

I. NATIONAL AND SUPRANATIONAL COURTS AS BATTLEGROUND AND MEETING GROUND OF CONSTITUTIONAL ADJUDICATION

LIMITING THE 'COUNTER-LIMITS'.
NATIONAL CONSTITUTIONAL COURTS
AND THE SCOPE OF THE PRIMACY OF EU LAW

*Davide Paris**

Abstract

This paper examines in a comparative perspective the jurisprudence of several EU Member States' constitutional courts concerning the limits of the primacy of EU law. It aims to demonstrate that significant similarities can be found in this body of case law and, drawing from these similarities, it proposes some guidelines for a cooperative and loyal exercise of constitutional review of EU law. If duly circumscribed, constitutional courts' power to declare an act of the EU inapplicable within the concerned Member State does not jeopardize the primacy and the uniform application of EU law. Instead, it enhances the guarantees of fundamental rights and the rule of law in the EU, contributing to the creation of a European legal space where common values are cherished while national peculiarities are respected.

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*Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, paris@mpil.de. I had the opportunity to present an earlier version of this paper in a panel session at the 2017 ICON-S Conference *Courts, Power, and Public Law* - Copenhagen, July 5-7, 2017. I would like to thank the other panelists (Marta Cartabia, Gábor Halmai, Angela Schwerdtfeger, Diletta Tega, and Ladislav Vyhnanek), as well as all participants, for their valuable comments. The usual disclaimers apply.

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1. Introduction

Throughout its more than sixty-year history, the Court of Justice has always adamantly defended the principle that “the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure”¹. However, it is well known that the constitutional courts of some Member States never accepted such an absolute understanding of the primacy of EU law. Instead, they developed doctrines that enable them to deny the application of a provision of EU law within the concerned Member State, if the EU law provision in question contradicts the most fundamental principles of national constitutional law, notably fundamental rights.

For a long time, this was the case of the Italian and the German constitutional courts only. In 1973, the *Corte costituzionale* was the first to warn that the institutions of the (then) European Community do not have the power to violate either the fundamental principles of the Italian legal order or the inalienable human rights, and it affirmed its own power to judge and redress such a hypothetical violation². One year later, the *Bundesverfassungsgericht* delivered its most well-known *Solange I* judgment, which spelled out the prevalence of the Basic Law’s fundamental rights over Community law³. In the following

¹ So the fundamental judgment of the Court of Justice, 17 December 1970, C-11/70, *Internationale Handelsgesellschaft*, para. 3.

² Corte costituzionale, judgment of 27 December 1973, 183/1973 (*Frontini*).

³ BVerfG, order of the Second Senate of 29 May 1974 - BvL 52/71.

decades, the dispute over the limits of the primacy of EU law was essentially confined to a confrontation between these two constitutional courts and the Court of Justice⁴.

In the last fifteen years, however, the number of constitutional courts that have established limits to the primacy of EU law over domestic constitutional law has increased dramatically. Some constitutional courts have dealt with this question in seminal judgments delivered in abstract proceedings concerning the constitutionality of international Treaties related to the integration process. The Spanish constitutional court did so in its declaration on the Treaty establishing a Constitution for Europe⁵, as did the Polish constitutional court in its judgment on the Accession Treaty⁶, and, more recently, the Belgian constitutional court in its decision on the Treaty on the Stability Pact⁷. By contrast, other courts, such as the French, the Czech and the Hungarian constitutional courts, have developed their doctrines on the limits of the primacy of EU law in 'ordinary' cases, in which EU law was involved.⁸

Interestingly enough, one frequently finds references to the corresponding jurisprudence of other constitutional courts in these decisions. While citations of foreign judgments are generally rare in the case law of constitutional courts, in this specific field, they represent the rule rather than the exception. It might not come as a surprise that the constitutional courts of Central and Eastern

⁴ This paper focuses on constitutional courts in the traditional, Kelsenian, meaning only, *i.e.* on those peculiar institutions detached from other courts – from which they differ in their composition and jurisdiction – that are entrusted with the task of upholding the constitution and with the exclusive power to nullify statutes passed by Parliament that conflict with the constitution. That is why decisions like those of the Supreme Court of Ireland of 9 April 1987, *Crotty*, and of the supreme court of Denmark of 6 April 1998 on the Maastricht Treaty are not considered here. However, some of the normative claims made in this paper may also apply, *mutatis mutandis*, to those Member States that do not have a separate constitutional court.

⁵ Tribunal Constitucional, declaration of 13 December 2004, n. 1.

⁶ Trybunał Konstytucyjny, judgment of 11 May 2005, K 18/04 (*Accession Treaty*).

⁷ Cour constitutionnelle, judgment of 28 April 2016, 62/2016.

⁸ See, respectively: Conseil constitutionnel, decision of 10 June 2004, 2004-496 DC (*Economie numerique*), and decision of 27 July 2006, 2006-540 DC (*Droit d'auteur*); Ústavní soud, judgment of 8 March 2006, 50/04 (*Sugar quotas III*); and Magyarország Alkotmánybírósága, decision of 30 November 2016, 22/2016 (*Refugee relocation policy*).

Europe refer to the *Bundesverfassungsgericht's* case law, for the influence of the German constitutional court on its younger colleagues is well known⁹. But it is certainly more surprising to see the *Bundesverfassungsgericht* – which is habitually quoted by other courts rather than quoting them – refer to the case law of several other constitutional courts of EU Member States, as it did in its 2015 judgment on the constitutional identity review¹⁰:

The fact that the identity review conducted by the BVerfG is compatible with EU law is corroborated by the fact that [...] the constitutional law of many other Member States of the EU also contains provisions to protect the constitutional identity and to limit the transfer of sovereign powers to the EU [...]. The vast majority of Constitutional Courts and Supreme Courts of the other Member States [...] share the BVerfG's view that the precedence (of application) of EU law does not apply unrestrictedly, but that it is restricted by national (constitutional) law.

One may view this unusually frequent cross-citation as an exercise of mutual legitimacy, which corresponds to what von Bogdandy, Grabenwarter and Huber term “the legitimizing function of the horizontal *Verfassungsgerichtsverbund*”¹¹. When it comes to resisting the Court of Justice's standing jurisprudence, which reserves for itself alone the power of judging the validity of EU law, constitutional courts feel the need to stress that they are not isolating themselves from the process of European integration but rather exercising a role that belongs to all constitutional courts ‘institutionally’. By emphasizing that most constitutional courts

⁹ See, for instance, the references to the *Solange II* and *Maastricht* judgments of the German constitutional court in Ústavní soud, judgment of 26 November 2008, 19/08 (*Lisbon I*), paras. 116 et seq.; and the reference to the *Honeywell* decision of the German constitutional court in Trybunał Konstytucyjny, judgement of 16 November 2011, SK 45/09 (*Supronowicz*), para. 2.6.

¹⁰ BVerfG, order of the second senate of 15 December 2015 - 2 BvR 2735/14 (*Identitätskontrolle*), para. 47. Constitutional courts' judgments are quoted in the English translations available on the websites of the respective courts.

¹¹ See A. von Bogdandy, C. Grabenwarter & P.M. Huber, *Verfassungsgerichtsbarkeit im europäischen Rechtsraum*, in A. von Bogdandy, C. Grabenwarter & P.M. Huber (eds.), *Handbuch Ius Publicum Europaeum. Band VI. Verfassungsgerichtsbarkeit in Europa: Institutionen* (2016), 9.

share the same vision and exercise the same power, they aim to show that they are not erecting a stumbling block for European integration but instead are ensuring that this process of integration develops in full compliance with the fundamental constitutional values of the Member States. In their view, it is the duty of the constitutional courts to secure this compliance.

Indeed, opposing constitutional limits to the primacy of EU law is an extremely delicate, albeit sometimes necessary, move at the crossroad between jeopardizing the European integration and fostering constitutional pluralism. On the one hand, since *Internationale Handelsgesellschaft*, the Court of Justice has always insisted that allowing rules of national constitutional law to override EU law is tantamount to calling into question “the legal basis of the Community itself”¹². No responsible constitutional court would take such a step thoughtlessly. On the other hand, constitutional courts may offer a valuable contribution by opposing constitutional values to an absolute reading of the principle of the primacy of EU law, thus ensuring that the EU authorities do not overlook the constitutional values of the Member States and counterbalancing the power of the Court of Justice with judicial dialogue.

Fostering constitutional pluralism in the EU without jeopardizing the integration process is anything but easy. However, this paper suggests that a comparative analysis of the relevant case law of several constitutional courts allows us to single out certain criteria, on which several constitutional courts agree, that help make the constitutional courts’ challenges to the primacy of EU law acceptable as a legitimate expression of constitutional pluralism. The present study first stresses the wide discretion that constitutional courts enjoy in the exercise of this power (para. 2); then it highlights several points of convergence in the jurisprudence of different constitutional courts (paras. 3 to 6). On the basis of this analysis, this paper argues that the power to impose limits on the primacy of EU law – if exercised according to strict criteria, like those deduced from such a comparative analysis – does not weaken but rather strengthens the authority of EU law by fostering its pluralistic and dialogue-oriented nature (para. 7). Ultimately, this study seeks to ‘limit the counter-limits’ by defining the procedural

¹² Court of Justice, judgment *Internationale Handelsgesellschaft*, cit. at 1, para. 3.

and substantial preconditions of a 'sustainable' judicial dissent in European multi-level constitutionalism.

2. Discretion through vagueness: Counter-limits, *ultra vires*, and constitutional identity

While each constitutional court has defined differently the conditions for denying application to EU law provisions in cases where they clash with constitutional principles, all of them share the same theoretical premise: The transfer of powers to the EU is limited, because domestic constitutions do not allow the Member State to surrender its sovereignty to the EU but only to confer on it some of the Member State's own power¹³. Starting from this common premise, constitutional courts have developed different doctrines, which can be grouped into three (partly overlapping) models.

The *counter-limits* doctrine, as advanced crucially by the Italian constitutional court, represents a first model. In its judgment 183/1973, the *Corte costituzionale* made clear that the Italian Constitution, and notably its Art. 11, enables the transfer to the EU only of those powers necessary for pursuing peace and justice among the Nations. But no constitutional provision allows the EU to violate either the fundamental constitutional principles or the inalienable human rights. Therefore, just as EU law limits the sovereignty of the State, so the fundamental principles of the constitutional order 'counter-limit' the power of the EU¹⁴.

A partly different reasoning backs the *ultra vires* doctrine, whose paternity must be attributed to the *Bundesverfassungsgericht*¹⁵. Since the Member States, as the "Masters

¹³ See, in particular: Corte costituzionale, judgment *Frontini*, cit. at 2; BVerfG, judgment of the second senate of 30 June 2009 - 2 BvE 2/08 (*Lissabon*), paras. 226 et seq.; Tribunal Constitucional, DTC 1/2004, cit. at 5, para. II.2; Trybunał Konstytucyjny, judgment *Accession Treaty*, cit. at 6, paras. 7-8, and judgment of 24 November 2010, K 32/09 (*Lisbon Treaty*), para. 2.1; Ústavní soud, judgment *Lisbon I*, cit. at 9, para. 97.

¹⁴ The term "*controlimiti*" was coined by the Italian constitutional law scholar Paolo Barile, in *Ancora su diritto comunitario e diritto interno*, in *Studi per il XX anniversario dell'Assemblea costituente*, vol. VI (1969) 45.

¹⁵ The *ultra vires* review was first announced in BVerfG, judgment of the second senate of 12 October 1993 - 2 BvR 2134, 2159/92 (*Maastricht*), para. 106.

of the Treaties”¹⁶, empower the EU to exercise supranational powers, it follows that the EU cannot act beyond the powers granted it by the Treaties. Similar in premise to the *counter-limits* doctrine, the *ultra vires* doctrine views the exercise of powers by the EU institutions from a different perspective. While the *counter-limits* doctrine prevents the EU from ‘invading’ the core of the constitutional order, the *ultra vires* doctrine applies when the EU institutions “transgress the boundaries of their competences”¹⁷.

In recent years, the concept of constitutional identity has imposed itself as a third model of review. In a sense, it represents the intersection between the previous two. On the one hand, what belongs to the constitutional identity of a Member State cannot be transferred to the EU. As a consequence, an act of the EU institution that violates the constitutional identity of a Member State cannot but be *ultra vires*¹⁸. On the other hand, a Member State’s constitutional identity certainly encompasses the most fundamental principles of the domestic constitutions, notably the protection of human rights¹⁹. Therefore, constitutional identity both marks the borders of the powers that can be transferred to (and exercised by) the EU and serves as a *counter-limit* against the potential violation of a Member State’s constitutional hard core.

Despite the differences in the language and in the framing, these doctrines not only share the common premise of the limited transfer of powers to the EU but also converge on two points.

Firstly, most constitutional courts agree in restricting the supremacy of constitutional law over EU law to some parts of the Constitution only. As a rule, constitutional courts do not claim that all constitutional provisions prevail over EU law. They accept the primacy of EU law over the provisions of the Constitution, but they introduce an exception to this rule by stating that EU law cannot override some fundamental constitutional principles²⁰. This means that it is not the entire Constitution but only its hardest core that

¹⁶ BVerfG, judgment *Lissabon*, cit. at 13, para. 231.

¹⁷ BVerfG, judgment *Lissabon*, cit. at 13, para. 240.

¹⁸ So BVerfG, order of the second senate of 14 January 2014 - 2 BvR 2728/13 (*Gauweiler-OMT*), para. 27.

¹⁹ See BVerfG, order *Identitätskontrolle*, cit. at 10, para. 49.

²⁰ See, in particular, BVerfG, order *Identitätskontrolle*, cit. at 10, paras. 37: “As a rule, the precedence of application of European Union Law also applies with regard to national constitutional law”.

serves as a yardstick for reviewing EU law provisions²¹. A distinction is then introduced within the constitutional provisions: Some of them can be derogated by EU law while others cannot.

To identify this hard core of the Constitution, constitutional courts employ different wordings. For example, the Spanish constitutional court refers to “the values, principles or fundamental rights of our Constitution”²². The *Conseil constitutionnel* first alluded to an “express contrary provision of the French Constitution”; then it moved to “a rule or principle inherent to the constitutional identity of France”²³. The Italian constitutional court speaks of “the supreme principles of the Italian constitutional order and inalienable rights”, while the Belgian constitutional court prefers a convoluted expression, partly following the wording of Art. 4, par. 2 TEU: “the national identity inherent in the fundamental political and constitutional structures, or the fundamental values of the protection that the Constitution affords to legal persons”²⁴. In its most recent jurisprudence, the *Bundesverfassungsgericht* points out that “the scope of precedence of application of European Union Law is mainly limited by the Basic Law’s constitutional identity that, according to Art. 23 sec. 1 sentence 3 in conjunction with Art. 79 sec. 3 GG, is beyond the reach of both constitutional amendment and European integration”²⁵. In the Czech constitutional court’s view, the limit to the primacy of EU law is set by “the foundations of materially understood constitutionality and the essential requirements of a democratic, law-based state that are, under the

²¹ Poland represents an exception, since the Trybunał Konstytucyjny maintains the prevalence of the Constitution over EU law without further distinctions. See, in particular, judgment *Supronowicz*, cit. at 9, para. 2.2: “The Constitution retains its superiority and primacy over all legal acts which are in force in the Polish constitutional order, including the acts of EU law”. However, in the same judgment, the constitutional court seems to soften its position. See, in particular, para. 2.9, where it states that the protection of fundamental rights must be ensured at the EU level “to a comparable extent as in the Polish Constitution” and stresses that “the requirement of appropriate protection of human rights pertains to their general standard, and does not imply the necessity to guarantee identical protection of each of the rights analyzed separately”.

²² DTC 1/2004, cit. at 5, para. 3.

²³ See the decisions *Economie numerique* and *Droit d’auteur* respectively, cit. at 8.

²⁴ *Cour constitutionnelle*, judgment 62/2016, cit. at 7.

²⁵ BVerfG, order *Identitätskontrolle*, cit. at 10, para. 41.

Constitution of the Czech Republic, seen as inviolable (Art. 9 par. 2 of the Constitution)”²⁶.

This variety of formulations should not be overestimated. What really matters – and that is the second point of convergence – is that all these notions are vague enough to allow constitutional courts the greatest possible discretion in defining what can resist EU law and what cannot. Since a constitutional provision that expresses a supreme principle of the constitutional order or that belongs to the constitutional identity is not formally distinct, the constitutional court can itself decide whether a certain constitutional rule belongs to the constitution’s hard core and therefore trumps conflicting EU law or whether it does not and so cedes to conflicting EU law.

Hence, constitutional courts enjoy the widest discretion in deciding whether or not to use the self-attributed power to deny application to a provision of EU law that conflicts with the hard core of the constitution. The following paragraphs will pinpoint some criteria to guide the exercise of this power, drawing from the relevant case law of several constitutional courts.

3. The monopoly of constitutional courts

Some constitutional courts have stressed that the power to review EU law in the light of the fundamental principles of the constitution is reserved to the constitutional court. The Italian constitutional court claimed as much in its preliminary reference to the Court of Justice in the case *Taricco*, where it stated that the constitution vests the task of assessing whether a certain provision of EU law is compatible with the constitution’s supreme principles exclusively in the constitutional court itself²⁷. But it is the *Bundesverfassungsgericht*, in particular in its Lisbon judgment, that offers the best explanation for this monopoly:

The ultra vires review as well as the identity review may result in [...] Union law being declared inapplicable in Germany. To preserve the viability of the legal order of

²⁶ Ústavní soud, judgment *Lisbon I*, cit. at 9, para. 216.

²⁷ Corte costituzionale, order of 26 January 2017, 24/2017 (*Taricco*), para. 6. Previously, see order 28 December 2006, n. 454; judgment of 13 July 2007, n. 284; and judgment of 22 October 2014, n. 238.

the Community, [...] an application of constitutional law that is open to European law requires that the ultra vires review as well as the finding of a violation of constitutional identity is incumbent on the Federal Constitutional Court alone²⁸.

The German constitutional court shows its awareness that the power to deny application to EU law is too delicate and too dangerous for the survival of the EU legal order to be left in the hands of all courts. If all courts are allowed to disregard EU law on the basis of vague notions like constitutional identity or the supreme constitutional principles, then judicial dialogue becomes impossible, and this power is more likely to turn into a serious threat to the EU legal order. By contrast, if a specific court is entrusted with the task of voicing the dissent to Luxembourg, then it becomes possible to manage the conflict in a cooperative dialogue between the Court of Justice and the constitutional court affected. To be sustainable, judicial dissent should be channeled to a single court.

4. Handle with care: the necessary self-restraint

A second point of convergence consists in the statement that the cases of irreconcilable clashes between EU and constitutional law are likely to be extremely rare.

In its older case law, the Italian constitutional court described the scenario of the Community violating the supreme principles of the Italian constitutional order and the inalienable rights as “aberrant” and “unlikely”²⁹. Later, in 1989, it qualified its view slightly by defining the same scenario as “utterly unlikely but not impossible”³⁰. The Spanish constitutional court considers it

²⁸ BVerfG, judgment of the second senate of 30 June 2009 - 2 BvE 2/08, para. 241 (*Lissabon*). See further BVerfG, order of the second senate of 6 July 2010 - 2 BvR 2661/06 (*Honeywell*), paras. 66 and 68; and order *Identitätskontrolle*, cit. at 10, para. 43.

²⁹ See, respectively, Corte costituzionale, judgment *Frontini*, cit. at 2, para. 9; and judgment of 8 June 1984, n. 170 (*Granital*), para. 7.

³⁰ Corte costituzionale, judgment of 21 April 1989, n. 232 (*Fragd*), para. 3.1. This judgment marks an important development of the counter-limits doctrine by the Italian constitutional court. While previously this was understood as an extreme reaction against a potential authoritarian involution of the EU as a whole, *Fragd*

“difficult to conceive” that EU law develops in a way that is irreconcilable with the Spanish constitution³¹. The Czech constitutional court called the potential clashes between EU law and the Czech constitutional order “exceptional” and “highly unlikely”³², and, in its *Lisbon I* judgment, stated that the *ultra vires* review based on the German blueprint “is more in the nature of a potential warning, but need not ever be used in practice”³³. However, this did not prevent the same court from declaring a decision of the Court of Justice as *ultra vires* for the first time ever just three years later³⁴. The Polish constitutional court stresses the similarities of the values on which both the Polish constitution and the EU Treaties rest, concluding that “there is a considerable likelihood that the assessment of the Court of Justice will be analogical to the assessment of the Constitutional Tribunal”, so that conflicts between EU and constitutional law should be extremely rare³⁵. Similarly, the *Bundesverfassungsgericht* relies on the effectiveness of fundamental rights’ protection at the EU level to consider a breach of the German constitutional identity by the EU institutions “exceptional”:

Violations of the principles of Art. 1 *Grundgesetz* [...] will only occur rarely – for the reason alone that Art. 6 TEU, the Charter of Fundamental Rights and the case law of the Court of Justice of the European Union generally

reshapes this doctrine as a more flexible review of specific EU acts allegedly violating the supreme principles of the Italian constitutional order and inalienable rights. This makes the use of the counter-limits significantly less unlikely. See M. Cartabia, *Principi inviolabili e integrazione europea* (1995) 109 et seq.

³¹ DTC 1/2004, cit. at 5, para. 4.

³² Ústavní soud, judgment of 3 May 2006, 66/04 (*European Arrest Warrant*), para. 53.

³³ Ústavní soud, judgment *Lisbon I*, cit. at 9, para. 139.

³⁴ Ústavní soud, judgment of 31 January 2012, 5/12 (*Slovak Pensions XVII*). However, Czech commentators point out that this decision is an isolated and improper episode that is deeply rooted in peculiar national circumstances – a “collateral damage in the judicial war” opposing the constitutional and the supreme administrative court – rather than an indicator of the crisis of authority of the Court of Justice. See: J. Komárek, *Playing with Matches: the Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires*, 9 *EuConst* 2 (2012), 323; similarly, R. Zbíral, *A legal revolution or negligible episode? Court of Justice decision proclaimed ultra vires*, 49 *Comm. Mkt. L.R.* 4 (2012), 1487.

³⁵ Judgment *Supronowicz*, cit. at 9, para. 2.6.

ensure an effective protection of fundamental rights vis-à-vis acts of institutions, bodies and agencies of the European Union³⁶.

In the constitutional courts' view, however, the exceptionality of the conflicts between EU and constitutional law is not just a statement of fact but also a normative claim. Such conflicts are not only deemed rare: They also have to be rare, because they jeopardize the very survival of the EU as an autonomous legal order. As a consequence, constitutional courts accept that the power of declaring an EU act inapplicable within the national legal order must be exercised with self-restraint, as an *ultima ratio*.

The *Honeywell* judgment of the *Bundesverfassungsgericht* spelled this out most clearly. These powers must be exercised "with restraint and in a manner open to European law", because

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 risk³⁷.

The *Supronowicz* judgment of the Polish constitutional court echoed this assessment:

Allowing the possibility of examining the conformity of the acts of EU secondary legislation to the Constitution, what should be emphasised is the need to maintain due caution and restraint in that respect.³⁸ [...] The ruling declaring the non-conformity of EU law to the Constitution should have the character of *ultima ratio*, and ought to appear only when all other ways of

³⁶ Order *Identitätskontrolle*, cit. at 10, para. 46. Previously, see order *Honeywell*, cit. at 28, para. 57.

³⁷ Order *Honeywell*, cit. at 28, para. 57. In the same judgment, the *Bundesverfassungsgericht* specified that "the act of the authority of the European Union must be manifestly in violation of competences and [...] highly significant in the structure of competences between the Member States and the Union [...]" (para. 61).

³⁸ Judgment *Supronowicz*, cit. at 9, para. 2.5.

resolving a conflict between Polish norms and the norms of the EU legal order have failed³⁹.

It is essential that constitutional courts practice self-restraint in using the power to declare an EU act inapplicable, so as not to let this power become a serious threat to the primacy of EU law. In German scholarship, the European multi-level system of fundamental rights protection is frequently described as a triangle with vertices in Luxembourg, Strasbourg and Karlsruhe⁴⁰. But it cannot be overlooked that in one of these three vertices, there is not just one single court, but as many courts as there are EU Member States. A bold recourse to this power by a single court not only creates a problem itself but also undermines the whole system, because it indirectly authorizes other courts to take the same step. After all, all Member States participate in the EU on an equal footing⁴¹, and there is no reason why the primacy of EU law should be stricter *vis-à-vis* certain Member States and more relaxed towards others. Just as one court exercising constitutional review of EU law increases the legitimacy of the same claim by other courts, so one court's excessive use of this power can support a similar use by other courts, in a kind of domino effect that is deleterious for the autonomy of the EU legal order⁴².

5. The Court of Justice must speak first

From the duty to exercise the constitutional review of EU law with self-restraint flows the procedural duty to first give the Court of Justice the opportunity to redress the alleged violation through a preliminary reference according to Art. 267 TFEU. Some constitutional courts have explicitly stated this obligation.

³⁹ *Ibidem*, para. 2.7. Similarly, see also Ústavní soud, judgment *Lisbon I*, cit. at 9, para. 216.

⁴⁰ G. Hirsch, *Schutz der Grundrechte im 'Bermuda-Dreieck' zwischen Karlsruhe, Straßburg und Luxemburg*, in J. Schwarze (ed.), *Europäische Verfassung und Grundrechtecharta* (2006), 7.

⁴¹ See Art. 4, para. 2 TEU: "The Union shall respect the equality of Member States before the Treaties [...]"

⁴² See A. von Bogdandy & S. Schill, *Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty*, 48 *Comm. Mkt. L.R.* 5 (2011), 1451: "Domestic courts must be aware of, and take into account, the Union-wide consequences of their jurisprudence".

The Spanish constitutional court did so in its declaration on the Treaty establishing a Constitution for Europe. Here, it maintained that the constitutional court could only step in when a conflict between EU and constitutional law arises “without the hypothetical excesses of the European legislation with regard to the European Constitution itself being remedied by the ordinary channels set forth therein”⁴³. The practice of the constitutional court clarified this rather ambiguous statement. In the famous *Melloni* case, confronted with a potential clash between the European arrest warrant and the right to a fair trial enshrined in the Spanish constitution, the constitutional court raised a preliminary reference to the Court of Justice and finally followed the Court of Justice’s decision by overruling its previous case law⁴⁴.

In *Honeywell*, the *Bundesverfassungsgericht* most clearly theorized the obligation not to declare an act of EU law inapplicable without first giving the Court of Justice the opportunity to speak:

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 Germany⁴⁵.

Later in *Identitätskontrolle*, the *Bundesverfassungsgericht* clarified that this obligation applies to the identity review as well.⁴⁶

Following *Honeywell*, the Polish constitutional court accepted the same procedural obligation, stressing the

⁴³ DTC 1/2004, cit. at 5, para. 4.

⁴⁴ Tribunal Constitucional, judgment of 28 September 2009, n. 99 (*Melloni*).

⁴⁵ Order *Honeywell*, cit. at 28, para. 60. Already in its *Lissabon* judgement, cit. at 13, para. 240, the *Bundesverfassungsgericht* already stated, less clearly, that the *ultra vires* review is to perform only “if legal protection cannot be obtained at the Union level.

⁴⁶ Order *Identitätskontrolle*, cit. at 10, para. 46.

“subsidiarity” of the constitutional tribunal’s jurisdiction to examine the conformity of EU law to the constitution:

Before adjudicating on the non-conformity of an act of EU secondary legislation to the Constitution, one should make sure as to the content of the norms of EU secondary legislation which are subject to review. This may be achieved by referring questions to the Court of Justice for a preliminary ruling, pursuant to Article 267 of the TFEU, as to the interpretation or validity of provisions that raise doubts⁴⁷.

The Italian constitutional court has not theorized such an obligation, but its practice clearly goes in this direction⁴⁸. In *Taricco*, the Court of Justice had already expressed its view. However, instead of directly declaring the obligations arising from that judgment inapplicable, the Italian constitutional court decided to raise a preliminary reference, a sort of appeal to the *Taricco* judgment, which ultimately led the Court of Justice to overrule its previous decision, as ‘suggested’ by its Italian counterpart⁴⁹.

The obligation to refer a matter to the Court of Justice ultimately rests on the assumption that there is a common ground for dialogue between the national and the EU level: This leads to a fourth and final point of convergence.

6. The common ground of fundamental values, and constitutional identity as the intersection point between the constitutional and the EU legal orders

Many constitutional courts have stressed the identity of the values that underpin both the domestic constitutions and the EU Treaties, so that it is hardly conceivable that a breach of a Member

⁴⁷ Judgment *Supronowicz*, cit. at 9, para. 2.6.

⁴⁸ As for Belgium, see P. Gérard & W. Verrijdt, *Belgian Constitutional Court Adopts National Identity Discourse*, in 13 *EuConst* 1 (2017), 197. Commenting on judgment 62/2016, cit. at 7, the two authors stress that “it is very unlikely that [the *Cour constitutionnelle*] would decide upon an ultra vires act or an infringement of Belgian national identity without engaging in prior preliminary dialogue with the Luxembourg Court”, although such an obligation is not spelled out in judgment 62/2016.

⁴⁹ See Court of Justice, Grand Chamber, judgment of 5 December 2017, C-42/17, *M.A.S. and M.B.*

State's most fundamental constitutional principles does not simultaneously violate the fundamental values enshrined in the Treaties as well.

The Spanish constitutional court's declaration on the Treaty establishing a Constitution for Europe made this point most clearly:

The competences whose exercise is transferred to the European Union could not, without a breakdown of the Treaty itself, act as a foundation for the production of Community regulations whose content was contrary to the values, principles or fundamental rights of our Constitution⁵⁰.

Art. 4, para. 2 TEU is particularly relevant from this perspective, because as a result of this provision, the concept of constitutional identity enjoys protection not only under domestic constitutional law but also under EU law. If the "national identities, inherent in their fundamental structures, political and constitutional", which the EU is bound to respect under Art. 4, para. 2 TEU, are tantamount to the "constitutional identities" that constitutional courts aim to protect, it follows that a breach of a Member State's constitutional identity by the EU is at the same time a breach of Art. 4, para. 2 of the Treaty.

In that sense, Art. 4, para. 2 TEU can be seen as a provision that provides legitimacy to the self-attributed power of constitutional courts to review EU law and potentially deny its application⁵¹. Some constitutional courts have openly embraced this perspective. In particular, the Spanish constitutional court established a direct link between the limits to the primacy of EU law previously set by constitutional courts on the one hand and the protection of national identities enshrined in the Treaty on the other hand:

The limits referred to by the reservations of constitutional courts now appear proclaimed unmistakably by the Treaty under examination, which

⁵⁰ DTC 1/2004, cit. at 5, para. 3. Similarly see Trybunał Konstytucyjny, judgment *Lisbon Treaty*, cit. at 13, para. 2.2; Ústavní soud, judgment *Lisbon I*, cit. at 9, para. 209.

⁵¹ A. von Bogdandy & S. Schill, *Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty*, cit. at 42, 1419.

has adapted its provisions to the requirements of the constitutions of the Member States⁵².

Similarly, the Polish constitutional court considers the notion of national identity “an equivalent of the concept of constitutional identity in the primary EU law”⁵³. In this way, the power to review EU law in the light of the most fundamental constitutional principles ceases to be an act of rebellion against the Court of Justice and instead becomes an obligation flowing from the Treaty.

Yet the identity of the two concepts, while giving legitimacy to the notion of “constitutional identity” under EU law, also entails a risk for constitutional courts. Indeed, if the Treaty itself protects the Member States’ constitutional identity, then there is no need any more for the same protection by constitutional courts: Through Art. 4, para. 2 TEU, the Court of Justice has the opportunity to take upon itself alone the power to protect constitutional identity. Since constitutional identities are protected by the Treaty, one could argue that it is the Court of Justice, and no longer the constitutional courts, which must act as the guardian of constitutional identity⁵⁴.

This concern about a potential shift of the protection of constitutional identity from the national constitutional courts to the Court of Justice presumably explains the sophisticated doctrine that the Italian constitutional court proposed in its preliminary reference in the case *Taricco*. In this view, while Art. 4, para. 2 TEU protects the Member States’ constitutional identities, the Court of Justice, which is already entrusted with the task of guaranteeing the uniform interpretation of EU law, cannot be expected to assess in detail whether EU law is compatible with each Member State’s constitutional identity:

⁵² DTC 1/2004, cit. at 5, para. 3.

⁵³ Trybunał Konstytucyjny, judgment *Lisbon Treaty*, cit. at 13, para. 2.1.

⁵⁴ See M. Claes, *National Identity: Trump Card or Up for Negotiations?*, in A. Saiz Arnaiz & C. Alcoberro Llivina (eds.), *National Constitutional Identity and European Integration* (2013), 109 et seq., who argues that “Article 4(2) does not represent a confirmation of the *controlimiti* case law of the national constitutional courts”, because “it is for the EU and its CJEU to decide whether the claim of the Member State based on the national constitution should be sanctioned as a matter of EU law” (122). In the author’s view, however, the operationalization of Art. 4, para. 2 TEU, requires the Court of Justice to engage in negotiations with national actors, including national courts (123 and 134 et seq.).

It is therefore reasonable to expect that, in cases in which such an assessment is not immediately apparent, the European court will establish the meaning of EU law, whilst leaving to the national authorities the ultimate assessment concerning compliance with the supreme principles of the national order⁵⁵.

Needless to say, in the Italian legal order, this assessment belongs exclusively to the constitutional court. Thus, in the view of the *Corte costituzionale*, the Treaty obligation to protect the constitutional identity of the Member States does not fall on the Court of Justice but is implicitly delegated to the national authorities, notably to the national constitutional courts. This rather creative doctrine makes it possible to enjoy the legitimacy bestowed on the identity review by Art. 4, para. 2 TEU, while keeping this review in the hands of the constitutional courts.

A similar concern probably underpins the sharp distinction that the *Bundesverfassungsgericht* made in its preliminary reference in the *OMT* case between the constitutional identity enshrined in the Treaty and the one enshrined in the German constitution:

The identity review performed by the Federal Constitutional Court is fundamentally different from the review under Art 4 sec. 2 sentence 1 TEU by the Court of Justice of the European Union. Art. 4 sec. 2 sentence 1 TEU obliges the institutions of the European Union to respect national identities. This is based on a concept of national identity which does not correspond to the concept of constitutional identity within the meaning of Art. 79 sec. 3 GG, but reaches far beyond [...]⁵⁶.

Keeping the two notions – and thus the two reviews – strictly separate ensures that the identity review performed by the constitutional court and the corresponding review by the Court of Justice remain independent. No matter whether the Court of Justice finds that EU law does not violate the constitutional identity of Germany: The *Bundesverfassungsgericht* can nevertheless reach the opposite result and declare a provision of EU law inapplicable in Germany, for the two forms of review are distinct and independent

⁵⁵ Order *Taricco*, cit. at 27, para. 6.

⁵⁶ BVerfG, order *Gauweiler-OMT*, cit. at 18, para. 29.

of one another. However, in its final decision on the *OMT*, after the judgment of the Court of Justice, the German constitutional court softened its position and seemed to consider coincident the two notions coincident. Indeed, it stated that the identity review performed by the German constitutional court “does not violate the principle of sincere cooperation within the meaning of Art. 4, sec. 3 TEU. On the contrary, Art. 4 sec. 2 sentence 1 TEU essentially provides for identity review [...]”.⁵⁷

Be that as it may, the overlapping between EU and constitutional values is indisputable. This allows constitutional courts to present their refusal to comply with EU law not as a rebellion but as an act of true fidelity to EU law, allegedly betrayed by the Court of Justice, which did not respect the Member States’ constitutional identity. The Italian constitutional court made extensive use of this possibility in its preliminary reference in *Taricco*, in which it tried – and finally succeeded – to convince the Court of Justice that its understanding of EU law is more faithful to EU law than the Court of Justice’s own perception.

7. Limiting the counter-limits: Towards a cooperative and loyal exercise of the constitutional review of EU law?

The analysis in this paper has demonstrated several points of convergence in the jurisprudence of the constitutional courts of a significant number of Member States. From these similarities, one can derive a set of recommendations for a cooperative exercise of constitutional review of EU law. If this power is reserved to the constitutional court only, if it is exercised with the utmost self-restraint as an *ultima ratio*, if it is not utilized without having first addressed the Court of Justice through a preliminary reference, and if it is grounded on the alleged violation of the values enshrined in the TEU and the Charter of fundamental rights of the EU, then it is highly unlikely that it will seriously jeopardize the primacy and the uniform application of EU law. Instead of posing a threat to the autonomy of the EU legal order, it is likely to prove that a legal space where common values are cherished while national peculiarities are respected can be better built in cooperation

⁵⁷ BVerfG, judgment of the second senate of 21 June 2016 - 2 BvR 2728/13 (*Gauweiler-OMT*), para. 140.

between the national constitutional courts and the Court of Justice, rather than by the latter alone.

Yet all this assumes that constitutional courts actually share a set of common values and are genuinely willing to cooperate in a common endeavour with the Court of Justice. Lacking this precondition, the power of freeing a Member State from the obligation to comply with selected provisions of EU law opens a most disturbing alternative scenario. The judgment of the Hungarian constitutional court of December 2016⁵⁸, in which, after praising judicial dialogue and the inviolability of human rights, the court reached the absurd conclusion that human dignity prevents Hungary from cooperating with the other EU Member States in fulfilling the right to asylum of migrants, clearly shows how dark the dark side of judicial pluralism can be.

But constitutional courts' potential abuses and distortions of a certain power should not lead to the absolute rejection of that power. A clearly delimited power to review compliance of the acts of the EU institutions with the most fundamental principles of domestic constitutional law – as this paper advocates – can be beneficial to the overall protection of fundamental rights and the rule of law in the EU and can help to secure the pluralistic nature of the EU legal order by counterbalancing the power of the Court of Justice. It would be unwise to renounce this balance in order to prevent potential abuses by courts unwilling to cooperate in a dialogue based on common values. The judgment of the Hungarian constitutional court mentioned previously does not seem to be an isolated extreme of a particular constitutional court. Rather, it is Hungary's last attempt to opt out of the EU response to the migrant crisis and to avoid the resulting duties. This poses a problem of general compliance with EU law – and ultimately with the fundamental values of the EU –, which should be addressed as such. Put differently, if a Member State generally rejects compliance with EU law and departs from the values on which the EU rests, its constitutional court, if lacking independence from the ruling majority, will likely have to use its powers to back the government's challenges to the EU. But this is not a good reason to prevent the constitutional courts of the Member States that are loyal to the values of Art. 2 TEU from exercising a power that, if duly

⁵⁸ Decision *Refugee relocation policy*, cit. at 8.

circumscribed, enhances the guarantees of fundamental rights and the rule of law in the EU⁵⁹.

⁵⁹ In this respect, commenting on this decision, G. Halmai concludes: “If the EU will still be unable to protect its joint values towards member states, such as Hungary (and lately also Poland), which do not want to comply with them, the case of Hungary (and Poland) will have a negative impact on countries with genuine and legitimate national constitutional identity claims, and on constitutional pluralism in the EU” (*The Hungarian Constitutional Court and Constitutional Identity*, in *Verfassungsblog*, 10 January 2017, available at <https://goo.gl/2RMExo>, accessed May 8, 2018).