival for the benefit of the parliament is balanced by asymmetry in the origin of the government for the benefit of the head of state.

Given the conception comparing with the classic patterns authority, we encounter here the mixed one. Considering the fact that the Commission has reasonable ambition to claim for being the executive of the EU, the institutional relationship among the Commission, the European Parliament and the European Council relies on the mixed patterns of authority.

Considering the principles of fusion and separation of origin and survival it results in the following:

- The European Council and the Council of the European Union as parts of the executive are separated from the European Parliament;
- The European Commission as a part of the executive is fused with the European Parliament.

This is the main conception in the pattern of the authority in the EU which it loans to Semi-presidentialism.

The part of the executive branch is involved in the formation of the European Commission. Here, the origin of the executive is not solely depended on the European Parliament as it is established in parliamentary democracies. The message and idea enshrined in the Lisbon Treaty is a mixed pattern of the Authority. The Lisbon treaty establishes the regime in which the authority is shared among the European Council, The Council of the European Union, the European parliament and the Commission.

The governance in the EU on its phase of significant development is characterized by sufficient features of a mixed pattern of authority. The European institutional dialectics is designed like French Bicephalism. There are conceptions of dual executive, forms of relations of parts of executive to other branches and other elements of mixed pattern of authority in the institutionalism of the European Union.
Institutionalization of the European Union indicates that the member states – the institutional architects of the EU have been relying on their well-established constitutional practices. The constitutional outcome itself is a reflection of the modern values and achievements of constitutionalism.

All the experts who, in several countries, studied the most typical institutional aspects of the states in order to identify the “common constitutional traditions” of the members of the European Union, mentioned by the treaties, although discussing the relevance of other elements, identified the parliamentary system, both in its monistic and Semi-presidential form, as the most expressive model of the European idea of democratic legitimacy.¹

Several scientists argue that the political system of the European Union is more characterized by the institutional aspect of Parliamentary democracy, rather than presidential one. The European Commission is the executive of the EU and is accountable to the European Parliament which has the right dissolve it. And this aspect is used as an evidence of parliamentary democracy. Moreover, according to the Lisbon Treaty, the candidate of the president of the Commission is nominated by the European Council taking into account the results of elections of the European Parliament. The nominated candidate with the list of the other commissioners is elected by the European Parliament.

The European Council that consists of the head of states or governments is presided over by a president elected by the European Council for a term of two and a half years. As the European Council does not have legislative power, and provides political impetus for development, the president will not have a real executive or legislative influence thus resembling a head of state in a parliamentary democracy.

The group of scientist who characterizes the EU as a parliamentary democracy, strongly refuses perspectives of the establishment of the mixed patterns of authority similar to France as in this type of government president shares executive power with prime-minister who is appointed by the president and approved by the legislature.

If such a system were transposed to the European Union, it would imply that the President of the European Council would be deeply involved in both the Union’s executive powers and its legislative powers. If that were the case, the Commission President, as the head of the European executive, would exercise his or her powers in the shadow of a directly elected President who would have his or her own, far stronger legitimacy. It would also imply a serious curtailment in the powers of the European Parliament and, therefore, increase the Union’s “democratic deficit.” Both these features make the French system unsuitable to a system like that of the European Union, which needs a strong executive to effectuate its integration project, and a strong parliament to enhance its democratic legitimacy.²

The new role of the Parliament of Strasbourg is highly important, but it is not still sufficient to define the European system of government as a parliamentary one. The institution subject to the political control of the European Parliament has in fact only one part of the Executive power, in a distribution of competences which seems now too fragmented.¹

Unfortunately today, the parliamentarisation of the relationship between the European Parliament and the Commission is, at most, sufficient to qualify the European system of government as semi-parliamentary, according to the definition given by Paul Magnette.²

To transform European Union in a Parliamentary system of governance intended to increase the wider participation of people in the democratic legitimation would require a number of political and institutional changes.

From the three political institutions – the European Parliament, the Council of the European Union and the Commission only the Parliament can claim for complete legitimacy as it is directly elected by the citizens if the EU. The powerful part of the legislative authority, the Council of the European Union lacks democratic legitimacy and it is no accountable to any political institutions on a supranational level.

Concerning the Commission, it consists of members De Facto appointed by the member states and scrutinized by the European Parliament. Disparately the national executives the commissioners are independent and they are not affiliated to any political party presented in the European or national parliaments.

Beside the commissioners bear kind of political accountability, as have to explain their activities to the European Parliament and are accountable to it as a collegial body.

Considering the democratic accountability three types of disadvantages can be identified. The members of commission are nominated by the national governments without participation of citizens. Considering the new rules in the Lisbon Treaty that the formation of the European Commission starts with taking into account the elections of the European Parliament there is a significant progress. The Council of the European Union and its members do not bear political accountability at European level. The European Council plays an important role in the political life, but its role is indefinite from the perspectives of political accountability.

To maintain democratic legitimacy, it is important for the commission to ensure citizens participation in election of the president and regular members of the commission. To achieve this objective the traditional way used in a parliamentary democracy is to involve political parties that are presented in legislature to form executive.

To reinforce democratic legitimacy in the EU, it is necessary to increase the quality of participatory democracy in setting the European Government to make it comparable to the national ones.

Due of democratic legitimacy, the candidate of the president of the European Commission should be the person elected by the European or national parliaments. Furthermore the Commission should consist of members whose configuration reflects all demographic and geographic aspects of the EU. The rule of initiating the composition of the Commission thus should be changed. The political parties presented in the European Parliament should be granted the authority. It is a case if a classic parliamentary democracy is to be established in the European Union. But in case of mixed pattern of authority in the EU, such kind of changes are not necessary as the origin of the executive is depended on the head of state as it is now in the EU.

One of the sensitive issues is to enhance political accountability of the Council of the European Union. To increase the quality of democratic legitimacy of the Council of the European Union, it should be based on peoples’ support. Each individual represented in the Council should be directly accountable to national parliaments. There are two possibilities: either by making the Council, as a body, politically accountable towards an institution at Union level - but which one? or by making it, as a body, politically accountable to a gathering of national parliaments.¹

From above we should conclude that strengthening the role of the European Parliament and the democratic legitimacy will result in establishment of Parliamentary system. All the above discussed complex changes will be followed: political platform of European parties, political accountability of the commission and the council, legitimation of the authority of the European Commission.

It is obvious that the decision-making process in the EU will not result in creation of Presidentialism. Among the 27 members, pure presidentialism exists only in Cyprus and classic semi-presidentialism - in France. The current political system of Union has more features of parliamentary democracy than Presidential one.

According to Dinane to explore the deficit of democracy it is not necessary to increase the Parliametary authority. He considers that the Union’s institutional framework and political system will never be the similar to classic liberal democracy. The Commission will never acquire all features of national executives. The union is a unique system with unique institutions. Correspondingly, the remit to democratic deficit will be a novel and nontraditional.

According to David Coombes the legislative power in the European Union is a poor and ultimately unworkable substitute for constitutional government.² This best describes the challenges of the institutional framework of the EU in whole.

The institutionalization of the European Union is the model of multi-level constitutionalism. The advantage this is that it highlights the actual and potential role of

constitutional ideas and practices in holding the EU together. It seems best to highlight that the EU is in a state of *becoming* and not *being* and so static descriptions of its essence are of relatively little assistance in describing or explaining it.¹

Perhaps a national state is a transitional phenomenon and over time it makes a way to other forms of subordination. It should be mentioned that Europe has never had such kind of transformational experience. When the Barbarian Tribes billeted at the former territory of Roman Empire, they were obeying their own rules not the rules of the land. Over time they mixed with the local population and in result the territorial principles prevailed over ethnic ones.

This type of evolution became the basis of a modern European state. In some kind this process has been repeating in contemporary Western Europe through creating transnational union that establishes common place for free movement of people, capital, goods and services. Here the territorial subordination is prevailing over ethic one as thousands years ago.²

It is still a far perspective to suppose that the European Union will become a super-state that substitutes the national states. But it’s obvious that the union will multiply shortcomings of the traditional national States. The member states should create the European Union rather the union substitute the national states. For now the community is “People’s Europe” and especially the Union of the sovereign national states.

² Фадеева, Т.М. - “Федерализм, региональное управление и местное самоуправление-Европейский федерализм, современные тенденции”, М., 2000, с. 55.
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