
# The Jurisprudence of Constitutional Conflict in the European Union

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# ABSTRACT

The aim of the thesis is to address the jurisprudence of constitutional conflict between the Court of Justice and national courts with constitutional jurisdiction. It seeks to determine how the principle of primacy of EU law works in reality and whether the jurisprudence of the courts under analysis supports this concept. In so doing, the goal is to determine if the theory of constitutional pluralism can explain and guide the application of the principle of primacy of EU law in the jurisprudence of constitutional conflict.

The analysis has been carried out on two levels. First, by exploring sovereignty claims by the courts under analysis, as well as reconciliatory vocabulary they employ to manage and contain constitutional conflict. Second, by further studying the three areas of constitutional conflict – *ultra vires* review, identity review, and fundamental rights review – to provide more nuance in the analysis of the way the Court of Justice has expanded the self-referential system of the Treaties; the different limits that constitutional adjudicators have placed on the principle of primacy as a result; and what possible solutions they envisage in the event of a constitutional conflict.

All the courts under analysis have employed the vocabulary of mutual respect and self-restraint as principles guiding the resolution of constitutional conflict. Constitutional conflict is managed through incremental and permanent contestation and accommodation of their opposing claims to sovereignty (the auto-correct function of constitutional pluralism) that results in the uniform interpretation and application of Union law, but keeping in line with conferral as its defining principle. The analysis demonstrated the existence of a heterarchical constellation – the potential of all the courts involved for being ranked in a number of different ways at different times – grounded in mutual respect and self-restraint.

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# LIST OF ABBREVIATIONS

| | |
|---|---|
| Area of Freedom, Security and Justice | AFSJ |
| Cambridge University Press | CUP |
| Common, Foreign and Security Policy | CFSP |
| Common Market Law Reports | *CMLR* |
| Common Market Law Review | *CMLRev* |
| Croatian Yearbook of European Law and Policy | *CYELP* |
| European Arrest Warrant | EAW |
| European Central Bank | ECB |
| European Constitutional Law Review | *EuConst* |
| European Convention on Human Rights | ECHR |
| European Court of Human Rights | ECtHR |
| European Free Trade Agreement | EFTA |
| European Economic Area | EEA |
| European Journal of International Law | *EJIL* |
| European Journal of Legal Studies | *EJLS* |
| European Law Journal | *ELJ* |
| European Law Review | *ELRev* |
| European Public Law | *EPL* |
| German Law Journal | *GLJ* |

| | |
|---|---|
| International and Comparative Law Quarterly | *ICLQ* |
| International Journal of Constitutional Law | *ICON* |
| Journal of Common Market Studies | *JCMS* |
| Journal of European Public Policy | *JEPP* |
| Journal of Law and Society | *J Law & Soc* |
| Maastricht Journal of European and Comparative Law | *MJ* |
| Modern Law Review | *MLR* |
| Outright Monetary Transactions Mechanism | OMT |
| Oxford Journal of Legal Studies | *OJLS* |
| Oxford University Press | OUP |
| Single European Act | SEA |
| Treaty on the European Union | TEU |
| Treaty on the Functioning of the European Union | TFEU |
| United Nations | UN |
| Utrecht Law Review | *ULRev* |
| Yearbook of European Law | *YEL* |

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### French Constitutional Council (*Conseil constitutionnel*)

**German Federal Constitutional Court (*Bundesverfassungsgericht*)**



**Hungarian Constitutional Court (*Magyarország Alkotmánybírósága*)**



**Italian Constitutional Court (*Corte Costituzionale*)**

**Latvian Constitutional Court (*Satversmes tiesa*)**



**Polish Constitutional Tribunal (*Trybunał Konstytucyjny*)**



**Spanish Constitutional Tribunal (*Tribunal Constitucional*)**



**United Kingdom**

**House of Lords/Supreme Court**



**Lower courts**



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# INTRODUCTION

## 1. Description of the problem

The European Union[1] can be characterised as one of the most significant political creations in recent history, bringing together nearly half a billion people in an economic project, which has developed into an increasingly political project.[2] Equally, the European legal landscape has evolved into a system that has empowered the individual, national administrations, and the judiciary through *inter alia* legal principles such as primacy[3] and direct effect; the creation of the internal market; the introduction of EU citizenship; the establishment of the Euro; and the protection of fundamental rights.

Despite the benefits of EU membership, national constitutional structures have not been always entirely ready or willing to embrace this political and legal 'revolution'.[4] This reluctance is exemplified through the behaviour of national courts performing constitutional review, who have traditionally been and still are considered the ultimate

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1 I will use the term European Union throughout the thesis, except when a reference to the European Community is due to the particular point in time or a direct citation. Equally, I will use EU law as a general term encompassing the entirety of the European Union legal order, save for when a difference between EC and EU law is of relevance for the analysis.

2 The recent crises (the Euro crisis, the refugee crisis, and Brexit, to name a few) have cast doubt on the ability of the integration project to manage and resolve these and potential future challenges. Nevertheless, remembering the iconic Monty Python's 'Life of Brian' sketch 'What have the Romans ever done for us?', it is my view that the countless benefits of the European project strongly outweigh its current problems, <https://www.youtube.com/watch?v=Y7tvauOJMHo>, accessed on 6 July 2017.

3 It suffices to remember that it was the vigilant individual, Flaminio Costa, unsatisfied with a slightly overpriced electricity bill due to the nationalisation of the electricity company (the relevant amount was 1925 lire, which can be translated into today's worth of approximately €17,51), and the assiduousness of a Milan *Giudice Conciliatore* (a first instance single judge) that we have to thank for one of the most important cases in the history of EU law (*Costa v ENEL*).

4 To borrow the phrasing from Joseph Weiler. J H H Weiler, 'A Quiet Revolution: The European Court of Justice and its interlocutors' (1994) 26(4) *Comparative Political Studies* 510.

guardians of national constitutions. These institutions have not always shared the Court of Justice's enthusiasm in expanding the self-referential system of the Treaties.[5] There are two specific dynamics driving this reluctance: first, the principles of direct effect and primacy called into question the previously undisputed supremacy of national constitutions in the national hierarchy of legal norms; and, second, these same principles combined with the preliminary reference procedure undermined the position and influence of national courts entrusted with safeguarding the constitution and its supremacy.

Against this backdrop, the present work attempts to address the incidences of, and reasons for, constitutional clashes between the European Court of Justice and national constitutional jurisdictions in the application and enforcement of EU law. It seeks to determine how the principle of primacy of EU law works in reality and whether the national constitutional jurisprudence supports this concept. In so doing, the thesis is based on the contributions of the theory of constitutional pluralism, and seeks to reinforce its normative prescriptions in the resolution of constitutional conflict in the EU.

## 1.1. The influence of EU law on the position of national courts performing constitutional review

Starting from *van Gend en Loos* and *Costa v ENEL*, the Court of Justice made it abundantly clear that for the purposes of achieving effectiveness and uniformity of EU

[5] See Chapter 2, Section 2 for a detailed analysis of this development.

law,[6] individuals can invoke their EU law rights directly before national courts, and national law cannot be applied if it contradicts an EU law obligation.[7] In *Internationale Handelsgesellschaft*, the Court of Justice explicitly stated that even provisions of national constitutions ('rules of national law, however framed')[8] cannot override obligations stemming from EU law. Four years later, the Court of Justice stated that EU law obliges national courts to disregard diverging jurisprudence of superior courts.[9] Although this case did not explicitly refer to the jurisprudence of constitutional courts in the system of centralised constitutional review,[10] the Court made clear that this case law was also captured.[11] An obligation to refer a question of constitutionality to the constitutional court equally cannot relieve the national court from the obligation of referring a preliminary reference to the Court of Justice.[12]

The jurisprudence established the so-called '*Simmenthal* mandate', according to which each national court must apply EU law to cases within their jurisdiction and protect the rights that it accords to citizens in their entirety.[13] These foundational cases placed the individual and her EU rights at the forefront, unlike any international

6 Court of Justice Case 106/77 *Simmenthal* [1978] ECLI:EU:C:1978:49, [18]-[22].

7 Court of Justice Case 6/64 *Costa v ENEL* [1964] ECLI:EU:C:1964:66.

8 Court of Justice Case 11/70 *Internationale Handelsgesellschaft* [1970] ECLI:EU:C:1970:4, [3].

9 Court of Justice Case 166/73 *Rheinmühlen* [1974] ECLI:EU:C:1974:3, [4].

10 See Section 4.2. of this Chapter for an elaboration of the different systems of constitutional review throughout the Member States.

11 Court of Justice Case C-348/89 *Mecanarte* [1991] ECLI:EU:C:1991:278, [46]; Court of Justice Case C-399/09 *Landtová* [2011] ECLI:EU:C:2011:415, [49]. See also, Opinion of Advocate General Cruz Villalón in Case C-173/09 *Elchinov* [2010] ECLI:EU:C:2010:336, [21]; and Court of Justice Case C-416/10 *Križan* [2013] ECLI:EU:C:2013:8, [73].

12 Court of Justice Case C-188/10 *Melki and Abdeli* [2010] ECLI:EU:C:2010:363, [51]-[56].

13 M Claes, *The national courts' mandate in the European Constitution* (Hart Publishing 2006), 108.

organisation founded on public international law has ever done before.[14] This consequently had the effect of dismantling some of the traditional principles of state-centric legal systems: a clear hierarchy of norms with the national constitution on top, as well as the principles of *lex posterior derogat legi prior*, and *lex specialis derogat legi generali*.[15] This created additional problems as regards the hierarchy of legal norms and placing limits on the up to then unfettered ability of the national parliament to legislate.

The introduction of the preliminary reference procedure presents a separate, though closely linked, procedural issue. The preliminary reference procedure was established as a cooperative mechanism between national courts and the Court of Justice,[16] which empowered ordinary national courts,[17] who then took up an additional identity as Community courts.[18] This new relationship between ordinary national courts and the Court of Justice, in particular when regarded jointly with the case law presented above, undermined the classic national judicial hierarchical structure, where the highest courts' legal reasoning represents an undisputable final authority.

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14 S Rodin, 'Back to the square one: the past, the present and the future of the Simmenthal mandate' in J M Beneyto and I Pernice (eds), Europe's constitutional challenges in the light of the recent case law of national constitutional courts – Lisbon and beyond (Nomos, 2011), 298.

15 Although it may well be concluded that now the latter of the two principles are central for the uniform and effective application of EU law. As put by Weatherill, any directly effective provision of EU law, however minor and technical, has priority in application over any provision of national law, however weighty and fundamental. S Weatherill, *Law and integration in the European Union* (OUP 1995), 106.

16 G Martinico and O Pollicino, 'Between constitutional tolerance and judicial activism: the specificity of European judicial law' (2008) 10 (1) *European Journal of Law Reform* 97, 108.

17 The argument of empowerment of ordinary national courts has most famously been put forward in the famous piece by A-M Burley and W Mattli, 'Europe before the Court: a political theory of legal integration' (1993) 47 *International Organization* 41; and further elaborated in W Mattli and A-M Slaughter, 'Revisiting the European Court of Justice' (1998) 52 *International Organization* 177. See also, Claes, *The National Courts' Mandate in the European Constitution* (n 13), 387. The theory will be analysed in more detail in Section 2.1.3. below.

18 J Temple Lang, 'The duties of national courts under Community constitutional law' (1997) 22 *ELRev* 3.

In addition, the preliminary reference procedure had two important implications. First, it placed a strong emphasis on judicial review as a method of ensuring the effectiveness of EU law.[19] This, in turn, shaped the second consequence: a more general decentralisation of constitutional review in the Member States.[20] Unsurprisingly, both have marginalised the role of national courts with constitutional jurisdiction.[21] The structure and coherence of national constitutional orders and judiciaries appears to have been sacrificed to ensure the uniformity and effectiveness of EU law.

The European Union competences steadily extended over time and now include the protection of fundamental rights through the binding Charter of Fundamental Rights.[22] This has further narrowed the area of influence of national courts with constitutional jurisdiction. The scope of the Charter's application is by its Article 51(1) limited solely to situations when Member States are implementing EU law. Nevertheless, the Court of Justice in *Fransson*[23] set out a far-reaching statement concerning the status of fundamental rights protection in the EU:

> Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental

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19 Even in countries where judicial review has traditionally been marginal. See, for example, J E Rytter and M Wind, 'In need of juristocracy? The silence of Denmark in the development of European legal norms' (2011) 9(2) *ICON* 470, 471. For a comprehensive list of what is entailed in the duty of national courts to review national law, see Claes, *The National Courts' Mandate in the European Constitution* (n 13), 67-68.

20 Rodin (n 14), 315; J Komárek, 'The place of Constitutional Courts in the EU' (2013) 9(3) *EuConst* 420, 421.

21 Rodin (n 14), 315; Claes, *The National Courts' Mandate in the European Constitution* (n 13), 387.

22 Charter of fundamental rights of the European Union [2012] OJ C326/391.

23 Court of Justice Case C-617/10 *Fransson* [2013] ECLI:EU:C:2013:105. The case is analysed in more detail in Chapter 4, Section 3.2.

rights guaranteed by the Charter.[24]

The Court of Justice subsequently connected the case at hand (which concerned tax penalties and criminal proceedings) to the scope of Union law by stating that part of the undeclared tax was VAT, which was regulated by Union law, and was Union income.[25] As a consequence, it was for the ordinary national court to decide on the compatibility of a national provision with fundamental rights, traditionally the task of a constitutional court.

Going even further, the Court of Justice has disregarded the higher level of protection of fundamental rights offered by the Spanish Constitution rather dismissively in *Melloni*,[26] prioritising uniformity, effectiveness and primacy of Union law. In this particular instance, the Spanish Constitutional Tribunal accepted the Court's interpretation, in a result that placed primacy of Union law above a higher standard of protection of a fundamental right. However, the *Tribunal Constitucional* also stated that, should it be necessary for the preservation of the basic sovereignty of the Spanish people, it would have the final say.[27] These developments are a good illustration of how the Court of Justice has marginalised national courts performing constitutional review in favour of primacy and effectiveness of Union law.

The penetration of Union law and its peculiarities into national constitutional orders has created a relationship of unease between the Court of Justice and national

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24 Court of Justice Case C-617/10 *Fransson* [2013] ECLI:EU:C:2013:105, [21]. The case is analysed in more detail in Chapter 4, Section 3.2.

25 ibid., [24]-[27].

26 Court of Justice Case C-399/11 *Melloni* [2013] ECLI:EU:C:2013:107, [58].

27 Spanish *Tribunal Constitucional* Case 26/2014 *Melloni*, Judgment of 13 February 2014, ground 3. For a more detailed analysis on the identity review aspects of the case, see Chapter 3, Section 2.3. For fundamental rights review aspects of the case, see Chapter 4, Section 4.2.1.

courts with constitutional jurisdiction. The Court of Justice, on the one hand, is convinced in the utmost value of effectiveness of Union law, and is expecting all national courts to share its zeal. On the other hand, national courts performing constitutional review tend to prioritise their respective constitutions. Consequently, they have employed different methods of adhering to the requirements of EU law while at the same time fulfilling their original role of safeguarding the supremacy of the national constitution. Some rejected particular findings of the Court of Justice by declaring them *ultra vires*,[28] whereas others joined ordinary national courts in submitting preliminary questions to the Court of Justice.[29] With the aim of analysing and corroborating the descriptive and normative side of constitutional pluralism, I propose the use of the 'judicial triangle' as an analytical tool aimed at capturing the nuances of the jurisprudence of constitutional conflict.

## 1.2. The judicial triangle as an analytical tool

The conundrum faced by national courts performing constitutional review is multi-faceted and depends on the national constitutional setting in which they operate. For the purposes of analytical precision in describing these intricacies, I have created and will be using the judicial triangle throughout the thesis as an explanatory tool. The judicial

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[28] Czech *Ústavní Soud* Case Pl. ÚS 5/12 *Slovak Pensions*, Judgment of 31 December 2012, < http://www.usoud.cz/en/decisions/?tx_ttnews%5Btt_news%5D=37&cHash=911a315c9c22ea1989d19a3a848724e2>, accessed on 16 November 2015. See Chapter 2, Section 3.2.1. for further analysis.

[29] With the Belgian *Cour Constitutionnelle* leading in the number of submitted references with 32. Court of Justice, Annual Report [2016] <https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-03/ra_jur_2016_en_web.pdf>, accessed 17 July 2017, 110.

triangle will be used to represent the balance of powers between ordinary national courts, national constitutional courts and the European Court of Justice.

In carrying out the analysis of the jurisprudence of constitutional conflict, it is possible to discern two broad categories. First is the jurisprudence of national constitutional courts dealing with questions of constitutionality of Treaty amendments, i.e. those acts that enter into force once the Member States ratify them based on their national procedural requirements. The second category deals with challenges to primary and secondary EU law.[30] A brief remark is necessary here to clarify the legal status of a Treaty amendment in order to be able to explain how it strengthens the position of national constitutional courts *vis-à-vis* the Court of Justice. A Treaty amendment needs to be ratified by all Member States according to their respective constitutional procedures,[31] which allows constitutional courts to determine the constitutional limits as regards a particular Treaty amendment;[32] they have the ability to reject the ratification of the amendment as contrary to national constitutional requirements. In addition, because Treaty amendments are acts awaiting national ratification, they are not (yet) in the system of binding EU law and therefore fall outside the exclusive jurisdiction of the Court of

30 There is no unified approach among the courts under analysis in their approach towards reviewing primary and secondary EU law. When a certain court does have a different approach, this will be flagged in the relevant chapter(s).

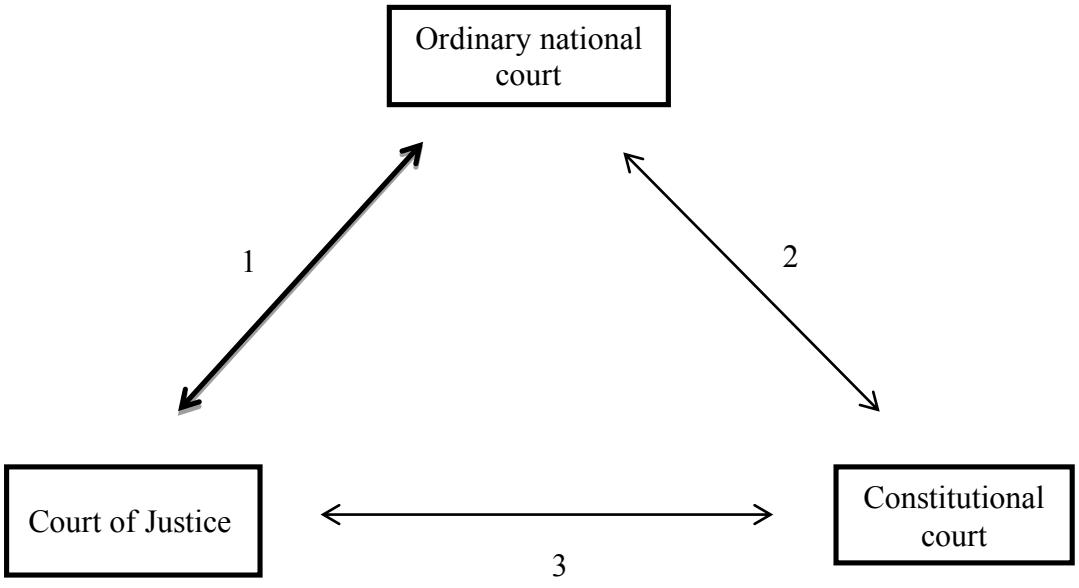
31 While the process of negotiation of the amendments varied for each Treaty amendment, the final process of ratification is done according to the respective rules of Member States on the ratification of international treaties. On the development of the former, see J Pollak and P Slominski, 'The representative quality of EU treaty reform: a comparison between the IGC and the convention' (2004) 26 (3) *Journal of European Integration* 201.

32 M Claes and J-H Reestman, 'The protection of national constitutional identity and the limits of European integration at the occasion of the Gauweiler case' (2015) 16 (4) *GLJ* 917, 943.

Justice regarding the interpretation of EU legislation.[33]

My analysis will follow and reflect these different procedural and substantive contexts, as they form the parameters for the power relations in the judicial triangle. In addition, power relations change at different points in time. By means of illustration, the judicial triangle depicted in Figure 1 represents power relations in a situation where a constitutional court in a system of centralised constitutional review is faced with a lower court disregarding its constitutional interpretation of a certain fundamental right due to requirements of EU law.

***Figure 1*** *Power relations in a system of centralised constitutional review*




The imbalance of powers is illustrated by the thicker Arrow 1. The interactions between the Court of Justice and the ordinary national courts are not analogous to those between

[33] Court of Justice Case 314/85 *Foto-Frost* [1987] ECLI:EU:C:1987:452, [15]. Treaty amendments grant national courts with constitutional jurisdiction an analogous advantage as they used to have *vis-à-vis* the measures of the third pillar. For a further analysis, see Chapter 4, Section 4.

the Court of Justice and the constitutional courts, as the latter find themselves in a position of 'interpretative competition'[34] concerning the scope of an individual fundamental right (the thin arrow 3). Thus, Arrow 1 illustrates a relationship of mutual trust and cooperation expressed through the routine use of the preliminary reference procedure. Arrow 2 is thinner as it depicts a reduced loyalty on the part of the ordinary national court towards their constitutional court, as it only remains an undisputed authority for matters outside the scope of EU law.

In constitutional pluralism, the judicial triangle will always be unbalanced; at times in favour of the Court of Justice and its relation with ordinary national courts, and at other times in favour of national constitutional courts. Thus, the normative argument of constitutional pluralism and heterarchy as the guiding scheme of judicial interactions will only become visible when all the imbalanced judicial triangles are regarded in aggregate.[35]

The following section will present the existing literature and underline the gaps that this project is aiming to fill. Section 3 sets out the research questions and section 4 details the research methodology used in providing answers. Finally, section 5 outlines the thesis.

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34 G Martinico, 'Multiple loyalties and dual preliminarity: the pains of being a judge in a multilevel legal order' (2012) 10 (3) *ICON*, 871, 885.

35 See Chapter 1, Section 3.2.

## 2. Literature review

### 2.1. Legal literature

The interactions between national courts performing constitutional review and the Court of Justice described above have been the subject of a considerable body of legal scholarship. First, indirectly, in the broader analysis of the relationship between the Member States and the EU as distinct types of legal orders, and second, directly, in light of the problems national judiciaries faced by the peculiarities of primacy, direct effect of EU law, and the preliminary reference procedure. The following section will analyse these two strands of literature: first, the contributions made in describing the nature of the EU as a polity different from states and international organisations; and, second, the literature addressing judicial interactions in this specific context. As the analysis will show, the two areas of scholarship are necessarily intertwined – it is impossible to grasp properly the nature and desirable manner of judicial interactions in the EU without first reflecting upon the features of the system in which they function. I will conclude by pointing out some of the existing gaps in the literature and the ways in which the present project will attempt to fill them.

#### 2.1.1. Is it a bird? Is it a plane? It's the European Union!

Legal academics have long faced the challenge of describing and assessing the nature of the European Union as a polity, specifically in relation to the well-established

Westphalian[36] categories of states and international organisations. The struggle of calling the EU legal order a constitutional one stemmed from an almost natural assumption of states as constitutional orders, as opposed to international organisations based on public international law and created by the authority of participating states. Nevertheless, taking into account its idiosyncratic features, such as direct effect and primacy (ultimately constructing actual state responsibility beyond what the public international law sphere ever entailed),[37] the current literature does not dispute constitutional features of the European Union,[38] despite a more general reluctance in the literature to ascribe constitutionalist characteristics to entities beyond the state.[39]

According to Weiler, the major transformative momentum in the development of the EU was the Maastricht Treaty,[40] more precisely, the sharp decline in public support that was taken for granted during all the previous integration benchmarks.[41] The public outrage translated into important judicial challenges to the ratification of the Treaty,[42] where national courts asserted their right to review the transfer of competences to the

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36 N Walker, 'Late sovereignty in the European Union' in N Walker (ed), *Sovereignty in Transition* (Hart Publishing 2003), 9.

37 J H H Weiler, 'Prologue: global and pluralist constitutionalism – some doubts' in G De Búrca and J H H Weiler (eds), *The Worlds of European Constitutionalism* (CUP 2012), 11-12. See also, N MacCormick, *Questioning Sovereignty* (OUP 1999), 97-98.

38 The Court of Justice called the system of the Treaties the EU's 'constitutional charter' in Case 294/83 *Les Verts* [1986] ECLI:EU:C:1986:166, [23]. For Lenaerts, this was an undisputed fact back in 1990. K Lenaerts, 'Constitutionalism and the many faces of federalism' (1990) 38(2) *American Journal of Comparative Law* 205, 210. See also, E Stein, 'Lawyers, judges, and the making of a transnational constitution' (1981) 75(1) *American Journal of International Law* 1.

39 M Kumm, 'The cosmopolitan turn in constitutionalism: an integrated conception of public law' (2013) 20(2) *Indiana Journal of Global Legal Studies* 605, 606.

40 Treaty Establishing the European Community (TEC) [1992] OJ C224/1.

41 J H H Weiler, *The Constitution of Europe. 'Do the new clothes have an emperor?' and other essays on European integration* (CUP 1999), 4. See also, MacCormick, Questioning Sovereignty (n 37), 98.

42 MacCormick, *Questioning Sovereignty* (n 37), 98-99. The challenges in Germany and Denmark are analysed in detail in Chapter 2.

EU, and remained firmly on the view that they are the Masters of the Treaties.[43] This in turn had the consequence of developing different theories to explain the nature of the EU as a polity, beyond the usual national-international dichotomy.

In that respect, Neil MacCormick, in its influential work, concluded that law is an institutional normative order, the 'principal example'[44] being found in nation-states, but not restricted solely to them[45] – they are only a species of a *genus*.[46] The law and the state are thus separated – law exists in multiple forms, and the state is only one of them.[47] For a normative order to be an institutional one (regardless whether the institution is rooted in a nation-state or another type of polity), it needs to possess the ability for the norms of the order to be applied to the situation they govern, which results in the self-referential quality of the system.[48]

MacCormick's ideas paved the way for a further exploration of the notion of sovereignty and how it can be understood outside the confines of the state. The debate on the possible existence of sovereignty beyond the state aroused a great deal of scepticism, connected mainly to the problem of defining any non-state system as constitutional.[49] The fear sparked by the Maastricht Treaty and the challenges to it revolved strongly

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43 For example, German *Bundesverfassungsgericht* Case 2 BVerfG 2/08 *Lisbon Treaty*, Judgment of 30 June 2009, <http://www.bverfg.de/e/es20090630_2bve000208en.html>, accessed 6 June 2017, [231].

44 MacCormick, *Questioning Sovereignty* (n 37), 1.

45 He concludes the European Union is one such institutional normative order. ibid., 102-103.

46 ibid., 1.

47 ibid., 76. See also, K Tuori, *European Constitutionalism* (CUP 2015), 87 onwards.

48 ibid., 7. For an analysis on how the Court of Justice created and expanded the self-referential system of the Treaties into an institutional normative order, see Chapter 2, Section 2.

49 Kumm (n 39), 608. See also, N Krisch, *Beyond Constitutionalism. The Pluralist Structure of Postnational Law* (OUP 2013), 27.

around the threat to the democratic form of self-government by the people.[50] The argument, in short, goes: only 'We the People' are able to create the constitutional framework claiming ultimate authority in a given space, and no unit beyond the state can satisfy this requirement.[51] Yet, the precise relationship between sovereignty as the ultimate power in a single territory does not necessarily correspond to the material constitutional requirement of a state conceived upon the rule of law (*Rechtsstaat*) – MacCormick concludes that sovereignty is neither the condition nor the desirable element for the existence of law and the state.[52]

International law, on the other hand, sources its legitimacy in state sovereignty and consent,[53] and thus cannot own any constitutionalist features of its own, according to a more conservative strand of scholarship.[54] If the EU as a polity has any autonomy, it

50 MacCormick, *Questioning Sovereignty* (n 37), 125.

51 Kumm (n 39), 608. This view was put forward by the *Bundesverfassungsgericht* in its *Maastricht* judgment, and was further heavily criticised by Weiler. See German *Bundesverfassungsgericht* Cases 2 BvR 2134/92 and 2159/92 *Brunner*, Judgment of 12 October 1993, (1994) 1 *CMLR* 57, 94. For a fierce critique of this reasoning, see J H H Weiler, 'Does Europe need a constitution? Demos, Telos and the German Maastricht decision' (1995) 1(3) *ELJ* 219. For a more detailed analysis, see Chapter 2, Section 3.1.

52 'A well-ordered Law-state (*Rechtsstaat*) is not subordinated to any political sovereign outside or above the law, nor is it necessarily constructed around some constitutional organ which enjoys sovereignty conferred by law.' MacCormick, *Questioning Sovereignty* (n 37), 129. Pernice finds sovereignty an outdated concept belonging to past centuries. I Pernice, 'Multilevel constitutionalism and the crisis of democracy in Europe' (2015) 11(3) *EuConst* 541, 555. See also, G Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (OUP 2012), 60-63, who talks about the existence of global legal pluralism and constitutionalism without state sovereignty.

53 For example, D Grimm, 'Does Europe need a constitution?' (1995) 1 *ELJ* 282, 291; S J Boom, 'The European Union after the Maastricht decision: will Germany be the "Virginia of Europe"?' (1995) 43 *American Journal of Comparative Law* 177, 209; T Schilling, 'The autonomy of the Community legal order: An analysis of possible foundations' (1996) 37 (2) *Harvard International Law Journal* 389.

54 Kumm (n 39), 607 (note 5), 609.

can only be partial and derivative, according to the *Bundesverfassungsgericht*,[55] and several other national courts performing constitutional review agreeing (most recently, the Danish *Højesteret*).[56] If this view of sovereignty is followed, the European Union has some more advanced features than classic international organisations such as the UN, but is eternally constrained by state approval through the principle of conferral.[57] MacCormick rejects these views, and claims that decades of development of the European Union and the self-referential nature of the *acquis communautaire* makes it impossible to reach any other conclusion than to recognise it as a 'full-blown instance of an institutional normative order.'[58]

Walker takes a slightly different approach from outright denying the existence of state sovereignty,[59] as he finds its relevance not in a positive reality, but rather in the function of the '*claim* to sovereignty,'[60] a part of the 'object-language.'[61] The threat of the abstract consequences of the claim to sovereignty are, in his view, important enough

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55 In the *Lisbon Treaty* decision, it stated that the legal status of the EU has: '[…] autonomy to rule which is independent but derived.' German *Bundesverfassungsgericht* Case *Lisbon Treaty* (n 43), [231].

56 Danish *Højesteret* Case 15/2014 *Dansk Industri*, 6 December 2016, <http://www.supremecourt.dk/supremecourt/nyheder/pressemeddelelser/Documents/Judgment%2015-2014.pdf>, accessed on 9 May 2017, 47.

57 Pernice raises an interesting point: keeping the EU as a polity within the conservative confines of the principle of conferral and limited to a 'compound of states' (using the terminology of the *Bundesverfassungsgericht*), in fact results in more power for the states, and diminishes the direct empowerment of their citizens to take ownership of the integration project. For this he blames the governments but also those national constitutional courts who employ the retrograde rhetoric of public international law. Pernice (n 52), 543.

58 MacCormick, *Questioning Sovereignty* (n 37), 131.

59 Similarly, Lindahl argues that rather than siding for or against sovereignty, we should turn our focus to better understanding sovereignty as the defining concept of the conditions for instituting a political unit, centred around the notion of representation. H Lindahl, 'Sovereignty and representation in the European Union' in Walker (n 36), 88-89.

60 Walker (n 36), 8-9.

61 ibid., 10-11. Walker also connects the object-language features of sovereignty to that of monism as a theory explaining the position of international law in domestic legal systems, imminently tied to state approval.

not to abandon the concept altogether. Instead, our attention should be directed towards the effects of the multiple existing claims to sovereignty.[62]

Should we then accept the language of sovereignty outside the state context? And if yes, what conclusions can we reach concerning the claim to sovereignty by the European Union? de Búrca argues that while the EU certainly does not establish its ultimate authority in the same manner as states do, the Court of Justice's development of a self-referential system of the Treaties, grounded in the doctrines of primacy and direct effect,[63] not only restrict Member States' sovereignty[64] in the classic Westphalian sense, but also render the EU legal order 'independent, autonomous and non-derivative.'[65] She concludes this makes the EU sovereign. Lindahl is in agreement, as he finds the EU's sovereignty rooted in the creation of the autonomous, independent, and self-referential nature of the system of Treaties.[66] The starting point of the present project will thus side with such a conclusion.

We are then left with one final question: what is the relationship between sovereignty and constitutionalism in the postnational context? Do they condition one another or do they overlap? Kumm defines constitutionalism as 'a normatively ambitious

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62 ibid., 9. As will be discussed in Chapter 1, Section 3.2., the conflict resolution mechanism of constitutional pluralism, the auto-correct function, rests on the premise that the imminent ability of all the judicial actors involved to make use of their *claim* to sovereignty is what balances out possible conflicts through time.

63 See Chapter 2, Section 2 for a detailed analysis of the Court of Justice's development of the self-referential system of the Treaties (its 'Constitutional Charter', as the Court calls it in *Les Verts*), based on which de Búrca concludes on the existence of sovereignty on behalf of the EU. G de Búrca, 'Sovereignty and the supremacy doctrine of the European Court of Justice' in Walker, *Sovereignty in Transition* (n 36), 452-453 and Walker (n 36), 12.

64 Stated explicitly by the Court of Justice as early as Case 26/62 *van Gend en Loos* [1963] ECLI:EU:C:1963:1, 12; and Case 6/64 *Costa v ENEL* (n 7), 593.

65 de Búrca (n 63), 453.

66 Lindahl (n 59), 107.

project of establishing legitimate authority over persons that are ultimately conceived as free and equals.'[67] This suggests that *materially* constitutionalism overlaps[68] with what Walker calls 'late sovereignty':[69] a heuristic term that aims to capture the nature of the claim to ultimate authority and constitutional representation[70] in a postnational context, freed from pre-existing state-centred conceptions of the term.[71]

What is then the content of late sovereign constitutional orders? Kumm's definition appears broad enough to capture a range of different polities, but it ultimately tells us little about the essential characteristics of a constitutional order. Stone Sweet's definition of the constitutional signifies 'having an overarching normative structure,' where fundamental rights represent the normative expression of a constitutional system.[72] Finally, Shaw has, in the context of the EU, listed four pillars of constitutionalism, which determine: (1) the nature of the polity; (2) the rule of law and its systemic properties;[73] (3) key values, principles and norms;[74] and (4) the exercise and limitation of power of the

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67 Kumm (n 39), 609. Similarly, Tuori sets out a functional definition of the European legal order as constitutional. However, he openly uses state-rooted terminology, finding that the European 'constitution' deviates from it. Tuori, *European Constitutionalism* (n 47), 28-30, 257.

68 Lindahl (n 59), 107.

69 Walker (n 36), 19.

70 Lindahl considers the requirement of representation central to self-determination, contrary to Grimm's state-centred views of a need for a collective identity as a *pouvoir constituant* of a sovereign polity. Lindahl (n 59), 108.

71 N Walker, 'Postnational constitutionalism and the problem of translation' in J H H Weiler and M Wind (eds), *European Constitutionalism Beyond the State* (CUP 2003), 39-40.

72 A Stone Sweet, 'The structure of constitutional pluralism: Review of Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Post-National Law*' (2013) 11(2) *ICON* 491, 493.

73 See also, Krisch, *Beyond Constitutionalism* (n 49), 27.

74 Including fundamental rights, non-discrimination and the institutionalisation of Union citizenship as foundations of the delivery of fairness and justice. J Shaw, 'Process and constitutional discourse in the European Union' (2000) 27 *J Law & Soc* 4, 16.

polity.[75]

In conclusion, the conservative strand of literature would find the European Union on a position in the spectrum between states (constitutional sovereign orders) and international law (derivative legal orders), leaning towards the latter.[76] Post-nationalists consider the European Union another type of an institutional normative order, with the self-referential quality for establishing its own validity. If we conclude that constitutionalism is a quality capable of existing in the EU as an institutional normative order claiming ultimate authority[77] it is possible then to turn to the literature examining the relationship between the EU and its Member States as different species of the same genus. I focus on theories of federalism, multi-level constitutionalism, and different versions of legal pluralism – all which presuppose that the EU is a constitutional order, as discussed in the preceding paragraphs.

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75 ibid., 15-18. Similarly, according to Priban, '[the] modern notion of democratic constitutionalism draw[s] on constituent power, ultimate sovereignty and the self-constitution of the people.' J Priban, 'Asking the sovereignty question in global legal pluralism: from "weak" jurisprudence to "strong" socio-legal theories of constitutional power operations' (2015) 28(1) *Ratio Juris* 31, 33.

76 For a presentation of the literature, see Walker (n 71), 27-31. As will be seen in Section 2.2. of this Chapter addressing the political science literature, Weiler groups the contributions in that field in three distinct categories: (1) intergovernmental (for example, Moravscik's theory of liberal intergovernmentalism, resembling closely to the public international law/state-centred approach in the legal literature); (2) supranational (such as the neo-functionalist theory as developed by Haas and Lindberg, or the multi-level governance theory developed by Hooghe and Marks, siding with the *sui generis* approach to explaining the EU in the legal literature); and (3) the (infra)national (governance studies). Weiler, *The Constitution of Europe* (n 41), 271-272, and the useful chart summary at 274.

77 Analogously, Maduro argues that state constitutionalism is but a 'contextual representation of constitutionalism […].' M P Maduro, 'Europe and the constitution: what if this is as good as it gets?' in Weiler and Wind (n 71), 74. On the debate on different views on constitutionalism as regards the EU, see N Walker, 'European Constitutionalism in the State Constitutional Tradition' (2006) 59 *Current Legal Problems* 51, 51-56.

## 2.1.2. The relationship between the EU and its Member States

The multi-level nature of the EU has led the legal scholarship to explore the federal structure and its applicability to the EU.[78] Lenaerts defines the common denominator of federalism to be 'the appropriate balance between the federation and its component entities.'[79] He further explains that integrative federalism, as a mode of constitutionalism that strives to unite diverse entities, can be applied to the model of the (then) supranational European Community.[80] The Treaty provisions setting out the vertical division of competences between the EU and the Member States, as well as the manner of exercise of these competences by the Union institutions (including a strong Court of Justice)[81] have been interpreted as clear indicators of a federalist structure.[82] In addition, Fabbrini praises federalism due to its applicability to any system of divided powers, and discards any *sui generis* approach as methodologically flawed.[83] Finally, the development of EU citizenship has been extensively addressed from the perspective of federalism, given its clear connection to multiple vertical levels of government and

78 The US has often served as a point of comparison. See, for example, R Dehousse, 'Integration v. Regulation? On the dynamics of regulation in the European Community' (1992) 30(4) *JCMS* 383.

79 Lenaerts (n 38), 205. Similarly, Kelemen provides the following, as he terms it, minimalist definition of federalism: 'Federalism is an institutional arrangement in which (a) public authority is divided between state governments and a central government, (b) each level of government has some issues on which it makes final decisions, and (c) a high federal court adjudicates disputes concerning federalism.' D R Kelemen, 'The structure and dynamics of EU federalism' (2003) 36(1-2) *Comparative Political Studies* 184, 185.

80 ibid., 206-207.

81 ibid., 216.

82 ibid. See also, Stein (n 38), 1.

83 F Fabbrini, Fundamental Rights in Europe. Challenges and Transformations in Comparative Perspective (OUP 2014), 24-25.

political association.[84]

There are at least two objections to the plausibility of federalism. First, the Treaty on a Constitution for Europe, reminiscing of the US Constitutional Convention in Philadelphia,[85] was ultimately rejected by referenda in France and the Netherlands. The Lisbon Treaty that ultimately came into force significantly watered down the federalist vocabulary of the Constitutional Treaty,[86] indicating that restructuring the EU to more closely resemble the federalist model of the US was not an acceptable development for the Member States. Normatively, it is hence highly unlikely that the EU will develop into a federal polity.

The second, and perhaps more important reason why federalism as a theory holds insufficient explanatory and normative power is because it fails to take into account national contributions to the EU constitutional landscape resulting in conditional primacy of EU law. For example, Lenaerts denies that the Lisbon Treaty diminishes any of the EU's federal features, since EU law retained a pervasiveness into national law, both through the obligation of national regulators not to legislate contrary to EU law, as well as due to a spill-over effect that EU law may have in the area of exclusive competences of Member States.[87] However, as will be shown in Chapters 2 to 4, the position of the

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84 For a most recent and comprehensive contribution, see D Kochenov (ed), *EU Citizenship and Federalism. The Role of Rights* (CUP 2017).

85 N Walker, 'The legacy of Europe's constitutional moment' (2004) 11(3) *Constellations* 368, 368.

86 The term 'constitution' was replaced with the more traditional term 'treaty', and categories of 'European laws' were again called directives and regulations.

87 He defines spill-over as the voluntary 'application by national authorities of EU norms (e.g., rules, principles, concepts) to situations governed entirely and exclusively by national law.' K Lenaerts, 'Federalism and the rule of law: perspectives from the European Court of Justice' (2010) 13 *Fordham International Law Journal* 1338, 1340-1341.

Court of Justice as the 'high federal court'[88] in the EU is but one reality; national courts performing constitutional review have developed a reality of their own, supported by vast jurisprudence which outright contradicts that of the Court of Justice.[89] Tuori relatedly argues that federalism cannot capture the EU without being stretched beyond recognition.[90] Federalism is thus, in my view, unable to capture the complex relationship of contestation between the EU and the national level.

Attempting to reconcile the peculiar relationship between the EU and the Member States, Pernice created the influential theory of multi-level constitutionalism. For Pernice, the creation of the EU signified a radical shift in how we regard international organisations, as well as domestic constitutions. The EU and its Member States now form part of a 'single constitutional system',[91] made up of the Treaties and national constitutions.[92] Furthermore, multi-level constitutionalism accords the *Kompetenz-Kompetenz* to the Union, and no longer considers Member States to be able to decide the extent of its competence.[93] In that respect, multi-level constitutionalism is similar to EU federalism, with the difference that it does not attempt to fit the relationship between the EU and its Member States in a pre-existing model of governance. Rather, Pernice claims

88 Kelemen (n 79), 185.

89 In competence monitoring (*ultra vires* review), protecting the constitutional core (identity review), and policing the standard of fundamental rights protection.

90 Tuori, *European Constituitonalism* (n 47), 345. See also, P Eeckhout, 'The EU Charter of Fundamental Rights and the federal question' (2002) 39(5) *CMLRev* 945, 946; D Halberstam, '"It's the autonomy, stupid!" a modest defense of *Opinion 2/13* on EU accession to the ECHR, and the way forward' (2015) 16(1) *GLJ* 105, 114.

91 I Pernice, 'Constitutional Law Implications for a State Participating in a Process of Regional Integration. German Constitution and "Multilevel Constitutionalism"' in E Riedel (ed), *German Reports on Public Law* (Baden-Baden NOMOS 1998), 42.

92 Somewhat similar to the Court of Justice's list of sources of fundamental rights protection back in its *Nold* judgment. Court of Justice Case 4/73 *Nold* [1974] ECLI:EU:C:1974:51, [13].

93 Pernice (n 91), 46.

that the relationship between different constitutional contributions to the supranational constitution should not be hierarchical, but 'pluralistic'.[94] An important contribution of the theory is its recognition of the inherent enmeshment of EU and national law, which results in a more advanced understanding of the rights of citizens and their role in the EU.[95] In his view, it is not the states, but the citizens, who are the masters of the Treaties.[96] This bottom-up approach is one of the most important contributions of the normative tenets of multi-level constitutionalism, and should guide the normative ambitions of the EU as a polity more generally.[97]

The problem with multi-level constitutionalism is that it still shares the federalist idea of one ultimate arbiter, regardless of the fact that multiple claims to ultimate authority by national courts performing constitutional review deny its existence.[98] To Pernice, any conflict between EU and national law is to be resolved in favour or the former,[99] for the purposes of preserving the rule of law and the *effet utile* of Union law.[100] Multi-level constitutionalism does accept the difference between primacy and supremacy, and finds primacy to be merely a conflict rule incapable of invalidating the relevant national provision.[101]

Pernice accepts that national constitutional identity is to be preserved, and does

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94 Pernice (n 52), 545.

95 ibid., 543-544.

96 ibid., 544.

97 Similarly to Habermas who argued that the creation of a constitution would improve self-determination and legitimacy of the EU. J Habermas, 'Why Europe needs a constitution' (2001) 11 *New Left Review* 5.

98 See n 89.

99 Pernice (n 52), 545.

100 ibid., 553.

101 ibid.

not assume 'unity' to mean 'identity':[102] each of the 28 national constitutions can co-exist with their respective particularities. Yet, he finds that in the European judicial space, it is impossible for a citizen to have her situation governed by two different solutions from the EU and the national level.[103] He does not specify how multi-level constitutionalism would accommodate the recent national rejection of the Court of Justice's interpretations of the Treaties,[104] or how a 'one right answer' approach would function in this context. Such a view also disregards the possible positive contributions that contestation on the national level can make in the development of EU law more generally, and keeping the Court of Justice in check more particularly.

Considering the welcomed bottom-up approach advocated by multi-level constitutionalism, but also taking into account its drawbacks as regards the extent and manner of mutual accommodation between the national and EU level, we now turn to the contributions made by legal pluralism in its many different forms.[105] Generically, pluralism represents one 'common, overarching legal framework that would integrate postnational governance, distribute powers, and provide for means of solving disputes between the various layers of law and politics.'[106] Michaels traces the origins of legal pluralism to legal sociological and anthropological studies from the '70s and '80s,

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102 Responding to the criticism by Barents. Pernice (n 52), 549-550.

103 ibid., 550.

104 For example, the Danish decision rejecting the *Mangold* doctrine (n 56).

105 A detailed analysis of the development of each of the different versions of legal pluralism is beyond the scope of the present work, which will focus mainly on the theories of pluralism addressing the European Union as a polity. For a more detailed overview, see Krisch, *Beyond Constitutionalism* (n 49), 71-78; M Avbelj, 'The EU and the many faces of legal pluralism' (2006) 2 *CYELP* 377; R Michaels, 'Global legal pluralism' (2009) 5 *Annual Review of Law and Social Science* 243; M Avbelj and J Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2012).

106 Krisch, *Beyond Constitutionalism* (n 49), 69.

researching the co-existence of normative orders within societies.[107] In legal research, the definition that seems to be the common denominator in the different readings of pluralism is that of a multitude of legal systems operating in one political unit.[108] It has further developed into different versions that may be surmised into what Griffiths calls 'weak' and 'strong' pluralism: the former describes the plurality of sources of law within a system with a *Grundnorm* (thus essentially falling into monism), whereas the latter imagines a situation in which not all law is state-sourced, or state-administered.[109] In its sociological form, Griffiths' 'strong' pluralism provides the theoretical groundwork[110] for MacCormick's concept of an institutional normative order that is not limited to states. While the present work focuses exclusively on the contributions of constitutional pluralism as developed by MacCormick and Walker, this literature overview will also briefly present radical and global legal pluralism.

Radical pluralism, which is relevant as it coincides with MacCormick's early work on pluralism in the European Union, regards the relationship between constitutional sites as not guided by any means of reconciliation or coordination, a complete lack of any *Grundnorm* that would ultimately guide contestation and conflict between different institutional normative orders.[111] Radical pluralism in this sense attempts to avoid the

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107 Michaels (n 105), 245. See also, N Barber, 'Legal pluralism in the European Union' (2006) 12(3) *ELJ* 306, 307.

108 B de Sousa Santos, *Towards a New Legal Common Sense* (Butterworths London 2002), 89; Michaels (n 105), 245.

109 J Griffiths, 'What is legal pluralism?' (1986) 24 *Journal of Legal Pluralism and Unofficial Law* 1, 5.

110 But also, a shift from the anthropological methodology whose object of inquiry was the relationship between state law and other less formal or 'self-styled' normative orders within the territory of that state. N Walker, 'Reconciling MacCormick: constitutional pluralism and the unity of practical reason' (2011) 24(4) *Ratio Juris* 369, 374.

111 N Krisch, 'Who is afraid of radical pluralism? Legal order and political stability in the postnational space' (2011) 24(4) *Ratio Juris* 386, 388.

trap of becoming the 'new monism', as Walker explains:

> [It] may well be that in the EU context, even though we talk about a brave new world of pluralism, that actually what we are doing is just inventing a new vocabulary which in the final analysis will end up pushing us in that federal-but-centralising direction […].[112]

Kumm's account of constitutionalism beyond the state aims to address this gap – the *Grundnorm* is not possible to discern neither in EU nor in national constitutional law, but is rather normatively rooted in political morality – and was also characterised as pertaining to the radical side of pluralism.[113] Kumm argues that, when faced with a constitutional conflict, the national judge should apply the 'principle of best fit'.[114]

In his later work, MacCormick softened his radical approach,[115] and argued that while EU and national law are on an equal footing as a matter of principle, the *Grundnorm* is to be found in international law, something that MacCormick calls 'pluralism under international law.'[116] Viewed in this way, it is international law that validates both national and EU legal systems, rather than looking at them from either a state-centrist (states are masters of the treaties and thus validate EU law) or an EU-centrist (the EU is a new legal order hierarchically superior to national law and thus validates national law) perspective. For MacCormick, thus, there is no 'all-purpose superiority of one system over another.'[117] The relationship between EU and national

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112 M Avbelj and J Komárek, 'Symposium: Four visions of constitutional pluralism (Symposium Transcript)' (2008) 2(1) *EJLS cou* 325, 344.

113 M Kumm, 'The jurisprudence of constitutional conflict: constitutional supremacy in Europe before and after the Constitutional Treaty' (2005) 11(3) *ELJ* 262, 286.

114 An optimal interpretation and balancing of values sourced in the applicable constitutional orders. ibid.

115 Krisch, *Beyond Constitutionalism* (n 49), 73.

116 N MacCormick, 'Risking constitutional collision in Europe?' (1998) 18(3) *OJLS* 517, 527.

117 ibid., 529.

legal systems in 'pluralism under international law' does not represent a third approach – a new non-hierarchical interpretative system (as radical pluralism suggests) – but is a framework for relationships between these non-hierarchical interactive systems.[118]

Global legal pluralism, as developed by Teubner,[119] argues that 'law is not generated by the state but instead creates itself (*autopoiesis*), and that the centre of law-making has moved away from the state and into the periphery of transnational actors.'[120] Teubner's work looks further away from jurisprudential instances of pluralism, and also includes other sectors of society which, more or less spontaneously, engage in 'self-constitutionalisation and constitutional fragmentation.'[121] Teubner's work was a sound basis for research into different sources of non-state law in a transnational environment caused by globalisation,[122] but what diminishes its usefulness for the purposes of the present research is its predominantly top-down approach, attempting to analyse the different variations in global law.[123] As a consequence, global legal pluralism appears too broad to help capture the subtleties of the interactions between the EU and national legal orders, as it denounces any institutionalised form of interaction between the different systems.[124]

It is at this point that we turn to constitutional pluralism that Walker developed

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118 ibid.

119 G Teubner, 'The two faces of Janus: rethinking legal pluralism' (1992) 5 *Cardozo Law Review* 1443.

120 Michaels (n 105), 247.

121 Priban (n 75), 38.

122 Michaels (n 105), 247.

123 ibid.

124 Krisch, *Beyond Constitutionalism* (n 49), 76-77; Avbelj (n 105), 3. Such a conclusion is rather disappointing given Teubner's own criticism of the classical legal pluralism as vague and ambiguous. See Teubner (n 119) in Avbelj (n 105), 3.

from MacCormick's ideas. In his influential piece from 2002,[125] he makes three claims: (1) the EU's constitutional setup is comprised of multiple constitutional sites of discourse and authority (explanatory claim);[126] (2) the mutual recognition and respect between these multiple sites of constitutional authority is 'the only acceptable ethic of political responsibility for the new Europe' (normative claim);[127] and (3) that pluralism revolves around the notion of incommensurability of different claims to authority (epistemic claim).[128]

Since, in the understanding of epistemic pluralism, the different sites of authority speak a different language, they lack a common denominator that might provide them with a 'monist' solution to possible conflicts. However, Walker claims that heterarchy and horizontality are underlying the relationship between the different sites of constitutional authority,[129] where conflicts are addressed through meta-constitutionalism – a process of mutual negotiation, learning, open dialogue and cross-examination.[130]

The initial success of Walker's theory was followed by criticism,[131] most vehemently expressed by Loughlin[132] who called it an 'oxymoron'. His critique is

125 N Walker, 'The idea of constitutional pluralism' (2002) 65(3) *MLR* 317.

126 ibid., 337.

127 ibid. Similarly, Maduro stresses the importance of the discursive element between different sites of constitutional authority, who then jointly and coherently strive to create the shared European legal space. M P Maduro, 'Contrapunctual law: Europe's constitutional pluralism in action' in Walker (n 36), 513-514, 518.

128 Walker (n 125), 338. See also, N Walker, 'Constitutional Pluralism Revisited' (2016) 22(3) *ELJ* 333, 333-334; Tuori, *European Constitutionalism* (n 47), 355.

129 Walker (n 125), 337.

130 ibid., 358-359.

131 For example, J Baquero Cruz, 'The legacy of the Maastricht-Urteil and the pluralist movement', (2008) 14 *ELJ* 389. See also, Avbelj and Komárek, *Constitutional Pluralism* (n 105). See also Chapter 1, which further establishes constitutional pluralism as the theoretical framework of the thesis, and presents the most recent criticism directed to constitutional pluralism.

132 M Loughlin, 'Constitutional pluralism: an oxymoron?' (2014) 3(1) *Global Constitutionalism* 9.

premised on unlimited state sovereignty, which can either be complete or it no longer exists.[133] He further strongly disagrees with MacCormick's claim that any institutional normative order is 'deserving of acknowledgement and even respect.'[134] For Loughlin, it is impossible for a constitution to be treated as a category able to transcend the confines of a state into any normative order, nor for these normative orders to be treated as equal counterparts.[135] He concludes that any acceptance by pluralists of a conflict resolution mechanism necessarily draws them back into monism – otherwise, they are near-anarchists eroding any normative stance.

What is then left of constitutional pluralism and is it worth exploring? Krisch emphasized the need for 'more empirical work and deeper inquiries into the institutional dynamics of pluralist orders in the varied contexts of postnational governance.'[136] Contrary to mainstream criticism to constitutional pluralism, I submit that the question of ultimate authority may, and should, remain open, as it can, and should, be resolved differently at different points in time. I will demonstrate this by chronologically looking at the web of heterarchical judicial relationships between the national and the EU level, using a more detailed methodology than that used in the reviewed literature. Normatively, I aim to show that constitutional pluralism offers a valuable answer not only to the structural avoidance of constitutional conflict, but also one which purports to achieve the values of constitutionalism as described in the reviewed scholarship.

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133 ibid., 13.

134 ibid., 16.

135 ibid., 17.

136 Krisch, *Beyond Constitutionalism* (n 49), 70.

## 2.1.3. Judicial interactions in the EU

The literature on judicial interactions in the EU is vast, and while it would be impossible to present it in its entirety, it is the aim of the present section to present the most important contributions, and underline some of the gaps that remain, which the present work is seeking to address. The first strand of literature in the research of judicial interactions between the EU and the national level takes a comparative approach to the research.

The edited volume *The European Court and National Courts – Doctrine and Jurisprudence* is an important starting point.[137] The volume is, in its first part, composed of national reports on the national constitutional jurisprudence concerning EU law, specifically in respect of primacy and direct effect. While national reports are a rich source of information, they do not seem to take a comprehensive normative stance towards the further development of judicial interactions in the EU. The second part of the volume features prominent theories of explaining the effects of the preliminary reference procedure on national judiciaries, such as the empowerment thesis developed by Burley and Mattli and the inter-court competition thesis by Alter (these will be discussed below). Nevertheless, the two parts are not connected into a coherent whole in order to make a normative conclusion on judicial interactions and constitutional conflict in the EU more generally.[138] In addition, the volume lost some of its relevance after the enlargements of 2004 onwards, as it does not include the jurisprudence of constitutional conflict of now

137 A-M Slaughter, A Stone Sweet and J H H Weiler (eds), *European Court and National Courts: Doctrine and Jurisprudence. Legal Change in its Social Context* (Hart Publishing 1998).

138 G Davies, 'A-M Slaughter, A Stone Sweet and J H H Weiler (eds), *European Court and National Courts: Doctrine and Jurisprudence. Legal Change in its Social Context* (Hart Publishing 1998)' (1999) 3(1) *ELRev* 113, 114.

nearly half of the Member States.

A similar effort was made by Martinico and Pollicino,[139] who have put together the most prominent scholars in the field for an analysis of the national courts' treatment of EU and the European Convention on Human Rights (ECHR)[140] as regards fundamental rights. Again, the national reports provide important information concerning the reception of EU law into national constitutional jurisprudence, and the theoretical chapters dealing with the relationship between national, EU and ECHR law. The main limitation of the volume is that is only deals with constitutional conflict in the area of fundamental rights, thus omitting the jurisprudence in areas of competence monitoring and the protection of the constitutional identity. In addition, the theoretical framework established in the theoretical chapters only focuses on the vertical relationships between the courts under analysis, and hardly puts it in any relationship to the nature of the EU as a polity and the effect this has had on judicial interactions.

De Visser's work on constitutional review in Europe[141] is another important contribution in comparative research, where she looks at national institutions responsible for upholding the supremacy of national constitutions. She focuses her work on eleven EU Member States in order to make meaningful comparisons of the ways in which these Member States ensure 'the integrity and supremacy of their constitutional rules and principles.'[142] De Visser's work is therefore of immeasurable value for a comparative depiction not only of the work of the constitutional and supreme courts of the eleven

139 G Martinico and O Pollicino *The Interaction between Europe's Legal Systems. Judicial Dialogue and the Creation of Supranational Laws*, (Edward Elgar 2012).

140 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) [1950] ETS 5.

141 M de Visser, *Constitutional Review in Europe. A Comparative Analysis* (Hart Publishing 2014).

142 ibid., 6.

Member States, but also of other non-judicial actors in the division of powers in the respective countries, such as national parliaments, Councils of State and Ministers of Justice. The book gives a thorough presentation of the case law relevant to the position of national constitutional courts and their relationship to constitutional review, particularly in relation to EU constitutional law.

However, the book does not succeed in answering the very essential questions it poses in its introduction, such as *who* is responsible for protecting the supremacy and integrity of constitutional rules and principles, both in the Member States and in the EU. The book leaves us with an excellent presentation of the *status quo*, unfortunately without offering substantive answers, neither to these crucial questions, nor as regards any proposal concerning possible improvements and reform. The main argument of the present work will rely heavily on the rich data presented in de Visser's book, including numerous translations of judgments that would otherwise be hard to access. However, the contribution by the present work will add to de Visser's groundwork by providing more gradation in the analysis of power relations between the courts under analysis. It will also remedy de Visser's lack of a more theoretical glue that connects the variety of interactions in the area of constitutional conflict. The important take from the book is how the author addresses the relationship between national constitutional courts and the European Court of Justice, rightly naming these interactions as '*engagement'* and '*communication*'.[143] In my view, these terms better reflects the randomness and informal character of judicial interactions, than the widely used 'judicial dialogue'.

Judicial dialogue will then be the starting point in presenting the next strand of

[143] ibid., 403.

literature, consisted of several theories explaining the effects of the preliminary reference procedure on national judiciaries. The literature on 'judicial dialogue'[144] attempts to explain interactions between the Court of Justice, ordinary national courts, and constitutional courts. According to this theory, 'case law of the Community mandate is the result of a continuing dialogue between the national courts and the Court of Justice.'[145] Its focus therefore rests on the preliminary reference procedure, and the exploration of reasons why and ways in which national courts use it.

The work of Martinico on judicial dialogue in the EU has been particularly thorough and extensive.[146] His work includes an in-depth presentation of the relevant jurisprudence of both the Court of Justice and national constitutional courts in the context of Union law. Moreover, he offers a detailed account of the different problems that arise in the system of multi-level adjudication, particularly focusing on the drawbacks in the interactions between three judicial instances: ordinary national courts, national constitutional courts and the Court of Justice.[147] The literature on judicial dialogue, while useful for depicting the operation of EU law before national courts and the methods they

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144 See M Cartabia, 'Taking dialogue seriously. The renewed need for a judicial dialogue at the time of constitutional activism in the European Union' (2007) Jean Monnet Working Paper 12/07, available at <centers.law.nyu.edu/jeanmonnet/papers/index.html>, accessed on 15 June 2015; F Fontanelli, G Martinico and P Carrozza (eds), *Shaping Rule of Law through Dialogue: International and Supranational Experiences*, (Europa Law Publishing, 2009); G Martinico, 'Judging in the multilevel legal order: exploring the techniques of "hidden dialogue"' (2010) 21 *King's College Law Journal* 257; C Guarnieri and D Piana, 'Bringing the outside inside: macro and micro factors to put the dialogue among the highest courts into its rights context' (2012) 8 *ULRev* 139; H Lambert, 'Transnational Judicial Dialogue, Harmonization and the Common European Asylum System' (2009) 58 *ICLQ* 519.

145 Claes, The National Courts' Mandate in the European Constitution (n 13), 249.

146 Martinico and Pollicino (n 16); Martinico and Pollicino *The Interaction between Europe's Legal Systems* (n 139); G Martinico, 'A (dis-) order of disagreements: exploring the nature of constitutional conflicts in EU Law', Sant' Anna Legal Study Research Paper 3/2012; Martinico (n 34).

147 See in particular Martinico (n 146).

employ to avoid conflict, lacks a more dynamic approach that would provide us with an idea of how constitutional interactions develop over time, and whether constitutional conflict can be managed on such a basis. In addition, many of the contributions subscribe to different theoretical frameworks which in my view do not live up to the descriptive and normative premises of constitutional pluralism.[148]

Claes' work on judicial interactions in the EU fills some of the gaps mentioned above, and its contribution to the field cannot be overstated. She follows the reception of the Court of Justice's case law on the national level, separating the analysis of ordinary national courts and those performing constitutional review. Her analysis follows the matrix developed by the Court of Justice, in which respect the national jurisprudence included in the analysis follows the analogous reactionary structure. Still, her analysis of the pre-existing national constitutional setups is of utmost value for further understanding constitutional conflicts in the EU, and it therefore does not take a one-sided approach to the topic. Similarly to de Visser, the present work will rely heavily on theoretical findings and definitions created and developed by Claes.

Claes explicitly uses constitutional pluralism as a theoretical framework,[149] although a connection to it and how it affects the judicial interactions she analyses is rarely visible. Consequently, the book takes a predominantly descriptive approach to judicial interactions,[150] with no apparent conclusion as to their possible development or improvement. Although the final part of the book is dedicated to the future of judicial

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148 For example, Martinico and Fontanelli employ an international law approach to judicial dialogue. G Martinico and F Fontanelli, 'The hidden dialogue: when judicial competitors collaborate' (2008) 8(3) *Global Jurist* Article 7, 20.

149 Claes, The National Courts' Mandate in the European Constitution (n 13), 35-36.

150 J Komárek, 'The National Courts' Mandate in the European Constitution by Monica Claes' (2006) 25(1) *YEL* 661, 663.

interactions, her focus remains on the failed Constitutional Treaty, and how it addresses the different areas of constitutional conflict. Instead of engaging with the importance of the self-imposed obligation of conflict avoidance in the pluralist setting, Claes places an emphasis on the desirability of converging opposing positions.[151] However, such an approach inevitably leads back to monism and consequently hierarchy, a constant problem in the literature on the nature of the EU as a polity.

Finally, the analysis in the book is limited to eight Member States, which again lacks in the nuance and richness of constitutional jurisprudence across all the Member States. This is firstly due to the time of publishing the book, however, the gap of analysing the contributions made by, for example, constitutional courts in former communist countries adds another layer of legal reasoning and enriches the entirety of the EU's constitution.[152]

The empowerment thesis, developed by Slaughter and Mattli[153] is another theory explaining judicial interactions in the context of the preliminary reference procedure. The theory finds the reason for national courts' acceptance of the preliminary reference procedure in their empowerment in the national context, through the expansion of judicial review even to legal systems without such a tradition.[154] Claes points out, however, that the thesis holds little explanatory value, given that it cannot be readily accepted that courts want an extension of their powers in the first place.[155] More

151 Claes, The National Courts' Mandate in the European Constitution (n 13), 669-670.

152 Pernice (n 91), 42.

153 See n 17.

154 J H H Weiler, 'Journey to an unknown destination: a retrospective and prospective of the European Court of Justice in the arena of political integration' (1993) 31(4) *JCMS* 417, 425.

155 Claes, The National Courts' Mandate in the European Constitution (n 13), 256.

generally, the focus of the theory are ordinary national courts, which is why its contribution will be only of limited use in the present work.

Alter's work further introduced the argument of inter-court competition that led lower national courts to accept EU law in opposition to their superior courts.[156] The preliminary reference procedure is used as a route to shun their national hierarchies, resulting in an inadvertent assistance to the process of legal integration.[157] Given that the theory fails to include the influence of powers of superior courts, nor national courts which initially rejected the powers granted by *Simmenthal*, its usefulness for the present work is equally limited.

In conclusion, the present work aims to offer a comprehensive account of the jurisprudence of constitutional conflict with a normative and empirical approach, taking into account the effects that the idiosyncratic nature of the EU as a polity has had on them. It therefore seeks to fill the gap in the literature which addresses these interconnected topics either separately, or partially.

## 2.2. Political science literature

Apart from the vast legal scholarship dealing with the nature of European integration and judicial interactions in the EU, important contributions have been made in political science scholarship. Political scientists have developed several theories to explain

156 K Alter, 'Explaining national court acceptance of European Court jurisprudence: a critical evaluation of theories of legal integration' in Slaughter, Stone Sweet and Weiler (n 137); K Alter, *Establishing the Supremacy of European Law. The Making of an International Rule of Law in Europe* (OUP 2003).

157 Alter, 'Explaining national acceptance' (n 156), 241.

European integration more generally,[158] and more specifically the politics of the judiciary in the process of integration.[159] However, a nuanced approach to the different types of judicial interactions taking place in the 'judicial triangle' seems to be missing. This section offers a comparison of legal and political science theories on events and trends of European integration, and judicial interactions within the EU. In addition, it point out flaws in this literature, particularly regarding its lack of engagement with (national constitutional) law.

This section will start with a brief overview of the key literature in the area of theories of European integration, underlining the main theories and concepts of the process of European integration, and their role in explaining the constitutionalisation of the EU. I will then present a comparative account of the concepts and terminology used in the legal and political science literature to describe the judicialisation of the EU constitution with the aim of making a meaningful comparison and drawing some conclusions as regards the use of terms in the remainder of the thesis. The third part will analyse the political science literature on judicial interactions, offering also a comparison to the legal literature. The final part of this section will offer a critique and some conclusions as regards the use of terminology and concepts throughout the thesis.

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158 For a detailed presentation of the dominant theories (neofunctionalism, liberal intergovernmentalism and multilevel governance), see: M Pollack, 'Theorizing the European Union: international organization, domestic polity, or experiment in new governance?' (2005) 8 *Annual Review of Political Science* 357; A Wiener and T Diez (eds), *European Integration Theory* (2nd edn, OUP 2009); and D Leuffen, B Rittberger and F Schimmelfenning, *Differentiatied Integration: Explaining Variation in the European Union* (Palgrave Macmillan 2013).

159 For a detailed overview of the political science literature in the area of judicialisation of European integration and governance, see A Stone Sweet, 'The European Court of Justice and the judicialization of EU governance' (2010) 5 *Living Reviews in EU Governance* 2; A Dyevre, 'Unifying the field of comparative judicial politics: towards a general theory of judicial behaviour' (2010) 2 *European Political Science Review* 297.

## 2.2.1. Theories of European integration

Without attempting to reiterate a detailed and comprehensive review of the political science literature on judicial politics,[160] the aim of this part is to offer a brief account of the most important literature concerning the theory of European integration, and judicial politics in the EU. The process of European integration – a development altering considerably the classic Westphalian setting centred around the notion of sovereignty,[161] – has resulted in the development of several theories among political scientists, with the aim of explaining and conceptualising the (then) newly emerging EU polity. Alongside the development of the two most frequently debated and contrasted theories,[162] neo-functionalism[163] and liberal intergovernmentalism,[164] any analysis of the theories of European integration would be incomplete without including the theory of multi-level governance.

The neo-functionalist theory of European integration claims that the interest-

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160 See Burley and Mattli (n 17); A Stone Sweet and M Shapiro, 'The new constitutional politics of Europe' (1994) 26 *Comparative Political Studies* 397; L Conant, 'The politics of legal integration' (2007) 45 *JCMS* 45; Stone Sweet (n 160).

161 T E Aalberts, 'The future of sovereignty in multilevel governance Europe – a constructivist reading' (2004) 42 *JCMS* 23, 24.

162 A Stone Sweet and W Sandholtz, 'European integration and supranational governance' (1997) 4 *JEPP* 297, 298.

163 The early neo-functionalist theory was initially developed by Haas and Lindberg in E B Haas, *The Uniting of Europe: Political, Social, and Economic Forces 1950-57* (Stanford University Press 1958); L N Lindberg, *The Political Dynamics of European Economic Integration* (Stanford University Press 1963). After a wave of criticism the theory has been reformulated, most notably in R Keohane and S Hoffmann (eds), *The New European Community: Decision-Making and Institutional Change* (Westview 1991); P Taylor, 'The New Dynamics of EC in the 1980s' in J Lodge (ed), *The European Community and the Challenge of the Future* (St Martin's Press 1989).

164 The theory was introduced and presented in seminal articles by A Moravcsik, 'Preferences and power in the European Community - a liberal intergovernmentalist approach' (1993) 31 *JCMS* 473; A Moravcsik, 'Liberal intergovernmentalism and integration: a rejoinder' (1995) 33 *JCMS* 611.

driven national and supranational elites provide the key impetus for integration. Moreover, the new institutions created in the process of integration can take on a life of their own and progressively escape the control of their creators.[165] The theory of neo-functionalism is centred around the concept of 'spillover', based on the idea of the interdependence of some sectors, resulting in the impossibility of isolating and integrating them individually.[166] Furthering integration in one sector therefore inevitably raises the need to integrate interdependent sectors as well.

The liberal intergovernmentalism theory is based on the assumption that states are rational actors pursuing their own self-interest, and that European integration is a result of bargaining among 'a series of rational choices made by national leaders'.[167] The economic interests of powerful domestic stakeholders condition the choices made by national leaders. Furthermore, the pace of integration ensues from the relative power of states involved in the process of integration, as well as the role of the institutions in enforcing the integration commitments.[168]

Finally, the multi-level governance theory, developed by Marks and Hooghe,[169] can be defined as a system in which governments negotiate at several levels – supranational, national, regional, and local – in a process of creating institutions and allocating decision-making. In other words, it represents a system of 'reallocation of

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165 Wiener and Diez, *European Integration Theory* (n 158), 48-49.

166 ibid.

167 ibid, 69.

168 ibid, 69-70.

169 G Marks, 'Structural Policy and Multilevel Governance in the EC' in A Cafruny and G Rosenthal (eds), *The State of the European Community* (Lynne Rienner 1993) 391–410; L Hooghe and G Marks, 'Unraveling the central State, but how? Types of multi-level governance' (2003) 97 *American Political Science Review* 233.

authority upwards, downwards and sideways from central states.'[170] Since multi-level governance entails numerous actors and levels of decision-making, it is inherently 'more complex and therefore difficult to map'.[171]

The theory of multi-level governance has also been subject of vehement criticism, namely focusing on the point that it is merely descriptive, without offering a normative account of the causes and the aims of European integration.[172] However, Zürn provides for a critical normative assessment of the post-national multilevel setting, casting doubt upon the ability to deliver satisfactory political outcomes, as well as the lack of guarantee that a 'workable equilibrium' will ever be reached.[173] While he finds that ensuring the maintenance of security, human rights protection and the rule of law in a multi-level governance regime will be as, if not more, successful in the post-national constellation, he also points towards a lower level of guaranteeing channels of effective participation and ensuring social welfare.[174]

None of the theories presented are completely correct, or completely incorrect; rather, each of the theories seems to be more applicable to a certain period of European integration, followed by a certain method of decision-making.[175] The development of the

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170 Hooghe and Marks (n 169), 233.

171 N Chowdhury and R A Wessel, 'Conceptualising multilevel regulation in the EU: a legal translation of multilevel governance?' (2012) 18 *ELJ* 335, 342.

172 A J Jordan, 'The European Union: an evolving system of multi-level governance ... or government?' (2001) 29 *Policy & Politics* 193, 201.

173 M Zürn, 'The State in the post-national constellation - societal denationalization and multi-level governance' (1999) 35 ARENA Working Papers 1, 22 onwards.

174 ibid., 23. See also A Hurrelmann and J DeBardeleben, 'Democratic dilemmas in EU multilevel governance: untangling the Gordian knot' (2009) 1 *European Political Science Review* 229.

175 While the literature normally contrasts the presented theories of European integration, according to Tatham, multi-level governance theory and liberal intergovernmentalism have more converging points (both in terms of weaknesses and advantages of the two theories) than what initially meets the eye, in particular concerning the involvement of regions in the EU policy-making. See: M

EU competence and secondary EU law in consumer protection is a case in point to depict how particular theories have reflected a particular stage of integration.

Although the Treaty of Rome[176] initially did not provide for EU competence in consumer protection, the Member States' preferences and bargaining led to a unanimous piece of legislation, the Directive on unfair terms in consumer contracts.[177] However, the Directive was an act of minimum harmonisation only, allowing Member States the enactment of stricter rules than those of the Directive. Moreover, the Directive contained a list of options, allowing for a greater variance of Member States choices, reflecting the compromise in the negotiation of the Directive. This resulted in a divergence across Member States, placing the preferences of Member States and their level of protection in the focus. The liberal intergovernmentalism theory is apt to explain such a development, as the Member States' inclinations remained safeguarded, while an agreement of a certain level of common regulation of consumer protection was present.

Having in mind this and many other examples of slow and inefficient harmonisation due to the unanimity requirement, the Single European Act (SEA)[178] introduced the qualified majority voting system, establishing the possibility for a Member State to be outvoted in the Council. While the liberal intergovernmentalism theory is able to explain the political functioning of the EU up to the enactment of the SEA itself, the representation of each individual Member State's power and preferences in the qualified majority voting system was no longer in line with the main assumptions

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Tatham, 'Devolution and EU policy-shaping: bridging the gap between multi-level governance and liberal intergovernmentalism' (2011) 3 *European Political Science Review* 53.

176 Treaty establishing the European Economic Community [1957].

177 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L95/29.

178 Single European Act (1987) OJ L169/1.

of the theory.

The developments taking place concerning the Tobacco Advertising Directive[179] serve, on the other hand, as an excellent support of the neo-functionalist theory of European integration. As a consequence of the qualified majority voting system, the Directive was enacted despite Germany's opposition. Subsequently Germany submitted a challenge to the Court of Justice, managing to annul the Directive[180] due to the wrong legal basis for the Directive and the lack of EU competence to regulate the area of public health through the qualified majority voting scheme. However, following the Court's instructions[181] in the judgment, a new Tobacco Advertising Directive was enacted,[182] and Germany failed to annul in its second attempt.[183] The neo-functionalist theory, namely the creation of institutions whose activities go beyond what was initially envisaged by their creators, appears best placed to explain the integration process after the SEA.

Finally, the Treaty of Lisbon[184] was the first act of primary EU legislation to contain an explicit attempt at a division of competences between the EU and the Member States, a development that sits rather well with the main assumptions of the multi-level governance theory. It divides the authority over listed areas not territorially, but

179 Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Relating to the Advertising and Sponsorship of Tobacco Products OJ L213/9.

180 Court of Justice Case C-376/98 *Germany v Parliament and Council* [2000] ECLI:EU:C:2000:544. For a further analysis of the *ultra vires* review aspects of the case, see Chapter 2, Section 2.3.

181 Weatherill calls the Court's instructions a 'drafting guide'. S Weatherill, 'The limits of legislative harmonization ten years after *Tobacco Advertising*: how the Court's case law has become a "drafting guide"' (2011) 12(3) *GLJ* 827.

182 Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Relating to the Advertising and Sponsorship of Tobacco Products 2003 OJ L152/16.

183 Court of Justice Case C-380/03 *Germany v Parliament and Council* [2006] ECLI:EU:C:2006:772.

184 Treaty on the European Union (TEU) [2016] OJ C202/13 (consolidated version) and Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/47 (consolidated version).

functionally, through three categories of EU competences – exclusive competences of the EU, shared, and supporting competences.[185] Areas in which the EU has a supporting competence, such as education and sport, offer a clear depiction of the multi-level governance theory – the Member States are the primary regulators of an area; however, the EU may supplement, coordinate or support Member State regulation in order to achieve an optimal result throughout the EU.

Both neo-functionalists and liberal intergovernmentalists may interpret the division of competences in the Lisbon Treaty as a development confirming their respective theories. More particularly, the possibility of expanding EU competences in the area of shared competences may be defined as a clear indication of the spillover effect: the possibility for the EU to assume competence to regulate a certain area, subject to the principles of subsidiarity and proportionality, comes at a point where the interdependence of different areas of regulation will require regulation to be done at the EU level. While the neo-functionalists may have an argument in explaining the expansion of EU competences, the spillover effect lacks the capacity to provide an account of how the division of competences reflects not only the interest-driven accord among Member States, but also the acceptance of the reality created by interest groups and organisations that operate in these areas.[186]

The liberal intergovernmentalists, on the other hand, may find the insertion of the

185 Articles 3-6 TFEU.

186 For an analysis of different areas, such as intellectual property rights, free movement of goods, and environmental protection, see: R A Cichowski, 'Integrating the environment: the European Court and the construction of supranational policy' (1998) 5 *JEPP* 387; P Bouwen and M McCown, 'Lobbying versus litigation: political and legal strategies of interest representation in the European Union' (2007) 14 *JEPP* 422; S Mazey and J Richardson, 'Interest groups and EU policy making' in J Richardson (ed), *European Union: Power and Policy-making* (Routledge 2006).

explicit division of competences in the Treaty text to be a clear reminder that the Member States remain the 'Masters of the Treaty'. The devolution of competences towards the EU level may only happen, according to the theory, as a consequence of the bargaining process between the Member States, and unanimous agreement. However, the argument overlooks the fact that the Treaty articles on the division of competences are subject to well-established principles of conferral, subsidiarity and proportionality, and largely reflect the reality of the areas already regulated by the EU. Conversely, the emphasis on the principle of subsidiarity enforces the prevalence of multi-level governance, focusing on a more inclusive approach towards sub-national state-actors in the process of EU policy- and decision-making.

### 2.2.2. Bridging the gap between the legal and political science scholarship

Having presented the main theories and their relationship to the explanation of judicial politics in the EU, this part will offer a comparison of the terminology and concepts used by the legal and political science scholarship in order to explain the judicialisation of the EU constitution. As mentioned earlier, Shapiro and Stone Sweet noted the reluctance of political scientists to engage in a more in-depth research of the Court of Justice, as it would require an inter-disciplinary approach and more attention to the legal aspects of judicial politics in the EU.[187] On the other hand, legal scholars researching the Court of

[187] Stone Sweet and Shapiro (n 160), 398. A rare and most welcomed exception is a piece by Grimmel, where he criticises the lack of engagement of the political science literature with the legal framework within which judicial politics take place. See A Grimmel, 'Politics in robes?: The

Justice and judicial interactions with the EU have rarely offered an account of the political science literature that might prove useful in the process of analysing and explaining the European judiciary and its role.[188]

It therefore comes as little surprise that one might regard the legal and the political science scholarship on European integration as existing and operating in two parallel universes. These circumstances have created a need to provide a meaningful comparison of the different terms and concepts used by legal and political science scholars, in order to reconcile the two and provide a dictionary of a sort. Also, and more importantly, such a comparison is necessary if we are to reach conclusions on how to use the contributions made by political scientists better to understand the judicial interactions under analysis. While this is certainly not the first contribution to address this divide,[189] it will go beyond mere critique of the political science scholarship,[190] and endorse a more inclusive stance towards the concepts and terminology used by the political science literature in explaining the role of courts in European integration.

In order to avoid the trap of the liberal intergovernmentalist – neo-functionalist debate, this section will draw upon Grimmel's and Conant's arguments on the inherent weakness of those two theories in their attempt to apply the previously-known theories of international relations to European integration more generally, and judicialisation more

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European Court of Justice and the myth of "judicial activism"' Discussion paper, Europa-Kolleg Hamburg, Institute for European Integration, No. 2/11 (2011) 7 <http://www.ssrn.com/abstract=1803156>, accessed on 14 November 2014.

188 The extensive work of Joseph Weiler cited throughout this Chapter is a notable exception.

189 H Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Dordrecht, M Nijhoff 1986); R Dehousse, *The European Court of Justice: The Politics of Judicial Integration* (Macmillan, St Martin's Press 1998).

190 Grimmel (n 187), 5 onwards; Conant (n 160), 46 onwards.

particularly.[191] However, somewhat similarly to Grimmel (who relies on the autonomy of EU law),[192] but differently from Conant (who argues that the explanation of judicialisation is more plausible through the use of domestic terms),[193] this section will address and rely on the multi-level governance theory which has taken into account the idiosyncrasies of the developments at the EU level, leaving behind the theories that explain the EU either through the lenses of international relations or those of the domestic order. It is precisely the recognition of the EU as an entity not belonging to the international/domestic dichotomy that makes the multi-level governance theory capable of providing a more plausible explanation of the judicialisation of the EU.

The process of finding common ground between the two parallel universes – the multi-level governance theory and the legal scholarship on the judicialisation of the EU integration – requires taking a close look at the terminology and explanations used by both strands of literature. Admittedly, one must exercise caution as to the specific perspectives and aims of the two theories before offering a straightforward comparison. In that respect, the main aim of the multi-level governance theory is to explain the realities of governance in the EU more generally. On the other hand, the theory of constitutional pluralism seeks to determine the legal consequences of this process, focusing on the effects it has had on the notion of sovereignty and the changed role of national constitutional law in relation to the supranational sources of law.

In brief, while they regard the process of European integration from different perspectives and with a distinct focus, both theories advocate an approach beyond the

191 Grimmel (n 187), 5; Conant (n 160), 45.

192 Grimmel (n 187), 13.

193 Conant (n 160), 46.

classic domestic – international dichotomy,[194] emphasising the out-datedness of the hierarchical relations between different levels of governance.[195] Moreover, the focus of this section upon the two theories is confined to their conclusions concerning the effect that the process of European integration has had on the sovereignty of the Member States, and their relationship and interactions with the EU level of governance.

The notion of multi-level governance and the concept of constitutional pluralism as developed by Walker[196] use almost identical terms when addressing sovereignty and the division of competences between the EU level and the Member States. More particularly, both theories argue that sovereignty should no longer be regarded through the classic Westphalian prism of exclusivity,[197] but should be reframed to fit the realities of European integration. In particular, it must incorporate the turn to functional sovereignty,[198] where jurisdiction is divided between different (non-hierarchical) levels according to tasks, and not territories (something that Hooghe and Marks refer to as 'Type II governance').[199] This turn is the common intellectual premise of both the theory of multi-level governance, and the idea of constitutional pluralism advocated in the legal scholarship. However, the pluralist theory is useful for offering a framework of checks and balances in the post-nationalist order.[200] It is at this point that the multi-level

194 Krisch, *Beyond Constitutionalism* (n 49), 27; Pollack (n 158) 380.

195 S Picciotto, 'Constitutionalizing Multilevel Governance?' (2008) 6 *ICON* 457, 461; Pollack (n 158) 380.

196 Walker (n 125).

197 ibid., 346.

198 Walker (n 125), 347; Hooghe and Marks (n 170), 237; Chowdury and Wessel (n 171), 340.

199 Hooghe and Marks (n 170), 237.

200 Krisch claims that in order to reconcile the claims of different levels to supremacy, it is necessary to turn to association, which, in his words, 'keeps an equal distance from the ideals of all of them, that refrains from according full control over decisions-through veto rights or otherwise-to either of the competing collectives.' Krisch, *Beyond Constitutionalism* (n 49), 85-86.

governance theory is no longer capable of providing satisfactory vindication as regards where and how different levels of governance in the EU should allocate decision-making.

### 2.2.3. Judicial interactions

It has been shown that, to a certain extent, there is common ground between the legal and political science scholarship in addressing the constitutionalisation of the EU more generally. Nevertheless, it is necessary to look further into the analysis of the importance of judicial interaction on behalf of the political science literature, in order to draw comparisons and useful conclusions as regards the use of such literature in the thesis. The importance of the role of the Court of Justice and the judicialisation of European integration is central to legal scholarship but initially received limited attention from political scientists.

The introduction of the preliminary reference procedure in the judicial architecture of the EU has been described as one of the main reasons for creating an imbalance of powers in the judicial triangle.[201] Its specific nature has been the subject of research of political scientists as well, who tend to focus on the relationship between the EU and national level of judiciary, without acknowledging the difference among ordinary national courts and courts performing constitutional review, therefore omitting to engage with the specific problems pertaining to their different roles.

The above analysed theories of European integration have hardly engaged with the role of the courts as institutions in the process of European integration. More

[201] See Section 1.2. of this Chapter.

particularly, in the course of explaining the integration process, both neo-functionalists and liberal intergovernmentalists have dealt with the executive, legislatures, political parties, interest groups, etc., without according the same attention to courts.[202] It seems that there is a strong divide between law and politics, with the focus of political scientists being placed on the latter, and in this dichotomy, the role of the courts is somehow considered to fall within the legal sphere. As Shapiro and Stone note, the research of courts inherently requires an interdisciplinary approach, as they operate in a 'specialised professional-technical discourse',[203] which represented an inherent discouragement to further and more detailed research on courts by political scientists.

The development of the core EU principles introduced by the case law of the Court of Justice, however, rendered it unavoidable to focus on the political role the Court assumed in the process of the EU integration, and especially in the advancement of the EU's internal market. Alter has usefully described the Court's role by claiming that it 'orchestrated'[204] the transformation of the European legal system, through 'bold legal interpretations'.[205] It is against this backdrop that scholars in political science have directed their research towards the Court of Justice and judicial interactions in the EU.

In the aftermath of the SEA, usually explained in the literature through the use of liberal intergovernmentalist terms,[206] the role of the Court of Justice as the 'motor' of integration brought the neo-functionalist theory back to life, as it explained the

202 Stone Sweet and Shapiro (n 160), 397.

203 ibid., 398.

204 Alter, *Establishing the Supremacy of European Law* (n 156), 1.

205 ibid.

206 A Moravscik, 'Negotiating the Single European Act: national interests and conventional statecraft in the European Community' (1991) 45 *International Organization* 19; W Sandholtz and J Zysman, '1992: recasting the European bargain' (1989) 42 *World Politics* 95.

development of integration beyond what was initially envisaged by the Member States as masters of the Treaties.[207] As a result, much of the literature on judicial politics in the EU relies on the neo-functionalist theory,[208] but, more importantly, the importance of the neo-functionalist – liberal intergovernmentalist debate was diminished.[209] The role of the Court of Justice as the institution furthering the process of European integration beyond the initial mandate of Member States was most commonly explained through the Principal-Agent[210] and the Principal-Trustee relations.[211]

The delegation theory between the Member States and the Court of Justice, has thus in the literature first been regarded through the Principal-Agent relationship.[212] The relationship refers to the principals who hold the constituent power, delegating certain tasks to the agent, for different reasons, whereas agents carry out the tasks determined by

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207 Mattli and Slaughter (n 17), 178. For a detailed neo-functionalist account of the importance of the activities of the European Commission and the Court of Justice beyond the Member States negotiations of the Single European Act, see: K Alter and S Meunier-Aitsahalia, 'Judicial politics in the European Community: European integration and the pathbreaking *Cassis de Dijon* decision' (1994) 26 *Comparative Political Studies* 535.

208 See Burley and Mattli (n 17); Mattli and Slaughter (n 17); Alter and Meunier-Aitsahalia (n 207); A Stone Sweet and J A Caporaso, 'From Free Trade to Supranational Polity: The European Court and Integration' in A Stone Sweet and W Sandholtz (eds), *European integration and supranational governance* (OUP 1998).

209 Alter, *Establishing the Supremacy of European Law* (n 156), 1.

210 Initially introduced and explained by G Garrett, 'International cooperation and institutional choice: the European Community's internal market' (1992) 46 *International Organization* 533; G Garrett, 'The politics of legal integration in the European Union' (1995) 49 *International Organization* 171.

211 See Stone Sweet (n 160).

212 M Pollack, 'Delegation, agency, and agenda setting in the European Community' (1997) 51 *International Organization* 99; K Alter, 'Agents or trustees? International courts in their political context' (2008) 14 *European Journal of International Relations* 33; K Alter, 'Who are the 'Masters of the Treaty'?: European governments and the European Court of Justice' (1998) 52 *International Organization* 121; G Garrett, R D Kelemen and H Schulz, 'The European Court of Justice, national governments, and legal integration in the European Union' (1998) 52 *International Organization* 149; S J Kenney, 'Beyond principals and agents: seeing courts as organizations by comparing referendaires at the European Court of Justice and law clerks at the U.S. Supreme Court' (2000) 33 *Comparative Political Studies* 593; Stone Sweet and Caporaso (n 208); Mattli and Slaughter (n 17).

the principal.[213] While liberal-intergovernmentalists use the Principal-Agent theory to describe the relationship between Member States and the Court of Justice, in which the Court's decision-making is bound by the most powerful Member States,[214] neo-functionalists accord more power to the Court of Justice as an Agent. More particularly, Stone Sweet and Caporaso rightly remind us that while in theory Member States may reverse the Court's rulings by an explicit Treaty amendment, this is not so easy to achieve in practice, which shifts the power balance from the Member States towards the Court.[215]

Going a step further in the analysis of the Court of Justice's position in the EU architecture, Stone Sweet claims that the relationship should be characterised as that of a Principal-Trustee, in which the Court is a trustee, an institution with more freedom from the principal than an agent.[216] Stone Sweet lists several differences between an agent and a trustee, in particular as regards the (lack of) control the principal has over the trustee. First, the Court of Justice can review and annul EU acts, as well as decide on the compatibility of national law with EU law; second, Member States cannot waive the jurisdiction of the Court; and, third, Member States have few, if any, possibilities to restrict or reverse its rulings.[217] However, Dehousse has underlined that Member States have attempted to use the strength of the Court of Justice to work to their advantage – mainly through initiating procedures to put an end to an unwanted expansion of Union

213 Stone Sweet and Caporaso (n 208), 93.

214 Moravcsik (1995) (n 164), 623 onwards.

215 Stone Sweet and Caporaso (n 208), 95.

216 Stone Sweet (n 160), 12.

217 ibid.

competence.[218] Nevertheless, he agrees that the Court has had a unique role in the promotion of European integration,[219] which would certainly be impossible had the Court been significantly constrained by Member States' control in the principal-agent framework.

In regarding the relations between Member States and the Court of Justice, and especially the Court's expansion of EU's influence beyond what was initially agreed upon by Member States, Stone Sweet's principal-trustee theory has certain useful elements. It provides a clear depiction of the balance of powers of the Court of Justice and the national level. Moreover, he is right in pointing out that national constitutional courts act as a restraining element in this respect, being the national actors that (can) resist conforming to the Court's 'expansionist interpretations'.[220] Nonetheless, the theory lacks the necessary nuances involved in recognising and explaining the different types of judicial interactions taking place within the judicial triangle, and how the power of the Court of Justice affects different national courts.

Relying upon Mattli and Slaughter's claims regarding the outdated character of the neo-functionalist – liberal intergovernmentalist debate, it is also necessary to reflect upon the contributions made by the theory of multi-level governance in the area of judicial interactions. This is even more the case since multi-level governance theory goes beyond the state-centred focus in the process of European integration,[221] enabling a more nuanced approach to the research of the particular role of the courts in this process.

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218 Dehousse (n 189), 105. These claims should, however, be taken with a dose of caution, given that the number of cases where the Member States have actually succeeded is very low. For an analysis, see Weatherill (n 181).

219 Dehousse (n 189), 177-178.

220 Stone Sweet (n 160), 32.

221 I Bache and M Flinders (eds), *Multi-Level Governance* (OUP 2004), 78.

Moreover, multi-level governance theory is capable of accommodating the arguments made by Walker[222] claiming we should no longer regard sovereignty as an exclusively territorial claim,[223] but rather as divided across different functions performed by different levels of authority.[224] It is this particular presumption of the multi-level governance theory that allows for a more realistic depiction of judicial politics in the EU. Kelemen and Schmidt[225] have pointed out that the multi-level element of European integration plays an important role in its advancement. In particular, they have emphasised the importance of private actors initiating litigation, national courts using the case law of the Court of Justice to strengthen their position at the national level, and the Court's somewhat blurry position as regards the Member States' courts control over it.

Multi-level governance theory has, in its study of the multitude of levels and stakeholders, provided a useful analysis that might be used in further research of judicial interactions. In researching networks and their accountability, judicial networks and relations were addressed as well. The preliminary reference procedure can, in theory, be explained through non-hierarchical terms as well, in particular as a co-operative relationship between the national and the Union judiciary,[226] creating a network of judicial co-operation with the purpose of a uniform interpretation of Union law

222 Walker (n 125).

223 Chowdhury and Wessel (n 171), 340.

224 ibid., 346.

225 R D Kelemen and S K Schmidt, 'Introduction – the European Court of Justice and legal integration: perpetual momentum?' (2012) 19 *JEPP* 1, 4.

226 C Harlow and R Rawlings, 'Promoting accountability in multi-level governance: a network approach' (2006) European Governance Papers No. C-06-02, 9 <http://edoc.vifapol.de/opus/volltexte/2011/2461/pdf/egp_connex_C_06_02.pdf>, accessed 15 November 2014, 9.

throughout the EU.[227]

## 2.2.4. Concluding remarks

This section has offered two levels of analysis in the political science literature: general overview of the work on the process of European integration and judicialisation as a part of the integration process; and a more focused discussion on judicial interactions between EU and national courts. The usefulness of the literature under analysis for this thesis has proved to follow an analogous picture – the more general theories on European integration may well be helpful for understanding and describing this process, whereas the more focused the literature on judicial interactions is less useful due to the lack of nuance necessary to accommodate a comprehensive legal analysis, principally a more detailed engagement with constitutional courts as specific actors in the European judicial space.

The contribution of the multi-level governance theory in explaining the interactions between different levels of governance in the EU has proved particularly useful for reflecting upon the division of competences in the EU more generally, and the effect it has on the classical understanding of sovereignty. The non-hierarchical approach to the relations between the institutions of the EU and the Member States, as well as private stakeholders, is apt to accommodate the decision-making trends that go beyond the explanations established in the theories of domestic or international politics. Moreover, in its explanation of the position of sovereignty, it goes hand-in-hand with the

[227] F Mancini, 'The Making of a Constitution for Europe' (1989) 26 *CMLRev* 595, 605–606.

theory of constitutional pluralism, as developed by Walker. However, multi-level governance theory does not offer a normative assessment of the current setting of the EU, nor does it provide for a preferable manner by which to allocate decision-making, thus leading us to the trap of falling back into monism.

Furthermore, the Principal-Trustee theory advanced by Stone Sweet contributes to explaining the position of the Court of Justice in respect of its case law advancing integration beyond what was initially agreed upon by Member States. Such a conclusion draws on the assumptions of the neo-functionalist theory to some extent. However, the theory is not able to address the difference between Member State institutions, and in particular the difference between ordinary national courts and national courts with constitutional jurisdiction.

When it comes to the specific role of the Court of Justice and judicial interactions in the EU, multi-level governance theory offers some interesting and useful insights. The study of networks and their operation in a non-hierarchical setting may prove very useful in analysing the judicial networks in the EU, their interactions, and how possible normative changes would be implemented through their auspices. As the Court of Justice does not act as a superior institution in the functioning of these networks, learning from those interactions may lead us to new ideas on how to improve their interactions in the preliminary reference procedure in particular, and more generally, in the interpretation of general principles of EU law and national constitutional principles.

In conclusion, the political science scholarship presented in this section largely fails to engage with the distinction between different judicial bodies at the national level, and the effect the preliminary reference procedure has had on them. Relying mainly on

the multi-level governance theory, its contribution will be used for understanding of the decision-making and (non-hierarchical) interactions among different institutions and levels of governance.

## 3. Research questions

The literature on the precise nature of the EU and its legal order has not reduced controversies and disagreements. Furthermore, the literature analysing judicial interactions in the EU has been mostly descriptive, thus lacking the connection to the theories analysing the postnational environment in which they occur. Against this background, any adequate and precise analysis of the jurisprudence on constitutional conflict must be preceded by an in-depth exploration of the context in which it has developed. Subscribing to the theory of constitutional pluralism, the present project will explore its descriptive and normative value as a legal theory of EU integration through a detailed analysis of the relationships in the European judicial space.[228] In doing so, the present project will answer two main research questions:

1. Does the theory of constitutional pluralism explain the application of the principle of primacy of EU law in the jurisprudence of constitutional conflict by EU and national courts?

[228] The term European judicial space, for the purposes of this work, will be used to refer to national courts performing constitutional interpretation and review and the Court of Justice. See further, Section 4.2. below.

2. Can the theory of constitutional pluralism be used to guide EU and national courts as to the desirable application of the principle of primacy of EU law in the jurisprudence of constitutional conflict?

The desirable application of primacy, the normative goal of constitutional pluralism, is characterised in two ways: first, institutionally, it seeks to achieve the avoidance and/or resolution of constitutional conflict in the European Union. Second, substantively, it aims to uphold value pluralism, where regardless of which institution in a certain situation has the final say, the balancing of values will strive to protect a wide array of both EU and national concerns.[229]

As was mentioned in the literature review, research of this jurisprudence has so far been done either following the matrix of the Court of Justice's case law[230] or following a comparative approach.[231] This project will take a targeted approach by focusing on specific topics where constitutional conflict took place: (i) *ultra vires* review (Chapter 2); (ii) identity review (Chapter 3); and (iii) fundamental rights review (Chapter 4). The conclusions of each chapter will conclude by addressing the research questions in their respective contexts.

These areas have been selected based on their proneness to generate clashes in interpretations provided by the Court of Justice and national constitutional courts. Certainly, this categorisation stems from the German jurisprudence on matters of

229 Chapter 1 explores these two normative goals further.

230 For example, Claes, The National Courts' Mandate in the European Constitution (n 13); Alter, Establishing the Supremacy of European Law (n 156).

231 For example, de Visser, *Constitutional Review in Europe* (n 141); Slaughter, Stone Sweet and Weiler (n 137).

European integration, and their response on the EU level. However, the three heads of review are more broadly connected to the main *material* components of constitutionalism:[232] the division of competences in a polity, the constitutional core reflecting the main values of a polity, and the protection of fundamental rights. Accordingly, they also reflect the main roles of constitutional adjudication, thus resulting in collisions between the courts under analysis.

*Ultra vires* review addresses the more structural view of the relationship between the EU and the national level, and may be seen as representing the underlying struggle in the relationship between the Court of Justice and national courts with constitutional jurisdiction. *Ultra vires* review is also content-neutral, as it can result in both more and less integration.

Furthermore, the concept of national identity is inherently different in every Member State and works as a dividing element in the evolution of EU and national constitutional law. The national identity clause, first introduced in the Maastricht Treaty, and further expanded in the Lisbon Treaty, served as a basis for national courts performing constitutional review to place more emphasis on their constitution. As a result, identity review has become a prominent area for constitutional courts to preserve its fundamental role as guardians of the constitutional core untouchable by European integration.

Finally, the protection of fundamental rights has been one of the first areas of constitutional conflict between the Court of Justice and national courts performing constitutional review. One of the basic reasons behind the establishment of constitutional

[232] See Section 2.1.1.

review was precisely the protection of fundamental rights of minorities against the 'majority of the day',[233] which is one of the reasons why national constitutional courts attempted to reserve this role for themselves in the face of the requirements of the principle of primacy. While fundamental rights protection has been subject of an ever-growing unification in the European Union, most recently by the elevation of the Charter of Fundamental Rights to the status of primary law, tensions and constitutional discord continues to take place concerning the appropriate level of protection of fundamental rights.

## 4. Methodology and scope

This section presents the methodology used for answering the research questions. First, the choice of sources will be explained, and second, the choice of the Member State courts under analysis. I will also underline some limitations of the study.

### 4.1. Sources

In order to capture the nuances of judicial interactions between the national and the EU level beyond the existing contributions in the legal literature, I have combined both theoretical and empirical sources.

The first level of analysis has been theoretical, through the use of secondary sources from the legal and political science literature to establish the doctrinal groundwork for the remainder of the analysis.

[233] Claes, The National Courts' Mandate in the European Constitution (n 13), 392.

The second level of analysis used the following primary legal sources: (1) judgments of the Court of Justice and courts with constitutional jurisdiction; and (2) national reports composed by national constitutional courts for the Conference of European Constitutional Courts.[234] The advantage of the reports is that all the courts under analysis answered the same questionnaires, thereby ensuring that all the responses covered the same issues. In addition, the reports shed additional light on how national courts understand and regard the issues surrounding the relationship between national and EU law, of particular relevance for constitutional pluralism.

However, differently from previous studies, the present analysis looks not only at the outcome of individual judgments or conclusions found in the reports, but also at the vocabulary used in those documents. The vocabulary of *obiter dicta* often paints a much more detailed image of how the courts under analysis understand and conceive important points concerning the relationships in the European judicial space, but also more generally the EU's constitutional constellation.

The third level of analysis aims to triangulate the findings from the previous analysis, and included semi-structured interviews conducted with Judges and Advocates General of the Court of Justice. The interviews were conducted as part of the research visit to the Court of Justice between February and May 2015, with 7 Judges and Advocates General. The questions in the interviews broadly corresponded to the questionnaire of the 26th Congress of Constitutional Courts as part of the Conference of European Constitutional Courts, to ensure the comparability of results. To safeguard the anonymity of the interviewees, they will only be referred to as 'Interviewee 1',

234 All reports are available at <http://www.confeuconstco.org/>, accessed 4 November 2015.

'Interviewee 2', etc. In addition, I have analysed public statements of all the judicial actors involved, by way of academic writings, talks, seminars and public interviews.

While these two sources do not represent the official stance of the institution(s) for which the interviewees work, Grainger pointed out, in relation to the Court of Justice in particular, that it is not a homogeneous actor, but is rather a 'complex social entity'.[235] Similarly, Weiler stated that any analysis of the Court of Justice cannot be complete if the Court is regarded simply as a 'homogeneous institution.'[236] Consequently, the personal opinions of the decision-makers in the Court of Justice and other national constitutional courts bear significance as regards the work and position of their institution(s). The Irish Supreme Court similarly confirmed the influence of the jurisprudence of both the Court of Justice and the Court in Strasbourg on the case law of the Supreme Court, underlining how inevitable this is, given the work experience of current Supreme Court judges as judges in European courts.[237] The study of the mentioned sources resulted in a finding of a widespread use of several common expressions[238] that are used by both national courts with constitutional jurisdiction, and the members of the Court of Justice.

Finally, the limitation of this methodology lies in the problem of comparing identical expressions that come from different legal systems and might have different contextual meaning. This certainly holds true in comparing, for example, the notion of 'openness to European law' in the jurisprudence of the *Bundesverfassungsgericht* and a

235 M-P Grainger, 'The future of Europe: judicial interference and preferences' (2005) 3 *Comparative European Politics* 155, 175.

236 J H H Weiler, 'The Reform of European Constitutionalism' (1997) 35 *JCMS* 95, 106.

237 National Report – The Supreme Court of Ireland (2014), 3.

238 I will refer to them as keywords throughout the text.

statement of a Judge or Advocate General at the Court of Justice given in the anonymous interview. For this purpose, particular care was taken to ensure that keywords were only included in the analysis when used in the same context. Where necessary, additional doctrinal support was consulted when use was made of vocabulary from national constitutional jurisprudence, or the jurisprudence of the Court of Justice.

## 4.2. Scope of research

In order to offer a comprehensive answer to the research questions presented in Section 3 of this Chapter, the present work will address them by topic rather than per Member State. There are two main reasons behind this choice. First, rather than scattering different topics across Member States, a targeted analysis will provide a richer illustration of the relevant area of constitutional review to make more general conclusions on the jurisprudence of constitutional conflict throughout the EU. Second, such an approach will give a clearer idea not only on the relationship between national constitutional jurisprudence and EU law, but also a more comparative analysis of the differences between Member States, and how they influence each other.

The present thesis analysed the interactions between the Court of Justice and national courts performing constitutional interpretation and review. For the purposes of the present work, the definition of constitutional interpretation will be

> [the] process of constructing, establishing the meaning of and explaining a country's written constitution (if there is one), other constitutional texts and other (unwritten) norms and principles that are of constitutional quality.[239]

[239] de Visser, *Constitutional Review in Europe* (n 141), 2.

Constitutional review will refer to what de Visser calls 'constitutional review in a narrow sense':

> [The] actor conducting the assessment of constitutional conformity is empowered to attach consequences to a finding that the acts of other State organs do not comport with the relevant constitutional yardsticks; and is thus legally able to impose its position on a constitutional issue on other State organs.[240]

However, while de Visser's definition is potentially inclusive of any type of State institution,[241] the present work will look exclusively at judicial bodies on top of the national hierarchy with the power of constitutional interpretation and review, including countries with both centralised and decentralised constitutional review. The centralised model of constitutional review presupposes a specialised constitutional court whose jurisdiction is limited to issues of constitutional interpretation and review (for example, Austria), while a decentralised model enables all courts in the national judiciary to perform constitutional review, and the supreme court on top of the national hierarchy has the ultimate say.[242]

In the remainder of this section, I will present the position and powers of each of the national courts under analysis. Second, I will discuss the four countries that are excluded from the analysis in more detail – Finland, Greece, the Netherlands and Sweden – with specific reference to the reasons for their exclusion.

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240 ibid.

241 ibid.

242 For a more detailed overview of the two models, see V Ferreres Comella, 'The European model of constitutional review of legislation: Toward decentralization?'(2004) 3(2) *ICON* 461. See also, de Visser, *Constitutional Review in Europe* (n 141), 54.

***Table 1*** *National courts under analysis*

| Court | System of constitutional review | Abstract and/or concrete review | *Ex ante* and/or *ex post* review |
|---|---|---|---|
| Austrian Constitutional Court (*Verfassungsgerichtshof*) | Centralised | Both | Both |
| Constitutional Court of the Kingdom of Belgium (*Cour constitutionnelle*) | Centralised | Both | Both |
| Bulgarian Constitutional Court (*Конституционният съд*) | Centralised | Abstract | *Ex post*[243] |
| Croatian Constitutional Court (*Ustavni Sud*) | Centralised | Both | *Ex post* |
| Cyprus (*Ανώτατο Δικαστήριο*) | Decentralised | Both | *Ex post* |
| Czech Constitutional Court (*Ústavní Soud*) | Centralised | Both | *Ex post* |
| Danish Supreme Court (*Højesteret*) | Decentralised | Concrete | *Ex post* |
| Estonian Supreme Court (*Riigikohus*) | Mixed system[244] | Both | *Ex post* |
| French Constitutional Council (*Conseil constitutionnel*) | Centralised | Both | Both[245] |
| German Federal Constitutional Court (*Bundesverfassungsgericht*) | Centralised | Both | Both |
| Hungarian Constitutional Court (*Magyarország Alkotmánybírósága*) | Centralised | Both | Both |

243 *Ex ante* review is only possible for treaties pending ratification.

244 A constitutional chamber forms part of the decentralised Supreme Court.

245 *Ex ante* review by the Constitutional Council is mandatory for the basic laws and regulations of Houses of Parliament, as well as international treaties prior to their ratification, while it is optional for ordinary legislation. *Ex post* review was been introduced by the constitutional amendment in 2008, and can be initiated by way of a preliminary ruling on the compatibility of a valid piece of legislation with constitutionally guaranteed rights and freedoms.

| Court | System of constitutional review | Abstract and/or concrete review | *Ex ante* and/or *ex post* review |
|---|---|---|---|
| Irish Supreme Court (*Cúirt Uachtarach na hÉireann*) | Decentralised | Both | Both |
| Italian Constitutional Court (*Corte Costituzionale*) | Centralised | Both | *Ex post* |
| Latvian Constitutional Court (*Satversmes tiesa*) | Centralised | Both | Both |
| Lithuanian Constitutional Court (*Konstitucinis Teismas*) | Centralised | Abstract | *Ex post* |
| Luxembourgish Constitutional Court (*Cour constitutionnelle*) | Centralised | Concrete | *Ex post* |
| The Constitutional Court of Malta | Mixed system[246] | Concrete | *Ex post* |
| Polish Constitutional Tribunal (*Trybunał Konstytucyjny*) | Centralised | Both | Both |
| Portuguese Constitutional Court (*Tribunal Constitucional*) | Centralised | Both | Both |
| The Constitutional Court of Romania (*Curtea Constituţională*) | Centralised | Both | Both |
| The Constitutional Court of the Slovak Republic (*Ústavný súd*) | Centralised | Both | *Ex post* |
| Slovenian Constitutional Court (*Ustavno sodišče*) | Centralised | Both | Both[247] |
| Spanish Constitutional Tribunal (*Tribunal* | Centralised | Both | Both[248] |

246 It operates as a separate court specialised for issues of constitutional interpretation and constitutional review, but it is also the superior court on top of the Maltese judiciary hearing appeals connected to constitutional interpretation and review.

247 The only *ex ante* review the Constitutional Court can undertake is that of treaties pending ratification.

248 *Ex ante* review is reserved solely for Statutes of Autonomy, prior to their receipt of the royal assent.

| Court | System of constitutional review | Abstract and/or concrete review | *Ex ante* and/or *ex post* review |
|---|---|---|---|
| *Constitucional*) | | | |

### 4.2.1. United Kingdom

The United Kingdom Supreme Court will be included in the analysis as an example of a decentralised system of constitutional review. However, the situation in the UK is more nuanced when it comes to powers of courts to review legislation, thus warranting some further attention to its organisation. The principle of parliamentary sovereignty emphasizes the exclusive power of the Parliament to enact legislation, and gives the Parliament the power to repeal any previous legislation, be it expressly or by implied repeal.[249] In this reading of the principle, all statutes are considered equal and courts are not allowed to review them. Nevertheless, Lord Justice Laws in his decision in *Thoburn*[250] made a distinction between ordinary and constitutional statutes. The latter, he claims, have a higher level of entrenchment and may not be repealed by implication. Constitutional statutes are, among others, the European Communities Act 1972 and the Human Rights Act 1998.

This exception is relevant for the position of constitutional review in the UK, as Section 4 of the Human Rights Act allows the courts to review all acts of Parliament against its standards, and to declare their incompatibility. The Parliament has so far

249 J Laws, 'Constitutional guarantees' (2008) 29(1) *Statute Law Review* 1, 3.

250 United Kingdom High Court Case *Thoburn* [2002] EWHC 195 (Admin), [62]-[63].

repealed all the statutes where the courts found an incompatibility[251] but the one concerning the prisoners voting rights,[252] resulting in a new role for judicial review in the UK. In addition, the courts have also been found torn between the requirements of EU law and national law. In the controversial *Factortame*[253] decision, the House of Lords granted interim relief in relation to an act of Parliament, relying on the response received by the Court of Justice,[254] creating a precedent for constitutional review.[255]

Finally, the role of the recently established Supreme Court, in opposition to a clearly defined political *ex ante* review of legislation as can be found in the Netherlands and Finland,[256] holds additional importance for including it in the analysis.[257] Malleson presents an array of opinions on the role the Supreme Court might assume, and concludes on a wide consensus for a role that is more actively policing the boundaries of Parliament action.[258] It can therefore be concluded that the UK Supreme Court can be regarded as a court with the competence to perform constitutional review, albeit to a limited extent,[259]

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251 K Malleson, 'The evolving role of the Supreme Court' (2011) *Public Law* 754, 760.

252 House of Lords and House of Commons Joint Committee on Human Rights, 'Human Rights Judgments' (2015), <https://www.publications.parliament.uk/pa/jt201415/jtselect/jtrights/130/130.pdf>, accessed on 20 September 2016, 19.

253 United Kingdom House of Lords Case *Factortame* (No 2) [1991] 1 AC 603.

254 Court of Justice Case C-213/98 *Factortame* [1990] ECLI:EU:C:1990:257.

255 Political and Constitutional Reform Committee of the House of Commons, 'Constitutional role of the judiciary if there were a codified constitution' (2014), <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpolcon/802/802.pdf>, accessed on 18 September 2016, 22.

256 ibid., 21.

257 See de Visser, *Constitutional Review in Europe* (n 141), 83-86.

258 Malleson (n 251), 763.

259 See Lord Neuberger's response to the Political and Constitutional Reform Committee of the House of Commons (n 256), 24. For a comprehensive analysis of the influence that the introduction of the Human Rights Act has had on constitutional review, and an argument supporting the existence of constitutional review in the UK, see Malleson (n 251); A Kavanagh, *Constitutional Review under the Human Rights Act* (CUP 2009).

thus warranting its inclusion in the analysis.[260] The position of the Supreme Court is additionally relevant due to its interpretations of the British constitution, which place it in interinstitutional dialogue with the Court of Justice.

### 4.2.2. Excluded Member States: Finland, Greece, the Netherlands and Sweden

These four countries are difficult to include in the analysis as none of the them has a permanent court performing constitutional interpretation and review of legislative acts against the constitution. The Greek system of constitutional review may be one of the most complicated in the EU, where no single court has the status of a centralised constitutional court. However, since 1897, Greek courts have regularly checked the constitutionality of laws, and the Constitution explicitly empowered them to do so since 1927.[261] In addition, Greece has three supreme courts (the Council of State, the Supreme Civil Court and the Auditor's Court), who are at the top of the judicial hierarchy in their specific areas of law. Moreover, Greece has a special, non-permanent Special Supreme Court (*Ανώτατο Ειδικό Δικαστήριο*), which has the power to annul an entire piece of legislation, as well as settle disputes that usually fall into the jurisdiction of a centralised constitutional court, such as competence disputes. However, since it is non-permanent,

260 The United Kingdom was included in the analysis regardless of the subsequent decision of the British voters to leave the European Union. This was done primarily as the UK Supreme Court has been part of the European judicial space, contributing to the development of the relationship between UK and EU constitutional law, and will continue to do so until the final exit agreement between the UK and the EU. The decision of the UK to leave the EU does not do away with the role of the Supreme Court in relation to EU law, nor would the analysis be complete had it been excluded.

261 A Kaltsa, 'The review of constitutionality of laws in Greece' (1998) 4(3) *EPL* 292, 293.

and is only set up in exceptional situations where the case law of the three supreme courts is divergent, there is no single judicial institution that may come into conflict with the Court of Justice.

Sweden's Supreme Court and Supreme Administrative Court combine to form a Council that performs a non-binding review of legislative drafts, whereas Finland's draft legislation is reviewed by the Constitutional Committee of the Parliament.[262] In the Netherlands, judicial constitutional review is prohibited by the Constitution,[263] and is instead performed by the Council of State (*Raad van State*), an independent advisor to the government and Parliament, and the Dutch Senate. Such a situation removes the point of comparison for these three Member States, as there is no national jurisdiction performing constitutional review against the Constitution.[264] Consequently, no judicial interactions are taking place in the context of a conflict of constitutional interpretation with the interpretation of EU law.

The status of parliamentary sovereignty in the UK and in the Netherlands[265] prima facie suggests that both jurisdictions should be excluded from analysis. However, at closer inspection, we find that the principle is interpreted and applied differently in both jurisdictions, leading to the conclusion that the UK's Supreme Court does warrant inclusion. First, the Dutch Constitution prohibits constitutional review by the courts

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262 F Mayer, 'The European Constitution and the courts adjudicating European constitutional law in a multilevel system' (2003) Jean Monnet Working Paper 9/03 1, 4.

263 Article 120 of the Constitution, <http://www.parliament.am/library/sahmanadrutyunner/niderland.pdf>, accessed on 17 September 2016. The prohibition includes both *ex ante* and *ex post* review, as well as substantive and procedural review. See G van der Schyff, 'Constitutional review by the judiciary in the Netherlands: a bridge too far?' (2010) 11 *GLJ* 175, 277.

264 Claes, The National Courts' Mandate in the European Constitution (n 13), 253-254.

265 For a comparative analysis of the two systems, see G Yein Ng, 'Judicialisation and the end of Parliamentary Supremacy: shifting paradigms in the protection of the rule of law and human rights in the UK, France and the Netherlands' (2014) 3 *Global Journal of Comparative Law* 50.

against the Constitution, but allows the Courts to review acts of Parliament against treaty law.[266] This means that courts are allowed to appraise acts of Parliament solely in relation to 'external' sources of law, and not the Constitution.[267] Substantively, therefore, it is almost impossible for Dutch courts to find themselves in conflict with the Court of Justice, as it is EU law (among other sources of treaty law), and not national constitutional law, that is the standard of review envisaged in Article 94 of the Dutch Constitution. This addition removes the possibility to analyse judicial interactions, as there is no supreme jurisdiction in the Netherlands able to interpret the Constitution contrary to EU law. Finally, given the powers of constitutional review of the Dutch Council of State and the Dutch Senate, both non-judicial bodies, the Supreme Court of Netherlands was excluded from the analysis.[268]

## 4.3. Limitations

The analysis set out in the remainder of this research is subject to two main limitations. First, by focusing exclusively on the Court of Justice and national courts performing constitutional interpretation and review, the project fails to capture the contributions of other institutions on both the EU and the national level, as well as the influence of national constitutional structures on the object of study. The project has therefore not

266 Article 94 of the Dutch Constitution: Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons. See also van der Schyff (n 263), 280.

267 As a result of the monist approach to the incorporation of international law, the Dutch courts have a peculiar role in interpreting directly applicable international law and using it as a standard of review against national statutes. Yein Ng (n 265), 88.

268 Yein Ng also concludes that the Netherlands, in comparison to the UK and France, has the weakest form of judicial review. Yein Ng (n 265), 93.

avoided the criticism directed toward court-centred research,[269] which is particularly present in accounts of constitutional pluralism.[270] Whenever possible therefore, I will refer to the national constitutional setting and how it has influenced a specific development through the judicial triangle, as explained in Section 1.2. of this Chapter.[271]

However, there are three reasons for attention to be confined to the courts under analysis. First, as the literature review has shown, and as will be further explored in Chapter 2, Section 2, the Court of Justice has been the dominant institution to expand the self-referential system of the Treaties, and has consequently attracted considerable attention not only on itself, but also on the judicial branch more generally. Second, and relatedly, the prominence of judicialisation as the dominant method of constitutionalisation of EU law has placed most constitutional conflicts in the judicial arena. In that respect, studying constitutional conflict in the EU is inherently linked to studying courts. Finally, I argue there is still more to learn from exploring the courts and their relationship in the EU from new perspectives.

The second limitation of the study is the exclusion of the European Court of Human Rights (ECtHR) from the analysis. There are three reasons for this exclusion. First, the relationship between the ECtHR and national courts performing constitutional review is one of a clear hierarchy, and has therefore not significantly influenced the position of constitutional courts in their national constitutional constellation. The

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269 J Komárek, 'Institutional dimension of constitutional pluralism' (2010) Eric Stein Working Paper 3/2010, <https://csesp.files.wordpress.com/2015/05/eswp-2010-03-komarek.pdf>, accessed on 4 July 2017, 4-5.

270 Walker (n 128), 336.

271 For example, when analysing the jurisprudence of the Danish Supreme Court in relation to *ultra vires* review, the role and influence of the Danish parliament was explicitly addressed, due to the strong principle of judicial self-restraint to the legislature in Denmark. See Chapter 2, Section 3.2.2.

relationship between the Court of Justice and the ECtHR is more complicated, but it has not (yet) led to instances of disagreement that would contribute to the existing jurisprudence of constitutional conflict between the national level and the EU. For matters of analytical and normative precision, the theoretical framework presented in Chapter 1 cannot be used as a Procrustean bed to accommodate these conceptually and structurally different relationships. The second reason for the exclusion of the ECtHR is its reduced influence within the EU legal order since the adoption of the Charter of Fundamental Rights and the activity of the Court of Justice in the interpretation of its scope. Relatedly, the third reason for exclusion is the rejection of EU's accession to the ECHR by the Court of Justice,[272] which would otherwise inherently include the ECtHR into the pluralist network of judicial interactions in the European Union.

## 5. Outline of the thesis

In this Introduction, I have presented the problems that primacy of EU law more generally, and the introduction of the preliminary reference procedure more specifically, caused to national judicial hierarchies. I have also analysed how the legal and political science literature addressed these issues, and offered research questions to fill the existing gaps from the perspective of constitutional pluralism. In what follows, Chapter 1 will present the theoretical framework of this thesis, and provide an empirical analysis of its plausibility. Chapters 2 to 4 analyse in more detail the jurisprudence of specific areas of constitutional review,[273] with the aim of capturing the nuances of the relationships

[272] Court of Justice Opinion 2/13 [2014] ECLI:EU:C:2014:2454.

[273] *Ultra vires* review, identity review and fundamental rights review.

under study, and make meaningful conclusions concerning the research questions. The conclusion will summarise the findings and offer final remarks concerning the research questions.

# CHAPTER 1

# THEORETICAL FRAMEWORK

## 1. Introduction

The theory of constitutional pluralism advanced by MacCormick[1] and Walker[2] has been presented and analysed in the Introduction.[3] In short, the EU's constitutional setup is comprised of multiple constitutional sites of discourse and authority;[4] the mutual recognition and respect between these multiple sites of constitutional authority is 'the only acceptable ethic of political responsibility for the new Europe';[5] and constitutional pluralism revolves around the notion of incommensurability of different claims to authority.[6] The theory's premise is that the question of who is the final arbiter among these courts is moot. Equally, doctrines of direct effect and primacy of EU law have significantly changed the position of constitutional law in Member States, thereby

1 N MacCormick, 'The Maastricht Urteil: Sovereignty Now' (1995) 1 *ELJ* 259; N MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (OUP 1999).

2 N Walker, 'The Idea of Constitutional Pluralism' (2002) 65(3) *MLR* 317.

3 Introduction, Section 2.1.2.

4 Walker (n 2), 337.

5 ibid. Similarly, Maduro stresses the importance of the discursive element between different sites of constitutional authority, who then jointly and coherently strive to create the shared European legal space. Maduro, 'Contrapunctual law: Europe's constitutional pluralism in action' in N Walker (ed), *Sovereignty in Transition* (Hart Publishing 2003), 513-514, 518.

6 Walker (n 2), 338. See also, N Walker, 'Constitutional Pluralism Revisited' (2016) 22(3) ELJ 333, 333-334; K Tuori, European Constitutionalism (CUP 2015), 355.

blurring the lines between national and supranational law.[7]

The classic theories denying sovereign features to polities beyond the state can, in my view, no longer accommodate and explain the legal nature of European integration and the EU's legal system,[8] nor its relationship to national law.[9] This inability results from the problem of using and translating state-centred constitutionalist terms with the aim of explaining and legitimising non-state settings, such as the EU. As Walker explains it:

> Just because the 'state constitutionalism' is the default determinant, and because the destination language of 'non-state constitutionalism' is under-developed, there is a danger that both scholars and actors in the integration process presume an isomorphism between the EU and their respective national polities. [10]

Therefore, we should not be judging the EU and its institutions against the 'state'

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7 J Shaw, 'Process and Constitutional Discourse in the European Union' (2000) 27 *J of Law & Soc* 4, 8. See also Czech *Ústavní Soud* Case Pl. ÚS 50/04 *Sugar Quotas III*, Judgment of 8 March 2006, <http://www.usoud.cz/en/decisions/20060308-pl-us-5004-sugar-quotas-iii-1/>, accessed 11 April 2017. '[…] at present time Community law radiates into the Czech Republic constitutional order, if it applied in a field of law related to Community law.', [VI.A-2].

8 Shaw (n 7), 21.

9 The Polish *Trybunał Konstytucyjny* recognised this important momentum in its decision on the Accession Treaty:

> The concept and model of European law created a new situation, wherein, within each Member State, autonomous legal orders co-exist and are simultaneously operative. Their interaction may not be completely described by the traditional concepts of monism and dualism regarding the relationship between domestic law and international law.

Polish *Trybunał Konstytucyjny* Case K 18/04 *Accession Treaty*, Judgment of 11 May 2005, <http://trybunal.gov.pl/fileadmin/content/omowienia/K_18_04_GB.pdf>, accessed 9 March 2016, [12]. See also, Czech *Ústavní Soud* Case Pl. ÚS 19/08 *Lisbon Treaty I*, Judgment of 26 November 2008, <http://www.usoud.cz/en/decisions/20081126-pl-us-1908-treaty-of-lisbon-i-1/>, accessed 15 April 2017, [101], [104]-[105].

10 N Walker, 'Late Sovereignty in the European Union' in Walker (n 5), 40. See also: Shaw (n 7), 20; R Dehousse, 'Beyond Representative Democracy: Constitutionalism in a Polycentric Polity' in J H H Weiler and M Wind (eds), *European Constitutionalism Beyond the State* (CUP 2003), 136; N Krisch, *Beyond Constitutionalism. The Pluralist Structure of Postnational Law* (OUP 2010), 35 onwards. In the political science literature, see also I Bache and M Flinders (eds), *Multi-Level Governance* (OUP 2004), 78.

vocabulary and standards, but should regard it as having its own, idiosyncratic nature.[11]

Furthermore, the decisive determinants for defining and differentiating among diverse legal systems should no longer be based on spatial boundaries,[12] but, instead, on an idea that the EU and national legal orders are inherently overlapping within the same geographical space.[13] Consequently, the reading of interactions between the national and the EU legal system should not be conducted in hierarchical, but rather in heterarchical terms.[14] Such an understanding does not disregard the existence of hierarchy in national constitutional settings, but emphasises heterarchy as a framework for the interaction of a plurality of constitutional orders co-existing and claiming sovereignty in the same geographical space. Heterarchy can be defined as 'the relation of elements to one another when they are unranked or when they possess the potential for being ranked in a number of different ways.'[15] Understood in this sense, heterarchy adequately captures the

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11 The same was underlined by Siniša Rodin, Judge at the Court of Justice, in a talk at the Bingham Centre in London, on 2 November 2015. He put forward the argument that the criticism addressed to the Court of Justice should be confined to those internal characteristics of the Court – not in comparison to a preferred, ideal type of a court, or even in comparison to a certain national constitutional or supreme court, but having in mind the specific context in which it operates as an institution of the EU. In the same vein, see also Czech *Ústavní Soud* Case Pl. ÚS 29/09 *Lisbon Treaty II*, Judgment of 3 November 2009, <http://www.usoud.cz/en/decisions/20091103-pl-us-2909-treaty-of-lisbon-ii-1/>, accessed 16 March 2016, [137]-[140].

12 Shaw (n 7), 7. See also I Pernice, 'Introduction: Achievements and Challenges – The European Union, its Constitutional Courts and the Perspectives after Lisbon' in J M Beneyto and I Pernice (eds) *Europe's constitutional challenges in the light of the recent case law of national constitutional courts – Lisbon and beyond* (Nomos 2011), 9, 10. In the political science literature, see L Hooghe and G Marks, 'Unraveling the Central State, but How? Types of Multi-Level Governance' (2003) 97 *American Political Science Review* 233, 237; N Chowdhury and R A Wessel, 'Conceptualising Multilevel Regulation in the EU: A Legal Translation of Multilevel Governance?' (2012) 18 *ELJ* 335, 340.

13 W Twining, *Globalization & Legal Theory* (Butterworths 2000), 83. See also M de Visser, *Constitutional Review in Europe. A comparative analysis* (Hart Publishing 2014), 3; J H H Weiler, 'Journey to an unknown destination: A retrospective and prospective of the European Court of Justice in the arena of political integration' (1993) 31 (4) *JCMS* 417, 422.

14 Krisch (n 10), 69.

15 C L Crumley, 'Heterarchy and the analysis of complex societies' (1995) 6 *Archaeological Papers of the American Anthropological Association*, 1, 3.

relations between different units claiming authority without predetermining in advance the relationships within the plurality of unities.

Such an understanding waters down the importance of the competition for the ultimate judicial authority in the EU,[16] because their interactions are taking place in a setting of mutual respect and are based on the principle of sincere cooperation.[17] The constitutional jurisdictions are ultimate interpreters and arbiters in their respective areas of jurisdiction. Understood in this sense, constitutional pluralism has the aim of overcoming 'the almost unconscious assumption of hierarchy-as-order'[18] that I find to be an inherent fallacy of monist views on the EU.[19]

In order to resolve clashes in interpretation, the division of competences should be addressed through functional, rather than territorial criteria.[20] Due to these developments, the post-national constellation seems best fit to explain the legal nature of European integration, as it places an emphasis on the de-territorialisation of law[21] that took place with the transfer of certain competences to the EU level, thus ending the territorial exclusivity of Member States. Analogously, possible clashes between national and EU constitutional orders should be resolved by recourse to the principle of sincere cooperation based on mutual respect.

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16 A Stone Sweet, 'A cosmopolitan legal order: Constitutional pluralism and rights adjudication in Europe' (2012) 1 (1) *Global Constitutionalism* 53, 55.

17 Different versions of the same principle are also in place at the national level. For an analysis of the principle of friendliness towards European integration in constitutional jurisprudence of Member States, see Section 3 below, and in particular n 70. On this point, see also de Visser (n 13), 3, fn 14.

18 Crumley (n 15), 3.

19 As discussed in Introduction, Section 3.1.1.

20 Walker (n 2), 346.

21 H Lindahl, 'A-Legality: Postnationalism and the Question of Legal Boundaries' (2010) 73 *MLR* 30, 30.

The critique of the theory has been vocal, in particular concerning its approach to sovereignty, its democratic credentials and the plausibility of its normative claims.[22] This Chapter has the aim of addressing a recent strand of critique to the theory, revolving around the growing number of national challenges to the principle of primacy.[23] The underlying reasoning behind the recent critique is that since national courts with constitutional jurisdiction are carrying out constitutional review contrary to the established case law of the Court of Justice,[24] in particular concerning the primacy of EU law, constitutional pluralism does not work. The aim of this chapter is thus to offer a theoretical and a practical response to these critiques from the perspective of courts enforcing their respective constitutional norms as an expression of their normative claim to sovereignty.

Section 2 will provide an overview of the critique and offer a theoretical reply. In doing so, it advances a reading of the Treaties that supports a pluralist understanding of the question of the final arbiter and the principle of primacy. This theoretical debate is

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22 M Loughlin, 'Constitutional pluralism: an oxymoron?' (2014) 3(1) *Global Constitutionalism* 9; J Baquero Cruz, 'The legacy of the Maastricht-Urteil and the pluralist movement', (2008) 14 *ELJ* 389; Krisch (n 10), 70; F W Scharpf, 'Legitimacy in the Multilevel European Polity' (2009) 1 *European Political Science Review* 173, 175 onwards. For a defence of the democratic characteristics of pluralism, see J W Kuyper, 'The democratic potential of systemic pluralism' (2014) 3 (2) *Global Constitutionalism*, 170. See also, Introduction, Section 2.1.3.

23 R D Kelemen, 'On the unsustainability of constitutional pluralism. European supremacy and the survival of the Eurozone' (2016) 23 *MJ* 136; F Fabbrini, 'After the *OMT* Case: The Supremacy of EU Law as the Guarantee of the Equality of the Member States' (2015) 16 (4) *GLJ* 1003; D Sarmiento, 'An instruction manual to stop a judicial rebellion (before it is too late, of course)' (*Despite Our Difference Blog*, 1 February 2017) <https://despiteourdifferencesblog.wordpress.com/2017/02/01/an-instruction-manual-to-stop-a-judicial-rebellion-before-it-is-too-late-of-course/> accessed 15 July 2017; D Sarmiento, 'The *OMT* case and the demise of the pluralist movement' (*Despite Our Difference Blog*, 21 September 2015) <https://despiteourdifferencesblog.wordpress.com/2015/09/21/the-omt-case-and-the-demise-of-the-pluralist-movement/>, accessed 20 October 2015.

24 For an overview of the most relevant recent cases, see Editorial, O Garner, 'The borders of European integration on trial in the Member States: *Dansk Industri*, *Miller* and *Taricco*' (2017) 9(2) *EJLS* 1.

supported by an empirical analysis in Section 3. The analysis shows that the recurring use of a number of expressions points to the existence of a shared understanding of the division of obligations among the participants of the European judicial space. Section 4 concludes.

## 2. The critique

As mentioned in the previous section, the most recent critique to constitutional pluralism revolves around the jurisprudence of constitutional conflict which does not unequivocally accept primacy of EU law as set out by the Court of Justice. Because actual conflict arose in a particular case, constitutional pluralism was not able to explain nor guide the behaviour of the courts involved, as mutual accommodation did not take place. The critique can be divided in two main strands: (1) the question of the final arbiter must be resolved if the EU is to call itself a constitutional order; and (2) primacy cannot be conditional upon national courts' acceptance, as this would hinder the equality of Member States and the uniform and effective application of EU law.

In the analysis that follows, I will argue the opposite in response to both points. First, leaving the question of the final arbiter open contributes to a more open coordination between the courts performing constitutional review. Second, primacy of EU law should not be interpreted as the wholesale subordination of national to EU law. Rather, primacy of EU law over national law is tempered by the EU's obligation to respect national identities of Member States. This reading allows for a more balanced application of the principle of primacy. Before engaging with the two points of critique in more detail, there is one important weakness they both share. By arguing that a final

arbiter is essential, and that primacy of EU law should be unconditional, both arguments are intrinsically monist – representing one right answer to both situations. In other words, then, constitutional pluralism does not work because it is not monism.

## 2.1. The question of the final arbiter

As mentioned earlier, the theory of constitutional pluralism rests upon the assumption that the question of the final judicial instance in the EU as we know it is immaterial. On the contrary, the basis for the inter-institutional relationship of national courts with a constitutional mandate and the Court of Justice is not that of hierarchy, but instead an interactive[25] heterarchy. Consequently, the pluralist theory asserts, there is no final arbiter, and there need not be one.[26]

Kelemen has been especially critical of how easily the pluralist theory has accepted that it is not problematic, but rather preferable, to leave out an answer to the question of the final arbiter.[27] In his view, reluctance to make an attempt to resolve this issue is a sign of immaturity of a legal system, and he called for a resolution of this question in order for the EU legal system to be able to call itself a constitutional order.[28] His proposition is a clear one – in order for the EU constitutional order to be considered 'mature', a decision on the final arbiter is necessary, and this should be the Court of

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25 MacCormick, 'The Maastricht-Urteil' (n 1), 264.

26 M Kumm, 'Who is the final arbiter of constitutionality in Europe: Three conceptions of the relationship between the German Federal Constitutional Court and the European Court of Justice' (1999) 36 *CMLRev* 351, 384.

27 Kelemen (n 23), 139.

28 ibid., 140.

Justice, in line with the primacy of EU law.[29] Should a national court with constitutional jurisdiction disagree with such a setting, he added, it should declare the continuing membership of its Member State in the EU as unconstitutional, thus urging their governments to approach the resolution of this constitutional conflict, if necessary, by recourse to Article 50 TEU and withdrawing from their membership in the Union.[30]

Such an approach seems extreme and resembles the Cold War logic: the question of the final arbiter will seemingly be settled, solely because anything else would result in a doomsday for that Member State's EU membership. In fact, it seems much more *im*mature than the *status quo*, as it is proposing a shift from a mutually assured trust to a mutually assured destruction.[31] While both might yield the same result, the cooperation between courts is far more fruitful when they operate in the context of a self-imposed restraint,[32] where none of the jurisdictions actually considers using the heavy weapons that are theoretically available to them.[33]

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29 ibid., 141.

30 ibid., 141, 148-149.

31 Mutually assured destruction is a doctrine of military strategy and national security policy in which a full-scale use of nuclear weapons by two or more opposing sides would cause the complete annihilation of both the attacker and the defender. It is based on the theory of deterrence, which holds that the threat of using strong weapons against the enemy prevents the enemy's use of those same weapons. The strategy is a form of Nash equilibrium in which, once armed, neither side has any incentive to initiate a conflict or to disarm. <https://en.wikipedia.org/wiki/Mutual_assured_destruction> accessed on 19 September 2016.

32 See also M Claes and M de Visser, 'Are you networked yet? On dialogues in European judicial networks' (2012) 8(2) *ULRev* 100, 106.

33 Even the Polish *Trybunał Konstytucyjny*, considered as one of the constitutional courts closest to the German understanding of limits to the primacy of EU law, proposed several possible solutions in the event of a constitutional conflict before leaving the EU:

> In such an event [of a collision between provisions of EU law and the Constitution] the Nation as the sovereign, or a State authority organ authorised by the Constitution to represent the Nation, would need to decide on: amending the Constitution; or causing modifications within Community provisions; or, ultimately, on Poland's withdrawal from the European Union.

The difference is clearly reflected in respect for the EU's national identity clause, whose importance appears to be overlooked by both Kelemen and Fabbrini. While Kelemen entertains the idea of a respect for national (constitutional) identity,[34] it results from his proposition that a proper safeguard of the inviolable core of a national constitution can only take place in the ultimate withdrawal of the Member State from the EU.[35] The doomsday device[36] activates, and everyone loses. Fabbrini, as will be discussed below, subordinates the national identity clause completely to the principle of equality of Member States, thereby leaving the reader in doubt as to the reasons for the very existence of the national identity clause.[37]

Applying these arguments to the most recent of interactions between the Court of Justice and a national court with constitutional jurisdiction paints a clear picture. In Kelemen's scenario, the *Bundesverfassungsgericht* did not need to submit the preliminary reference to the Court of Justice in the first place. In his view, all the doubts it had concerning the bounds of the European Central Bank's (ECB) competence are easily resolved in two ways: (1) by unconditionally accepting the OMT as it is; or (2) by requiring withdrawal from the EU if it found it a breach of Germany's constitutional identity. In a pluralist context, however, the *Bundesverfassungsgericht* was able to express its own view of constitutional identity and how that might be affected by the

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Polish *Trybunał Konstytucyjny* Case *Accession Treaty* (n 9), [13]. See also, Weatherill, *Law and Values in the European Union* (OUP 2016), 243, 251.

34 Kelemen (n 23), 148.

35 ibid.

36 A doomsday device is a hypothetical construction — usually a weapon, or collection of weapons — which could destroy all life on a planet, particularly Earth, or destroy the planet itself, bringing "doomsday", a term used for the end of planet Earth. <https://en.wikipedia.org/wiki/Doomsday_device> accessed on 19 September 2016.

37 Fabbrini (n 23), 1018.

introduction of the Outright Monetary Transaction (OMT) mechanism. The Court of Justice entered the discussion, focusing solely on the analysis of the mechanism, but deferring to the *Bundesverfassungsgericht* on questions of national constitutional identity.[38] Both jurisdictions have balanced and, it is submitted, will continue carefully to balance their claims and arguments; as a result, they will exhibit considerable self-restraint, based on the principle of sincere cooperation and mutual respect. This would certainly not be a novelty for the *Bundesverfassungsgericht* – it would be a continuation of the pattern of its EU-friendly reasoning,[39] in line with the pluralist vision of judicial interactions in the EU.

## 2.2. Primacy of EU law

A further criticism directed to constitutional pluralism is that it seems to abandon or negate the primacy of EU law,[40] as it is expressed by the Court of Justice in its long-standing jurisprudence.[41] In addition, Fabbrini (correctly) underlines that the principle of primacy surpasses bilateral disagreements between the EU and individual Member States and their constitutional/supreme courts, and serves to provide a guarantee of equality of

38 The Court only inserted a reference to the mention of national identity in the preliminary points of the judgment, omitting any further analysis in the remainder of the judgment. Court of Justice Case C-62/14 *Gauweiler and Others* [2015] ECLI:EU:C:2015:400, [17].

39 On this matter, see: A Voßkuhle, 'Multilevel cooperation of the European Constitutional Courts: Der Europäische Verfassungsgerichtsverbund' (2010) 6(2) *EuConst* 175, 188; M Wendel, 'Judicial Restraint and the Return to Openness: The Decision of the German Federal Constitutional Court on the ESM and the Fiscal Treaty of 12 September 2012' (2013) 14 *GLJ* 21, 41 onwards.

40 Kelemen (n 23), 144.

41 Introduced as early as 1964 in Case 6/64 *Costa v ENEL* [1964] ECLI:EU:C:1964:66.

all Member States in a multilateral manner.[42] Yet he questions the usefulness of the pluralist theory in cases where there exists a potential conflict in interpretation between EU law and national constitutions.[43]

Against this backdrop, there are two main counter-claims that aim to reconcile primacy with the pluralist approach: (1) primacy should not be regarded as subordination; and (2) the respect for the principle of primacy in ensuring the equality of Member States is equally important as the obligation of the EU to respect national identity. In relation to the first claim, it is important to distinguish primacy and subordination. MacCormick explains this as follows:

> [...] the doctrine of supremacy of Community law is not to be confused with any kind of all-purpose subordination of Member State law to Community law. Rather, the case is that these are interacting systems, one of which constitutes in its own context and over the relevant range of topics a source of valid law superior to other sources recognized in each of the Member State systems.[44]

To understand this position better, it is useful to reflect upon the distinction between supremacy and primacy made by the Spanish *Tribunal Constitucional* in its decision on the Constitutional Treaty:

> Supremacy is sustained in the higher hierarchical character of a regulation and, therefore, is a source of validity of the lower regulations, leading to the consequent invalidity of the latter if they contravene the provisions set forth imperatively in the former. Primacy, however, is not necessarily sustained on hierarchy, but rather on the distinction between the scopes of application of different regulations, principally valid, of which, however, one or more of them have the capacity for displacing others by virtue of their preferential or prevalent application due to various reasons.[45]

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42 Fabbrini (n 23), 1014-1016.

43 ibid., 1014.

44 MacCormick, 'The Maastricht-Urteil' (n 1), 264.

45 Spanish *Tribunal Constitucional* Case DTC 1/2004 *Constitutional Treaty,* Declaration of 13 December 2004, [II-4]. Significantly, the Court of Justice has consistently been using the term

Both statements underline the principle of primacy as a trigger for the application of EU law in areas of EU competence, in the event there is a conflicting provision on the national level. This outright rejects the absolute primacy of EU legal order as a whole over national legal orders. Dougan further explains such a view through what he calls 'trigger primacy' – in a situation of conflict between national and EU law, the latter has primacy when it satisfies the criteria for direct effect.[46] In essence, Dougan is right to note that the trigger model accommodates both the constitutional requirements of national legal systems, while at the same time respecting the primacy of Union law, under the condition of direct effect.[47]

It is also important to point out that national constitutions of Member States have all, to a certain extent, gone through a process of amendments with the aim of accommodating the requirements and specificities of EU law.[48] Mutual respect and judicial self-restraint do not deny the primacy of EU law in its particular context, but a

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'primacy' and not 'supremacy'. See also, J Kokott, 'Report on Germany' in A-M Slaughter, A Stone Sweet, J H H Weiler (eds) *The European Court and National Courts, Doctrine and Jurisprudence: Legal Change in its Social Context* (Hart Publishing, 1998), 83; Czech *Ústavní Soud* Case *Sugar Quotas III* (n 7), [VI.A.]; National report – The Constitutional Court of the Republic of Lithuania (2014), 5; P M Huber, 'The Federal Constitutional Court and European Integration' (2015) 21(1) *EPL* 83, 87.

46 M Dougan, 'When worlds collide! Competing visions of the relationship between direct effect and supremacy' (2007) 44 *CMLRev* 931, 934.

47 ibid., 942.

48 Millet points to different constitutional amendments that several Member States undertook in order to accommodate the implementation of the European Arrest Warrant. See F-X Millet, 'How much lenience for how much cooperation? On the first preliminary reference of the French Constitutional Council to the Court of Justice' (2014) 51 *CMLRev* 195, 196. Moreover, the Spanish Constitutional Tribunal accepted the necessary changes in its *Melloni* decision (Judgment 26/2014 *Melloni* of 13 February 2014), after receiving a response to the preliminary reference submitted to the Court of Justice in Case C-399/11 *Melloni* [2013] ECLI:EU:C:2013:107. In addition, this serves as a case in point to demonstrate that national courts performing constitutional review are only one among many of the relevant constitutional actors at the national level, and while their jurisprudence might be seen as central to the prospect of constitutional conflict, the national constitutional structure will also serve as a break in conflict control.

pluralist account does reject the outright subordination of national legal orders in their entirety to the EU legal order.

In close connection with the previous point, we now turn to claim (2), which underlines the importance of respect for national identity, and its effect on the equality of Member States. If we were to accept the unconditional primacy of EU law, the national identity clause in Article 4(2) TEU would become redundant. To understand this dynamic, let us first briefly recall Fabbrini's argument on the importance of primacy in ensuring the equality of Member States. Looking at the EU not through a series of bilateral relations, but rather as a multilateral entity in which actions of particular members affect all other members, he identifies the principle of primacy as the ultimate insurance of equality of all Member States in the EU.[49] He dismisses the possibility for each Member State to re-negotiate the terms of their membership, and concludes that EU law should be applied in all Member States in an equal manner.[50]

When faced with the counter-claim of the importance of the national identity clause in the EU setting, Fabbrini's response does not seem convincing, as he uses a literal interpretation of Article 4(2) TEU, stating that the respect for national identity of Member States is located after, i.e. it is subordinate to, the declaration of equality of Member States.[51] His dismissal of the role of the national identity clause in ensuring the equality of Member States seems too quick, and has the following important shortcoming: the national identity clause was agreed upon by all Member States and, when applied under the same conditions, it in fact contributes to the equality of Member

49 Fabbrini (n 23), 1019.

50 ibid., 1015.

51 ibid., 1019.

States, while also respecting the plurality of legal systems in the EU. In other words, all Member States are, under equal conditions, able to protect and underline their national particularities and constitutional specificities. In addition, neither the case law of the Court of Justice, nor any other international document[52] supports the literal interpretation suggested by Fabbrini. Quite to the contrary, cases such as *Omega*,[53] *Sayn-Wittgenstein*,[54] and *Runevič-Vardyn*[55] serve as excellent examples of how the Court itself found that national particularities are to be protected at the cost of primacy of EU law, but without any effect on the equality of Member States.[56]

The national identity clause aims to accommodate national particularities in the application of EU law on the national level, while the role of the Court of Justice is to determine the limits to this exception through the application of the principle of proportionality. The pluralist nature of the proposed interpretation of Article 4(2) TEU stems from its intrinsically heterarchical nature, as it does not impose an overarching European value over specific national values.[57] On the contrary, it endorses an equal position of a variety of national specificity claims that are all subject to the same process

52 Article 31(1) of the Vienna Convention on the Law of Treaties states that treaties shall be interpreted: 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' No mention can be found of the literal interpretation which would result in a subordinate relationship of two clauses within the same provision.

53 Court of Justice Case C-36/02 *Omega* [2004] ECLI:EU:C:2004:614.

54 Court of Justice Case C-208/09 *Sayn-Wittgenstein* [2010] ECLI:EU:C:2010:806.

55 Court of Justice Case C-391/09 *Runevič-Vardyn* [2011] ECLI:EU:C:2011:291.

56 K Lenaerts and J A Gutiérez-Fons, 'The constitutional allocation of powers and general principles of EU law' (2010) 47(6) *CMLRev* 1629, 1663.

57 For a similar pluralist reading of the national identity clause, see A von Bogdandy and S Schill, 'Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty' (2011) 48 *CMLRev* 1417, 1452.

of assessing such claims through the proportionality test.[58] Consequently, respect for national specificities, subject to the principle of proportionality, reinforces the role of the Court of Justice in ensuring the uniform application of Union law through providing an essentially common limit to the exception of Article 4(2) TEU, and ensuring the equality of Member States.[59]

## 3. Reply from the courts

Against the background of the theoretical response, I argue that a proper reading of the Treaty, combined with formal and informal expressions of all the judicial actors involved, favours a heterarchical multilateral approach. The analysis demonstrates that the use of a shared vocabulary proves the main premises of the theory of constitutional pluralism. First, the use of vocabulary underlining the claims of ultimate authority by courts with constitutional jurisdiction in their own respective national orders, as well as the Court of Justice prove the co-existence of multiple claims of authority within the same geographical space.[60] Second, common reconciliatory vocabulary points to the existence of a shared understanding of the division of obligations among the participants of the European judicial space, which I argue will auto-correct any imbalance that might arise from a constitutional conflict. In this respect, all Member States are equal, and their

58 For a more detailed presentation of the pluralist interpretation of the national identity clause, and how it conditions the interactions between the Court of Justice and national courts with constitutional jurisdiction, see Chapter 3, Section 4.

59 The Polish *Trybunał Konstytucyjny* made an excellent point concerning the role of the national identity clause: 'confirming one's national identity in solidarity with other nations, and not against them'. K 32/09 *Treaty of Lisbon*, Judgment of 24 November 2010, <http://trybunal.gov.pl/fileadmin/content/omowienia/K_32_09_EN.pdf>, accessed 9 March 2016, [2.1].

60 Walker (n 2), 337.

relationship with the Court of Justice is always conducted within the bounds of mutual respect[61] and sincere cooperation.

## 3.1. Keyword analysis

The analysis demonstrates that the use of a shared vocabulary proves the main premises of the theory of constitutional pluralism. In order to address the co-existence of sovereignty claims in the same geographical space, it is necessary to briefly reflect upon those expressions which would point to state-centred sovereigntist views of national courts with a constitutional mandate. National courts with a constitutional mandate have consistently claimed final authority in their territory, in particular in relation their role of protecting the national constitution as hierarchically the highest act applicable in a Member State,[62] and underlining sovereignty as the ultimate limit for European integration and the reach of the principle of primacy.[63]

National constitutional courts have also put forward identity-based limits to the principle of primacy of EU law, reasserting the untouchable character of the

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61 ibid.

62 For example, Czech *Ústavní Soud* Case Pl. ÚS 19/08 *Lisbon Treaty I*, Judgment of 26 November 2008, <http://www.usoud.cz/en/decisions/20081126-pl-us-1908-treaty-of-lisbon-i-1/>, accessed 1 May 2016, [216]; Danish *Højesteret* Case I 361/1997 *Carlsen*, Judgment of 6 April 1998; German *Bundesverfassungsgericht* Case 2 BvR 2661/06 *Honeywell*, Order of 06 July 2010, <http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2010/07/rs20100706_2bvr266106en.html>, accessed 1 May 2016, [68]; National report – The Constitutional Court of the Republic of Lithuania (2014), 5; Polish *Trybunał Konstytucyjny* Case *Accession Treaty* (n 9), [11]; United Kingdom Supreme Court Case *Pham* [2015] UKSC 19, [90].

63 For example, Czech *Ústavní Soud* Case *Sugar Quotas III* (n 7), headnote [8]; German *Bundesverfassungsgericht* Cases 2 BvR 2134/92 and 2 BvR 2159/92 *Maastricht Treaty*, Judgment of 12 October 1993, <http://www.judicialstudies.unr.edu/JS_Summer09/JSP_Week_1/German%20ConstCourt%20Maastricht.pdf>, accessed 1 May 2016, [C.II.1.a]; Spanish *Tribunal Constitucional* Case *Constitutional Treaty* (n 45), [II-2].

constitutional core.[64] These expressions point to the parallel existence of competing claims to ultimate authority on the national level. The sovereignty claims on the national level are consistently put forward by constitutional adjudicators, in particular in situations of possible clashes in interpretation.[65] This does not, as will be shown below in the analysis of reconciliatory keywords, undermine the ability of constitutional pluralism to balance these opposing claims through its auto-correct function.

On behalf of the EU, the debate concerning its sovereignty is more complex. This complexity stems from the inherent and almost natural assumption that sovereignty belongs to nation states. Nevertheless, while the source and the development of EU sovereignty differs substantially from the classic notion of state sovereignty, and we may debate its nature,[66] there seems to be a consensus on its existence.[67] The sovereignty of the EU, although never explicitly mentioned, can be discerned from the early case law of

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64 Czech *Ústavní Soud* Case *Lisbon Treaty II* (n 11), [150]; French *Conseil constitutionnel* Case 2006–540 DC *Information Society*, Decision of July 27, 2006, [19]; German *Bundesverfassungsgericht* Case 2 BVerfG 2/08 *Lisbon Treaty*, Judgment of 30 June 2009, <http://www.bverfg.de/e/es20090630_2bve000208en.html>, accessed 6 June 2017, [240] onwards; German *Bundesverfassungsgericht* Case 9/2014 *Gauweiler*, Press release of 07 February 2014, <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2014/bvg14-009.html> accessed 4 November 2015, [2.a]; Italian *Corte costituzionale* Case 183/1973 *Frontini*, judgment of 27 December 1973, (1974) 2 *CMLR* 372; Latvian *Satversmes tiesa* Case 2008-35-01 *Treaty of Lisbon*, Decision of 7 April 2009, [16.3], [17]; Polish *Trybunał Konstytucyjny* Case *Treaty of Lisbon* (n 59), [1.1.2]; Belgian *Cour Constitutionnelle* Case 62/2016 *Stability Pact*, Judgment of 28 April 2016, <http://www.const-court.be/cgi/judgments_popup.php?lang=en&ArrestID=4097> accessed 16 July 2017, summary.

65 For an analysis of the increasing frequency of state-centred claims by the *Bundesverfassungsgericht* see J E K Murkens, '"We want our identity back" - the revival of national sovereignty in the German Federal Constitutional Court's decision on the Lisbon Treaty' (2010) 25 *Public Law*, 530.

66 G de Búrca, 'Sovereignty and the supremacy doctrine of the European Court of Justice' in Walker (n 5), 449.

67 N Walker, 'Late Sovereignty in the European Union' in Walker (n 5), 12; H Lindhal, 'Sovereignty and representation in the European Union' in Walker (n 5), 107; de Búrca (n 66), 451 onwards. Conversely, the Latvian Constitutional Court concluded the EU does not have sovereignty in the classic Westphalian sense. Its subsequent analysis points to a clear struggle to fit the EU into the category of a classical international organisation. Latvian *Satversmes tiesa* Case *Treaty of Lisbon* (n 64), [17]-[18].

the Court of Justice, most notably in *Costa v ENEL*:

> By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.[68]

The Court of Justice addressed the characteristics of the newly established legal order, asserting a claim to ultimate legal authority in the limited fields of its competence, albeit not in the classical sense that we usually associate with nation states.[69]

I will proceed with the analysis of the recurring reconciliatory vocabulary, which in my view points to the existence of a shared understanding of the division of obligations among the participants of the European judicial space, which will auto-correct any imbalance that might arise from a constitutional conflict. The following figure depicts the keywords and the intensity of their use in the sources under analysis: the horizontal axis represents the number of jurisdictions in which a certain keyword placed on the vertical axis was used.

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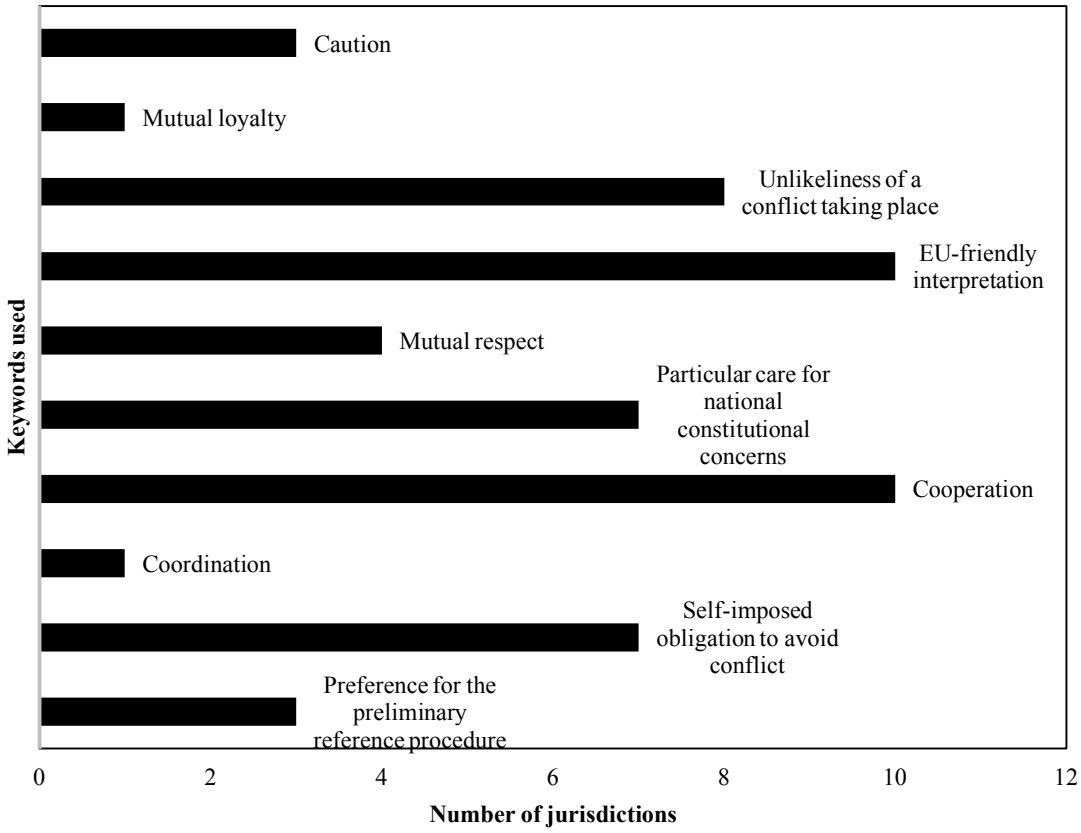
[68] Court of Justice Case 6/64 *Costa v ENEL* (n 41), 593. A more detailed analysis of the vocabulary of the Court of Justice concerning the question of sovereignty of the EU can be found in B de Witte, 'Direct effect, supremacy and the nature of the legal order'in P P Craig and G de Búrca, *Evolution of EU Law* (OUP 1999).

[69] See also, Court of Justice Opinion of Advocate General Kokott in Case C-105/03 *Pupino* [2004] ECLI:EU:C:2004:712, [32]: '[The] Treaty on European Union includes not only inter-governmental cooperation, but also joint exercise of sovereignty by the Union.'

***Figure 2*** *Use of keywords*




The argument proceeds as follows – the use of the keywords, the exhibited self-restraint and a self-imposed obligation to avoid conflict all offer strong proof that a clear (*ex ante*) answer to the question of the final arbiter is indeed unnecessary. Moreover, an insistence upon its resolution might bring about more harm than good, as it may provoke conflicts of unimaginable proportions. Subsequently, the analysis of common keywords will be used to depict the functioning of the pluralist auto-correct function in preventing an outbreak of constitutional conflict.

The sets of keywords under analysis, as will be shown, have three common characteristics: (1) they are aimed at conflict prevention, both from the perspective of national constitutional jurisdictions and that of the Court of Justice; (2) they are inherently pluralist, as none of them contains elements of either superiority or

subordination; and (3) their implementation shows institutional awareness of the big (multilateral) picture in the everyday work of the courts under analysis, as they are conscious of the need for a balanced relationship among all constitutional jurisdictions in the EU. All four characteristics point to the conclusion that there exists a strong awareness of the importance of preserving the pluralist setting, present both on the side of national constitutional jurisdictions and the Court of Justice.

As is visible from Figure 2, the most commonly used set of keywords is 'EU-friendly interpretation'.[70] In particular, the majority of answers were given in national reports on the question of their approach towards the relationship between national constitutions and EU law, and how to proceed in a case of a possible divergence between the two. Such an understanding is a direct application of the principle of sincere cooperation among the courts under analysis.[71] The use of the term was so widespread among national reports that it was also underlined as one of the most common practices in the General report of the 2014 Conference of European Constitutional Courts.[72] While the use of this term in national reports has little legal value *per se*, I argue that it reflects a

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70 Italian *Corte Costituzionale* Case 170/84 *Granital*, Decision of 8 June 1984, [7-3]; Voßkuhle (n 39), 188; German *Bundesverfassungsgericht* Case *Honeywell* (n 62), [100], [111]; German *Bundesverfassungsgericht* Case *Lisbon Treaty* (n 64), [221]; Polish *Trybunał Konstytucyjny* Case *Treaty of Lisbon* (n 59), [3.1]; General Report, Conference of European Constitutional Courts (2014), 2-4; National report – The Supreme Court of Cyprus (2014), 3; National report – The Constitutional Court of the Czech Republic (2014), 4; National report – The Federal Constitutional Court of the Republic of Germany (2014), 2; National report – The Constitutional Court of Hungary (2014), 3; National report – The Constitutional Court of the Republic of Latvia (2014), 8; National report – The Constitutional Court of the Republic of Lithuania (n 62), 15, 26; National report – The Portuguese Constitutional Court (2014), 23.

71 The German *Bundesverfassungsgericht* stated in Case *Honeywell* (n 62), [100], as regards its principle of openness towards EU law:

> When exercising this competence to effect a review, the principle of openness of the Basic Law towards Europe is to be complied with as a correlate of the principle of sincere cooperation (Article 4.3 TEU) and to be made fruitful.

72 General Report, Conference of European Constitutional Courts (n 70), 2-4.

shared attitude that is, in practice, resulting in a uniform application of EU law at the national level.

The second most commonly used set of keywords is the 'self-imposed obligation to avoid conflict'.[73] The term was used widely among European constitutional courts when asked about possible divergences in interpretation between national constitutional law and the exigencies of EU law. In addition, Advocate General Wathelet[74] agreed on the existence of self-restraint that drives the behaviour of the courts involved, in order to prevent a conflict from taking place when a particular case calls into question both national constitutional law and EU law. The use and application of this keyword is central to the preservation of the pluralist setting without any claims of superiority or subordination.

From an anti-pluralist perspective, self-restraint might be regarded as an inherent weakness of the current system that needs to be remedied by a clear set of jurisdictional demarcations. Conversely, as will be shown below, when we regard law as a (dynamic) process, rather than law as a (static) rule, the *lacunae* of the system are resolved by interpreting the norms in their societal context, by way of an analogy, which are applied

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73 Polish *Trybunał Konstytucyjny* Case SK 45/09 *Brussels Regulation*, Judgment of 16 November 2011, <http://trybunal.gov.pl/uploads/media/SiM_LI_EN_calosc.pdf>, accessed 10 March 2016, [2.6]; Czech *Ústavní Soud* Case *Lisbon Treaty II* (n 11), [112]; General Report, Conference of European Constitutional Courts (n 70), 2; National report – The Constitutional Court of the Czech Republic (n 70), 4; National report – The Supreme Court of Denmark (2014), 12; National report – German Federal Constitutional Court (n 70), 3; National report – The Constitutional Court of Hungary (n 70), 2-3; National report – The Constitutional Tribunal of the Republic of Poland (2014), 2; National report – The Constitutional Court of Romania (2014), 12. See also, extrajudicially, Lecture of Advocate General M Wathelet: 'Constitutional Courts and the CJEU: Is There a Dialogue? History and Prospects' given at the EU Law discussion group at the Law Faculty, University of Oxford, 23 October 2015; Huber (n 45), 89.

74 Wathelet (n 73).

as 'tools of authoritative decision-making' in place of a precise rule.[75]

Two more keywords need to be mentioned alongside the 'self-imposed obligation to avoid conflict': (1) the unlikeliness of a conflict taking place;[76] and (2) caution.[77] All three sets emphasise the preference for a parallel functioning of Member States' legal systems and the EU legal system. The EU is comprised of legal systems, which are not in a hierarchical relationship, but rather operate in parallel. When the EU competence to regulate a certain area clashes with the national competence to protect constitutional values, the situation will be resolved through an EU-friendly interpretation, which is also driven by a self-imposed obligation to avoid any conflict, wherever possible. Even in the eyes of the constitutional courts of Member States, such situations are extremely unlikely to take place, but when they do, they should be approached with caution, keeping in mind the ultimate aim of avoiding conflict.

The next group of keywords relevant for the pluralist explanation of the judicial interactions in the area of constitutional interpretation are: (1) cooperation;[78] (2)

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75 R Higgins, *Problems and Process. International Law and How We Use It* (Clarendon Press 1995), 10.

76 National Report – The Constitutional Court of Belgium (2014), at 31; Czech *Ústavní Soud* Case *Lisbon Treaty I* (n 9), [5]; Danish *Højesteret* Case *Carlsen* (n 62), [9.6]; Italian *Corte costituzionale* Case *Granital* (n 70), [7-7]; Polish *Trybunał Konstytucyjny* Case *Brussels Regulation* (n 73), [2.7]; Spanish *Tribunal Constitucional* Case *Constitutional Treaty* (n 45), [II-4]; Spanish *Tribunal Constitucional* Case *Melloni* (n 48), [II-3]; National report – German Federal Constitutional Court (n 70), 3; UK Supreme Court Case *Pham* (n 62), [91].

77 Polish *Trybunał Konstytucyjny* Case *Brussels Regulation* (n 73), [2.5], [2.8]; National report – The Constitutional Court of Romania (n 73), 12; UK Supreme Court Case *Pham* (n 62), [91].

78 German *Bundesverfassungsgericht* Case *Maastricht Treaty* (n 63), [B.II.b], [B.II.c.5]; Czech *Ústavní Soud* Case *Sugar Quotas III* (n 7), [VI.A.]; Polish *Trybunał Konstytucyjny* Case *Brussels Regulation* (n 73), [2.6]; General Report, Conference of European Constitutional Courts (n 70), 12; National report – The Portuguese Constitutional Court (n 70), 23; National report – The Constitutional Court of Romania (n 73), 12-13; National report – The Constitutional Court of the Slovak Republic (2014), 12; National report – The Constitutional Court of the Republic of Slovenia (2014), 18; UK Supreme Court Case *HS2* [2014] UKSC 3, [202]; UK Supreme Court Case *Pham* (n 62), [91].

coordination;[79] (3) mutual respect;[80] and (4) mutual loyalty.[81] While the previous group of keywords entailed a more passive attitude of avoiding conflict, in the highly unlikely scenario that problems arise, this group of keywords takes a further step forward and engages constitutional jurisdictions in conduct that is more active. Not only are the constitutional jurisdictions avoiding conflicting situations, but they are fostering cooperation and coordination in their work. Equally, all interviewees at the Court of Justice confirmed they are participating in judicial networks throughout Europe, and benefit greatly from bilateral meetings and visits with national judges at all levels. Read together, these sets of keywords show that constitutional courts are implementing the principle of sincere cooperation in practice.

The final group of keywords focuses more on reflecting the attitudes of those making decisions at the Court of Justice – the judges and advocates general. In particular, it aims to show not only the need for the national constitutional jurisdictions to project an EU-friendly jurisprudence, but also to reflect the attempts of the Court of Justice in adhering to the principle of sincere cooperation, as well as the obligation to respect the national identities of Member States. Two sets of keywords have been analysed to this end: (1) particular care is taken where national constitutional concerns are involved;[82] and (2) there is a preference for the use of the preliminary reference

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79 Italian *Corte costituzionale* Case *Granital* (n 70), [7-4].

80 National report – The Constitutional Court of the Czech Republic (n 70), 11; Polish *Trybunał Konstytucyjny* Case *Brussels Regulation* (n 73), [2.5]; National report – The Constitutional Court of Romania (n 73), 58; UK Supreme Court Case *Pham* (n 76), [91].

81 National report – The Constitutional Tribunal of the Republic of Poland (n 73), 2.

82 Interviewee 1; Interviewee 2; Interviewee 3; Interviewee 4; Interviewee 5; Interviewee 6.

procedure.[83] When asked about possible clashes in interpretation with national constitutional jurisdictions, six judges/advocates general have confirmed that in their work on a specific case, particular care is taken if a national constitutional concern arises. In addition, three interviewees expressed their preference for any possible conflict to take place in the realm of the preliminary reference procedure. The importance of such an attitude should not be underestimated – the trust that national constitutional courts have in the Court of Justice complying with the obligation to respect national particularities is not unfounded.

In addition to the use of keywords, the present work has analysed the extent of cross-referencing to other constitutional jurisdictions throughout the EU, as it represents yet another sign of awareness of constitutional adjudicators of the multilateral momentum of judicial interactions, both institutionally and substantively. The practice of cross-referencing is common among a broad range of constitutional jurisdictions in the EU,[84] and the practice has become more widespread in the recent years.[85] This trend is significant as it further confirms the argument that constitutional courts throughout the

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83 Interviewee 1; Interviewee 2, Interviewee 4; National report – The Supreme Court of Denmark (n 73), 12; National report – The Portuguese Constitutional Court (n 70), 23; Polish *Trybunał Konstytucyjny* Case *Brussels Regulation* (n 73), [2.6].

84 National report – The Constitutional Court of Austria (2014), 11; National report – The Constitutional Court of Croatia (2014), 24; National report – The Supreme Court of Cyprus (n 70), 5; National Report – The Constitutional Court of the Czech Republic (n 70), 20; National report – German Federal Constitutional Court (n 70), 17; National report – The Constitutional Court of Hungary (n 70), 2; National Report – The Supreme Court of Ireland (2014), 5; National report – The Constitutional Court of the Republic of Latvia (n 70), 8; National report – The Constitutional Court of the Republic of Lithuania (n 62), 30; National report – The Constitutional Court of the Republic of Malta (2014), 4; National report – The Constitutional Tribunal of the Republic of Poland (n 73), 15; National report – The Portuguese Constitutional Court (n 70), 38; National report – The Constitutional Court of Romania (n 73), 61-62; National report – The Constitutional Court of the Slovak Republic (n 78), 9; National report – The Constitutional Court of the Republic of Slovenia (n 78), 26; National report – The Constitutional Tribunal of Spain (2014), 26; UK Supreme Court Case *Pham* (n 76), [91].

85 General Report, Conference of European Constitutional Courts (n 70), 8.

EU are aware of the need for a multilateral approach to judicial interactions in the EU.

Cross-referencing is of course not without its shortcomings – the courts that do make use of it may be seen as cherry-picking only those judgments that support their argument.[86] On this point, Claes and Reestman analysed the cross-referencing done by the German *Bundesverfassungsgericht* in its preliminary reference to the Court of Justice, where case law of nine other Member States was cited in support of its interpretation of constitutional identity.[87] They found that the case law cited is only partially supportive of the view of the German Court, while more recent jurisprudence of the cited courts has been omitted. Nevertheless, even such cross-referencing is welcome and contributes to the general awareness of all the courts involved that they are equal counterparts, who are jointly, multilaterally contributing to the development of what can be perceived as EU constitutional law.[88]

The practice of cross-referencing underlines both the substantive and institutional elements of a pluralist heterarchical judicial setting. Substantively, constitutional jurisdictions in the EU are using each other's jurisprudence to add a comparative element to their reasoning, as well as to support their arguments. The use of foreign jurisprudence both enriches the reasoning of the court in question, but also adds to a broader momentum of mutual acknowledgment and the idea of a shared legal culture and standards. As underlined in the General Report of the Conference of European

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86 For an analysis of advantages and shortcomings of the use of comparative constitutional law as a method of judicial interpretation, including the problem of cherry-picking, see A-B Kaiser, '"It isn't true that England is the moon": comparative constitutional law as a means of constitutional interpretation by the courts?' (2017) 18(2) *GLJ* 294.

87 M Claes and J-H Reestman, 'The protection of national constitutional identity and the limits of European integration at the occasion of the *Gauweiler* case' (2015) 16(4) *GLJ* 917, 941 onwards.

88 See also, Weatherill, *Law and Values in the European Union* (n 33), 245.

Constitutional Courts, the use of European constitutional jurisprudence contributes to the creation of a 'European standard' of converging jurisprudence in Europe.[89] In that respect, it can be concluded that these particular judicial interactions (in the broadest sense) represent a conversation and a discussion on substantive matters of European constitutional law.

Institutionally, cross-referencing acknowledges the multilateral, heterarchical setting among Europe's highest courts.[90] When one constitutional jurisdiction cites another to support its claims, it means in essence that they are regarding each other as peers, equal counterparts.[91] The same logic is applicable not only among national constitutional jurisdictions, but also in relation to the Court of Justice. Consequently, one should reject Fabbrini's claims concerning the narrow bilateral relationship among courts that would arise as a consequence should there be any exceptions to the principle of primacy of EU law.[92] Conversely, introducing an exception with a common limit for all Member States *contributes* to the equality of Member States.[93] The relationship is characterised again by the same mutual respect and self-restraint as between the Court of Justice and national constitutional jurisdictions, demonstrating a clear heterarchy.[94]

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89 General Report, Conference of European Constitutional Courts (n 70), 9.

90 See also, Czech *Ústavní Soud* Case *Lisbon Treaty I* (n 9), [105].

91 The very framework of the Conference of European Constitutional Courts demonstrates how cooperation among judges and courts contributes to what Jacobs famously called the cross-fertilization of legal systems. See generally, F G Jacobs, 'Judicial dialogue and the cross-fertilization of legal systems: The European Court of Justice' (2003) 38 *Texas International Law Journal* 547.

92 Fabbrini (n 23), 1014-1016.

93 To reiterate the point made by the Polish *Trybunał Konstytucyjny*: 'confirming one's national identity in solidarity with other nations, and not against them'. Polish *Trybunał Konstytucyjny* Case *Treaty of Lisbon* (n 59), [2.1].

94 Co-operative programs, conferences and networking events of these judicial networks play a role in the co-ordination of judicial activity and the unification of practices at the national level. One of

The use of the keywords under analysis, when expressed in the context of possible clashes in constitutional interpretation, resounds immensely. Kelemen's claims on the immaturity of the EU legal system, which he asserts does not deserve to be called a 'constitutional' one,[95] need to be rejected. On the contrary, in a system in which the questions of the final arbiter and the absolute superior legal order do not exist, the participants in the EU judicial space need to be commended for their mature reasoning and behaviour.

Fundamentally, each set of keywords reflects both an attitude of mutual trust and the principle of sincere cooperation. While at times it is the Court of Justice that will take care of national concerns and particularities,[96] at other times it will be national constitutional courts that will be cautious in the interpretation of matters that involve EU law[97] – all with the same awareness of the importance of EU's pluralist nature and the balance it brings to these judicial interactions, both bilaterally and multilaterally.

## 3.2. The pluralist auto-correct function

This system of self-restraint and a self-imposed obligation to avoid conflict might not seem to be a feature of a mature constitutional order, in particular to scholars who use the classic state-centred standards for their assessment.[98] However, following Walker, this

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their main advantages is precisely the level-playing field character, where no judicial instance is in a hierarchical position to another. See also Claes and de Visser (n 32), 101.

95 Kelemen (n 23), 146.

96 See in particular, on this matter, Lord Neuberger and Lord Mance in UK Supreme Court Case *HS2* (n 78), [201].

97 Hence, heterarchy's ability of different actors to be ranked in a number of different ways.

98 Kelemen (n 23), 146. See also n 10.

chapter subscribes to the need to analyse and judge the EU constitution (in the widest sense of the term)[99] in its own context and on its own merits.[100] Having concluded that Member States share the idea of a peaceful character of interactions with the Court of Justice, I further argue that the pluralist system contains within itself an auto-correct function, which serves as a check and balance among constitutional jurisdictions on the national and on the EU level.[101]

In order fully to understand the pluralist auto-correct function, it is first necessary to address another feature of a pluralist legal order – incrementalism. In particular, incrementalism accentuates the gradual development of institutional interactions, but also substantively the creation of rules and principles.[102] Incrementalism may be regarded as stemming from an understanding of law as process, where the lines between *lex lata* and *lex ferenda* are becoming increasingly blurred, as the use of analogy and contextual interpretation take centre stage.[103] With these premises in mind, the lack of legal norms on the resolution of constitutional conflict among national constitutional jurisdictions and the Court of Justice seem overstated. In addition, the recent critics of the pluralist theory have overlooked incrementalism, both as a feature of the system and in how it contributes to its sound functioning.

Let us recall briefly the *Solange* saga to depict both how incrementalism influences intra-EU judicial interactions and also contributes more broadly to the

99 See n 10.

100 Walker (n 67), 40. See also Rodin's argument (n 11).

101 Weiler talks about the 'persuasion pull' and 'compliance pull' as the drivers behind the implementation of the case law of the Court of Justice. Weiler (n 13), 419.

102 L Helfer and A-M Slaughter, 'Toward a theory of effective supranational adjudication' (1997) 107 *Yale Law Journal* 273, 314; Krisch (n 10), 247.

103 Higgins, *Problems and Process. International Law and How We Use It* (n 75), 10. See also, M Claes, *The national courts' mandate in the European Constitution* (Hart Publishing 2006), 713.

development of EU constitutional law.[104] In its first *Solange* judgment,[105] the *Bundesverfassungsgericht* retained the right to exercise judicial review in matters of fundamental rights protection, as long as the European integration process did not reach a level whereby it would guarantee a satisfactory level of protection. If we were to use the arguments of those criticising pluralism today and apply them to the *Solange* situation, this judgment would probably be seen as the demise of the entire European project, while judicial interactions would be characterised at their absolute low. Conversely, subsequent events[106] demonstrated the gradual, step-by-step[107] development of the fundamental rights protection on the EU level,[108] but also the contribution to the relationship between national constitutional jurisdictions and the Court of Justice.[109] It has also demonstrated how such a gradual development contributed to the avoidance of an outburst of conflict or the activation of Kelemen's predicted doomsday device.[110] Therefore, in order to conclude on the applicability of the theory of constitutional pluralism to the EU

104 See also Shaw (n 7), 14, 19, 24; Z Bañkowski and E Christodoulidis, 'The European Union as an essentially contested project' (1998) 4(4) *ELJ* 341, 342.

105 German *Bundesverfassungsgericht* Case 37 BVerfGE 271 *Internationale Handelsgesellschaft (Solange I)* Judgment of 29 May 1974, (1974) 2 *CMLR* 540.

106 In its response, in Case C-4/73 *Nold* [1974] ECLI:EU:C:1974:51, [13], the Court of Justice used the common constitutional traditions of Member States as the source of inspiration and the level of protection of fundamental rights that will be accorded on the Union level. Finally, the German Constitutional Court accepted such a level of protection in the *Solange II* judgment. German *Bundesverfassungsgericht* Case 73 BVerfGE 339 *Wünsche Handelsgesellschaft (Solange II)* Judgment of 22 October 1986, (1987) 3 *CMLR* 225.

107 Krisch (n 10), 247 onwards. See also Czech *Ústavní Soud* Case *Sugar Quotas III* (n 7), [VI.A-3], where the Constitutional Court states that both the case law of the Court of Justice and national constitutional courts has undergone a dynamic development in the area of fundamental rights.

108 The area of fundamental rights is an excellent example of how the EU has evolved as a constitutional legal order not comparable to nation states. See, for example, G de Búrca, 'After the EU Charter of Fundamental Rights: the Court of Justice as a human rights adjudicator?' (2013) 20(2) *MJ* 168. 169.

109 See also A Stone Sweet, 'The structure of constitutional pluralism: Review of Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Post-National Law*' (2013) 11(2) *ICON* 491, 500.

110 Kelemen (n 23), 141, 148-149.

constitutional setting, one needs to take a step back from individual judgments, and ground the analysis by regarding the relevant jurisprudence as a process.[111] It is precisely due to incrementalism that a broader examination of the relevant case law confirms the main premises of the pluralist theory. Furthermore, it prevents future conflicts from taking place through the auto-correct function.

The auto-correct mechanism functions in the following context: issues prone to constitutional conflict arise regularly in the EU,[112] and both the Court of Justice and national constitutional jurisdictions are able, through their respective procedural avenues, to control the extent of the conflict. There are also two legal imperatives driving this dynamic in two opposite directions – the principle of primacy of Union law on the one hand, and the obligation to respect the national identity of Member States on the other. An explicit primacy clause that would serve as a resolution of this inherent conflict failed to come into force as part of the Constitutional Treaty after its signature in 2004, implying that the sentiment among Member States was and is against any such a conclusive provision.[113] In the following Treaty amendment in 2007, the provision on the obligation of the EU to respect national identities of Member States was expanded in its

111 Similarly, Rodin differentiates among the immediate and the future impact of the case law of the Court, arguing that the latter is based on the changed societal context, gradually transforming a judgment into a landmark. See S Rodin, 'Dumb and no more here', presented on the conference: Central and Eastern European Judges Under The EU Influence: The Transformative Power of Europe Revisited on the 10th Anniversary of the Enlargement, 12-13 May 2014, EUI, Florence, Italy [cited with the author's permission], 10, 14 onwards.

112 Stone Sweet argues that the possibility of a conflict is a 'manifestation, probably permanent, of a pluralist structure of EU law.' Stone Sweet (n 16), 65.

113 This is not to diminish the importance of the principle of primacy in the case law of the Court of Justice, but rather to emphasise the importance of the 'political' in relation to the 'legal'. Moreover, it also serves to reiterate the importance of the national constitutional setting and its ability to constrain national constitutional jurisdictions.

wording, but it also henceforth fell under the jurisdiction of the Court of Justice.[114]

Support for the auto-correct function can be found in the *Bundesverfassungsgericht* case *Mr R.* The EAW was to be applied to an American citizen, and he was to be extradited to Italy where he was sentenced *in absentia*.[115] In particular, the German Court emphasised that any conflict that may arise would be an exception, and would not harm the uniform application of Union law, as each individual case will be handled with restraint and in a manner open to European integration, thus confirming that individual judgments do not prejudice the relationship between the legal orders.[116] It is necessary to underline that the auto-correct function does not call into question or undermine the parallel sovereign claims of the 28[117] national constitutional systems as well as the primacy claim put forward by the Court of Justice. It is precisely in the acknowledgment of these claims that the auto-correct takes centre stage.

## 4. Conclusion

As the keyword analysis has shown, a clash between parallel sovereignty claims is avoided through the application of self-restraint and mutual accommodation. More particularly, the analysis has shown that each of the systems has in-built conditions for the application of the auto-correct function, such as the principle of EU-friendly

114 B Guastaferro, 'Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause' (2012) Jean Monnet Working Paper 01/12, 4.

115 German *Bundesverfassungsgericht* Case 2 BvR 2735/14 *Mr R.* Order of 15 December 2015, <http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-004.html>, accessed 2 March 2016. See also, Chapter 4, Section 4.2.1.

116 The same was underlined by the Austrian Constitutional Court, where it stated that should a conflict arise, this should not be developed beyond an individual case. National report – The Constitutional Court of Austria (n 84), 9.

117 Soon to be 27.

interpretation, or the national identity clause. However, it is only through interactions between the systems that the auto-correct function takes place and brings about a balance among the different individual systems claiming sovereignty. Thus, while the conditions for the utilisation of the auto-correct are contained within each of the systems, its consequences have an effect on the system as a whole – namely its balance.

In addition to institutional conflict management, the normative promise of constitutional pluralism is value based. As Lenaerts and Gutiérrez-Fons explain, the Court of Justice should recognise that:

> [General] principles leave some room for constitutional values that differ from one Member State to another. […] In this view, the ECJ cannot reply on general principles of EU law, particularly fundamental rights, as an unstoppable centripetal force that would ensure uniformity while destroying constitutional diversity.[118]

In the same vein, Cloots lists a number of interpretative guidelines to both national courts with constitutional jurisdiction and the Court of Justice, in order to not only contain conflict, but also resolve it in a manner that will be respectful of the values, and ultimately constitutional orders, in balance.[119] Finally, Besselink and Ejisbouts explain that judges faced with situations of constitutional conflict should not address it by 'mere reference to the autonomy or the supremacy of his own legal order, nor by reference to legal hierarchy. He shall do so by reference to fundamental substantive norms valid in the wider circumscription […].'[120] For Weatherill, values listed in Article 2 TEU[121] are

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118 Lenaerts and Gutiérez-Fons (n 56), 1662-1663.

119 E Cloots, 'Germs of pluralist adjudication: *Advocaten Voor De Wereld* and other references from the Belgian Constitutional Court' (2010) 47(3) *CMLRev* 645, 668.

120 W T Ejisbouts and L Besselink, '"The Law of Laws" – Overcoming pluralism' (2008) 4(3) *EuConst* 395, 397.

121 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to

the minimum above which value diversity is to be promoted.[122]

In such a setting, the auto-correct has the function of preventing long-term conflict between either of the constitutional jurisdictions involved. In the EU judicial architecture, an awareness on the part of all the actors involved of the benefits of a pluralist setting results in conflict management and control. The result of a particular case will sometimes be on the side of national concerns,[123] and other times on the side of integration.[124] In any event, the outcome will be reached after a careful balancing, conducted through applying: *both* self-restraint and the strong will to avoid conflict;[125]

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minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

122 Weatherill, *Law and Values in the European Union* (n 33), 250. The point is proven well with the latest Hungarian example: the recent reforms of the constitutional system undermining the rule of law cannot form part of the national identity protected by Article 4(2) TEU. For more information on the abuse of identity review by the Hungarian Constitutional Court, see G Halmai, 'National(ist) constitutional identity? Hungary's road to abuse constitutional pluralism' (2017) EUI Working Paper Law 2017/08 < http://cadmus.eui.eu/bitstream/handle/1814/46226/LAW_2017_08.pdf?sequence=1>, accessed on 17 July 2017.

123 For instance, Court of Justice Case C-36/02 *Omega* (n 53); Case C-208/09 *Sayn-Wittgenstein* (n 54); Case C-391/09 *Runevič-Vardyn* (n 55).

124 See French *Conseil constitutionnel* Case 2007-560 DC *Treaty of Lisbon*, Decision of 20 December 2007; German *Bundesverfassungsgericht* Case *Honeywell* (n 70); Court of Justice Case C-62/14 *Gauweiler* (n 38).

125 Two further examples highlighting the auto-correct function are: (1) the decision of the *Bundesverfassungsgericht* in relation to the European Arrest Warrant (EAW). In this decision, the German Court was in a position to enter into a discussion on the compatibility of the EAW with the Basic Law. Instead, the Court only focused on interpreting the national law implementing the EAW, avoiding entirely having to entertain the idea of a declaring an EU act contrary to the national constitution. German *Bundesverfassungsgericht* Case 2 BvR 2236/04 *European Arrest Warrant*, Decision of 18 July 2005, <http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2005/07/rs20050718_2bvr223604en.html>, accessed 15 June 2017. See also A Hinarejos, '*Bundesverfassungsgericht* (German Constitutional Court), Decision of 18 July 2005 (2 BvR 2236/04) on the German European Arrest Warrant Law' (2006) 43(2) *CMLRev* 583 (note); and (2) Polish *Trybunał Konstytucyjny* Case *Brussels Regulation* (n 73). The Polish *Trybunał Konstytucyjny* provided a broad interpretation of the term 'normative act' and assumed jurisdiction to review secondary acts of EU law against the Constitution. In addition, the Tribunal stated that its jurisdiction to do so is only subsidiary to that of the Court of Justice in relation to EU primary law ([2.6]). Nevertheless, it found the provision to be in accordance with the Polish Constitution. I argue that, regardless of expanding its jurisdiction to review secondary EU acts, the Polish Constitutional Tribunal was aware and intentionally exhibited self-restraint in order to avoid conflict.

*and* also an EU-friendly interpretation on behalf of national jurisdictions *and/or* the accommodation of national identity claims by the Court of Justice.[126] Individual points of conflict do not bring into question the ability of the auto-correct function to incrementally resolve them, both institutionally and substantively. Over time, the pluralist setting will inherently work to auto-correct any imbalance, and prevent the activation of the doomsday device.

126 See, in this respect, Court of Justice Opinion of Advocate General Maduro in Joined cases C-402/05 P and C-415/05 P *Kadi* [2008] ECLI:EU:C:2008:11, [44]. See also Claes *The national courts' mandate in the European Constitution* (n 103), 37.

# CHAPTER 2

## *ULTRA VIRES* REVIEW

## 1. Introduction

The peculiar nature of the European Union's constitutional setup, and in particular the relatively unclear[1] manner in which competences have been conferred from the Member States to the Union, have made the question of the ultimate arbiter one of the most debated issues of EU constitutional law.[2] In particular, it relates to the question of who is the holder of 'interpretative autonomy'[3] concerning the extent of EU competences and the manner of their exercise by Union institutions, which Schilling calls the 'Decisive

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1 The lack of clarity has been addressed through a clearer and more precise division of competences in the Draft Constitutional Treaty, and later transposed to the Lisbon Treaty. On the appraisal of whether this endeavour has been successful (as regards the text of the Constitutional Treaty), see P P Craig, 'Competence: clarity, conferral, containment and consideration' (2004) 29(3) *ELRev* 323. For a most recent overview, see S Weatherill, *Law and Values in the European Union* (OUP 2016), Chapter 2.

2 See, for example, M Kumm, "Who is the final arbiter of constitutionality in Europe? Three conceptions of the relationship between the German Federal Constitutional Court and the European Court of Justice' (1999) 36 *CMLRev* 351; F C Mayer, 'The debate on European powers and competences: seeing trees but not the forest?' (2003) Walter Hallstein-Institut für Europäisches Verfassungsrecht Paper 18/03, <http://www.whi-berlin.de/powers.htm>, accessed on 18 December 2016; M Kumm, 'The jurisprudence of constitutional conflict: constitutional supremacy in Europe before and after the Constitutional Treaty' (2005) 11(3) *ELJ* 262; M Claes, *The National Courts' Mandate in the European Constitution* (Hart 2006); G Luebbe-Wolff, 'Who has the last word? National and transnational courts—conflict and cooperation' (2011) 30(1) *YEL* 86; G Beck, 'The Lisbon judgment of the German Constitutional Court, the primacy of EU law and the problem of *Kompetenz-Kompetenz*: a conflict between right and right in which there is no *Praetor*' (2011) 17(4) *ELJ* 470; J Komárek, 'The place of Constitutional Courts in the EU' (2013) 9(3) *EuConst* 420.

3 T Schilling, 'The autonomy of the Community legal order: An analysis of possible foundations' (1996) 37(2) *Harvard International Law Journal* 389. Weiler offers a critique of his reading of EU law through an international law prism in J H H Weiler, *The Constitution of Europe. "Do the new clothes have an emperor?" and other essays on European integration* (CUP 1999), chapter 9.

Question'.[4] While the Court of Justice established this jurisdiction as early as *Van Gend en Loos*,[5] national constitutional courts have, in their case law, begged to differ.[6] The conflict can be narrowed down to the relationship between the exclusive power of the Court of Justice to interpret (and annul)[7] EU law,[8] and the principle of conferral[9] which determines the Member States as the source of autonomy of EU law. In order to analyse the case law concerning the question of the final say, the remainder of this introduction will address the division of competences between the Union and Member States and some problems that such a configuration has yielded.

The question of EU's powers and their limits have been declared a problem in need of a solution in the Declaration on the Future of the Union,[10] and this was indeed addressed in the Laeken Declaration,[11] which proposed a reform in the form of a clear list of the Union's competences. The same approach was adopted in the Draft Constitutional Treaty,[12] and ultimately made its way into the Lisbon Treaty.[13] Unlike previous Treaties, the Treaty of Lisbon incorporated a list of areas in which the EU has competence,

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4 ibid., 404. Schilling treats EU law as a public international law entity, and thus bases his conclusions on the judicial *Kompetenz-Kompetenz* through a literal reading of the Treaties (which, as mentioned in n 3, Weiler deconstructs and heavily criticises).

5 Court of Justice Case 26/62 *Van Gend en Loos* [1963] ECLI:EU:C:1963:1.

6 For an analysis of the national case law vocabulary asserting the supremacy of national constitutions and a final say, see Chapter 1, Section 3.1.

7 Court of Justice Case 314/85 *Foto-Frost* [1987] ECLI:EU:C:1987:452, [17].

8 Based on Article 19 TEU, and Articles 263 and 267 TFEU.

9 The German *Bundesverfassungsgericht* placed the principle of conferral as the 'basic feature of the Community legal order'. German *Bundesverfassungsgericht* Cases 2 BvR 2134/92 and 2159/92 *Manfred Brunner and Others*, Judgment of 12 October 1993, (1994) 1 *CMLR* 57, 94.

10 Declaration on the Future of the Union, attached to the Treaty of Nice [2001] OJ C 80/85.

11 European Council, Presidency conclusions, Laeken, 14 and 15 December 2001.

12 2003 IGC--Draft Treaty establishing a Constitution for Europe, Brussels, November 25, 2003.

13 See Article 5 TEU and Articles 2-6 TFEU.

divided into three categories (exclusive, shared and supporting competence).[14] In general, this shift represents an improvement in legal certainty and clarity,[15] but it has left the question of how borderline cases are to be resolved without a clear answer.[16] For example, the question on the limits of competence of the European Central Bank as regards the scope of monetary policy was tested in the *Gauweiler* case,[17] but regardless of the actual outcome, both the Court of Justice and the *Bundesverfassungsgericht* remained firm in their respective views that they are the ultimate arbiters on the limits of EU competence.

The criticism against leaving open the question of the final say has been extensively analysed in Chapter 1,[18] but suffice it to mention here that in order for the pluralist order to be preserved, it is not only desirable, but rather necessary for the question of the final arbiter to remain immaterial. Given the strong positions of both the Court of Justice and national constitutional adjudicators concerning their ultimate authority, the lack of finality – and the possibility of each of the participants of the European judicial space to be the ultimate arbiter at a certain time[19] – is conducive to

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14 Articles 3-6 TFEU.

15 See, for example, Czech *Ústavní Soud* Case *Lisbon Treaty I* Pl. ÚS 19/08, 26 November 2008, <http://www.usoud.cz/en/decisions/20081126-pl-us-1908-treaty-of-lisbon-i-1/>, accessed 15 April 2017, [133].

16 Craig (n 1), 327; Mayer (n 2), 10 and F C Mayer, 'The European Constitution and the courts. Adjudicating European constitutional law in a multilevel system' (2003) Jean Monnet Working Paper 9/03, 69.

17 The *Bundesverfassungsgericht* submitted a preliminary reference to the Court of Justice [Case 2 BvR 2728/13 *Gauweiler and Others*, Order of 14 January 2014] to determine whether the OMT mechanism is within the competence of the ECB. The response from the Court of Justice came in Case C-62/14 *Gauweiler* [2015] ECLI:EU:C:2015:400.

18 See section 2.1.

19 It is useful to recall the definition of heterarchy here: 'the relation of elements to one another when they are unranked or when they possess the potential for being ranked in a number of different ways.' C L Crumley, 'Heterarchy and the analysis of complex societies' (1995) 6 *Archaeological Papers of the American Anthropological Association*, 1, 3. A pluralist

cooperation and mutual respect between the courts uner analysis. It is precisely because the winners and losers are not pre-determined, and there is a possibility for everyone to be a winner at certain times, that all the players remain in the game. That this is a deliberate choice can be seen from the rejection of the Constitutional Treaty, which contained an explicit primacy clause in its Article I-6, but was subsequently excluded from the Lisbon Treaty.[20] While the role and the authority of the principle of primacy is not diminished by the lack of its express inclusion in the Treaty, it does demonstrate the desire for it to remain on the level of a judicial principle, and thus possibly open to differing interpretations in different situations.[21]

In essence, the *ultra vires* conflict reflects the autonomous claims to ultimate authority by the Court of Justice, and the parallel replies by national jurisdictions with a constitutional mandate. In addition, the conflict also yielded the conclusion that these conflicts can be resolved through time, in a dynamic manner, and this chapter aims to determine whether the jurisprudence in this area is supportive of the existence of the auto-correct function of constitutional pluralism.

In what follows, the *ultra vires* conflict will be looked at from the perspective of

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constellation thus relies on heterarchy as the state of constant possibility of different actors being the ultimate arbiter.

[20] Instead, a Declaration on primacy has been added to the Lisbon Treaty:

> The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.

17th Declaration concerning primacy [2008] OJ C115/344.

[21] de Búrca argues that EU law has more generally evolved through the use of vague and open terms that have deliberately been used to 'mediate between very different understandings and conceptions of the issue under discussion'. See G de Búrca, 'Reappraising subsidiarity's significance after Amsterdam' (1999) Harvard Jean Monnet Working Paper 7/99, 8. See also, Weatherill, *Law and Values in the European Union* (n 1), 69.

the Court of Justice (section 2), and from the perspective of national constitutional adjudicators (section 3). The chapter will conclude with an analysis of the applicability of the theory of constitutional pluralism and its auto-correct function (section 4).

## 2. The EU side of analysis

In the early days of European integration, the Court of Justice famously stated that the

> […] Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals.[22]

In addition to the case law asserting the autonomy, primacy and direct effect of Union law, Article 1 and Article 47 TEU state that the Union is a successor to the European Community, and now has legal personality, resulting from the merging of the earlier second and third pillars with the Community. This shift particularly strengthened the position of the Court of Justice as it gained limited jurisdiction in the areas of the Common Foreign and Security Policy,[23] and the Area of Freedom, Security and Justice.[24]

In what follows, I will analyse the Court's case law in an incremental fashion,

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22 Court of Justice Case 26/62 *Van Gend en Loos* (n 5), 12. The same was reiterated by the Court in Case 6/64 *Costa v ENEL* [1964] ECLI:EU:C:1964:66, 593.

23 According to the Court of Justice: '[…] as regards the provisions of the Treaties that govern the CFSP, the Court of Justice has jurisdiction only to monitor compliance with Article 40 TEU and to review the legality of certain decisions as provided for by the second paragraph of Article 275 TFEU.' Opinion 2/13 [2014] ECLI:EU:C:2014:2454, [249].

24 For a more detailed analysis on the legal consequences for the Common Foreign and Security Policy, see Opinion 2/13 (n 23), [249]-[257]; D Eisenhut, 'Delimitation of EU-competences under the First and Second Pillar: a view between ECOWAS and the Treaty of Lisbon' (2009) 10 *GLJ* 585; as regards the changes concerning the Area of Freedom, Security and Justice, see A Hinarejos, 'The Lisbon Treaty versus standing still: a view from the Third Pillar' (2009) 5(1) *EuConst* 99. For a comparison between the two areas, see A Engel, 'Delimiting competences in the EU: CFSP versus AFSJ legal bases' (2015) 21(1) *EPL* 47. Finally, for an analysis of the relevant jurisprudence in the former third pillar as regards fundamental rights review, see Chapter 4, Section 4.

starting from the early days of introducing the principles of direct effect and primacy of EU law, through the emphasis placed on the autonomy of EU law, and the role and reach of general principles of Union law.

## 2.1. Early case law – introducing direct effect and primacy

The Court's assertion of the autonomy of the EU's legal order comes as a direct response to the post-Westphalian understanding of nation states as the exclusive holders of sovereignty.[25] Maduro argues that the Court has taken upon itself the role of ensuring the effectiveness of Union law by way of underlining its distinctiveness from the public international law realm,[26] whereas Weiler adds that the Court has implied its self-perception as a supreme court through the self-referential interpretation of the system of the Treaties.[27] He underlines that the creation of constitutional structural and material doctrines (such as primacy and direct effect) contributed to the creation of EU constitutional law which the Court is legitimised to protect.[28] In support of this view, Lindahl finds that the use of an internal reference point, or the self-referential system of Treaties[29] as Weiler calls it, results in a Union law as an expression of collective self-

25 See Introduction, Section 3.1. for a discussion on the legal nature of the EU as a polity, and Chapter 1, Section 3.1. on the discussion on the claim to sovereignty by the Court of Justice.

26 M P Maduro, *We the Court. The European Court of Justice and the European Economic Constitution* (Hart Publishing 1998), 7.

27 Weiler, *The Constitution of Europe*. (n 3), 189.

28 ibid., 189-190.

29 Lenaerts concludes that the Court of Justice has 'a constitutional mandate in a self-referential and, in that sense, autonomous legal order'. K Lenaerts, 'The Court's outer and inner selves: exploring the external and internal legitimacy of the Court of Justice' in M Adams, H de Waele, J Meeusen and G Straetmans (eds), *Judging Europe's judges. The legitimacy of the case law of the European Court of Justice* (Hart Publishing 2015), 15.

legislation, meaning the European Union is a sovereign polity within the scope of its objectives.[30]

In order for this new, autonomous and distinct legal order to function properly without attempts at circumvention from the Member States, the Court introduced the principles of direct effect[31] and primacy[32] of EU law. According to Claes, the innovative momentum of introducing the principle of direct effect by the Court of Justice is not in the more general request for direct applicability of a provision with a supranational source, but rather the fact that this appears to be the first time that such a conclusion was reached by a supranational court 'irrespective of domestic preferences as to monism or dualism'.[33] Maduro adds that the Court of Justice, in building its legitimation, did not have to counter claims of democratically legitimate national parliaments, as did national constitutional courts.[34]

In addition to direct effect, the principle of primacy has added another layer to the confidence of the Court of Justice to determine the limits of its own power. Primacy

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30 H Lindahl, 'Sovereignty and representation in the European Union' in N Walker (ed), *Sovereignty in Transition* (Hart Publishing 2003), 107.

31 ibid. For a useful elaboration (there are too many contributions to cite here), see in particular P Pescatore, 'The doctrine of "direct effect": an infant disease of Community Law' (2015) 40(2) *ELRev* 135 [an update from the original article that appeared in (1983) 8 *ELRev* 155]; Claes, *The National Courts' Mandate in the European Constitution* (n 2), 70-97.

32 Court of Justice Case 6/64 *Costa v ENEL* (n 22), 594. For an analysis of the role of the principle of primacy in the context of constitutional pluralism, see Chapter 1, Section 2.2.

33 Claes, *The National Courts' Mandate in the European Constitution* (n 2), 73. See also, H de Waele, 'The role of the European Court of Justice in the integration process: a contemporary and normative assessment' (2010) 6 *Hanse Law Review* 3, 4. A disregard for monism or dualism as legal concepts is advocated by von Bogdandy, who argues they are 'intellectual zombies of another time and should be laid to rest.' See A von Bogdandy, 'Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law' (2008) 6 *ICON* 397, 400.

34 Maduro, *We the Court* (n 26), 11. In the national setting, this critique is called the counter-majoritarian difficulty, according to which judicial review distorts majoritarian decision-making in democratically elected institutions. See M Tushnet, 'Policy distortion and democratic debilitation: comparative illumination of the countermajoritarian difficulty' (1995) 94(2) *Michigan Law Review* 245.

assumes necessary for its existence, but at the same time also legitimises, the autonomy and independence of the Union legal order.[35] As de Búrca points out, again taking into account the self-referential nature of the Court's interpretation, primacy of EU law is 'a consequence of the sovereignty of the EC rather than vice versa.'[36]

Discussing the autonomy and independence of the Union's legal order leads us to explore in more detail what this means for the role and the position of the Court of Justice itself. More particularly, while it appears to be widely accepted that Union law is an autonomous and sovereign legal order, is it indispensable for the Court of Justice to assume the position of a court akin to our State-rooted preconceptions of a supreme court at the top of a national judiciary? The autonomy of EU law can be seen as the keystone of the Court's central role in ensuring the uniform interpretation and application of Union law. Interviewees 1, 3 and 5 confirmed this to be the role of the Court, and Interviewee 1 placed a particular emphasis on Article 19 TEU as the source of this mandate for the Court of Justice granted by the Member States.[37] The same Interviewee concluded that the Court of Justice may be regarded as the EU's court fulfilling the role of a supreme court in the national setting.

Both direct effect and primacy of Union law may lead us to conclude that the Court of Justice is right in claiming the final say concerning the outer limits of EU competence. It can certainly be read as the Court's claim to (a functionally limited)

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35 Lindahl analysed the Court's circular construction of arguments in *Costa v ENEL*, and concluded that: '[in] the same stroke by which supremacy is held to flow from the "special and original nature" of the Treaty, the Treaty acquires a "special and original nature" because the ECJ grants its provisions supremacy over national law.' Lindahl (n 30), 109-110

36 de Búrca in Walker (n 30), 454. See also Maduro, *We the Court* (n 26), 10.

37 See also the Court's elaboration on the autonomy of EU law and the consequences this has for its position in Opinion 2/13 (n 23), [176], [198]-[199], [246].

sovereignty in parallel to the claims of constitutional adjudicators. This fact appears rather uncontroversial for Interviewees 1 and 3, and is implied by Interviewee 4.[38] Interviewee 3 stated that the question of *Kompetenz-Kompetenz* has many meanings, and while determining the legislative limits of the EU through Treaty amendments falls to the Member States, the judicial final say is undoubtedly in the hands of the Court of Justice.

During the 1970s and the 1980s, the Court has had the opportunity to further establish itself as the institution designated for and entrusted not only with the uniform interpretation and application of Union law, but also with determining its validity. In *Internationale Handelsgesellschaft*,[39] the Court was faced with the question of validity of the system of export licences and of the deposit attached to them set out in two regulations, as the German administrative court considered they are contrary to several fundamental rights contained in the German Basic Law.[40] While the case marked the beginning of a decades-long saga on the status of fundamental rights protection in the European Union,[41] its importance for the focus of the present chapter lies in the Court's reassertion of its exclusive position to review Union legislation, and solely against the standard of Union law – thus rendering the German constitutional requirements irrelevant for its assessment. It is worth taking a closer look at how the Court approached this conflict. On the point of validity of Union regulations against national constitutional

38 Interviewee 4 stated that since the early case law of the Court starting with Case 166/73 *Rheinmühlen* [1974] ECLI:EU:C:1974:3, [4], the position of national constitutional and supreme courts in their national judicial structured has irreversibly changed and this is in the view of the Interviewee no longer a controversial issue.

39 Court of Justice Case 11/70 *Internationale Handelsgesellschaft* [1970] ECLI:EU:C:1970:114.

40 ibid., 1133.

41 On the relationship between the Court of Justice and national constitutional courts in the area of fundamental rights review, see Chapter 4, and for the *Solange* developments more specifically, Section 2.

requirements, the Court stated that:

> In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called in question.[42]

The first step the Court took was to reiterate the autonomy and independence of Union law, in order to cement its position in the institutional structure of the Union, by ultimately sourcing it in the autonomous and independent character of Union law that requires judicial oversight.[43] It stated that no EU measure's validity could be brought into question due to a contrary national constitutional principle or structure.[44] At this point, the Court faced the possibility of a serious backlash from German courts, as it defied the authority of the German Basic Law during a time when the protection of fundamental rights was far beyond the landscape of Union law.[45] Aware of the importance of the case for preserving the primacy of Union law, the Court nevertheless stated that:

> However, an examination should be made as to whether or not any analogous guarantee inherent in Community law has been disregarded. In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.[46]

The Court broadened the scope of its own self-referential system with general principles

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42 Court of Justice Case 11/70 *Internationale Handelsgesellschaft* (n 39), 1134.

43 The circularity of the sentence follows the circularity of the Court's reasoning.

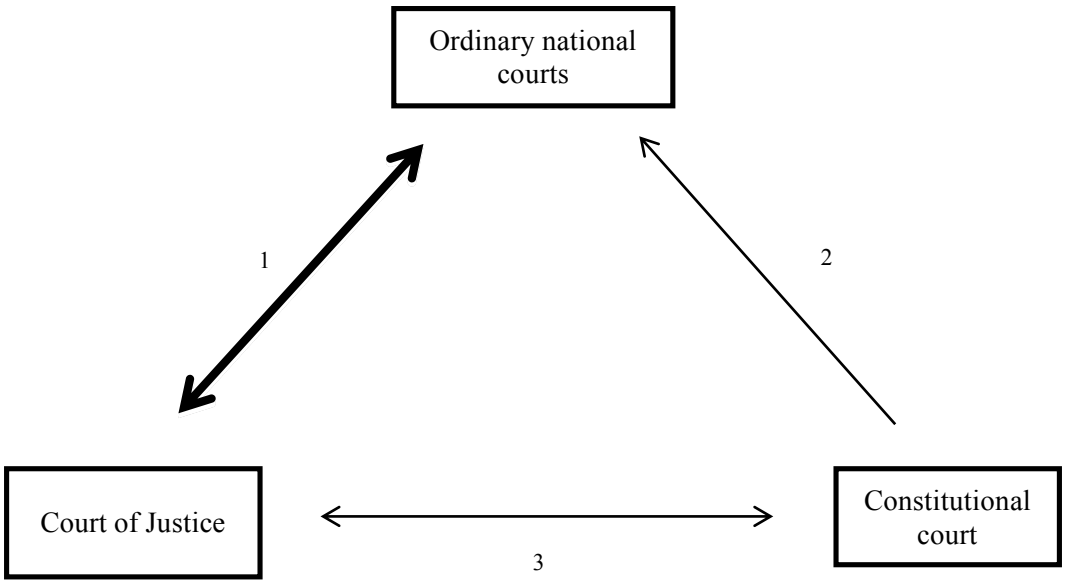
44 It is the claim of the present work that the national identity clause from Article 4(2) TEU has changed this unconditional approach initially taken by the Court of Justice. For a further analysis, see Chapter 3.

45 It was not until the late '80s and the early '90s that the Court established that fundamental rights are a standard of review of Union action. See Court of Justice Case 5/88 *Wachauf* [1989] ECLI:EU:C:1989:321; Case C-260/89 *ERT* [1991] ECLI:EU:C:1991:254. See Chapter 4, Section 3.1. for a more detailed analysis of this development.

46 Court of Justice Case 11/70 *Internationale Handelsgesellschaft* (n 39), 1134.

which also include the constitutional traditions of Member States, yet preserving its own exclusive jurisdiction in this area. It then analysed the regulations in question and found they were both appropriate and proportionate, and thus not in violation of fundamental rights. The response from the Court of Justice was ultimately rejected by the German Federal Constitutional Court in what is now best known as the *Solange I* judgment.[47] Regardless of the subsequent developments concerning fundamental rights protection, this judgment marks an important step in limiting national courts' use of national (constitutional) law as a standard of review against Union acts. The consequences of this case law on power relations are explained in the judicial triangle below (Figure 3).

***Figure 3*** *Power relations in the judicial triangle after Van Gend en Loos, Costa v ENEL and Internationale Handelsgesellschaft*




[47] German *Bundesverfassungsgericht* Case 37 BVerfGE 271 *Internationale Handelsgesellschaft (Solange I)* Judgment of 29 May 1974, (1974) 2 *CMLR* 540.

The doctrines of primacy and direct effect represent the first enchroachment of the Court of Justice, and EU law more generally, on the national judicial hierarchy. Arrow 1 depicts the relationship of cooperation between the Court of Justice and ordinary national courts (which is a two-way process), as the latter are now to apply EU law irrespective of possible contrary provisions of their national constitutions.[48] Arrow 2 accordingly illustrates the reduced influence that courts with constitutional jurisdiction have on ordinary national courts, specifically visible after *Internationale Handelsgesellschaft*. They are still in the position to mandate constitutional interpretation and review, but only to the limit of primacy of EU law. As a result of these relations, arrow 3 shows the Court of Justice and courts with constitutional jurisdiction in a relationship of interpretative competition. Initially, thus, the Court of Justice has the advantage.

## 2.2. An explicit assertion as to the final say

More than a decade later, the Court had another opportunity to expand its influence in having the final (judicial) say, this time in relation to other EU institutions. In *Les Verts*,[49] the Court was faced with an action for annulment of a decision of the Bureau of the European Parliament, which in turn sought, through a broad interpretation of (then) Article 173 of the Treaty, to gain the right to initiate an action for annulment against the Commission and the Council. The Court provided an all-encompassing definition of its role and duties:

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48 The strengthening of ordinary national courts in this triangle has been subject of extensive scholarship, most prominently addressed by Slaughter and Mattli's empowerment thesis, and Alter's inter-court competition thesis. See Introduction, Section 2.1.3.

49 Court of Justice Case 294/83 *Les Verts* [1986] ECLI:EU:C:1986:166.

> It must first be emphasized in this regard that the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty. In particular, in Articles 173 and 184, on the one hand, and in Article 177, on the other, the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions.[50]

Regardless of the fact that the provisions cited made no mention of the European Parliament, the Court reviewed the decision in question, using a dynamic interpretation of the Treaty, in particular in light of the expanded powers of the European Parliament and the more general spirit and the system of the Treaty.[51]

A year later, the Court had the opportunity to shed further light on its power of judicial review of EU acts. In *Foto-Frost*,[52] the Court addressed the relationship between the preliminary reference procedure and its power of judicial review. Drawing upon its conclusions in *Les Verts* about the Treaty's complete system of judicial remedies,[53] the Court found that the preliminary reference procedure, although it does not explicitly determine its exclusive power of declaring an act of the EU invalid, necessarily leads to that conclusion as any other reading of it would be contrary to the coherence of the Treaties.[54]

Read together, *Les Verts* and *Foto-Frost* seem to complete the Union's system of judicial review:[55] privileged applicants[56] are entitled to initiate a direct action before the

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50 ibid., [23].

51 ibid., [25].

52 Court of Justice Case 314/85 *Foto-Frost* (n 7).

53 ibid., [16].

54 ibid., [17].

55 See also, K Lenaerts, 'The rule of law and the coherence of the judicial system of the European Union' (2007) 44 *CMLRev* 1625, 1626.

Court, whereas natural and legal persons are capable of doing so when an act is of a direct and individual concern to them.[57] In addition, the preliminary reference procedure provides another avenue for natural and legal persons, as well as national courts questioning the validity of a Union act.[58] Ultimately, it is only through the self-referential system of the Treaties, rooted in the rule of law, that any measure or activity of the Union may be assessed, and solely against the standards of EU law. This inherently includes deciding on the outer limits of Union activity in the most general sense of the term.

The Court of Justice did, however, in the same year as *Foto-Frost*, decide that measures of EU law may suffer from defects greater than that of illegality. In *Consorzio Cooperative d'Abruzzo*,[59] the Court differentiated between EU measures that are illegal (to which *Foto-Frost* applies), and those which are non-existent (nullity *ex nunc*) and have accordingly never produced legal effects. In such situations, the national court is allowed to declare that the measure in question never produced legal effects, in line with the principles of legal certainty and legitimate expectations.[60] The Court of Justice envisaged such an option for measures which 'exhibit particularly serious and manifest

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56 According to the current wording of Article 263(2) TFEU, these are Member States, the European Parliament, the Council and the Commission. Article 263(3) TFEU accords to the Court of Auditors, the European Central Bank and the Committee of the Regions the right to initiate a direct action for the purpose of protecting their prerogatives.

57 The Treaty of Lisbon omitted the need for individual concern to exist in order to initiate a direct action concerning regulatory acts which do not entail implementing measures (Article 263(4) TFEU). This sparked further problems into what exactly regulatory acts entail, and the General Court defined them as 'all acts of general application apart from legislative acts' in Case T-18/10 *Inuit Tapiriit Kanatami* [2011] ECLI:EU:T:2011:419, [56]. On appeal, the Court of Justice confirmed this interpretation in Case C-583/11 P *Inuit Tapiriit Kanatami* [2013] ECLI:EU:C:2013:625, [61].

58 Court of Justice Case 294/83 *Les Verts* (n 49), [23]; Case 314/85 *Foto-Frost* (n 7), [16]. The special role of the preliminary reference procedure in the system of judicial review of Union acts was confirmed explicitly in, for example, Case C-50/00 P *UPA* [2002] ECLI:EU:C:2002:462, [40]; Case C-491/01 *BAT and Imperial Tobacco* [2002] ECLI:EU:C:2002:741, [39].

59 Court of Justice Case 15/85 *Consorzio Cooperative d'Abruzzo* [1987] ECLI:EU:C:1987:111.

60 ibid., [9]-[10].

effects.'[61] A further elaboration of this exception was given in *Commission v BASF*:

> [Acts] tainted by an irregularity whose gravity is so obvious that it cannot be tolerated by the Community legal order must be treated as having no legal effect, even provisional, that is to say that they must be regarded as legally non-existent. […]
> From the gravity of the consequences attaching to a finding that an act of a Community institution is non-existent it is self-evident that, for reasons of legal certainty, such a finding is reserved for quite extreme situations.[62]

Regardless of the existence of this option, Bast reports that the Court of Justice has not allowed national courts to use it to an extent of any relevance.[63] Such an outcome is unsurprising, as it would otherwise allow national courts to escape their obligation of sincere cooperation.

## 2.3. Expanding the self-referential system of the Treaties as an expansion of the Court's position of final arbiter

The above assertions of the Court of Justice could primarily have been seen as directed towards Member States and their courts. In the development of its case law, the Court has expanded its jurisdiction both towards external actors and by determining a universal application of general principles of law. I will address both of these aspects in turn.

The Court had the opportunity to address its relationship towards external actors in

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61 ibid., [10].

62 Court of Justice Case C-137/92 P *Commission v BASF* [1994] ECLI:EU:C:1994:247, [49]-[50]. Confirmed in Case C-245/92 P *Chemie Linz* [1999] ECLI:EU:C:1999:363, [93]; Case C-475/01 *Commission v Greece* [2004] ECLI:EU:C:2004:585, [18]-[20].

63 J Bast, 'Don't act beyond your powers: the perils and pitfalls of the German Constitutional Court's *ultra vires* review' (2014) 15(2) *GLJ* 167, 171-172. Beyond its use in EU law, Bast suggests another more significant point: the formula used by the Court of Justice seems to have inspired the *Bundesverfassungsgericht* in defining its own *ultra vires* standard of review in its *Honeywell* decision. See Section 3.1. below for the analysis of the German standard.

1991, when it was asked by the Commission to assess the compatibility of the EEA Agreement with the Treaty provisions on its judicial structure.[64] The Court first provided an explanation as to the differences between the (then) EEC Treaty and the EEA Agreement:

> In contrast, the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law. As the Court of Justice has consistently held, the Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals […].[65]

The cited paragraph provides interesting insight into how the Court regards the EU as opposed to other international organisations in the context of public international law. The Court finds primacy and direct effect to have resulted in constitutionalising the Treaties, based on the rule of law. The Court's move is an HLA Hart-esque one,[66] as it places the rule of law as the ultimate rule of recognition of the EU constitution. This in turn legitimises the system as a constitutional one and differentiates it from the EEA as an international law one.[67] Ultimately, the Court found that, due to the specific nature of the EU as a polity, but also its own powers stemming from the self-referential system of the Treaties, an EEA Court as determined in the EEA Agreement would not be able to achieve legal homogeneity[68] and would undermine the autonomy of Union law.[69]

The Court's rejection did not result in the abandonment of the EEA in itself, as

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64 Court of Justice Opinion 1/91 [1991] ECLI:EU:C:1991:490.

65 ibid., [21].

66 See H L A Hart, *The Concept of Law* (OUP 2nd edition, 1994), 92.

67 Court of Justice Opinion 1/91 (n 64), [20].

68 ibid., [25]-[29].

69 ibid., [46].

the Member States and the EFTA States subsequently devised a parallel judicial structure (the EFTA Court for EFTA States), whereby the EEA Joint Committee would be handling any dispute between these two pillars.[70] Thus, while it was open for the Member States to completely abandon and amend the system in which the Court of Justice was powerful enough to reject an international treaty,[71] the opinion of the Court was respected and a different solution was found which respects the Court's Treaty-based, but also self-proclaimed powers.

The expansion of the Court's influence, beyond curbing access to other potential judicial bodies, also took place in relation to the expansion of the general principles of law and their application. In *Mangold*,[72] the Court expanded the application of the general principle of non-discrimination on grounds of age to horizontal situations. The case concerned the application of the Framework Directive,[73] the aim of which was to establish a general anti-discrimination framework, to a contractual relationship between

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70 For further background, see S Norberg, '20 years on: some reflections on the European Economic Area judicial mechanism' in *Constitutionalising the EU judicial system. Essays in Honour of Pernilla Lindh* (Hart Publishing 2012), 61 onwards.

71 While this is certainly politically true, legally the Court has, starting with its Opinion concerning the Uruguay round of negotiations, drawn red lines that Member States would not be able to cross when concluding international treaties without 'rise to adverse consequences for all interested parties, including third countries'. See Court of Justice Opinion 3/94 [1995] ECLI:EU:C:1995:436, [17]; Opinion of the Court 1/09 [2011] ECLI:EU:C:2011:123, [48]; Opinion 2/13 (n 23), [146]. The Court stated as early as 1971 that 'each time the Community [...] adopts provisions laying down common rules ... the Member States no longer have the right [...] to undertake obligations with third countries which affect those rules.' Case 22/70, *Commission v Council* [1971] ECLI:EU:C:1971:32, [17]. More recently, in relation to different types of EU competences, the Court held that: 'duty of genuine cooperation is of general application and does not depend either on whether the Community competence concerned is exclusive or on any right of the Member States to enter into obligations towards non-member countries.' Case C-433/03, *Commission v Germany* [2005] EU:C:2005:462, [64]. For a comprehensive overview of how EU law affects Member States competences in the international sphere, see A Arena, 'Exercise of EU competences and pre-emption of Member States' powers in the internal and the external sphere: towards "Grand Unification"?' (2016) 35(1) *YEL* 28, 64-98.

72 Court of Justice Case C-144/04 *Mangold* [2005] ECLI:EU:C:2005:709.

73 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16.

the parties in the procedure prior to the expiry of the transposition deadline. The Court was thus faced with a national provision which was apparently detrimental for workers of an older age which the Directive was, among others, attempting to protect, but was not able to apply it before the transposition deadline had expired. The Court instead 'regarded'[74] the prohibition of discrimination on the grounds of age as a general principle of EU law,[75] which must be applied whenever a national rule is within the scope of EU law.[76] The Court stated that the principle of non-discrimination on grounds of age can be found in various international instruments and common constitutional traditions of Member States.[77] In consequence, the general principle of prohibition of discrimination on grounds of age has acquired horizontal effect.[78] However, de Mol rightly points out that international instruments and national constitutional traditions usually do not accord horizontal effect to the values to which they give expression.[79] Nevertheless, the Court

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74 Court of Justice Case C-144/04 *Mangold* (n 72), [75]. Mazák and Moser provide a nice comparison to the Court's 'recognition' of this pre-existing general principle, as opposed to its establishment: Michelangelo's alleged explanation of the statue of David was that he was not created from stone, but rather, Michelangelo saw him in it and removed the unnecessary parts of the stone for David to emerge in his full beauty. J Mazák and M K Moser, 'Adjudication by reference to general principles of EU law: a second look at the *Mangold* case law' in Adams, de Waele, Meeusen and Straetmans (eds), *Judging Europe's judges* (n 29), 61.

75 Court of Justice Case C-144/04 *Mangold* (n 72), [75].

76 ibid. On the contrary, when a situation is found to be outside the scope of EU law, general principles do not apply. See Court of Justice Case C-427/06 *Bartsch* [2008] ECLI:EU:C:2008:517, [15]-[16]. It should however be underlined that the Court does not make any mention of the horizontality of the situation either in *Mangold* or in *Bartsch*.

77 Court of Justice Case C-144/04 *Mangold* (n 72), [74]. For a direct critique of this point, see Opinion of Advocate General Mazák in Case C-411/05 *Palacios de la Villa* [2007] ECLI:EU:C:2007:106, [88] (indicating only a few Member States had an explicit reference to the principle); Opinion of Advocate General Bot in Case C-555/07 *Kücükdeveci* [2009] ECLI:EU:C:2009:429, [77].

78 See on that point, Opinion of Advocate General Sharpston in Case C-427/06 *Bartsch* [2008] ECLI:EU:C:2008:297, [35]. See also M de Mol, '*Kücükdeveci*: *Mangold* revisited – horizontal direct effect of a general principle of EU law' (2010) 6 *EuConst* 293, 302 onwards; A Eriksson, 'European Court of Justice: broadening the scope of European nondiscrimination law' (2009) 7(4) *ICON* 731, 736.

79 de Mol (n 78), 302.

used this reasoning to expand the reach of the general principle of non-discrimination on grounds of age, resulting in an expansion of the self-referential system of the primary EU law.

This line of reasoning was further explored in *Kücükdeveci*,[80] where the material difference was the expiry of the transposition period of the Framework Directive, as well as entry of the Charter into force, whose Article 21(1) prohibits discrimination on grounds of age. The reference concerned the provision of the German Civil Code according to which periods of employment before the age of 25 do not count towards the statutory notice period for dismissal. The Court used *Mangold* as a reference that the prohibition of discrimination on grounds of age is a general principle of EU law,[81] which was given specific expression in the Framework Directive. The Court distinguished the situation in *Kücükdeveci* from that of *Bartsch* solely on the basis of the expiry of the implementation deadline,[82] which to the Court appears to be central for placing a situation within the scope of Union law:

> On that date, that directive had the effect of bringing within the scope of

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80 Court of Justice Case C-555/07 *Kücükdeveci* [2010] ECLI:EU:C:2010:21. Prior to this case, the Court was faced with similar questions concerning the Framework Directive and the status of the non-discrimination on grounds of age, but made no mention of the novelties from *Mangold* in Case C-411/05 *Palacios de la Villa* [2007] ECLI:EU:C:2007:604, Case C-427/06 *Bartsch* (n 76), Case C-88/08 *Hütter* [2009] ECLI:EU:C:2009:381, Case C-388/07 *Age Concern England* [2009] ECLI:EU:C:2009:128, Case C-229/08 *Wolf* [2010] ECLI:EU:C:2010:3, and Case C-341/08 *Petersen* [2010] ECLI:EU:C:2010:4.

81 Court of Justice Case C-555/07 *Kücükdeveci* (n 80), [21] and [50]. Note here how the Court again creates the point of reference (in *Mangold*), and then addresses subsequent cases based on its own self-referential system, as discussed above. Conversely, Advocate General Bot stated that he was of the opinion that the only legal basis for the case is the Directive, as an autonomous position of the general principle of prohibition of discrimination on grounds of age would 'deprive the Directive 2000/78 of all useful effect.' See Opinion of Advocate General Bot in Case C-555/07 *Kücükdeveci* (n 77), [34].

82 Court of Justice Case C-555/07 *Kücükdeveci* (n 80), [24]. For a critique concerning the inconsistency of this finding with that set out in *Bartsch*, see Editorial Comment, 'The scope of application of general principles of Union Law: an ever expanding Union?' (2010) 47 *CMLRev* 1589, 1593.

> European Union law the national legislation at issue in the main proceedings, which concerns a matter governed by that directive, in this case the conditions of dismissal.[83]

Subsequently, the Court found that since the Directive's expiry period had passed, which gives a specific expression to the general principle of non-discrimination on the grounds of age, this had the effect of rendering the general principle to be the basis of review.[84] The Court proceeded with the analysis of the national measure, and found it contrary to the principle of non-discrimination on grounds of age.[85] It remained unclear, however, whether the Court is of the view that all general principles of EU law have horizontal direct effect, or whether the case was relevant solely to non-discrimination on the grounds of age.[86] While the Court also established horizontal direct effect of non-discrimination on the grounds of nationality,[87] further cases made it clear that the doctrine in *Mangold* and *Kücükdeveci* applies solely to age discrimination.[88]

The reasoning in *Kücükdeveci* appeared to have raised more questions than it answered.[89] A particularly pressing one was whether the provisions of the Framework Directive or the principle of prohibition of discrimination on the grounds of age require the national court to disapply, in a horizontal situation, a contrary national provision for which there is no possible interpretation in conformity with EU law. This question was

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83 ibid., [25]. Interestingly, the Court did not explain the difference between *Mangold* and *Bartsch*, or why the expiry period was not a decisive factor in *Mangold*.

84 ibid., [27].

85 ibid., [43].

86 P P Craig and G de Búrca, *EU Law. Text, cases and materials* (OUP, 6th ed, 2015), 220-221; de Mol (n 78), 302-303.

87 Court of Justice Case C-115/08 *ČEZ* [2009] ECLI:EU:C:2009:660, [139].

88 Court of Justice Case C-147/08 *Römer* [2011] ECLI:EU:C:2011:286, [61]-[62]; Editorial Comment (n 82), 1596; Mazák and Moser (n 74), 84-85.

89 Significantly, Interviewee 1 stated that they find *Kücükdeveci* to be a rather controversial decision.

referred to the Court by the Danish Supreme Court (*Højsteret*) in the *Dansk Industri* case.[90] The *Højsteret* also asked whether the general principle of prohibition of discrimination on grounds of age could be balanced against the principles of legitimate expectations and legal certainty.

The Court started answering the question by highlighting that it was faced with a horizontal situation,[91] and reiterated that non-discrimination on grounds of age is a general principle of EU law, as established in *Mangold* and *Kücükdeveci*.[92] The self-referential system established in *Mangold* has been reaffirmed and qualified by the Charter in *Kücükdeveci*, and is now used in its qualified form in *Dansk Industri*. Ultimately, the Court further expanded the application of the general principle to horizontal situations, stating that for such a result to occur, it is necessary for the situation also to fall within the scope of the Framework Directive (which the Court found that it did).[93] The Court concluded:

> In the light of the foregoing considerations, the answer to the first question is that the general principle prohibiting discrimination on grounds of age, as given concrete expression by Directive 2000/78, must be interpreted as precluding, including in disputes between private persons, national legislation, such as that at issue in the proceedings before the referring court […].[94]

In conclusion, the development of the three cases is a perfect depiction of the dynamic approach that the Court takes in expanding the self-referential system of the Treaties,

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90 Court of Justice Case C-441/14 *Dansk Industri* [2016] ECLI:EU:C:2016:278. The Court has already found the Danish provision incompatible with the Directive in Case C-499/08 *Ingeniørforeningen i Danmark* [2010] ECLI:EU:C:2010:600, where the relationship between the parties was a vertical one.

91 Court of Justice Case C-441/14 *Dansk Industri* (n 90), [21].

92 ibid., [22].

93 ibid., [24].

94 ibid., [27].

which results in cementing its position as the ultimate arbiter.[95] From 2005, when *Mangold* was decided, until 2016 and *Dansk Industri*, the landscape of the law on the general principle of non- discrimination on grounds of age has changed considerably, and yielded an increase in the scope of influence of the Court.[96] As a result, the general principle of non-discrimination on grounds of age has been granted 'exclusionary effect'.[97]

The expansion of the self-referential system of primary EU law was further strengthened through the expansion of the authority of general principles of EU law in areas where the rules of the internal market clash with exclusive Member State competence. This entire process started in a case concerning the cross-border provision of health services in *Smits and Peerbooms*,[98] where the Court stated that while Member States are free to regulate their social security systems, they are still bound by Union law.[99] The Court provided no further detail on what this obligation entails and how it affects the regulatory autonomy of Member States. The situation was clarified in cases such as *Watts*[100] and *Stamatelaki*,[101] where the Court explicitly referred to the freedom to provide services as the benchmark against which Member States are not allowed to

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95 The *Højsteret* decided the case after receiving the answer from Luxembourg, and rejected the interpretation put forward by the Court as *ultra vires*. For an analysis, see Section 3.2.2. of this Chapter.

96 It remains to be seen will the Court expand its approach from *Mangold*/*Kücükdeveci*/*Dansk Industri* to other grounds of discrimination. For a pre-*Dansk Industri* analysis, see M de Mol, 'The novel approach of the CJEU on the horizontal direct effect of the EU principle of non-discrimination: (Unbridled) expansionism of EU law?' (2011) 18 (1-2) *MJ* 109.

97 S Rodin, 'Back to the square one: the past, the present and the future of the *Simmenthal* mandate' in J M Beneyto and I Pernice (eds), *Europe's constitutional challenges in the light of the recent case law of national constitutional courts – Lisbon and beyond* (Nomos, 2011), 312.

98 Court of Justice Case C-157/99 *Smits and Peerbooms* [2001] ECLI:EU:C:2001:404.

99 ibid., [44]-[46].

100 Court of Justice Case C-372/04 *Watts* [2006] ECLI:EU:C:2006:325, [92].

101 Court of Justice Case C-444/05 *Stamatelaki* [2007] ECLI:EU:C:2007:231, [23].

legislate. Giving exclusionary effect to written Treaty provisions has long been the approach of the Court;[102] however, this starting position was used to expand the exclusionary effect to non-written general principles.[103]

Mr Maruko claimed the right to a widower's pension of his deceased (homosexual) life partner, but was refused on the ground that such an entitlement exists only for spouses, and not life partners.[104] This time, the Court was faced with a discriminatory practice in the area of social security, an exclusive competence of Member States. The Court brought the case within the scope of EU law by concluding that the survivor's pension falls within the scope of term 'pay' enshrined in Article 141 EC,[105] thus bringing it within the scope of the Framework Directive.[106] The Court continued:

> Admittedly, civil status and the benefits flowing therefrom are matters which fall within the competence of the Member States and Community law does not detract from that competence. However, it must be recalled that in the exercise of that competence the Member States must comply with Community law and, in particular, with the provisions relating to the principle of non-discrimination (see, by analogy, Case C-372/04 Watts [2006] ECR I-4325, paragraph 92, and Case C-444/05 Stamatelaki [2007] ECR I-3185, paragraph 23).[107]

This paragraph is significant in terms of expanding the application of the general principle of non-discrimination, through an expansive interpretation of the concept of

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102 de Mol (n 78), 306.

103 For a further analysis of the argument that the Court is following an expansive trend, see M Cartabia, 'Europe and rights: Taking dialogue seriously' (2009) 5 *EuConst* 5, 11.

104 Court of Justice Case C-267/06 *Maruko* [2008] ECLI:EU:C:2008:179, [19]-[22].

105 Now Article 157 TFEU.

106 Court of Justice Case C-267/06 *Maruko* (n 104), [56].

107 ibid., [59].

'pay'.[108] The Court cites the cases concerning the cross-border provision of health services, and the paragraphs cited also refer to the freedom to provide services as a restriction of Member States regulatory competence. However, the novelty in *Maruko* is that the Court introduces the principle of non-discrimination, which does not have a written expression in the Treaties, as a limit to Member State regulatory competence.[109] Tobler and Waaldijk do not find this development controversial, and list a number of areas where the Court has already mentioned a limit to Member States' regulatory autonomy.[110] They however fail to mention the specificity of the benchmark (a non-written general principle) and the novel exclusionary effect of the general principle of non-discrimination.

Despite the mentioned expansions of its jurisdiction beyond the letter of the Treaties and insistence on the final say, the Court of Justice has not been particularly active or rigorous in policing the EU institutions' use of conferred competences. In the sea of challenges, the well-known *Tobacco Advertising I*[111] case is still a lonely example of an EU act of general application that has been annulled due to an excess in the use of conferred competences. In brief, Germany, after being outvoted in the Council, argued

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108 Such an expansion of Union law obligations is often termed as 'competence creep'. In relation to the exclusive Member State competence in particular, Weatherill cites Lenaerts: 'there simply is no nucleus of sovereignty that the Member States can invoke, as such, against Union law'. K Lenaerts, 'Constitutionalism and the many faces of federalism' (1990) 38(2) *American Journal of Comparative Law* 205 in Weatherill, *Law and Values in the European Union* (n 1), 30. See also, S Weatherill, 'Competence creep and competence control' (2004) 23(1) *YEL* 1.

109 On how different areas of Member States' exclusive competence were hindered by Treaty provisions on free movement, see Weatherill, *Law and Values in the European Union* (n 1), 45-51.

110 C Tobler and K Waaldijk, 'Case C-267/06, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen*, Judgment of the Grand Chamber of the Court of Justice of 1 April 2008, not yet reported.' (2009) 46 *CMLRev* 723, 734 (note).

111 Court of Justice Case C-376/98 *Germany v Parliament and Council* [2000] ECLI:EU:C:2000:544. For a presentation of the case, see Introduction, Section 2.2.2., and Weatherill, *Law and Values in the European Union* (n 1), 39-40.

that the EU had no competence to regulate the advertising of tobacco, as it is a measure of public health, where EU has no competence to harmonise national laws. The Court of Justice analysed the aims of the Directive, and found that:

> [A] measure adopted on the basis of Article 100a of the Treaty must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market. If a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition liable to result therefrom were sufficient to justify the choice of Article 100a as a legal basis, judicial review of compliance with the the proper legal basis might be rendered nugatory.[112]

The Commission therefore cannot use the most convenient legal basis, distorting the principle of conferral. Yet, in assessing the scope of the Directive, the Court of Justice differentiated between various types of advertising, and found that they only in part exceed the regulation of disparities in Member State regulation, namely that concerning 'the prohibition of advertising on posters, parasols, ashtrays and other articles used in hotels, restaurants and cafés, and the prohibition of advertising spots in cinemas, prohibitions which in no way help to facilitate trade in the products concerned.'[113] The Court of Justice thus annulled the Directive in its entirety. It later became clear that the Court of Justice will not take up a more active role in policing EU legislative action. As Weatherill points out, since the annulment of the Directive, the decision turned into a circular drafting guide to satisfy the requirements of conferral to the EU institutions,[114]

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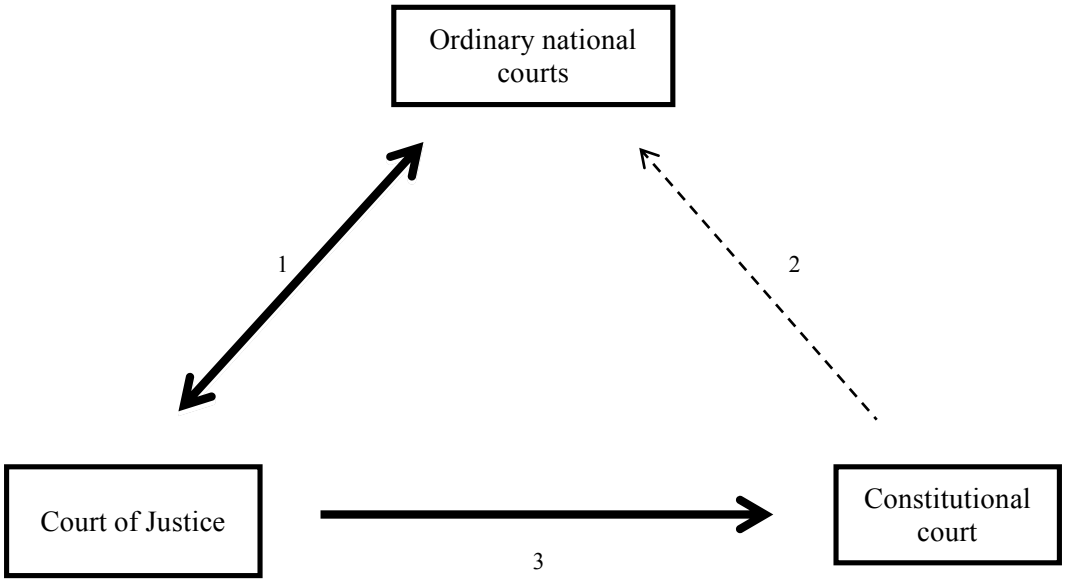
112 Court of Justice Case C-376/98 *Germany v Parliament and Council* (n 111), [84].

113 ibid., [99]. Usher equates this formula with 'selling arrangements' from *Keck*, which also do not touch upon trade between Member States. J Usher, 'Case C-376/98, Germany v. European Parliament and Council (tobacco advertising). Judgment of the Full Court of 5 October 2000, [2000] ECR I-8419' (2001) 38(6) *CMLRev* 1519, 1525 (note). See also Court of Justice Joined cases C-267/91 and C-268/91 *Keck* [1993] ECLI:EU:C:1993:905.

114 S Weatherill, 'The limits of legislative harmonization ten years after Tobacco Advertising: how the Court's case law has become a "drafting guide"' (2011) 12(3) *GLJ* 827, 828. Weatherill adds that the drafting guide includes another circularity in the Court's approach:

resulting in a rather high benchmark for finding a violation of the principle of conferral.[115] Subsequent cases have demonstrated this scepticism,[116] and leave considerable doubt as to the Court of Justice's willingness to keep the EU legislative institutions within the bounds of the Treaty. It thus remains to be seen how this case law influenced the power relations in the judicial triangle.

***Figure 4*** *Power relations in the judicial triangle after Tobacco Advertising, Mangold, Dansk Industri and Maruko*




The Court of Justice is again in the advantage. Ordinary national courts are bound to

> [The] Court presents a formula which defines the proper scope of legislative harmonization and which sets out the control exercised by the principles of proportionality and subsidiarity, the EU legislature duly adopts the approved but reliably vague vocabulary and, provided the drafting is well-chosen, the Court has no plausible basis on which to set aside the legislative act.

115 Weatherill, *Law and Values in the European Union* (n 1), 38. After the Directive has been amended to include the Court's recommendations, Germany failed in its second attempt to annul it. Court of Justice Case C-380/03 *Germany v Parliament and Council* [2006] ECLI:EU:C:2006:772.

116 Weatherill (n 114), 834-842.

apply the general principle of non-discrimination on grounds of age in horizontal situations that are in the scope of EU law (per *Mangold* and *Dansk Industri*). Without referring to a specific ground of discrimination, the general principle of non-discrimination furthermore applies in areas where the rules of the internal market clash with exclusive Member State competence (per *Maruko*). Consequently, Arrow 1 depicts the expanded influence of EU law in the everyday work of ordinary national courts. Accordingly, the role of constitutional adjudicators has been additionally marginalised, in particular given that general principles predominantly correspond to fundamental rights, where constitutional adjudicators were an undisputed authority (arrow 2). Finally, arrow 3 expands the leverage of the Court of Justice *vis-à-vis* constitutional adjudicators, as countervailing constitutional principles are rarely taken into account by the Court of Justice (as in *Dansk Industri*). This imbalance was at least part of the reason national courts with constitutional jurisdiction have insisted on maintaining their right to *ultra vires* review, as will be seen in the following section.

## 3. The Member State side of analysis

Constitutional pluralism presupposes the existence of parallel claims to ultimate authority in a single geographical space. Accordingly, Member States' courts performing constitutional review have had a variety of reactions to the penetration of the new autonomous legal order into their respective constitutional orders,[117] including that of rejecting the Court of Justice's claim to the final say.

[117] Mancini referred to them as 'some grumblings by the French *Conseil d'État*, the Italian *Corte Constituzionale* and a couple of English law lords.' F Mancini, 'The making of a constitution for Europe' (1989) 26(4) *CMLRev* 595, 600.

This section will aim to present this diverse jurisprudence in two broader categories: (1) the jurisprudence of the German *Bundesverfassungsgericht* setting out its view of the *ultra vires* review of Union acts; and (2) national constitutional jurisprudence declaring the decision of the Court of Justice *ultra vires*, in order to analyse how they envisage the resolution of a possible constitutional conflict if it concerns the division of competences between the EU and the national level (the Czech Republic and Denmark).

The aim of this section is to explore specifically: (1) the different limits that national constitutional adjudicators have placed upon the principle of primacy in relation to the final say; and (2) the possible scenarios that they envisage in the event that a constitutional conflict takes place. The analysis will aim to show that, regardless of the controversy surrounding the question of the final say, the auto-correct function of constitutional pluralism will serve to mediate any conflict that might arise as a result.

## 3.1. Germany – the conceptual role model

The centrality of the German jurisprudence for the European integration project more generally, but also for the development of a pluralist system, cannot be overstated.[118] Constitutional courts throughout the European Union have cited and taken over the German model of constitutional review of EU acts,[119] or have used it as support in creating their own standards of review.[120] It is thus essential for the understanding of *ultra vires* review in the European judicial space to study the development of the German

118 E Vranes, 'German constitutional foundations of, and limitations to, EU integration: a systematic analysis' (2013) 14(1) *GLJ* 75, 75.

119 For example, the Czech Constitutional Court.

120 For example, the Danish Supreme Court.

jurisprudence and standard of review in detail.

The position of the *Bundesverfassungsgericht*[121] in the German constitutional setup is in some ways analogous to the constitution-making activities of the Court of Justice;[122] the jurisprudence of the *Bundesverfassungsgericht* has been central not only to matters of European integration in Germany, but for the preponderance of major political issues in Germany,[123] resulting in a constitutionalisation of the entire legal order. With its progressive interpretations of individual rights, the law-making activities of the *Bundesverfassungsgericht* moved significantly beyond its original mandate.[124] The dominant position of the *Bundesverfassungsgericht* among the three branches of government has sparked criticism, mainly associated with the counter-majoritarian difficulty,[125] but according to Huber, the criticism has not changed the practice of the *Bundesverfassungsgericht*.[126]

This exceptionally strong domestic position has translated into the *Bundesverfassungsgericht* becoming one of the most influential courts in the European

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121 A more thorough analysis of the *Bundesverfassungsgericht* goes beyond the scope of this chapter. The literature on the topic is vast. For a recent and thorough presentation, see M Hailbronner, *Traditions and Transformations. The Rise of German Constitutionalism* (OUP 2015). For a comprehensive analysis of the *Bundesverfassungsgericht*'s case law, see D P Kommers and R A Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press, 3rd edition, 2012).

122 A-M Burley and W Mattli, "Europe before the Court: a political theory of legal integration" (1993) 47 *International Organization* 41, 42; K Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (OUP 2001), 2-3; Lenaerts (n 29), 15.

123 P M Huber, 'The Federal Constitutional Court and European integration' (2015) 21(1) *EPL* 83, 83; D P Kommers, 'The Federal Constitutional Court in the German political system' (1994) 26(4) *Comparative Political Studies* 470, 470-471.

124 Huber (n 123), 85. See also, C Joerges, 'Pereat iustitia, fiat mundus. What is left of the European economic constitution after the *Gauweiler* litigation?' (2016) 23(1) *MJ* 99, 101.

125 See n 34.

126 Huber (n 123), 85.

Union, widely cited among other constitutional courts in Europe.[127] It therefore comes as little surprise that it was the *Bundesverfassungsgericht* that first introduced the *ultra vires* review of EU acts, after which other constitutional courts in the EU followed suit. In what follows, I will chronologically present the case law of the *Bundesverfassungsgericht* establishing its claim to the final say in competence monitoring.

The notion of sovereignty has been central to the German constitutional thought,[128] and has found itself in the centre of the constitutional challenge to the German ratification of the Maastricht Treaty.[129] The *Bundesverfassungsgericht* has found itself torn between the exigencies of sovereignty as understood in the traditional sense and the requirements stemming from the autonomy of EU law, most importantly its principle of primacy. It therefore comes as little surprise that sovereignty has been forcefully reasserted and relied upon by the *Bundesverfassungsgericht* when it introduced its claim to perform an *ultra vires* review of EU primary law.[130] The decision was consequentially characterised as marking the beginning of constitutional pluralism,[131] as the *Bundesverfassungsgericht* countered the Court of Justice's claim to the final say with its own. In addition, the German Court allowed a constitutional complaint against an EU act

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127 General Report, Conference of European Constitutional Courts (2014), 9; G Anagnostaras, 'Activation of the *ultra vires* review: the *Slovak Pensions* judgment of the Czech Constitutional Court' (2013) 14(7) *GLJ* 959, 959.

128 For an analysis of its development in the post-war Germany, see M Aziz, 'Sovereignty *Über Alles*: (Re)configuring the German legal order' in Walker (n 30).

129 German *Bundesverfassungsgericht* Case *Manfred Brunner and Others* (n 9). For a fierce critique of the judgment, see J H H Weiler, 'Does Europe need a constitution? Demos, Telos and the German Maastricht decision' (1995) 1(3) *ELJ* 219. For a comparison with the Italian 'lack of worry' for national sovereignty when compared to Germany, see M Cartabia, 'The legacy of sovereignty in Italian constitutional debate' in Walker (n 30), 319 onwards.

130 Aziz significantly calls the *Bundesverfassungsgericht*'s case law on the ultimate say 'sovereignty jurisprudence.' Aziz (n 128), 293.

131 Most notably in the seminal piece by N MacCormick, 'The Maastricht-Urteil: sovereignty now' (1995) 1(3) *ELJ* 259.

for the first time in its jurisprudence, posing a direct challenge to the principle of primacy.[132] This created a space of co-existing claims to the ultimate authority of competence monitoring.[133]

The litigation concerning the constitutionality of the Maastricht Treaty revolved around two issues:[134] (1) its compatibility with the right to democratically legitimate representation enshrined in Article 38 of the German Basic Law;[135] and (2) its effect on the German statehood.[136]

The *Bundesverfassungsgericht* turned its focus to the democratic legitimation of the EU institutions based on the Maastricht Treaty. The starting premise of the Court bodes well with an understanding of EU's legitimacy as qualitatively different from that of Member States: 'democratic legitimation for these purposes cannot be produced in the same way as it is within a national order governed uniformly and conclusively by a state constitution.'[137] For the *Bundesverfassungsgericht*, genuine devotion to the integration project requires the acceptance of the majority principle. Such adherence is further positively and negatively qualified:

In any event the majority principle, in accordance with the requirement of

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132 J Kokott, 'Report on Germany' in A-M Slaughter, A Stone Sweet, J H H Weiler (eds) *The European Court and National Courts, Doctrine and Jurisprudence: Legal Change in its Social Context* (Hart Publishing, 1998), 81.

133 However, as will be explained in Chapter 4, Section 2, the argument in this thesis is that multiple claims to ultimate authority in the European judicial space started as early as the *Frontini* and *Solange I* decisions of the Italian *Corte Costituzionale* and the German *Bundesverfassungsgericht*, respectively.

134 Complaints regarding the protection of fundamental rights were rejected as inadmissible in line with the *Solange II* doctrine. German *Bundesverfassungsgericht* Case *Manfred Brunner and Others* (n 9), [B.2.b]. See also Kommers and Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (n 121), 335.

135 German *Bundesverfassungsgericht* Case *Manfred Brunner and Others* (n 9), [A.II.1.a)].

136 ibid., [A.II.1.b)] and [A.II.2.a)].

137 ibid.

> mutual consideration entailed by loyalty to the community, finds its limits in the constitutional principles and basic interests of the member-States.[138]

The Court thus managed to reconcile the requirements of the democratic principle enshrined in the German constitution with its participation in the European project. It then proceeded to analyse the ability of the project to develop its own democratic credentials and potentially convert into a different legal creature than it is now. In what Weiler calls 'sad, pathetic and embarrassing reasoning',[139] the *Bundesverfassungsgericht* elaborated its vision of the *pouvoir constituant* of the Community.

The Court analysed the notion of *demos* and its centrality to the creation of a state, concluding that there is no such thing as a European nation,[140] which might be the basis of creation of a 'United States of Europe, in a way comparable to the United States of America'.[141] Yet, despite its crude and state-centred reasoning,[142] the *Bundesverfassungsgericht* found that establishing the European Union necessarily entails a transfer of sovereignty from the Member States, for the purposes of jointly exercising it through the European institutions.[143] For the *Bundesverfassungsgericht*, the foundation for finding the EU institutions' democratic credentials was a derivation of the democratic credentials of Member State institutions participating in the integration project, where the

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138 ibid. As will be seen in Chapter 3, Section 2.1., the limits mentioned here may be seen as the basis for the introduction of the identity review in the Lisbon decision of the *Bundesverfassungsgericht*, where review is carried out against the standard of the unamendable constitutional core.

139 Weiler (n 129), 222.

140 See also, Vranes (n 118), 91.

141 German *Bundesverfassungsgericht* Case *Manfred Brunner and Others* (n 9), [II.a)]. Weiler at times compares the *no demos* analysis to the Nazi language of nationalism, although he clearly points out this surely was not the intention of the *Bundesverfassungsgericht*. Weiler (n 129), 223.

142 The Court remained on the thesis that Member States are the 'Masters of the Treaties'. German *Bundesverfassungsgericht* Case *Manfred Brunner and Others* (n 9), [II.a)]. In addition, the Court stated that the Member States are the ones 'continuously breathing life into the Treaty'. [II.d).2.1].

143 ibid.

increased powers of the European Parliament were marked as a step forward in improving the democratic deficiencies of the Union.[144]

Weiler rightly points to several inconsistencies in the reasoning of the Court related to the *no demos* thesis and the democratic credentials of the Union. First, demos can be many things, and by saying it can only exist on the Member State level, the Court in essence pre-empts the possibility for the Union to develop into a democratic polity on a basis different from that of Member States.[145] Second, by then restating how the European Parliament may contribute to the resolution or improvement of the EU's current democratic deficit, it is contradicting its own statement that the existence of a *demos* is central to democratic legitimacy.[146]

Ultimately, the *Bundesverfassungsgericht*'s addition of the *ultra vires* review is the control of the democratic pedigree of Union acts,[147] the limits of which are defined by Article 79(3) of the Basic Act.[148] This meant that primacy of EU law only extends to acts within *vires*,[149] and it was the *Bundesverfassungsgericht* who has retained the right to control the division between *intra* and *ultra vires*.

*Ultra vires* was confirmed as a head of review of EU acts in the decision

144 ibid., [A.II.2.a)]; [C.I.2.b.1)]; and [C.I.2.b.2)].

145 Weiler (n 129), 222, 230.

146 ibid., 235. For an analogous criticism of the *Lisbon* judgment of the *Bundesverfassungsgericht*, see C Calliess, 'The Future of the Eurozone and the Role of the German Federal Constitutional Court' (2012) 31(1) *YEL* 402, 406. For a broader critique of the *Bundesverfassungsgericht*'s reasoning in both judgments, see M Everson, 'An exercise in legal honesty: rewriting the Court of Justice and the *Bundesverfassungsgericht*' (2015) 21(4) *ELJ* 474, 484.

147 Kokott (n 132), 81; Huber (n 123), 98; M Kumm, 'The jurisprudence of constitutional conflict: constitutional supremacy in Europe before and after the Constitutional Treaty' (2005) 11(3) *ELJ* 262, 264. For a converse opinion according to which democracy control is to be considered a separate head of review, see M Claes, 'Luxembourg, here we come? Constitutional courts and the preliminary reference procedure' (2015) 16(6) *GLJ* 1331, 1335.

148 German *Bundesverfassungsgericht* Case *Manfred Brunner and Others* (n 9), [B.1.a)[5]-[6]].

149 Kokott (n 132), 81.

concerning the constitutionality of the Lisbon Treaty in Germany,[150] alongside which the *Bundesverfassungsgericht* added constitutional identity as a separate head of review, measured against the standards in the unamendable core of the German Basic Law.[151] The *Lisbon* judgment repeated the state-centrist views first set out in the *Maastricht* judgment, according to which Member States are the Masters of the Treaties and the imminent source of any legitimation of EU action. The *Bundesverfassungsgericht* additionally reflected upon how such a finding affects the autonomy of the EU as a supranational legal order:

> In a functional sense, the source of Community authority, and of the European constitution that constitutes it, are the peoples of Europe with democratic constitutions in their states. The "Constitution of Europe", international treaty law or primary law, remains a derived fundamental order. […] autonomy can only be understood - as is usual regarding the law of self-government - as an autonomy to rule which is independent but derived, i.e. is granted by other legal entities.[152]

It would therefore be logically impossible for the EU to be able to decide on the scope of its own competence,[153] and the principle of conferral is a principle of both European and national constitutional law.[154] By way of conclusion of this analysis, the

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150 German *Bundesverfassungsgericht* Case 2 BVerfG 2/08 *Lisbon Treaty*, Judgment of 30 June 2009, <http://www.bverfg.de/e/es20090630_2bve000208en.html>, accessed 6 June 2017, [240].

151 For a detailed analysis of identity review in general, see Chapter 3; for a detailed analysis of the identity review in Germany, see Section 2.1.

152 German *Bundesverfassungsgericht* Case *Lisbon Treaty* (n 150), [231].

153 ibid., [233].

154 ibid., [234]. Such an understanding is very much in line with constitutional pluralism, according to which the lines between national and EU law are becoming increasingly blurred, and their division can only be conceived upon functional, rather than territorial criteria. For example, the difficulty with which the UK Supreme Court attempted to divide EU from national law to decide on the Government's prerogative to act in the international sphere is further proof of the enmeshment of national and EU law. See UK Supreme Court case *Miller* [2017] UKSC 5; and a critical appraisal by M Elliott, 'The Supreme Court's judgment in *Miller*: in searh of a constitutional principle' (2017) *Cambridge Law Journal* (forthcoming). For a critique of the *Bundesverfassungsgericht* for its lack of regard for such an enmeshment, see C Möllers, 'German Federal Constitutional Court: constitutional *ultra vires* review of European acts only under

*Bundesverfassungsgericht* stated that 'it must be possible within the German jurisdiction to assert the responsibility for integration if obvious transgressions of the boundaries occur when the European Union claims competences.'[155] Despite the threatening and sharp language employed to set out the different heads of review of EU acts, the *Bundesverfassungsgericht* also revisited the principle of openness to European integration,[156] and ultimately found the Lisbon Treaty in line with the Basic Law.

A further, more detailed elaboration of the precise standards for review of EU action took place in *Honeywell*,[157] which reached the *Bundesverfassungsgericht* because the German Federal Labour Court applied the *Mangold* doctrine to a subsequent case concerning the same national legislation.[158] The constitutional complaint of the applicant was based on three assertions:[159] (1) that the *Mangold* reasoning is a manifest transgression of the competences allocated to the Court of Justice;[160] (2) that the Court of Justice's decision in *Mangold* was an interpretation of national private law, which is outside the powers of the Court; and finally (3) the Court of Justice stepped out of bounds in finding the applicability of the Framework Directive prior to the expiry of its

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exceptional circumstances; Decision of 6 July 2010, 2 BvR 2661/06, *Honeywell*' (2011) 7(1) *EuConst* 161, 164 (note).

155 German *Bundesverfassungsgericht* Case *Lisbon Treaty* (n 150), [240].

156 ibid., [221]. See also Chapter 1, section 3.1. for a more detailed vocabulary analysis of this jurisprudence, and how it fits into the structure of constitutional pluralism.

157 German *Bundesverfassungsgericht* Case 2 BverfG 2661/06 *Honeywell*, Order of 06 July 2010, <http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2010/07/rs20100706_2bvr266106en.html>, accessed 7 June 2017.

158 German *Bundesverfassungsgericht* Case *Honeywell* (n 157), [28]-[31]. See also, Möllers (n 154), 163.

159 German *Bundesverfassungsgericht* Case *Honeywell* (n 157), [40].

160 Arguments along similar lines were put forward in the *Dansk Industri* case before the Danish *Højesteret*, also including a reference to the principle of legitimate expectations. See below, n 301.

implementation period.[161]

The *Bundesverfassungsgericht* was thus presented with a perfect opportunity to carry out an *ultra vires* review of the Court of Justice's actions. Elaborating first upon the operation of the principle of primacy of EU law as developed by the Court of Justice,[162] the *Bundesverfassungsgericht* linked the limited extent of primacy to the principle of conferral.[163] Before detailing further the standard of review, an important point was made for the viability of constitutional pluralism: 'The obligation incumbent on the Federal Constitutional Court to pursue substantiated complaints of an *ultra vires* act on the part of the European bodies and institutions is to be coordinated with the task which the Treaties confer on the Court of Justice.'[164] In accordance with constitutional pluralism, the *Bundesverfassungsgericht* considers the EU judicial space to be a cooperative one, and any review of EU acts thus needs to be carried out in a manner mindful of such a setup.[165]

It is at this point that the *Bundesverfassungsgericht* set out a more structured and

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161 See also, Kommers and Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (n 121), 350.

162 Note here that the *Bundesverfassungsgericht* uses the term 'primacy of application' and not 'supremacy', which would otherwise indicate a clear-cut hierarchical superiority of the entirety of Union law over the entirety of national law. The *Bundesverfassungsgericht* then goes on to explain primacy as a rule of collision, fully in line with the centrality of heterarchy in the system of constitutional pluralism. German *Bundesverfassungsgericht* Case *Honeywell* (n 157), [53]; Kokott (n 132), 83. See also to this effect, MacCormick (n 131), 264.

163 German *Bundesverfassungsgericht* Case *Honeywell* (n 157), [55]. See also n 152.

164 ibid., [56].

165 The language the *Bundesverfassungsgericht* uses fits perfectly with the theoretical framework based on the auto-correct function of constitutional pluralism as set out in Chapter 1:

> If each Member State claimed to be able to decide through their own courts on the validity of legal acts of the Union, the primacy of application could be circumvented in practice, and the uniform application of Union law would be placed at risk. If, however, on the other hand the Member States were to completely forgo ultra vires review, disposal of the treaty basis would be transferred to the Union bodies alone, even if their understanding of the law led in the practical outcome to an amendment of a Treaty or to an expansion of competences. […] The tensions, which are basically unavoidable according to this construction, are to be harmonised cooperatively in accordance with the European integration idea and relaxed through mutual consideration. (ibid., [57])

specified standard of *ultra vires* review:

> This means for the ultra vires review at hand that the Federal Constitutional Court must comply with the rulings of the Court of Justice in principle as a binding interpretation of Union law. Prior to the acceptance of an ultra vires act on the part of the European bodies and institutions, the Court of Justice is therefore to be afforded the opportunity to interpret the Treaties, as well as to rule on the validity and interpretation of the legal acts in question, in the context of preliminary ruling proceedings according to Article 267 TFEU. As long as the Court of Justice did not have an opportunity to rule on the questions of Union law which have arisen, the Federal Constitutional Court may not find any inapplicability of Union law for Germany […].
>
> Ultra vires review by the Federal Constitutional Court can moreover only be considered if it is manifest that acts of the European bodies and institutions have taken place outside the transferred competences […]. A breach of the principle of conferral is only manifest if the European bodies and institutions have transgressed the boundaries of their competences in a manner specifically violating the principle of conferral (Article 23.1 of the Basic Law), the breach of competences is in other words sufficiently qualified (see on the wording "sufficiently qualified" as an element in Union liability law for instance ECJ Case C-472/00 P Fresh Marine <judgment of 10 July 2003> [2003] ECR I-7541 paras. 26-27). This means that the act of the authority of the European Union must be manifestly in violation of competences and that the impugned act is highly significant in the structure of competences between the Member States and the Union with regard to the principle of conferral and to the binding nature of the statute under the rule of law […].[166]

This level of detail ultimately resulted in a significant narrowing[167] of the *Bundesverfassungsgericht*'s scope of review. First, by stating that prior to any finding, the Court of Justice must have a say through the preliminary reference procedure,[168] the *Bundesverfassungsgericht* is putting into effect its obligation of sincere cooperation and

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166 German *Bundesverfassungsgericht* Case *Honeywell* (n 157), [60]-[61].

167 Kommers and Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (n 121), 350.

168 A preliminary reference was indeed submitted by the *Bundesverfassungsgericht* in the Case *Gauweiler* (n 17), where the it was questionable if the OMT programme met the *Honeywell* standard of an *ultra vires* act.

mutual respect.[169] Its function is to avoid conflict 'whenever possible'.[170] Second, the *Bundesverfassungsgericht* will police only 'manifest transgressions', a rather high threshold.[171] Third, not only must the transgression be manifest, it also needs to fall into an area which is highly significant[172] in the structure of competence division between the EU and its Member States. Beyond the test itself, there are two further qualifications in *Honeywell* that restrict the applicability of *ultra vires* review: first, only the *Bundesverfassungsgericht* is allowed to carry out the review; and second, 'the Court of Justice has a right to tolerance of error.'[173]

After having set out the test and its qualifications, the *Bundesverfassungsgericht* applied it to the *Mangold* judgment of the Court of Justice, and found that it does not meet the threshold of a 'manifest transgression' and is consequently *intra vires*.[174] Justice Landau dissented from the majority, arguing the majority departed from its *Lisbon* state-oriented language and reasoning,[175] thus leaving the Court of Justice operating without

169 The principles guiding the resolution of constitutional conflict according to the theoretical framework of the present work. Möllers notes that *Honeywell* adds the obligation to carry out the review in a 'restrained' manner, confirming the importance of self-restraint in the conduct of courts involved in a possible constitutional conflict. Möllers (n 154), 165.

170 Huber (n 123), 89.

171 In his dissent, Justice Landau states that manifest must mean 'each expanding interpretation of the Treaties which is tantamount to a non-permissible autonomous amendment of the Treaty.' German *Bundesverfassungsgericht* Case *Honeywell* (n 157), Dissenting Opinion of Justice Landau, [101].

172 This requirement has subsequently been made part of the Danish *ultra vires* review standard. See n 297.

173 German *Bundesverfassungsgericht* Case *Honeywell* (n 157), [66].

174 ibid., [71] (as regards the significant breach of the principle of conferral), [75] (concerning the law-making activities of the Court of Justice being *ultra vires*), [80] (in relation to the principle of legitimate expectations).

175 German *Bundesverfassungsgericht* Case *Honeywell* (n 157), Dissenting Opinion of Justice Landau, [96]-[98].

any institution or Member State being able to effectively keep it in check.[176] It is argued that when considered together with the fundamental rights review and identity review, the *Bundesverfassungsgericht*'s control of the Court of Justice is not as negligible as Justice Landau presents it. Indeed, had it not been for the expansive German jurisprudence adding further layers of review of Union action, it is questionable whether other constitutional courts of Member States would join[177] to also contribute to keeping the Court of Justice in check. The very addition of the different heads of review creates a cooperative judicial space in the EU, and has forced the Court of Justice to take notice of national constitutional concerns and adjust its case law accordingly. It is precisely incremental and permanent contestation and accommodation (the auto-correct function of constitutional pluralism) that results in a uniform interpretation and application of Union law, but keeping in line with conferral as its defining principle.

The *Bundesverfassungsgericht* applied the *Honeywell* standard in its review of the OMT programme in the *Grauweiler* case. The *Bundesverfassungsgericht* doubted the compatibility of the OMT mechanism with primary EU law, specifically the extent of powers accorded to the ECB beyond monetary policy.[178] In line with the requirements of *Honeywell*, in performing an *ultra vires* review of EU acts, the *Bundesverfassungsgericht* first submitted a preliminary reference to the Court of Justice[179] for it to be able to determine whether the ECB's mandate covers the OMT programme. More specifically,

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176 ibid., [99]. Möllers sides with Justice Landau's finding that the *Bundesverfassungsgericht* effectively waived its review powers by setting an unreachable *ultra vires* standard. Möllers (n 154), 167.

177 Or be as assertive as they are today.

178 The case was also analysed in Chapter 3 as regards the identity review aspects of the case. For a wide array of opinions and analyses of the preliminary reference, see the *Special Issue - The OMT Decision of the German Federal Constitutional Court* (2014) 15(2) *GLJ*.

179 See n 17.

for the OMT to be *ultra vires*, it needed to exceed monetary policy and the prohibition of monetary budget financing, resulting in an encroachment of Member States' economic policy.[180] Bast points out that framing monetary and economic policy as mutually exclusive disregards the functional nature of EU competences, which necessarily influence each other and may at times partially overlap.[181] In that respect, the very starting point of the inquiry into the possible transgression of ECB competence is set up strongly in favour of Member State competences in economic policy. After carrying out the analysis of the OMT programme and its effects on the monetary and economic policy, in which the *Bundesverfassungsgericht* preliminarily concluded that it is *ultra vires*, it finally set out a possible Treaty interpretation that would be compliant with the current division of competences:

> In the view of the Federal Constitutional Court, the OMT Decision might not be objectionable if it could, in the light of Art. 119 and Art. 127 et seq. TFEU, and Art. 17 et seq. of the ESCB Statute, be interpreted or limited in its validity in such a way that it would not undermine the conditionality of the assistance programmes of the European Financial Stability Facility and the European Stability Mechanism […], and would only be of a supportive nature with regard to the economic policies in the Union […]. This requires, in light of Art. 123 TFEU, that the possibility of a debt cut must be excluded […], that government bonds of selected Member States are not purchased up to unlimited amounts […], and that interferences with price formation on the market are to be avoided where possible […].[182]

By defining the possible compliant interpretation of the Treaty in relation to the mandate of the ECB, the *Bundesverfassungsgericht* narrowed the scope of the Court of Justice's

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180 German *Bundesverfassungsgericht* Case *Gauweiler* (n 17), [36], [39], [63] and [80].

181 Bast (n 63), 175. The political science literature on the theory of neo-functionalism explains European integration mainly through the spillover of the conferred competences into new areas which also may impinge upon Member States' exclusive competences. See A Wiener and T Diez (eds), *European Integration Theory* (2nd edn, OUP 2009), 48-49; and more generally on the role of the neo-functionalist theory Introduction, Section 2.2. See also on the spill over of existing competences into ever wider areas, Weatherill, *Law and Values in the European Union* (n 1), 29-30.

182 German *Bundesverfassungsgericht* Case *Gauweiler* (n 17), [100].

answer, and according to Kumm, invited it in the game of 'chicken'.[183] According to Kumm, such a move is problematic for both the Court of Justice and the *Bundesverfassungsgericht* itself, as it significantly restricts the latter's subsequent manoeuvring space.[184]

Justice Lübbe-Wolff joined the critique of the *Bundesverfassungsgericht* in her dissent, where she found that the Order for reference is itself a judicial *ultra vires* act, which disregards the constitutional position and role of the *Bundesverfassungsgericht*.[185] She emphasised that the admissibility criteria applied to allow the constitutional complaint were too wide, not least since the case relates to matters of European integration.[186] The extension related to admitting an *ultra vires* claim[187] and a review of omissions (in addition to actions) of German authorities to deny the implementation of an *ultra vires* Union act.[188]

Finally, Fabbrini[189] and Kelemen[190] both found that the wording of the *Bundesverfassungsgericht* left no space for the Court of Justice to reach a satisfactory interpretation, concluding that a constitutional conflict is inevitable, and with it the fall of constitutional pluralism. Conversely, the possibility or even the emergence of a conflict is

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183 M Kumm, 'Rebel without a good cause: Karlsruhe's misguided attempt to draw the CJEU into a game of "chicken" and what the CJEU might do about it' (2014) 15(2) *GLJ* 203, 206.

184 ibid., 203-204.

185 German *Bundesverfassungsgericht* Case *Gauweiler* (n 17), Dissenting Opinion of Justice Lübbe-Wolff, [1], [5]-[10].

186 ibid., [14].

187 She claims actions based on the constitutionally guaranteed right to vote were previously only admitted for identity review. ibid., [16].

188 ibid., [17], [21].

189 F Fabbrini, 'After the *OMT* case: the supremacy of EU law as the guarantee of the equality of the Member States' (2015) 16 (4) *GLJ* 1003.

190 R D Kelemen, 'On the unsustainability of constitutional pluralism. European supremacy and the survival of the Eurozone' (2016) 23 *MJ* 136.

not contrary to constitutional pluralism, but is rather its essential element.

Among the options available to the Court of Justice, it chose to preserve the OMT programme. It first analysed the powers of the ECB and concluded that indirect effects of monetary policy on economic policy do not make them an equivalent, leading to the conclusion that the ECB was acting within the boundaries of its mandate.[191] The Court of Justice further provided an interpretation setting out some of the conditions necessary for compliance with the Treaties,[192] albeit differently than what the *Bundesverfassungsgericht* stated in its order for reference.[193] In relation to the judicial relationship between the two courts, the Court of Justice omitted any analysis of the claims to constitutional identity and *ultra vires* review of the *Bundesverfassungsgericht*, stating only that the decisions provided by way of the preliminary reference procedure concerning the interpretation and validity of Union acts are binding on the national court.[194]

The academic community read the reply from the Court of Justice as being firmly on a 'collision course'[195] with the *Bundesverfassungsgericht*, predicting the final decision in the case to activate the doomsday device.[196] Perhaps due to the time passed between the announcement of the OMT programme by Mario Draghi (which had the effect of calming the market) and the final judgment, it appeared the actual use of the programme

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191 Court of Justice Case C-62/14 *Gauweiler* (n 17), [52], [56], relying on its findings in Case C-370/12 *Pringle* [2012] ECLI:EU:C:2012:756.

192 For a more detailed analysis of each of these conditions, see T Tridimas and N Xanthoulis, 'A legal analysis of the Gauweiler case. Between monetary policy and constitutional conflict' (2016) 23(1) *MJ* 17, 23-30.

193 ibid., 30-31.

194 Court of Justice Case C-62/14 *Gauweiler* (n 17), [16].

195 Fabbrini (n 189), 1012.

196 Kelemen (n 190), 138.

might not be necessary, and the *Bundesverfassungsgericht* accepted the Court of Justice's findings.[197] In the substantive part of its judgment, the *Bundesverfassungsgericht* first sets out the relationship between the principle of primacy and the Basic Law, addressing also the identity and *ultra vires* review it carries out in relation to EU acts. The conclusion is that any such review must be done cautiously, with restraint, and in a way that is open to European integration.[198] This reasoning closely follows the framework of constitutional pluralism, whereby an initial expression of the right to the final say is followed by a reconciliatory vocabulary aimed at a final balancing exercise through which conflicts are managed and resolved in a dynamic manner. This setup confirms the cooperative relationship[199] between the *Bundesverfassungsgericht* and the Court of Justice, and is summed up in the following paragraph which addresses a situation of diverging interpretations of Union law by the two courts:

> Against this backdrop, it is not the task of the Federal Constitutional Court to replace the interpretation of the Court of Justice with its own when faced with issues of interpretation of Union law that can – even when handled in a methodologically correct manner within the usual bounds of legal debate – yield differing results […]. On the contrary, as long as the Court of Justice applies recognised methodological principles and does not act in a way that is objectively arbitrary, the Federal Constitutional Court must respect judicial development of the law by the Court of Justice even when the Court of Justice adopts a view against which weighty arguments could be made.[…][200]

In what reads as a third *Solange* conclusion, the *Bundesverfassungsgericht* accepts the different interpretation of the OMT programme provided by the Court of Justice, and will not contradict it in the face of its obligation to respect the mandate of the Court of Justice.

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197 German *Bundesverfassungsgericht* Case 2 BvR 2728/13 *Gauweiler*, Judgment of 21 June 2016, <http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2016/06/rs20160621_2bvr272813en.html>, accessed 7 June 2017, [9].

198 ibid., [121], [154], [156].

199 ibid., [157].

200 ibid., [161].

Substantively, the *Bundesverfassungsgericht* accepted the conditions attached to the OMT programme as defined by the Court of Justice,[201] as well as the standard of review of Union acts it exercises.[202] Should the ECB, in a potential use of the OMT mechanism, sideline any of these conditions, such an action would be considered *ultra vires*.[203]

The OMT programme ultimately survived, and contrary to the abovementioned commentators, the collision between the two courts was avoided according to the theoretical framework of constitutional pluralism. Does this mean the *Bundesverfassungsgericht* ultimately accepted the absolute supremacy of EU law and the final say of the Court of Justice? The language of the judgment does not imply that the *Bundesverfassungsgericht* might embark upon a more lenient approach towards reviewing EU action against the standards of the principle of conferral and constitutional identity. This will also remain a signal to the Court of Justice that despite its authoritative position in the EU, it cannot act free from national judicial control.

In conclusion, the *Gauweiler* decision represents a restatement of the *ultra vires* standard of review as defined in *Honeywell*. As the subsequent section will show, this standard has been the source of inspiration for other courts performing constitutional review, most notably the Czech and Danish courts, which have applied them in their respective jurisprudence, and found two judgments of the Court of Justice to be *ultra vires*. In addition, Lithuania, Poland and Hungary have put forward similar constraints on

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201 ibid., [174]. The *Bundesverfassungsgericht* does however mention the arguments it found to be important for the review of the OMT programme, which were not taken into account by the Court of Justice, and the question submitted in the preliminary reference concerning the independence of the ECB that the Court of Justice did not answer ([181]-[189]).

202 ibid., [179]. The *Bundesverfassungsgericht* mentions specifically that the standard of review is now more explicit in relation to the ECB ([180]).

203 ibid., [193], [205].

the application of the principle of primacy, grounded in the authority of their constitutions as the source of authority of EU law.[204]

## 3.2. The Czech Republic and Denmark – an explicit rejection of the Court of Justice's final say

The Czech Constitutional Court (*Ústavní soud*) and the Danish Supreme Court (*Højesteret*) are the only two national jurisdictions that have declared a decision of the Court of Justice *ultra vires*. Beyond their conclusion, the two judgments have little to nothing in common – they were rendered in entirely different circumstances, and more importantly, for different reasons. The analysis will start with the Czech Republic and its jurisprudence on *ultra vires* review. I will then turn to analyse the Danish approach towards *ultra vires* review, and in particular the most recent decision after receiving the response of the Court of Justice in the *Dansk Industri* case.

### 3.2.1. The Czech Republic

The analysis will begin by focusing on a relatively new Member State, the Czech Republic, and the relationship that its *Ústavní soud* has developed with the Court of Justice concerning *ultra vires* review. The Czech Republic amended its Constitution

[204] National report – The Constitutional Court of the Republic of Lithuania (2014), 5, 28; Polish *Trybunał Konstytucyjny* Case P 37/05, Order of 19 December 2006, (2007) 3 *CMLR* 48, [7]; Hungarian *Magyarország Alkotmánybírósága* Case 143/2010 (VII. 14.) *Treaty of Lisbon*, Judgment of 12 July 2010, <http://hunconcourt.hu/letoltesek/en_0143_2010.pdf> (press release) accessed 16 July 2017.

upon accession to the EU, which introduced a monist approach to incorporating international law into its legal order, and accorded the jurisdiction to the Constitutional Court to review international treaties prior to their ratification.[205]

The *Sugar Quotas III* judgment was the first occasion for the *Ústavní Soud* to set out its approach to EU law.[206] The Court was asked to assess the constitutionality of Government regulations implementing the allocation of sugar quotas in the internal market. Accordingly, the Court had the task of answering 'the question of degree to which it is even authorised to adjudge the constitutional conformity of such legal norms as are tied up with Community law.'[207] The analysis in the judgment is extremely useful as it sets out the main findings concerning the consequences of primacy[208] and direct effect for the Constitutional Court's referential framework, how this affects the question of the final say, its relationship with the Court of Justice, and its role in the preliminary reference procedure.

The *Ústavní Soud* started its analysis in line with constitutional pluralism. It first stated that the Court of Justice has the exclusive jurisdiction to assess the validity of Union law, after which it proceeded to analyse the challenges to this power by constitutional courts of other Member States, such as Germany, Italy, Denmark and

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205 National report – The Constitutional Court of the Czech Republic (2014), 2.

206 Czech *Ústavní Soud* Case Pl. ÚS 50/04 *Sugar Quotas III*, Judgment of 8 March 2006, <http://www.usoud.cz/en/decisions/20060308-pl-us-5004-sugar-quotas-iii-1/>, accessed 11 April 2017.

207 ibid., [VI.A].

208 *Ústavní Soud* calls it 'applicational precedence', presumably guided by an attempt to avoid mentioning a clear-cut overall supremacy of one legal order over another. The same was done by the Spanish Constitutional Tribunal when it distinguished between primacy and supremacy. Spanish *Tribunal Constitucional* Case DTC 1/2004 *Constitutional Treaty*, Declaration of 13 December 2004, [II-4]. For the same development in the German constitutional jurisprudence, see n 162.

Ireland,[209] demonstrating the parallel existence of claims to the final say. The *Ústavní Soud* stated that none of these circumstances can be overlooked in determining its own approach to the doctrines of primacy and direct effect, concluding that these issues represent the 'constitutional exegesis for the entire [Union] and that these issues have certain implications not just in the legal sphere, but also the political.'[210]

The approach taken by the *Ústavní Soud* should be commended for its awareness of the need to define the relationship between the Union and national constitutional orders. It kept in mind not only the interpretation put forward by the Court of Justice, but also the bigger picture painted by other constitutional courts in the EU, where primacy and direct effect are not absolute and unlimited, but rather operate in a collaborative EU judicial space.[211]

The Court proceeded with the assessment of the relationship between Member State discretion and the exigencies of EU law, taking into account the principle of sincere cooperation as well as the principle of subsidiarity. The two principles should in the view of the *Ústavní Soud* result in the Union applying restraint when exercising its competences and leaving space for Member States to implement their EU obligations.[212] Conversely, when Member States are in line with their EU obligations, their discretion is

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209 Czech *Ústavní Soud* Case *Sugar Quotas III* (n 206), [VI.A].

210 ibid.

211 The Constitutional Court should also be commended for the amount of cross-referencing to other judgments of European constitutional courts concerning national constitutional limits to primacy of EU law, but also concerning the participation of constitutional courts in the preliminary reference procedure. See Czech *Ústavní Soud* Case *Sugar Quotas III* (n 206), [VI.A], [VI.A-1]. It goes to show that the Czech Constitutional Court views the EU judicial space as shared among the Court of Justice and guardians of national constitutions.

212 Czech *Ústavní Soud* Case *Sugar Quotas III* (n 206), [VI.A].

curbed by the objectives of the EU norm in question, and general principles of EU law.[213] By way of conclusion as to the position of EU law in relation to the constitutional review sought, the Constitutional Court stated that:

> Although the Constitutional Court's referential framework has remained, even after 1 May 2004, the norms of the Czech Republic's constitutional order, the Constitutional Court cannot entirely overlook the impact of [Union] law on the formation, application, and interpretation of national law, all the more so in a field of law where the creation, operation, and aim of its provisions is immediately bound up with [Union] law. In other words, in this field the Constitutional Court interprets constitutional law taking into account the principles arising from [Union] law.[214]

The Court provided a thorough analysis of the case law of the Court of Justice concerning sugar quotas, and its own case law on the matter. Subsequently, it proceeded in the reconciliatory fashion introduced in Chapter 1, and sought to establish whether there were any inconsistencies between the two lines of jurisprudence that would require the Constitutional Court to amend its case law.[215] It concluded that it needed to be amended as the case law of the Court of Justice prohibits implementation measures for directly applicable EU law, and found the Government regulation to be *ultra vires*.[216]

Finally, the Constitutional Court emphasised that the transfer of powers to the EU level is conditional upon the Czech Republic remaining a democratic, rule of law-based, state. It accordingly reserved for itself the power of the final say should the EU institutions carry out their delegated powers in a manner that is 'regressive' to that

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213 ibid., [VI.A-1].

214 ibid.

215 Czech *Ústavní Soud* Case *Sugar Quotas III* (n 206), [VI.A-3].

216 ibid. For a comparison of the German and Czech language concerning the state-rooted conceptions of sovereignty, see J Priban, 'The semantics of constitutional sovereignty in post-sovereign "new" Europe: A case study of the Czech Constitutional Court's jurisprudence' (2015) 13(1) *ICON* 180, 182-183.

condition.[217] Crucially, the Constitutional Court found this conditionality essential for the persistence of the dynamic development of the effects of EU law in national law.

Regardless of this reservation, the *Ústavní Soud* put forward a reconciliatory approach to possible inconsistencies in its judgment concerning the constitutionality of the European Arrest Warrant. Similar to the approach taken by the Polish Constitutional Tribunal in the area of identity review,[218] the Constitutional Court stated that:

> If the Constitution […] can be interpreted in several manners, only certain of which lead to the attainment of an obligation which the Czech Republic undertook in connection with its membership in the EU, then an interpretation must be selected with supports the carrying out of that obligation, and not an interpretation which precludes [it].[219]

The judgments in *Sugar Quotas III* and *European Arrest Warrant* represented the general approach of the *Ústavní Soud* towards EU law,[220] at least until a constitutional complaint was lodged against the ratification of the Lisbon Treaty. The Constitutional Court assumed jurisdiction to review the Treaty amendment,[221] stating that this is the first time it will be undertaking a review of an international treaty,[222] thus expanding its powers of review as regards EU law. However, more importantly, it reiterated the conditionality of the transfer of powers to the EU, as well as its power to review EU law should it deform

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217 Czech *Ústavní Soud* Case *Sugar Quotas III* (n 206), [VI.B]. See also, National report – The Constitutional Court of the Czech Republic (n 205), 3-4.

218 Polish *Trybunał Konstytucyjny* Case K 18/04 *Accession Treaty*, Judgment of 11 May 2005, <http://trybunal.gov.pl/fileadmin/content/omowienia/K_18_04_GB.pdf>, accessed 9 March 2016, [14]. See Chapter 3, Section 2.2.1. for a more detailed analysis of the identity review aspects of the case.

219 Czech *Ústavní Soud* Case Pl. ÚS 66/04 *European Arrest Warrant*, Judgment of 3 May 2006, <http://www.usoud.cz/en/decisions/20060503-pl-us-6604-european-arrest-warrant-1/>, accessed 15 April 2017, [61].

220 National report – The Constitutional Court of the Czech Republic (n 205), 4.

221 Limited, however, by the scope of the petition request. Czech *Ústavní Soud* Case *Lisbon Treaty I* (n 15), [77].

222 ibid., abstract.

the essential elements of a democratic law-based state.[223] It thus concluded by underlining its own right to a final say in matters of both identity review and *ultra vires* review:

> The Constitutional Court of the Czech Republic will (may) also – although in view of the foregoing principles – function as an ultima ratio and may review whether any act of Union bodies exceeded the powers that the Czech Republic transferred to the European Union under Art. 10a of the Constitution. However, the Constitutional Court assumes that such a situation can occur only in quite exceptional cases; these could be, in particular, abandoning the identity of values and, as already cited, exceeding the scope of conferred competences.[224]

The Constitutional Court proceeded with its analysis of the final say. It cited the *Bundesverfassungsgericht*'s *Maastricht* decision in parts where it reserved for itself the right to the final say,[225] stating that the decision should be read as a warning without any need to be used in practice.[226] The *Ústavní Soud* cited the Polish *Trybunał Konstytucyjny* on the same issue, stating however that its position is comparable only to a certain extent, since the Czech Constitutional Court does not regard the question of the final say as being one of purely domestic constitutional law.[227] Finally, the *Ústavní Soud* addressed the role of the Court of Justice in policing the boundaries of EU action, but also the new position for national parliaments in policing the application of the principle of subsidiarity. The Constitutional Court concluded this analysis in the spirit of cooperation and mutual respect: '[r]eview of observing the limits of the conferral of competences is thus the joint role of all participating bodies, both at the European level and at the

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223 Czech *Ústavní Soud* Case *Lisbon Treaty I* (n 15), abstract, [120].

224 ibid., [120].

225 ibid., [118].

226 ibid., [139].

227 ibid. See Priban (n 216), 189-192.

domestic level.'[228] The behaviour of the Czech Constitutional Court thus squarely falls into the framework of constitutional pluralism, where ultimate authority is claimed by a plurality of bodies in the same geographical space.

The remainder of the Czech Court's analysis places emphasis on self-restraint and Euro-friendly interpretation as necessary interpretative tools in review of the treaties, and the Czech Constitution will only take precedence if there is a clear and insurmountable conflict.[229] The Constitutional Court further compared its standard of review in this case to that in *Sugar Quotas III*, where secondary EU law enjoyed a presumption of constitutionality, and was only reviewed against individual provisions of the Czech Constitution. Conversely, the *Ústavní Soud* concluded it necessary to review a revision of primary EU law against the entire Czech constitutional order.[230] The *Ústavní Soud* was subsequently faced with a second challenge for review of the Lisbon Treaty, where it rejected the petitions and restated its main findings from *Lisbon Treaty I*.[231]

The relationship between the Court of Justice and the *Ústavní Soud* took a rather unexpected turn after these Euro-friendly interpretations. The *Slovak Pensions* case[232] concerned a very specific issue of entitlements to pensions rights after the break-up of

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228 Czech *Ústavní Soud* Case *Lisbon Treaty I* (n 15), [140].

229 ibid., [85], [94].

230 Expanding for itself the referential scope of review. Czech *Ústavní Soud* Case *Lisbon Treaty I* (n 15), [94]. It also repeated that, should a conflict arise, it might also be necessary to change the Czech Constitution. The *Ústavní Soud* thus fell in the company of those Member States' constitutional courts who have in their jurisprudence addressed possible ways of reconciliation should a constitutional conflict arise between the EU and the national level.

231 Czech *Ústavní Soud* Case Pl. ÚS 29/09 *Lisbon Treaty II*, Judgment of 3 November 2009, <http://www.usoud.cz/en/decisions/20091103-pl-us-2909-treaty-of-lisbon-ii/>, accessed 20 April 2017. See also, J Komárek and Editors, 'The Czech Constitutional Court's Second Decision on the Lisbon Treaty of 3 November 2009' (2009) 5(3) *EuConst* 345.

232 Czech *Ústavní Soud* Case Pl. ÚS 5/12 *Slovak Pensions*, Judgment of 31 December 2012, <http://www.usoud.cz/en/decisions/?tx_ttnews%5Btt_news%5D=37&cHash=911a315c9c22ea1989d19a3a848724e2>, accessed 16 November 2015.

Czechoslovakia. The original agreement[233] between the Czech Republic and Slovakia provided rules on the allocation to a particular social security system based on the seat of the former employer.[234] This could result in a considerably lower amount of pension for those Czech nationals who were working for companies whose seat was located in Slovakia.[235]

In order to allow these workers to receive the same amount of pension as workers whose entire employment was carried out in the Czech Republic, the Constitutional Court decided that Czech nationals residing in the Czech Republic were entitled to a pension supplement for periods they worked in the territory of Slovakia.[236] The Constitutional Court justified the introduction of the supplement through the constitutional right to material security in old age, guaranteed by the Czech Charter of Fundamental Rights and Freedoms.

Although the original agreement between the Czech Republic and Slovakia was compliant with EU law and incorporated in the Regulation 1408/71,[237] the case law of the Czech Constitutional Court started causing problems as it awarded a pension

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233 Treaty between the Czech Republic and the Slovak Republic on Social Security, 29 October 1992.

234 For a more detailed analysis of the intricacies of the case, see M Bobek, '*Landtová, Holubec*, and the problem of an uncooperative court: implications for the preliminary ruling procedure' (2014) 10 *EuConst* 54; Anagnostaras (n 127); J Komárek, 'Czech Constitutional Court playing with matches: the Czech Constitutional Court declares a judgment of the Court of Justice of the EU *ultra vires*; Judgment of 31 January 2012, Pl. ÚS 5/12, *Slovak Pensions XVII*' (2012) 8 *EuConst* 323 (note).

235 ibid., 57.

236 Czech *Ústavní Soud* Case II. ÚS 405/02 *Pension Insurance*, Judgment of 3 June 2003, <http://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Decisions/pdf/2-405-02.pdf>, accessed 29 April 2017. As Bobek reports, between this decision and the decision in *Slovak Pensions*, there were 17 cases in total where the Constitutional Court confirmed its original decision granting the right to a pension supplement. Bobek (n 234), 59.

237 Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, [1971] OJ L149/2.

supplement based on nationality and residence in the Czech Republic, constituting nationality-based discrimination prohibited by EU law. Accordingly, the Supreme Administrative Court of the Czech Republic was faced with a number of cases in which it had to juggle the requirements of the Czech-Slovak Agreement and EU law on the one hand, and the authoritative jurisprudence of the Constitutional Court on the other.

With the aim of resolving this conundrum, the Supreme Administrative Court submitted a preliminary reference to the Court of Justice, asking it to decide on the compliance of the pension supplement with EU law.[238] The Court of Justice found that while a pension supplement as such is not contrary to Regulation 1408/71,[239] the fact that it is awarded solely based on Czech nationality and residence in the Czech Republic, constituted prohibited direct and indirect discrimination.[240]

While the outcome established by the Court of Justice seems straightforward, Interviewee 4 stated that the Court has made its fair share of mistakes in its *Landtová* decision. Specifically, the *Ústavní Soud* sought to intervene in the preliminary reference procedure, and submitted an *amicus curiae* brief of sorts to present its view of the situation to the Court of Justice.[241] Since the Rules of Procedure of the Court envisage no such correspondence, the Court of Justice returned the letter. Interviewee 4 stated that this could have been handled better – for example, there could have been an effort on behalf of the Court to explain to the *Ústavní Soud* that it cannot receive such letters.

238 Court of Justice Case C-399/09 *Landtová* [2011] ECLI:EU:C:2011:415.

239 ibid., [40].

240 ibid., [49].

241 See also, Bobek (n 234), 80. The *Ústavní Soud* subsequently addressed this point, concluding that the Court of Justice regularly uses *amicus curiae* briefs (it remains unclear how the *Ústavní Soud* reached this conclusion), and that the 'the ECJ's statement that the Constitutional Court was a "third party" in the case at hand cannot be seen otherwise than as abandoning the principle audiatur et altera pars.' Czech *Ústavní Soud* Case *Slovak Pensions* (n 232), [VII].

Moreover, the same Interviewee considered that the Court of Justice took too long to realise and take into account the constitutional implications of the case, thus confirming that in the EU pluralist judicial space, the Court of Justice is obliged to take note of national constitutional sensitivities. The members of the Court of Justice confirmed in their interviews this is the regular practice upon receiving a preliminary reference.[242]

The *Landtová* decision resulted in a conflict between the Supreme Administrative Court and the Constitutional Court, and ultimately led to the *Slovak Pensions* decision.[243] The constitutional complaint before the Constitutional Court was factually analogous to *Landtová*, and the *Ústavní Soud* had the opportunity to respond to the findings of the Court of Justice. The Constitutional Court started its substantive review by reiterating its case law on the relationship between national and EU law analysed above, where the Court compared its position to that of the German *Bundesverfassungsgericht* as set out in the *Solange* and *Maastricht* judgments, introducing *ultra vires* review of EU action.[244]

The Constitutional Court further stated that the Court of Justice failed to take into account the specificities of the dissolution of Czechoslovakia, which cannot simply be translated into the language of the uniform social security system in the European Union.[245] Keeping these findings in mind, the Court proceeded:

> [We] cannot do otherwise than state, in connection with the effects of ECJ judgment of 22 June 2011, C-399/09 on analogous cases, that in that case there were excesses on the part of a European Union body, that a situation occurred in which an act by a European body exceeded the powers that the Czech Republic transferred to the European Union under Art. 10a of the Constitution; this exceeded the scope of the transferred powers, and was ultra

242 Interviewee 1; Interviewee 2; Interviewee 3; Interviewee 4; Interviewee 5; Interviewee 6. See Chapter 1, Section 3.2. for a more detailed analysis.

243 Bobek (n 234), 62.

244 Czech *Ústavní Soud* Case *Slovak Pensions* (n 232), [VII].

245 ibid.

vires.[246]

The decision in *Slovak Pensions* may be seen as a tectonic shift in the relationship between the Court of Justice and national constitutional courts, where the principle of mutually assured trust was replaced by open defiance. The decision to disapply the judgment of the Court of Justice due to its alleged transgression of conferred powers, while being within the theoretical possibilities after the *Lisbon Treaty I* judgment, seems antagonistic when read together with other options available to the Constitutional Court in case of a conflict with EU law in the most general sense.

However, this judgment cannot be assessed solely based on the relationship between the Court of Justice and the Constitutional Court; a complete reading needs to include the relationship and clashes that took place between the Supreme Administrative Court and the Constitutional Court, as reported in detail by Bobek.[247] The Constitutional Court also pointed out that the Czech Government failed properly to inform the Court of Justice of the legal situation revolving around the Czech and Slovak pensions.[248] In addition, the marginality of the case has been underlined by AG Wathelet,[249] Fabbrini,[250] and Interviewee 4.[251] Moreover, EU institutions, including the Court of Justice, could have pursued further sanctions against the Constitutional Court for breach of EU law, but

246 ibid.

247 Bobek (n 234).

248 Czech *Ústavní Soud* Case *Slovak Pensions* (n 232), [VII].

249 Lecture of Advocate General M Wathelet: 'Constitutional Courts and the CJEU: Is There a Dialogue? History and Prospects' given at the EU Law discussion group at the Law Faculty, University of Oxford, 23 October 2015.

250 F Fabbrini, 'The European Court of Justice, the European Central Bank and the supremacy of European law: Introduction' (2016) 23 *MJ* 1, 2.

251 Who stated that the case should not be taken into account as a representation of anything, as is it vitiated by numerous mistakes on behalf of both the Czech Constitutional Court and the Court of Justice.

have not done so.[252] Finally, the 2014 National report for the Conference of European Constitutional Courts prepared by the Czech Constitutional Court itself does not mention this judgment among those relevant for the relationship between EU law and national constitutional law, but only mentions it as an example of a divergence in jurisprudence, stating that the Court of Justice 'overlooked'[253] the facts of the case. Significantly, the Czech Constitutional Court never applied the judgment again, but rather complied with the initial interpretation put forward by the Court of Justice,[254] which may be considered an implicit admission of its overly zealous bahviour.

In conclusion, the Czech jurisprudence may be seen as crossing the line of a constructive dialogue between the Court of Justice and national constitutional adjudicators. However, the *Slovak Pensions* decision should be read in context: the *ultra vires* review conducted by the *Ústavní Soud* was misdirected, as the original conflict was in fact one with the Supreme Administrative Court. As Komárek puts it, the *ultra vires* declaration of a Court of Justice decision was collateral damage.[255] In that respect, the defiance of the *Ústavní Soud* has little to do with a constructive critique of the Court of Justice's jurisprudence[256] and more to do with its perceived loss of influence due to the preliminary reference procedure.[257] If read in an incremental fashion, the extent of the

252 Bobek (n 234), 72.

253 To be precise, the exact wording used by the Czech Constitutional Court was: '[t]he Constitution[al] Court inferred that the Court of Justice of the European Union had overlooked these facts, as it otherwise would have had to conclude that EU law was not applicable in the situation [at] hand.' National Report – The Constitutional Court of the Czech Republic (n 205), 18.

254 Bobek (n 234), 66, 71.

255 Komárek (n 234), 323.

256 As I argue is the case with the latest *ultra vires* declaration by the Danish Supreme Court, see below.

257 Komárek (n 234), 332.

conflict is considerably reduced. Conversely, it can be concluded that the position taken by the *Ústavní Soud* in the *Lisbon Treaty I* judgment is the leading authority on the approach to be taken in a situation of another constitutional conflict, which is led by a preference for an EU-friendly interpretation.[258]

### 3.2.2. Denmark

Denmark, a majoritarian democracy, has a decentralised system of constitutional review, where all courts can review legislation with the Supreme Court at the top of the hierarchy.[259] Regardless of this broad power, the Nordic courts have more generally applied self-restraint in favour of the supreme parliament,[260] and this tradition was characterised by the former president of the *Højesteret* Mr Pontoppidan as a long-standing tradition of utmost judicial self-restraint towards the *Folketing* (the Danish Parliament).[261]

Such a constitutional division of labour results in a different relationship between the legislature and the judiciary than that found in the Czech Republic. In addition, such a structure makes it less likely for the Supreme Court to find itself in a conflict with other national courts, as may well be the case in countries with a special constitutional court.

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258 See National Report – The Constitutional Court of the Czech Republic (n 205), 6, 15-16, 32.

259 This may be contrasted with the Czech system, which – as a constitutional democracy – has a centralised system of constitutional review. See Introduction, Section 4.2. For an analysis of the advantages of a centralised system of constitutional review, see J Komárek, 'The place of constitutional courts in the EU' (2013) 9(3) *EuConst* 420.

260 J E Rytter and M Wind, 'In need of juristocracy? The silence of Denmark in the development of European legal norms' (2011) 9(2) *ICON* 470, 471.

261 In an interview given in 1996, 2 years ahead of the *Maastricht* decision of the Danish *Højesteret*. H Rassmusen, 'Denmark's Maastricht ratification case: some serious questions about constitutionality' (1998) 21(1) *Journal of European Integration* 1, 5.

Finally, it is important to note that while all courts in Denmark can theoretically strike down primary legislation, it is only the Supreme Court that has done it for the first and only time in 1999.[262]

The well-established principle of self-restraint on the national level resulted in an equally passive position of the Danish courts as regards constitutional review of statutes, in particular in the area of fundamental rights.[263] In the same 1996 statement, Mr Pontoppidan indicated that the time may have come for the Danish courts more actively to police the constitutionality of statutes.[264] According to Rytter and Wind, it was the appearance and expansion of supranational adjudication that created a pressure for national courts to abandon blindly applying self-restraint *vis-à-vis* acts of Parliament.[265] It is thus the aim of this section to address the relationship that the Danish Supreme Court has since developed with the Court of Justice, and to determine whether the Danish principle of judicial self-restraint expanded from the national legislator towards the Court of Justice.

Having in mind the Danish context of the utmost judicial self-restraint, the *Højesteret* was faced with a challenge to the constitutionality of the Maastricht Treaty. The first indication that the case would mark a shift in the jurisprudence of the *Højesteret* was allowing the appeal – the Danish court is only trying cases of a precedential nature, narrowing admission to only some cases being admitted (as oppose to the more lenient

262 National Report – The Supreme Court of Denmark (2011), 2.

263 Rasmussen (n 261), 6.

264 ibid.

265 Rytter and Wind (n 260), 471.

doctrine of only some cases being refused).[266] As Rasmussen reports, allowing the case to be heard represented a radical shift in the century-old tradition of Danish courts not to question the constitutionality of parliamentary statutes via a class action.[267] The *Højesteret* justified the reversal by emphasising the 'radical significance' of the transfer of powers by the Maastricht Treaty for the Danish population.[268]

The principal question of the dispute was whether the Danish Constitution allows for the transfer of powers to the EU as defined in the Maastricht Treaty. Once the case reached the *Højesteret*, the appellants made two main assertions. First, the conditions of Section 20(1) of the Danish Constitution[269] for the transfer of sovereignty, which was the basis for accepting the Maastricht Treaty, have not been met. The appellants referred to the broad scope of the then Article 235 EC, as well as the 'law-making activities of the Court of Justice'.[270] Second, the appellants claimed that the transfer of sovereignty under the Maastricht Treaty was contrary to the premise of a democratic form of government.[271]

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266 P H Lindblom, 'The role of supreme courts in Scandinavia' (2000) 39 *Scandinavian Studies in Law* 325, 329.

267 Rasmussen (n 261), 8, 15.

268 ibid., 8.

269 Section 20 of the Danish Constitution reads as follows:

> (1) Powers vested in the authorities of the realm under this Constitutional Act may, to an extent specified by statute, be delegated to international authorities set up by mutual agreement with other states for the promotion of international rules of law and co-operation.
>
> (2) For the enactment of a bill dealing with the above, a majority of five-sixths of the members of the Folketing shall be required. If this majority is not obtained, whereas the majority required for the passing of ordinary bills is obtained, and if the Government maintains it, the bill shall be submitted to the electorate for approval or rejection in accordance with the rules for referenda laid down in section 42.

270 Danish *Højesteret* Case I 361/1997 *Carlsen*, Judgment of 6 April 1998, (1999) 3 *CMLR* 854, 857.

271 ibid.

The length of the Supreme Court's decision[272] may be read as the first sign towards a new approach taken by the *Højesteret*, whose decisions are usually extremely short.[273] The Court then proceeded with the analysis of Section 20 of the Danish Constitution, finding that it was first necessary to read it broadly, since it was introduced in 1953 and envisaged to regulate Danish membership in international organisations more generally.[274] However, any reading of this provision cannot be so broad to assume that the international organisation in question may specify the limits to its powers.[275]

Having concluded that the transfer of powers to the EU under the principle of conferral is in principle in line with Section 20(1) of the Danish Constitution, the Court proceeded with a more detailed analysis of Article 235, which the appellants flagged as specifically breaching a precise transfer of powers as required by Section 20(1). The *Højesteret* referred to Opinion 2/94 of the Court of Justice, where it provided for a narrow reading of Article 235,[276] to establish that its scope is in line with Section 20 of the Danish Constitution. In addition, it also referred to the unanimity requirement, which ensured that the Member State may even subsequently control the extent of exercise of transferred powers.[277]

The *Højesteret* then turned to the appellants' argument concerning the law-making powers of the Court of Justice, addressing its powers of interpretation and review

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272 Harck and Olsen report that this was the longest judgment in the history of *Højesteret*'s case law. S Harck and H P Olsen, 'Decision concerning the Maastricht Treaty. 1998 Ugeskrift for Retsvaesen, H 800' (1999) 93(1) *The American Journal of International Law* 209, 211 (note).

273 Rasmussen (n 261), 28.

274 Danish *Højesteret* Case *Carlsen* (n 270), 857.

275 ibid., 858. See also German *Bundesverfassungsgericht* Case *Manfred Brunner and Others* (n 9), [C.I.3].

276 Court of Justice Opinion 2/94 [1996] ECLI:EU:C:1996:140, [29]-[30].

277 Danish *Højesteret* Case *Carlsen* (n 270), 860.

of EU action. It is here that the Supreme Court established its power of *ultra vires* review:

> [The] Supreme Court finds that it follows from the demand for specification in section 20(1) of the Constitution, held against the Danish court's access to test the constitutionality of acts, that the courts of law cannot be deprived of their right to try questions as to whether an E.C. act of law exceeds the limits for the surrender of sovereignty made by the Act of Accession. Therefore, Danish courts must rule that an E.C. act is inapplicable in Denmark if the extraordinary situation should arise that with the required certainty it can be established that an E.C. act which has been upheld by the European Court of Justice is based on an application of the Treaty which lies beyond the surrender of sovereignty according to the Act of Accession. Similar interpretations apply with regard to Community law rules and legal principles which are based on the practice of the European Court of Justice.[278]

The Supreme Court thus established its right to the final say on the constitutionality of both EU acts and the judgments of the Court of Justice. The *Højesteret* based this finding on their reading of Section 20(1) of the Constitution. It went on to dismiss the remaining arguments of the appellants and found the Maastricht Treaty to be in line with the Danish Constitution.

The Supreme Court's finding is not without a reservation. In particular, and similar to the German *Bundesverfassungsgericht*'s finding in its own *Maastricht* decision, the Supreme Court stated that any finding of unconstitutionality by the Danish courts can only be established after the Court of Justice has had the opportunity to assess its compatibility with primary law. This approach follows a clear pluralist line of reasoning: the Danish Constitution is found to be central and supreme in Denmark, and it is the Supreme Court who is entrusted with its interpretation, albeit with a strong self-restraint applied in favour of the national parliament. Subsequently, in a reconciliatory fashion, the Supreme Court considers the Court of Justice the ultimate interpreter of EU

[278] ibid., 861-862.

primary law, and will only assume the position of the ultimate arbiter in an 'extraordinary situation'.[279]

In addition to the awareness of the extraordinary conditions that would need to be met in order for the *Højesteret* to declare an EU act *ultra vires*, Danish courts more generally follow the 'rule of interpretation' – an obligation to interpret Danish law in line with Denmark's obligations under international (including EU) law 'to the fullest extent possible'.[280] This method is outlined by the Supreme Court as the guiding principle for avoidance of divergences in with decisions with international courts, including the Court of Justice.[281] This obligation may be considered analogous to the obligation of an EU-friendly interpretation found in the jurisprudence of a number of Member States. As was discussed in Chapter 1, 'EU-friendly interpretation' is the most widespread common keyword in national constitutional jurisprudence guiding the relationship of mutually assured trust in the European judicial space.

The Supreme Court has demonstrated, using a very cautious vocabulary, that it forms part of the pluralist European judicial space. Its vocabulary is in line with the vocabulary used by other constitutional courts under analysis in the present work. Thus, the Supreme Court established its position as the final arbiter as regards the application of EU law in Denmark, but found the Maastricht Treaty in line with it. Such a concession is in line with the pluralist auto-correct, as it balances out opposing claims by the Court of Justice and ultimate national jurisdictions.

A counter-argument to such a reading was offered by Harck and Olsen, who

279 ibid., 861.

280 National Report – The Supreme Court of Denmark (2014), 2.

281 ibid., 12.

analysed the judgment in a clear liberal intergovernmentalist fashion,[282] according to which Denmark (along with other Member States) remains the Master of the Treaties, and the 'national constitution is the original source from which all valid legal powers […] flow.'[283] However, they acknowledged that the *Højesteret* was not the only national court reserving for itself ultimately to define what the Masters of the Treaties had in mind as regards a particular transfer of powers. They envisaged two scenarios resulting from this clash of assertions to the final say: first, a situation of a mutually assured destruction and a total judicial war; and, second, mutually assured trust where excesses will take place only exceptionally and in line with the theoretical framework of the present work. Specifically, 'allowing national courts to strike down European legislation in such a context might well enhance rather than restrain the development of a coherent European legal order by both the ECJ and national courts.'[284] It is argued that this thesis is not only correct on a conceptual level, but proved correct in subsequent judgments of constitutional jurisdictions, including the *Højesteret*.

With the aim of determining the existence of a balanced relationship of mutually assured trust between the Danish Supreme Court and the Court of Justice through a dynamic lens, I will address the case law of the Danish Supreme Court leading up to and including its most recent finding of an *ultra vires* judgment of the Court of Justice. In so doing, the next benchmark is the Danish ratification of the Lisbon Treaty, the

282 See Introduction, Section 2.2.

283 Harck and Olsen (n 272), 213.

284 ibid., 214.

constitutionality of which was questioned before the *Højesteret*.[285]

As was the case in the *Maastricht* litigation, the basis for the appellants' action revolved around the proper interpretation of Section 20 of the Danish Constitution, and its requirement for a 5/6 majority in the Parliament when parts of sovereignty are transferred to a supranational organisation.[286] The Government's position was that the Lisbon Treaty did not entail a new transfer of sovereignty to the European Union, and thus Section 20 and its rigorous majority requirement did not apply. Conversely, the Government claimed that Section 19, regulating the powers of the Government in international affairs, applied.[287] The appellants' case rested on the claim that the changes in the decision-making procedures (in particular the expansion of qualified majority voting in the Council) and the administration of delegated powers were so fundamental so as to warrant the application of Section 20 of the Danish Constitution to the ratification of the Lisbon Treaty.[288]

The Supreme Court's decision continued the trend of the Maastricht decision as regards its length and verbosity. What is specifically telling is its explicit reference to methods of interpretation: starting from reference to the wording of the provision, but also including the interpretation of the legislative history and the general purpose of Section 20 of the Danish Constitution.[289] The *Højesteret* concluded that a transfer of new powers, or a reform of the international organisation that would result in its new identity

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285 Danish *Højesteret* Case 199/2012 *Hausgaard*, Judgment of 20 February 2013, <http://www.hoejesteret.dk/hoejesteret/nyheder/ovrigenyheder/Documents/199-12engelsk.pdf>, accessed 5 May 2017.

286 See n 269.

287 H P Olsen, 'The Danish Supreme Court's decision on the constitutionality of Denmark's ratification of the Lisbon Treaty' (2013) 50 *CMLRev* 1489, 1489.

288 Danish *Højesteret* Case *Hausgaard* (n 285), 5.

289 ibid., 7.

are of such a fundamental importance so as to warrant the use of Section 20.[290] However, even if the powers have been delegated without any further specification as to the structure and design of such an organisation, Section 20 would not be breached, so long as the delegated powers are defined precisely.[291]

Having carried out the analysis of the substantive changes brought about by the Lisbon Treaty, the Supreme Court concluded that they do not amount to changes 'so fundamental in nature that the EU has in effect assumed a new identity.'[292] For example, the declaration on the principle of primacy,[293] the legal status of the Charter of Fundamental Rights, and the new wording of Article 352 TFEU[294] were all labelled by the appellants as extending the Union's powers. The Supreme Court did not accept these arguments, given the reservations included in each of the mentioned provisions.[295] The *Højesteret* concluded:

> If an act or a judicial decision which has a specific and real impact on Danish citizens etc. raises doubts as to whether it is based on an application of the Treaties which lies beyond the surrender of sovereignty according to the Accession Act, as amended, this may be made subject to a judicial review, as stated in paragraph 9.6 of the Maastricht judgment. The same applies if EU acts are adopted – or if the Court of Justice delivers judgments – based on

290 ibid., 8.

291 ibid.

292 ibid., 10. Olsen adds that this 'identity principle' is an added criterion for the application of Section 20 of the Danish Constitution, and was deliberately left vague to leave the Court with some manoeuvring space in future reviews. Olsen (n 287), 1495-1496. For the same tendency in the context of EU law, see n 21.

293 See n 20. It is worth noting that the primacy clause was first inserted in the text of the failed Constitutional Treaty, and was subsequently moved to the position of a Declaration in the Lisbon Treaty, presumably so as not to raise the principle into a direct supremacy clause.

294 The former Article 235 EC was also subject of review in the Supreme Court's *Maastricht* judgment. See n 277.

295 The Supreme Court stated that it can still perform an *ultra vires* review of the Court of Justice's case law on primacy (as per its decision in *Maastricht*); Article 6(1) TEU expressly prevents the Charter from extending the Union's competences; and the unanimity requirement attached to the flexibility clause from Article 352 TFEU prevents its broad application. Danish *Højesteret* Case *Hausgaard* (n 285), 12-15.

> such application of the Treaties with reference to the Charter of Fundamental Rights.[296]

This conclusion fits with the pluralist tradition: the Supreme Court reserves for itself the right to perform *ultra vires* review of Union action (and specifically the Court of Justice's action). Further, in a reconciliatory fashion of mutually assured trust, the Court finds the text of the Lisbon Treaty and the related case law of the Court of Justice to fall within the boundaries of what the Danish Constitution allows. The reluctance and self-restraint of the Danish Supreme Court may seem as all bark and no bite, but when regarded from the perspective of the role and position of Danish courts in the Danish constitutional setup, it becomes clear that the Supreme Court did bare its teeth. Olsen also adds that the very language of the Danish Supreme Court is more stringent than that of its German counterpart introducing the right to *ultra vires* review of 'structurally significant' transgressions of delegated competences.[297] Nevertheless, it is argued that the Danish Supreme Court's language relies on the 'extraordinary' character of any such transgression, which ultimately results in a high threshold to meet.

The Court of Justice's case law on the scope of general principle of non-discrimination on grounds of age and the Framework Directive[298] triggered a series of interactions with the Supreme Court.[299] As mentioned above, the Danish law regulating retirement discriminated between workers' right to severance package based on their age. The expansion of the general principle non-discrimination on grounds of age to horizontal situations as decided in *Kücükedeveci* was almost automatically applied to the situation

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296 Danish *Højesteret* case *Hausgaard* (n 285), 15.

297 Olsen (n 287), 1502.

298 See Section 2.3. above.

299 See n 90.

referred by the Danish Supreme Court. The *Højesteret* took from April to December 2016 to deliberate on how to approach the response it received from Luxembourg in the *Dansk Industri* case. In its longest judgment to date, the Danish court rejected the obligation to interpret the Danish Law on salaried employees *contra legem* in order to afford horizontal effect to the general principle of non-discrimination on grounds of age. The Danish Law on Salaried Employees had, in the course of the procedure been amended, but not in time for it to be applicable to the case at hand.[300]

The Supreme Court undertook an extensive interpretation of the limits to the competences that Denmark conferred upon the EU. It interpreted the Danish Act of Accession to the EU, all the ratifying acts of Treaty amendments, and to what extent that includes the law-making activities carried out by the Court of Justice through its jurisprudence. Essentially, the Danish Court rejected outright the expanded self-referential system of the Treaties as created by the Court of Justice; more precisely, its jurisprudence on the direct effect of general principles of EU law.[301] Article 6(3) TEU was used as the central provision to determine the extent to which general principles of Union law are applicable in Denmark, and the *Højesteret* found no basis in that provision for the Court of Justice's findings in *Mangold* and *Kücükdeveci*.[302]

The Supreme Court's analysis is far from logically flawless. It accepts direct effect and primacy, but solely in relation to Treaty provisions and not general principles

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300 M R Madsen, H P Olsen and U Šadl, 'Competing supremacies and clashing institutional rationalities: the Danish Supreme Court's decision in the *Ajos* case and the national limits of judicial cooperation' (2017) *ELJ* (forthcoming), 6.

301 Danish *Højesteret* Case 15/2014 *Ajos*, Judgment of 6 December 2016, <http://www.supremecourt.dk/supremecourt/nyheder/pressemeddelelser/Documents/Judgment%2015-2014.pdf>, accessed 9 May 2017, 45-46.

302 ibid., 45.

of EU law. In her dissent, Judge Scharling pointed out that both the *Maastricht* and the *Lisbon* decisions of the Supreme Court did not set such a high 'specificity' requirement of Section 20 of the Constitution so as not to be able to include the case law of the Court of Justice using interpretative methods beyond the literal one.[303]

The second inconsistency is the conclusion that the Danish legislature was aware in 1972, when the Law on Accession came into force, of the doctrines of direct effect and primacy.[304] Conversely, even though *Mangold* was analogously decided before the Lisbon Treaty Ratification Act, was not enough to include it in its scope, solely because the *travaux préparatoires* of the Ratification Act did not mention *Mangold*.[305]

While the logic of the Supreme Court may be thin, and the Danish Law on Salaried Employees is now amended, the substantive criticism directed at the Court of Justice for expanding the self-referential system of the Treaties through the horizontal application of general principles remains.[306] The Supreme Court thus decided to dismiss the appeal and not allow the application of the general principle in a horizontal situation. Consequentially, the Supreme Court decision leads to the conclusion that the judgments of the Court of Justice in *Mangold* and *Kücükdeveci* were *ultra vires*. The Supreme Court also applied the more classical Nordic principle of self-restraint,[307] and decided it would be acting outside its constitutional powers if it allowed the application of a principle (arguably) not covered by the transfer of powers from Denmark to the EU.[308]

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303 ibid., Dissenting Opinion of Judge Scharling, 49.

304 ibid., 45-46. Similar criticism was voiced in the Dissenting Opinion of Judge Scharling, 49-50.

305 ibid., 47.

306 See also, Möllers (n 154), 163-164.

307 See n 260.

308 Danish *Højesteret* Case *Ajos* (n 301), 48.

The reaction of the academic community to the decision expectedly did not pick up the existing critique directed to the Court of Justice in relation to its *Mangold*-initiated jurisprudence, but rather turned on the Supreme Court for stepping out of bounds. The decision was called an act of 'defiance of clear guidelines from the Court of Justice'[309] and 'controversial,'[310] which 'took the European legal community by surprise.'[311] The present work does not share the shock of those commentaries. While the Supreme Court could have justified its decision through a more coherent and a less formalistic argument, which was rooted almost exclusively in the textual interpretation of the Law on Accession and the Treaties, substantively its decision complements the criticisms already made to the Court of Justice.

In the description of the background of the case, the Supreme Court mentions opinions of several Advocates General concerning the same criticism. First, the Supreme Court cites the analysis of Advocate General Trstenjak[312] concerning the implications of *Kücükdeveci* for the principle of legal certainty, and in particular her questioning of the remaining scope of the Framework Directive beyond the general principle of anti-discrimination.[313] The Supreme Court also cited Advocate General Kokott, who calls the

309 M R Madsen, H P Olsen and U Šadl, 'Legal disintegration? The ruling of the Danish Supreme Court in AJOS' (Verfassungsblog, 30 January 2017) <http://verfassungsblog.de/legal-disintegration-the-ruling-of-the-danish-supreme-court-in-ajos/>, accessed 9 May 2017.

310 S Klinge, 'Dialogue or disobedience between the European Court of Justice and the Danish Constitutional Court? The Danish Supreme Court challenges the Mangold-principle' EU Law Analysis Blog, <http://eulawanalysis.blogspot.nl/2016/12/dialogue-or-disobedience-between.html>, accessed 9 May 2017.

311 Madsen, Olsen and Šadl (n 300), 1.

312 Court of Justice Opinion of Advocate General Trstenjak in Case C-282/10 *Dominguez* [2011] ECLI:EU:C:2011:559.

313 Danish *Højesteret* Case *Ajos* (n 301), 4.

outcome in *Mangold* and *Kücükdeveci* a 'makeshift arrangement'[314] for resolving discrimination situations between individuals.[315] Finally, in support for its formalistic reading of the application of general principles of EU law, the Supreme Court cites Advocate General Bot[316] in *Kücükdeveci*, where he criticises the Court of Justice's overestimate of the commonality of the constitutional protection of antidiscrimination on grounds of age across EU Member States.[317] Rather, he recommends a more formalistic reading of the principle, based on the prohibition of discrimination in the then Article 13 TEC, and Article 21(1) of the Charter.[318] These concerns have been present since the *Mangold* judgment,[319] and, accordingly, reactions to the Danish Supreme Court's decision seems blown out of proportions.

First, the Danish Supreme Court was in doubt as to the counter-balance that the principles of legal certainty and legitimate expectations provide to the horizontal application of the principle of prohibition of discrimination. The same concerns were endorsed by different Advocates General in the development of the Court of Justice's jurisprudence, as set out above, which perhaps should have signalled to the Court of Justice to think further about the importance of the two principles. The Court of Justice dismissed the importance of these countervailing principles rather quickly, perhaps

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314 Court of Justice Opinion of Advocate General Kokott in Case C-499/08 *Ingeniørforeningen i Danmark* [2010] ECLI:EU:C:2010:248, [22].

315 Danish *Højesteret* Case *Ajos* (n 301), 40.

316 Danish *Højesteret* Case *Ajos* (n 301), 38.

317 Opinion of Advocate General Bot in Case C-555/07 *Kücükdeveci* (n 77), [77].

318 ibid. In addition to the three Advocate Generals mentioned in the Danish judgment, it is also worth revisiting the Opinion of Advocate General Mazák in Case C-411/05 *Palacios de la Villa* (n 77), [133]-[139]. He criticises *Mangold* on the basis of legal certainty and the bringing into jeopardy the Treaty structure on the division of competences between the EU and its Member States, but also between the different Union institutions.

319 Mazák and Moser called the *Mangold*/*Kücükdeveci* case law as having an 'evading, transgressing flavour.' Mazák and Moser (n 74), 85. See also the analysis at 62-63 and 81-84.

without affording enough weight to national constitutional concerns, contrary to the general approach affirmed by all the interviewees at the Court of Justice.

Second, the rejection of the Court of Justice's decision in *Dansk Industri* serves a perhaps even more important purpose – that of keeping the Court of Justice in check,[320] and reminding it that, in the pluralist setting in which they all operate, constitutional adjudicators are to be considered peers. Unlike the most recent literature critical of constitutional pluralism, which sources the demise of the theory in individual cases of disobedience by national constitutional courts,[321] precisely the opposite is true. If all the national courts performing constitutional review always remained supportive of all the Court of Justice's decisions, this would result in a clear hierarchical supremacy of EU law over national constitutions. The EU institutions and the Member States, on the other hand, have little to no recourse to keep the Court of Justice in check, namely because any significant control would require a Treaty change. It is therefore essential for the healthy functioning of the pluralist constellation for all the courts involved constructively to contest the Court of Justice and keep it in check.[322]

It may be concluded that the Danish Supreme Court has undergone significant shifts in its behaviour since Denmark joined the EU. Its starting position was one of

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320 Justice Huber of the *Bundesverfassungsgericht* has, in his extrajudicial writing, critiqued the Court of Justice's lack of interest for a fiercer policing of the principles of conferral and subsidiarity, and argued as a consequence, the Court of Justice will not 'overstretch' the competences of the EU. Huber (n 123), 106.

321 See, for example, D Sarmiento, 'The *OMT* case and the demise of the pluralist movement' (*Despite Our Difference Blog*, 21 September 2015) <https://despiteourdifferencesblog.wordpress.com/2015/09/21/the-omt-case-and-the-demise-of-the-pluralist-movement/>, accessed 20 October 2015.

322 In the same vein, Huber argues for a constructive policing of the boundaries of EU action by national constitutional courts, which ultimately contribute to the 'balance between the unitarian and diversity-oriented dimensions of European law.' Huber (n 123), 106.

'ultimate judicial self-restraint' towards the parliament,[323] but then evolved into a court ready to review acts of parliament by allowing the *Maastricht* appeal. A further change can be witnessed in the Supreme Court's willingness to review EU acts and the jurisprudence of the Court of Justice (in its *Maastricht* decision), and to do so using an expanded set of interpretative methods. Finally, in the *Dansk Industri* decision, and what might be a result of a changed composition of the Supreme Court,[324] self-restraint towards the national parliament appears to have reassumed its previous prominence. However, this return to judicial self-restraint can also be read as a scapegoat for the Supreme Court to challenge the exigencies of EU law and the Court of Justice's jurisprudence, but determining the political arena as the proper place for the resolution of constitutional conflict.

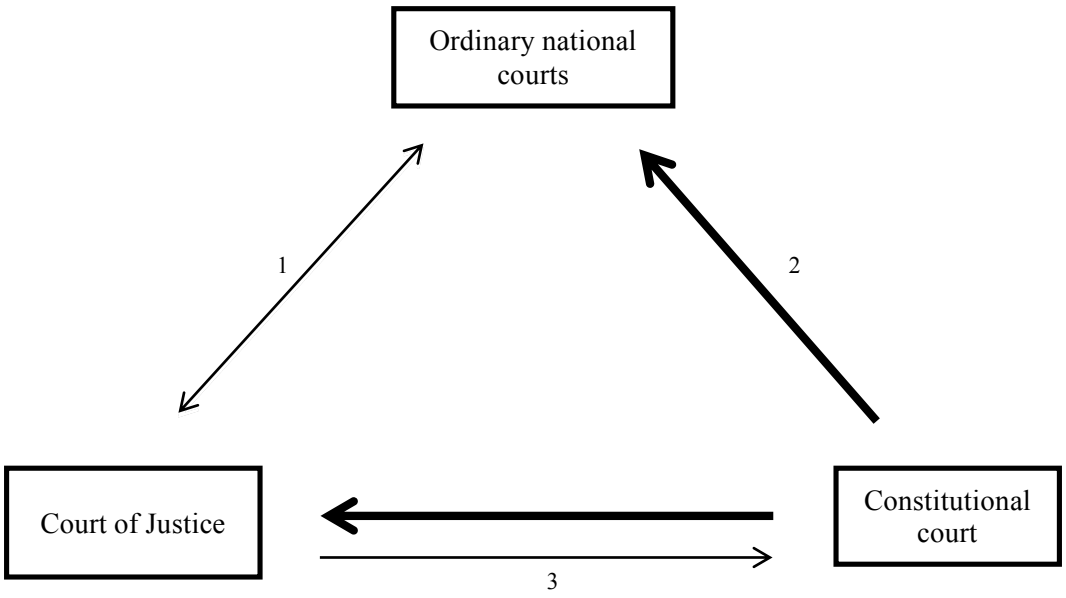
## 3.3. Consequences in the judicial triangle

National case law has demonstrated that the Court of Justice does not operate in a vacuum. As a consequence, the following judicial triangle will provide additional nuance concerning the power relations that are the result of the analysed national jurisprudence.

323 See n 261.

324 Madsen, Olsen and Šadl (n 300), 13. They note, however, that the changes on the bench cannot lead to a conclusion that the new judges have a normatively different view on the position of the Supreme Court in the new era of increased supranational adjudication.

***Figure 5*** *Power relations in the judicial triangle after ultra vires review decisions of national constitutional adjudicators*




The analysed case law demonstrates that national courts with constitutional jurisdiction have not fully accepted the Court of Justice's case law on general principles. Hence, the thicker arrow (3) represents not only a theoretical power of *ultra vires* review, which is an indication of power leverage in itself (as in the case of Germany), but also the position of the ultimate arbiter on behalf of those constitutional adjudicators that have found individual decisions of the Court of Justice to be outside the Treaty mandate. In line with the vocabulary analysis in Chapter 1, however, this power is not absolute. National courts will perform *ultra vires* review only in exceptional circumstances, and will reach their conclusion in line with the principle of sincere cooperation, EU-friendly interpretation, and the will to avoid conflict if possible. The thin line (3) thus illustrates the restraining elements of national constitutional jurisprudence.

Ordinary national courts remain in the relationship of cooperation with the Court

of Justice through the preliminary reference procedure (arrow 1), although it remains to be seen if this relationship will be shaken up by the decisions analysed above.[325] Finally, constitutional adjudicators have strengthened their position in relation to ordinary national courts (Arrow 2), by placing limits on the operation of the principle of primacy in cases of competence conflicts.

## 4. Conclusion

> If an alien were to land on earth and (let us assume the impossible . . .) were to be interested on the relationship between European law and national law, his perception of reality would vary considerably depending on whether he would land on the European Court of Justice or some national constitutional courts. One thing would not change however: he or she (in case aliens have gender differences) would not question the source of ultimate authority.[326]

The question of the final arbiter in the European Union appears to be unsettled to everyone except the courts under analysis. The Court of Justice has, for its part, consistently held that it has the final say for all matters of EU law, and it has for this purpose created its own self-referential framework of analysis. Drawing upon Germany's model of *ultra vires* review, courts with constitutional jurisdiction in the Czech Republic and Denmark have both found judgments of the Court of Justice outside its mandate. Parallel claims to the final say by the courts under analysis is therefore beyond obvious.

The analysed jurisprudence offers a perfect occasion to test the applicability and usefulness of the auto-correct function of constitutional pluralism in the event of a

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325 This has not proven true for the Czech Republic, as the *Ústavní Soud* was not only in conflict with the Court of Justice, but primarily with ordinary (administrative) courts. See Section 3.2.1. above.

326 M P Maduro, 'Contrapunctual law: Europe's constitutional pluralism in action' in Walker (n 30), 502-503.

constitutional conflict. As advocated by Huber,[327] the role of national constitutional courts should be to keep the Court of Justice in check, and control its jurisprudence. The Danish case demonstrates precisely this point – none of the criticism by the Advocates General or academic commentary propelled the Court of Justice to rethink the role of general principles, and their application among private parties. The decision also falls squarely into Walker's framework of conflict resolution, in which it should be resolved through mutual negotiation, learning, open dialogue and cross-examination.[328] It remains to be seen whether the Court of Justice will change its approach, or potentially more national courts will join the Danes in curtailing the applicability of general principles of Union law.

The Czech decision, on the other hand, demonstrates that we should look beyond individual points of conflict, and regard the jurisprudence of constitutional conflict incrementally, equally presupposed by constitutional pluralism. A single decision did not lead to an overall deterioration in the relationship between the *Ústavní Soud*: the 2014 National report for the Conference of European Constitutional Courts prepared by the *Ústavní Soud* itself does not mention this judgment among those relevant for the relationship between EU law and national constitutional law.[329]

In the area of competence monitoring, as our analysis has shown, there is no single ultimate arbiter. There are advantages for all the actors in the European judicial space to engage in competence monitoring. On the one hand, it is essential for the Court of Justice to be the final interpreter of Union law to ensure its uniform application

327 Huber (n 123), 106.

328 N Walker, 'The idea of constitutional pluralism' (2002) 65(3) *MLR* 317, 358-359.

329 See n 253.

throughout the Member States. On the other hand, it would be contrary to the principle of conferral for the Court of Justice to decide on the limits of its own competence, since the source of its mandate – the Treaties – was created by the Member States. In this context, constitutional pluralism appears to best capture these tensions, where constitutional adjudicators compete with the Court of Justice and through it engage in a constructive dialogue on the development of EU and national constitutional law. Such dialogue takes place not in a single case, but in an incremental fashion, where tensions and conflicts are settled through progressive interpretations on both the EU and the national level. As a consequence, judicial triangles throughout this chapter have shown that power constellations indeed change throughout time, and are thus heterarchical.

# CHAPTER 3

# IDENTITY REVIEW

## 1. Introduction

The long-celebrated EU motto, *united in diversity*, depicts rather well the inherent tension between two main drivers behind Member State action – the inclination towards integration, while preserving national particularities and interests. The 'national identity' clause in Article 4(2) TEU, introduced first in the Maastricht Treaty in 1992, lies at the intersection between these two tensions. Reliance on the clause before the Court of Justice has been limited, confined mainly to its use as a justification of a Member State's failure to respect EU law obligations. Leczykiewicz highlights another, for now purely theoretical, role of the national identity clause as a 'codification of the case law of national constitutional courts'.[1] In essence, the identity clause is a substantive expression of national constitutional concerns,[2] which aims to minimise future constitutional, as well as institutional, conflicts.[3]

In the wider constitutional dialogue of the EU, the terms 'national' and

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1 D Leczykiewicz, 'The 'national identity clause' in the EU Treaty: a blow to supremacy of Union law?', UK Constitutional Law Association Blog, <http://ukconstitutionallaw.org/2012/06/21/dorota-leczykiewicz-the-national-identity-clause-in-the-eu-treaty-a-blow-to-supremacy-of-union-law/>, accessed 8 June 2015.

2 For an analysis of the introduction of national constitutional concepts in the Constitutional Treaty, see J Ziller, 'National constitutional concepts in the new Constitution for Europe' (2005) 1(2) *EuConst* 247.

3 One should bear in mind that the application of Article 4(2) TEU is not restricted solely to address the conflicts between existing EU law and national law, but also has a role in the legislative procedure itself. However, its use in the legislative procedure lies outside the scope of the present research, insofar as it does not involve courts as relevant actors.

'constitutional' identity have been used as synonyms.[4] However, in its first preliminary reference to the Court of Justice, the *Bundesverfassungsgericht* stated that the terms were not interchangeable, and, more importantly, that the protection of constitutional identity of a Member State falls within the exclusive jurisdiction of national constitutional courts.[5] Constitutional identity is thus a concept developed by national constitutional courts in the process of identity review, as one of the heads of review in the area of constitutional conflict. Constitutional adjudicators have referred to constitutional identity with the aim of determining constitutional limits to the primacy of Union law, and thus reasserting their own position in the judicial triangle of the EU.[6]

These two different interpretations of the national identity clause portray rather clearly the nature of the constitutional conflict in the EU. After looking in more detail at the case law of national constitutional adjudicators and the Court of Justice on identity review, several conclusions will be drawn as to the substantive use of the national identity clause, as well as institutional relations in the judicial triangle. It will become visible that the question of who is the final arbiter on matters of national and/or constitutional identity will not yield a single and clear winner, but, more beneficially for

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4 Opinion of Advocate General Maduro in Case C-53/04 *Marrosu* [2006] ECLI:EU:C:2006:569, [40]. See also, L F M Besselink, 'National and constitutional identity before and after Lisbon', (2010) 6(3) *ULRev*, 36, 37; S Rodin, 'National identity and market freedoms after the Treaty of Lisbon', (2011) 7 *CYELP* 11; A von Bogdandy and S Schill, 'Overcoming absolute primacy: respect for national identity under the Lisbon Treaty', (2011) 48 *CMLRev* 1417, 1435; G van der Schyff, 'The constitutional relationship between the European Union and its Member States: the role of national identity in article 4(2) TEU', (2012) 37(5) *ELRev*, 563, 568.

5 German *Bundesverfassungsgericht* Case 2 BvR 2728/13 *Gauweiler*, Order of 14 January 2014, <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2014/01/rs20140114_2bvr272813en.html>, accessed 8 June 2015, [29].

6 I will refer to 'identity review' throughout the Chapter so as to encompass review carried out on the basis of both the national identity clause, and constitutional identity as conceived by constitutional adjudicators. When the difference between national and constitutional identity is relevant, this will be flagged in the analysis.

the more general development of EU's judicial architecture, it will render the question immaterial.[7]

Section 2 will offer an analysis of the national constitutional jurisprudence and its approach to constitutional identity. The case law of the Court of Justice will be explored in Section 3. Section 4 will conclude with suggesting a pluralist interpretation of the national identity clause that would accommodate both national constitutional concerns, and the requirements of the principle of primacy of EU law.

## 2. The Member State side of analysis

Jurisprudence of constitutional adjudicators of Member States has influenced, if not even shaped, fundamental constitutional concepts of EU law. Any attempt in addressing identity review would therefore be deeply flawed without the analysis of judicial contributions originating from the national level. This section analyses national constitutional jurisprudence in the area of identity review. It is argued that this jurisprudence can be placed in a spectrum from a seemingly uncompromising identity review (the obvious example being the German *Bundesverfassungsgericht*) on one end, to a stance where trust is placed in the Court of Justice to safeguard national constitutional values through the application of Article 4(2) TEU (an approach taken by the Spanish *Tribunal Constitucional*). In between is a range of jurisprudence introducing identity-based constitutional limits and concessions to the principle of primacy and

[7] In this respect, Halberstam claims that the lack of a determined final authority is in fact an 'essential characteristic' of the system. D Halberstam, 'Constitutional heterarchy: the centrality of conflict in the European Union and the United States', in, J L Dunoff and J P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP, 2009), 331.

European integration, both aimed at avoiding a breach of well-established principles of EU law (here, I will analyse the Polish and French jurisprudence). Ultimately, all the courts involved in identity review strive to avoid conflict with the Court of Justice, and to preserve the atmosphere of mutual respect and self-restraint. The aim of this section is to explore in particular: (1) the different limits that national constitutional adjudicators placed on the principle of primacy in relation to the protection of national/constitutional identity; and (2) the possible scenarios that they envisage in the event a constitutional conflict takes place.

Finally, this section will show that due to different power relations that exist in the judicial triangle, the relationship between the courts under analysis is necessarily pluralist and heterarchical. I argue that both national constitutional adjudicators and the Court of Justice exhibit self-restraint in the spirit of the principle of sincere cooperation and mutual respect.

## 2.1. The unamendable constitutional core: Germany

In this section the focus is placed on the German jurisprudence concerning identity review, in particular in the light of its recent interpretation of the Basic Law, underlining the difference between national and constitutional identity.[8] However, in order to draw a complete picture of the German Court's understanding of constitutional identity and how it affects the primacy of EU law, it is necessary to take a step back and have a look at its older jurisprudence.

[8] German *Bundesverfassungsgericht* Case *Gauweiler* (n 5), [29].

The first mention of the notion of constitutional identity can be found in the *Solange I*[9] judgment, where the *Bundesverfassungsgericht*, apart from introducing the preferable standards for the review of fundamental rights protection at the Union level, explained the limits to integration referring to the core of the German Basic Law as a basis for its identity.[10] While the judgment in *Solange I* concerned a valid regulation, the scope of EU's competence at that time did not extend to the protection of fundamental rights, and the leverage was unquestionably on the side of the *Bundesverfassungsgericht*, whose mandate is the protection of fundamental rights.[11]

Several decades later, a number of constitutional complaints against the ratification of the Lisbon Treaty proved an excellent opportunity for the *Bundesverfassungsgericht* to present its complete vision of identity review, added as a third head of review of EU acts, alongside *ultra vires* review and fundamental rights review.[12] While the complaints were admitted based on an allegation of an infringement of the right to vote under Article 38(1) of the Basic Law, the *Bundesverfassungsgericht* engaged in a full review of the Treaty Amendment pending ratification. The identity review introduced in the judgment is defined in rather vague terms:

> […] it must be possible within the German jurisdiction to assert the responsibility for integration if obvious transgressions of the boundaries occur when the European Union claims competences […] and to preserve

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9 German *Bundesverfassungsgericht* Case 37 BVerfGE 271 *Internationale Handelsgesellschaft (Solange I)* Judgment of 29 May 1974, (1974) 2 *CMLR* 540, [279].

10 See also German *Bundesverfassungsgericht* Case 2 BvR 197/83 *Re the Application of Wünsche Handelsgesellschaft (Solange II)* Decision of 22 October 1986, (1987) 3 *CMLR* 225, [375]-[376].

11 See, in that respect, the Dissenting Opinion of Justice Gerhardt in German *Bundesverfassungsgericht* Case *Gauweiler* (n 5), [3]. See also, the power relations in the judicial triangle in Figure 11, Chapter 4, Section 2.3.

12 German *Bundesverfassungsgericht* Case 2 BVerfG 2/08 *Lisbon Treaty*, Judgment of 30 June 2009, <http://www.bverfg.de/e/es20090630_2bve000208en.html>, accessed 16 November 2015, [240]-[241].

> the inviolable core content of the Basic Law's constitutional identity by means of a identity review.[13]

The *Bundesverfassungsgericht* goes on to give examples of 'core areas' that are not subject to integration, including criminal law (both substantive and procedural), the monopoly on the use of force by the police and by the military, fundamental fiscal decisions on public revenue and expenditure, the social State, the school and education system, as well as the relationship with religious communities.[14]

The *Bundesverfassungsgericht* does not define or give examples of what an 'obvious transgression' might entail. However, it underlines that undertaking identity review needs to go hand in hand with the principle of sincere cooperation from Article 4(3) TEU, and should furthermore be performed taking into account the Basic Law's openness towards EU law.[15] Wendel is pessimistic about the actual use of the principle of friendliness towards EU law when conducting identity review; he views it as a trick through which the *Bundesverfassungsgericht* will place further limits on the applicability of EU law in Germany.[16] Pernice offers a more optimistic reading of the reference to the

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13 ibid., [240].

14 ibid., [252]-[260]. The *Bundesverfassungsgericht* also added the budget autonomy of the German Parliament to the list of areas pertaining to the untouchable constitutional core in Case 2 BVerfG 987/10 *Aids for Greece and EFSF*, Judgment of 7 September 2011, <http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2011/09/rs20110907_2bvr098710en.html>, accessed 1 June 2017, [125]. See also P M Huber, 'The Federal Constitutional Court and European integration' (2015) 21(1) *EPL* 83, 92.

15 ibid., [240]. See also E Vranes, 'German constitutional foundations of, and limitations to, EU integration: a systematic analysis' (2013) 14(1) *GLJ* 75, 92.

16 M Wendel, 'Lisbon before the courts: a comparative perspective', (2011) 7 *EuConst* 96, 134. In general, it seems that the literature dealing with the judgment is mainly pessimistic as regards the use of the principle of openness to European law. See D Halberstam and C Möllers, 'The German Constitutional Court says "Ja zu Deutschland!"' (2009) 10(8) *GLJ* 1241; D Thym, 'From ultra-vires-control to constitutional identity review: the Lisbon judgment of the German Constitutional Court', in J M Beneyto and I Pernice (eds) *Europe's constitutional challenges in the light of the recent case law of national constitutional courts – Lisbon and beyond* (Nomos, 2011); S Theil, 'What red lines, if any, do the Lisbon judgments of European constitutional courts draw for future EU integration?' (2014) 15(4) *GLJ*, 599.

principle of friendliness towards European law, interpreting the seemingly contradictory statement as a turn to a 'non-hierarchical or pluralist' understanding of the relationship between European and national constitutional law.[17]

I argue that the wording of the *Bundesverfassungsgericht* can be read in support of a pluralist understanding of the European constitutional space. In particular, the *Bundesverfassungsgericht* refers to the *Kadi* judgment of the Court of Justice[18] as an example of a situation in which the identity claim overrides legal obligations of the EU.[19] In so doing, the *Bundesverfassungsgericht* refers to the 'contexts of political order which are not structured according to a strict hierarchy',[20] and subsequently applies the analogy to a hypothetical situation of a conflict between the German constitutional identity and the requirements of EU law.[21]

Interestingly, the Court states that the right to perform an identity review is 'rooted in constitutional law',[22] and exists because 'the guarantee of national constitutional identity under constitutional and under Union law go hand in hand in the European legal area.'[23] This point treats national and constitutional identity as

17 I Pernice, 'Motor or brake for European policies? Germany's new role in the EU after the Lisbon-Judgment of its Federal Constitutional Court' in Beneyto and Pernice (n 16), 355, 385. See also D Thym, 'In the name of the sovereign statehood: a critical introduction to the Lisbon judgment of the German Constitutional Court', (2009) 46 *CMLRev*, 1795, 1805.

18 Court of Justice Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation* [2008] ECLI:EU:C:2008:461.

19 German *Bundesverfassungsgericht* Case *Lisbon Treaty* (n 12), [340].

20 ibid.

21 Nicolaïdis argues that the *Bundesverfassungsgericht* in fact praises the heterarchical setting. See K Nicolaïdis, 'Germany as Europe: how the Constitutional Court unwittingly embraced EU demoicracy. A comment on Franz Mayer' (2011) 9(3-4) *ICON*, 786, 791.

22 German *Bundesverfassungsgericht* Case *Lisbon Treaty* (n 12), [240].

23 ibid., Headnote 4 and [240].

synonyms,[24] and therefore represents a reading of Article 4(2) TEU similar to that employed by the Court of Justice and the majority of the academic community.[25] In addition, Thym notes that the use of the expression 'hand in hand' for describing the relationship between national and constitutional identity might also serve as a subscription to the pluralist understanding of the EU constitutional framework.[26]

Somewhat surprising in comparison to the reasoning of its judgment concerning the Lisbon Treaty, the *Bundesverfassungsgericht* set out a more detailed account of identity review in its first preliminary reference to the Court of Justice.[27] A few sentences are necessary to place the preliminary reference in the context of constitutional review. The case concerns the announced OMT mechanism, which is not a binding piece of EU law, but merely a press release issued by the Governing Council of the ECB.[28] Still, the legal nature of the document was not disputed by the *Bundesverfassungsgericht* or by the Court of Justice, although some of the intervening Member States and EU institutions in the procedure raised issues of admissibility of such a reference.[29] The Court of Justice stated that the reference concerns the interpretation of Treaty provisions regulating the

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24 Thym (n 16), 41; Halberstam and Möllers (n 16), 1247.

25 See in particular n 4, and Thym (n 17), 1811.

26 ibid.

27 German *Bundesverfassungsgericht* Case *Gauweiler* (n 5). For an analysis of the *ultra vires* reasoning of the *Bundesverfassungsgericht* in the reference, see Chapter 2, Section 3.1.

28 'Technical features of Outright Monetary Transactions', Governing Council of the European Central Bank, 6 September 2012, <http://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html>, accessed 2 March 2016.

29 Admissibility was challenged, in one way or another, by the Dutch, Finnish, French, Greek, Irish, Italian, Portuguese, and Spanish Government, as well as by the European Commission, the ECB, and the European Parliament. Court of Justice Case C-62/14 *Gauweiler* [2015] ECLI:EU:C:2015:7, [18]-[23]. For a more detailed analysis of the admissibility point of the judgment, see S Simon, 'Direct cooperation has begun: some remarks on the judgment of the ECJ on the OMT Decision of the ECB in response to the German Federal Constitutional Court's first request for a preliminary ruling', (2015) 16(4) *GLJ* 1025, 1027 onwards.

competences of the ECB, and are therefore admissible.[30]

As regards identity review, the *Bundesverfassungsgericht* in its reference divides constitutional values in two categories: those underpinning national 'fundamental structures, political and constitutional' as set out in Article 4(2) TEU; and the core constitutional values that represent the national constitutional identity, and therefore lie beyond the reach of EU law. The main difference between the two is that the latter are not subject to the principle of primacy of EU law, and the *Bundesverfassungsgericht* has exclusive jurisdiction as to their interpretation.[31] Furthermore, the Court stated that the values representing constitutional identity cannot be subject to any kind of balancing exercise, and must be unconditionally protected by the *Bundesverfassungsgericht*.[32]

The distinction between constitutional and national identity seems at odds with the reasoning employed in the *Lisbon Treaty* decision of the *Bundesverfassungsgericht*. In particular, it seems the Court has abandoned its view that the two notions go 'hand in hand'[33] and put forward an interpretation which clearly sets out a *domaine réservé* for the constitutional court. The Court of Justice, in its reply to the preliminary reference, refrained from entering into any discussion on this point, and focused solely on the substantive questions concerning the ECB's mandate in relation to the OMT mechanism. I argue that the Court of Justice was prudent not to enter a discussion on this matter, and deferred to the *Bundesverfassungsgericht*.[34] In turn, the *Bundesverfassungsgericht* also

30 Court of Justice Case C-62/14 *Gauweiler* (n 29), [30].

31 German *Bundesverfassungsgericht* Case *Gauweiler* (n 5), [29].

32 ibid., [29].

33 German *Bundesverfassungsgericht* Case *Lisbon Treaty* (n 12), Headnote 4 and [240].

34 See on this point, M Claes and J-H Reestman, 'The protection of national constitutional identity and the limits of European integration at the occasion of the Gauweiler case' (2015) 16(4) *GLJ* 917, 970.

acted in a manner of mutual respect and self-restraint, and has not disputed the interpretation on the validity of the OMT mechanism as given by the Court of Justice.[35] It has, in a clear pluralist fashion, only done so after underlining its vision of identity review as a limit to European integration.[36]

In December 2015, the *Bundesverfassungsgericht* decided not to refer a preliminary reference to the Court of Justice, in a case where the EAW was to be applied to an American citizen, and he was to be extradited to Italy where he was sentenced *in absentia*.[37] The Düsseldorf Higher Regional Court allowed such an extradition, and the American citizen submitted a constitutional complaint to the *Bundesverfassungsgericht* claiming he was sentenced *in absentia*, and would not have a chance of a new evidentiary hearing in Italy, as required by Article 5(1) of the EAW Framework Decision.[38]

The *Bundesverfassungsgericht* quashed the decision of the Higher Regional Court, but the Order is of interest as it gives further information on the

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35 German *Bundesverfassungsgericht* Case 2 BvR 2728/13 *Gauweiler*, Judgment of 21 June 2016, <http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2016/06/rs20160621_2bvr272813en.html>, accessed 7 June 2017.

36 ibid., [120]-[121]. In July 2017, the *Bundesverfassungsgericht* submitted another preliminary reference to the Court of Justice, asking whether the Public Sector Purchase Programme of the ECB violates the prohibition of monetary financing and exceeds the monetary policy mandate of the European Central Bank, thus encroaching upon the competences of the Member States (specifically in relation to the criteria of the Court of Justice set out in its *Gauweiler* decision). German *Bundesverfassungsgericht* Cases 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15 *Public Sector Purchase Programme*, Order of 18 July 2017, <http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2017/bvg17-070.html>, accessed 16 August 2017.

37 German *Bundesverfassungsgericht* Case 2 BvR 2735/14 *Mr R.*, Order of 15 December 2015, <http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-004.html>, accessed 2 March 2016.

38 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1. Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial [2009] OJ L81/24.

*Bundesverfassungsgericht*'s view of identity review. First, the *Bundesverfassungsgericht* found that although the requirements of its *Bananas Market Regulation* decision for fundamental rights review were not met,[39] it will carry out such review by means of an identity review. Specifically, the right to fair trial was considered inextricably linked to human dignity, which forms part of the unamendable core of the Basic Law.[40]

Second, the *Bundesverfassungsgericht* reiterated the view introduced in *Gauweiler* on how the constitutional identity of Germany is a matter for it alone to interpret and protect, and is not subject to European integration or open to European interpretation.[41] However, it continued by reiterating its stance from the *Lisbon Treaty* decision, that such an understanding of constitutional identity is inherent to the national identity clause from Article 4(2) TEU, and is in line with the principle of sincere cooperation from Article 4(3) TEU.[42] Nevertheless, the *Bundesverfassungsgericht*, taking into account the principle of openness to European integration, reserves solely for itself any possibility of declaring a provision of EU law inapplicable in Germany, underlining the extremely exceptional nature of such a scenario.[43] Yet, 'this does not entail a substantial risk for the uniform application of Union law, as the powers of review reserved for the Federal Constitutional Court have to be exercised with restraint and in a

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39 See Chapter 4, Section 4.1.1.2. on the analysis of the decision.

40 German *Bundesverfassungsgericht* Case *Mr R.* (n 37), [34].

41 German *Bundesverfassungsgericht* Case *Mr R.* (n 37), Key considerations [1]. The case law of the United Kingdom Supreme Court might be interpreted as similar to the position of Germany. In a recent United Kingdom Supreme Court case, Lord Mance stated that should an unlikely situation of a constitutional conflict arise between the national and the EU constitutional order, it should be for the Supreme Court itself to decide on consistency of national constitutional requirements. He then went on to underline that such a situation would be unlikely, and should be treated with mutual respect and caution. United Kingdom Supreme Court Case *Pham* [2015] UKSC 19, [90]-[91].

42 German *Bundesverfassungsgericht* Case *Mr R.* (n 37), Key considerations [1].

43 ibid.

manner open to European integration'.[44]

Such reasoning is perhaps best fit to serve as a conclusion to the presented case law of the *Bundesverfassungsgericht* on identity review - although it might come across as contrary to the principle of primacy, it in fact fits into the pluralist heterarchical scheme. The role of the national identity clause is precisely to underline differences between Member States and their constitutional values. However, national courts are not able to use this exception to circumvent the principle of primacy, and the most extreme remedy is reserved for the constitutional court, under strict conditions. It is argued, reference to these conditions will always be done taking into consideration that Germany is a part of a pluralist system that functions on a heterarchical basis.

## 2.2. Constitutional identity as a limit which may be subject to constitutional amendment: Poland and France

The rigour of identity review appears to follow the normal distribution curve, where the majority of constitutional adjudicators across the EU declared some kind of identity-based constitutional limit to the principle of primacy, while allowing for a possibility of a constitutional amendment as one of the reconciliatory options should a situation of conflict arise. France and Poland will be used as two key examples of such a position, with reference to other jurisdictions where relevant. The analysis will underline pluralist elements of the reasoning of these institutions, demonstrating further the viability of constitutional pluralism.

[44] ibid., Key considerations [1.b)].

## 2.2.1. Poland

The Polish *Trybunał Konstytucyjny* is sometimes singled out as being the closest to the German position of preserving constitutional identity,[45] but it will be argued that its jurisprudence is in fact leaving ample space for concessions and compromises. There are three cases in particular that will be used to depict the limits that the Tribunal places on the principle of primacy of EU law, but also to sketch out the various options it leaves in the event of a constitutional conflict taking place.[46] They concern first, the review of the Polish Accession Treaty that has already been ratified; second, the Lisbon Treaty, again after the ratification has been deposited; and, third, the Brussels Regulation,[47] where the Tribunal assumed jurisdiction to perform such a review in relation to the Polish Constitution. In all three situations, the Tribunal acted in direct opposition to the well-established *Foto-Frost* jurisprudence,[48] which, it will be argued, ultimately shaped its decisions.

In 2004, the Polish Constitutional Tribunal was faced with a review of the Polish Accession Treaty[49] with its Constitution. While the judgment itself is not relevant specifically for identity review, it is nevertheless necessary to touch upon some of its

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45 See in particular, Claes and Reestman, (n 34), 956.

46 For a more detailed analysis of the difference between these three cases and the German position, in particular as they were cited by the *Bundesverfassungsgericht* in support of its claims on constitutional identity in its *Gauweiler* reference, see Claes and Reestman, (n 34), 957-959.

47 Council Regulation 44/2001/EC of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1.

48 Court of Justice Case 314/85 *Foto-Frost* [1987] ECLI:EU:C:1987:452, [15].

49 Polish *Trybunał Konstytucyjny* Case K 18/04 *Accession Treaty*, Judgment of 11 May 2005, <http://trybunal.gov.pl/fileadmin/content/omowienia/K_18_04_GB.pdf>, accessed 9 March 2016.

reasoning on the relationship between EU and Polish constitutional law. In the judgment, the Tribunal offered an extensive account of its prerogative to interpret the Constitution, as well as the supremacy of the Constitution in the territory of Poland. Article 91(3) of the Polish Constitution states: 'If an agreement, ratified by the Republic of Poland, establishing an international organisation so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws.' The Tribunal hence faced the well-known omnipotence paradox:[50] if the Polish Constitution is supreme, can it allow an external legal order to take precedence? For the *Trybunał Konstytucyjny* the answer was no, and it emphasised that the Constitution is the 'supreme law of the Republic of Poland'.[51]

Regardless of its seemingly firm stance, subsequent reasoning in the judgment strongly resembles the pluralist rhetoric:

> The concept and model of European law created a new situation, wherein, within each Member State, autonomous legal orders co-exist and are simultaneously operative. Their interaction may not be completely described by the traditional concepts of monism and dualism regarding the relationship between domestic law and international law. The existence of the relative autonomy of both, national and Community, legal orders in no way signifies an absence of interaction between them.[…][52]

Such reasoning is in accordance with the pluralist understanding of the existence of

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50 Most usually expressed through: 'Could God create a stone so heavy that even He could not lift it?' <https://en.wikipedia.org/wiki/Omnipotence_paradox>, accessed 9 March 2016.

51 Polish *Trybunał Konstytucyjny* Case K 18/04 *Accession Treaty* (n 49), [8], [11].

52 Polish *Trybunał Konstytucyjny* Case K 18/04 *Accession Treaty* (n 49), [12]. For an opposite reading, see W Sadurski, '"Solange, chapter 3": constitutional courts in Central Europe – democracy – European Union' (2008) 14(1) *ELJ* 1, 19. I argue that the inability to retort to monism and dualism to explain the status of the EU demonstrates that the Polish *Trybunał Konstytucyjny* cannot place the EU in the category of a classical international organisation. At [6], the Tribunal does discuss the lack of the term 'supranational organisation' in the Polish Constitution and the Accession Treaty itself, the latter itself being an act of public international law. Nevertheless, subsequent reasoning of the Tribunal suggests it is aware that defining the EU is no simple task resolvable by resorting to public international law terminology and categories.

multiple legal orders in the same territory, whereas their demarcation is based on functional criteria.[53]

In addressing the possibility of an 'irreconcilable inconsistency'[54] between an EU law norm and a constitutional norm, the Tribunal listed three possible outcomes, the first being an amendment of the Constitution, the second the amendment of the Union norm in question, and finally, if none of the previous is possible, Poland's withdrawal from the EU.[55] The Tribunal, however, emphasised that in any event, an EU-friendly interpretation of the Constitution should be employed.[56] Unlike the German view of the unamendable and eternal character of the core of Germany's constitutional identity, the Polish Constitutional Tribunal seems open, at least in theory, to make concessions in order to avoid or reconcile possible future conflicts.

The second judgment relevant for the analysis of identity review in Poland was handed down on the occasion of the ratification of the Lisbon Treaty.[57] The Tribunal stated that a ratified treaty benefits a presumption of constitutionality, and such a presumption can be dismissed only in the event there is no possible reconciling interpretation of the Constitution, nor of the treaty, keeping in mind the consequences

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53 J Shaw, 'Process and Constitutional Discourse in the European Union' (2000) 27 *J Law & Soc* 4, 7. See also W Twining, *Globalization & Legal Theory* (Butterworths 2000), 83; I Pernice, 'Introduction: Achievements and Challenges – The European Union, its Constitutional Courts and the Perspectives after Lisbon' in Beneyto and Pernice (n 16), 9, 10.

54 Polish *Trybunał Konstytucyjny* Case K 18/04 *Accession Treaty* (n 49), [13].

55 ibid., [13]. I argue the Tribunal lists these options in order of preference, regardless of the use of the conjunction 'or' between them, as it calls the third option (leaving the EU altogether) as the ultimate one.

56 ibid., [14]. It should be added that in the same passage, the *Trybunał Konstytucyjny* placed fundamental rights as the limit to the principle of Euro-friendly interpretation. For the analysis of this limit, see Chapter 4, Section 4.1.2.1.

57 Polish *Trybunał Konstytucyjny* Case K 32/09 *Treaty of Lisbon*, Judgment of 24 November 2010, <http://trybunal.gov.pl/fileadmin/content/omowienia/K_32_09_EN.pdf>, accessed 9 March 2016.

that such a judgment might have for the sovereignty of the state, as well as its constitutional identity.[58] In consequence, it seems that any interpretation that might go against Polish constitutional identity would not be acceptable for the Tribunal.

Differing again from the German approach to the relationship between constitutional identity and the national identity clause, the *Trybunał Konstytucyjny* considers the two equivalents.[59] The Tribunal goes on to emphasise the underlying logic of the national identity clause and the way it functions – 'confirming one's national identity in solidarity with other nations, and not against them'[60] – an understanding which seems to confirm the pluralist interpretation of the identity clause as set out in the present work. In other words, if the national identity clause is used as a general exception for national particularities (constitutional identities) of all Member States, which are subject to the same limits determined by the Court of Justice, it only reinforces and strengthens the heterarchical, pluralist relationship between national and EU law. It also confirms that the Tribunal does not only regarding the bilateral relationship between the Polish Constitution and EU law, but is aware of the multilateral consequences that must not be overlooked in order for the system to function.

The judgment of the *Trybunał Konstytucyjny* concerning the Brussels Regulation is significant as it concluded it has the jurisdiction to review secondary EU law against the Constitution.[61] The Tribunal emphasised, however, that such a review must be

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58 ibid., [1.1.2].

59 'An equivalent of the concept of constitutional identity in the primary EU law is the concept of national identity.' ibid., [2.1].

60 ibid.

61 Polish *Trybunał Konstytucyjny* Case SK 45/09 *Brussels Regulation*, Judgment of 16 November 2011, <http://trybunal.gov.pl/uploads/media/SiM_LI_EN_calosc.pdf>, accessed 10 March 2016, [2.2].

performed with great caution and restraint, taking into account the principle of sincere cooperation.[62] More importantly, the Tribunal has used this opportunity to further explain two points: (1) the relationship between national and constitutional identity, and (2) the way in which potential constitutional conflict is to be resolved.

The Tribunal addresses constitutional identity as the essential component of national identity as set out in Article 4(2) TEU.[63] Read in conjunction with the *Lisbon Treaty* judgment, it is possible to infer the Tribunal's more general stance concerning the relationship between national and constitutional identity: it appears the Tribunal regards the national identity clause in Article 4(2) TEU as a general clause allowing for protection of national particularities. It then goes on to state that the Polish equivalent of such a concept is constitutional identity.[64] If we are to apply the Polish reasoning universally, this would mean that Article 4(2) TEU is the EU concept for each identity-based limit to integration and the principle of primacy put forward by the national level. Such an approach endorses a multilateral understanding of the protection of national identity, as it creates a common denominator on the Union level, under which national particularities can be placed.

The *Trybunał Konstytucyjny* is, however, well aware that the protection of constitutional identity might give rise to constitutional conflict. It therefore engages in a detailed analysis of possible reconciliatory methods that would need to be employed so as to avoid the conflict actually taking place, which seem to elaborate further on what has

62 ibid., [2.5].

63 ibid.

64 Polish *Trybunał Konstytucyjny* Case K 32/09 *Treaty of Lisbon* (n 57), [2.1]; Case *Brussels Regulation* (n 61), [2.5].

been introduced in its *Accession Treaty* judgment.[65] The Tribunal advances the idea of a cooperative relationship, based on mutual loyalty, which should result in an interpretation of both EU law, as well as national constitutional law that is mutually acceptable. Therefore, considerable efforts should be put in place to provide for an interpretation that is EU-friendly (by the Tribunal), but also respective towards national particularities (by the Court of Justice). It can therefore be concluded that the Polish Tribunal endorses a pluralist, heterarchical understanding of the relationship between EU and national constitutional law, which should be based on mutual respect and self-restraint, in order to avoid conflict. Only subsequently, when all efforts fail to provide for a mutually satisfactory interpretation, the *ultima ratio* decision that might take place declares the secondary act of EU law as contrary to the Constitution and therefore inapplicable in Poland.[66]

In conclusion, the Polish view of constitutional identity, and the prospect of a constitutional conflict taking place seem to fit the pluralist understanding of the relationship between a number of constitutional orders in the EU, but also the judicial interactions between constitutional adjudicators. While there are some limits placed on European integration in the form of constitutional identity, the Polish Tribunal is well aware of the grave consequences that would take place should such a protection be applied without caution and observance of the mutual respect and self-restraint. It is argued that the *Trybunał Konstytucyjny* found all acts under review to be in accordance

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65 Polish *Trybunał Konstytucyjny* Case K 18/04 *Accession Treaty* (n 49), [13].

66 The Polish Tribunal is aware of the fact that such a ruling would be contrary to obligations undertaken when signing the Treaties, and states that this might result in proceedings being brought by the European Commission against Poland before the Court of Justice. Polish *Trybunał Konstytucyjny* Case *Brussels Regulation* (n 61), [2.7].

with the Constitution precisely due to these reservations.

### 2.2.2. France

The French *Conseil Constitutionnel* also pronounced itself on the notion of constitutional identity, and its role in the interplay between EU and national constitutional law. As will be shown below, the French position seems to be close to the Polish jurisprudence presented above, but there are significant differences between the German and the French court and their understanding of constitutional identity and the extent of judicial review that is to be applied in this regard.

The *Conseil Constitutionnel* was called to assess the conformity of the Constitutional Treaty with the French Constitution.[67] Prior to the French and the Dutch referenda which ultimately decided the destiny of the Constitutional Treaty, the *Conseil Constitutionnel* decided on the constitutionality of the new Treaty. The Council, aware of the intricacies of EU judicial relations and the broader complexity of the EU constitutional context, concluded, among others, that the new proposed primacy clause set out in Article I-6 would not extend the existing scope of the principle, in particular referring to the new identity clause contained in the proposed Article I-5 that has the function of a safeguard in this context.[68]

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[67] For a detailed analysis of the decision, see G Carcassonne, 'Case note: *Conseil Constitutionnel* on the European Constitutional Treaty. Decision of 19 November 2004, 2004–505 DC.' (2005) 1(2) *EuConst*, 293 (note).

[68] French *Conseil Constitutionnel* Case 2004-505 DC *Constitutional Treaty* Decision of 19 November 2004, [12]. The wording of the decision seems to reflect its reasoning from five months earlier, when it was faced with a review of a national law which almost literally transposed an EU directive. The *Conseil Constitutionnel* stated that the transposition of a directive into the national legal order is a constitutional obligation, and it would be possible to disregard this obligation only in the event of an express provision of the Constitution to the contrary. See

In 2006, the *Conseil Constitutionnel* further explained its vision of identity review.[69] In its decision on the validity of a national law literally transposing a directive,[70] the *Conseil Constitutionnel* was faced with an assessment of whether a directive is compliant with the French Constitution. It is important to note that this case is placed in the context of review of secondary EU acts, against the background of the exclusive jurisdiction of the Court of Justice to interpret and possibly annul them. It is argued that this situation conditioned the extent of self-restraint that was applied by the *Conseil Constitutionnel*.

In deciding the case, the *Conseil Constitutionnel* replaced its previous reasoning, which held that the implementing act of a directive can only be reviewed against an expressly conflicting provision of the Constitution.[71] Instead, constitutional identity was placed as a benchmark against which the constitutionality of an act implementing a directive can be reviewed.[72] Nevertheless, the Council did not leave this statement as final and unconditional – in the same paragraph it allowed for the possibility of a constitutional amendment that would remedy such a situation.[73] The *Conseil Constitutionnel* certainly did not go as far as the *Trybunał Konstytucyjny* to assume jurisdiction to review secondary acts of EU law, but it did reserve for itself the power to do so should the act in question go against French constitutional identity. Again,

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*Conseil Constitutionnel*, Case 2004-496 DC Decision of 10 June 2004, [7]. Such a wording of the Council was seen as declaring a limit to the primacy of EU law based on the new national identity clause, and as a basis of the subsequent pronunciation of the Council on the notion of constitutional identity. Further on this point, see also J-H Reestman, 'The Franco-German constitutional divide' (2009) 5(3) *EuConst* 374.

69 Unlike the *Bundesverfassungsgericht*, the *Conseil Constitutionnel* never expressly uses this term.

70 French *Conseil Constitutionnel*, Case 2006-540 DC *Information Society* Decision of 27 July 2006.

71 French *Conseil Constitutionnel* Case 2004-505 DC (n 68).

72 French *Conseil Constitutionnel* Case 2006-540 DC *Information Society* (n 70), [19].

73 See also Reestman, (n 68), 388.

similarly to the *Trybunał Konstytucyjny*, a provision of the Constitution denoting French constitutional identity seems to be the one for which no other interpretation is possible, which in turn means that an EU-friendly interpretation is the first step in approaching a constitutional conflict. Only subsequently does the *Conseil Constitutionnel* mention the option of amending the Constitution.

Alongside Poland and France, other constitutional adjudicators in the EU[74] have taken the opportunity to introduce identity-based constitutional limits to the principle of primacy of EU law, introducing at the same time possible reconciliatory methods.

## 2.3. Trusting the Court of Justice to safeguard national identity: Spain

On the opposite end of the spectrum of identity review we find the Spanish *Tribunal Constitucional*. Its position is characterised by the trust it places in the Court of Justice in protecting its national identity through Article 4(2) TEU, and the correspondingly high level of judicial restraint it exercises. The following section will analyse the Declaration of the *Tribunal Constitucional* on the Constitutional Treaty,[75] as well as its judgment in *Melloni* after receiving the answer from the Court of Justice on its first preliminary

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74 Italian *Corte costituzionale* Case 183/73 *Frontini,* Judgment of 27 December 1973, (1974) 2 *CMLR* 372; Czech *Ústavní Soud* Case Pl. ÚS 29/09 *Lisbon Treaty II*, Judgment of 3 November 2009, <http://www.usoud.cz/en/decisions/20091103-pl-us-2909-treaty-of-lisbon-ii-1/>, accessed 16 March 2016, [150]; Latvian *Satversmes tiesa* Case 2008-35-01 *Treaty of Lisbon*, Judgment of 7 April 2009, <http://www.satv.tiesa.gov.lv/wp-content/uploads/2008/09/2008-35-01_Spriedums_ENG.pdf>, accessed 12 April 2016, [16.3]; Belgian *Cour Constitutionnelle* Case 62/2016 *Stability Pact*, Judgment of 28 April 2016, <http://www.const-court.be/cgi/judgments_popup.php?lang=en&ArrestID=4097> accessed 16 July 2017, summary. See also, Huber (n 14), 92.

75 Spanish *Tribunal Constitucional* Case DTC 1/2004 *Constitutional Treaty*, Declaration of 13 December 2004.

reference.[76]

In its declaration on the constitutionality of the Constitutional Treaty, the *Tribunal Constitucional* offered some insight into its view on the Treaty structure and how it safeguards national constitutional concerns. While the declaration concerned a treaty that never entered into force, the reasoning of the *Tribunal Constitucional* is valid, insofar as it relates to the provisions that are still contained in the Treaty of Lisbon, in particular the national identity clause. The *Tribunal Constitucional*, in its assessment of the Constitutional Treaty, firstly describes how the Spanish Constitution is the source of the transfer of competences from Spain to the EU, and subsequently, for the penetration of EU law into national law.[77] The *Tribunal Constitucional* goes on to accept the need for a supranational institution to oversee the application of the Treaties (the Court of Justice), and provide its interpretation.[78] In its view, the Treaty is set up to ensure the protection of the basic constitutional values and principles, and is based on the protection of identity of its Member States, which should be preserved regardless of the extent of the transfer of competences to the Union.[79] In the eyes of the *Tribunal Constitucional*, therefore, the Treaty framework is set up so as to include the protection of national constitutional

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76 Spanish *Tribunal Constitucional* Case 26/2014 *Melloni*, Judgment of 13 February 2014. For the answer of the Court of Justice, see Case C-399/11 *Melloni* [2013] ECLI:EU:C:2013:107.

77 Spanish *Tribunal Constitucional* Case DTC 1/2004 *Constitutional Treaty* (n 75), ground 2 states in particular:

> Metaphorically, it could be said that Art. 93 CE [Spanish Constitution] operates as a door through which the Constitution itself allows the entry of other legislations into our constitutional system through the transfer of the exercise of competence.

78 ibid.

79 Spanish *Tribunal Constitucional* Case DTC 1/2004 *Constitutional Treaty* (n 75), ground 3. The Tribunal stated that the identity of Member States and their fundamental constitutional structures should not become unrecognisable in the process of transfer of competences to the EU. It can therefore be inferred that the basic constitutional features of Member States that form their national identity represent the limit to the reach of Union law.

particularities:

> In other words, the limits referred to by the reservations of said constitutional justifications now appear proclaimed unmistakably by the Treaty under examination, which has adapted its provisions to the requirements of the constitutions of the member states.[80]

Such interpretation is placing a considerable amount of trust in the Court of Justice and its interpretation of the Treaties, whose role is to ensure at all times that the obligation to respect national identities of Member States is complied with.[81] The *Tribunal Constitucional* also sets out its vision of primacy of Union law, and its heterarchical character: EU law does not enjoy an absolute hierarchical supremacy over national law, but is rather relevant only in situations of conflict between national and EU law.[82] Such an understanding of primacy is crucial for the sound functioning of the pluralist setting.

10 years later, in the *Melloni* judgment, the Tribunal once again addressed the relationship between national and EU constitutional law, and in particular, the limits to the transfers of competences to the EU and the preservation of basic constitutional structures through the national identity clause. In this case, the *Tribunal Constitucional* first asked the Court of Justice for an interpretation of the EAW Framework Decision; specifically, whether it allows for the protection as set out in the Spanish Constitution, which gives a right to a constitutional complaint to those that have been convicted *in absentia* in a criminal procedure. This is a higher level of protection than that of the

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80 Spanish *Tribunal Constitucional* Case DTC 1/2004 *Constitutional Treaty* (n 75), ground 3. On this point, see also the Opinion of Advocate General Cruz Villalón in Case C-62/14 *Gauweiler* [2015] ECLI:EU:C:2015:7, [59]-[61].

81 See also, Claes and Reestman (n 34), 961.

82 Spanish *Tribunal Constitucional* Case DTC 1/2004 *Constitutional Treaty* (n 75), ground 4. On this distinction, see Chapter 1, Section 2.2.

Charter and the EAW.[83] The Court of Justice stated that the EAW and the Charter provide for a satisfactory level of protection of fundamental rights, and should therefore be applied instead of the rules set out in the Spanish Constitution.[84]

The *Tribunal Constitucional* was faced with a clear constitutional conflict, where the standard of protection provided by the Spanish Constitution was higher than that provided by the EAW and the Charter. Based on its declaration on the Constitutional Treaty, the Tribunal had to change its case law in order to accommodate the answer of the Court of Justice.[85] Such a move may be the ultimate expression of the trust the *Tribunal Constitucional* is placing in the Court of Justice in the protection of constitutional identity, as was stated in its declaration on the Constitutional Treaty. This approach places the *Tribunal Constitucional* on the far end of the spectrum regarding national jurisprudence on identity review – a position that it does not seem to share with many other Member States. The *Tribunal Constitucional* nevertheless also put forward a claim of jurisdiction in the unlikely case where constitutional conflict would jeopardise the sovereignty of the Spanish people.[86]

In conclusion, the Spanish position considers the national identity clause and the system of the Treaties as accommodating national constitutional traditions and structures. It therefore reserves for itself the power to protect these values only in the unlikely event where the basic characteristics of Spain as a sovereign state become unrecognisable.

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83 For the analysis of the fundamental rights aspects of the decision, see Chapter 4, Section 4.2.1. For a more detailed analysis of the preliminary reference, see N de Boer 'Addressing rights divergences under the Charter: Melloni' (2013) 50(4) *CMLRev* 1083 (note).

84 Court of Justice Case C-399/11 *Melloni* (n 76), [55]-[61].

85 Spanish *Tribunal Constitucional* Case 26/2014 *Melloni* (n 76), grounds 3-4.

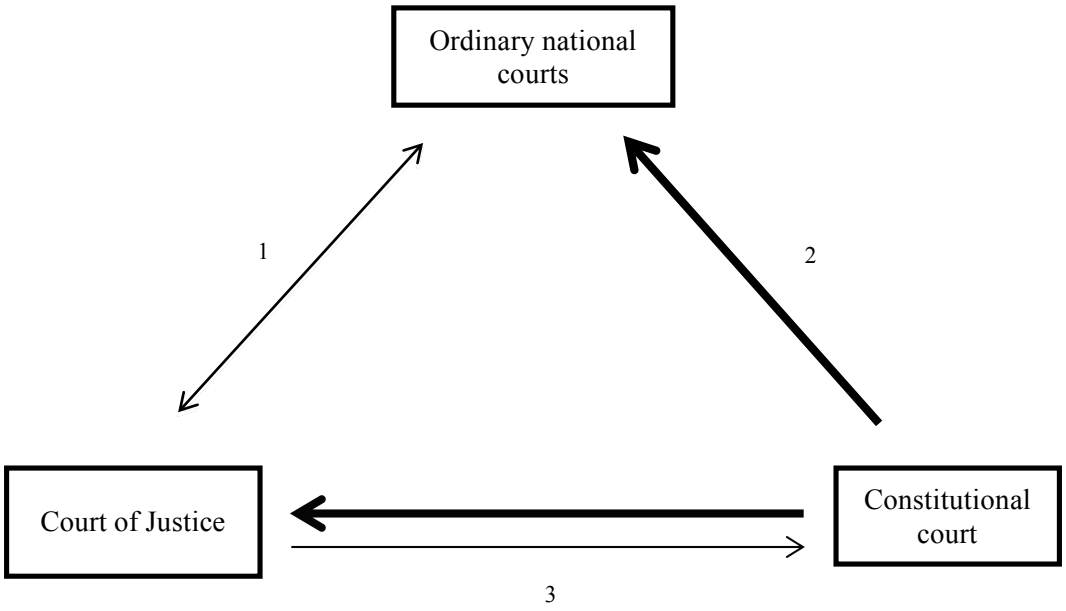
86 Spanish *Tribunal Constitucional* Case DTC 1/2004 *Constitutional Treaty* (n 75), ground 4; Case 26/2014 *Melloni* (n 76), ground 3.

Until such a situation takes place, it trusts the Court of Justice to do so.

## 2.4. Consequences in the judicial triangle

The foregoing analysis of the case law shows that constitutional courts are in the strongest position in the judicial triangle (both *vis-à-vis* ordinary national courts and the Court of Justice) in cases that concern pending Treaty amendments.

***Figure 6*** *Power relations in the judicial triangle in the context of a Treaty amendment pending ratification*

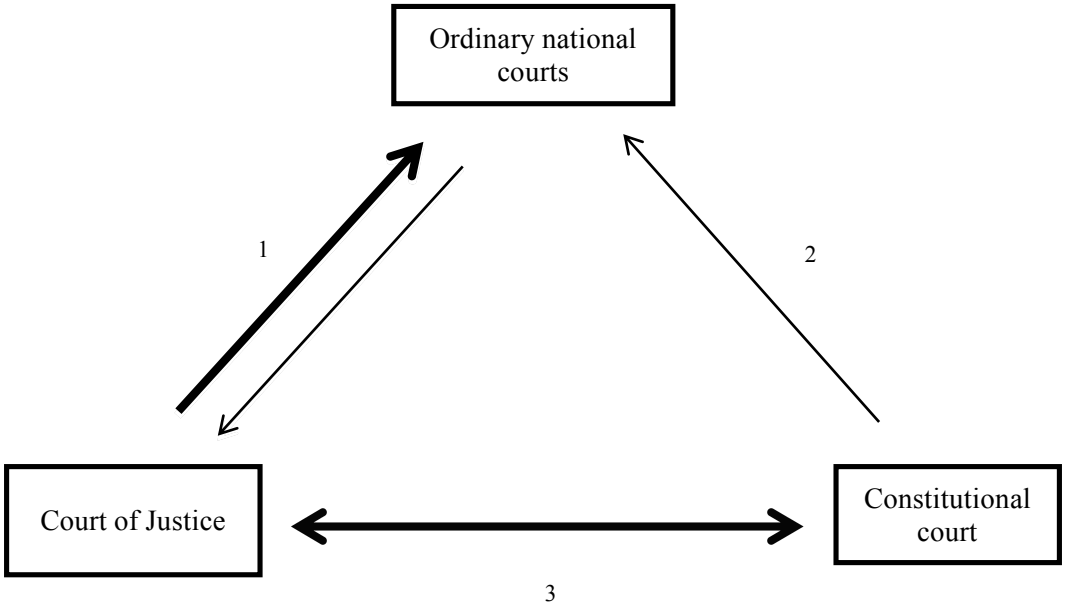



The thicker of the two arrows (3) represents the leverage of constitutional adjudicators. With respect to cases concerning Treaty amendment pending ratification, they are the only ones empowered to determine the constitutional limits to integration. This makes the mandate of the Court of Justice conditional on the acceptance of the proposed Treaty change by constitutional adjudicators. Nevertheless, as the analysis of the case law has

shown, national constitutional courts are very much aware of the need for the respect of the principle of sincere cooperation and mutual respect, and none of them have yet taken advantage of their privileged position in this context (illustrated by the thin arrow 3). Second, the relationship between constitutional adjudicators and ordinary national courts in situations of constitutional review of Treaty amendments is one of classic hierarchy, without the imbalance introduced by the preliminary reference procedure (arrow 2). Finally, ordinary national courts are still in the relationship of cooperation with the Court of Justice as regards the *acquis communautaire* (arrow 1).

The power relations in the judicial triangle look different in cases concerning the review of EU legislation.

***Figure 7*** *Power relations in the judicial triangle in the context of review of valid EU law*




While constitutional adjudicators carry out a review of valid EU acts, they appear reluctant to find them unconstitutional; instead, constitutional courts tend to practice self-

restraint and defer to the exclusive jurisdiction of the Court of Justice to interpret and annul EU legislation. In this sense, arrow 3 is thick because powers of both constitutional adjudicators and the Court of Justice are considerable, and it is two-directional as both use the powers cautiously, and taking into consideration the broader consequences this might have for the European judicial space. The Court of Justice is (per *Foto-Frost*) the exclusive institution which may invalidate an EU act, thus exhibiting a stronger position in relation to ordinary national courts (thicker arrow 1). Yet, the thin arrow 1 illustrates the dependency of the Court of Justice on national courts submitting a preliminary reference concerning the validity of an EU act. Finally, arrow 2 depicts the power of constitutional adjudicators to mandate constitutional interpretation and review upon ordinary national courts, but only to the limit of primacy of EU law.

## 3. The EU side of the analysis

Before the Lisbon Treaty, the national identity clause was outside the jurisdiction of the Court of Justice,[87] resulting in a very limited discussion of the clause in the Court's jurisprudence.[88] The Lisbon Treaty eliminated this exclusion; however, the use of the

87 The exclusion was expressed in the pre-Lisbon Article 46 TEU.

88 The Court has so far addressed the national identity claim in Case 379/87 *Groener* [1989] ECLI:EU:C:1989:599, [18]; Case C-473/93 *Commission v Luxembourg* [1996] ECLI:EU:C:1996:263, [32], [35]-[36]; Case C-36/02 *Omega* [2004] ECLI:EU:C:2004:614, [32]; Case C-208/09 *Sayn-Wittgenstein* [2010] ECLI:EU:C:2010:806, [92]; Case C-391/09 *Runevič-Vardyn* [2011] ECLI:EU:C:2011:291, [86]; Case C-393/10 *O'Brien* [2012] ECLI:EU:C:2012:110, [49]; Case C-202/11 *Las* [2013] ECLI:EU:C:2013:239, [26]; Case C-127/12 *Commission v Spain* [2014] ECLI:EU:C:2014:2130, [61]; Case C-151/12 *Commission v Spain* [2013] ECLI:EU:C:2013:690, [37]; Joined Cases C-58/13 and C-59/13 *Torresi* [2014] ECLI:EU:C:2014:2088, [55]; and Case 156/13 *Digibet* [2014] ECLI:EU:C:2014:1756, [34]. Moreover, in only a few cases has the principle been elaborated upon in more detail, whereas the majority of the cases involved the Court's rejection of national authorities' invocation of the national identity clause.

clause is still at a level that can hardly allow us to reach any serious conclusions as to its scope, meaning and use.[89] The small number of cases where the national identity clause has been invoked by national authorities predominantly concern internal market law.

Despite the lack of litigation, scholars have offered predictions as to the role and use of the national identity clause. Leczykiewicz determines three uses of the national identity clause: (1) a justification for a national measure breaching the internal market rules; (2) a means to invoke the validity of an EU act; and (3) a codification of the case law of national constitutional courts.[90] Guastaferro calls for a horizontal application of the national identity clause, in order to interpret the existing EU law principles in a manner more favourable towards the regulatory autonomy, and constitutional and cultural diversity of Member States.[91] Perhaps on a more fundamental basis, there is a prevalent view in the literature that the national identity clause will have its greatest significance in the field of constitutional conflict.[92] Hence, it confirms the relevance of national constitutional concerns, but also, institutionally, national constitutional adjudicators, with the aim of minimising potential conflicts taking place in the future.

Advocates General have also had an important role in positioning the national identity clause in the wider architecture of EU law by underlining the Union's obligation to respect national identities of Member States. The first substantial contribution aimed at

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89 This trend is also confirmed in the recent judgment of the Court of Justice in Case C-62/14 *Gauweiler* (n 29), where the Court omitted to address the claims of the *Bundesverfassungsgericht* concerning the difference between national identity as enshrined in Article 4(2) TEU and German constitutional identity.

90 Leczykiewicz, (n 1).

91 B Guastaferro, 'Beyond the exceptionalism of constitutional conflicts: the ordinary functions of the identity clause' (2012) Jean Monnet Working Paper 01/12, 69.

92 von Bogdandy and Schill, (n 4), 1452; Wendel, (n 16), 137; Besselink, (n 4), 45; and Leczykiewicz, (n 1). Conversely, Guastaferro calls for an 'ordinary use' of the national identity clause, see Guastaferro, (n 91), 5.

providing an analysis of this Union's duty was made by Advocate General Maduro. In *Marrosu*,[93] he took the position that national authorities, and in particular national constitutional courts, are best placed to define the content of national identity, while the Court of Justice has the role of determining how far Member States can go in derogating from EU law obligations as the basis of national identity.[94] In *Michaniki*, he highlighted the role of the national identity clause as a legitimate aim for derogating from free movement rules.[95] He also shed further light on the relationship between national and constitutional identity, finding the two concepts to be inherently overlapping due to the reference to fundamental constitutional structures in Article 4(2) TEU.[96]

In *Gauweiler*, Advocate General Cruz Villalón had the opportunity to analyse the claim of the *Bundesverfassungsgericht* on the different scope of constitutional identity as opposed to national identity.[97] He shares Advocate General Maduro's understanding of the overlapping scope of constitutional and national identity,[98] and warns of the dangers that a different understanding of Article 4(2) TEU could have for the principle of primacy – rendering Union law subordinate to 28 different legal systems.[99] It seems that

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93 Court of Justice Opinion of Advocate General Maduro in Case C-53/04 *Marrosu* (n 4), [40].

94 ibid., [40]. See also Opinion of Advocate General Maduro in Case 213/07 *Michaniki* [2008] ECLI:EU:C:2008:544, [33].

95 Court of Justice Opinion of Advocate General Maduro in Case 213/07 *Michaniki* (n 94), [32].

96 ibid., [31].

97 Court of Justice Opinion of Advocate General Cruz Villalón in Case C-62/14 *Gauweiler* (n 80). For a more detailed comparison of the Advocate General's Opinion and the judgment of the Court of Justice, see D Sarmiento, 'The Luxembourg "double look": The Advocate General's Opinion and the Judgment in the *Gauweiler* case', (2016) 23(1) *MJ* 40.

98 He notes, rather dramatically: [...] it seems to me an all but impossible task to preserve this Union, as we know it today, if it is to be made subject to an absolute reservation, ill-defined and virtually at the discretion of each of the Member States, which takes the form of a category described as 'constitutional identity'. Court of Justice Opinion of Advocate General Cruz Villalón in Case C-62/14 *Gauweiler* (n 80), [59].

99 ibid., [60].

the views of Advocates General on the role and scope of the national identity clause broadly correspond to the mainstream academic understanding of the clause.

Before providing an argument for the pluralist interpretation of the national identity clause, I will address the limited case law thereon. The case law will be divided into three main areas: (1) cases connected to the public policy justification; (2) cases where the national identity clause was invoked in relation to the national language; and (3) cases where the national identity clause was used to argue an EU act is invalid.

## 3.1. National identity as an expression of public policy

The case law prior to the entry into force of the Lisbon Treaty reveals the tendency of Member States to put forward their national constitutional concerns as justification for hindering free movement. While the Court was willing to engage in the assessment of those claims in its interpretation of the limits of and acceptable derogations from free movement rules, it has done so mainly through the public policy exception. Initially, this was due to the lack of an explicit provision in the Treaty aimed at the protection of national particularities and, subsequently, due to the lack of jurisdiction of the Court of Justice to interpret the national identity clause once it was inserted in the Maastricht Treaty.

There is hardly any scholarly inquiry into the protection of national identity in EU law that does not refer to the Court's judgment in *Omega*,[100] where the Court stated that the special protection of human dignity in the German Basic Law is a justified restriction

[100] Court of Justice Case C-36/02 *Omega* (n 88). The Court in the case does not refer to the term national identity as such, but rather focuses on the public policy exception through which the German constitutional concern is framed.

upon the free provision of services. Although the judgment makes no explicit reference to national identity, its relevance for research into national identity in the context of EU law results from the Court's treatment of a *national* constitutional concern from which a restriction of a fundamental freedom ensued. *Omega* concerned the ban of laser games that simulated killing by the city of Bonn, Germany.[101] The basis for the ban was the violation of human dignity, a value of particular importance in the German Basic Law. The Court applied the four-step proportionality test, a well-established practice regarding national measures restricting free movement. The Court found that the German ban did restrict the free provision of services, and went on to assess the aim that Germany was seeking to protect by the ban. Human dignity was recognised by the Court not only as a value of specific importance in Germany, but also as a part of general principles of Union law.[102]

The Court first addressed the post-Lisbon version of the national identity clause in *Sayn-Wittgenstein*, a case concerning Austria's ban on using reference to nobility in personal names, as a part of a wider abolition of nobility and a constitutional enforcement of the principle of equality.[103] The applicant in the case was an Austrian national, who was later adopted by a German national, and acquired his last name that entailed a nobility reference. Although several identity documents were issued to her in

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101 The prohibition of the laser game was issued by the Bonn police authority, and was therefore applicable solely on that territory. There was no argument raised in the proceedings concerning the geographical scope of the ban, but it is interesting to note that there was no obligation in the wording of the national identity clause for the Union to respect local and regional self-government until the Treaty of Lisbon. Most recently, the Court underlined, as stated in Article 4(2) TEU, the importance of regional and local self-government, and subsequently, that the division of competences between different levels of governance cannot be called into question by Union law. See Court of Justice Case 156/13 *Digibet* (n 88), [34].

102 Court of Justice Case C-36/02 *Omega* (n 88), [34].

103 Court of Justice Case C-208/09 *Sayn-Wittgenstein* (n 88).

Austria under the new last name, the administrative authorities in Austria informed her that her documents would be changed so as to exclude the reference to nobility. She appealed this decision, claiming that the mandatory change of her last name was contrary to the right to free movement and the right to provide services in the EU, as it would interfere with her business of luxury real estate, carried out predominantly in Germany, but also in other Member States.

The Court confirmed the existence of a restriction on her right of free movement enshrined in Article 21 TFEU.[104] It then turned to the question of justification, which was, according to Austria, the constitutional status of the abolition of nobility (as a more particular expression of the general principle of equal treatment) forming part of the country's national identity.[105] The Court, faced with the need to accommodate the invocation of Article 4(2) TEU into its existing free movement case law, stated that the national identity claim should be 'interpreted as reliance on public policy'.[106] It proceeded, by referring to its *Omega* reasoning, to find that the concept of public policy may vary across Member States and they are thus allowed a certain margin of appreciation.[107] The subsequent examination of the justification followed the classic four-step proportionality test. The Court of Justice found that the national measure *was* proportionate to the 'fundamental constitutional objective pursued.'[108]

There is a difference between *Omega* and *Sayn-Wittgenstein* that has thus far been overlooked in scholarly writings. The Court in *Omega* addressed the value of

104 ibid., [71], [80].

105 ibid., [82].

106 ibid., [84].

107 ibid., [87].

108 ibid., [93].

human dignity as a German specificity, but added that the protection of human dignity is a general principle that Union law is striving to protect.[109] The Court concluded that the specific position of the protection of human dignity in Germany was *immaterial*, as it coincided with the general principle of protection of human dignity, determined as a European value of high regard.[110] The wording of *Sayn-Wittgenstein* does not appear to follow the same logic, as the Court includes a reference to the specificity of the abolition of nobility in the context of Austrian constitutional history.[111] While the abolition of nobility in Austria is, according to the Court, an expression of the principle of equality, which is also a general principle of EU law, it is precisely the Austrian *national* context that justifies the national provision. The importance of this difference becomes clear when placed in the broader context of EU primary law: *Omega* was a pre-Lisbon case, when the Court had no jurisdiction to interpret the national identity clause, and recourse to general principles of EU law was a sort of a safe harbour. *Sayn-Wittgenstein*, on the other hand, was a case where the Court was free to interpret and apply Article 4(2) TEU, and give some insight as to its future scope and application, regardless of the fact that the value invoked was confined to a single Member State.

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109 Court of Justice Case C-36/02 *Omega* (n 88), [34]. The Opinion of Advocate General Stix-Hackl is even more telling in this regard, as she spends a great part of her opinion in determining the status of fundamental rights in the EU ([46]-[73]), human dignity as a legal concept ([74]-[81]), and its position in Community law ([82]-[91]). Opinion of Advocate General Stix-Hackl in Case C-36/02 *Omega* [2004] ECLI:EU:C:2004:162. See also C Dupré, 'Human dignity in Europe: a foundational constitutional principle' (2013) 19(2) *EPL* 319.

110 Court of Justice Case C-36/02 *Omega* (n 88), [34]. The status of human dignity in the EU is now highlighted in Article 2 TEU, which reads:

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

111 Court of Justice Case C-208/09 *Sayn-Wittgenstein* (n 88), [82]-[83].

There are also similarities in the Court's reasoning in *Omega* and *Sayn-Wittgenstein* that paint a broader picture on the use of Article 4(2) TEU in the area of free movement. First, the Court seems to take a unified approach in relation to Member State reliance on national identity, identifying it as an expression of public policy.[112] Second, Member States invoking national identity as a legitimate aim benefit from a wider margin of discretion,[113] in particular as the Court stressed that the values protected need not be uniform across Member States.[114] Finally, the Court clearly determined the division of tasks in the process of justification of a national measure, explaining that it is for the national authorities to spell out the content of the national value, whereas the Court is to set the limit to the application of such a value through the proportionality test. In both cases, the Court did not leave it to the national court to assess the proportionality of the measure in question, but undertook the evaluation itself.[115]

This approach of the Court to national identity in *Omega* and *Sayn-Wittgenstein* mirrors a method that the Court employs in cases concerning the public policy justification.[116] The following statement by the Court sums up its approach to the use of

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112 Court of Justice Case C-36/02 *Omega* (n 88), [28]; Case C-208/09 *Sayn-Wittgenstein* (n 88), [84].

113 Guastaferro advocates for such a reading of the case law as well. Guastaferro, (n 91), 43.

114 Court of Justice Case C-36/02 *Omega* (n 88), [31]; Case C-208/09 *Sayn-Wittgenstein* (n 88), [87].

115 Court of Justice Case C-36/02 *Omega* (n 88), [39]; Case C-208/09 *Sayn-Wittgenstein* (n 88), [93]. Both cases therefore fall squarely into what Tridimas calls 'outcome cases'. According to his categorisation,

> The ECJ may give an answer so specific that it leaves the referring court no margin for manoeuver and provides it with a ready-made solution to the dispute (outcome cases); it may, alternatively, provide the referring court with guidelines as to how to resolve the dispute (guidance cases); finally, it may answer the question in such general terms that, in effect, it defers to the national judiciary on the point in issue (deference cases).

See T Tridimas, 'Constitutional review of member state action: the virtues and vices of an incomplete jurisdiction', (2011) 9(3-4) *ICON*, 737, 739.

116 See in this respect, K Lenaerts, 'EU Values and Constitutional Pluralism: The EU System of Fundamental Rights Protection' (2014) 34 *Polish Yearbook of International Law* 135, 156.

and limits to the public policy exception:

> The Court has always emphasised that while Member States essentially retain the freedom to determine the requirements of public policy and public security in accordance with their national needs, which can vary from one Member State to another and from one era to another, the fact still remains that, in the European Union context and particularly as justification for a derogation from the fundamental principle of free movement of persons, those requirements must be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the institutions of the European Union.[117]

The Court's division of tasks in the application of the public policy exception is extremely useful in this regard – there is a scope for the discretion of national authorities in determining the public policy requirements, which can also express national particularities. Once the national value is voiced as a justification, it is for the Court to perform a control in accordance with the principle of proportionality. While it would be misplaced to regard the national identity clause as merely an adjacent claim when Member States invoke the public policy exception, it would be equally wrong to ignore the Court's recurring application of the principles set out in the public policy jurisprudence to cases to national identity cases. As will be suggested below,[118] for the purposes of uniform application of Union law, the Court interprets Article 4(2) TEU in the context of previously established principles in the area of free movement.

## 3.2. Language as an expression of national identity

Another use of Article 4(2) TEU is connected to one of the most vivid expressions of a

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117 Case C-434/10 *Aladzhov* [2011] ECLI:EU:C:2011:750, [34]. See also Case C-33/07 *Jipa* [2008] ECLI:EU:C:2008:396, [23]; and Case C-420/07 *Apostolides* [2009] ECLI:EU:C:2009:271, [57].

118 See Section 3.4.

nation's identity – its language.[119] While the content of national identity throughout Member States is anything but clear and determined,[120] language appears to be the value broadly appreciated across the European Union as a determination of identity. Furthermore, the competence for language policies lies almost exclusively with the Member States;[121] the EU has only a supporting competence in promoting linguistic diversity,[122] and EU secondary legislation might sporadically touch upon the different national language arrangements.[123]

While the competence of Member States in language policy is so far undisputed, the respect for linguistic diversity inevitably obstructs the smooth functioning of the internal market, creating additional costs to market operators across the EU.[124] The inherent heterogeneity of national language policies and the homogeneity required by the liberalisation of economic activity represent the crux of the problem with which the internal market is faced. It thus comes as little surprise that the first case to refer to the concept of national identity concerned a reference to the promotion of a (minority) national language.[125]

The facts of the case were as follows: Ms Groener, a Dutch national, applied for a

119 See in particular E Cloots, *National identity in EU law* (OUP 2015), 288.

120 ibid., 139.

121 B de Witte, 'Internal market law and national language policies' in K Purnhagen and P Rott (eds), *Varieties of European Economic Law and Regulation* – Liber Amicorum *for Hans Micklitz* (Springer, 2014), 421.

122 Article 165 TFEU.

123 de Witte mentions Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings [2010] OJ L280/1, which sets out rules for the use of languages, rather than harmonising national language policies. de Witte, (n 121), 420.

124 In that respect, see I Urrutia, 'Approach of the European Court of Justice on accommodation of the European language diversity in the internal market: overcoming language barriers or fostering linguistic diversity?' (2012) 18(2) *Columbia Journal of European Law* 243, 245.

125 Court of Justice Case 379/87 *Groener* (n 88).

teaching position at the College of Marketing and Design in Dublin, only to be rejected based on the Irish law which requires all the permanent teaching staff to speak Gaelic, regardless of the actual use of the language in their work. The Court stated that the promotion of Gaelic was an expression of national identity worthy of protection, subject to the principle of proportionality.[126] Hence, the promotion of a national language, as an expression of national identity, may serve as a derogation from the free movement rules, so long as it is proportionate. The same rationale was used by the Court when Luxembourg attempted to use the national identity argument in a case where it reserved teaching posts to Luxembourgish nationals, claiming they were best placed to safeguard the Luxembourgish language.[127] The Court found the nationality requirement disproportionate to the aim pursued, stating that the same could be achieved through language requirements.[128]

Ever since the Lisbon Treaty underlined the importance of linguistic diversity in Article 3(3) TEU[129] and Article 22 of the Charter,[130] the Court has consistently referred to it when interpreting national identity claims concerning the protection of an official language, emphasising even further the obligation of the Union to respect such an aim in the face of market integration. The first such case, *Runevič-Vardyn*, concerned a Lithuanian provision determining that documents indicating civil status must be in accordance with the rules governing the spelling of the official national language. Based

126 ibid., [18]-[19].

127 Court of Justice Case C-473/93 *Commission v Luxembourg* (n 88).

128 ibid., [35]. The Court reiterated its position dismissing a recent (post-Lisbon) Luxembourgish attempt to confine the notary function to Luxembourgish nationals only. See Case C-51/08 *Commission v Luxembourg* [2011] ECLI:EU:C:2011:336, [124].

129 The fourth subparagraph of Article 3(3) TEU reads: [The Union] shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.

130 Article 22 of the Charter states: The Union shall respect cultural, religious and linguistic diversity.

on such legislation, a Lithuanian national of Polish origin was unable to obtain her birth and marriage certificate to include the original Polish spelling of her last name. As she lived in Belgium with her husband, a Polish national, her appeal was based on a breach of the free movement provisions. The Court upheld the importance of the national rules governing the official language, in particular in the light of Articles 3(3) and 4(2) TEU, and Article 22 of the Charter.[131]

Consistently, the Court puts the protection of the official language, formulated as a national identity claim, to the proportionality test. In that respect, it seems that the Court is, as in the case law involving the public policy exception, making use of the same division of tasks between the national and EU levels – it is for the national authorities to define the national language policy, while it is for the Court to interpret the limits up to which such a derogation can be used. Again, the principle of proportionality has proved to be a useful and well-known tool to delineate the outer limits of the applicability of Article 4(2) TEU.

## 3.3. Invoking the invalidity of an EU act based on Article 4(2) TEU

The duty of the Union to respect national identities, as previously mentioned, is not limited to judicial review by the Court of Justice, but exists also in the legislative process on the EU level. It is therefore possible for a Member State to call into question the validity of an EU measure based on the EU's breach of the obligation to respect the

[131] Court of Justice Case C-391/09 *Runevič-Vardyn* (n 88), [86]. The same reasoning was reiterated by the Court in the context of free movement of workers. See Case C-202/11 *Las* (n 88).

Member State's national identity. The first such doubt was voiced by the Italian *Consiglio Nazionale Forense* (National Bar Council), in respect of the conformity of Article 3 of the Directive 98/5/EC[132] with Article 4(2) TEU.[133] In particular, the National Bar Council considered that the possibility for Italian nationals to register in Italy with a professional legal qualification obtained in another Member State was contrary to the constitutional provision according to which the profession of a lawyer is reserved to those having successfully passed the Italian State examination.[134]

The answer of the Court contained a brief introductory reference to Article 4(2) TEU,[135] while the answer dismissed the concerns of the National Bar Council, clarifying that the Directive did not open access to the Italian professional title, and concluding this in no way breaches the constitutional provisions concerning the Italian profession of a lawyer.[136] The brevity of the case unfortunately does not allow us to draw any relevant conclusions regarding the level of scrutiny that the Court will apply to EU measures that are potentially contrary to the obligation to respect the national identities of Member States. Nevertheless, it points to the fact that Article 4(2) TEU will be used in order to challenge the validity of EU acts, which might result in placing a greater burden on the political process at the EU level.

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132 Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained [1998] OJ L77/36.

133 Court of Justice Joined Cases C-58/13 and C-59/13 *Torresi* (n 88).

134 ibid., [14].

135 ibid., [54].

136 ibid., [58]. See also G di Federico, 'Joined Cases 58 and 59/13, C-58/13 and C-59/13 *Angelo Alberto Torresi and Pierfrancesco Torresi v. Consiglio dell'Ordine degli Avvocati di Macerata*, Judgment of the Court (Grand Chamber) of 17 July 2014' (2015) 21(3) *EPL* 481 (note).

## 3.4. Concluding remarks

The Court of Justice has not undertaken an exploratory mission to determine the scope of the newly-worded national identity clause, but has remained in the area of well-established concepts and principles, and has applied them to the claims of national authorities seeking protection for national specificities. It is my argument that the Court was applying a contextual interpretation of the relevant value identified as 'national identity' in accordance with the already established principles in other areas of EU law in order to ensure its coherence with the existing jurisprudence. For example, when invoked in the area of free movement, the clause has been interpreted analogously to public policy justifications on national restrictive measures.[137] The case law where the clause was invoked on the basis of protection of a national language confirms this hypothesis: in *Runevič-Vardyn*, the Court stated that the protection of a national language forms part of the national identity of a Member State and is as such considered to be a legitimate aim for a national restriction on the free movement enshrined in Article 21 TFEU.[138] Once defined as a legitimate aim, it was subject to the same test that is consistently used in the context of restrictions on free movement.[139] In effect, the Court of Justice introduced a

137 The Court's reasoning in Case C-208/09 *Sayn-Wittgenstein* (n 88) is particularly useful in this regard: the Court first analysed the status of the value invoked by the Austrian authorities ([74], [83]), after which it introduced its connection to the already existing public policy justification ([84]). Finally, it states that 'the concept of public policy as justification for a derogation from a fundamental freedom must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without any control by the European Union institutions.' ([86]).

138 Court of Justice Case C-391/09 *Runevič-Vardyn* (n 88), [87].

139 ibid., [88] onwards.

common denominator for all national identity claims – the principle of proportionality.[140]

Such an approach endorses the principle of uniform interpretation and it contributes to the consistency of the Court's case law. Furthermore, the use of well-known and developed principles is also beneficial for national authorities, as they are aware of the benchmark by which their measures will have to abide, as well as the standard of scrutiny to which they will be subjected in potential subsequent litigation. However, the Court has not developed a clear pattern of the actual application of the proportionality test – in certain cases, the Court itself found the national measure proportionate or disproportionate,[141] while in others it left it to the national court to take into account the circumstances of the case and finally decide on proportionality.[142]

In a similar vein, Cloots argues that the proportionality test is not an adequate method of adjudication, and should be replaced by a more rule-like method of adjudication by the Court,[143] which would leave the Court with less space for balancing based on values, and would result in more certainty for all the parties concerned. While there is some merit in calls for more legal certainty, it was precisely the wide latitude of the Court in applying the proportionality test that has provided clearer regulation of the internal market in the absence of a political consensus in the remainder of the Union institutions.

A final remark should be added on the Court's most recent judgment in

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140 The academic literature in the field mainly seems to agree on this point. In opposition to the usefulness of the principle of proportionality in the balancing exercise before the Court of Justice, see Cloots, *National identity in EU law* (n 119), 196 onwards. See also Lenaerts (n 116), 156.

141 Court of Justice Case C-36/02 *Omega* (n 88), [39]; Case C-208/09 *Sayn-Wittgenstein* (n 88), [93].

142 Court of Justice Case C-391/09 *Runevič-Vardyn* (n 88), [91]. As already mentioned, Tridimas divided the cases in three groups depending on the level of interference the Court employs in the proportionality test. See Tridimas (n 115).

143 Cloots, *National identity in EU law* (n 119), 196 onwards.

*Gauweiler*,[144] as it had the opportunity to address the claim of the *Bundesverfassungsgericht* on the difference in the scope of national identity as formulated in Article 4(2) TEU and constitutional identity. Perhaps disappointingly for some,[145] the Court made no reference to national identity at all. Although this was brought up by the Italian Government in the course of the procedure and referred to by the Advocate General in his Opinion, and while due reference was inserted in the preliminary points of the judgment,[146] the substantive part of the judgment made no assessment or assertion to respond to or address this claim of the *Bundesverfassungsgericht*.

The lack of attention paid to this issue might be explained as a reflection of the great importance this case holds more generally for the determination of the powers pertaining to the ECB, and it only seems reasonable for the Court to address as few controversial points as necessary in order to avoid additional unnecessary constitutional conflicts. The short-term importance of the survival of mechanisms apt to address the monetary crisis overtook the thrust of the judgment. The Court made a trade-off between these two claims, in order to preserve the OMT mechanism in the short run, and to maintain the relationship of mutual respect with the *Bundesverfassungsgericht*. In particular, although the *Bundesverfassungsgericht* referred its first preliminary question to the Court only in *Gauweiler*, the dialogue that these two courts have had in the

144 Court of Justice Case C-62/14 *Gauweiler* (n 29).

145 'Whether the ECJ should enforce the EU Treaty's identity clause against other Union institutions is, in my view, one of the primary issues raised by the Gauweiler case and a question of paramount importance': E Cloots, 'Cruz Villalón's "Gauweiler" Opinion: Lost in Platitudes', (*Verfassungsblog*, 15 January 2015) <http://www.verfassungsblog.de/en/cruz-villalons-gauweiler-opinion-lost-platitudes/#.Va16HF9Viko>, accessed 4 July 2015.

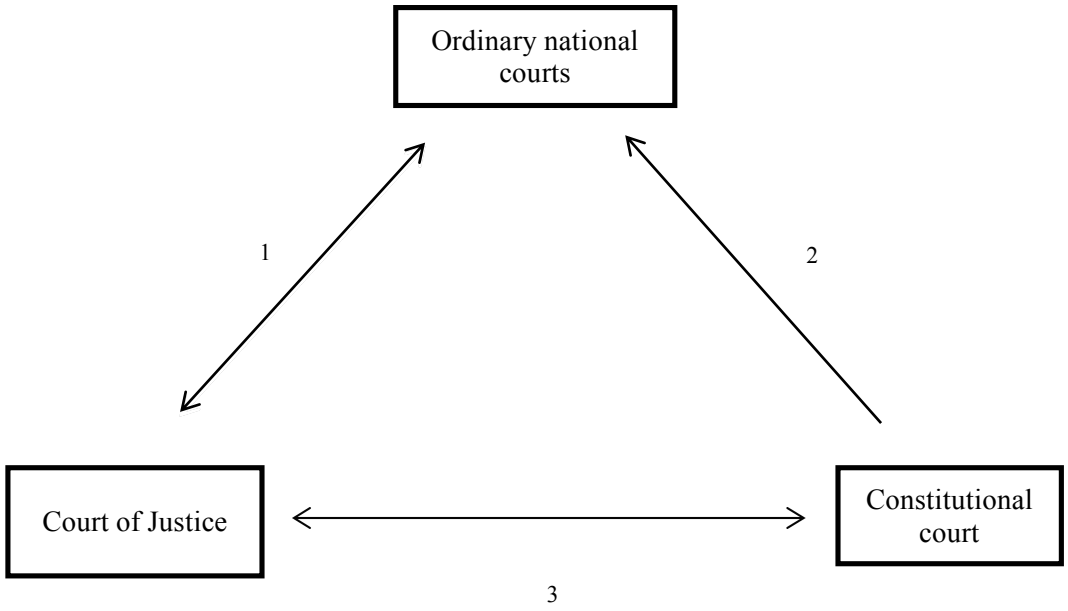
146 Court of Justice Case C-62/14 *Gauweiler* (n 29), [17].

development of European integration has been constructive and highly relevant for the advancement of the European project. A brief look at the past case law of both courts concerning fundamental rights, treaty amendments and the division of competences between the Union and the Member States shows a well-thought-out, balanced approach without rushed and controversial decisions.

In the same vein, the wording of the Court in the judgment does not put forward any statement that would pose a direct threat to the *Bundesverfassungsgericht* as regards its interpretation of constitutional identity.[147] The Court rightly recognised that, regardless of the importance of the participation of the *Bundesverfassungsgericht* in the preliminary reference procedure, this is not and should not be the focus of the case. Moreover, precisely because the central point of the case is the scope of the ECB's mandate, there was no need to enter a potentially problematic discussion on the relationship between constitutional and national identity. From a pluralist perspective, such an omission of the Court of Justice is a case in point which demonstrates the functioning of the pluralist relationship among constitutional courts of Member States and the Court of Justice, which includes self-restraint not only on the national level, but also on the EU level. It therefore best depicts the inherent heterarchy that is at the heart of the relations among the participants of the EU judicial space. What remains to be seen are the power relations in the judicial triangle, taking into account the above analysed case law of the Court of Justice.

147 The Opinion of Advocate General Cruz Villalón is more direct in this respect. The specific legal nature of an Advocate General opinion served as a perfect platform for the Advocate General Cruz Villalón to put forward a statement concerning the overlapping scope of constitutional and national identity, as well as to put forward the idea of a converging European identity, a statement that is still difficult to imagine coming from the Court in such a direct form. See Court of Justice Opinion of Advocate General Cruz Villalón in Case C-62/14 *Gauweiler* (n 80), [59]-[61].

***Figure 8*** *Power relations in the judicial triangle as regards the Court of Justice's interpretation of Article 4(2) TEU*




Arrow 3 represents the division of tasks in the interpretation of Article 4(2) TEU, according to which the national constitutional adjudicator defines the national value, while the Court of Justice applies the proportionality test as to the limits within which the national value can be protected. In essence, their relationship is cooperative, and analogous to the relationship between ordinary national courts and the Court of Justice (Arrow 1). Finally, arrow 2 depicts the power of constitutional adjudicators to mandate constitutional interpretation and review upon ordinary national courts, but only to the limit of primacy of EU law.

## 4. Conclusion - A pluralist interpretation of the national identity clause

In the preceding sections, I have analysed the case law of national constitutional courts performing identity review, and drew some conclusions on the power relations in the judicial triangle. The same was done in relation to the interpretation of the national

identity clause offered by the Court of Justice. The aim of this section is to propose a coherent interpretation grounded in the framework of constitutional pluralism, and to draw some conclusions concerning the question of the ultimate arbiter.

It is possible to discern two different views of identity review. According to the first interpretation, there are essentially two sets of constitutional values: those underpinning national 'fundamental structures, political and constitutional' as set out in Article 4(2) TEU; and the core constitutional values that represent the national constitutional identity and, in the view of constitutional adjudicators, lie beyond the reach of the primacy of EU law. The second line of interpretation endorses a more homogeneous understanding of Article 4(2) TEU, according to which the concept of fundamental political and constitutional structures encompasses core constitutional values of Member States, leaving no national provision of principle outside its scope.

The first line of interpretation seems to single out national constitutional provisions that have a higher degree of constitutional entrenchment, such as provisions on the basic principles of state organisation, sovereignty, the principle of democracy, and human dignity.[148] In substantive terms, such a reading of the identity clause in relation to national constitutions creates an area of constitutional interpretation which appears to run counter to the principle of primacy of EU law. Interviewee 5 stated that the scope of the national identity clause is broader in its content, and encompasses constitutional identity. The same Interviewee stated that when it comes to constitutional identity as interpreted by the *Bundesverfassungsgericht*, there should be some areas of national constitutions that remain in the exclusive realm of constitutional adjudicators. Such a view opposes the

[148] von Bogdandy and Schill (n 4), 1432.

Court's case law whereby Member States are bound by general principles of EU law even when exercising their exclusive competences.[149] From an institutional point of view, it represents an area of primacy for constitutional adjudicators, where their interpretative jurisdiction remains intact. However, as was shown in the preceding analysis, constitutional courts that have introduced some form of identity review have themselves imposed limits to such review, grounded in the principles of EU-friendly interpretation and self-restraint.[150]

It is difficult to imagine the Court of Justice subscribing to an understanding of Article 4(2) TEU which would seriously undermine its decades-long jurisprudence on the primacy of Union law over all sources of national law, including national constitutions, which are possibly in conflict with provisions of EU law. At the same time, the Court of Justice has not been very pro-active in interpreting the scope of the national identity clause. Advocates General have been more elaborate in proposing a comprehensive interpretation of the notion, which has only exceptionally found its way into the judgments of the Court. In the view of Interviewee 6, since the national identity clause is contained in the Treaties, it is only natural that the Court of Justice treats it as an autonomous concept of EU law.

Despite the *prima facie* contradictions between European and national case law, when analysed through the lens of constitutional pluralism, this jurisprudence is nevertheless coherent: the underlying assumption of such an interpretation is that all the courts involved are aware of the need to preserve a peaceful relationship in the European

149 See Chapter 2, Section 2.3. on this point.

150 The limits can, as was shown, be placed on a spectrum from a seemingly uncompromising identity review (Germany), to a position whereby the Court of Justice is trusted to be the one protecting the national identity on the EU level (Spain).

judicial space, without a clear or prior declaration of superiority or subordination. The exercise of self-restraint is therefore key in situations of potential constitutional conflict.

The proposed pluralist interpretation of the identity clause is twofold: (1) the national identity clause is to serve as an exception to accommodate national particularities in the application of EU law on the national level, while the role of the Court of Justice is to apply a uniform method in determining the limits to this exception through the application of the principle of proportionality;[151] (2) the proportionality analysis will highlight issues of jurisdictional and constitutional conflict, both between the EU and national level, but potentially also conflicts within the Member State – the balancing of these issues will determine the extent of self-restraint that is to be applied in a particular case. In addition, interviewee 6 underlined that the Court of Justice will, in taking into account national identity concerns, undertake a balancing exercise in reaching its final judgment. The same interviewee also stated that the Court of Justice should carry out this balancing carefully, taking into account the historical underpinnings of a particular national value, as was done in the case of *Sayn Wittgenstein*. Such a division of interpretative tasks between national and EU judiciaries is inherently pluralist.

In order to understand the use of the proportionality analysis, and in particular the balancing exercise, it is necessary to distinguish between *institutional* and *substantive* balancing. Institutional balancing is closely linked to the use of self-restraint, and is the next step to be taken after a particular national principle or value has been highlighted as an expression of national identity in a particular case. If the specific case is in procedure before the Court of Justice, the use of institutional balancing will mean rendering a

[151] Court of Justice Case C-420/07 *Apostolides* (n 117), [57]. See also Besselink, (n 4), 46; Wendel, (n 16), 134-135; K Lenaerts, 'La Vie Après l'Avis: exploring the principle of mutual (yet not blind) trust' (2017) 54(3) *CMLRev* 805, 822.

decision on the instance that is to take the final decision. Such an approach is well-known in the case law of the Court and, as Tridimas explains, the Court of Justice employs it regularly in what he calls 'guidance' and 'deference' cases.[152] In particular, the Court either gives guidance to the national court that is then finally to decide on the question of proportionality (guidance cases), or it leaves it entirely up to the national court to decide on proportionality (deference cases). In deciding whether to rule on a certain issue for itself, or leave it to the national court, I argue that the Court will be driven by taking into account the sensitivity of the case, which will condition the extent of self-restraint that is to be applied. As was shown in Section 3, the Court of Justice was mostly receptive to accommodating national identity claims, treating them as yet another legitimate aim for limiting the application of EU law at the national level.[153]

By contrast, when a case takes place before a national constitutional adjudicator, regardless of the fact whether the court submitted a preliminary reference or not, it is my argument that national instances will be wary of the possible constitutional conflict that protecting a particular national value might entail. The latest decision by the German *Bundesverfassungsgericht* is an excellent example:[154] the German Court did not refer the case to the Court of Justice for a further interpretation of the EAW, but has instead decided the case itself. Nevertheless, regardless of its statements concerning the protection of constitutional identity, the *Bundesverfassungsgericht* did not call into question the application of the EAW in the particular case. In addition, it stated that any situation of a constitutional conflict is to be approached with great self-restraint, and in a

152 Tridimas (n 115), 739.

153 See also Huber (n 14), 107, who emphasises how the principle of cooperation among courts in the European judicial space needs to work in both directions.

154 German *Bundesverfassungsgericht* Case *Mr R.* (n 37).

manner open to European integration.[155] More importantly, it underlined that any conflict which might take place would not undermine the uniform application of EU law in Germany as a whole, confirming the incrementalism as one of the main features characterising a pluralist system.

The institutional balancing – i.e. the determination of which instance will ultimately decide the case, as explained in the preceding paragraphs – is followed by the substantive balancing of values put forward as an expression of national identity.[156] Surely, the result of the institutional balancing will serve as a strong indicator as to the extent of the substantive balancing that a particular court is to exhibit. In essence, when the Court of Justice defers to the national court on the ultimate decision concerning the proportionality of a particular measure that is sought to be justified by invoking the national identity clause, such a decision undoubtedly means an endorsement for that court to protect the national value in question.

The pluralist nature of the presented interpretation of Article 4(2) TEU stems from its intrinsically heterarchical nature, as it does not impose an overarching European value over specific national values. On the contrary, it endorses an equal position of a variety of national specificity claims that are all subject to the same method applied by the Court of Justice through the proportionality test.[157] Such a view appears to outweigh

155 ibid., Key considerations [1.b].

156 See K Lenaerts and JA Gutiérrez-Fons, 'The constitutional allocation of powers and general principles of EU law' (2010) 47(6) *CMLRev* 1629, 1649-1653 for a detailed analysis on how the balancing exercise is to be carried out in order to achieve the rule of law.

157 To quote the Polish *Trybunał Konstytucyjny*: 'confirming one's national identity in solidarity with other nations, and not against them'. Case K 32/09 *Treaty of Lisbon* (n 57), [2.1].

the argument of Advocate General Cruz Villalón in *Gauweiler*[158] in favour of a converging European identity in a *Solange*-like trend.[159] There are several reasons to support this claim. First, the application of the Advocate General's view would create a hierarchical relationship between identity claims on the EU and the national level, thus increasing the possibility of constitutional conflict. A clear statement of hierarchy does not appear as something that national constitutional adjudicators would welcome, as their jurisprudence revolves around the reconciliation between the primacy of EU law, and the supremacy of national constitutions in their own territory.[160] Quite to the contrary, the preservation of national constitutional particularities seems to be at the heart of the national identity clause. This necessarily implies a diverse range of values and principles that should be protected by the Court of Justice, providing for the same method of determining the limit through the application of the principles of proportionality and self-restraint.

Second, from an institutional point of view, respecting national particularities contributes to the mutual respect and cooperation between constitutional adjudicators and the Court of Justice, which would be jeopardised if a converging European identity were to replace the current understanding of the identity clause. Third, if we were to accept the view of Advocate General Cruz Villalón, this would significantly weaken the purpose of Article 4(2) TEU, particularly having in mind Article 2 TEU, which serves to underline

158 Court of Justice Opinion of Advocate General Cruz Villalón in Case C-62/14 *Gauweiler* (n 80), [61].

159 Lord Mance in fact used the argument of the Advocate General against him – in *Pham* he stated: 'This recognises, perhaps, that Europe has not yet reached a situation where it is axiomatic that there is constitutional identity between the Union and its Members.' United Kingdom Supreme Court Case *Pham* (n 41), [79].

160 To use the wording of the Spanish and Polish Constitutional Tribunals. See Spanish *Tribunal Constitucional* Case DTC 1/2004 *Constitutional Treaty* (n 75), ground 4; Polish *Trybunał Konstytucyjny* Case K 18/04 *Accession Treaty* (n 49), [12].

the shared and common values among EU Member States. Finally, respect for national specificities, subject to the principle of proportionality, reinforces the role of the Court of Justice in ensuring the uniform application of Union law through providing a common method of determining the limit(s) to Article 4(2) TEU, and ultimately contributes to equality among Member States.

Fabbrini has argued that the principle of primacy must be applied without exceptions to all Member States, so as to preserve the multilateral, rather than a bilateral, framework of the Union constitutional order.[161] In contrast, I argue that the use of Article 4(2) TEU as an exception to the primacy of EU law would not reduce the EU's constitutional order to bilateral relations between individual countries and the EU. It would create a Union-wide unification of the procedure for determining the limits to Article 4(2) TEU, and Member States would be able to invoke each other's case law and practice in order to reinforce the national identity clause. Understood in this way, a proper implementation of the national identity clause and identity review can in fact contribute to a further connection between national constitutional jurisdictions throughout the EU.

Furthermore, through incrementalism, the development of the case law in this area will create a common approach to the substantive issues connected to the national identity clause,[162] as it can be expected that recourse to Article 4(2) TEU will become more frequent over time. Interviewee 1 stated that one of the functions of the Court of

161 F Fabbrini, 'After the *OMT* case: the supremacy of EU law as the guarantee of the equality of the Member States' (2015) 16(4) *GLJ* 1003, 1005.

162 A common approach to substantive issues does not mean a convergence of values towards a European identity, as proposed by Advocate General Cruz Villalón. Instead, it means that the sheer volume of cases that will arise over time will establish a unified jurisprudence of the Court of Justice, and create expectations on behalf of national authorities as regards the extent to which a particular national value can be protected.

Justice as a supreme court of the EU of sorts (based on the mandate in Article 19(1) TEU), is to accommodate national constitutional provisions in a substantive sense, so as to give them a coherent meaning throughout the European Union. However, for sensitive issues (for example of gay marriage or abortion) answers are limited to the single case and do not draw on wider implications that this could have on all the member states.[163]

In essence, the national identity clause should be interpreted so as to follow the main characteristics of a pluralist constitutional order. First, the national identity clause, due to its broad wording, is constituted to encompass a wide range of values, and its particular national expressions are translated into notions such as constitutional identity.[164] While they cannot be used as synonyms in terms of content, they are functionally equivalent.[165]

Second, the aim of the system is conflict prevention, both from the perspective of constitutional adjudicators and that of the Court of Justice. Both constitutional adjudicators and the Court of Justice aim to avoid constitutional conflict, and find it highly unlikely. In addition, remedies for a resolution of a possible conflict have also been put in place, without – however – clear hierarchical solutions. Third, the protection of national identity through Article 4(2) TEU is necessarily multilateral in its nature. Its implementation shows an institutional awareness of the big picture in the everyday work of the courts under analysis, as they are conscious of the need for a balanced relationship

163 In support of this view, see also D Thym, 'Separation versus fusion – or: how to accommodate national autonomy and the Charter? Diverging visions of the German Constitutional Court and the European Court of Justice' (2013) 9(3) *EuConst* 391, 419; Lenaerts and Gutiérrez-Fons (n 156), 1663 (disucssing 'value diversity' that the Court of Justice appreciates and strives to protect).

164 According to von Bogdandy et al., the role of Article 4(2) TEU is to protect constitutional pluralism. A von Bogdandy et al', 'Reverse Solange – Protecting the essence of fundamental rights against EU Member States' (2012) 49(2) *CMLRev* 489, 491.

165 To use the wording of the Polish *Trybunał Konstytucyjny* (n 59).

among all constitutional jurisdictions in the EU.[166] Finally, as a consequence, in order for the clause to work for everyone, and not against anyone,[167] it is the role of the Court of Justice to set common limits through the application of a careful balancing exercise.[168] This means that sometimes national particularities will prevail, while other times, it will be the primacy of Union law. This ultimately renders the question of the final arbiter immaterial, as the system is one of a clear-cut heterarchy – one where there are no pre-determined winners and losers, but rather, different courts will have the final say at different times.

166 Perhaps the best example of this is the vast number of cross-references among constitutional jurisdictions in the EU in their jurisprudence on national identity. See, for example, United Kingdom Supreme Court Case *Pham* (n 41); German *Bundesverfassungsgericht* Case *Gauweiler* (n 5); Polish *Trybunał Konstytucyjny* Case K 18/04 *Accession Treaty* (n 49).

167 See n 157.

168 See, in that sense, J H H Weiler, *The Constitution of Europe. 'Do the new clothes have an emperor?' and other essays on European integration* (CUP 1999), 122.

# CHAPTER 4

# FUNDAMENTAL RIGHTS REVIEW

## 1. Introduction

The story of fundamental rights protection in the European Union is well documented.[1] The Court of Justice, in the expansion of its self-referential system of the Treaties, could not avoid the question of fundamental rights, as the creation of the single market necessarily touched upon national guarantees of protection of fundamental rights.[2] In managing this interaction, the Court of Justice *de facto* elevated free movement rules to the status of a fundamental right.[3] In parallel, the (standard of) fundamental rights protection was the first area of constitutional conflict between national courts performing constitutional review and the Court of Justice.[4]

Given that – in a pre-EU world – national courts performing constitutional review

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1 The literature is too vast to be cited here. Important contributions include P Alston and J H H Weiler, 'An "Ever Closer Union" in Need of a Human Rights Policy' (1998) 9 *European Journal of International Law* 658; P Alston (ed), *The EU and Human Rights* (OUP 1999); A Torres Pérez, *Conflicts of Rights in the European Union. A Theory of Supranational Adjudication* (OUP 2009); F Fabbrini, *Fundamental Rights in Europe. Challenges and Transformations in Comparative Perspective* (OUP 2014).

2 A classic example is the Court of Justice Case C-112/00 *Schmidberger* [2003] ECLI:EU:C:2003:333, where the Austrian constitutionally protected right to protest was restricting the free movement of goods.

3 M P Maduro, *We, the Court. The European Court of Justice and the European Economic Constitution* (Hart Publishing 1998), 168.

4 The structure of the thesis' analytical chapters are, however, not ordered in a chronological fashion, but rather in order of relevance of the jurisprudence of constitutional conflict in a specific area of review.

were the foremost protectors of fundamental rights,[5] it is only logical that the Court of Justice's jurisdictional claim in fundamental rights protection led to a constitutional clash. Fundamental rights have been central in defining the EU as a constitutional order in its own right.[6] So while the initial goals of European integration were purely economic,[7] and its foundations fell squarely within the framework of an international organisation, the Court of Justice built[8] a constitutional structure protecting fundamental rights through the spill-over of existing competences.[9]

Fundamental rights protection is one of the areas where the federalist argument bites strongest: the multilevel system of fundamental rights protection (national,

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5 Some of them were established after the Second World War primarily with the purpose of safeguarding fundamental rights against the majority of the day. See Fabbrini, *Fundamental Rights in Europe* (n 1), 17; M de Visser, *Constitutional Review in Europe. A Comparative Analysis* (Hart Publishing 2014), 410.

6 See Introduction, Section 3.1.1. (see also 2.1.1. on the role of fundamental rights in constitutional orders more generally). See further, Maduro, *We the Court* (n 3), 8. For an analysis of the development by which fundamental rights are being placed at the centre of the integration project, see A von Bogdandy, 'The European Union as a human rights organization? Human rights at the core of the European Union' (2000) 37(6) *CMLRev* 1307.

7 von Bogdandy (n 6), 1308. See also, G de Búrca, 'The road not taken: the European Union as a global human rights actor' (2011) 105 *American Journal of International Law* 649.

8 Although, as will be seen in the case law analysis, the Court of Justice viewed this development not as a creation, but rather as giving expression to fundamental rights as the essential value of the integration project. See J H H Weiler, *The Constitution of Europe. 'Do the new clothes have an emperor?' and other essays on European integration* (CUP 1999), 102. The wording used by Lenaerts and Gutiérrez-Fons follows this logic, as they conclude that one of the functions of the Charter of fundamental rights is its operation 'as a source for the *discovery* of general principles of EU law' (emphasis added). K Lenaerts and J A Gutiérrez-Fons, 'The constitutional allocation of powers and general principles of EU Law' (2010) 47(6) *CMLRev* 1629, 1656. For the commentary on the same approach of the Court in the context of general principle of non-discrimination on grounds of age, see J Mazák and M K Moser, 'Adjudication by reference to general principles of EU law: a second look at the *Mangold* case law' in M Adams, H de Waele, J Meeusen and G Straetmans (eds), *Judging Europe's judges. The legitimacy of the case law of the European Court of Justice* (Hart Publishing 2015), 61.

9 As advocated by neo-functionalists. See Introduction, Section 2.2.1. for neo-functionalism as a theory of European integration, and 2.2.3. for its role in the political science literature on judicial interactions. As will be seen in Section 3.2. of this Chapter, neo-functionalism can no longer adequately explain EU's competence in fundamental rights protection.

supranational, international)[10] provides an almost perfect laboratory for exploring the possibilities of the normative side of EU federalism.[11] This is even more so given the prominence of what is in the literature termed as the 'federal question'[12] – are the Member States subject to the fundamental rights control by the Court of Justice? However, while the multi-layered architecture of fundamental rights protection may lead us to imagine it in vertical and hierarchical terms, the relationship between national courts performing constitutional review and the Court of Justice is inherently heterarchical.[13] For that reason, the monism which is intrinsic to federalist systems cannot adequately capture the European judicial space of mutual respect, where each of the courts under analysis can at times have the final say as regards fundamental rights review.

For the purposes of defining the subject of analysis, I will follow Torres Pérez's definition of the term 'fundamental rights': all rights which are recognised as fundamental by the legal orders under analysis will be regarded as such.[14] In instances when both the EU and national level of adjudication are dealing with the same fundamental right, I will address possible differences in the scope or standard of

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10 Fabbrini, *Fundamental Rights in Europe* (n 1), 4; Torres Pérez, *Conflicts of Rights in the European Union* (n 236), 3.

11 Fabbrini sides explicitly with the federalist argument. Fabbrini, *Fundamental Rights in Europe* (n 1), 3. See also, D Kochenov (ed), *EU Citizenship and Federalism. The Role of Rights* (CUP 2017).

12 P Eeckhout, 'The EU Charter of Fundamental Rights and the federal question' (2002) 39(5) *CMLRev* 945.

13 Again explicitly, Fabbrini rejects pluralism as being able to 'offer a comprehensive and persuasive account of the complex implications produced by the interaction between the multiple human rights standards in Europe.' Fabbrini, *Fundamental Rights in Europe* (n 1), 4. Conversely, Torres Pérez compares the US and EU contexts of fundamental rights protection, concluding that a federal approach is not an appropriate solution for the EU. Torres Pérez, *Conflicts of Rights in the European Union* (n 236), Chapter 4.

14 Torres Pérez, *Conflicts of Rights in the European Union* (n 236), 9.

protection. Equally, as Fabbrini posits, the constitutional dynamics of fundamental rights protection in Europe[15] apply to all fundamental rights, regardless of whether they are civil, political, social, or a new generation right.[16] This chapter will likewise prove the descriptive and normative prescriptions of constitutional pluralism in relation to all fundamental rights irrespective of their generation.[17]

The aim of this Chapter is not to re-tell the history of the development of protection of fundamental rights in the EU,[18] but rather to address two points connected to the jurisprudence of constitutional conflict in this area: (1) the different limits that constitutional adjudicators have placed on the principle of primacy in the area of fundamental rights protection; and (2) the possible scenarios that they envisage in the event of a constitutional conflict. The argument running through both these themes is that constitutional pluralism can both explain and guide the relations among the courts under analysis in the area of fundamental rights protection.

The remainder of this Chapter is divided in five sections. I will first analyse the initial judicial interactions that led to the development of fundamental rights protection at the EU level (section 2). The subsequent section (section 3) will address the case law of the Court of Justice in the area of fundamental rights review, in particular in relation to the expansion of its scope and the Charter of Fundamental Rights.[19] Section 4 will again look at the joint jurisprudence of the EU and the national level in relation to the

15 And by deduction, then, in the EU.

16 Fabbrini, *Fundamental Rights in Europe* (n 1), 48-49.

17 For a brief description of the different generations of rights see ibid., 48 and the literature cited.

18 Although this will at certain points be inevitable, as it is inextricably linked to the jurisprudence of constitutional conflict.

19 Charter of fundamental rights of the European Union [2012] OJ C326/391.

application of fundamental rights review in the Area of Freedom, Security and Justice (ASFJ).[20] The last section (5) will offer conclusions and summarise the role and position of fundamental rights review in the system of constitutional pluralism, and the question of the ultimate arbiter.

## 2. The common perspective: the beginning of constitutional conflict

The principle of primacy of EU law, as developed by the Court of Justice,[21] was first challenged in the context of fundamental rights protection. The principles behind the protection of fundamental rights, according to Bobek, transcend 'a nation state, ancestry, or ethnicity'[22] and have 'universal meaning'.[23] They may therefore be expected to serve as a unifying factor in the development of EU constitutional law.[24] However, as Weiler analyses in detail, this view is over simplified. The very definition of fundamental rights and differing standards of protection throughout the European Union created further tensions and differentiation in the European judicial space. Weiler points out that these differences 'reflect fundamental societal choices and form an important part in the different identities of polities and societies.'[25]

The protection of fundamental rights can subsequently also lead to institutional frictions, given the overlapping jurisdictions of national courts performing binding

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20 The ASFJ has been chosen as a case study, as the entire joint jurisprudence concerning fundamental rights protection is too vast to be included in the analysis.

21 See Chapter 2, Section 2.1.

22 M Bobek, *Comparative Reasoning in European Supreme Courts* (OUP, 2013), 61.

23 ibid.

24 Weiler, *The Constitution of Europe* (n 8), 102.

25 ibid.

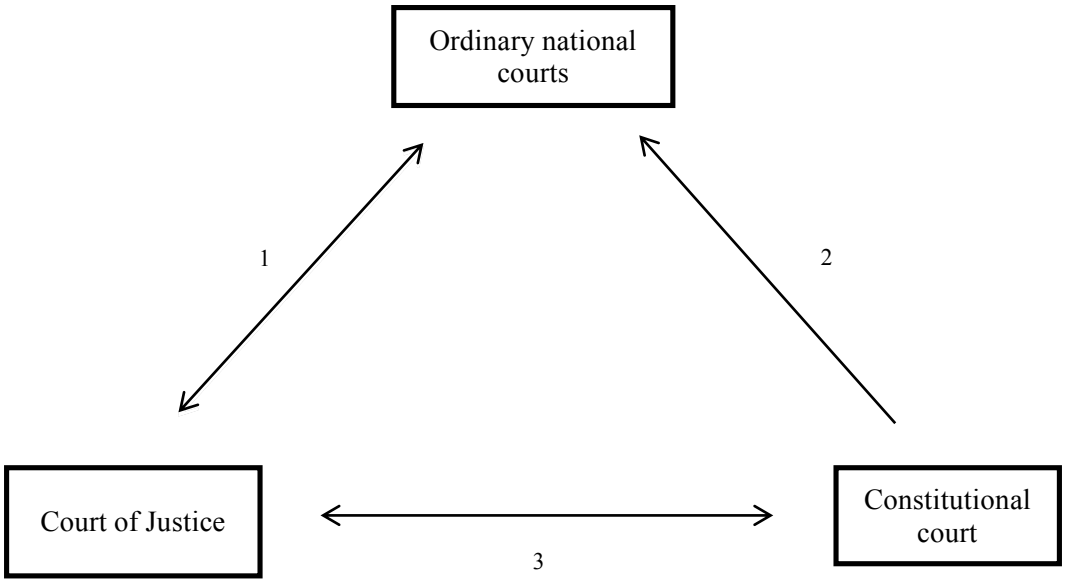
constitutional review and the Court of Justice. In the course of European integration, the constitutional conflict in fundamental rights review developed from a predominantly institutional one (as national courts performing constitutional review have been faced with an expansion of the Court of Justice's jurisdiction in this area), toward a more substantive conflict (related to the appropriate standard of fundamental rights protection). This section will divide its analysis in three periods to reflect this shift: (1) the period before fundamental rights entered the scope of EU law (until 1970); (2) the period of institutional conflict over the jurisdiction to perform fundamental rights review (1970 to 1984); (3) the period of accommodation of parallel jurisdictional claims (after 1984).

## 2.1. The period until 1969

The position of constitutional courts with respect to fundamental rights protection was undisputed.[26] The power relations in the judicial triangle during that time were configured as in Figure 9 below.

[26] In this period, these were the constitutional courts of Italy and Germany. ibid., 108. See also F Mancini, 'The making of a constitution for Europe' (1989) 26(4) *CMLRev* 595, 611; Table 1 in Introduction, Section 4.2.

***Figure 9*** *Power relations in the judicial triangle before the inclusion of fundamental rights in the scope of EU activity*




The power relations in this judicial triangle are balanced (no single arrow is thicker than the other), as both the Court of Justice and national constitutional courts have their respective spheres of authority. Arrow 3 thus represents a lack of overlap in jurisdiction to perform the fundamental rights review. The Constitutional court is at the top of the national judicial hierarchy,[27] and their constitutional fundamental rights protection was not affected by the principle of primacy of EU law. The Constitutional court remains an undisputed final authority over ordinary national courts in the area of fundamental rights, hence arrow 2 is pointing in only one direction. The Court of Justice's authority is confined to areas of existing EU competences, where it has developed a relationship of cooperation through the preliminary reference procedure (arrow 1).

[27] Save for the authority of the European Court of Human Rights, which was created specifically for the purpose of protecting fundamental rights, and the High Contracting Parties have accepted its jurisdiction. In addition, the ECHR functions as the minimum standard, and States are allowed to confer protection higher than that required by the European Court of Human Rights, something that will not be the case in relation to the EU Charter of Fundamental Rights. In relation to the former, see also Weiler, *The Constitution of Europe* (n 8), 105. For the analysis of the jurisprudence of constitutional conflict in relation to the Charter, see Sections 3 and 4 below.

An example which reflects this power balance well is the German *EEC Regulations Constitutionality* decision.[28] The *Bundesverfassungsgericht* was to decide on a constitutional complaint against two regulations which allegedly breached fundamental rights protected by the Basic Law. The decision was praised by the academic community as Euro-friendly for rejecting its jurisdiction to review the constitutionality of regulations, due to the autonomous status of the EU's legal order.[29] Nevertheless, the *Bundesverfassungsgericht* reserved for itself the power to review EU law should it breach fundamental rights enshrined in the Basic Law. The position of the *Bundesverfassungsgericht* in the judicial triangle thus remained the same as described above.

## 2.2. The start of the conflict (the period between 1969 and 1984)

The power relations in the triangle above started shifting towards the end of the 1960s, as the requirements of EU law began to coincide with the fundamental rights protection in Member States. The competition between the participants of the European judicial space caused the Court of Justice to protect its autonomy and offer its own contribution to the fundamental rights protection landscape.[30] According to Mancini, it was the 'brutal

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28 German *Bundesverfassungsgericht* Case 22 BVerfGE 293 *EEC Regulations Constitutionality* decision of 18 October 1967.

29 M Claes, *The National Courts' Mandate in the European Constitution* (Hart Publishing 2006), 597-598.

30 F Schimmelfennig, 'Competition and community: constitutional courts, rhetorical action, and the institutionalisation of human rights in the European Union' (2006) 13(8) *JEPP* 1247, 1248. See also, H Kaila, 'The scope of application of the Charter of Fundamental Rights of the European Union in the Member States' in *Constitutionalising the EU judicial system. Essays in Honour of Pernilla Lindh* (Hart Publishing 2012), 292; J Coppel and A O'Neill, 'The European Court of Justice: taking rights seriously?' (1992) 12(2) *Legal Studies* 227, 229. For a critique of the latter,

blow'[31] of the above *EEC Regulations Constitutionality* decision that provoked the Court of Justice to address fundamental rights protection. Interviewee 1 stated that, although at this time there was no political consensus on the matter, introducing fundamental rights review at the EU level was a 'necessity'. Whether this was a defensive or offensive move,[32] collision was inevitable,[33] and fundamental rights slowly but surely entered the scope of the Union legal order. Equally, the power relations in the judicial triangle started changing, as the jurisdictions of national courts under analysis and the Court of Justice started to overlap as regards fundamental rights protection.

The story begins with the well-known *Stauder* decision:[34] Mr Stauder claimed that the Commission's welfare scheme issuing coupons for a subsidised butter price that included his name breached his fundamental right to human dignity. National fundamental rights were, it was long decided, not the acceptable standard of review of EU action.[35] Unlike the ECHR which acts as the floor for the level of protection, the Court of Justice could not allow national standards to have a role in review and interpretation of EU law, given its role is to achieve and maintain the uniformity and

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see J H H Weiler and N J S Lockhart, '"Taking rights seriously" seriously: the European Court and its fundamental rights jurisprudence – Part I' (1995) 32(1) *CMLRev* 51.

31 Mancini (n 26), 609-610.

32 Weiler reports that during the 1960s, it was a political and legal imperative to complete the constitutional charter of the Community with the protection of fundamental rights. Weiler, *The Constitution of Europe* (n 8), 108. See also, B-O Bryde, 'The ECJ's fundamental rights jurisprudence – a milestone in transnational constitutionalism' in M P Maduro and L Azoulai (eds), *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010), 122.

33 Mancini (n 26), 611. See also, F G Jacobs, 'Human rights in the European Union: the role of the Court of Justice' (2001) 26(4) *ELRev* 331, 332.

34 Court of Justice Case 29/69 *Stauder* [1969] ECLI:EU:C:1969:57. For an analysis, see N Fennelly, 'Pillar talk: fundamental rights protection in the European Union' (2008) 8(1) *Judicial Studies Institute Journal* 95, 98.

35 Court of Justice Case 1/58 *Stork* [1959] ECLI:EU:C:1959:4, [4(a)].

effectiveness of EU law. Nevertheless, the Court of Justice found a relatively easy way out of this situation, finding that only the German version of the Commission's decision indicated the name as an identifier on the subsidies coupon, thus allowing the German authorities to employ other methods of identification.[36] More importantly,[37] the Court stated that '[i]nterpreted in this way, the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the Court.'[38] The Court employed the same technique as regards the expansion of general principles of EU law,[39] by solely *giving expression* to a pre-existing state of affairs.

A year after, the Court of Justice expanded, or 'revealed', the scope of fundamental rights protection. In *Internationale Handelsgesellschaft*,[40] the Administrative Court of Frankfurt-am-Main was in doubt as to the compatibility of a regulation concerning export licences with principles of freedom of action and disposition, of economic liberty and of proportionality.[41] Again repeating that national law cannot be the standard of review of EU acts, the Court of Justice provided an autonomous definition of its fundamental rights catalogue:

> In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives

36 Court of Justice Case 29/69 *Stauder* (n 34), [2].

37 More importantly is used here as a reference to the consequence, since the Court of Justice only mentions fundamental rights at the end of the judgment, 'in passing', to borrow the phrasing from Coppel and O'Neill (n 30), 228.

38 Court of Justice Case 29/69 *Stauder* (n 34), [7].

39 See Chapter 2, Section 2.3.

40 Court of Justice Case 11/70 *Internationale Handelsgesellschaft* [1970] ECLI:EU:C:1970:114.

41 See Chapter 2, Section 2.1. for the analysis of the case in relation to the principle of primacy.

of the Community.[42]

General principles of law, thus, *materially* comprised of common constitutional traditions of Member States. While a single national standard was a threat to the primacy, uniformity and effectiveness of EU law,[43] it was impossible to ignore national constitutional standards of protection of fundamental rights altogether. In the structure of constitutional pluralism, national and EU law are inherently intertwined, thereby ensuring that cross-fertilisation is a two-way process of interaction between national and EU constitutional orders.[44]

After the case returned to the Administrative Court, which was not satisfied with the finding of the Court of Justice as regards the status of fundamental rights protection,[45] it referred the case to the *Bundesverfassungsgericht*, resulting in the famous *Solange I* decision.[46] The decision requires an analysis from the perspective of constitutional pluralism, regardless of the fact the theory has developed and is mostly connected to the much later *Maastricht* judgment of the *Bundesverfassungsgericht*.[47] The *Bundesverfassungsgericht* first addressed the nature of the legal system: 'Community law is neither a component part of the national legal system nor international law, but forms

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42 Court of Justice Case 11/70 *Internationale Handelsgesellschaft* (n 40), [4].

43 'According to the evaluation of the Verwaltungsgericht, the system of deposits is contrary to certain structural principles of national constitutional law which must be protected within the framework of Community law, with the result that the primacy of supranational law must yield before the principles of the German Basic Law.' Court of Justice Case 11/70 *Internationale Handelsgesellschaft* (n 40), [2].

44 To use the phrasing of Thym, these orders are 'separate, but not separable.' D Thym, 'Separation versus fusion – or: how to accommodate national autonomy and the Charter? Diverging visions of the German Constitutional Court and the European Court of Justice' (2013) 9(3) *EuConst* 39, 410.

45 Claes, *The National Courts' Mandate in the European Constitution* (n 29), 599.

46 German *Bundesverfassungsgericht* Case 37 BVerfGE 271 *Internationale Handelsgesellschaft (Solange I)* Judgment of 29 May 1974, (1974) 2 *CMLR* 540.

47 See Introduction, Section 2.1.2. for the review of the relevant literature.

an independent system of law flowing from an autonomous legal source.'[48] The *sui generis* approach may not be considered as a particularly advanced way of defining the nature of the EU's legal order,[49] but the *Bundesverfassungsgericht* continues: '[i]t follows from this that, in principle, the two legal spheres stand independent of and side by side one another in their validity.'[50] This may in fact be the first expression of the existence of multiple claims to ultimate authority, the first premise of constitutional pluralism.

The *Bundesverfassungsgericht* goes further, and addresses the situation of a possible conflict in the spirit of constitutional pluralism:

> This does not lead to any difficulties as long as the two systems of law do not come into conflict with one another in their substance. There therefore grows forth from the special relationship which has arisen between the Community and its members by the establishment of the Community first and foremost the duty for the competent organs, in particular for the two courts charged with reviewing law—the European Court of Justice and the Bundesverfassungsgericht—to concern themselves in their decisions with the concordance of the two systems of law.[51]

The incremental functioning of the auto-correct mechanism of constitutional pluralism is visible from the joint obligation on behalf of the two courts to accommodate each other's claims to ultimate authority in their respective areas of jurisdiction. The *Bundesverfassungsgericht* continued by stating that even an exceptional disapplication of a Community or a German obligation would not bring into question the validity of claims of those two legal orders.[52] The obligation of mutual respect should thus drive the two

48 German *Bundesverfassungsgericht* Case *Solange I* (n 46), [19].

49 Fabbrini, *Fundamental Rights in Europe* (n 1), 23.

50 German *Bundesverfassungsgericht* Case *Solange I* (n 46), [20].

51 ibid., [20].

52 ibid., [21].

courts in their decision-making, and the emergence of any possible conflict does not lead to a violation of the Treaty, nor of the Basic Law.[53] In addition, a possibility of an exceptional 'victory' of one legal order over the other, and vice versa, is in line with the definition of heterarchy,[54] a system in which there is no single winner, but one where participants can be positioned differently in relation to one another at different times.

The remainder of the judgment is widely known: the *Bundesverfassungsgericht* stated that the Community at that time did not have a catalogue of protecting fundamental rights,[55] and the conflict should be resolved as follows:

> Provisionally, therefore, in the hypothetical case of a conflict between Community law and a part of national constitutional law or, more precisely, of the guarantees of fundamental rights in the Constitution, there arises the question of which system of law takes precedence, that is, ousts the other. In this conflict of norms, the guarantee of fundamental rights in the Constitution prevails as long as the competent organs of the Community have not removed the conflict of norms in accordance with the Treaty mechanism.[56]

Six months earlier, the Italian *Corte Constituzionale* had put forward criticism concerning the protection of fundamental rights along very similar lines. In its *Frontini* decision,[57] it introduced the '*controlimiti*' doctrine.[58] It first addressed the nature of the Community's legal order: 'Community norms, which cannot be characterised as a source of

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53 ibid.

54 See Chapter 1, Section 2.

55 Although it did not rule out the possibility this might change. German *Bundesverfassungsgericht* Case *Solange I* (n 46), [23].

56 ibid., [24].

57 Italian *Corte costituzionale* Case 183/73 *Frontini*, Decision of 27 December 1973, (1974) 2 *CMLR* 372.

58 Cartabia reports this was already implicitly announced already in 1965, but was given explicit expression in *Frontini*. M Cartabia, 'The Italian Constitutional Court and the Relationship Between the Italian Legal System and the European Union' in A-M Slaughter, A Stone Sweet and J H H Weiler (eds), *European Court and National Courts: Doctrine and Jurisprudence. Legal Change in its Social Context* (Hart Publishing 1998), 138; Italian *Corte Costituzionale* Case 98/65 *Società Acciaierie San Michele*, Decision of 27 December 1965, (1967) *CMLR* 160.

international law, nor of foreign law, nor of internal law of the individual States';[59] and the relationship of such a legal order with those of its Member States: 'its laws and the internal law of the individual member-States can be described as autonomous and distinct legal systems, albeit co-ordinated in accordance with the division of power laid down and guaranteed by the Treaty'.[60]

Thus, the vision of the *Corte Costituzionale* as regards the EU's legal order and its relationship to national law also closely follows the structure of constitutional pluralism – the co-existence of multiple *autonomous* legal orders claiming authority in overlying areas of regulation. The overlap of functions is all the more evident in *Frontini*, as the applicants are seeking review of the Community's powers to regulate customs duties, which overlap with the constitutionally guaranteed state monopoly (*riserva di legge*) to regulate personal and financial obligations of individuals.[61] The *Corte Costituzionale* then proceeded with its claim to the ultimate say as regards fundamental rights:

> It is hardly necessary to add that by Article 11 of the Constitution limitations of sovereignty are allowed solely for the purpose of the ends indicated therein, and it should therefore be excluded that such limitations of sovereignty, concretely set out in the Rome Treaty, signed by countries whose systems are based on the principle of the rule of law and guarantee the essential liberties of citizens, can nevertheless give the organs of the EEC an unacceptable power to violate the fundamental principles of our constitutional order or the inalienable rights of man.[62]

The language of the *Corte Costituzionale* certainly stems from a dualist approach to external sources of law.[63] However, the *Corte Costituzionale* talks about the specific

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59 Italian *Corte costituzionale* Case *Frontini* (n 57), [12].

60 ibid.

61 ibid., [6].

62 ibid., [21].

63 Cartabia (n 58), 133-134.

nature of the EU's legal order, not pertaining to the sphere of either public international law, or national law. Rather, taking into account primacy and direct effect,[64] the vocabulary of dualism becomes obsolete as it lacks an ultimate monist solution (a *Grundnorm*, or a rule of recognition, which is traditionally found in the national constitution).[65] The *Corte Costituzionale* talks about co-ordination of the two legal orders, rather than a single ultimate solution, which can only exceptionally be a disapplication of the principle of primacy. Again, much like the analysis in *Solange I*, such a solution corresponds to the definition of heterarchy, thus placing its position in the sphere of constitutional pluralism.

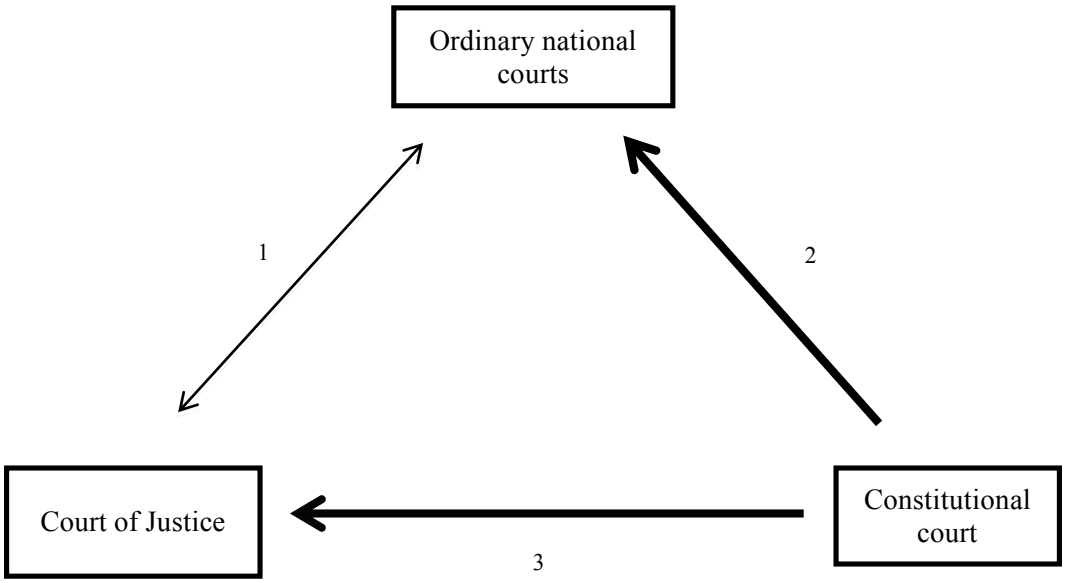
The two courts' decisions display important similarities. For the *Bundesverfassungsgericht*, the status of European integration did not satisfy the German standard of protection of fundamental rights, and it rejected the primacy of EU law 'provisionally, therefore, in the hypothetical case of conflict'[66] in the area of fundamental rights. The standpoint of the *Corte Costituzionale* was that of a conditional primacy, subject to the counter-limits of the constitutional core and fundamental rights. The power relations in the judicial triangle have therefore shifted from their original position of balance in Figure 9. The power leverage in this period is positioned in favour of constitutional courts as depicted by the thicker arrows (2 and 3) below:

64 Italian *Corte costituzionale* Case *Frontini* (n 57), [12].

65 See Introduction, Section 2.1.1. for a review of the theoretical discussion on monism and pluralism.

66 German *Bundesverfassungsgericht* Case *Solange I* (n 46), [24].

***Figure 10*** *Power relations in the judicial triangle after Solange I and Frontini*




The relationship between ordinary national courts and the Court of Justice remained virtually the same as in Figure 9, save for the situation in which the ordinary national court would be obliged to follow the Constitutional court should it find that an EU measure violates the constitutional standard of fundamental rights protection (arrow 1). The position of the Constitutional court is accordingly strengthened in relation to ordinary national courts, as it is the undisputed final authority over ordinary national courts in the area of fundamental rights protection, since the EU does not (yet) have an appropriate catalogue of fundamental rights. Arrow 3 equally illustrates the power of the Constitutional court to review EU legislation against the constitutional standard of fundamental rights protection.

The German and Italian constitutional courts thus had the upper hand. The next

development brings us back to Luxembourg. The case of *Nold* was,[67] according to some commentators,[68] a response to the 'conditional primacy' jurisprudence of the Italian and German constitutional courts.[69] It involved an action for annulment of a Commission decision concerning the retail of coal in the Ruhr area of Germany, based on, among others, a claim that the decision breaches the fundamental right of a free pursuit of business, enshrined in the German Basic Law, but also in constitutions of other Member States, and the ECHR. In its judgment, the Court of Justice set out a comprehensive catalogue of fundamental rights in the EU:

> As the Court has already stated, fundamental rights form an integral part of the general principles of law, the observance of which it ensures. In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States. Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.[70]

This was the first time that the Court of Justice, in describing the content of general principles of law, referred to an international source of law, seeking to establish 'external coherence for its human rights protection and thereby enhance its legitimacy.'[71] By

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67 Court of Justice Case 4/73 *Nold* [1974] ECLI:EU:C:1974:51. It should be noted that the judgment in *Nold* was handed down two weeks before *Solange I*, but its findings were not taken into account by the *Bundesverfassungsgericht*.

68 J Kühling, 'Fundamental rights' in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (Hart Publishing 2006) 501; Schimmelfennig (n 30); both cited in Fabbrini (n 1), 9; M de Visser, *Constitutional Review in Europe. A Comparative Analysis* (Hart Publishing 2014), 410.

69 While the decision in *Solange I* was handed down two weeks after *Nold*, the commentators refer more generally to the German jurisprudence initiated by the mentioned *EEC Regulations Constitutionality* decision (n 28) of the *Bundesverfassungsgericht*, as well as the Italian *controlimiti* jurisprudence.

70 Court of Justice Case 4/73 *Nold* (n 67), [13].

71 Schimmelfennig (n 30), 1254.

including international treaties in the scope of fundamental rights protection, the Court of Justice was able to encompass the ECHR. As explained by Henckaerts, the ECHR was of use to the Court of Justice, as all the Member States were signatories. This way, the Court of Justice did not have to enter into a comparative constitutional law study when protecting fundamental rights, but was rather able to refer to a common denominator.[72]

## 2.3. The incremental accommodation of conflict

Both the *Bundesverfassungsgericht* and the *Corte Costituzionale* watered down their approach in subsequent case law. The language of the Italian decision in *Granital*[73] is in line with the incremental nature of constitutional pluralism, as the *Corte Costituzionale* stated that its own jurisprudence concerning the relationship between EU and Italian constitutional law had undergone an evolution:[74] EU regulations have primacy over national law, and the latter must be interpreted as much as possible in light of the former.[75] The *Corte Costituzionale* then further elaborated upon the primacy of EU law, and retained for itself the right to invalidate a conflicting national provision which was enacted after the EU act in question. In a situation of conflict, it reiterated its position from *Frontini* – it is the ultimate arbiter as regards the basic principles of the Italian state and fundamental rights – only this time with an additional use of reconciliatory

72 J-M Henckaerts, 'The protection of human rights in the European Union: overview and bibliography' (1994) 22 *International Journal of Legal Information* 228, 232.

73 Italian *Corte Costituzionale* Case 170/84 *Granital*, Decision of 8 June 1984.

74 G Gaja, 'Constitutional Court (Italy), Decision No. 170 of 8 June 1984, S.p.a. Granital v. Amministrazione delle Finanze dello Stato' (1984) 21(4) *CMLRev* 756, 758 (note).

75 ibid.

vocabulary, emphasising that a conflict is an 'unlikely possibility'.[76] In sum, the Italian court will perform the fundamental rights review only if the exceptional situation takes place that the constitutionally protected fundamental rights are breached by adhering to an obligation sourced in EU law.[77]

The German *Solange II* decision[78] more closely resembles the Italian approach rather than its own position in *Solange I*, and more generally follows the framework of constitutional pluralism. First, the *Bundesverfassungsgericht* called the Court of Justice 'a sovereign organ of judicature', that has the 'judicial monopoly' as regards the interpretation and validity of EU law,[79] acknowledging multiple claims to ultimate authority in overlapping areas of jurisdiction. The *Bundesverfassungsgericht* proceeded:

> That partly functional incorporation of the European Court into the jurisdictions of member-States expresses the fact that the legal orders of member-States and that of the Community are not abruptly juxtaposed in a state of mutual insulation but are in numerous ways related to each other, interconnected and open to reciprocal effects.[80]

Such an understanding of the relationship between EU and national law, and accordingly their respective judiciaries, points to a more cooperative relationship than one which could be resolved through a hierarchical monist structure. In the same incremental fashion as the *Corte Costituzionale*, its German counterpart changed its view as regards fundamental rights review, addressing at length how the Court of Justice changed its

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76 Gaja (n 74), 764. Note here the resemblance to the *Solange I* vocabulary of the *Bundesverfassungsgericht*, when it talks about a 'hypothetical case of a conflict'. See n 56.

77 This approach was further refined in 1989, where the *Corte Costituzionale* stated that it will test individual provisions of EU law with fundamental rights. Italian *Corte Costituzionale* Case 232/89 *Fragd*, Decision of 21 April 1989.

78 German *Bundesverfassungsgericht* Case 2 BvR 197/83 *Re the Application of Wünsche Handelsgesellschaft (Solange II)* Decision of 22 October 1986, (1987) 3 *CMLR* 225.

79 ibid., [4], [6].

80 ibid., [7].

approach to fundamental rights. It then concluded:

> In view of those developments it must be held that, so long as the European Communities, and in particular in the case law of the European Court, generally ensure an effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Constitution, and in so far as they generally safeguard the essential content of fundamental rights, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation cited as the legal basis for any acts of German courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany, and it will no longer review such legislation by the standard of the fundamental rights contained in the Constitution […].[81]

At this point, the position of the *Bundesverfassungsgericht* is very similar to that of the *Corte Costituzionale*, in that they will both perform fundamental rights review only if the Court of Justice fails to adhere to the standards of their national constitutions and the ECHR. The Italian and German constitutional courts have thus instituted a rebuttable presumption in favour of compliance of EU law with the constitutional level of fundamental rights protection. The power relations in the judicial triangle are now changed from the imbalance presented in Figure 10, and are back in balance. This balance is however sourced in a different legal structure than depicted in Figure 9, as the spheres of jurisdiction of the Court of Justice and constitutional courts now overlap. Nevertheless, the relationship between their opposing claims to fundamental rights review is heterarchical, as the jurisprudence on both levels leaves open the possibility of such review under specific circumstances.[82]

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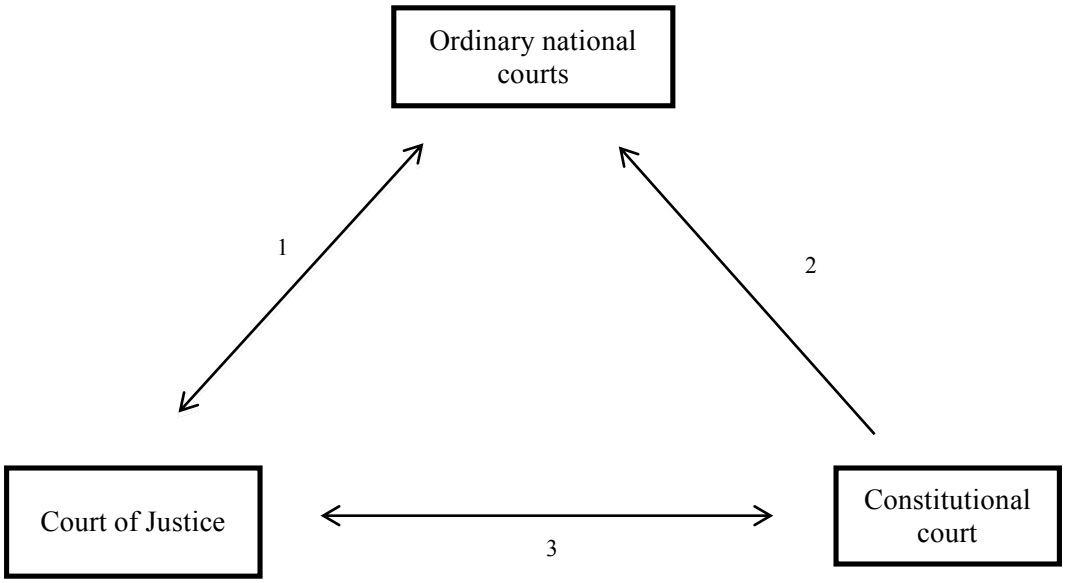
81 ibid., [48].

82 For the Court of Justice, this is a situation when an EU law obligation allegedly breaches fundamental rights. For constitutional courts, this is the situation when the standard of fundamental rights protection on the EU level sinks below the constitutional level of protection.

***Figure 11*** *Power relations in the judicial triangle after Granital and Solange II*




Arrow 1 depicts the relationship of cooperation of ordinary national courts with the Court of Justice, which will only be put in question if the presumption is rebutted. The Constitutional court remains the undisputed final authority for ordinary national courts in fundamental rights review of national law (arrow 2). Finally, the Constitutional court will exhibit self-restraint in matters of EU law, according to the presumption established by *Solange II* and *Granital*, whereas the Court of Justice will safeguard the standard of fundamental rights protection in line with the standard of national constitutions (arrow 3).

*Solange II* thus marks the end of the initial period of a more institutionally-based constitutional conflict in the European Union, settling the question of whether the Court of Justice has jurisdiction in the area of fundamental rights. The conflict opened the door for a more substance-oriented discussion between the participants of the European judicial space, in relation to the proper standard of fundamental rights protection. In this

respect, national constitutional courts acted as a check to the Court of Justice in the cooperative, heterarchical setting that is the European judicial space.[83] The next development is marked by an expansion of the Court of Justice's jurisdiction in fundamental rights review (by instituting review of national measures and the enactment of the Charter), which will be addressed in Section 3.

## 3. Further expansions of fundamental rights review by the Court of Justice

Having established a catalogue of fundamental rights protection for matters of EU law, ultimately expanding the self-referential system of the Treaties,[84] the Court of Justice proceeded by attempting to establish itself as the constitutional court of the European Union.[85] For this purpose, it extended its jurisdiction of fundamental rights review, and this section will look more closely at three such expansions: (1) review of national measures; (2) the scope of the Charter of Fundamental Rights, and (3) external actors.

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83 See also, in that sense, P M Huber, 'The Federal Constitutional Court and European integration' (2015) 21(1) *EPL* 83, 106.

84 The protection of fundamental rights first entered the text of the Treaties in the Preamble to the Single European Act (1987) and in Article F of the Maastricht Treaty (1992).

85 J J Barceló III, 'ECJ review of Member State measures for compliance with fundamental rights' (2009) Cornell Law School Legal Studies Research Paper No. 10-001, available at <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1096&context=clsops_papers>, accessed on 23 July 2017, 4; S Weatherill, *Law and Values in the European Union* (OUP 2016), 152. For a recent argument on the existence of supranational constitutional courts, see F Fabbrini and M P Maduro, 'Supranational constitutional courts' (2017) iCourts Working Paper Series 98/2017, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2990277>, accessed on 23 July 2017.

## 3.1. Expansion of fundamental rights review to national measures

The Court of Justice has, by defining the fundamental rights catalogue in *Nold*, surpassed the initial constitutional conflict with the German and Italian constitutional courts. As a further development, the Court of Justice expanded its fundamental rights review by subjecting national measures to its scrutiny.

Advocate General Jacobs proposed the scrutiny of national measures directly in *Wachauf*,[86] relying upon the analogous obligation of Union institutions. As Weiler explains, given that Member States are implementing EU law on a daily basis, it would be arbitrary to review only the Union's institutions' compliance with fundamental rights.[87] Thus, according to Advocate General Jacobs, when Member States act 'in pursuance of powers granted under Community law' it is 'self-evident' they must act in compliance with fundamental rights.[88] The Court of Justice followed suit, equally deriving Member States' obligation from that of the Union legislator:

> [It] must be observed that Community rules which [would be equal to the German rules in question] would be incompatible with the requirements of the protection of fundamental rights in the Community legal order. Since those requirements are also binding on the Member States when they implement Community rules, the Member States must, as far as possible, apply those rules in accordance with those requirements.[89]

The power of review is thus expanded from its original focus on EU law measures, and will be carried out also when Member States are acting in their capacity of implementing

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86 Court of Justice Opinion of Advocate General Jacobs in Case 5/88 *Wachauf* [1989] ECLI:EU:C:1989:179, [22].

87 Weiler, *The Constitution of Europe* (n 8), 120-121.

88 Court of Justice Opinion of Advocate General Jacobs in Case 5/88 *Wachauf* (n 86), [22].

89 Court of Justice Case 5/88 *Wachauf* [1989] ECLI:EU:C:1989:321, [19].

EU law (labelled as the 'agency situation' in the literature).[90]

In addition, the Court of Justice introduced fundamental rights review of national measures which derogate from EU law in *ERT*.[91] The Court of Justice linked the adherence to fundamental rights to public policy derogations in Treaty Articles concerning free movement: 'the national rules in question can fall under the exceptions provided for by […] Articles 56 and 66 only if they are compatible with the fundamental rights the observance of which is ensured by the Court.'[92] It is generally accepted that this is an expansion of the Court's jurisdiction,[93] but Weiler is right to note that the extent of the derogation is still a matter within the scope of EU law and thus within the jurisdiction of the Court.[94] A reservation in relation to the *ERT* reasoning on the scope of EU law may be found in *Annibaldi*,[95] where the Italian authorities denied the right to Mr Annibaldi to grow an orchard in the park he owns due to concerns related to its cultural heritage status, as well as environmental concerns. He claimed his right to property is infringed, and attempted to prove the relevant national legislation falls in the scope of Union law. The Court of Justice did not establish a connection between the national law

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90 Weiler, *The Constitution of Europe* (n 8), 120; Kaila (n 30), 296.

91 Court of Justice Case C-260/89 *ERT* [1991] ECLI:EU:C:1991:254.

92 ibid., [43]. The Court of Justice confirmed in later cases that this relates to implementing all sources of EU law. See Court of Justice Case C-309/96 *Annibaldi* [1997] ECLI:EU:C:1997:631, [14]-[21]; Case C-384/05 *Piek* [2007] ECLI:EU:C:2007:21, [34]. The Court of Justice confirmed explicitly that this also entails situations where the Member States have a wide discretion in the implementation obligation. Court of Justice Case C-292/97 *Karlsson* [2000] ECLI:EU:C:2000:202, [35].

93 Jacobs (n 33), 335-336; Fabbrini, *Fundamental Rights in Europe* (n 1), 210. This point will also be of relevance in relation to the scope of the Charter of Fundamental Rights in Section 3.2. below.

94 Weiler, *The Constitution of Europe* (n 8), 122. See also, K Lenaerts, 'The Court of Justice of the European Union and the Protection of Fundamental Rights' (2011) 31 *Polish Yearbook of International Law* 79, 88-90. By analogy, the same proposition is made in relation to the pluralist reading of the national identity clause. See Chapter 3, Section 4.

95 Court of Justice Case C-309/96 *Annibaldi* (n 92).

and the EU's common agricultural policy:

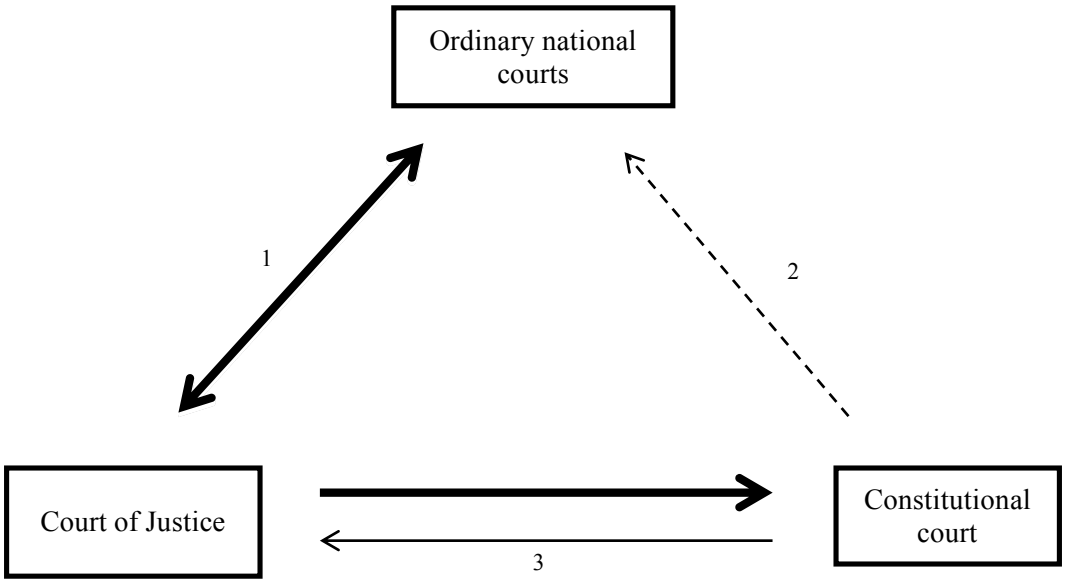
> [Even] if the Regional Law be capable [sic] of affecting indirectly the operation of a common organization of the agricultural markets, it is not in dispute that, the park having been created to protect and enhance the value of the environment and the cultural heritage of the area concerned, the Regional Law pursues objectives other than those covered by the common agricultural policy, or that the Law itself is general in character.[96]

*Annibaldi* thus offered some reassurance that the Court of Justice will carry out a more detailed analysis of the connection between the national measure EU law. Lenaerts stated that the *ERT* expansion sources its importance in providing reassurance to national (constitutional) courts that the basic values of their constitutions are adhered to.[97] In order to test whether this is indeed the case, let us take a look at the post-*Wachauf* and *ERT* judicial triangle and the shifts in power relations that ensued.

96 ibid., [22].

97 Lenaerts (n 94), 89.

***Figure 12*** *Power relations in the judicial triangle after Wachauf and ERT*




As visible from this triangle, Lenaerts may have overestimated the benefits that constitutional courts would yield after *Wachauf* and *ERT*. As seen from the thick arrows in the triangle (1 and 3), the leverage in this triangle is on the side of the Court of Justice. First, it has the advantage in relation to constitutional courts (thick arrow 3) thanks to the presumption of compliance with constitutional protection of fundamental rights, per *Solange II* and *Granital*. Second, it now also has the advantage of reviewing national measures implementing or derogating from EU law that may have not been questioned for their constitutionality on the national level. This results in a more influential relationship towards ordinary national courts, as they will be bound by the fundamental rights review of national measures carried out by the Court of Justice.

Constitutional courts remain firmly influential towards their ordinary national courts solely in situations of constitutional review of measures that fall outside the scope of EU law, which results in an additional decrease of their authority in the national

judicial hierarchy (arrow 2). Yet, the existence of the rebuttable presumption from *Solange II* and *Granital* retained some power of the constitutional courts towards the Court of Justice (thin arrow 3). Finally, the power of the Court of Justice to review national measures has increased the overlap of its jurisdiction with that of national courts performing constitutional review. Constitutional pluralism presupposes such an overlap, whereas in line with the definition of heterarchy, at this particular point in time, it was the Court of Justice that had the upper hand. Having established the catalogue of fundamental rights (per *Nold*), and the scope of fundamental rights review of both EU and national measures in the scope of EU law (per *Internationale Handelsgesellschaft*, *Wachauf* and *ERT*),[98] the Court of Justice holds most influence in the judicial triangle in this point in time.

## 3.2. Defining the scope of the Charter of Fundamental Rights

The Charter of Fundamental Rights marks the next step in the development of fundamental rights review on the EU level. The Charter was initially envisaged as non-binding EU bill of rights, proposed during the German presidency in 1999.[99] The Cologne Conclusions of the Council affirmed that the role of the Charter is to, first and foremost, improve the visibility of the EU as a fundamental rights actor to its citizens, and, second, to codify the *existing* jurisprudence of the Court of Justice in fundamental

98 To Lenaerts and Gutiérrez-Fons, this is inherent in the mandate of the Court of Justice, enshrined in today's Article 19(1) TEU, to ensure that in the interpretation and application of the Treaties the law is observed. Lenaerts and Gutiérrez-Fons (n 8), 1650.

99 G de Búrca, 'The drafting of the European Union Charter of Fundamental Rights' (2001) 26(2) *ELRev* 126, 130.

rights protection.[100] Consequently, the Charter was not intended to introduce any novelties as regards the status of fundamental rights protection in the EU. It was proclaimed as a non-binding legal document by the European Parliament, the Council and the Commission in Nice in 2000. Its legal status remained non-binding until it was attached to the Lisbon Treaty and gained the status of binding primary EU law.[101] Prior to the entry into force of the Lisbon Treaty, the Charter was used as inspiration for the establishment of general principles.[102] The scope is set out in Article 51(1) of the Charter:

> The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

The Explanations relating to the Charter[103] refer to *Wachauf* and *ERT* as the relevant case

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100 ibid., 130-131. On the extent to which the final text of the Charter introduces innovations, see C Ladenburger, 'Protection of fundamental rights post-Lisbon – the interaction between the Charter of Fundamental Rights, the European Convention of Human Rights and National Constitutions' (2012) FIDE Institutional Report, <http://www.fide2012.eu/index.php?doc_id=88>, accessed on 30 July 2017, 2.

101 For an analysis of the Court's treatment of the Charter between 2000 and 2009 when the Charter became binding, see Eeckhout (n 12); S Iglesias Sánchez, 'The Court and the Charter: The Impact of the Entry into Force of the Lisbon Treaty on the ECJ's Approach to Fundamental Rights' (2012) 49(5) *CMLRev* 1565. It should be added that Poland and the United Kingdom added a Protocol to the Charter, exempting them from the judicial expansion of the rights and principles set out in the Charter, and in particular its Title IV (concerning workers' protection, social and environmental protection). As Weatherill notes, however, it seems unclear what the added value of the Protocol is, as Article 6(1) TEU already prevents the Charter from adding anything to the existing EU competences. Protocol on the application of the Charter on Fundamental Rights of the European Union to Poland and to the United Kingdom [2007] OJ C306/156; S Weatherill, *Law and Values in the European Union* (n 85), 213-214. For a detailed analysis, see V Belling, 'Supranational Fundamental Rights or Primacy of Sovereignty? Legal Effects of the So-Called Opt-Out from the EU Charter of Fundamental Rights' (2012) 18(2) *ELJ* 251 (concluding the Protocol will not lead to substantively lower fundamental rights protection in the UK and Poland).

102 Court of Justice Case C-540/03 *Parliament v Council* [2006] ECLI:EU:C:2006:429, [38]. See also, Ladenburger (n 100), 2.

103 Explanations relating to the Charter of fundamental rights [2007] OJ C303/17.

law in determining the proper reading of Article 51(1) of the Charter. As the following analysis will demonstrate, the Court of Justice has, again incrementally, expanded the outer limits of Article 51(1), through an expansive interpretation of what it means to 'implement Union law.'

According to Lenaerts, this expression covers 'all situations where Member States fulfil their obligations under the Treaties as well as under secondary EU law, […] i.e. […] whenever Member States fulfil an obligation imposed by EU law.'[104] His definition lacks precision, and it is susceptible to being stretched and narrowed according to the needs of a particular case. In *Scattolon*,[105] Advocate General Bot argued for a wide reading of Article 51(1) of the Charter, arguing that it does not seem to be the intention of the drafters of the Charter that general principles of EU law and the Charter have a different scope of application.[106] He cited *Kücükdeveci* in support of such a wide reading, and concluded that (in relation to directives) the Charter should apply to 'all situations in which national legislation concerns or affects a matter governed by a directive the period for the transposition of which has expired.'[107]

In contrast, former Advocate General Jacobs and Lord Goldsmith both advocated for a narrower reading of Article 51(1) of the Charter, arguing it should be confined

104 Lenaerts (n 94), 83.

105 Court of Justice Opinion of Advocate General Bot in Case C-108/10 *Scattolon* [2011] ECLI:EU:C:2011:211, [119]-[120]. Advocate General Bot also cited *Annibaldi* as an example of a situation without sufficient connection to EU law, in which the Charter did not apply. *Annibaldi* is also cited in the Explanations relating to the Charter concerning Article 51 of the Charter. Court of Justice Case C-309/96 *Annibaldi* (n 92).

106 Which is not entirely correct, as the general principles have direct horizontal effect, unlike the provisions of the Charter. Lenaerts (n 94), 82.

107 Court of Justice Opinion of Advocate General Bot in Case C-108/10 *Scattolon* (n 105), [119].

solely to the 'agency situation'.[108] Situations not covered by *Wachauf* should remain outside the scope of the Court of Justice's powers of review, and their compliance with fundamental rights should be ensured in accordance with the national constitution and the ECHR.[109] The analysis of the case law below will illustrate the difference these various views make in practice.

Against this backdrop, in *Kücükdeveci*,[110] the Court of Justice found that for the general principles and the Charter to apply, it suffices that the national measure in question falls within the scope of the Directive.[111] The Court mentions no further conditions, nor does it differentiate between implementation and derogation. A further progressive interpretation of Article 51(1) of the Charter was given in *Estov*,[112] where the Court of Justice rejected a preliminary reference as inadmissible for the following reason:

> Given that the order for reference does not contain any specific information to show that the decision of the Ministerski savet na Republika Bulgaria of 16 December 2009 would constitute a measure implementing European Union law or would be connected in any other way with that law, the jurisdiction of the Court to rule on the present reference for a preliminary ruling is not established.[113]

The Court of Justice employed a very wide reading of Article 51(1) of the Charter, as it refers, aside from implementation, to any other connection with EU law.[114] The 'any

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108 Lord Goldsmith, 'A Charter of rights, freedoms and principles' (2001) 38(5) *CMLRev* 1205, 1206; Jacobs (n 33), 336.

109 Jacobs (n 33), 336.

110 Court of Justice Case C-555/07 *Kücükdeveci* [2010] ECLI:EU:C:2010:21. For the analysis of the case in the context of the horizontal effect of the general principle of non-discrimination on grounds of age, see Chapter 2, Section 2.3.

111 ibid., [23]-[26].

112 Court of Justice Order C-339/10 *Estov* [2010] ECLI:EU:C:2010:680.

113 ibid., [14].

114 See also, Kaila (n 30), 312.

other connection' formula has a strong *Dassonville*-ian taste to it,[115] as it is capable of being stretched even beyond the derogation situation envisaged in *ERT*. This could have the consequence of expanding the influence of the Charter beyond the mandate of both Article 51(1) of the Charter and Article 6(1) TEU.[116] Nevertheless, the political situation surrounding the Charter does not warrant the justification present in *Dassonville* – that of the lack of the necessary consensus in the Council in the course of creating the internal market and the ensuing need for measures of negative integration by the Court of Justice.[117] A further look at the relevant case law will reveal whether the Court of Justice indeed intended for Article 51(1) of the Charter to follow the *Dassonville* trajectory.

In *N.S.*,[118] the Court of Justice was asked 'whether the decision adopted by a Member State […] to examine a claim for asylum which is not its responsibility […] falls within the scope of European Union law.'[119] Although the decision to decide on the asylum application was within the Member State's discretion, once this discretion was exercised, it had the effect of bringing Member State action within the scope of the relevant regulation, and under the scrutiny of the Court of Justice as regards the Charter.[120]

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115 The *Dassonville* formula equally seemed to have no limits: 'All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.' Court of Justice Case 8/74 *Dassonville* [1974] ECLI:EU:C:1974:82, [5].

116 The second sentence of Article 6(1) TEU, states that '[the] provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.'

117 See, for example, K Alter and S Meunier-Aitsahalia, 'Judicial politics in the European Community. European integration and the pathbreaking *Cassis de Dijon* decision' (1994) 26(4) *Comparative Political Studies* 535, 536; F W Scharpf, 'The asymmetry of European integration, or why the EU cannot be a "social market economy"' (2010) 8 *Socio-Economic Review* 211, 223; C Barnard, *The Substantive Law of the EU. The Four Freedoms* (OUP 2016), 75.

118 Court of Justice Joined Cases C-411/10 and C-493/10 *N.S.* [2011] ECLI:EU:C:2011:865.

119 ibid., [55].

120 Court of Justice Joined Cases C-411/10 and C-493/10 *N.S.* (n 118), [68]-[69].

It appeared that Article 51(1) of the Charter will not be used in a *Dassonville*-ian fashion when the Court gave some further criteria as to the applicability of the Charter in its judgment in *Iida*, which cross-referred to the previously mentioned decision in *Annibaldi*:

> [To] determine whether the German [decision] falls within the implementation of European Union law within the meaning of Article 51 of the Charter, it must be ascertained among other things whether national legislation […] is intended to implement a provision of European Union law, what the character of that legislation is, and whether it pursues objectives other than those covered by European Union law, even if it is capable of indirectly affecting that law, and also whether there are specific rules of European Union law on the matter or capable of affecting it […].[121]

However, a more detailed account of the conditions to be met for the Charter to apply have not been mentioned in *Fransson*.[122] Mr Fransson was subject of a criminal and administrative procedure for tax fraud, parts of which were VAT, which is the income of the Union. Advocate General Cruz Villalón suggested to the Court to reject the reference as inadmissible.[123] Having presented the discrepancies between the case law and the Explanations relating to the Charter, Advocate General Cruz Villalón proposed the following interpretation of Article 51(1) of the Charter:

> To my mind, on a proper interpretation of the basic constitutional structure of the compound comprising the Union and the Member States, which has been described as the 'European Verfassungsverbund', it is, as a rule, for the Member States themselves, in the context of their own constitutional order and the international obligations which they have entered into, to review acts of their public authorities.
> However, that rule is accompanied by an exception […] where national public authorities are implementing Union law, to use the wording of the Charter. In my opinion, the perception of the dialectical relationship between the two scenarios in terms of rule and exception continues to be justified

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121 Court of Justice Case C-40/11 *Iida* [2012] ECLI:EU:C:2012:691, [79].

122 Court of Justice Case C-617/10 *Fransson* [2013] ECLI:EU:C:2013:105.

123 Court of Justice Opinion of Advocate General Cruz Villalón in Case C-617/10 *Fransson* [2012] ECLI:EU:C:2012:340, [5].

today.[124]

The proposal of the Advocate General is rather narrow as it revolves around the notion of 'implementation', rather than the 'any connection' terminology used by the Court of Justice in *Estov*.[125] Cruz Villalón added that fundamental rights review of Member State action must be 'explained by reference to a specific interest of the Union in ensuring that [it] accords with the interpretation of the fundamental rights by the Union.'[126] He concluded that there is no such direct interest of the Union. A completely opposite view was proposed by Advocate General Kokott a year earlier in the *Bonda* case, arguing that:

> [For] the purposes of the obligation to comply with the fundamental rights of the European Union when imposing penalties in respect of infringements of European Union law, it cannot make a difference whether the Member State's measure […] was adopted explicitly when implementing European Union law or whether it already existed. In both cases it serves to implement Union law.[127]

The Court of Justice's conclusion in *Fransson* side-lined the proposal of Advocate General Cruz Villalón and reasoned closer to the proposal of Advocate General Kokott:

> Since the fundamental rights guaranteed by the Charter must […] be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental

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124 ibid., [35]-[36].

125 Court of Justice Order C-339/10 *Estov* (n 112), [14].

126 Court of Justice Opinion of Advocate General Cruz Villalón in Case C-617/10 *Fransson* (n 123), [40]. The proposal could have sit well with the more specific guidance the Court of Justice mentioned in Case C-40/11 *Iida* (n 121). See also, Editorial Comments, '*Ultra vires* – has the *Bundesverfassungsgericht* shown its teeth?' (2013) 50(4) *CMLRev* 925, 926.

127 Court of Justice Opinion of Advocate General Kokott in Case C-489/10 *Bonda* [2011] ECLI:EU:C:2011:845, [20]. An even broader proposal was put forward in the Court of Justice Opinion of Advocate General Sharpston in Case C-34/09 *Ruiz Zambrano* [2010] ECLI:EU:C:2010:560, [163]:

> It seems to me that, in the long run, the clearest rule would be one that made the availability of EU fundamental rights protection dependent neither on whether a Treaty provision was directly applicable nor on whether secondary legislation had been enacted, but rather on the existence and scope of a material EU competence.

rights guaranteed by the Charter.[128]

The Court thus essentially concluded that 'implementing Union law' overlaps with 'the scope of Union law', and both are to be read as 'applicability of Union law.' Reading the Court's reasoning jointly with the previous case law, it results in a wide interpretation of the notion of implementation, as was the case in *Kücükdeveci*, *Estov*, and *N.S.*[129] Commenting on this expansion, Interviewee 1 stated that from the standpoint of determining the limits of the scope of EU law, the decision in *Kücükdeveci* is far more controversial (or in their words, 'borderline') than the one in *Fransson*. The private nature of the dispute, and the decision on the relevant standard of review (the Framework Directive[130] or primary EU law) were contentious points that could have led to the inadmissibility of the reference.

After *Fransson*, the Court of Justice further addressed the same question in *Siragusa*,[131] this time connecting it to the more specific reasoning from *Iida*. This enabled the Court of Justice to carry out a more substantive analysis of the connection between national and EU law, and to establish whether the national measure in question would result in the level of protection of fundamental rights differing among Member

128 Court of Justice Case C-617/10 *Fransson* (n 122), [21].

129 See also, J Snell, 'Fundamental Rights Review of National Measures: Nothing New under the Charter?' (2015) 21(2) *EPL* 285, 293. For a proposal for a clearer demarcation of the scope of the Charter, see D Sarmiento, 'Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe' (2013) 50(5) *CMLRev* 1267; X Groussot, L Pech and G T Petursson, 'The Scope of Application of EU Fundamental Rights on Member States' Action: In Search of Certainty in EU Adjudication' (2011) Eric Stein Working Paper 1/2011, <https://csesp.files.wordpress.com/2015/05/eswp-2011-01-groussot.pdf>, accessed 30 July 2017.

130 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16.

131 Court of Justice Case C-206/13 *Siragusa* [2014] ECLI:EU:C:2014:126.

States, to the extent of undermining the 'unity, primacy and effectiveness of EU law'.[132] If the Court of Justice continues the *Annibaldi-Iida-Siragusa* trend,[133] it is unlikely that Article 51(1) of the Charter will follow the *Dassonville* approach. Moreover, unlike the scope of general principles, which stretches all the way to horizontal situations (*Mangold*)[134] and the exclusive competences of Member States (*Maruko*),[135] the Charter appears to have a narrower scope, constrained by Article 6(1) TEU and Article 51(1) of the Charter.[136] It thus remains to see whether this case law affected the power relations in the judicial triangle.

132 Court of Justice Case C-206/13 *Siragusa* (n 131), [32]. See also, Snell (n 129), 296.

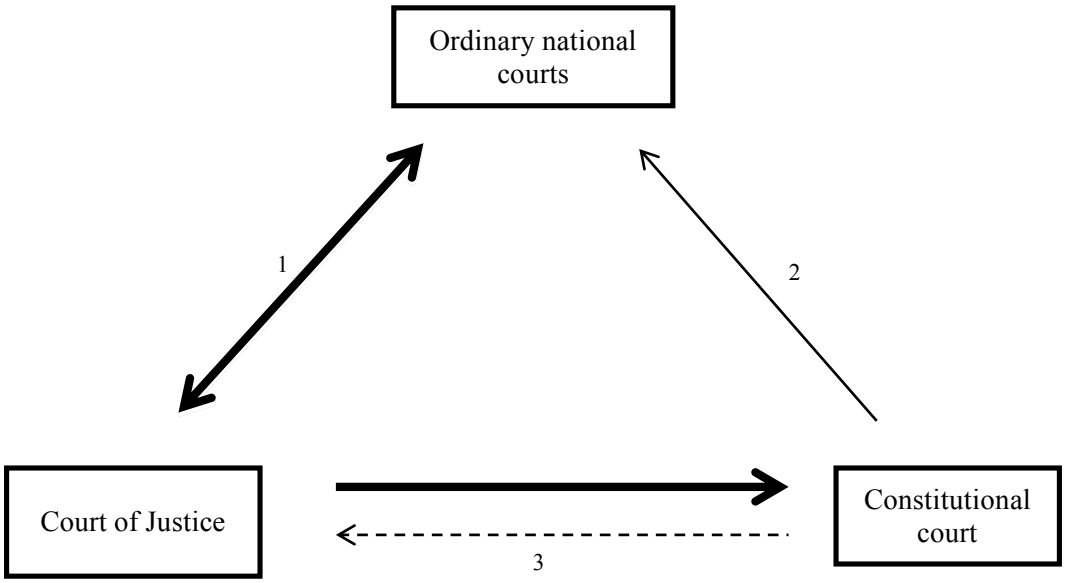
133 Confirmed as 'settled case law' by the Court of Justice in Case C-198/13 *Hernández* [2014] ECLI:EU:C:2014:2055, [37]. See also, M Dougan, 'Judicial review of Member State action under the general principles and the Charter: defining the "scope of Union law"' (2015) 52(5) *CMLRev* 1201, 1230.

134 In relation to the principle of non-discrimination on grounds of age.

135 In relation to the principle of non-discrimination.

136 Dougan mentions the decision of the Court in Case C-476/11 *HK Danmark* [2013] ECLI:EU:C:2013:590, [31] which points to the horizontal application of the Charter. In my view, however, the case however deals with the prohibition of discrimination on grounds of age and corresponds to the content of the same general principle from *Mangold*, which does not lead to an automatic conclusion as to the horizontal applicability of the Charter. Dougan (n 133), 1203.

***Figure 13*** *Power relations in the judicial triangle after Fransson and Siragusa*




The power relations between the Court of Justice and the constitutional court further clarified the leverage on behalf of the Court of Justice (thick arrow 3) inasmuch as it is now established that fundamental rights review will be carried out in relation to all national measures in the scope of EU law, regardless of whether the measure is implementing, derogating from EU law, or is connected to it in some other way (per *Estov*, *Kücükdeveci*, *N.S.* and *Fransson*).[137] The importance of the rebuttable presumption from *Solange II* and *Granital* has accordingly been diminished (dashed arrow 3). From the perspective of the Court of Justice, however, they remain influential only for situations outside the scope of EU law. One remaining reservation of a disproportionate intrusion of the Court of Justice into the traditionally exclusive realm for

[137] Weatherill reads the consequence of *Fransson*, and more generally the case law on citizenship, as the Court's assertion of 'a general jurisdiction in matters of human rights when they arise on the territory of the EU, even in cases when the matter appears to be internal to a single Member State.' S Weatherill, *Law and Values in the European Union* (n 85), 211.

constitutional courts is *Iida*,[138] requiring the Court of Justice to more specifically justify undertaking the review.

Arrow 1 represents the relationship of coordination between ordinary national courts and the Court of Justice, in relation to the review of both EU and national measures when in the scope of EU law. Ordinary national courts will be bound by the jurisprudence of the Court of Justice in spite of the possible contrary interpretation provided by their Constitutional court. In that sense, Arrow 2 depicts the remaining influence of the Constitutional court towards ordinary national courts, as it remains the undisputed final authority in fundamental rights protection solely for cases outside the scope of EU law.[139]

## 3.3. Fundamental rights review and external actors

While the relationship between the Court of Justice and external actors is not within the scope of the present thesis, I will briefly address the Court's findings aiming to delineate its position towards external actors in relation to fundamental rights protection. The aim of such an exercise is to sketch the influence this has had on the status of fundamental rights review, and consequently on the courts under analysis.

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138 And the subsequent case law confirming these conditions. See n 133.

139 For example, see Court of Justice Case C-617/10 *Fransson* (n 122), [48]:

> It follows that [EU] law precludes a judicial practice which makes the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the Charter conditional upon that infringement being clear from the text of the Charter or the case law relating to it, since it withholds from the national court the power to assess fully, with […] the cooperation of the Court of Justice, whether that provision is compatible with the Charter.

The applicants in *Kadi*[140] sought to annul an EU regulation implementing the counter-terrorism UN Security Council Resolution, according to which all their funds and other financial resources in the EU were frozen. The basis for the appellants claims before the Court of Justice relied on a *Solange* claim of the EU: so long as the UN do not provide for an independent judicial fundamental rights review, the Union courts should make sure the implementing measures are fundamental rights compliant.[141]

Accordingly, the Court stated that the Community was bound to ensure the minimum of fundamental rights protection in its implementation of the UN Security Council Resolution.[142] The Community is based on the rule of law, and any measure incompatible with the protection of fundamental rights is not acceptable.[143] Furthering the *Solange* logic, it concluded that the review mechanisms in the UN system are inadequate, and thus cannot prevent the Court of Justice to ensure fundamental rights protection by way of reviewing the implementing regulation.[144]

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140 Court of Justice Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation* [2008] ECLI:EU:C:2008:461. For a more general commentary of the international law aspects of the case, see G de Búrca, 'The European Court of Justice and the international legal order after *Kadi*' (2010) 51(1) *Harvard International Law Journal* 1; D Halberstam and E Stein, 'The United Nations, the European Union, and the King of Sweden: economic sanctions and individual rights in a plural legal world' (2009) 46(1) *CMLRev* 13. For a more fundamental rights driven approach, see T Isiksel, 'Fundamental rights in the EU after *Kadi and Al Barakaat*' (2010) 16(5) *ELJ* 551.

141 Court of Justice Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation* (n 140), [256].

142 ibid., [279].

143 ibid., [281], [284]. For an analysis of the constitutional core of the EU, and consequently its constitutional identity, see D Sarmiento, 'The EU's Constitutional Core' in A Saiz Arnaiz and C Alcoberro Llivina (eds), *National constitutional identity and European integration* (Intersentia 2013).

144 ibid., [320]-[326]. Note here that the Court of Justice is using the same method as some national constitutional courts, by focusing its review on implementing measures rather than the decision emanating from another legal order. See, for example, German *Bundesverfassungsgericht* Case 2 BvR 2236/04 *EAW Constitutionality* Decision of 18 July 2005, where the *Bundesverfassungsgericht* declined to rule on the constitutionality of the EAW, but assessed the national implementing measure.

The inspiration, or at least a strong resemblance to the different limits that national constitutional courts have placed on the principle of primacy is hard to miss when reading the Court of Justice positioning EU law *vis-à-vis* the acts of the UN, but also other actors in the international law arena more generally.[145] The rights-based claim to ultimate authority was at the source of constitutional pluralism (initiated by *Frontini* and *Solange I*), and it continues to provide a substantive basis for such claims.[146]

Defending its position may have been more straightforward for the Court of Justice against the UN, given its apparent lack of fundamental rights protection mechanisms. The Court of Justice was able to resort to the dualist rhetoric in *Kadi*, and use the ECHR as a shield[147] to establish its own reputation in fundamental rights protection. Yet, the same argument turned into a sword for the Court of Justice in relation to a possible ECHR accession.

The Court of Justice set out the constitutional[148] matrix of the EU,[149] underlining its distinctive nature which needs to be reflected and taken into account in the ECHR accession agreement. In this sense, the EU treaties are 'unlike ordinary international treaties established a new legal order'[150] which has 'its own constitutional framework and founding principles, a particularly sophisticated institutional structure and a full set of

145 See also, Isiksel (n 140), 559-560.

146 W T Eijsbouts and L Besselink, '"The law of laws" – overcoming pluralism' (2008) 4(3) *EuConst* 395, 397-398.

147 Court of Justice Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation* (n 140), [283].

148 The constitutional vocabulary is particularly present, obviating the Court's intention to place the EU's distinctiveness and autonomy at the centre of the argument.

149 Court of Justice Opinion 2/13 [2014] ECLI:EU:C:2014:2454, [154]-[174].

150 ibid., [157].

legal rules to ensure its operation.'[151] The emphasis on the 'constitutional' is there for two important reasons – it extends the sovereignty vocabulary to the EU, and it underlines the EU's own capacity in fundamental rights protection.[152]

Ultimately, the Court found that the accession to the ECHR is contrary to the specific features of the EU and its Treaties.[153] As Halberstam points out, the decision of the Court of Justice is no surprise.[154] It has previously made similar assertions concerning the accession to the ECHR,[155] the original EEA agreement,[156] and most recently, the UN in *Kadi*. The fundamental rights protection record of the EU is satisfactory in the view of the Court of Justice, and does not invoke the need to formally accede to the ECHR.[157]

Is the conclusion of the Court of Justice solely an expression of hubris or is it rooted in a plausible argument of a possible dismantling of the EU's constitutional setup? Let us reverse the situation and consider a national constitutional court deciding on the constitutionality of accession to a polity which might distort their constitutional setup and

151 ibid., [158].

152 Which is rather ironic given that the Court of Justice took up fundamental rights protection without considering the ways in which this might undermine the national constitutional structures.

153 For a more detailed analysis, see D Halberstam, '"It's the autonomy, stupid!" A modest defense of *Opinion 2/13* on EU accession to the ECHR, and the way forward' (2015) 16(1) *GLJ* 105. For critical accounts, see S Douglas-Scott, 'Autonomy and fundamental rights: the ECJ's Opinion 2/13 on accession of the EU to the ECHR' (2016) 1 *Europarättslig tidskrift (Swedish European Law Journal)* 29, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2752133>, accessed 15 July 2017; T Isiksel, 'European exceptionalism and the EU's accession to the ECHR' (2016) 27(3) *EJIL* 565.

154 Halberstam (n 153), 111.

155 Court of Justice Opinion 2/94 [1996] ECLI:EU:C:1996:140.

156 Court of Justice Opinion 1/91 [1991] ECLI:EU:C:1991:490. See also Chapter 2, Section 2.3. for the analysis of the case.

157 Isiksel (n 153), 566.

ultimately influence national sovereignty.[158] If such a distortion would threaten the constitutional core of the state in question, the decision of the constitutional court may well be to require the amendment of the constitution or a re-negotiation of the accession treaty to accommodate these concerns. Irony aside, and keeping in mind the conclusion from the Introduction, Section 2.1.1. on the existence of sovereignty on behalf of the EU, I consider it the analogous right of the Court of Justice to require the Commission to re-negotiate the accession agreement so as to keep in line with the mandate of Article 6(2) TEU.

The two decisions have indirect influence on the system of constitutional pluralism. Building up on the discussion in the Introduction on the existence of sovereignty on the behalf of the EU, it was concluded that substantively, late sovereignty[159] and constitutionalism overlap. According to such a construct, it was concluded that the Court of Justice developed a self-referential normative constitutional order, resulting in a plausible claim to ultimate authority,[160] overlapping in the same

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158 For the purposes of illustration, let us imagine this polity is one which displaces the position of constitutional courts in the national judicial hierarchy, and grants all national courts the power of judicial review.

159 Understood as the claim to ultimate authority and constitutional representation in a postnational context. N Walker, 'Late Sovereignty in the European Union' in N Walker (ed), *Sovereignty in Transition* (Hart Publishing 2003), 19.

160 In his reply to Halberstam (n 153), Komárek stated: 'Structurally, the ECJ seems to understand autonomy in a similar way as national constitutional courts conceive of sovereignty: EU law should reign supreme in its jurisdiction and any encroachment by another authority must be put under the ECJ's check.' For him, the EU's claim to ultimate authority is inherently limited due to the lack of political legitimacy, as oppose to that of the Member States. Conversely, and agreeing with de Búrca, I find that the claim to ultimate authority by the Court of Justice (and the EU) is rooted in more than just the autonomy of the EU's constitutional order, namely its independence and non-derivativeness. Thus, if we genuinely believe there is any such thing as sovereignty beyond the state, subjecting it to identical conditions as state sovereignty (namely popular representation) would be a *contradictio in adiecto*. See J Komárek, 'It's a stupid autonomy…' Verfassungsblog <http://verfassungsblog.de/its-a-stupid-autonomy-2/>, accessed 1 June 2017; G de Búrca, 'Sovereignty and the supremacy doctrine of the European Court of Justice' in Walker, *Sovereignty in Transition* (n 159), 453; Introduction, Section 2.1.1.

geographical space with that of the Member States and their courts tasked with upholding national constitutions. What *Kadi* and Opinion 2/13 add to this construct is an emphasis on the entrenchment of fundamental rights protection, materially one of the essential elements of a constitutional system.[161]

## 4. The common perspective: application of the fundamental rights review in the Area of Freedom, Security and Justice

Having addressed the expansions in the jurisdiction of the Court of Justice in fundamental rights review, the aim of this section is to analyse responses from the national level, and the ensuing judicial interactions that took place, ultimately determining the relationship between the EU and national constitutional standard of fundamental rights protection. The appropriate standard of fundamental rights protection is determined by Article 53 of the Charter:

> Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

The wording of the provision suggests it functions as a minimum standard clause, similar to the operation of the ECHR in national law.[162] However, as the case law analysis to

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161 J Shaw, 'Process and constitutional discourse in the European Union' (2000) 27 *Journal of Law & Society* 4, 16; A Stone Sweet, 'The structure of constitutional pluralism: Review of Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Post-National Law*' (2013) 11(2) *International Journal of Constitutional Law* 491, 493.

162 Sarmiento (n 129), 1287-1288.

follow will demonstrate, fundamental rights protection set by EU law may only be surpassed if it does not hamper the effectiveness and uniform application of EU law. In what follows, I will look at the Area of Freedom, Security and Justice (AFSJ), analysing both the EU and national jurisprudence of the courts under analysis in a chronological fashion, with the aim of a clear presentation of the constitutional conflict, and the manner of its resolution through the constitutional pluralism framework. Another reason warranting a joint analysis lies in the specificities of the post-Lisbon context – as Besselink explains, the power of EU institutions in fundamental rights protection 'intrude into areas previously within the constitutional autonomy of Member States in a more invasive manner than could have been imagined in the early days of EU fundamental rights protection'.[163] Thus, reactions from the national level deserve attention beyond the *Solange II*/*Granital* accommodation of the initial constitutional conflict in fundamental rights protection.

The tension between fundamental rights protection and the principle of mutual trust in the former third pillar[164] became obvious with the enactment of the European Arrest Warrant (EAW) Framework Decision,[165] which contradicted the wide-spread

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163 L Besselink, 'The protection of fundamental rights post-Lisbon: the interaction between the EU Charter of Fundamental Rights, the European Convention on Human Rights (ECHR) and national constitutions' (FIDE General Report 2012) <www.fide2012.eu/index.php?doc_id=94> accessed 15 June 2017, 22.

164 Previously called Police and Judicial Cooperation in Criminal Matters.

165 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1. It was further amended by Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial [2009] OJ L81/24. On its legislative history, see O Pollicino, 'European Arrest Warrant and constitutional principles of the Member States: a case law-based outline in the attempt to strike the right balance between interacting legal systems' (2008) 9(10) 1313, 1316-1323.

constitutional prohibition of extraditing Member States' own nationals.[166] The second source of tensions between the principle of mutual trust and fundamental rights protection is the application of the EU's asylum legislation,[167] specifically connected to the process of determining the Member State responsible for processing the asylum application.[168]

The Lisbon Treaty did away with the previous pillar structure and the differences between EU and EC law, primacy being applicable solely in relation to the latter.[169] The Court of Justice gained full jurisdiction to interpret and review those measures pursuant to Article 19(1) TEU and the *Foto-Frost* jurisprudence.[170] The newly gained jurisdiction is to be exercised keeping in mind Article 67(1) TFEU: 'The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.' However, the bulk of the criticism directed to Opinion 2/13 of the Court revolved around the impression that the principle of

166 J Komárek, 'European constitutionalism and the European Arrest Warrant: in search of the limits of "Contrapunctual Principles"' (2007) 44(1) *CMLRev* 9, 14. Another issue concerned the abolition of double criminality. A Hinarejos, 'The Lisbon Treaty versus standing still: a view from the Third Pillar' (2009) 5(1) *EuConst* 99, 103. More generally, see V Mitsilegas, 'The constitutional implications of mutual recognition in criminal matters in the EU' (2006) 43(5) *CMLRev* 1277.

167 The existing legislation in the field, as well as the current reform proposals are presented on the European Parliament website < http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_5.12.2.html> accessed 17 June 2017.

168 P Eeckhout, 'Opinion 2/13 on EU accession to the ECHR and judicial dialogue: autonomy or autarky' (2015) 38(1) *Fordham International Law Journal* 1, 14.

169 For a more detailed analysis of the previous setup and the changes introduced by the Lisbon Treaty, see Hinarejos (n 166).

170 Court of Justice Case 314/85 *Foto-Frost* [1987] ECLI:EU:C:1987:452, [17]. The exception to this was Protocol No. 36 to the Lisbon Treaty on transitional provisions [2008] OJ C115/322. Its Article 10 stated that the existing measures from the former third pillar shall be subject to the previously set powers of the institutions for five years (unless repealed, annulled or amended in implementation of the Treaties per Article 9 of the Protocol), thus limiting the review powers of the Court of Justice until 2014.

mutual trust was elevated above fundamental rights protection,[171] contrary to the main tenets of Article 67(1) TFEU. Peers emphasised that the 'Treaty does not give priority to mutual trust over human rights—quite the opposite'.[172]

The constitutional conflict that emerged against this backdrop will therefore be at the centre of the following analysis. I will first address the national jurisprudence on the constitutionality of the EAW Framework Decision and the response of the Court of Justice. Second, I will explore the divergences in the standard of fundamental rights protection and how they are to be balanced against the principle of mutual trust both as regards the EAW and the Common European Asylum System.

## 4.1. The EAW Framework Decision

### 4.1.1. Poland

The approach of the Polish *Trybunał Konstytucyjny* to matters of European integration has been analysed in detail in Chapter 3,[173] with regard to its claims to perform identity review of EU acts. By way of a brief introduction, it is worth recalling the *Accession Treaty* decision of the *Trybunał Konstytucyjny*, where it first set out the limits to the principle of primacy in relation to fundamental rights protection.[174] The *Trybunał Konstytucyjny*, in establishing the obligation of a Euro-friendly interpretation, positioned

171 Eeckhout (n 168), 15; S Peers, 'The EU's accession to the ECHR: the dream becomes a nightmare' (2015) 16(1) *GLJ* 213, 221.

172 Peers (n 171), 221.

173 Section 2.2.1.

174 Polish *Trybunał Konstytucyjny* Case K 18/04 *Accession Treaty*, Judgment of 11 May 2005, <http://trybunal.gov.pl/fileadmin/content/omowienia/K_18_04_GB.pdf>, accessed 9 March 2016.

fundamental rights as its limit:

> The principle of interpreting domestic law in a manner 'sympathetic to European law', as formulated within the Constitutional Tribunal's jurisprudence, has its limits. […] In particular, the norms of the Constitution within the field of individual rights and freedoms indicate a minimum and unsurpassable threshold which may not be lowered or questioned as a result of the introduction of Community provisions.[175]

The *Trybunał Konstytucyjny* will therefore perform a fundamental rights review against EU law whenever it might jeopardise the minimum level of fundamental rights protection.[176]

The EAW Framework Decision was thus an opportunity for the Tribunal to apply its standard of review. The Regional Court of Gdańsk, being faced with the request to surrender a Polish citizen to the Netherlands, contrary to the constitutional prohibition of extradition of Polish nationals, referred a question of constitutionality to the Tribunal.[177] The initial analysis of the *Trybunał Konstytucyjny* addresses the (then existing) differences between EC and EU law.[178] This statement is important as it demarcates the institutional power leverage of the *Trybunał Konstytucyjny* in relation to the jurisdiction of the Court of Justice.[179] The Tribunal then turned its attention to the limits of consistent

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175 ibid., [14].

176 Sadurski concludes that the intention of the *Trybunał Konstytucyjny* was to set a *Solange*-like limit to the primacy of EU law. W Sadurski, '"Solange, chapter 3": Constitutional Courts in Central Europe – Democracy – European Union' (2008) 14(1) *ELJ* 1, 20.

177 Polish *Trybunał Konstytucyjny* Case P 1/05 *European Arrest Warrant*, Judgment of 27 April 2005, <http://trybunal.gov.pl/fileadmin/content/omowienia/P_1_05_full_GB.pdf>, accessed 15 June 2016. For the background of the case, see D Leczykiewicz '*Trybunał Konstytucyjny* (Polish Constitutional Tribunal), Judgment of 27 April 2005, No. P 1/05, on the constitutionality of the European Arrest Warrant national implementation' (2006) 43(4) *CMLRev* 1181 (note).

178 Polish *Trybunał Konstytucyjny* Case *European Arrest Warrant* (n 177), [2.1].

179 The same advantage is present in the situation where courts with constitutional jurisdiction decide on the constitutionality of a Treaty amendment pending ratification (see, for example, Chapter 3, Section 2.4.).

interpretation as regards the third pillar,[180] specifically in relation to fundamental rights protection.

The *Trybunał Konstytucyjny* found that the right of a Polish citizen to be tried before a Polish court, the requirement of double criminality, and the prohibition of extradition of a Polish citizen for the purposes of serving imprisonment abroad are all instances of deteriorated rights protected by the Polish Constitution.[181] Equally, the introduction of EU citizenship cannot be corrosive to those constitutionally protected rights.[182] The Tribunal thus concluded the relevant provision of the Criminal Code is unconstitutional, and the constitutional prohibition of extraditing Polish nationals will therefore need to be amended.[183] With the aim of avoiding a breach of its obligations under EU law and the Accession Treaty, the *Trybunał Konstytucyjny* postponed the invalidation of the implementing provisions for 18 months.[184, 185]

180 The Court of Justice concluded on the existence of the obligation of consistent interpretation in the third pillar two months later. Court of Justice Case C-105/03 *Pupino* [2005] ECLI:EU:C:2005:386, [43].

181 Polish *Trybunał Konstytucyjny* Case *European Arrest Warrant* (n 177), [3.6], [4.2].

182 ibid., [4.3]. For a contrary view, see the analysis of the Czech decision, Section 4.1.1.4. below.

183 ibid., [5].

184 ibid., [5.2]. Komárek comments that while the reasoning of the *Trybunał Konstytucyjny* is not entirely justified, the postponement of the effects of its decision falls into one of the welcomed methods of avoiding constitutional conflict. Komárek (n 166), 19.

185 The changes introduced to the composition of the Polish *Trybunał Konstytucyjny* and the more general attack on the independence of judiciary in Poland has overshadowed its role and position in the European judicial space. The European Commission has activated the Article 7 TEU procedure, as the reforms introduced pose a systemic threat to the rule of law. <http://europa.eu/rapid/press-release_IP-17-2161_en.htm>, accessed 27 July 2017.

## 4.1.2. Germany

The German jurisprudence has been analysed extensively throughout this thesis.[186] Suffice it to add to the *Banana Market Regulation* decision[187] to the *Solange I* and *II* jurisprudence, and what it contributed to the position of the *Bundesverfassungsgericht* towards fundamental rights review. The decision came after an almost decade long saga[188] initiated by the Council Regulation regulating the market in bananas.[189] Three challenges before the Court of Justice[190] were unsuccessful, and the Administrative Court of Frankfurt-am-Main ultimately submitted a reference to the *Bundesverfassungsgericht*.[191] In finding the reference inadmissible, the *Bundesverfassungsgericht* outlined its approach towards the review of secondary EU law:

> [Constitutional] review under Article 100(1) GG which refer to rules that are

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186 The *Bundesverfassungsgericht* has placed limits on the principle of primacy in relation to competence monitoring (Chapter 2, Section 3.1.), the preservation of German constitutional identity (Chapter 3, Section 2.1.).

187 German *Bundesverfassungsgericht* Case 2 BvL 1/97 *Banana Market Regulation*, Order of 7 June 2000, <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2000/06/ls20000607_2bvl000197en.html>, accessed 12 July 2017.

188 For a more detailed analysis of the intricacies of the case, see C U Schmid, 'All bark and no bite: notes on the Federal Constitutional Court's "Banana Decision"' (2001) 7(1) *ELJ* 95; Claes, *The National Courts' Mandate in the European Constitution* (n 29), 610-620.

189 Council Regulation 404/93 of 13 February 1993 on the common organization of the market in bananas [1993] OJ L47/1. Challenges against the Banana Regulation were brought before national constitutional courts, the Court of Justice and the Dispute Settlement Body of the WTO. Schmid (n 188), 96. These procedures will not be analysed as they are of no relevance for the present discussion.

190 Court of Justice Case C-280/93 *Federal Republic of Germany v Council of the European Union* [1994] ECLI:EU:C:1994:367; Case C-466/93 *Atlanta* [1995] ECLI:EU:C:1995:370; Case C-68/95 *T Port* [1996] ECLI:EU:C:1996:452.

191 This was the third instance that the *Bundesverfassungsgericht* was deciding on the same regulation. For more information, see Claes, *The National Courts' Mandate in the European Constitution* (n 29), 616.

> part of secondary European Community law [is] only admissible if [its] grounds show in detail that the present evolution of law concerning the protection of fundamental rights in European Community law, especially in case law of the Court of Justice of the European Communities, does not generally ensure the protection of fundamental rights required unconditionally in the respective case.[192]

Reiterating its *Solange* and *Maastricht* jurisprudence, the conditions for activating fundamental rights review by the *Bundesverfassungsgericht* are as follows:

> The constitutional requirements are satisfied […] if the rulings of the Court of Justice […] generally ensure effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Basic Law, and in so far as they generally safeguard the essential content of fundamental rights.[193]

The judgment was criticised for its leniency and lack of engagement with actual infringements of the fundamental rights at stake,[194] and for abandoning its cooperative relationship with the Court of Justice in fundamental rights review as set out in its *Maastricht* decision.[195] What can be concluded for the purposes of the present discussion is that the *Bundesverfassungsgericht* will apply self-restraint in fundamental rights review, reviewing only manifest violations[196] of fundamental rights.[197]

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192 German *Bundesverfassungsgericht* Case *Banana Market Regulation* (n 187), [31].

193 ibid., [38].

194 Schmid (n 188), 100.

195 Schmid (n 188), 100; M Aziz, 'Sovereignty Lost Sovereignty Regained - Some Reflections on the *Bundesverfassungsgericht*'s Bananas Judgment' (2002) 9(1) *Columbia Journal of European Law* 109, 124; D P Kommers and R A Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press, 3rd edition, 2012), 340.

196 I am intentionally using the *Honeywell* language in this context, which was equally criticised for its unattainable threshold. See the discussion in Chapter 2, Section 3.1. For criticism directly concerning this similarity, see C Möllers, 'German Federal Constitutional Court: Constitutional *Ultra Vires* Review of European Acts Only Under Exceptional Circumstances; Decision of 6 July 2010, 2 BvR 2661/06, *Honeywell*' (2011) 7(1) *EuConst* 161, 161 (note).

197 An argument that I have not come across in the literature is a connection between the German initiative and role in the process of creating the Charter of Fundamental Rights, which began in 1999 during the German Presidency, and the more restrained approach of the *Bundesverfassungsgericht* a year later. After all, the lack of a binding catalogue of fundamental

The *Bundesverfassungsgericht* was given an opportunity to test its standard of review in the constitutionality challenge to the German EAW Law implementing the EAW Framework Decision.[198] The case concerned an arrest warrant and the request for extradition to Spain of Mr Darkazanli, a German and Syrian national, for his alleged participation in the Al-Qaeda activities and money laundering, crimes punishable only in Spain at the time.[199] Unlike the Polish state of affairs, the German Basic Law had already been amended so as to allow extradition of German nationals to another EU Member State (or to an international court of justice), under the condition that the rule of law is observed.[200]

The first important point in the decision follows the logic of the Polish *Trybunał Konstytucyjny* in concluding that the first and the third pillar represent different legal orders, and primacy and direct effect do not operate in the latter:

> In particular with a view to the principle of subsidiarity, (Article 23.1 of the Basic Law), the cooperation that is put into practice in the "Third Pillar" of the European Union in the shape of *limited mutual recognition*, which does not provide for a general harmonisation of the Member States' systems of criminal law, is a way of preserving national identity and statehood in a

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rights at the EU level was one of the main criticisms directed to the EU in the *Solange I* decision. In that sense, we may read the approach of the *Bundesverfassungsgericht* in the *Bananas Market Regulation* decision as one of endorsing a satisfactory progress that European integration has made in the area of fundamental rights protection. As mentioned in Chapter 1, Section 3.2., the pluralist constellation presupposes a dynamic development of the law through a constructive discussion across the jurisprudence of constitutional conflict (the auto-correct function of constitutional pluralism). Fundamental rights protection is but one example (the scope of application of general principles is yet to develop into another; see Chapter 2, Section 3.2. on this point). On the more detailed analysis of the role of Germany in the creation of the Charter, see de Búrca (n 99).

198 German *Bundesverfassungsgericht* Case 2 BvR 2236/04 *European Arrest Warrant*, Decision of 18 July 2005, <http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2005/07/rs20050718_2bvr223604en.html>, accessed 15 June 2017.

199 Kommers and Miller (n 195), 341.

200 Article 16(2) of the German Basic Law.

single European judicial area.[201]

The third pillar is, given its intergovernmental features, consequently subject to constitutional review by the *Bundesverfassungsgericht*.[202] Mutual recognition in this area is in the view of the *Bundesverfassungsgericht* only limited. But this conclusion does not come without the small print. Only a month earlier, the Court of Justice decided in *Pupino*[203] that the obligation of consistent interpretation operates in the third pillar as well. The *Bundesverfassungsgericht* was most certainly aware of it, as the Dissenting Opinion of Judge Gerhardt made a case for its application. The majority, however, omitted any reference to *Pupino*, finding that the requirements of legal certainty and clarity run counter to any interpretation beyond the textual one.[204]

### 4.1.3. Cyprus

The Cypriot *Ανώτατο Δικαστήριο* also had the opportunity to rule on the constitutionality of the national act implementing the EAW Framework Decision.[205] By way of introduction, upon its accession to the EU, the Cypriot Constitution was amended and EU law was accorded supremacy over all sources of national law, including the Constitution.[206] However, the Constitution only allows extradition of non-Cypriot

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201 German *Bundesverfassungsgericht* Case *European Arrest Warrant* (n 198), [78] (emphasis added).

202 ibid., [33], [83].

203 Court of Justice Case C-105/03 *Pupino* (n 180), [43].

204 For criticism on this point, see A Hinarejos, '*Bundesverfassungsgericht* (German Constitutional Court), Decision of 18 July 2005 (2 BvR 2236/04) on the German European Arrest Warrant Law' (2006) 43(2) *CMLRev* 583, 587-589 (note).

205 Cypriot *Ανώτατο Δικαστήριο* Case 294/2005 *Attorney General of the Republic v Konstantinou*, Judgment of 7 November 2005, (2007) 3 *CMLR* 42.

206 National Report – The Supreme Court of Cyprus (2014), 1.

nationals, and the Regional Court of Limassol accordingly rejected the execution of an EAW against a Cypriot national.[207] Having cited, among others, the Polish and German decisions, the Supreme Court found that the EAW Framework Decision, as a measure of the third pillar, does not have direct effect. It did, unlike the *Bundesverfassungsgericht*, consider the developments brought about by *Pupino*, but it concluded that the EAW Law could not be interpreted consistently with the EAW Framework Decision without resulting in an unconstitutional interpretation.[208] Leczykiewicz concluded that the lack of a possible consistent interpretation of the implementing act with the Constitution (although it is aligned with the EU act it implements) results in the limitation of primacy and direct effect for EU acts contrary to the Cypriot Constitution.[209]

Such a conclusion counters the constitutional provision granting all European Union sourced law (EC and EU) an all-purpose supremacy over the national constitution. As Tsadiras explains, the Supreme Court should have been clearer in determining the legal status of the third pillar in Cypriot law.[210] The consequence of this reasoning was a constitutional amendment which then explicitly also included the second and third pillars in the definition of supremacy of EC and EU law over the entirety of the Cypriot legal system.[211]

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207 The application for surrender was made against the Cypriot national who was also a UK national. However, previous case law of the Supreme Court confirmed the prohibition in the Constitution applied regardless of dual nationality of the person concerned. Cypriot *Ανώτατο Δικαστήριο* Case *European Arrest Warrant Law* (n 205), summary. See also, A Tsadiras, 'Cyprus Supreme Court (Ανώτατο Δικαστήριο Κύπρου), Judgment of 7 November 2005 (Civil Appeal no. 294/2005) on the Cypriot European Arrest Warrant Law.' (2007) 44(5) *CMLRev* 1515 (note).

208 Cypriot *Ανώτατο Δικαστήριο* Case *Attorney General of the Republic v Konstantinou* (n 205), [24]. Tsadiras (n 207), 1518.

209 D Leczykiewicz, 'Constitutional conflicts and the third pillar' (2008) 33(2) *ELRev* 230, 236.

210 Tsadiras (n 207), 1524. He even hints that the Supreme Court did not properly understand the difference between EU and EC law (at 1528).

211 ibid., 1527.

## 4.1.4. Czech Republic

The challenge to the EAW implementing act in the Czech Republic was put forward during the legislative procedure by a group of Parliamentarians, based again on the prohibition of extraditing own nationals and the abandonment of double criminality.[212] The *Ústavní Soud* first referred to the status of the principle of primacy in the Czech Republic:

> In its judgment no. Pl. ÚS 50/04 of 8 March 2006,[213] the Constitutional Court refused to recognize the ECJ doctrine insofar as it claims absolute primacy of EC law. It stated that the delegation of a part of the powers of national organs upon organs of the EU may persist only so long as these powers are exercised by organs of the EU in a manner that is compatible with the preservation of the foundations of state sovereignty of the Czech Republic, and in a manner which does not threaten the very essence of the substantive law-based state. Understandably that, unless such an exceptional and highly unlikely eventuality comes to pass, the Constitutional Court, guided by the above-mentioned ECJ doctrine, will not review individual norms of Community law for their consistency with the Czech constitutional order.[214]

In line with the vocabulary analysis in Chapter 1, the principle of primacy will only be put into question in an exceptional, highly unlikely situation that the essence of the Czech constitutional order is put into question. The *Ústavní Soud* then analysed the legal nature of acts enacted in the third pillar, but not without taking into account the obligation of consistent interpretation established by *Pupino*.[215] However, without

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212 Czech *Ústavní Soud* Case Pl. ÚS 66/04 *European Arrest Warrant*, Judgment of 3 May 2006, <http://www.usoud.cz/en/decisions/20060503-pl-us-6604-european-arrest-warrant-1/>, accessed 18 July 2017.

213 The *Ústavní Soud* quotes its *Sugar Quotas III* decision. See Chapter 2, Section 3.2. for a more detailed analysis of the case.

214 Czech *Ústavní Soud* Case *European Arrest Warrant* (n 212), [53].

215 ibid., [56]-[58].

submitting a preliminary reference to the Court of Justice on the matter,[216] the *Ústavní Soud* found that status of primacy in the third pillar is not conclusively determined.[217] This did not prevent the *Ústavní Soud* from reviewing the implementing act and finding that a consistent interpretation is possible.[218] The acceptance of the obligation of consistent interpretation is in line with self-restraint and mutual accommodation driving the interactions in the pluralist European judicial space. After an extensive analysis of the status of fundamental rights protection granted by the EAW Framework Decisions, and taking into account safeguards in the EAW Framework Decision[219] and in the Czech implementing act,[220] the *Ústavní Soud* found the latter constitutional.

### 4.1.5. Belgium and the Court of Justice's response

The Belgian *Cour d'Arbitrage* (today's *Cour Constitutionnelle*), faced with the challenge of constitutionality of the EAW Framework Decision, submitted a preliminary reference to the Court of Justice.[221] By way of introduction, it should be mentioned that the Belgian court has jurisdiction to perform a fundamental rights review, and it has assumed it also

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216 This was not done since the Belgian *Cour d'Arbitrage* already submitted a preliminary reference concerning the validity of the EAW Framework Decision. ibid., [60]. Leczykiewicz argues that this enabled the *Ústavní Soud* to use broader criteria for review than what would be the case had the principle of primacy conclusively applied to the third pillar. Leczykiewicz (n 209), 238.

217 Czech *Ústavní Soud* Case *European Arrest Warrant* (n 212), [59].

218 ibid., [60], [83].

219 Recital 10 of the EAW Framework Decision states its implementation may be suspended if a Member State commits a serious and persistent breach of Article 6(1), determined by the Council through the rule of law mechanism from Article7 TEU.

220 Czech *Ústavní Soud* Case *European Arrest Warrant* (n 212), [88].

221 Belgian *Cour d'Arbitrage* Case 124/2005 *Advocaten voor de Wereld*, Judgment of 13 July 2005 <http://www.const-court.be/cgi/arrets_popup.php?lang=en&ArrestID=1993>, accessed 15 July 2017 (reference); Court of Justice Case C-303/05 *Advocaten voor de Wereld* [2007] ECLI:EU:C:2007:26.

in relation to external sources of law, including primary and secondary EU law.[222]

The Court of Justice was given the perfect opportunity to contribute to the discussion on the EAW Framework Decision taking place in the European judicial space. The basis for the constitutionality challenge in Belgium centred around the abandonment of double criminality for a certain list of offences, when committed in the Member State issuing the EAW, resulting in the breach of the principles of equality and legal certainty.[223] In essence, then, the Court of Justice was to give its view on the compliance of abandoning double criminality with fundamental rights the EU claims to safeguard.

In fact, the reference provided a perfect opportunity for the Court of Justice to carry out its fundamental rights review, on which it insisted throughout the decades of development of EU law. As the Advocate General put it:

> Accordingly, the Court must break its silence and recognise the authority of the Charter of Fundamental Rights as an interpretative tool at the forefront of the protection of the fundamental rights which are part of the heritage of the Member States. That undertaking must be approached with caution and vigour alike, in the full belief that, while the protection of fundamental rights is an essential part of the Community pillar, it is equally indispensable in the context of the third pillar, which, owing to the nature of its subject-matter, is capable of affecting the very heart of individual freedom, the foundation of the other freedoms.
> In that way it might be possible to avoid repeating past misunderstandings with national courts which have been reticent about the capacity of the

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222 Belgian *Cour d'Arbitrage* Case 136/2004 *Town and Country Planning*, Judgment of 22 July 2004 <http://www.const-court.be/cgi/judgments_popup.php?lang=en&ArrestID=1789>, accessed 17 July 2017. The *Cour Constitutionnelle* has declared the precedence of the Belgian Constitution in Case 29/1991, Judgment of 16 October 1991. An explicit definition of the relationship between the Belgian Constitution and EU secondary law has not yet been established by the Belgian court. Furthermore, equality and non-discrimination are envisaged in Articles 10 and 11 of the Belgian Constitution, and are the necessary link to trigger the *Cour d'Arbitrage*'s jurisdiction for constitutional review. Since 2003, it is also able to perform a fundamental rights review. M Bossuyt and W Verrijdt, 'The full effect of EU law and of constitutional review in Belgium and France after the *Melki* judgment' (2011) 7(3) *EuConst* 355, 358-359, 364.

223 Belgian *Cour d'Arbitrage* Case *Advocaten voor de Wereld* (n 221), summary. See also, Leczykiewicz (n 209), 231. The second challenge to the EAW Framework Decision disputed the use of the framework decision, as the EAW Framework Decision was going beyond mere 'approximation of laws and regulations'. This point will not be addressed in the analysis.

> Community institutions to protect fundamental rights.[224]

After conducting an abstract and concrete analysis of the status of equality and legal certainty, the Advocate General concludes that the EAW Framework Decision is valid. The Court of Justice did not match the Advocate General's nuanced analysis, and started from the premise that the definition of offences for which the requirement of double criminality has been lifted is a matter of national law of the issuing Member State.

> [The] definition of those offences and of the penalties applicable continue to be matters determined by the law of the issuing Member State, which, as is, moreover, stated in Article 1(3) of the Framework Decision, must respect fundamental rights and fundamental legal principles as enshrined in Article 6 EU, and, consequently, the principle of the legality of criminal offences and penalties.[225]

The *non sequitur* is striking. For the Court of Justice, the validity of the EAW Framework Decision depends on the Member States' respect for fundamental rights.[226] The conclusion regarding double criminality is equally scant[227] in argumentation. The principle of equality is not put into question: different treatment of different offences is objectively justified because they are different. Or, in the Court's own words:

> Consequently, even if one were to assume that the situation of persons suspected of having committed offences featuring on the list set out in Article 2(2) of the Framework Decision or convicted of having committed such offences is comparable to the situation of persons suspected of having committed, or convicted of having committed, offences other than those listed in that provision, the distinction is, in any event, objectively justified.[228]

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224 Court of Justice Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-303/05 *Advocaten voor de Wereld* [2006] ECLI:EU:C:2006:552, [79]-[80].

225 Court of Justice Case C-303/05 *Advocaten voor de Wereld* (n 221), [53].

226 ibid., [54]. Leczykiewicz (n 209), 240.

227 E Cloots, 'Germs of pluralist judicial adjudication: *Advocaten Voor De Wereld* and other references from the Belgian Constitutional Court' (2010) 47(3) *CMLRev* 645, 660.

228 Court of Justice Case C-303/05 *Advocaten voor de Wereld* (n 221), [58].

Short story shorter, the EAW Framework Decision is valid.[229] The Court of Justice regrettably offered no analysis of the fundamental rights at issue, their possible infringement or justification.[230]

The *Cour d'Arbitrage* accepted the decision of the Court of Justice and found the EAW Framework Decision in line with the principles of equality and legal certainty. It replicated the relevant analysis of the Court of Justice into its decision, and found a material overlap between the protected rights and principles at issue. Consequently, the interpretation of the EAW Framework Decision was applied *mutatis mutandis* to the implementing act.[231]

### 4.1.6. Consequences in the judicial triangle

National decisions on the constitutionality of the EAW share two main similarities worth examining further. First, as they all deal with a measure of the third pillar, the courts have assumed jurisdiction to review it, concluding that primacy and direct effect are not applicable. The Court of Justice issued its decision in *Pupino* after the Polish decision had been handed down, but before the remainder of the analysed decisions. The power relations in the judicial triangle are therefore to be analysed against this background.

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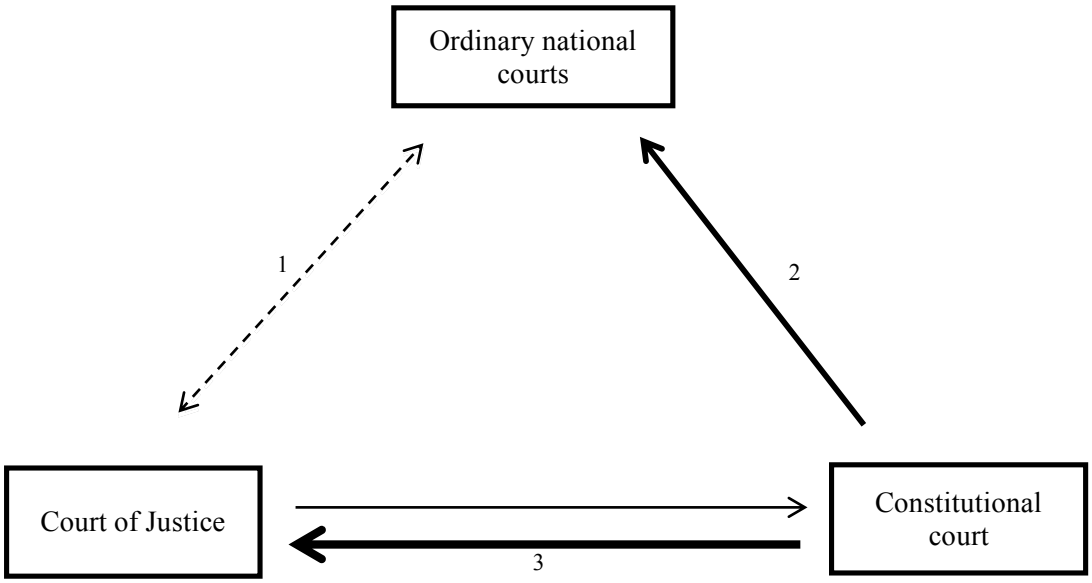
229 ibid., [61].

230 Cloots (n 227), 659-660.

231 Belgian *Cour d'Arbitrage* Case *Advocaten voor de Wereld* (n 221), [B.16]. See also, T Vandamme, 'Prochain Arrêt: La Belgique! Explaining recent preliminary references of the Belgian Constitutional Court' (2008) 4 *EuConst* 127, 141.

***Figure 14*** *Power relations in the judicial triangle after national EAW decisions*




The power relations in this judicial triangle favour national constitutional adjudicators, albeit not absolutely. In this respect, arrow 3 is comprised of a thicker arrow, depicting the leverage of the Constitutional court over the Court of Justice in terms of the legal status of third pillar acts, similarly to the position of Treaty revisions pending national ratification. However, taking into account *Pupino*, the thinner arrow 3 represents the limit placed by the obligation of consistent interpretation for the Constitutional court. At this point in time, however, *Pupino* has not proven itself effective in the national constitutional review of the EAW Framework Decision, save for the Czech *Ústavní Soud*. Arrow 2 represents the analogous authority of the Constitutional court towards ordinary national courts, given the legal status of the third pillar and the constitutional status of fundamental rights protection. Arrow 1 thus signifies the weakest relationship, as ordinary national courts are bound by *Pupino* up to the point where an EU-consistent interpretation would be *contra legem*. Equally, there is little basis for ordinary national

courts to decide contrary to the interpretation mandated by the constitutional court.[232]

The second similarity the judgments share is a more general reluctance to subscribe to the principle of mutual trust. Mutual trust, which should be one of the foundations of the third pillar, was mentioned by the *Trybunał Konstytucyjny* only when addressing the need to carry out the legislative and constitutional amendment as soon as possible, due to the benefits of the Framework Decision:

> Effectiveness in combating […] crime depends to a large degree on the development of more advanced forms of cooperation between the Member States of the EU than the traditional extradition procedure. This is possible thanks to the high level of mutual confidence between legal systems, built on the basis of principles of political systems assuring the protection of fundamental human rights and liberties.[233]

The German decision talks about the *limited* mutual confidence in the third pillar. Conversely, and most certainly more convincing, Judge Gerhardt issued a Dissenting Opinion arguing for the application of *Pupino* and the importance of mutual trust:

> Pursuant to Article 6.3 of the Treaty on European Union, the Union shall also respect the national identities of its Member States. Already this implies the Member States' duty to mutual respect. In […] *Pupino*, the Court of Justice […] has emphasised that the principle of the Member States' loyal cooperation in the area of police and judicial cooperation in criminal matters also, and particularly, applies as regards the implementation of Framework Decisions […]. Precisely for the sake of the effectiveness of this legal instrument, the European Judicial Community cannot support individual Member States' resorting to criminal sanctions in an imbalanced and one-sided manner by means of extraditions to them.[234]

The passage is instructive for understanding the relationship between national identity and mutual respect among Member States. In other words, insisting on the respect for

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[232] Note that at this point, the Court of Justice had not yet delivered its judgments in *Melki and Abdeli*, *Cartesio* and *Križan*, which caused further deterioration in the authority of constitutional courts over ordinary national courts. See Introduction, Section 1.1.

[233] Komárek (n 166), 17-19.

[234] German *Bundesverfassungsgericht* Case *European Arrest Warrant* (n 198), Dissenting Opinion of Judge Gerhardt, [189].

national identity brings not only benefits, but also responsibilities.[235] For the *Bundesverfassungsgericht*, however, the obligation of consistent interpretation cannot put into question the constitutional fundamental rights protection.[236] While the values of Article 6(1) TEU mentioned by Judge Gerhardt were found to be a basis for mutual confidence by the majority,[237] the *Bundesverfassungsgericht* did not make a conclusion according to which it would apply automatically as regards fundamental rights associated with criminal procedure and extradition – after all, Article 6(1) TEU is no Basic Law.[238] Rather, the *Bundesverfassungsgericht* avoided the conflict by placing an obligation on the legislator to make use of all the available options set out in the EAW Framework Decision.

Similarly, the constitutional conflict between the EU and the Polish Constitution was avoided through a procedural avenue, by postponing the effects of the decision. However, the normative goal for the Polish *Trybunał Konstytucyjny* should be balancing the supremacy of the Constitution with the principle of mutual trust between Member States. If constitutionally protected rights and freedoms are the 'unsurpassable threshold', the Tribunal should look for a solution according to which they are substantively protected.

It is unclear why, as Komárek points out in relation to the Polish decision, the trust in fundamental rights protection in other Member States was not sufficient to find that the essence of the constitutionally protected right was preserved. At this point, a clash

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235 The analogy is inspired by the Czech *Ústavní Soud*'s reasoning concerning EU citizenship. See below.

236 German *Bundesverfassungsgericht* Case *European Arrest Warrant* (n 198), [119].

237 ibid., [80].

238 Komárek (n 166), 25.

was avoided in all Member States in one way or another, in the operation of the self-imposed obligation to avoid conflict. Yet, the normative promise of constitutional pluralism requires the participants of the European judicial space to exhibit mutual respect toward their counterparts without any clear expression of superiority. The management of co-existing claims to ultimate authority in the same geographical space requires not only a procedural conflict prevention, but should also be led by value pluralism, which is particularly important in fundamental rights protection. Substantive fundamental rights protection should be the aim regardless of the institution ultimately upholding it. As Eijsbouts and Besselink put it:

> A judge or another public authority may qualify the validity, in his own jurisdiction, of a rule of more general circumscription than his own and binding on him. He shall do so not by mere reference to the autonomy or the supremacy of his own legal order, nor by reference to a legal hierarchy. He shall do so by reference to fundamental substantive norms valid in the wider circumscription also, or by putting forward such substantive norms that he holds to be applicable also there.[239]

Furthermore, the decision of the Court of Justice leaves a general impression of an opportunity missed to more clearly articulate its vision of fundamental rights review, the relationship to national constitutional standards of fundamental rights protection, and the role of mutual trust in this exercise. Despite the conclusion on the direct dependence of the EAW Framework Decision's validity on the Member States' fundamental rights protection, the Court of Justice mentions constitutional traditions common to the Member States only in passing, in the introductory sections of the judgment. It likewise passes on the chance to engage with the substance of the rights at issue from the perspective of the

[239] Eijsbouts and Besselink (n 146), 397. Similarly, Kumm's principle of best fit relies on normative ideals shared by the national and EU level as the aim. M Kumm, 'The jurisprudence of constitutional conflict: constitutional supremacy in Europe before and after the Constitutional Treaty' (2005) 11(3) *ELJ* 262, 286. See also, Introduction, Section 2.1.2.

Charter, nor does it compare it to the ECHR standards.

A more pluralist approach would be, as Cloots argues, a more active engagement with national standard of fundamental rights protection, a detailed reasoning, and, most importantly, a high standard of protection.[240] Ultimately, a more detailed engagement with Member States' constitutional traditions would result in the Court of Justice acting as a platform for enhancing mutual trust in the standard of fundamental rights protection. In the words of Interviewee 1, the constitution of the EU in a material sense is based on and prolongs the constitutional traditions of Member States, and the role of the Court of Justice is to 'accommodate the constitutional provisions in the substantive sense, and give them a coherent and unified meaning throughout the Union'. I argue this is not what we have seen in *Advocaten voor de Wereld*.

The Czech decision is an exception, as it uses the concept of EU citizenship to justify the imposition of obligations on Czech citizens, alongside the obvious benefits of free movement. It also concludes that there is no reason for doubting fundamental rights protection standards in other Member States are not of an equal quality as in the Czech Republic.[241] Similarly, Alegre and Leaf provide an analysis of judicial decisions taken in France and the UK which set out a more accommodating approach than the Polish and German decisions.[242] In those countries, the courts have elaborated upon the importance of mutual trust, and the contributions of the ECHR in safeguarding fundamental rights

240 Cloots (n 227), 670.

241 Czech *Ústavní Soud* Case *European Arrest Warrant* (n 212), [71], [86].

242 A Alegre and M Leaf, 'Mutual recognition in European judicial cooperation: a step too far too soon? Case study—the European Arrest Warrant' (2004) 10(2) *ELJ* 200, 210-213.

protection throughout the Member States to a generally satisfactory level.[243]

A final remark is to be made on heterarchy in the pluralist constellation. All the analysed decisions (save for the Court of Justice) have, to a greater or lesser extent, made cross-references to the findings of other constitutional courts, and their constitutional traditions.[244] This is in line with the view of the European judicial space as a cooperative one, where the participating courts are equal counterparts. According to Maduro, this contributes to the creation of a 'coherent and integrated European legal order'.[245] It thus remains regrettable that only the Czech *Ústavní Soud* applied this respect not only institutionally, but also in relation to the standard of fundamental rights protection in constitutional orders of other Member States. Maduro's idea of universalizability should be taken with a grain of salt, however: universalizability reeks of monism, as he places the EU legal order as the normative ideal for achieving coherence and integration of the European legal order.[246] The argument of this chapter is rather achieving a result which at different times accommodates both national and EU level of fundamental rights protection. Most certainly, this can only be achieved by adopting a dynamic understanding of law, regarding it as process rather than a static matter of fact.[247]

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243 For example, the UK High Court stated that 'It is not, however, to be readily assumed or inferred that another state, particularly a fellow member of the Council of Europe represented on the European Court of Human Rights, will deny an accused person a fair trial.' UK High Court Case *Rachid Ramda* [2002] EWHC 1278 (Admin), [10].

244 In the same vein, see Komárek (n 166), 31-32.

245 M P Maduro, 'Contrapunctual law: Europe's constitutional pluralism in action' in N Walker (ed), *Sovereignty in Transition* (Hart Publishing 2003), 501, 529.

246 See also, Komárek (n 166), 33, who addresses it from the aspect of its inability to provide for a conflict resolution method.

247 On this point, see Chapter 1, Section 3.2.

## 4.2. Balancing fundamental rights protection and the principle of mutual trust post-Lisbon

The meagre reasoning of the Court of Justice in *Advocaten voor de Wereld* in fact sits well with its more general inactivity in fundamental rights review. As de Búrca reports, the role of the Court of Justice as a fundamental rights adjudicator has only seen a significant rise after the entry into force of the Charter.[248] Nevertheless, even after this point, the Court of Justice seems reluctant to apply a more rigorous review of fundamental rights protection against EU measures.[249] Decisions in which the Court annulled a piece of EU legislation based on fundamental rights violations can easily be counted on the fingers of one hand, and as Weatherill points out, the assertion of fundamental rights protection is rarely followed by a finding of a violation, as the Court of Justice will most often defer to the legislative choices made by EU institutions.[250]

By contrast, as explained in Section 1, the activity of national courts with constitutional jurisdiction revolves around fundamental rights protection. After the initial judicial interactions concerning the validity of the EAW Framework Decision, I will now turn to further developments that took place after the Lisbon Treaty came into force. As is well-known, the pillar structure disappeared, and EC and EU law merged in terms of their legal status.[251] The analysis will focus on the development of the relationship between mutual trust and fundamental rights protection, and will include developments

248 G de Búrca, 'After the EU Charter of Fundamental Rights: the Court of Justice as a Human Rights Adjudicator?' (2013) 20(2) *MJ* 168, 170.

249 Weatherill, *Law and Values in the European Union* (n 85), 149.

250 ibid., 149, 152.

251 See n 170.

in the Dublin System[252] and further interactions concerning the application of the EAW Framework Decision.

The decision of the Court of Justice in *N.S.*[253] has already been mentioned in the context of the interpretation of the scope of application of the Charter. And while the Court found that the Charter is applicable, it was faced with the question whether the Member State processing the application may return the asylum seeker to the country of first entry deemed to be a safe country, if there are doubts that the person concerned will be subject to inhumane and degrading treatment. Greece (alongside Belgium) has already been found by the ECtHR to be in violation of Article 3 ECHR, due to the unfair asylum procedure and detention, as well as humiliating and degrading living conditions.[254]

The Court of Justice placed a great deal of emphasis on mutual confidence between Member States in handling asylum claims, based on the presumption that all Member States are complying with the Charter, the Geneva Convention[255] and the ECHR.[256] Such a presumption may only be rebutted if there are

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252 Council Regulation (EC) of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L50/1 ('Dublin II Regulation'); repealed and replaced by Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L180/13 ('Dublin III Regulation'). See also n 167.

253 Court of Justice Joined Cases C-411/10 and C-493/10 *N.S.* (n 118).

254 European Court of Human Rights Case *M.S.S. v. Belgium and Greece* ECHR 2011-I. For a more detailed analysis of the case, see M den Heijer, 'Joined Cases C-411 & 493/10, N.S. v. Secretary of State for the Home Department and M.E. and Others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform, Judgment of the Court (Grand Chamber) of 21 December 2011, nyr.' (2012) 49(5) *CMLRev* 1735 (note).

255 Convention Relating to the Status of Refugees [1951] 189 UNTS 137.

256 Court of Justice Joined Cases C-411/10 and C-493/10 *N.S.* (n 118), [79]-[80], [83]. The presumption was further developed into a definition of mutual trust in the European Union. See Opinion 2/13 (n 149), [191].

> systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment […] of asylum seekers transferred to the territory of that Member State […].[257]

The result of such an approach is that the Member State handling the request must only ascertain the existence of systemic deficiencies in the asylum request procedure of responsible Member State. The ECtHR, however, requires a more individualised investigation of the circumstances in any case being handled.[258] For the Court of Justice, the mutual trust that underlies the Common European Asylum System (and the AFSJ more generally) warrants the approach in *N.S.*

Commenting on this discrepancy, the UK Court of Appeal found that: '[the] decision of the [CJEU] in the NS case […] has set a threshold in Dublin II and cognate return cases which exists nowhere else in refugee law.'[259] The UK Supreme Court further added:

> Violation of article 3 [ECHR] does not require […] that the complained of conditions said to constitute inhuman or degrading conditions are the product of systemic shortcomings. It is self-evident that a violation of article 3 rights is not intrinsically dependent on the failure of a system. […] And it means that those who would suffer breach of their article 3 rights other than as a result of a systemic deficiency in the procedure and reception conditions provided for the asylum seeker will be unable to avail of those rights in order to prevent their enforced return to a listed country where such violation would occur. That this should be the result of the decision of CJEU in the NS case would be, as I have said, remarkable.[260]

The approach was equally criticised in academia.[261] Nevertheless, the Court of Justice

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257 ibid., [86].

258 European Court of Human Rights Case *M.S.S. v. Belgium and Greece* (n 254), [293].

259 United Kingdom Court of Appeal Case *R. (on the application of EM (Eritrea)) v Secretary of State for the Home Department* [2012] EWCA Civ 1336, [94].

260 United Kingdom Supreme Court Case *E.M. v. Secretary of State for the Home Department* [2014] UKSC 12, [42].

261 den Heijer (n 254), 1747; Halberstam (n 153), 127-130.

persisted. In *Abdullahi*,[262] it confirmed the presumption of fundamental rights compliance by Member States participating in the Common European Asylum System, the ensuing principle of mutual trust, and the right of the asylum seeker to invoke the systemic (rather than individual) deficiencies in the responsible Member State against the decision of removal.[263] The justification of this jurisprudence was offered further in Opinion 2/13, where the Court of Justice provided an analysis of the specificities of the AFSJ to defend the inconsistencies with the ECHR jurisprudence on the same matter.[264] Ultimately, mutual trust was given 'fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained.'[265]

Against this backdrop, two courts with constitutional jurisdiction submitted references to the Court of Justice in an attempt to clarify the relationship between constitutional and EU standards of fundamental rights protection. The first such instance is the reference submitted by the Spanish *Tribunal Constitucional* in relation to the EAW, the execution of which contradicted the constitutional protection from prison sentencing *in absentia*.[266]

The *Tribunal Constitucional* thus asked the Court of Justice if the constitutional

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262 Court of Justice Case C-394/12 *Abdullahi* [2013] ECLI:EU:C:2013:813.

263 Court of Justice Case C-394/12 *Abdullahi* (n 262), [52], [53], and [60] respectively.

264 Court of Justice Opinion 2/13 (n 149), [191]. See also, D Swoboda, 'The self-perception of the European Court of Justice and its neglect of the defense perspective in its preliminary rulings on judicial cooperation in criminal matters A small note on a fundamental misunderstanding' (2015) 7-8 *Zeitschrift für Internationale Strafrechtsdogmatik* 361, 371.

265 Court of Justice Opinion 2/13 (n 149), [191].

266 The case has already been analysed in Chapter 3, Section 2.3., from the perspective of identity review. The analysis here will therefore be confined to fundamental rights protection aspects of the case. It should also be added that in the meantime, the EAW Framework Decision had been amended in 2009 (see n 165). In that respect, the relevant Article 5(1), providing reasons for refusing to execute an EAW, was clarified by the new Article 4a(1). See also, A Torres Pérez, 'Constitutional dialogue on the European arrest warrant: the Spanish Constitutional Court knocking on Luxembourg's door' (2012) 8(1) *EuConst* 105, 110-111.

protection of fair trial, specifically in relation to the trial *in absentia*, can be taken into account by the judicial authority tasked with deciding on the execution of an EAW.[267] As Torres Pérez explains, the Spanish level of protection is higher than that of the EAW Framework Decision and the ECHR (which share the same level of protection).[268] The tension between levels of protection goes to the heart of constitutional conflict in fundamental rights protection and its relationship to mutual trust between Member States. If Spain can refuse to execute the EAW due to its higher level of protection not shared by the issuing Member State, mutual trust does not exist, and the uniform application of the EAW throughout the Union is put into question. In connection to the first question, the Spanish court asked if Article 53 of the Charter allowed a Member State to provide for a higher level of protection than the level granted by EU law. In other words, are higher national standards of fundamental rights protection a limit to primacy of EU law?[269]

The Court of Justice expectedly upheld the level of fundamental rights protection of the EAW Framework Decision and dismissed the possibility of interpreting it so as to allow a Member State to apply its own fundamental rights protection standards and jeopardise its uniform application.[270] More importantly, in relation to Article 53 of the Charter, the Court found that:

> [Allowing] a Member State to avail itself of Article 53 of the Charter to make

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267 As Torres Pérez reports, the Court of Justice once avoided answering the question of whether the executing judicial authority is allowed to refuse the execution of an EAW if 'there are valid grounds for believing that its execution would have the effect of infringing the fundamental rights of the person concerned' in Case C-306/09 *I.B.* [2010] ECLI:EU:C:2010:626. Torres Pérez (n 266), 112.

268 Torres Pérez (n 266), 114.

269 The *Tribunal Constitucional* usefully proposed three possible interpretations to this question. For further analysis, see Torrez Pérez (n 266), 116-117; N de Boer, 'Addressing rights divergences under the Charter: *Melloni*. Case C-399/11, *Stefano Melloni v. Ministerio Fiscal*, Judgment of the Court (Grand Chamber) of 26 February 2013, nyr.' (2013) 50(4) *CMLRev* 1083, 1087 (note).

270 Court of Justice Case C-399/11 *Melloni* [2013] ECLI:EU:C:2013:107, [46], [54].

> the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing Member State, a possibility not provided for under Framework Decision 2009/299, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by the constitution of the executing Member State, by casting doubt on the uniformity of the standard of protection of fundamental rights as defined in that framework decision, would undermine the principles of mutual trust and recognition which that decision purports to uphold and would, therefore, compromise the efficacy of that framework decision.[271]

Read together with a strong assertion as regards the scope of the Charter from *Fransson*, issued only three days earlier, the Court of Justice seems determined to reaffirm its commitment to fundamental rights protection. Yet, this commitment cannot be regarded in isolation of the remainder of EU law, where mutual trust plays a prominent role. As explained in Chapter 3, the *Tribunal Constitucional* accepted the interpretation of the Court of Justice, with the caveat that it will adhere to the principle of primacy up to the point where it clashes with Spanish constitutional identity.

The first preliminary reference of the French *Conseil Constitutionnel*[272] also concerned the EAW Framework Decision.[273] More specifically, the *Conseil Constitutionnel* had before itself the conflict between the possibility in the EAW Framework Decision for the speciality rule[274] to be lifted without the right to appeal, and

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271 ibid., [63].

272 French *Conseil constitutionnel* Case 2013-314P QPC *Mr Jeremy F.*, Decision of 4 April 2013, <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2013/2013-314p-qpc/decision-n-2013-314p-qpc-du-4-avril-2013.136588.html> (in French), accessed 22 July 2017.

273 For more information on the powers of the *Conseil Constituionnel*, see Introduction, Section 4.2. On how its position affects its approach to the preliminary reference procedure; and its lack of reference to constitutional identity in the submitted reference, see F-X Millet, 'How much lenience for how much cooperation? On the first preliminary reference of the French Constitutional Council to the Court of Justice' (2014) 51(1) *CMLRev* 195, 197-200, 204-205. For an analysis of the jurisprudence of the *Conseil Constitutionnel* in the area of identity review, see Chapter 3, Section 2.2.2.

274 Article 27 of the EAW Framework Decision provides that 'a person surrendered may not be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his or her surrender other than that for which he or she was surrendered'.

the constitutionally protected right to an effective judicial remedy. This time around, the Court of Justice paid heed to the importance of the constitutionally protected right at stake:

> […] Article 1(3) of the Framework Decision expressly states that the decision is not to have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 EU, an obligation which moreover concerns all the Member States, in particular both the issuing and the executing Member States.[275]

It then carried out the analysis of effective judicial protection, its status in the ECHR, the Charter, and national constitutional law.[276] Ultimately, the *Conseil Constitutionnel* was able to provide for an appeal suspending the execution of the EAW in cases where the speciality rule is to be lifted, save for the requirement that the entire procedure is concluded within the time limits prescribed by the EAW Framework Decision.[277] The decision was praised as a demonstration of the 'maximum level of protection of human rights',[278] and the *Conseil Constitutionnel* accordingly annulled the implementing provision which previously excluded the right to appeal.[279]

The final national decision to be mentioned was handed down by the *Bundesverfassungsgericht* in the execution of the EAW, concerned with the protection of the principle of individual guilt in opposition to the execution of the EAW based on a

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275 Court of Justice Case C-168/13 PPU *Jeremy F.* [2013] ECLI:EU:C:2013:358, [40].

276 ibid., [43], [47], and [48]-[53] respectively.

277 ibid., [75]. The uniformity, effectiveness and primacy of EU law must, after all, be observed.

278 Millet, (n 273), 210.

279 French *Conseil Constitutionnel* Case 2013-314 QPC *Mr. Jeremy F. (II)*, Decision of 14 June 2013, <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/pdf/conseil-constitutionnel-140221.pdf>, accessed 18 July 2017.

trial *in absentia*.[280] The Düsseldorf Higher Regional Court allowed the extradition of a person sentenced *in absentia* in line with the EAW Framework Decision, who then submitted a constitutional complaint. Although the threshold for fundamental rights review from its *Bananas Market Regulation* had not been met, the *Bundesverfassungsgericht* found that when the fundamental right in question is part of human dignity, which is part of the German constitutional identity, it will nevertheless carry out the review.[281] The *Bundesverfassungsgericht* found that the right to a fair trial was breached, and quashed the decision of the Higher Regional Court, without submitting a preliminary reference to the Court of Justice.[282]

The *Bundesverfassungsgericht* engaged with the decision of the Court of Justice in *Melloni*, and the limits it imposed on the refusal to execute an EAW in the name of effectiveness, uniformity and primacy of EU law. It moreover mentioned the exhaustive character of the EAW Framework Decision in exceptions to the execution of the EAW in relation to trials *in absentia*.[283] It concluded, nevertheless, that 'the principle of mutual trust that governs extraditions within Europe is limited by human dignity guaranteed under Art. 1 sec. 1 [of the Basic Law]'.[284]

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280 For the analysis of the identity review aspects of the case, and in particular how the *Bundesverfassungsgericht* carried out a fundamental rights review *by means of* identity review, see Chapter 3, Section 2.1.

281 German *Bundesverfassungsgericht* Case 2 BvR 2735/14 *Mr R.* Order of 15 December 2015, <http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-004.html>, accessed 2 March 2016, [34].

282 Interestingly, Leanerts concludes that the *Bundesverfassungsgericht* 'endorsed the level of fundamental rights protection provided for by the EAW Framework Decision as interpreted by the ECJ in *Melloni*.' K Lenaerts, 'La Vie Après l'Avis: exploring the principle of mutual (yet not blind) trust' (2017) 54(3) *CMLRev* 805, 819.

283 German *Bundesverfassungsgericht* Case *Mr R.* (n 281), [79]-[82].

284 ibid., [83]. For a more detailed analysis, see J Nowag, 'EU law, constitutional identity, and human dignity: a toxic mix? Bundesverfassungsgericht: *Mr R* 2 BvR 2735/14, *Mr R v. Order of the*

The Court of Justice thus had to elaborate further upon the principle of mutual trust, and its possible limits. In *Aranyosi and Căldăraru*[285] the Higher Regional Court in Bremen asked if the execution of an EAW is required, despite solid evidence pointing to the conclusion that fundamental rights of the person concerned, protected by Article 6 TEU, will be breached by the issuing Member State. The Court's decision in *Abdullahi* was firmly of the view that only systemic deficiencies will suffice to invoke the breach of inhumane and degrading treatment. The Court, however, appears to have softened its approach: 'limitations of the principles of mutual recognition and mutual trust between Member States can be made "in exceptional circumstances"'[286] and

> [Where] the judicial authority of the executing Member State is in possession of evidence of a real risk of inhuman or degrading treatment of individuals detained in the issuing Member State, having regard to the standard of protection of fundamental rights guaranteed by EU law and, in particular, by Article 4 of the Charter […] that judicial authority is bound to assess the existence of that risk when it is called upon to decide on the surrender to the authorities of the issuing Member State of the individual sought by a European arrest warrant.[287]

If a real risk is established, the national court must ascertain if this risk will manifest itself in relation to the person concerned.[288] Thus, although mutual trust is not blind trust,[289] an additional effort must be made by the relevant national authority to establish the breach of rights protected by Article 6 TEU by the issuing Member State in the

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*Oberlandesgericht Düsseldorf*, Order of the Bundesverfassungsgericht (Second Senate) of 15 December 2015, DE:BVerfG:2015:rs20151215.2bvr273514.' (2016) 53(5) *CMLRev* 1441 (note).

285 Court of Justice Joined Cases C-404/05 PPU and C-659/15 PPU *Aranyosi and Căldăraru* [2016] ECLI:EU:C:2016:198.

286 ibid., [82].

287 ibid., [88].

288 ibid., [92].

289 G Anagnostaras, 'Mutual confidence is not blind trust! Fundamental rights protection and the execution of the European Arrest Warrant: *Aranyosi and Caldararu*' (2016) 53(6) *CMLRev* 1675, 1683; Lenaerts (n 282), 821.

individual case at hand.[290]

## 5. Conclusion

'When it comes to protecting fundamental rights, the ECJ seeks to define the EU constitutional space without denying that EU law influences, *and is influenced by*, the legal orders that surround it.'[291] The view of the Court of Justice, thus, cannot develop in isolation from the national constitutional jurisprudence on the same matter. Accordingly, mutual trust cannot develop in the Luxembourg bubble – and we have in fact seen how incrementalism and constitutional dialogue function in the system of constitutional pluralism.

Lenaerts connects the principle of mutual trust to the equality of Member States enshrined in Article 4(2) TEU.[292] In his view, when the equality of Member States is read together with their shared endorsement of the values in Article 2 TEU, mutual trust is a necessary result, and 'a constitutional principle that pervades the entire ASFJ.'[293] However, mutual trust is not limitless. Chapter 3 addressed the role of the national identity clause in Article 4(2) TEU, which enshrines the justified limits to the application of EU law in a Member State through the public policy gateway, in accordance with the

290 By analogy, the Court of Justice relaxed its approach to finding a breach of Article 3 ECHR in determining the Member State responsible for handling the asylum claim, in Case C-63/15 *Ghezelbash* [2016] ECLI:EU:C:2016:409, [34]-[46], distinguishing it from *Abdullahi* based on the amendment in the Dublin III Regulation.

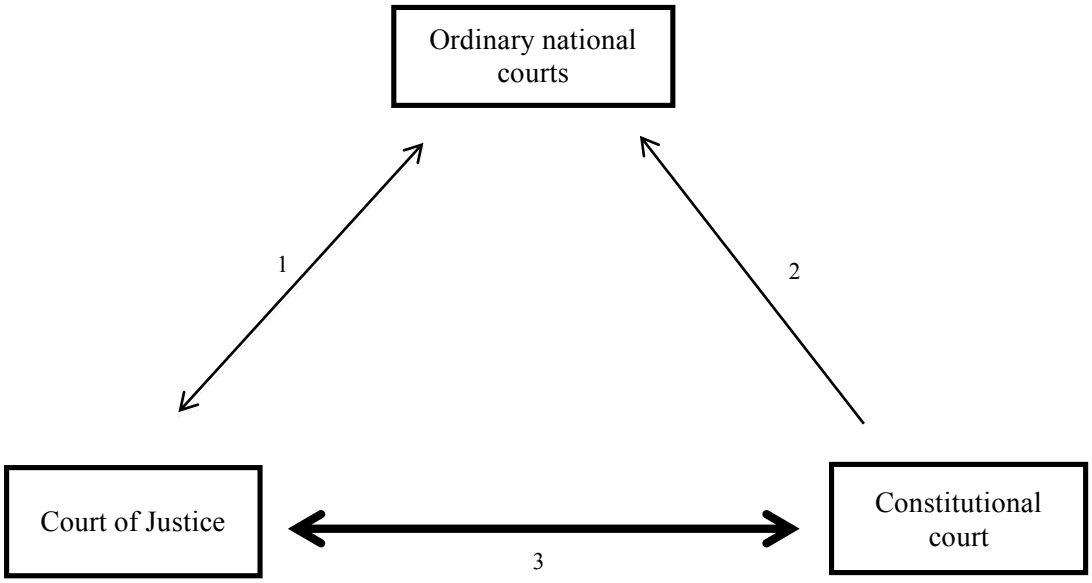
291 Lenaerts (n 282), 807 (emphasis added).

292 Lenaerts (n 282), 808-809.

293 ibid., 813. See also, German *Bundesverfassungsgericht* Case *European Arrest Warrant* (n 198), Dissenting Opinion of Judge Gerhardt, [189].

principle of proportionality.[294] Equally, mutual trust reaches its limit when its functioning becomes harmful to fundamental rights protection,[295] where the public policy is again used to safeguard these concerns. In both situations, the Court of Justice applies the proportionality test, and in a careful balancing exercise, decides on the extent of deference to the national status of fundamental rights protection.[296] On the other hand, when the case is pending before the constitutional court, it will apply a Euro-friendly interpretation driven by mutual respect and the self-imposed obligation of restraint. There is no single ultimate arbiter for every situation. Rather, we can see the existence of a heterarchical constellation – the potential of all the courts involved for being ranked in a number of different ways at different times – grounded in mutual respect and self-restraint. That is constitutional pluralism at its best.

***Figure 15*** *Power relations in the judicial triangle in fundamental rights review today*




294 See Chapter 3, Section 4.

295 Lenaerts (n 292), 823.

296 As analysed in Chapter 1, Section 3.1., all the Interviewees at the Court of Justice confirmed they take particular care of national constitutional concerns when they are relevant for the case at hand.

The power relations in the judicial triangle are thus not influenced so much by the overlap of jurisdiction, but rather the appropriate standard of fundamental rights protection. In this respect, *Melloni* appears to provide the ceiling for the application of national standards, for the purposes of preserving the effectiveness and uniformity of EU law. Procedurally, however, the leverage appears to favour constitutional courts, as the cases are more likely to reach them than the Court of Justice (arrow 3). Equally, the analysed case law suggests that national constitutional adjudicators will insist on a more detailed assessment of the individual circumstances of the case in relation to the status of fundamental rights protection,[297] as opposed to the focus on 'systemic deficiencies' by the Court of Justice, now enhanced as regards the right to an effective legal remedy (per *Jeremy F.*) and inhumane and degrading treatment (per *Aranyosi and Căldăraru*). Thus, the Court of Justice and constitutional courts appear to be in complete balance of powers. Arrows 1 and 2 are illustrating the analogous balance towards ordinary national courts, as they will be able to adhere to a high standard of fundamental rights protection, save for the exceptions incrementally and jointly developed by the Court of Justice and national constitutional adjudicators. *Melloni* in isolation would suggest that constitutionally protected rights are always to yield before the uniformity, effectiveness and primacy of EU law, under the principle of mutual trust. Yet, the Court of Justice will at times defer to the national level of protection (*Jeremy F.*), but only when given the opportunity by constitutional courts (unlike in *Mr R.*). In other words, the Court of Justice has *Melloni* as its weapon of choice, while constitutional courts have side-stepping the preliminary reference procedure as theirs. It does not appear that any of the courts under analysis has

[297] As was the case in *Mr. R.*

so far abused the options available.

By contrast, the *Bundesverfassungsgericht*'s approach is particularly instructive for heterarchy in constitutional pluralism. Specifically, while EU law more generally protects human dignity to a sufficient degree, it is only in exceptional cases, which do not undermine the validity of EU law, that the Basic Law will take precedence. In the same manner, the application of primacy that exceptionally disapplies a provision of the Basic Law does not render it invalid. Rather, the auto-correct function of constitutional pluralism balances out these respective claims to sovereignty, as they are both accommodated over time.

In conclusion, the analysed jurisprudence demonstrated that mutual respect, self-restraint and ultimately mutual accommodation – the features of the auto-correct function of constitutional pluralism – guide the behaviour of the courts under analysis. In addition, the normative promise of constitutional pluralism goes beyond mere institutional conflict avoidance/resolution. In the area of fundamental rights review, the normative drive of pluralism strives to provide, following a careful balancing, the optimal level of fundamental rights protection.

# CONCLUSION

> Thus we have on stage two men, each of whom knows nothing of what he believes the other knows, and to deceive each other reciprocally both speak in allusions, each of the two hoping (in vain) that the other holds the key to his puzzle.[1]

After first coming across the different instances of constitutional conflict in the European Union, I imagined the different courts' relationship precisely as the one between the two men Eco describes. To my mind, the courts under analysis were behaving in completely random and at times inexplicable ways: the Czech decision in *Landtová* seemed rushed, unnecessary and poorly argued; the Spanish decision in *Melloni* overly submissive; and the Court of Justice's decision in *Mangold* mind-boggling and unconvincing. Then, the unusual suspect,[2] the Danish *Højesteret*, rejected the expansion of the general principles of EU law to horizontal situations in *Dansk Industri*. It seemed all these courts were in vain attempting to deceive each other through various allusions of their approach to the principle of primacy, hoping it will result in an ultimate resolution of the puzzle: the constitutional matrix of the European Union. Yet, after four years of examining the rich jurisprudence of constitutional conflict, the situation now looks far less puzzling.

The main objective of this thesis was thus to determine the actual application of the principle of primacy of EU law by constitutional adjudicators in the European Union. In so doing, I have relied upon the framework of constitutional pluralism, arguing it is both descriptively and normatively relevant for the web of relations in the European

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1 U Eco, *The Island of the Day Before* (Vintage 1998), 399.

2 See Chapter 2, Section 2.2., where the analysis demonstrated that Danish courts more generally exhibit strong self-restraint in favour of the national parliament, and the *Højesteret* equally maintains a low profile as regards constitutional review.

judicial space. The analysis has been carried out on two levels. First, in Chapter 1, I explored sovereignty claims by the courts under analysis, as well as reconciliatory vocabulary they employ to manage and contain constitutional conflict. Second, I have further explored the three areas of constitutional conflict – *ultra vires* review, identity review, and fundamental rights review – to provide more nuance in the analysis of the way the Court of Justice has expanded the self-referential system of the Treaties; the different limits that constitutional adjudicators have placed on the principle of primacy as a result; and what possible solutions they envisage in the event of a constitutional conflict. In what follows, I will summarise these findings by addressing the research questions posed in the Introduction.

*Does the theory of constitutional pluralism explain the application of the principle of primacy of EU law in the jurisprudence of constitutional conflict by EU and national courts?*

Descriptively, the theory of constitutional pluralism asserts that the European Union represents a geographical space with co-existing claims to sovereignty put forward by the Court of Justice and constitutional adjudicators at the national level. In addition, in managing constitutional conflict, the participating courts are guided by mutual respect, the obligation of sincere cooperation and a self-imposed obligation to avoid conflict. The question of the ultimate arbiter in the EU is thus immaterial. As the analysis in Chapter 1 has shown, all the courts under analysis have put forward sovereignty claims, considering they are the ultimate arbiter in their respective jurisdiction. Equally, the Court of Justice

has developed jurisprudence according to which it has made an analogous[3] claim to sovereignty, continually expanding the self-referential system of the Treaties.

All the courts under analysis have employed the vocabulary of mutual respect and self-restraint as principles guiding the resolution of constitutional conflict. Constitutional conflict is managed through incremental and permanent contestation and accommodation of their opposing claims to sovereignty (the auto-correct function of constitutional pluralism) that results in a uniform interpretation and application of Union law, but keeping in line with conferral as its defining principle. In the *ultra vires* review, not only have Member States announced they will police the transfer of competences from the national to the EU level, but have also found individual decisions of the Court of Justice outside the Treaty mandate. However, individual points of conflict do not undermine the ability of constitutional pluralism to accommodate divergences, through the incremental application of the auto-correct function. In identity review, points of conflict have not yet arisen, but constitutional adjudicators on the national level are consistently re-emphasising their prerogative to protect the constitutional core (the German *Bundesverfassungsgericht* again submitted a preliminary reference to the Court of Justice to test the mandate of the ECB against Germany's constitutional identity; the Belgian *Cour Constitutionnelle* has recently introduced constitutional core limits to the operation of the principle of primacy). In fundamental rights review, constitutional adjudicators on the national level have set out their claim to be the ultimate arbiters as regards fundamental rights protection. The Court of Justice has reacted by subscribing to the imperative of fundamental rights protection at the EU level. Through the incremental

[3] Albeit qualitatively not the same, or in the words of Walker, incommensurate. See the discussion in Introduction, Section 2.1.1. and Chapter 1, Section 3.1.

development of jurisprudence, and despite occasionally descending into individual conflicts (for example, concerning the EAW Framework Decision), the landscape of fundamental rights protection has improved considerably due to the jurisprudence of constitutional conflict (for example, the Court of Justice's decisions in *Aranyosi and Căldăraru* and *C.K.*).

As was visible throughout the analysis of different constellations of the judicial triangle, the question of the ultimate arbiter is indeed immaterial. Heterarchy, according to which various courts can be ultimate arbiters at different times, pervades the power relations between the courts under analysis. There is no balanced triangle, and there need not be one. Heterarchy does not presuppose one winner, but rather different power constellations at different times. The auto-correct function of constitutional pluralism instead requires that, when regarded in the aggregate, the triangles demonstrate a balance. In conclusion, I argue that constitutional pluralism adequately explains the interactions in the jurisprudence of constitutional conflict in the European Union.

*Can the theory of constitutional pluralism be used to guide EU and national courts as to the desirable application of the principle of primacy of EU law in the jurisprudence of constitutional conflict?*

The desirable application of primacy, the normative goal of constitutional pluralism, is characterised in two ways: first, institutionally, it seeks to achieve the avoidance and/or resolution of constitutional conflict in the European Union. Second, substantively, it aims to uphold value pluralism, where regardless of which institution in a certain situation has

the final say, the balancing of values will strive to protect a wide array of both EU and national concerns.

The jurisprudence of constitutional conflict in the three areas of review serves to underline the normative strengths of constitutional pluralism. First, *ultra vires* review addresses the more structural view of the relationship between the EU and the national level, and may be seen as representing the underlying struggle in the relationship between the Court of Justice and national courts with constitutional jurisdiction. *Ultra vires* review is also content-neutral, as it can result in both more and less integration. In that sense, the normative goal of constitutional pluralism is institutional, and seeks to avoid constitutional conflict from taking place, but is substantively neutral. As the decision on more or less integration is ultimately a political one, the reach and influence on the ultimate resolution of constitutional conflict by courts with constitutional jurisdiction is thus limited (for example, the Danish Parliament amended the relevant law which gave rise to the decision of the *Højesteret* in *Dansk Industri*).

In identity review, the value-driven normative promise of constitutional pluralism is more visible. I have proposed a pluralist interpretation of Article 4(2) TEU: (1) the national identity clause is to serve as an exception to accommodate national particularities in the application of EU law on the national level, while the role of the Court of Justice is to apply a uniform method in determining the limits to this exception through the application of the principle of proportionality; (2) the proportionality analysis will highlight issues of constitutional conflict, and the balancing of these issues will determine the extent of self-restraint that is to be applied in a particular case. The pluralist nature of the presented interpretation of Article 4(2) TEU stems from its

intrinsically heterarchical nature, as it does not impose an overarching European value over specific national values, but rather endorses value pluralism.

The normative argument of constitutional pluralism is most visible in fundamental rights review, where Article 2 TEU and the Charter represent the shared values that both Member States and the EU are striving to protect. Mutual trust is an important principle guiding these interactions, but it reaches its limit when its functioning becomes harmful to fundamental rights protection. In both situations, the Court of Justice applies the proportionality test, and in a careful balancing exercise, decides on the extent of deference to the national status of fundamental rights protection. On the other hand, when the case is pending before the constitutional court, it will apply a Euro-friendly interpretation driven by mutual respect and the self-imposed obligation of restraint.

In all three areas of review, it is evident that a heterarchical constellation is more conducive to cooperation, mutual respect and the will to avoid conflict. The role of national constitutional adjudicators should be to keep the Court of Justice in check, and control its jurisprudence. Conflict resolution should be guided and resolved through mutual negotiation, learning, open dialogue and cross-examination. Ultimately, there is no single ultimate arbiter for every situation nor should there be one. Rather, we can see the existence of a heterarchical constellation – the potential of all the courts involved for being ranked in a number of different ways at different times – grounded in mutual respect and self-restraint.

It has become clear that the courts under analysis may not share the ultimate rule of recognition, a *Grundnorm*, to which they all unconditionally adhere. They may not even share the same methods of interpretation, or the same level of verbosity in

presenting their views. Nevertheless, they without a doubt share a view according to which the integration project is a joint endeavour, and each of the participants in the European judicial space is carefully and respectfully carrying out its respective tasks.

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