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Besselink, L.F.M.

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# Constitutional conflict between EU and national law and its resolution: The rule of law, ultra vires review, constitutional identity review and primacy

LEONARD F.M. BESSELINK

At the international conference on the occasion of the 35th anniversary of the *Tribunal constitucional* of Portugal in 2018, I had the honour to present a typology of constitutional conflict occurring between national and EU law under the conditions of the post-sovereign inter-constitutional order in which constitutional actors, not least the national constitutional courts and the Court of Justice of the European Union, find themselves.[1] In that typology, I attach particular importance to the various effects which the outcome of the conflict between two constitutional norms has, when we look at the respective best-known judgments. Firstly, the effect can be ascertained in terms of which of the two prevailed: the national or the European norm. Next the effects were distinguished as to their pan-EU or purely internal (national or EU institutional) effects, whilst I also gave an indication of the motives for these outcomes in terms of purely formal hierarchy versus substantively constitutionalist values – in other words, in terms of *thin* or *thick rule of law* values.[2]

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[*] Emeritus Professor of Constitutional Law at the University of Amsterdam; parttime co-teaching professor of (European) Constitutional Law at LUISS, Rome. Some of this paper connects some of the author's recent work on the rule of law to questions covered in the paper mentioned in the next footnote. I have also profited from receiving comments on the presentation of a part of this paper in a workshop on the EU after Weiss, organized by Nik de Boer and Matteo Bonnelli, at the Ius Commune Conference 2020.

[1] See L.F.M. Besselink, "Being A Constitutional Court In A Post-Sovereign Inter-Constitutional Order." In: *35.o Aniversário Tribunal Constitucional. Conferência Internacional*. Lisboa – Centro Cultural de Belém. 24 e 25 de maio, 2018. [Commemorative Conference of the 35th Anniversary of the Constitutional Court, Lisbon 2018], pp. 95-107, Lisbon 2022. https://www.tribunalconstitucional.pt/tc/content/files/tc_ebook_35anos/94/.

[2] On the distinction between 'thin' and 'thick' rule of law, *pro multis* BZ Tamanaha, *On the Rule of Law: History, Politics, Theory,*: Cambridge University Press 2004, Chapter 7; Lord Tom Bingham, *The Rule of Law*, (Penguin, 2011), pp. 61 ff..

| | EU norm prevails ↔ | National constitutional norm prevails |
|---|---|---|
| EU wide effect ↕ | ECJ<br>Thin rule of law (hierarchical primacy)<br>or<br>Thick rule of law (incl. fundamental rights, etc) | National Court<br>Thin rule of law (hierarchical primacy)<br>or<br>Thick rule of law (fundamental rights, separation powers etc ) |
| Localized effect | ECJ (intra-institutional)<br>National Court<br>(autonomous extension of EU law outside scope of EU law) | ECJ (national identity exception, thick rule of law)<br>National Court (either thin or thick rule of law) |

We found that not all conflicts and the way they ended, had consequences that had an EU wide impact, and that mostly – but not exclusively – the approach by the European Court of Justice was based on thin rule of law arguments that mainly assert hierarchical primacy of EU law, whereas most national courts' judgments – but not all – were based on more substantive rule of law arguments that take on board also principles like fundamental rights protection and democracy.

Since 2018 various developments took place that are relevant to the topic. In this essay I discuss developments regarding *ultra vires* review of EU law, and, more pertinent to the Portuguese constitutional case law, developments regarding constitutional identity review.

### Ultra vires review : *PSPP*

One major development since 2018 is the handing down of the judgment of 5 May 2020 of the *Bundesverfassungsgericht* concerning the European Central Bank's so-called secondary markets Public Sector Asset Purchase Programme (PSPP), sometimes also referred to as the *Weiss* judgment.[1] In this case, in which the *Bundesverfassungsgericht* had referred the major questions concerning the legal basis for the ECB's programme and the compatibility with Articles 119 in conjunction with 127, and 123 TFEU to the Court of Justice. As the Court of Jus-

[1] BVerfG, Judgment of the Second Senate of 5 May 2020, 2 BvR 859/15, paras. 1-237.

tice found no infringement of these provisions and held that the ECB decisions did not interfere with the division of powers between EU and member states, the PSPP programme and decisions based thereon were considered valid. As we all know the *Bundesverfassungsgericht* disagreed in its judgment of 2020 and found the ECJ's judgment to defy a rationally transparent understanding of the principle of proportionality between aims and instruments in the context of the division of powers between the financial and monetary policy mandate of the ECB, and the economic policy powers retained by the member states. It consequently found the powers as understood by the Court of Justice and the ECB, as well as the German authorities cooperating in all this, to be *ultra vires*.

A battle – very civilized of course – between the presidents of the Court of Justice and the *Bundesverfassungsgericht* ensued in the form of press releases and a whole series of press interviews in which Peter Huber, the *juge rapporteur* of the case at the *Bundesverfassungsgericht,* joined.[2] Less public attention was drawn to a further judgment of the *Bundesverfassungsgericht* in this very same case, on a request for a court order to comply with the judgment, a *Vollstreckungsanordnungsantrag*.[3] This second judgment concerned an application for an order of execution of the first *PSPP* judgment, which was refused. The *BVerfG* held that any declaration by the Court that the measures taken by the Federal Government, the Bundestag and the ECB were not sufficient to restore conformity with the Constitution, thus declaring that the ultra vires act identified in the judgment of 5 May 2020 persisted, would go beyond the matter in dispute decided by the judgment of 5 May 2020; an order of execution, *Volstreckungsanordnung*, must remain strictly within the limits of the case as adjudicated, and may not concern an assessment of facts or findings that have occurred after the judgment was handed down.[4]

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[2] On the part of the Court of Justice, Press release following the judgment of the German Constitutional Court of 5 May 2020, PRESS RELEASE No 58/20, Luxembourg, 8 May 2020; interview with the President of the BVerfG, "Der scheidende Präsident des Bundesverfassungsgerichts zieht Bilanz. Ein Gespräch mit Andreas Voßkuhle über bedrohte Richter, die Gefahren für die Freiheit in der Corona-Krise und Fehler der liberalen Eliten" in *Die Zeit* 13 May 2020; interview with justice Peter Huber, „ ‚Das Urteil war zwingend'", *Frankfurter Allgemeine Zeitung*, 13 May 2020, p. 2. Several other interviews were conducted with the President of the Court of Justice in national newspapers touching on the PSPP judgment by the *BVerfG*.

[3] BVerfG, Order of the Second Senate of 29 April 2021 – 2 BvR 1651/15 –, paras. 1-111, http://www.bverfg.de/e/rs20210429_2bvr165115en.html.

[4] BVerfG, Order 29 April 2021, para. 88.

Analogous to earlier case law on execution orders in the context of a constitutional judgment requiring legislation, the *Bundesverfassungsgericht* would allow an exception to this prohibition to go outside the case as adjudicated on the merits. This exception is only recognised if the constitutional organs involved, despite an obligation to take action imposed on them by the decision on the merits, either fails to take *any action at all* or only takes measures that so *manifestly fall short* of satisfying the decision on the merits that they are essentially equivalent to complete inaction.[5]

Interestingly, this provided the *BVerG* with a tool indirectly to judge within the context of an execution order, that basically both the *Bundestag* and *Bundesregierung* as well as the ECB had taken sufficient steps. In concluding that the applicants failed to establish, or that it is otherwise ascertainable that these measures are manifestly inadequate or essentially equivalent to complete inaction, the Court was able to say such things as the following:

> 'Similar to a violation of (other) duties of protection, as derived for example from fundamental rights, a violation of the 'responsibility with regard to European integration', as derived inter alia from Art. 38 (1) first sentence GG, can only be found if no action is taken at all, if the legal and other measures taken are evidently unsuitable or completely inadequate, or if they fall significantly short of achieving the aim of the protection [...]'[6]

It engaged, furthermore, in an in-depth description of all the steps and measures taken by the *Bundestag* and *Bundesregierung*, in particular in relation to the proportionality review by the ECB Governing Council of the PSPP programme in June 2020. It found that all this clearly satisfied the criteria of the marginal review of complying with the judgment in the context of the requested execution order; a marginal review which is explicitly based on the constitutional principle of the separation of powers.[7]

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[5] BVerfG, Order 29 April 2021, para. 79-80.

[6] BVerfG, Order 29 April 2021, para. 94.

[7] BVerfG, Order 29 April 2021, para. 80: 'The power to issue an order of execution is subject to limitations deriving from the principle of the separation of powers (Art. 20(2) second sentence GG) and from the fact that the law of procedure in constitutional court cases is necessarily tied to the subject matter in dispute in the proceedings. This gives rise to requirements that, as general principles, apply in all constitutional review proceedings in relation to all constitutional organs and all types of acts taken by them.'

**The place of *PSPP* in the typology of constitutional conflict**

If we place the judgment in the *PSPP* case within the parameters distinguished in the typology presented at the international conference on the occasion of the Portuguese *Tribunal Constitucional*'s 35th anniversary, we can make the following observations.

The *Bundesverfassungsgericht* indisputably aimed at making the German national understanding of proportionality, and its autonomous finding that the Court of Justice's proportionality assessment was inadequate, prevail over the EU norms. However, the answer to the question whether the effects of that national judgement were pan-European or pure ly internal (which I distinguish in terms of effects internal to the EU institutions and bodies, and effects that are internal to a member state only) is less obvious. We can say that precisely the judgment on the execution order limits the effects of the earlier judgment on the merits considerably. There was a near outrage in the EU institutions, among EU law scholars and a variety of constitutional scholars in several member states over the judgment on the merits. This near outrage can explain that 'civilized war' being waged in the press between the President of the Court of Justice and the president and a member of the *Bundesverfassungsgericht* . But if we look at the judgment on the execution order, it all seemed a bit like a storm in teacup.[8]

And let's face it: what happened is that the ECB Governing Board did in fact engage in a review of the proportionality of its PSPP programme in terms of the economic effects, economic policy being a member state prerogative. And accountability – even partly in the form of the confidential submission of documents to the national government and parliament – on the part of such extremely powerful independent bodies as the ECB, which takes far-reaching decisions on practices with huge consequences for member states and the European citizens, can hardly be considered harmful from the perspective of the principles of the democratic state under the rule of law.

It has been thought that independent banks, as other independent agencies, may engage in accountability through adhering to practices of transparency towards the general public and to political institutions, but that it is hard to sanction that accountability. But this is precisely what the PSPP judgment by the Karlsruhe court shows to be somewhat misguided in the inter-constitu-

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[8] This is not to ignore the possibility of a less marginal scrutiny of the measures taken after the judgment on the merits in a separate and new application to the *BVerfG*. However, precisely the reference to the separation of powers in the judgment on the *Volstreckungsanordnungsantrag* would presumably also apply in that hypothetical case, and may very well leave us with a conclusion that does not go in a different direction than that in the this judgment on execution of 29 April 2021.

tional context of the composite European constitutional order: it is precisely this national court that proclaimed the sanction of German authorities having to end cooperation within the ECB and EU system of governance.

Was this German approach a manifestation of *thin* or of *thick* rule of law conceptions?

If we look beyond the effects of the judgment just mentioned, the enhanced transparency is in the service of a thicker notion of the rule of law, notably democracy. Also when we look at the language of the judgment on the merits, the prime principle involved was democracy. In as much as thinner understandings of the rule of law are often distinguished from thick ones on the point of excluding democracy (in a thin understanding democracy is not part of the rule of law), the judgment can be viewed as inspired by a thicker conception of the rule of law. The judgment on the execution order confirms a thicker understanding as well in as much as it invokes the separation of powers principle as a basis for its marginal review of what happened after the handing down of the judgment on the merits. But this is not the whole story of *ultra vires* review.

### The problem of *ultra vires* review and its motives

Although the *Bundesverfassungsgericht* grounds *ultra vires* review on the constitutional principle of democracy, an essential element in European understandings of constitutionalism (the rule of law in a *thick* understanding), this type of review concerns protection of national democracy against encroachments of the EU into spheres of autonomy of member states, and is in general inspired by concerns of protecting the powers of a member state over fears of 'competence creep' and shifts in *Kompetenz-Kompetenz*. In other words, it is a sovereignty concern, as is also clear in for instance the Danish *Højsteret*'s approach in its *Maastricht* judgment[9], although in its *Ajos* judgment it was in a somewhat hidden way interwoven with the constitutional principle that courts cannot review acts of parliament against unwritten general principles, which is closely linked to one of the defining treats of the Nordic constitutional tradition.[10]

So from the perspective of the rule of law, two dimensions of *ultra vires* review are prominent.

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[9] *Højsteret* 6 April 1998, I 361/1997, para 9.2 ff..

[10] *Højsteret,* 6 December 2016, 15/2014; on the principle of non-review against unwritten general principles, see H Krunke, Impact of the EU/EEA on the Nordic Constitutional Systems. In: *The Nordic Constitutions: a Comparative and Contextual Study,* H Krunke and B Thorarensen (red.), Hart 2018, p. 194; Eivind Smith, Judicial Review of Legislation, in: Krunke and Thorarensen, ibid, 107-132.

Firstly there is the purely formal aspect of the hierarchy of norms (or actually legal orders) implicit in the protection of sovereignty. Sovereignty is a formal concept in as much as there is no inherent demarcation of the substantive area of public authority over which sovereignty exists; sovereign authority can be dispensed with as regards particular powers, as is the very mechanism that has made European integration possible. In this respect it is associated with *thin* notions of the rule of law, I would say. From this perspective, a problem of *ultra vires* review lies in its – at least potentially and conceptually – boundlessness in terms of the substantive scope for this review. The only way to restrict it is through procedural contrivances such as the building in of a threshold for bringing ultra vires complaints, as was done by the *BVerfG* in *Honeywell*.[11] Another we find in the marginal review of compliance as evident in its *PSPP execution order* judgment.

Secondly, there is the interwovenness of ultra vires review with elements associated with a thicker understanding of the rule of law, notably democracy and the separation of powers. Both these concepts are part of the *BVerfG*'s understanding of the Federal Republic's *constitutional identity*. Thus *ultra vires* and *constitutional identity* review could seem to be assimilated into one general form of constitutional review of EU law.

Nevertheless, ultra vires review and identity review do not substantively fully coincide.[12] Conceptually the matter is more fuzzy. Logically an infringement of a member state's constitutional identity by Union law would seem to imply an *ultra vires* act; but not every *ultra vires* act would seem to be necessarily an infringement of a substantive element of constitutional identity. It is unclear to what extent this applies to the German *PSPP*-judgment.

There has been some speculation that the avoidance of the language of identity review in the *PSPP* judgment was to prevent the Polish Constitutional Tribunal and its Hungarian sister institution from abusing this as a precedent in its own case law. The Polish judgment in case *K3/21* of 7 October 2021,[13] although

[11] BVerfG Order of 6 July 2010, 2 BvR 2661/06.

[12] This may be why in Austria *ultra vires* review is considered to be entirely distinct from review against constitutional provisions. For a presentation and discussion of further varieties as per January 2014, see L. Besselink, M. Claes, S. Imamović, J.H. Reestman, *National Constitutional Avenues for Further EU Integration*, (Study European Parliament, Constitutional Affairs Committee, PE 493.046 EN, Brussels March 2014), http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493046/IPOL-JURI_ET%282014%29493046_EN.pdf, pp. 22-27.

[13] At the time of this writing – June 2022 – the Polish judgment has still not been published. Except fort he dictum, there is a report of the oral statement made at the presentation of the

adorned with references to what can be considered constitutional principles that are part of Polish constitutional identity as understood by the Tribunal, emphasizes the *ultra vires* nature of its problem with EU law in this judgment.

Among many other important differences, the result of the two courts' judgments was quite different. We have to conclude that the *PSPP* judgment was resolved by the German authorities involved taking up their duties as specified in the judgment on the merits, with the cooperation of the ECB Governing Board. The constitutional conflict of the Polish Constitutional Tribunal with the Union has been far from resolved.

**Use and Abuse of constitutional identity: An abstract norm on unity and diversity**

A major problem concerning constitutional identity review as a 'counter-limit' to the primacy and direct effect of EU law, is the scope it leaves for abuse. The matter pivots around the legal question as to the amount of constitutional diversity that EU law allows for, and the amount of constitutional unity EU law requires.[14] At least in abstract terms, the problem can be resolved by taking together the norms of Articles 2, on the constitutional principles common to the EU and the member states, and 4(2), on national identity, of the Treaty on European Union, and to construe them in each other's light.

Two possible perspectives can be taken on these provisions, the EU law and the member state perspective. These two perspectives do not, at the present state of European integration, fully coincide in practice, and leave scope for persistent constitutional conflict. And yet it is not meaningless to take them together and construct them in each other's light.

From the EU perspective on the lawfulness of an appeal to 'constitutional identity' one might say that, normatively, *that* amount of constitutional identity must be respected that does not infringe the 'homogeneity' of the European constitutional order. An appeal to 'diversity' as a matter of constitutional iden-

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dictum, which is also available in English at https://trybunal.gov.pl/en/news/press-releases/after-the-hearing/art/11664-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej. A reportedly more precise translation, which includes part of the dissenting opinion by judge Piotr Pszczółkowski, at https://archiwumosiatynskiego.pl/images/2021/10/Polish-CT-decision-of-7-Oct-motifs_PL.pdf,.

[14] For an early treatment, see Besselink, "Does EU Law Recognize Legal Limits to Integration? Accommodating diversity and its limits" in Giegerich, Gstrein and Zeitzmann (eds), *The EU Between 'an Ever Closer Union' and Inalienable Policy Domains of Member States* (Nomos Verlag 2014), pp. 59-78, http://dx.doi.org/10.2139/ssrn.2343751.

tity which infringes the common constitutional basis of the EU would be unlawful (Art. 2 TEU).

From the member state perspective, the counterpart of this is the issue of the legitimacy and lawfulness of the legal homogeneity that the Union requires from member states' legal orders. At least arguably, one can say that *that* amount of homogeneity is lawful that does not infringe the duty of respect for the national identity inherent in the constitutional structure of the member states; consequently, that amount of homogeneity that infringes this duty is unlawful. This is a possible interpretation of the problem in terms of Art. 4(2) TEU. In most constitutional systems, however, this would also be a type of argumentation that explains how national constitutional law deals with Union law that appears incompatible with national constitutional law in terms of national law (so outside the terms of Art. 4(2) TEU).[15]

What do these abstract norms on unity and diversity imply?

The first norm – constitutional identity can only be respected if it does not infringe the fundamental constitutional values common to the Union and the member states – means that in the pathological cases which have now arisen in, amongst others, Hungary and Poland, recourse to national identity is illegitimate, because it clearly infringes the fundamental constitutional values on which the Union and its member states are based.

The second norm requires the Union to accommodate at least legitimate constitutional diversity. 'Legitimate constitutional diversity' means diversity that is based on and respects the founding values that the Union and the member states hold in common.

This abstract normative approach leaves scope for constitutional conflict in practice in concrete cases. This has not prevented an important development in the case law of constitutional courts engaging in constitutional identity review of EU law – an approach which can resolve much of the problem. This development has occurred quite conspicuously in the case law of the French *Conseil constitutionnel*, in the trail of the *Conseil d'État*. This French approach is substantively also the approach used in the Portuguese *Tribunal constitucional*'s landmark

[15] This applies also in member states where constitutional identity is not exclusively understood in terms of where national constitutional rules and principles differ in particular points from both EU law and the common constitutional traditions, but also to rules and principles that are common to the EU law and national constitution law but are nevertheless identity conferring in as much as the relevant constitutional fundamentals cannot constitutionally be sacrificed. More on this distinction below.

judgment of July 2020.[16] This approach I coin 'constitutional complementarity', a complementarity which confirms the composite nature of the European constitutional order, so nicely captured in the Portuguese term *interconstitucionalidade*.[17] I describe this development in the next section of this contribution.

**Constitutional identity review: towards constitutional complementarity in resolving constitutional conflict?**

In some member states, in case of conflicts with EU law, all constitutional norms of the national constitution are considered to have precedence (Bulgaria, Malta and Poland), whereas in others this precedence of national norms only exists with regard to core constitutional norms and institutions. In the latter group of countries – which includes Italy,[18] Germany[19], France[20], and Portugal[21] – precedence exists only as regards the 'constitutional identity' of that member state.[22]

In the doctrine it has been pointed out that one can discern two approaches as regards the scope of constitutional identity.[23] In the German case law, the scope of constitutional identity is not limited to where Germany's identity conferring rules might be *different* from the common constitutional traditions, but is inspired by its 'eternity clause' and therefore comprises also values we find expressed in Article 2 TEU, the common constitutional foundations. Germany's constitutional identity may be violated when a core principle of the German

[16] Acórdão N.º 422/2020, https://www.tribunalconstitucional.pt/tc/acordaos/20200244.html, Engels https://www.tribunalconstitucional.pt/tc/en/acordaos/20200422.html.

[17] A Composite European Constitution/ Een samengestelde Europese constitutie. [Inaugural Address Jean Monnet Chair European Constitutional Law, University of Utrecht, 10 January 2007.] Groningen, Europa Law Publishing, 2007, 22 + 22 pp. ISBN : 9789076871912; ISBN : 9076871914; OCLC : 191875187, https://pure.uva.nl/ws/files/16598551/oratie_UU_Scan_Besselink_Leonard_15_18_05_09_2017.pdf.

[18] Corte costituzionale, Sentenza 183/1973, 18 December 1973, *Frontini*, para. 9 in fine: only in case the *principî supremi* of the Italian Constitution are at stake there is room for constitutional review.

[19] See amongst others the well-known *Maastricht*- en *Lissabon Urteile* of the Bundesverfassungsgericht.

[20] At least as regards the case law of the *Conseil constitutionnel*, but probably not that of the *Conseil d'Etat*.

[21] Art. 8(4) of the Portuguese Constitution, as elaborated by the *Tribunal Constitucional*, in Acórdão N.º 244/2020 20 July 2020.

[22] It logically holds to say that in the countries where *no* national constitutional norm can be set aside in case of incompatibility with Union law, all constitutional norms are considered to make up for the constitution's identity.

[23] Monica Claes and Jan-Herman Reestman, "The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case", in *German Law Journal* Vol. 16 No. 04, 917-970.

Constitution is not sufficiently protected in the EU legal order, irrespective of whether or not the principle exists at the EU level (e.g. *nullum crimen sine culpa*, or data protection). Whenever a relevant provision of Union law, as interpreted by the Court of Justice, is alleged to infringe any element of German constitutional identity in a manner that passes the threshold of seriousness in order to be admissible, the *Bundesverfassungsgericht* will adjudicate that claim.

The Italian approach has been likened to the German one, in as much as the *Corte costituzionale* will review any Union law that allegedly infringes on the 'supreme principles of the Constitution'. In the 2018 follow-up decision in *MAS*, which concerned the particularly Italian understanding principle of legality in criminal matters (i.e. that the statute of limitations touches on the prohibition of substantive retroactive effect and the *lex certa* principle) the *Corte* reiterates, as it had done in the order for referral, that 'it alone is entitled to ascertain whether EU law contrasts with the supreme principles of the constitutional system and, in particular, with the inalienable rights of the person.'[24] In this *MAS* case, the Court of Justice had for all intents and purposes reversed crucial aspects of its previous judgment in *Taricco*, thus allowing for the exceptional Italian understanding of legality.[25] This in turn allowed the *Corte costituzionale* to conclude that allowing for the disapplication of the rule and interpretation formulated in *Taricco*, as a matter of EU law as interpreted by the Court of Justice, has created space for accommodation of the Italian Constitution as interpreted by the *Corte costituzionale* on the point of legality in criminal law.

The approach which is typical of the French *Conseil d'Etat* and *Conseil constitutionnel*, but arguably inspired by the German *Solange* approach combined with the similar aspect of the European Court of Human Rights' *Bosphorus* doctrine,[26] is that these courts will not adjudicate the compatibility of Union law as inter-

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[24] Sentenza 115/2018 (ECLI:IT:COST:2018:115), para. 8.

[25] Case C-42/17, 5 December 2017, *M.A.S. and M.B.*; case C-105/14, 8 September 2015, *Taricco*.

[26] This appears from the extra-judicial speeches of the then vice-president of the *Conseil d'État*, Jean-Marc Sauvé, such as Propos introductifs de Jean-Marc Sauvé, FIDE 2012, Tallinn https://www.conseil-etat.fr/actualites/discours-et-interventions/la-protection-des-droits-fondamentaux-au-niveau-de-l-union-europeenne-et-des-etats-membres#1; A l'ère du pluralisme juridique, 31 mai 2014, Intervention de Jean-Marc Sauvé, FIDE 2014 Kopenhagen, https://www.conseil-etat.fr/actualites/discours-et-interventions/a-l-ere-du-pluralisme-juridique; Intervention à la Faculté de droit de l'Université Humboldt de Berlin le 28 octobre 2015, https://www.conseil-etat.fr/actualites/discours-et-interventions/presentation-a-berlin-d-un-ouvrage-de-droit-compare-franco-allemand; Intervention de Jean-Marc Sauvé le 25 avril 2017 au déjeuner du Cercle des constitutionnalistes, https://www.conseil-etat.fr/actualites/discours-et-interventions/le-conseil-d-etat-et-la-constitution.

preted by the Court of Justice, with a norm protected by the French Constitution as such (*Conseil d'Etat*) or by a constitutional norm belonging to the French constitutional identity (*Conseil constitutionnel* ), *if that norm or its equivalent is also protected in EU law*. In the recent case law, this idea of 'equivalent' protection is scrutinized more carefully by the *Conseil d'Etat* than the *Conseil constitutionnel*. The *Conseil constitutionnel*, in its judgment of 15 October 2021, reasserts the classic view that in the hierarchy of norms the Constitution is supreme, and adopts the criterion of the *Conseil d'Etat* that it will only review the French rules and principles belonging to its constitutional identity that do not have equivalent protection in Union law, and found that the French constitutional principle that the exercise of public force cannot be privatized is not protected in Union law. It found without further ado that as a consequence of this criterion the appeal to the right to personal liberty, the presumption of innocence and the *égalité devant les charges publiques* had to be dismissed. The *Conseil d'Etat*, to the contrary, scrutinized the case law of the Court of Justice on the applicability and interpretation of the Working Time Directive to the armed forces – the case concerned working times of the gendarmerie – involved in order to conclude that the principle of the government's free disposition of armed forces at all times and places was not protected in an equivalent manner by Union law.

This French approach is essentially also followed by the Portuguese *Tribunal Constitucional*, in its landmark judgment of 15 July 2020 on the alleged infringement of the equal protection clause of Article 13 of the Portuguese Constitution.[27]

It reiterated that it is exclusively competent to adjudicate whether Union law complies with the counter-limit of the fundamental principles of the democratic state under the rule of law, as contained in Article 8(4) of the Portuguese Constitution. Significantly, it decided that it will *only* do so in the case of fundamental principles which, within the scope of EU law itself as interpreted by the Court of Justice, 'does not enjoy a parametric value that is materially equivalent' to that of the Constitution. So only if the standard of protection under EU law, as interpreted by the Court of Justice, falls short – either by the absence of an equivalent standard, or in terms of the level of protection afforded to it – of that under the Portuguese Constitution as interpreted by the *Tribunal Constitucional,* will the *Tribunal* entertain a review of the relevant EU law against the provisions of the Portuguese Constitution that concern the principles of the democratic state under the rule of law (in the sense of Article 8(4) Constitution).

[27] See footnote 15 above.

It is true that the 'German' and 'Franco-Portuguese' approaches have distinct features and result in different *judicial techniques*. I would submit that the differences are less in terms of the *substantive meaning and scope* of constitutional identity under these two approaches. The 'French' approach essentially acknowledges that there is a body of substantively coextensive constitutional principles and norms contained in both Union and French law. The consequence is, however, mainly procedural in as much as it leads to a division of judicial tasks. It does *not* mean that EU law has superior rank over core national constitutional principles when there is substantively equivalent overlap; the French Constitution remains superior to EU law in the hierarchy of norms. However, the relative rank of the constitutional principles involved becomes relevant only when the relevant constitutional norms and principles are not sufficiently protected under EU law. Moreover, one can say that also in the 'German' approach there are judicial limits in the form of admissibility requirements that have been developed both as regards fundamental rights review (*Solange II* and its progeny ) and as regards ultra vires review (*Honeywell*). Neither of these approaches exclude a reserve power of constitutional review of Union law, nor do they diminish the importance of the member state perspective on constitutional conflict, which is premised on the prevalence of (core) constitutional principles over Union law, however absolute the latter's principle of primacy is supposed to be. Thus, the 'German' and 'Franco-Portuguese' approaches share a similar assessment of the scope of identity conferring constitutional principles: they cover both common constitutional principles but also those that are specific to a member state's constitution. It is only that the judicial technique of reviewing EU law's compatibility with identity conferring national constitutional rules and principles which is more pronounced in the latter approach.

**Constitutional co-extensiveness, identity review and the typology of constitutional conflict**

The Franco-Portuguese approach bears out the hypothesis of a convergent tendency in national constitutional case law: where equivalence of protection of the same constitutional rule or principle in Union law exists, there is neither necessity nor room for a national court to step in to protect that norm in the national context if this is being done in the context of Union law. This by implication means that the national constitutional rules and principles are coextensive (or homogenous) with Union constitutional rules and principles. This co-extensiveness or homogeneity exists not only at the abstract level of the 'value' of the rule of law, but at the level of concrete legal rules and principles.

One may wonder whether there is co-extensiveness if we look at the eventual outcome of the *MAS* case, where – as we saw – the Italian constitutional court observed that the principle of legality that was at stake as a matter of constitutional identity for the Italian court, was respected by the Court of Justic by allowing for the disapplication of the '*Tarricco*-rule' in its *MAS&MB*-judgment. What is striking in this particular case, is that the matter of the principle of legality at stake concerned a particularly Italian understanding of that principle that is shared in hardly any other member state: Italy is one of the very few states where time limits on the ability to prosecute criminal offences is considered not merely to be a matter of procedural law that does not affect the punishability of a delict, but extends materially into liability to be punished, and therefore involves the lex praevia principle, the prohibition of substantive retroactive effect, and – at least under the terms of the Court of Justice's *Taricco* judgment – the *lex certa* principle. So here it was not a matter of allowing for a classic public policy exception to a free movement right, as in *Omega*,[28] but a purely national constitutional claim that is (nearly) unique to one member state outside the sphere of market regulation. Although the Court of Justice managed to avoid mentioning the words 'constitutional identity', it found the constitutional claim justified and legitimate in terms that concerned the constitutional substance and value of the principle of legality involved.

The fact that the Court of Justice allowed for the exception to the *Taricco*-rule as legitimate, was based on considering the principle of legality in criminal law, including *lex certa* and non-retroactivity, consistent with the Charter of Fundamental Rights and as belonging to the common to the constitutional traditions of member states.[29] To that extent, and at a highly abstract level, constitutional co-extensiveness is suggested. This approach by the Court of Justice would be understandable in terms of this Court wishing to retain control over the legitimacy of invocations of exceptions to EU law on the basis of constitutional identity assertions; this is a brake on abusive invocations of constitutional identity.

In reality, however, it is better not to understand this kind of declaration of legitimacy as positing substantive co-extensiveness ('constitutional homogeneity') between national constitutional and EU constitutional rules principles. Asserting this legitimacy at such a very high level of abstraction from the actual content of the national rule or principle as in *MAS* is totally unconvincing. After all, the particular idea that is core to the whole of the *Taricco*-saga, and runs

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[28] Case C-36/02, 14 October 2014, *Omega Spielhallen GmbH*.

[29] Case Case C-42/17, 5 December 2017, *MAS and MB*, para. 46-58, especially 51-53.

through all the Italian cases before criminal courts, the *Corte costituzionale* and those adjudicated at the Court of Justice, is that the precise understanding that the statute of limitations is a matter of substantive criminal law that affects the substantive punishability of an offence (and not merely of procedural criminal law that merely concerns the ability to prosecute an offence) is specifically Italian, and is an understanding of legality that is *not* shared in a large majority of member states. So the particular Italian understanding of the constitutional principle at stake, according to its constitutional self-understanding to the 'supreme principles of the Constitution', does not at all form part of the constitutional traditions of the member states.[30]

Instead, we must understand the Court of Justice's legitimation of the exceptions to the EU law as *permission*, and not as asserting the co-extensiveness of the EU and national rules and principles involved.

In terms of the typology of constitutional conflict, a case like *MAS* [31] is resolved by extending only 'local' effect to the prevalence of the national constitutional norm over the EU law. The exception to the general EU norm (here the rule enunciated in *Taricco*) is not universally applicable throughout the Union. The exception only applies to countries where legality in criminal law is understood firstly in the substantive manner like in Italian law, and secondly as belonging to constitutional identity of the relevant member state.

Our findings regarding the outcome of the Italian *Taricco* saga may apply to the Franco-Portuguese approach to constitutional identity review, but not always. Primarily, the actual prevalence of a national constitutional rule or principle has effects in the legal order of the member state concerned. But this is so only if and when those national constitutional rules and principles are identity conferring to that particular member state and not to others who do not have similar equivalent rules or principles. Only in those cases national constitutional law will prevail over EU law. But when an identity conferring rule or principle is also *actually and substantively* co-extensive with an equivalent rule or principle of EU law, we are in a situation where the application of that rule or principle has

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[30] This reminds of the situation in *Sayn-Wittgenstein*, case C 208/09, 22 December 2010, which concerned the particular republican understanding of equality as prohibiting the use of noble titles and names, being considered by the Court of Justice legitimate as a matter of EU law because equality is also a principle of EU law and is enshrined in Art. 20 Charter (at para 89); cf Besselink, "Respecting Constitutional Identity in the EU. A Case Note to ECJ (Second Chamber), Case C 208/09, 22 December 2010, Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien." In: 49 *CMLRev* (2012) nr 2 pp. 671–693, at 671 and 6-82-683.

[31] And also *Sayn-Wittgenstein*.

pan-EU effect and encompasses both the EU legal order (in the narrow sense) and the member state orders.

**Conclusion: The problem of primacy**

Constitutional conflict between EU and national constitutional law concerns the primacy of either EU law or national constitutional law. This problem would seem to be unresolved. The primacy of EU law over conflicting *ordinary* national law, including acts of parliament, has been clearly established for all member states. This has not been the case for the primacy of EU law over national *constitutional* law, or at any rate the core rules and principles.

One could say that as a matter of EU law, the Union must respect the constitutional identity of member states (Article 4(2) TEU). This duty of respect can be considered a recognition of the primacy of democratic constitutionalism under the rule of law. From this point of view, as a matter of EU law, the TEU identity clause enhances the provision on the constitutional foundations of Article 2 TEU from the constitutional values that are common to the member states and Union to their elaboration in concrete constitutional rules and principles that are not necessarily common. This, succinctly put, implies a positive constitutional attitude to legitimate diversity, that is to say to diversity that does not run counter to common constitutional values. Viewed thus, the duty to respect the national constitutional identity entails an 'exception' to primacy of EU law, to the extent that EU law creates space for identity conferring rules and principles that are not common to the Union and member states.[32]

This is, however, not uncontroversial. Apart from arguments as to the intention of treaty makers,[33] one major reasons is the doctrine of primacy of Union law as propounded by the Court of Justice. The primacy of Union law is often taken to be an absolute and unconditional primacy: primacy exist independent of the nature and substance of the conflicting national rule of principle. We all know the case law, which is explicit on this in *Internationale Handelsgesellschaft*,

[32] See e.g. Armin von Bogdandy & Stephan Schill, "Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty", 48 *Common Market Law Review* 1417–1454; Besselink, National and constitutional identity before and after Lisbon, In: 3 *Utrecht Law Review* (2010), November 2010, http://www.utrechtlawreview/index.php/ulr/article/viewFile/139/135, pp. 36-49; ibidem, "Respecting Constitutional Identity in the EU. A Case Note to ECJ (Second Chamber), Case C 208/09, 22 December 2010, Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien". In: 49 *Common Market Law Review* (2012) nr 2 pp. 671–693.

[33] B. Guastaferro, "Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause", in *Yearbook of European Law*, Vol. 31, No. 1 (2012), pp. 263–318.

*Simmenthal II*, and among the more recent judgments, *Melloni*,[34] and *Opinion 2/13*[35]. In other words, the doctrine of the primacy of Union law as concerning a purely formal and purely hierarchical principle is a notion based on a *thin* understanding of the rule of law.

Saying this is of course not saying that the Court of Justice has not given meaning and purpose to substantive rules and principles of democracies under the rule of law in relevant cases. *Omega*, *Schmidberger*,[36] and many other judgment bear witness to this. The problem is that this is not a stable case law. *Opinion 2/13*, though not only based on its embracing of primacy in the context of dealing with Article 53 of the ECHR and other considerations that are essentially based on the primacy of Union law, can stand as the judgment that has deeply undermined the authority of the Court of Justice as a promotor of the rule of law in the thick sense of necessarily encompassing also the protection of fundamental rights of the Union's citizens. This *Opinion* builds in this respect on *Melloni*,[37] which has forced a member state constitutional court to lower its protection of a constitutional right due to that member state's government view in that case, and that is equally embarrassing from a fundamental rights perspective.

This unconditional and absolute primacy of Union law is clearly rejected by the member state constitutional courts when Union law interferes with identity conferring rules and principles of the national constitution. Absolute and unconditional primacy is rejected and should be rejected because it is untenable, both in terms of EU law and in terms of national constitutional law, because both these legal orders are based on the values of the democracy under the rule of law. If Union law is based on these foundational principles – and Article 2 TEU makes clear that it is – also primacy of Union law is conditional on those values, just as an appeal to national constitutional rules and principles must be conditional on respect of these values, as we argued above. This is precisely the importance of what we have termed the Franco-Portuguese approach in the constitutional case law to constitutional identity review. It acknowledges primacy of Union law whenever it protects these fundamental constitutional values, and it will not undertake review if Union law as interpreted by the Court of Justice provides equivalent protection.

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[34] Case C 399/11, 26 February 2013, *Melloni*.

[35] Opinion 2/13, 18 December 2014.

[36] Case C-112/00, 12 June 2003, *Schmidberger*.

[37] Besselink, "Parameters of Constitutional Conflict after *Melloni*". In: *European Law Review* 2014,39( 4), 531-552.

It was an important precondition for Portugal to accede to the European Communities to respect the principles of the democratic state under the rule of law. It was rightly refused not only membership but also an association with the Communities when it was an authoritarian dictatorship.[38] Membership of the Communities after the Carnation Revolution was not only contingent on adherence to the principles of democracy under the rule of law, it was also intended to consolidate it. Hence, it is no coincidence that Article 8(4) of the Portuguese Constitution provides that European Union law 'shall apply in Portuguese internal law in accordance with Union law and with respect for the fundamental principles of a democratic state based on the rule of law.'

Can Portugal be required to adhere to the fundamental principles of democracy under the rule of law to become a member state, but at the same time be required to abandon fundamental principles for the mere sake of an absolute and unconditional primacy of Union? This question makes clear the aporia of understanding the doctrine of the unconditional primacy of EU law apparent.

It is the lasting contribution of judgment N.º 422/2020 of the *Tribunal Constitucional* of 15 July 2020 to a European constitutional order that encompasses the Union and its member states to have made clear that the constitutional primacy of Union law need not be abandoned, as long as it is conditioned on the fundamental principles of democracy under the rule of law. Quite to the contrary, when Union law as interpreted by the Court of Justice provides equivalent protection to those fundamental principles of constitutionalism, it will not be reviewed. Primacy, therefore, is conditioned on the principles of democracy under the rule of law.

[38] Ronald Janse, "The evolution of the political criteria for accession to the European Community, 1957–1973", *European Law Journal* 2018;24:57–76.