ON THE RISE WHILE FALLING

The New Roles of Constitutional Courts in the Era of European Integration

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ABBREVIATIONS

ACC	Constitutional Court of Austria
AG	Advocate General
BCC	Constitutional Court of Belgium
CBS	Constitutionalism Beyond State
CC	Constitutional Council of France
CCC	Constitutional Court of the Czech Republic
CEEC	Central and Eastern European Countries
CJEU	Court of Justice of the European Union
CT	Constitutional Treaty
CUP	Cambridge University Press
EAW	European Arrest Warrant
EC	European Community
ECB	European Central Bank
ECHR	European Convention on Human Rights
ECLI	European Case Law Identifier
ECtHR	European Court of Human Rights
EFSF	European Financial Stability Facility
ESM	European Stability Mechanism
EU	European Union
EWM	Early Warning Mechanism
FCC	Federal Constitutional Court of Germany
GG	Grundgesetz (Basic Law of Germany)
HCC	Constitutional Court of Hungary
ICC	Constitutional Court of Italy
LCC	Constitutional Court of Lithuania
OMT	Outright Monetary Transactions
OUP	Oxford University Press
PCT	Constitutional Tribunal of Poland
QE	Quantitative Easing
RCC	Constitutional Court of Romania
SCC	Constitutional Court of Slovakia
SCT	Constitutional Tribunal of Spain
TA	Treaty of Amsterdam
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TM	Maastricht Treaty
US	United States
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

Introduction

1 The main objectives of the dissertation

The process of European integration has a deep impact on the constitutional and political systems of the member states of the European Union. The development of the EU and its legal order has led to reconsiderations and adjustments of many traditional legal notions and doctrines as well as brought shifts in the institutional setting and balance within the respective states. In this sense, discussions over the winners and losers of the integration process among the national institutions have emerged.[1] Based on this discussion, it has been argued that the greatest winners are the executive power, above all national governments, with their increasing decision-making power[2] and the national ordinary courts of lower instances which have benefited significantly from the development of EU law.[3] Then again, national parliaments and constitutional courts, as the argument goes, are the national institutions which are the greatest losers of the integration processes in Europe.[4] This latter conclusion has been slightly adjusted in regard to national parliaments since the adoption of the Lisbon Treaty, as arguably, their status was strengthened by providing them with specific roles in the EU through treaty provisions.[5] Nevertheless, the dominant perception of constitutional courts has remained unaltered, they are on a steady track of an institutional demise as a result of European integration.

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[1] See for instance Klaus H. Goetz and Simon Hix (eds), *Europeanised Politics? European Integration and National Political Systems* (Frank Cass 2001); Robert Ladrech, Europeanization and National Politics (Palgrave Macmillan 2010).

[2] See the seminal work of Andrew Moravcsik, 'Why the European Union Strengthens the State: Domestic Politics and International Cooperation' (1994) Working Paper Series 52, Center for European Studies, Harvard University; Klaus Dieter Wolf, 'The New Raison d'Etat as a Problem for Democracy in World Society' (1999) 5 European Journal of International Relations 333, 335-339; Klaus H. Goetz and Jan-Hinrik Meyer-Sahling, 'The Europeanisation of national political systems: Parliaments and executives' (2008) 3 Living Reviews in European Governance available at: http://www.europeangovernance-livingreviews.org/Articles/lreg-2008-2/download/lreg-2008-2Color.pdf last visited 15.10.2018; and Ladrech (n 1) 44-70.

[3] On the empowerment of national ordinary courts Karen J. Alter, Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe (OUP 2001) 45-52; Michal Bobek, 'The Impact of the European Mandate of Ordinary Courts on the Position of Constitutional Courts' in Monica Claes, Maartje de Visser, Patricia Popelier and Catherine Van de Heyning (eds) Constitutional Conversations in Europe (Intersentia 2012) 288ff; Marta Cartabia, 'Europe and Rights: Taking Dialogue Seriously' 5 European Constitutional Law Review 2009, 28, Monica Claes and Bruno De Witte, 'Role of National Constitutional Courts in the European Legal Space' in Patricia Popelier, Armen Mazmayan and Werner Vandenbruwaene (eds) The Role of Constitutional Courts in Multilevel Governance (Intersentia 2012) 90; and Ladrech (n 1) 114-120.

[4] Philipp Kiiver, The National Parliaments in the European Union: A Critical View on EU Constitution-Building (Kluwer 2006) 71ff, Andreas Maurer and Wolfgang Wessels (eds) National Parliaments on their Ways to Europe: Losers or Latecomers? (Nomos 2001); Maja Kluger Rasmusen, 'The Empowerment of Parliaments in the EU Integration: Victims or Victors?' in Jack Hayward and Rüdiger Wurzel (eds.) European Disunion: Between Sovereignty and Solidarity (Palgrave Macmillan 2012) 99-114; Aleksandra Maatsch, 'Empowered or Disempowered? The Role of National Parliaments during the Reform of European Economic Governance' (2015) MPIfG Discussion Paper 15/10, Max Planck Institute for the Study of Societies; and Ladrech (n 1) 71-90.

[5] See for instance Katrin Auel and Thomas Christiansen, 'After Lisbon: National Parliaments in the European Union' (2015) 38 West European Politics 261-281; Rasmusen (n 4) 110-112.

Scholarly contributions entrenching this perception have been multiplying lately. The accounts have ranged from constitutional courts as the most disparaged branch,[6] through the marginalization,[7] disempowerment[8] and displacement of constitutional courts as a consequence of the case law of the CJEU,[9] to a creeping loss of their relevance (*Bedeutungsverlust*) in light of the increasing supranationalisation of national law.[10] Consequently, according to these accounts, as a result of this situation and this sort of status of constitutional courts in Europe these institutions have eventually been forced to become the "brakeman" (*Bremser*)[11] of the integration processes in order to protect their own institutional interests. These accounts are justified and supported by a common line of reasoning which puts emphasis on the ever increasing scope of EU law as a result of which it is entering core national constitutional areas and the CJEU's constantly growing role and power that inevitably leads to the overshadowing of constitutional courts' role in general. The latter essentially occurs as a result of the development of the fundamental principles of EU law, such as primacy and direct effect, which displace national constitutional law[12] and accordingly national constitutional courts.

While these accounts might come as very reasonable and intuitive, part of a realist approach even,[13] they give rise to serious dilemmas which somehow linger throughout the years. Namely, how can it be that constitutional courts, which are the youngest among the central national institutions and which have been perceived as a fundamental part of 'new constitutionalism',[14] are already under such an existential threat? Is it possible that while constitutional courts are claimed to be "the only truly novel institution within the parliamentary

[6] Maria Dicosola, Cristina Fasone and Irene Spigno, 'Foreword: Constitutional Courts in the European Legal System After the Treaty of Lisbon and the Euro-Crisis' 16 *German Law Journal* 6, Special Issue, (2015) 1317, 1317 -1320.

[7] Marta Cartabia, '"Taking Dialogue Seriously": The Renewed Need for a Judicial Dialogue at the Time of Constitutional Activism in the European Union' Jean Monnet Working Paper 12/07 available at: http://jeanmonnetprogram.org/wp-content/uploads/2014/12/071201.pdf last visited 15.10.2018; .see Elias Deutscher and Sabine Mair, 'National constitutional courts in the European constitutional democracy: A Reply to Jan Komarek' (2017) 15 International Journal of Constitutional Law 801, 802, Davide Paris, 'Constitutional Courts as Guardians of EU Fundamental Rights? Centralised Judicial Review of Legislation and the Charter of Fundamental Rights of the EU' (2015) 11 European Constitutional Law Review 389, 390ff.

[8] Siniša Rodin, 'Back to the Square One – the Past, the Present and the Future of the Simmenthal Mandate' in Jose Maria Beneyto and Ingolf Pernice (eds.) *Europe's Constitutional Challenges in the Light of the Recent Case Law of National Constitutional Courts* (Nomos 2011) 315; Bobek (n 3) 288ff; and for a claim of a "gewisse Erosion der Zuständigkeiten" see Barcyak 30-31.

[9] Jan Komarek, 'National constitutional courts in the European constitutional democracy' (2014) 12 International Constitutional Law Journal 525, 527; and Jan Komarek, 'The Place of Constitutional Courts in the EU' (2013) 9 European Constitutional Law Review 420, 428-444.

[10] Christoph Schönberger, 'Anmerkungen zu Karlsruhe' in Christoph Schönberger et al (eds) *Das entgrenzte Gericht: Eine kritische Bilanz nach sechszig Jahren Budensverfassungsgericht* (Suhrkamp 2011), 57; and Franz Merli,'Umleitung der Rechtsgeschichte' (2012) 20 Journal für Rechtspolitik 355, 359-360.

[11] Thomas Giegerich, 'Zwischen Europafreundlichkeit und Europaskepsis – Kritischer Überblick über die bundeverfassungsgerichtliche Rechtsprechung zur europäischen Integration' (2016) Zeitschrift für Europarechtliche Studien 1/2016 3, 47.

[12] Dieter Grimm, *Constitutionalism: Past, Present, and Future* (Oxford University Press 2016) 281.

[13] Bobek (n 3) 288.

[14] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press 2000) 37-38.

systems of Western Europe"[15] and one of the most important institutions in the democratization process of the former communist countries of Central and Eastern Europe[16] are losing their relevance only after a couple of decades since their establishment? Are they truly marginalized and without any significant influence if the EU and its member states anxiously await constitutional court decisions every time these might challenge EU law and its fundamental doctrines? Could constitutional courts be in a demise at the same time we speak of a global spread of constitutional review? [17] Are constitutional courts in Europe actually on the rise while falling?

Constitutional courts have been established as pivotal institutions of the centralized model of constitutional review originally developed by Hans Kelsen in the early 20th century for the purpose of remedying the obvious practical shortcomings of the traditional understanding of the organization of state power and the doctrine of separation of this power.[18] Accordingly, one of the main aims of constitutional courts has been to safeguard the centrality and supreme authority of constitutions by ensuring that the exercise of public authority by institutions is in compliance with the constitution. Therefore, they are specially designed and uniquely placed between law and politics in fulfilling their institutional purpose. Their successful track-record has brought to a rapid spread of the centralized model of constitutional review across Europe, and abroad, under which most of the member states of the EU today have constitutional courts as part of their constitutional systems. This proliferation of constitutional courts has led to the claim of the ongoing rise of constitutional courts.[19]

Being a rather novel institution amidst already well-established ones, constitutional courts, from early on, have constantly been subject of both internal and external challenges in securing their authority. The former challenges have been posed by other national institutions whose authority has been influenced through the establishment of constitutional courts, and the latter by the internationalization and supranationalisation of the national legal orders. In this sense, constitutional courts are somehow by creation predetermined and required to become resistant to such challenges to their authority and endowed with instruments which enable them to organically adapt to the new developments and circumstances. It is exactly this process of

[15] Helmut Steinberger, 'Historic Influence of American Constitutionalism upon German Constitutional Development', in Louis Henkin and Rosenthal (eds), *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* (Columbia University Press 1990) 199.

[16] Marek Safjan, 'Central and Eastern European Constitutional Courts' in Michal Bobek (ed) *Central European Judges Under the European Influence* (Bloomsbury 2015) 375-379; Wojciech Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer 2nd edition 2014) xvi; and Laszlo Solyom The 'Role of Constitutional Courts in the Transition to Democracy' (2003) 18 International Sociology 133-161.

[17] Tom Ginsburg, 'The Global Spread of Constitutional Review' in Gregory A. Caldeira, R. Daniel Kelemen and Keith E. Whittington (eds) *The Oxford Handbook of Law and Politics* (Oxford University Press 2008) 81

[18] Hans Kelsen, 'Who Ought to be the Guardian of the Constitution?' in Lars Vinx (ed.) *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (Cambridge University Press 2015) 174-221; and Hans Kelsen, 'Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution' (1942) 4 The Journal of Politics 183.

[19] Victor Ferreres Comella, *Constitutional Courts and Democratic Values: A European Perspective* (Yale University Press 2009) 3; Victor Ferreres Comella, 'The Rise of Specialized Constitutional Courts' in Tom Ginsburg and Rosalind Dixon (eds) *Comparative Constitutional Law* (Edward Elgar 2011) 265-277; and Tom Ginsburg, 'The Global Spread of Constitutional Review' in Gregory A. Caldeira, R. Daniel Kelemen and Keith E. Whittington (eds) *The Oxford Handbook of Law and Politics* (Oxford University Press 2008) 81.

continuous adaptation of constitutional courts to the supranationalisation of national legal orders resulting from the broadening scope and authority of EU law, and as well as the increasing influence of the CJEU and their role in the process of European integration, which is the main subject of interest in this dissertation.

Against the paradoxical backdrop created on the one hand by the debate over constitutional courts' demise in light of European integration, and the proliferation and rise of constitutional courts in Europe and abroad, on the other hand, this dissertation aims at explaining this conundrum by providing arguments through an interdisciplinary approach for a role of constitutional court as a "constructive corrective force" in the EU.[20] Even though counter-intuitive at a first glance, or argued by some to be an idealist approach,[21] the main thesis is that not only are constitutional courts not 'falling' but rather they are on the 'rise' through the self-established three new roles in the EU, previously not foreseen in any of the respective constitutions.[22] First, as result of their particular deliberative nature constitutional courts represent the most adequate interlocutor of the CJEU in the national realm through which judicial exchange, direct or indirect, constitutional courts provide EU law with constitutional legitimacy. Second, constitutional courts through their power of identity review protect the constitutional identity against encroachment by EU law. Third, assuming the EU is a neo-federal structure, constitutional courts represent the most appropriate institutions to safeguard the division and exercise of competences in the EU through their *ultra vires* review. Furthermore, these new roles and powers of constitutional courts encompass three very important aspects of the relationship between constitutional courts and the CJEU, and accordingly with EU law. They have to do with the procedural aspect of providing constitutional legitimacy to EU law through judicial dialogue, the substantive aspect of protecting constitutional identity, and the jurisdictional aspect of safeguarding the vertical division and exercise of competences in the EU. In exercising these new roles constitutional courts need to take into due consideration also the interests of the EU legal order and the possibly broad negative effects of their decisions in order to represent a genuine constructive corrective force.

Accordingly, while it cannot be denied that the supranationalisation of the national legal orders definitely has a certain influence on the position and status of constitutional courts, it certainly has not caused their displacement, marginalization or creeping loss of relevance. Instead of talking of a loss of relevance, *Bedeutungsverlust*, it could be said that there is change of relevance, *Bedeutungswandel*, under which constitutional courts are assuming new roles and powers, which seem to be far more 'realist' than the claim of their demise.[23] Therefore, this

[20] Mattias Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty' (2005) European Law Journal 262, 292.
[21] Bobek (n 3) 287-288.
[22] The most illustrative manifestation is to be seen in FCC, Case *2 BvE 2/08 Lisbon Decision*, judgment of 30 June 2009 para. 241: "also conceivable, however, is the creation by the legislature of an additional type of proceedings before the Federal Constitutional Court that is especially tailored to ultra vires review and identity review to safeguard the obligation of German bodies not to apply in individual cases in Germany legal instruments of the European Union that transgress competences or that violate constitutional identity. " See also on this Herbert Bethge, in Theodor Maunz, Bruno Schmidt-Bleibtreu, Franz Klein, Herbert Bethge et al., *Bundesverfassungsgerichtsgesetz: Kommentar Band 1* (54th edition C.H. Beck 2018) 72.
[23] But cf Bobek (n 3) 288ff.

dissertation aims at profoundly restructuring the way in which the place and role of constitutional courts in the EU is being approached and comprehended.

The stance of constitutional courts towards EU law and their relationship with the CJEU are issues that have been on the scholarly radar of many academics since the first encounters of constitutional courts with EU law. There is a significant amount of academic work devoted to this topic, however, rarely has this work taken into proper consideration the special nature of constitutional courts or their specific institutional features in the EU context.[24] The focus has too often been narrowed down to decisions of constitutional courts which involve EU law providing partial accounts, above all, on whether these decision are pro-European or not, without truly engaging with the specificities of these institutions and therefore more general perspectives of national constitutional law have somehow been given a secondary importance.[25] In this sense, constitutional courts have been mainly perceived in terms of conflict and struggle for power and not in terms of their potentially constructive role. One could easily get the impression that constitutional courts have been portrayed as conservative and traditionalist institutions interested in preserving national sovereignty at the expense of further integration in Europe.[26]

On the other hand, the EU institutions have also kept turning the blind eye towards the special nature of constitutional courts which might be another reason why EU law scholars have mirrored this stance in their academic work. Most importantly, the CJEU has continuously overlooked and neglected the particular status and role these institutions play in national constitutional systems thus tacitly denying constitutional courts' potentially constructive role in European integration.[27] Additionally, it is worth noting, as another confirmation of EU's indifference towards constitutional courts, that also within the EU enlargement process led by the European Commission not a single negotiating chapter devoted to the rule of law even mentions constitutional courts, not to speak of engaging with any standards related to them

[24] Among the few works discussing these features see for instance Patricia Popelier, Armen Mazmanyan and Werner Vandenbruwaene (eds) *The Role of Constitutional Courts in Multilevel Governance* (Intersentia 2013); Anneli Albi, 'From the Banana Saga to a Sugar Saga and Beyond: Could the Post-Communist Constitutional Courts Teach the EU a Lesson in the Rule of Law?'(2010) 47 Common Market Law Review 791; or Jan Komarek, 'The Place of Constitutional Courts in the EU' (2013) 9 European Constitutional Law Review 420.

[25] Anneli Albi, 'An Essay on How the Discourse on Sovereignty and on the Co-operativeness of National Courts Has Diverted Attention from the Erosion of Classic Constitutional Rights in the EU in Monica Claes, Maartje de Visser, Patricia Popelier and Catherine Van de Heyning (eds) Constitutional Conversations in Europe (Intersentia 2012) 41-42.

[26] See for instance strong criticism of the FCC over its Lisbon decision in Daniel Halberstam and Christoph Möllers, 'The German Constitutional Court says "Ja zu Deutschland!"(2009) German Law Journal 1242, Frank Schorkopf, 'The European Union as An Association of Sovereign States: Karlsruhe's Ruling of the Treaty of Lisbon' (2009) German Law Journal 1220, Christoph Schönberger, 'Lisbon in Karlsruhe: Maastricht's Epigones At Sea' (2009) German Law Journal 1202, but compare this to Alejandro Saiz Arnaiz and Carina Alcoberro Livina, ' Why Constitutional Identity Suddenly Matters: A Tale of Brave States, a Mighty Union and the Decline of Sovereignty' in Alejandro Saiz Arnaiz and Carina Alcoberro Livina (eds) *National Constitutional Identity and European Integration* (Intersentia 2013) 14. There were also negative accounts over FCC's OMT reference, for instance see Franz C. Mayer, 'Rebels Without a Cause? A Critical Analysis of the German Constitutional Court's OMT Reference' German Law Journal (2014) 111; and Mattias Kumm, 'Rebel Without a Good Cause: Karlsruhe's Misguided Attempt to Draw the CJEU into a Game of "Chicken" and What the CJEU Might Do About it', (2014) German Law Journal 203.

[27] See for instance Paris (n 7) 404-405.

within the accession negotiations.[28] In this manner, it is demonstrated, wrongly, that there is no place for constitutional courts in the European integration and they have no role to play. Different from such a stance of the EU institutions, constitutional courts of CEEC, for instance, have played a vital role in promoting EU values and respect of EU law even in the period prior to the accession of these countries in the EU.[29]

In this regard, analyzing the three new roles this dissertation draws attention to the specific features of constitutional courts through which they are distinguished, above all, from the ordinary judiciary and argues for the special role and place of constitutional courts in the EU. It is argued that these institutions have an added value in the European integration through their institutional particularities and political sensibility that could hardly be provided by any other national institution. Member states with established constitutional courts tend to have more influence and impact on the legal integration in the EU as they have more possibilities in contributing to the debate and development of EU law. Nevertheless, this certainly does not mean that one should completely and unreservedly support what constitutional courts in Europe have been doing so far. As a matter of fact, by analyzing the new roles there is a critical note also on the manner in which constitutional courts have coped with the external challenge of supranationalisation and recommendations and guidelines are made for further adjustments of their approach. Serious concerns are raised over the stance of the CJEU towards constitutional courts as well, with the basic aim to provide for a more fertile ground for a mutual contribution of both the CJEU and constitutional courts in the development of the common European legal space. These recommendations and guidelines are strongly advocating the readjustment of the traditional doctrines and notions which have proven to be unable to cope with the current complex reality existing in the EU. Namely, the vertical relationship between the legal or constitutional orders in the EU cannot be perceived through traditionally entrenched hierarchical models but rather reflect the reality of heterarchy.

In view of that, the theoretical framework through which the new roles of constitutional courts are analyzed here is based on the theory or theories of constitutional pluralism.[30] As a theory on the exercise of judicial power under circumstances of competing claims of constitutional authority in the EU, constitutional pluralism provides theoretical basis for analyzing the institutional dimension of the heterarchical relationship between the legal orders. In essence, this theory focuses on the relationships between a plurality of institutional normative orders with a functioning constitution where none of these orders can claim a comprehensive constitutional superiority over the others and at the same time these orders have to be led by

[28] This has been the case in all of the previous cycles of enlargement. See for instance Christian Boulanger, 'Europeanization through Judicial Activism? The Hungarian Constitutional Court's Legitimacy and the "Return to Europe"' in Wojciech Sadurski, Adam Czarnota and Martin Krygier, Spreading Democracy and the Rule of Law? The Impact of EU Enlargement on the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders (Springer 2006) 274. Even under the new-approach to EU Enlargement negotiations from 2012 there is nothing on constitutional court in the so-called rule of law negotiating chapters, 23 and 24.

[29] Wojciech Sadurski, 'Solange, Chapter 3: Constitutional Courts in Central Europe - Democracy - European Union' (2008) 14(1) European Law Journal 1, 1-4; and Safjan (n 16) 375-379.

[30] For more on constitutional pluralism see Matej Avbelj and Jan Komarek, *Constitutional Pluralism in the European Union and Beyond* (Hart 2012); Matej Avbelj and Jan Komarek (eds), 'Four Vision of Constitutional Pluralism', EUI Working Paper Law 2008/21; and Klemen Jaklic, *Constitutional Pluralism in the EU*, (OUP 2014).

the principles of accommodation and mutual respect in avoiding legally unresolvable conflicts.[31] By providing such an account of the state of play in the EU, constitutional pluralism serves as the most appropriate alternative,[32] in both a descriptive and normative sense, to the traditional doctrines on the relationship between legal orders, monism and dualism. Therefore, each of the new roles of constitutional courts is viewed through the prism of constitutional pluralism that helps devise recommendations and guidelines which would best serve the constructive role of constitutional courts in the European integration. In this manner, constitutional pluralism is being placed in an institutional context, within which constitutional courts' relationship with the CJEU has a central spot, and thus receives a more practical and tangible connotation instead of a mere high level of abstractness that often characterizes it.

2 The methodology of the research

There are several clarifications that need to be presented which concern the methodology of the research presented in this dissertation. They are intended to fend off the possible legitimate objections on behalf of the approach and methodology.

Generally speaking, the research heavily relies on both theoretical as well as empirical methods. This is the direct result of the overarching goal of this dissertation not to represent a purely theoretical discussion and analysis but also to offer conclusions which would be applicable in practice. The methodology is dominantly based on a comparative and an interdisciplinary approach which cover diverse aspects and theories concerning the subject of interest, the role of constitutional courts in European integration and their institutional relationship with the CJEU. The empirical method is based on the analysis of the relevant case law of, above all, constitutional courts but also the CJEU, that sheds light on the relationship between these two institutions and helps determine the role of constitutional courts in the EU.

There is one important caveat which needs to be addressed and clarified when speaking of the methodology. The most serious objection which could be raised against the methodology and approach taken here is its selectivity. However, there are convincing reasons that justify the selectivity present in this work. The scope of this dissertation is not ambitiously set in exploring the complete case law of all constitutional courts of the member states of the EU and the respective academic contributions on this very same case law. Such a task of a completely exhaustive overview would require far more time and resources which is currently beyond the capacity of the author. In this regard, there is an obvious need of picking and choosing which would not be randomly done but rather in a methodologically supported manner.

First, the scope of the research is limited to constitutional courts in a strict sense. This means that, unlike some other scholars,[33] the research does not include other judicial institutions tasked with constitutional review such as courts having constitutional jurisdiction or ordinary

[31] Neil MacCormick, *Questioning sovereignty* (OUP 1999) 104.
[32] Joseph H. H. Weiler, 'Prologue: Global and Pluralist Constitutionalism – some doubts' in Grainne de Burca and Joseph H. H. Weiler (eds), *The Worlds of European Constitutionalism* (CUP 2011) 8. See also Dana Burchardt, *Die Rangfrage im Europäischer Normenverbund: Theoretische Grundlagen und dogmatische Grundzüge des Verhältnisses von Unionsrecht und nationalem Recht* (Mohr Siebeck 2015) 30-32.
[33] Monica Claes, *The National Court's Mandate in the European Constitution* (Hart 2006) 391ff.

courts pronouncing on constitutional issues. The latter two are part of the ordinary judiciary and do not share the institutional specificities, related particularly to design and purpose, of constitutional courts. The very fact that a certain judicial institution conducts constitutional review does not suffice in this regard.

Second, there is no specific case study as seen through a constitutional court of a particular member state. Taking into considerations that there are discrepancies and differences in many respects between the respective constitutional courts, it is a very difficult task to select a case study that would be representative for all or even most of constitutional courts in the EU. Therefore, this dissertation employs a "middle-level abstraction"[34] applied to constitutional courts in general, focusing solely on their common features, and hence develops more general recommendations and guidelines flexible enough to apply to all constitutional courts. In this manner, national constitutional specificities are left aside in order to avoid missing the wood for the trees. In this process, though, slightly more attention is placed on the most influential constitutional court: The Federal Constitutional Court of Germany. This is only due to the coherent and comprehensive doctrine that this court has developed in regard to EU law and the CJEU so far, especially compared to most of the other constitutional courts in Europe.

Third, there is also a certain selectivity when it comes to the relevant case law of constitutional courts. Namely, the relevance of the case law is based on their impact and influence on the doctrines and principles of EU law as well as on the relationship of constitutional courts with the CJEU. Thus not every case before the constitutional courts involving EU law is equally important in this sense. Additionally, the relevance is also supported by the academic interest and the level of their presence in scholarly contributions.

Fourth, there is a very important substantive aspect of this selectivity. Among the new roles of constitutional courts analyzed here the important role of fundamental rights protection is not included. Most importantly, contrary to the three new roles, fundamental rights review already exists as part of the constitutional powers and jurisdiction of most constitutional courts and thus this role and review power, as result of EU law, is only extended to external sources of law. Accordingly, it does not represent a new role for constitutional courts and it is not only related to the EU. Moreover, the fundamental rights protection in Europe today is shared among several judicial instances, ordinary courts, constitutional courts, ECtHR and CJEU. In this sense, including this power of constitutional courts would substantially broaden the scope of this dissertation which is focused on their role in European integration.

3 The structure of the dissertation – roadmap

The dissertation consists of six chapters and a conclusion. The first two chapters are intended to set the stage for analyzing the role of constitutional courts and hence they are rather descriptive. Chapter 1 provides a brief overview of the constitutional courts in the EU by discussing the main reasons behind their establishment and diffusion, their specific institutional features through which both differences and common features among constitutional courts are

[34] Corando Hübner Mendes, *Constitutional Courts and Deliberative Democracy* (OUP 2013) 5-9.

presented and the internal struggles for establishing their authority. Chapter 2 continues with the external challenges of constitutional courts as seen through the process of supranationalisaiton of the national legal orders as result of the European integration. The focus here is placed on the evolution of the stance and relationship of these institutions with EU law and the CJEU by classifying the main approaches in researching this relationship and detecting the main substantive meeting points and points of contention. The last section of this chapter provides an analysis of the, arguable, decentralization of constitutional review and whether the empowerment of ordinary courts in the aftermath of *Simmenthal II*[35] and its progeny has led to the disempowerment of constitutional courts.

Chapter 3 provides the theoretical framework of the research. It represents an important part of the dissertation as in each of the subsequent chapters this framework is employed in order to determine and analyze the new roles of constitutional courts. The theory of constitutional pluralism is at the center of this chapter which provides a thorough theoretical outline of the general common features of this theory in the context of the EU and its main advantages and shortcomings. Taking into consideration that constitutional pluralism has various theoretical currents three versions of constitutional pluralism of the most renowned authors, Neil MacCormick, Miguel Maduro and Mattias Kumm, are presented in detail.

All of the remaining chapters are dealing specifically with each of the three new roles of constitutional courts in the EU. They represent the substantive core of this dissertation. Chapter 4 goes into the deliberative nature of constitutional court as one of their particular institutional features including the specificity of the constitutional discourse and their role in the judicial dialogue in Europe. The latter represents an important institutional avenue through which constitutional courts provide constitutional legitimacy to EU law which is the first new role of constitutional courts in European integration. In this vein, constitutional courts' new role is perceived from its procedural aspect, that is through the judicial dialogue. This chapter in essence argues for the special role of constitutional courts in different forms of the judicial dialogue with the CJEU and their added value and unique contribution in this communicative arrangement in Europe.

Chapter 5 focuses on the second new role of constitutional courts to protect constitutional identity in the EU that reveals a more substantive dimension. The central point of this chapter is Article 4(2) TEU which triggered the more intense development of the role of constitutional courts as guardians of the respective constitutional identity thus representing a sort of bridging mechanism between constitutional courts and the CJEU. Accordingly, this chapter provides a detailed analysis of this important provision, then turns to the relevant case law of constitutional courts related to the safeguard of constitutional identity using this provision as a sword or a shield in the EU context and lastly presents the main weaknesses and advantages of their stance in order to present a way forward which would facilitate a more constructive corrective role of these institutions.

[35] CJEU, Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA (Simmental II)*, Judgement of 9 March 1978, ECLI:EU:C:1978:49.

Chapter 6 draws on the jurisdictional aspect of the third new role of constitutional courts. Namely, it argues for a particular role of these institutions in safeguarding the vertical division and exercise of competence in the EU coining another name for the *ultra vires* review, the external federal mandate of constitutional courts. The chapter actually revolves around this latter notion and justifies it by conducting a theoretical analysis of the theory of federalism and proposing a new framework through which the EU needs to be perceived in this regard, neo-federalism. Then it detects the main shortcomings of the political and, above all, judicial safeguards of the division of competences in the EU by looking at the notions of conferral of powers, subsidiarity and proportionality. In the end, it promotes an adjustments of the substantive and procedural elements of the *ultra vires* review that would prevent excessive centralization of powers in the EU while at the same time not jeopardizing the effectiveness and unity of EU law.

At the end a summary of the main arguments and recommendations will be presented in the conclusions. It will shed light on how this dissertation has managed to fulfil its main objectives by arguing for the rise of constitutional courts through the three new constructive roles and why that is good for the process of European integration and for the further development of EU law.

Chapter 1

Constitutional Courts of the Member States of the European Union

1 Introduction

Nothing in early 20th century Europe, with a constitutional landscape and legal and political discourse dominated by the notions of parliamentary sovereignty and constitutional monarchy, suggested that a newly born institution specialized for constitutional review could become such a successful institutional novelty.[1] The success of the brainchild of Hans Kelsen,[2] who first envisaged a specialized constitutional body for constitutional review called constitutional court in the Constitution of Austria in 1920, was not swift and immediate. The 'triumph of [this] idea'[3] and 'the rise of constitutional courts'[4] took several decades and waves of establishment before a large number of the states in Europe founded these institutions with their respective constitutions. This model of constitutional review through constitutional courts, also known as the European model, based on its successful track record, has come to be a very frequent feature of the institutional design, even though not indispensable, not only in Europe, but also in other continents.[5] As a matter of fact, even in countries which have deeply rooted tradition of opposing constitutional review, such as the Netherlands, there are ongoing debates over the possible introduction of a constitutional court or at least a form of constitutional review.[6]

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[1] See for instance, Herman Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (University of Chicago Press 2000) 3, terming constitutional courts "strange new institutions"; Helmut Steinberger claims constitutional courts are "the only truly novel institution within the parliamentary systems of Western Europe" (see Helmut Steinberger, 'Historic Influence of American Constitutionalism upon German Constitutional Development', in Louis Henkin and Rosenthal (eds), *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* (Columbia University Press 1990) 199, quoted in Herman Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (University of Chicago Press 2000) 18-19. In regard to the German context, Alfred Grosser argues that the Federal Constitutional Court is the "ohne Frage originellste Institution des deutschen Verfassungsgefüges", see Alfred Grosser, *Die Bonner Demokratie, Deutschland von draußen gesehen* (K. Rauch 1960) 115.

[2] See for instance Hans Kelsen, 'Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution' (1942) 4 The Journal of Politics 183; Hans Kelsen, 'On the Nature and Development of Constitutional Adjudication' in Lars Vinx (ed.) *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (Cambridge University Press 2015) 22; Hans Kelsen, 'Who Ought to be the Guardian of the Constitution?' in Lars Vinx (ed.) *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (Cambridge University Press 2015) 174.

[3] Victor Ferreres Comella, *Constitutional Courts and Democratic Values: A European Perspective* (Yale University Press 2009) 3.

[4] Victor Ferreres Comella, 'The Rise of Specialized Constitutional Courts' in Tom Ginsburg and Rosalind Dixon (eds) *Comparative Constitutional Law* (Edward Elgar 2011) 265-277; and Comella (n 3) 3.

[5] See for instance Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press 2003); and Tom Ginsburg, 'Constitutional Courts in East Asia' in Tom Ginsburg and Rosalind Dixon (eds) *Comparative Constitutional Law in Asia* (Edwar Elgar 2014) 47.

[6] Gerhard van der Schyff, *Judicial Review of Legislation: A Comparative Study of the United Kingdom, the Netherlands and South Africa* (Sprigner 2010); Jan ten Kate and Peter J. van Koppen, Judicialization of Politics in the Netherlands: Towards a Form of Judicial Review' (1994) 15 International Political Science Review 143;

But why has an institution which is not an indispensable part of the institutional setting of all European states reached such prominence and approval? What is this idea behind constitutional courts which triumphed despite all criticism? Are constitutional courts conducting a legislative or judicial function, political or legal? Is there truly one single model and design of constitutional courts or are there diversities which result from the necessary adaptations required in different countries?

These and many other questions are frequently posed and occupy the academic debate on constitutional courts. In this sense, this first chapter aims to briefly discuss different aspects of the establishment, role and function of constitutional courts in Europe. It will, on the one hand, show the common features of constitutional courts across Europe but also, on the other hand, the existing diversity among these institutions. All these aspects of constitutional courts will be analyzed in three sections. The first section discusses the birth of an idea of establishing constitutional courts and the creation of two different models of constitutional review, decentralized and centralized, in order to reveal the main reasons and factors that led to the introduction of specialized institutions for conducting constitutional review in Europe. The second section focuses on defining constitutional courts through their main institutional features and characteristics. In this sense, constitutional courts will be distinguished from other judicial bodies, part of the ordinary judiciary, which are also endowed with the power of constitutional review. Specific features of constitutional courts – such as their institutional design, function and powers, appointment and tenure of constitutional justices, effect of their decisions as well as certain procedural aspects such as the access to the court – will be discussed. The third section is devoted to presenting and deconstructing the main objections and challenges to constitutional courts in national constitutional systems. These are often manifested through the constitutional court's relationship with the legislative institutions as well as the ordinary judiciary and the sort of institutional struggle between them which has raised doubts over the appropriateness of the existence and function of constitutional courts. At the end, a conclusion will summarize the main arguments.

2 The birth of an idea of establishing constitutional courts and the two models of constitutional review

2.1 Reasons behind the initial establishment of constitutional courts

The 'quest' of adopting an immutable and stable legal rule which would codify the basic values of states and societies has been ongoing for a very long time. In this sense, the notion of a written constitution, as a higher law through which the political power and its exercise would be legally framed, and the subordination of, above all, statutory provisions to it, has its roots very deep in history.[7] However, the quest for introducing a judicial safeguard for the supremacy and respect of constitutions could be said to be of a relatively more recent date.

Leonard F. M. Besselink, 'Constitutional Adjudication in the Era of Globalisation: the Netherlands in Comparative Perspective' (2012) 18 European Public Law 231; Gerhard van der Schyff, Constitutional Review by the Judiciary in the Netherlands: A Bridge Too Far? (2010) 11 German Law Journal 275.

[7] Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (Clarendon 1989) 117-131.

Constitutional review understood as 'the power of courts to strike down incompatible legislation and administrative action'[8] has been first incorporated by the U.S. Supreme Court with the renowned decision in *Marbury v. Madison* in 1803[9] and thus marked the beginning of modern constitutional review.[10] By convincingly reasoning on the supremacy as the defining feature of a written constitution as well as determining the role of judges in saying what the law is, the U.S. Supreme Court in this decision had introduced the first model of constitutional review which is usually named as the decentralized or diffuse model of constitutional review:[11] Decentralized because, in the U.S. as well as the other constitutional systems which have incorporated this type of review, all ordinary courts have the power of reviewing the conformity of statutory provisions with the constitution in the course of their regular duties.[12]

This sort of jurisdiction of ordinary judges to conduct judicial review did not arise 'out of the blue'. On the contrary, belying the often existing impression, the idea of constitutional review in the U.S. could be traced to earlier doctrines and the role of judges in the former English colonies in America and in the United Kingdom overall.[13] Thus, 'more than a century of American history and a strong line of precedents – to say nothing of contemporary writings – stood behind'[14] the decision of U.S. Supreme Court and the establishment of the decentralized model of constitutional review.

A rather similar evolutionary path could also be recognized in the case of the second model of constitutional review which occurred much later. The so-called centralized model of constitutional review through constitutional courts was based on the same overarching ideas and aimed to fulfil similar goals which were gradually further developed in the European context.[15] The centralized model of constitutional review is characterized by ascribing constitutional review of legislation as an exclusive power to only one specially established institution, a constitutional court. From a historical perspective the centralized constitutional review developed as a reaction to the perceived shortcomings of the decentralized model in the U.S.,[16] but even more importantly, as a result of the unsuccessful attempts of its introduction

[8] Tom Ginsburg, 'The Global Spread of Constitutional Review' in Gregory A. Caldeira, R. Daniel Kelemen and Keith E. Whittington (eds) *The Oxford Handbook of Law and Politics* (Oxford University Press 2008) 81; also quoted in Maartje de Visser, *Constitutional Review in Europe: A Comparative Analysis* (Hart 2014) 53.

[9] *Marbury v Madison,* 5 U.S. (1 Cranch) 137 (1803). See also on this Michel Troper, 'Marshall, Kelsen, Barak and the constitutional fallacy' (2005) 3 International Journal of Constitutional Law 24; Geoffrey R. Stone, Louis Michael Seidman, Cass R. Sunstein, Mark V. Tushnet and Pamela S. Karlan, *Constitutional Law* (6th edition Wolters Kluwer 2009) 29-42.

[10] Simon (n 1) 15.

[11] De Visser (n 8) 94.

[12] Cappelletti (n 7) 133-136.

[13] Cappelletti (n 7) 130; and Ginsburg (n 8) 82-83. However, this was also the case in France prior to the French Revolution; on this see more on this Michel Troper, 'The Logic of Justification of Judicial Review' (2003) 1 International Journal of Constitutional Law 103.

[14] Cappelletti (n 7) 131.

[15] For more on this generally see Louis Favoreu, 'Constitutional Review in Europe', in Louis *Henkin* and *Rosenthal* (eds), *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* (Columbia University Press 1990) 38; excerpts taken over in Vicki Jackson and Mark Tushnet (eds) *Comparative Constitutional Law* (Foundation Press 1999) 459-464. On specific issues, for instance, on the similarities and differences over the notion of supremacy between Marshall and Kelsen see Troper (n 13) 103-109 and on the common trait of negative experience with parliamentary sovereignty see Comella (n 3) 11.

[16] More on this in Favoreu (n 15) 464-466; and Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press 2000) 33, 40. On the Italian experience with decentralized review, see Vittoria

and application in Europe under the existing circumstances in the 19th and early 20th century.[17] Therefore one might argue for a certain level of historical continuum in the development of an idea of constitutional review and the supremacy and guarantees of the constitution. Namely, even before the establishment of the first constitutional court, there were attempts in certain European states to adapt the U.S. decentralized model by limiting the review only to the highest judicial instances, that is, through a form of centralization of the decentralized model of constitutional review.[18] However, the success of these adaptations of the decentralized model of constitutional review did not even come close to the one achieved in the United States. As result of these developments and certain instances of serious failures of the existing model of separation of powers in continental Europe inherited from the French Revolution, Hans Kelsen and other scholars after him elaborated several reasons for the introduction of a new institution termed a constitutional court.[19] The main goal of these institutions would be to guarantee the respect of the constitution from all public authorities not only from its procedural but also from a material aspect, that is, its content.[20] In this manner the constitution would no longer be perceived solely as a mere political document subject to the discretion of the political institutions[21] but rather as the highest or basic legal norm of the country which should be characterized through its supremacy.[22] This task of constitutional review could not be entrusted to ordinary courts but rather to a special constitutional body which would be outside of the *trias politica*[23] because of several reasons related to legal certainty, expertise and democratic legitimacy.

Barsotti, Paolo G. Carozza, Marta Cartabia and Andrea Simoncini, *Italian Constitutional Justice in Global Context* (Oxford University Press 2016) 11-12.

[17] Cappelletti (n 7) 141, and ideals of 18th and 19th century, John E. Ferejohn, 'Constitutional Review in the Global Context' (2002) 6 Legislation and Public Policy 52; and Ginsburg (n 8) 84. However, to avoid confusion there are also successful examples that need to be stressed such as the Swiss example. See for instance Cappelletti (n 7) 133. On other examples see for instance, Allan Randolph Brewer-Carias, *Judicial Review in Comparative Law* (Cambridge University Press 1989) excerpts in Vicki Jackson and Mark Tushnet (eds) *Comparative Constitutional Law* (Foundation Press 1999) 477-478; and de Visser (n 8) 95-95.

[18] See for instance Cappelletti (n 7) 134; Allan R. Brewer-Carias, *Constitutional Courts as Positive Legislators: A Comparative Law Study* (Cambridge University Press 2011) 13-14; and Favoreu (n 15) 462-466.

[19] Kelsen today is commonly referred to as the father of constitutional courts; however, similar ideas were elaborated before him by several authors, and some institutions served as precedents, such as the ideas of Georg Jellinek as well as some examples of abstract review in some South American countries since late 19th century. For more on this see Comella (n 3) 3; Cristoph Bezemek, 'A Kelsenian Model of Constitutional Adjudication: The Austrian Constitutional Court' (2012) 67 Zeitschrift für öffentlisches Recht 115, 117; and Manfred Stelzer, *The Constitution of the Republic of Austria: A Contextual Analysis* (Hart 2011) 176-177.

[20] Hans Kelsen, 'On the Nature and Development of Constitutional Adjudication' in Lars Vinx (ed.) *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (Cambridge University Press 2015) 28-29.

[21] Cappelletti (n 7) 186; Christoph Möllers, 'Pouvoir Constituant-Constitution-Constitutionalisation' in Armin von Bogdandy and Jürgen Bast (eds) *Principles of European Constitutional Law* (2nd edition Hart 2010) 171-173; Christoph Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (Oxford University Press 2013) 127-128; and Dieter Grimm, 'Types of Constitutions' in Michel Rosenfeld and Andras Sajo (eds) *Comparative Constitutional Law* (Oxford University Press 2012) 115ff.

[22] Favoreu (n 15) 465.

[23] Comella (n 3) 14-15, quoting Allan Randolph Brewer-Carias, *Judicial Review in Comparative Law* (CUP 1989) 118-119; Besselink (n 6) 232; but cf Simon (n 1) 27, quoting Möllers, argues that: "Das Bundesverfassungsgericht ist Teil der Gewaltengliederung, es steht nicht über ihr", Christoph Möllers, 'Dogmatik der grundgesetzlichen Gewaltgenliederung' (2007) 132 Archiv des öffentlichen Rechts 493, 531.

2.1.1 Legal certainty

Constitutional courts would be able to deliver higher level of legal certainty than ordinary courts in conducting constitutional review. This is mainly the result of the absence of the doctrine of *stare decisis* or the principle of precedent in civil law countries such as most of the European ones.[24] Additionally, the organization of the judiciary in most of the European countries is characterized by lack of unity of jurisdiction[25] and thus is based on the division of labor between separate judicial structures having jurisdiction either over civil and criminal or over administrative matters. These separate judicial structures have different supreme courts on top.[26] Bearing this in mind, situations in which one court would declare a certain statute unconstitutional while the other would hold it constitutional could easily occur because there is no single supreme court at the apex of the judiciary.[27] This does not mean that legal certainty would collapse in civil law countries which have incorporated the decentralized model. However, as a result of the limitations of the civil law system, constitutional courts could offer a better safeguard of legal certainty. This would result from an exclusive power of constitutional courts to invalidate unconstitutional legislative acts with *erga omnes* effect instead of just setting them aside and disapplying them only in individual cases, which is actually the power ordinary courts have in the decentralized model.[28]

2.1.2 Expertise

The claim goes that ordinary judges in civil law countries, who are career judges, lack the expertise for the highest level of abstract legal reasoning required by constitutional review which often involves complex analysis of normative and policy considerations.[29] Such an assumption on the lack of expertise is also the result of the deeply entrenched distrust towards the judges, especially in the aftermath of the French Revolution[30] and their function being reduced to application of legal syllogism.[31] This has been best captured by Montesquieu's understanding of the role of judges as a mere mouthpiece for the law and inanimate beings

[24] On the factual relevance of precedents in civil law countries through the existing of a loose hierarchy in the organization of the judiciary see Comella (n 3) 22-23 and Stone Sweet (n 16) 146. However, this is not to say that the model of constitutional review is preconditioned or determined by the legal tradition or legal system. As a matter of fact, there are civil law countries which have also adopted a decentralized model of constitutional review and still maintain this model through certain adaptations. For more on this Brewer-Carias (n 18) 15; Favoreu (n 15) 466-469 and de Visser (n 8) 94-97.

[25] Favoreu (n 15) 465; and Vicki Jackson and Mark Tushnet (eds) *Comparative Constitutional Law* (Foundation Press 1999) 458.

[26] Kelsen (n 20) 40; Comella (n 3) 21; John Bell, *Judiciaries within Europe: A Comparative Review* (CUP 2009); and Favoreu (n 15) 465.

[27] Hans Kelsen, 'Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution' (1942) 4 The Journal of Politics 185-186.

[28] Kelsen (n 20) 40-43. It has to be noted, though, that as a result of *stare decisis*, for instance the decision of the U.S. Supreme Court, represents a binding precedent for future cases. See Comella (n 3) 18; and Jackson and Tushnet (n 25) 458.

[29] For more on this see Cappelletti (n 7) 142-146; Comella (n 3) 47; Favoreu (n 15) 465; and Jackson and Tushnet (n 25) 457.

[30] Later also, as a result of the democratization of totalitarian regimes, see Andrew Harding, Peter Leyland and Tania Groppi, 'Constitutional Courts: Forms, Functions and Practice in Comparative Perspective' in Andrew Harding and Peter Layland (eds.) *Constitutional Courts: A Comparative Study* (Wildy, Simmonds and Hill 2009) 13.

[31] Cappelletti (n 7) 142-146; and Favoreu (n 15) 459-460.

which could not enter into interpretation of the laws, and this should be instead left to the legislative power.[32] According to such an understanding of the role of judges, there is/was a strong emphasis on a manifestation of high level of judicial deferentialism to political institutions and public authorities which essentially undermines constitutional review.[33] On the other hand, the constitutional discourse has a special nature and a relative autonomy as opposed to other forms of legal and political discourse.[34] This character of the constitutional discourse stems from the way in which constitutions are drafted and enacted, often as result of political negotiations and compromises.[35] In this manner constitutions frequently consist of general and open-ended provisions which require further clarification and interpretation. Consequently, the relative autonomy of the constitutional discourse draws with it the relative autonomy of constitutional review from ordinary courts and other public authorities. In this sense, specially designed constitutional courts would better achieve the role of guarding the constitution due to their composition with experienced lawyers with different backgrounds and expertise insulated from the ordinary judiciary and also from the other two branches whose acts are subject to constitutional review.[36] This diversity in the composition of the constitutional courts ensures that the constitution as both a fundamental political and legal document would not fall into the trap of overtly 'legalistic' form of reasoning.[37] In this manner, constitutional courts would be dealing exclusively with constitutional issues as their main task and not incidentally as ordinary courts would do in a decentralized system.

2.1.3 Separation of powers and democratic legitimacy

Ascribing constitutional review to ordinary judges raises serious objections, taking into consideration the understanding of the separation of powers in Europe dominated by the doctrine of parliamentary sovereignty.[38] The most important among these objections is the issue of democratic legitimacy as perceived through the counter-majoritarian difficulty.[39] This objection actually depicts the uneasy relationship between democracy and constitutional review as part of constitutionalism which is present in most liberal democracies.[40] The counter-majoritarian character of constitutional review has also been raised in light of the decisions of constitutional courts.[41] However, constitutional courts through their specific institutional features are designed to better tackle the objections than is the case with the ordinary judiciary under the separation of powers doctrine.[42]

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[32] Charles de Secondat, Baron de Montesquieu, *The Spirit of Laws* (Batoche 2011) book XII chapter 6, 180. On the role of judges and a new light on Montesquieu's interpretation see K.M. Schönfeld, 'Rex, Lex et Judex: Montesquieu and *la bouche de la loi* revisited' (2008) 4 European Constitutional Law Review 274-301.
[33] Harding (n 30) 5.
[34] Comella (n 3) 36-55.
[35] On the notion of relational contracting and its consequences see Stone Sweet (n 16) 44.
[36] Kelsen (n 20) 47-48; and Favoreu (n 15) 459.
[37] Comella (n 3) 46; and Comella (n 4) 269.
[38] Comella (n 3) 11-12; Barsotti et al. (n 16) 235-236; and Ferejohn (n 17) 53.
[39] More on the counter-majoritarian difficulty in the U.S. context see Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale University Press 1986) 16-23. See also Comella (n 3) 86.
[40] Dieter Grimm, *Constitutionalism: Past, Present, and Future* (Oxford University Press 2016) 215-219.
[41] Comella (n 3) 86-94.
[42] For instance, it is claimed that the centralized model could be subject to control more easily than the decentralized model and all of the ordinary courts; for this see Stone Sweet (n 16) 40.

Constitutional review in a centralized model involves invalidation of legislative acts which by its character is a legislative function. In this manner, constitutional review directly interferes with the legislative power.[43] The legislative power under the separation of powers scheme is reserved solely for the legislative body that in a democracy is the highest representative institution of respective citizens who choose their representatives through elections. As a result, the legislative function is requiring democratic legitimacy which the ordinary courts in Europe do not possess and this makes the case for establishing a constitutional court even stronger. Taking this into consideration, the way in which constitutional courts are conceived and designed neutralizes these types of objections.[44] Perhaps the most important aspect of constitutional courts which distinguishes them, for instance, from the self-declared power of judicial review of federal law of the U.S. Supreme Court, is that their exclusive power of constitutional review is explicitly proclaimed in the constitution.[45] Furthermore, the members of a constitutional court, different from ordinary judges, are appointed to the court for a limited term and through procedures which directly involve the political institutions, the legislative and the executive, in providing indirect democratic legitimacy to these courts.[46] Additionally, while invalidation of legislative acts might be perceived as a legislative function it does not represent a creation of new general legal norm *strictu sensu* by making policy decisions, but rather an application and interpretation of constitutional norms while conducting constitutional review.[47] Lastly, the nature of constitutional courts' function and the issue of democratic legitimacy have their implication also in the procedure of review before constitutional courts. Namely, constitutional review *in abstracto* before a constitutional court could be initiated only by a limited number of subjects related to the other three branches of power.[48] All these aspects of the institutional design of constitutional courts represent a democratic check and at the same time refute the objections based on democratic legitimacy.[49]

2.1.4 How 'European' is the European model of constitutional review?

These reasons as well as the circumstances related to the constitutional and political system common to many states in Europe have contributed to the introduction of the centralized model of constitutional review through constitutional courts as special constitutional institutions. However, there are authors, especially from Latin America, which strongly rebut the uniqueness of this European model of constitutional review, arguing that a centralized model of constitutional review existed in Latin America several decades before Hans Kelsen first introduced the constitutional court in Austria but later under his influence also around Europe.[50] Nevertheless, there is a wrong assumption behind these arguments which tries to identify the process of centralization of the decentralized model with the establishment of constitutional

[43] Kelsen (n 20) 45.
[44] Comella (n 3) 95-97.
[45] Christoph Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (Oxford University Press 2013) 141; and Brewer-Carias (n 18) 8.
[46] See for instance, John Ferejohn and Pasquale Pasquino, 'Constitutional Adjudication: Lessons from Europe' 82 Texas Law Review 2004, 1681; Kelsen (n 27) 187; and Kelsen (n 20) 47-49.
187.
[47] Kelsen (n 20) 47.
[48] Kelsen (n 20) 64-68.
[49] Comella (n 3) 95-107.
[50] Brewer-Carias (n 18) 8, 13-14; and Brewer-Carias (n 17) 477.

courts outside of the regular judiciary. In several states in Latin America in the late 19th century constitutional review was centralized in the highest judicial instances within the ordinary judiciary, supreme courts, and not in constitutional courts which makes a significant difference especially in light of the main reasons behind the centralized model. Therefore, a distinction should be made between courts having constitutional jurisdiction besides their other duties and constitutional courts which are entrusted with a monopoly and exclusive jurisdiction over constitutional review of legislative acts.[51] Accordingly, it can be convincingly argued that constitutional courts are the product of constitutional developments that first took place in Europe. The initial model was first developed in Austria and Czechoslovakia and was named as the Kelsenian model.[52] In the aftermath of the Second World War the model was adopted in several European states and was further developed through the establishment of the German Federal Constitutional Court after which the model is often termed as the Austro-German model. However, since constitutional courts were introduced in other European states which have opted for features of constitutional courts different from the Austro-German model, the centralized model of constitutional review perceived through its common features among all constitutional courts generally is referred to as the European model.

2.2 Factors that determined the diffusion of the European model of constitutional review

Since the introduction of the first constitutional courts in Austria and Czechoslovakia,[53] it took several decades for the spread of this institution. The relatively rapid expansion and diffusion could be best perceived in Europe where a great majority of states have introduced a constitutional court in their constitutional systems. Currently, in the European Union 19 of the 28 member states have constitutional courts. All seven countries that already set up a certain type of legal relationship with the European Union which might prospectively lead to a membership have established constitutional courts.[54] More broadly, of 47 member states of the Council of Europe 33, more than two-thirds of them, have a constitutional court. The European model has been a successful exporting constitutional product abroad.[55] Constitutional courts

[51] Monica Claes, *The National Courts' Mandate in the European Constitution* (Hart 2006) 394-397. One should note that there are also so-called mixed or hybrid models such as that in Portugal where, besides the centralized model of constitutional review, ordinary courts have the power to enter into constitutional review which in the end is sent before the Constitutional court. For more on this see Art. 280 of the Constitution of the Portuguese Republic and Lucas Prakke and Constantijn Kortmann (eds.) *Constitutional Law of 15 EU Member States* (Kluwer 2004) 698.

[52] Ferejohn and Pasquino (n 46) 1676 and Bezemek (n 19) 115.

[53] Comella (n 3) 3, writes that before Second World War, besides these two countries, only Lichtenstein (1921) and Spain (1931) had established constitutional courts; Prakke and Kortmann (n 51) 779; Wojciech Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer 2nd edition 2014) 4; Jiri Priban, 'Judicial Power vs. Democratic Representation: The Culture of Constitutionalism and Human Rights in the Czech Legal System' in Wojciech Sadurski (ed) *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (Kluwer 2002) 373; and Zdenek Kühn, 'Czech Constitutional Court as Positive Legislator?' in Allan R. Brewer-Carias (ed), *Constitutional Courts as Positive Legislators: A Comparative Law Study* (Cambridge University Press 2011) 446-448.

[54] Montenegro, Serbia, Macedonia, Albania, Bosnia and Hercegovina, Kosovo and Turkey.

[55] Christoph Schönberger, ‚Anmerkungen zu Karlsruhe' in Matthias Jestaedt, Oliver Lepsius, Christoph Möllers and Christoph Schönberger, *Das entgrenzte Gericht: Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht* (Suhrkamp 2011) 44-45.

have been diffused to Africa,[56] Asia[57] and Latin America.[58] Thus, Stone Sweet notes that in 2005 of 135 national systems with a constitutional review 85 had a constitutional court.[59] Bearing in mind the number of countries in Europe and abroad which have already established constitutional courts, it should not come as a surprise that we could speak of a global rise of constitutional courts.[60]

The spread of constitutional courts in Europe occurred in three waves which corresponded to the waves of democratization on the continent.[61] The first wave was in the immediate aftermath of the Second World War when Austria, Germany and Italy established their constitutional courts with their respective constitutions. The second wave took place in the late 1970s when Spain and Portugal enacted new constitutions which were supposed to mark a turn towards democracy after experiencing military dictatorship and thus introduced constitutional courts. The third wave took place in the early 1990s after the collapse of the communist regimes in Central and Eastern Europe and the Balkans. In most of these countries the newly enacted constitutions established new institutions,[62] constitutional courts.[63] It could be observed that all three waves came as a reaction to a previous authoritarian experience which further emphasized some of the abovementioned reasons for establishment of constitutional courts.[64]

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[56] For instance, on the case of Egypt see Tamir Moustafa, 'Law and Resistance in Authoritarian States: The Judicialization of Politics in Egypt' in Tom Ginsburg and Tamir Moustafa (eds), *Rule of Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press 2008) 132; Hienz Klug, 'South Africa: South Africa's Constitutional Court: Enabling Democracy and Promoting Law in the Transition from Apartheid' in Andrew Harding and Peter Layland (eds) *Constitutional Courts: A Comparative Study* (Wildy, Simmonds and Hill 2009) 263-288; and Babacar Kante, 'Francophone Africa: Models of Constitutional Jurisdiction in Francophone West Africa' in Andrew Harding and Peter Layland (eds) *Constitutional Courts: A Comparative Study* (Wildy, Simmonds and Hill 2009) 242-262.

[57] Ginsburg (n 5); and Andrew Harding and Peter Leyland, 'Indonesia and Thailand: The Constitutional Court of Thailand and Indonesia: Two Case Studies from South East Asia' in Andrew Harding and Peter Layland (eds) *Constitutional Courts: A Comparative Study* (Wildy, Simmonds and Hill 2009) 317-341.

[58] Thomas Bustamante and Evanilda de Godoi Bustamante, Constitutional Courts as Negative Legislators: The Brazilian Case in Allan R. Brewer-Carias (ed), *Constitutional Courts as Positive Legislators: A Comparative Law Study* (Cambridge University Press 2011) 283-314; Sandra Morelli, The Colombian Constitutional Court: From Institutional Leadership to Conceptual Audacity in Allan R. Brewer-Carias (ed) *Constitutional Courts as Positive Legislators: A Comparative Law Study* (Cambridge University Press 2011) 363-388; on Costa Rica Ruben Hernandez Valle, The Normative Resolutions of the Constitutional Court Allan R. Brewer-Carias (ed) *Constitutional Courts as Positive Legislators: A Comparative Law Study* (Cambridge University Press 2011) 389-406; Daniela Urosa Magii, Constitutional Courts as Positive Legislators: The Venezuelan Experience Allan R. Brewer-Carias (ed) *Constitutional Courts as Positive Legislators: A Comparative Law Study* (Cambridge University Press 2011) 843-887.

[59] Alec Stone Sweet, 'Constitutional Courts' in Michel Rosenfeld and Andras Sajo (eds.) *Comparative Constitutional Law* (Oxford University Press 2012) 820.

[60] Ginsburg (n 8); Comella (n 4); and Barsotti et al. (n 16) 231, "the globalization of constitutional adjudication".

[61] Stone Sweet (n 16) 40-41; Ferejohn and Pasquino (n 46) 1671; and Ferejohn (n 17) 50.

[62] It should be noted that prior to this Yugoslavia since 1963, and its republics as well as Poland since 1985 had already had experience with constitutional courts which however had limited powers very much subordinated to the political regime. Sadurski (n 53) 3.

[63] More on this Sadurski (n 53) 4-13, Lech Garlicki, 'Constitutional Court of Poland: 1982-2009' in Pasquale Pasquino and Francesca Billi (eds) *The Political Origins of Constitutional Courts: Italy, Germany, France, Poland, Canada, United Kingdom* (Fondazione Adriano Olivetti 2009) 16-19.

[64] Christoph Möllers, 'Legalität, Legitimität und Legitimation des Bundesverfassungsgerichts' in Matthias Jestaedt, Oliver Lepsius, Christoph Möllers and Christoph Schönberger, *Das entgrenzte Gericht: Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht* (Suhrkamp 2011) 285; and Ferejohn and Pasquino (n 46) 1674. Actually, this reflects the difference between two types of constitutions in Europe, evolutionary and

Even though an overwhelming majority of states have followed this pattern of establishment of constitutional courts, there are three exceptions to this pattern in Europe which could be seen through the examples of France,[65] Belgium and Luxembourg. In the case of France and Belgium, the underlying reason for an establishment of a constitutional court was the control over the division and exercise of competences. In the case of France this mainly had to do with the horizontal balance of powers and therefore the *Conseil Constitutionnel* (CC) must safeguard the powers of the executive in relation to the legislative. As for Belgium, the constitutional court was introduced in light of the newly established federal order with the Constitution of 1993.[66] In this sense the constitutional court's main role is to safeguard the vertical balance of power within the federation. For the particular case of Luxembourg it is interesting to note that it was the judgment of the ECtHR against it which led to the establishment of a constitutional court.[67]

However, while it is clear that there has been a rapid spread of constitutional courts, it is not clear what stands behind this rapid spread and diffusion of constitutional courts, particularly in Europe.

The spread of constitutional courts in Europe, but also abroad, has been determined by several factors related to these institutions. The first factor has to do with the institutional adaptability of constitutional courts. More precisely, these institutions could be introduced without requiring drastic changes in the existing understanding of separation of powers and the parliamentary system of government.[68] Being placed outside of the traditional *trias politica*, they represent an addendum to the existing institutional setting and in this sense constitutional courts do not extensively disrupt the main functions of the other constitutional bodies. Accordingly, constitutional courts represent a form of external control and checks over the three branches of government and whether they abide by the constitution and respect its supremacy.

Second, constitutional courts proved to be perfectly tailored for fulfilling one of the main tasks of the new constitutionalism, the protection of constitutional rights. Even though this task was not foreseen initially as part of the powers of constitutional courts in Austria and

revolutionary, where the former have usually undergone a long term of political developments instead of as result of a single foundational constitutional moment. For more on this see Besselink (n 6) 232.

[65] For the different path of the French CC see Alec Stone, *The Birth of Judicial Politics in Europe* (Oxford University Press 1992) and Stone Sweet (n 16) 41. Though often the CC is not said to be a genuine constitutional court through the developments resulting the decision of 1971, Stone Sweet (n 16) 41 and Ferejohn and Pasquino (n 46) 1675, claiming that actually CC is not a constitutional court, and the constitutional amendments of 2008, have definitely changed this perception. On this see Michel Troper, 'Constitutional Amendments Aiming at Expanding the Powers of the French Constitutional Council' in Pasquale Pasquino and Francesca Billi (eds) *The Political Origins of Constitutional Courts: Italy, Germany, France, Poland, Canada, United Kingdom* (Fondazione Adriano Olivetti 2009) 88-95; and Marrie-Claire Ponthoreau and Jacques Ziller, 'The Experience of the French Conseil Constitutionnel: Political and Social Context and Current Legal-Theoretical Debates' in Wojciech Sadurski (ed) *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (Kluwer 2002) 123, on court or not 129-131.

[66] de Visser (n 8) 56-57.

[67] Patricia Popelier and Aida Araceli Patino, 'Deliberative Practices of Constitutional Courts in Consolidated and Non-Consolidated Democracies' in Patricia Popelier, Armen Mazmanyan and Werner Vandenbruwaene (eds.), *The Role of Constitutional Court in Multilevel Governance* (Intersentia 2012) 206.

[68] Stone Sweet (n 59) 818.

Czechoslovakia, it was through the prominent example of the FCC that this role of rights protection became an important, if not crucial, part of many constitutional courts' powers and role. In this way, the Austro-German model gained its attractiveness which influenced its spread and adoption outside of these countries. As the processes of democratization placed rights protection at the center stage so did constitutional courts become very suitable institutional solutions to existing needs and challenges.[69]

Third, it is the "recursive nature of the diffusion process".[70] Successful constitutional ideas tend to migrate quite swiftly.[71] The speed with which they migrate is determined by the degree of their success and positive track record. When it comes to constitutional courts, this has definitely been the case, especially based on the success of the FCC. Accompanied by the important promoting role of the so-called international rule of law industry,[72] constitutional courts became an essential element of new constitutionalism and in consolidation of democracy. In this manner, the path was paved for the global rise of constitutional courts.[73]

Keeping in mind this line of institutional evolution and development based largely on the Austro-German model, could one claim that there is a single model of constitutional courts based on common institutional design and features or there are several different models of constitutional courts? The next section will provide an overview of the common elements and feature of the European model of constitutional courts and at the same time it will point out the differences that exist between individual constitutional courts.

3 Institutional features of constitutional courts

Constitutional courts are special institutions placed outside the ordinary judiciary which have an exclusive power, provided for by the constitution, to control the conformity of statutes and other legal acts with the constitution.[74] Their overarching role is to guarantee the supremacy of the constitution and its respect by all three branches of the government. Therefore, they are positioned between law and politics, which follows the character of the constitution as both a legal and political document, as they are supposed to provide legal answers to political questions and conflicts.[75] As a direct result of this role and position, they are perceived as hybrid institutions which are neither a regular court nor a purely political institution.[76] However, they are said to be both at the same time and thus having a double nature.[77] As a

[69] Stone Sweet (n 59) 818-819.
[70] Stone Sweet (n 59) 819.
[71] Sujit Choudry (eds) *Migration of Constitutional Ideas* (Cambridge University Press 2009).
[72] Michal Bobek and David Kosar, 'Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe' (2014) 15 German Law Journal 1276.
[73] Stone Sweet (n 59) 819; Ginsburg (n 8); and on the broader spread of judicial power see C. Neal Tate and Torbjörn Vallinder (eds) *The Global Expansion of Judicial Power* (New York University Press 1992).
[74] Comella (n 4) 265.
[75] Claes (n 51) 391, "translate political issues into legal ones"; Schwartz (n 1) 30; and Simon (n 1) 25, 29.
[76] Möllers (n 45) 141-142.
[77] In the German context this double role is the one of 'Verfassungsorgan' and 'Gericht'. For more on this see Schönberger (n 55) 50; Gerd Sturm and Steffen Detterbeck, 'Art. 93: Bundesverfassungsgericht, Zuständigkeiten' in Michael Sachs (ed) *Grundgesetz Kommentar* (8th edition C.H. Beck 2018) paras. 4-12; and Klaus Schlaich and Stefan Korioth, *Das Bundesverfassungsgericht: Stellung, Verfahren, Entscheidungen* (11th edition C.H. Beck 2018) 19; and Simon (n 1) 25-26. While this might seem contradictory at first glance, it is perfectly logical bearing

matter of fact, Kelsen himself has put this nicely by arguing that a constitutional court "is a court from an organizational point of view, is nevertheless, as a result of its function, engaged in an activity that makes it into something more than a mere court[…] an organ of legislative power".[78] This double nature and specific character of constitutional courts is best manifested and perceived through their institutional features. It is exactly through these features that it becomes apparent why they are outside of ordinary judiciary and why they are to be distinguished from other ordinary courts having constitutional jurisdiction or pronouncing on constitutional issues.[79]

The institutional features of constitutional courts have been determined to a large extent by the reasons behind their establishment. As a result, based on the assumption that in the great majority of cases the same reasons stood behind the establishment of constitutional courts, one might think that this would determine the existence of one single institutional design for these courts based on Kelsen's original model.[80] However, there is a certain level of diversity between constitutional courts in different countries through which they diverge from the original model. This is quite understandable, as even Kelsen admitted this could easily be the case by arguing that "the specific design of the constitutional court will have to adapt itself to the peculiarities of the respective constitution."[81] Furthermore, new circumstances brought with them additional reasons, such as the rights protection imperative of the new constitutionalism, which influenced the institutional features of constitutional courts.[82] Accordingly, one could speak of three different models of constitutional courts in Europe. Those models are based on the respective constitutional courts of Germany, Italy and France.[83] However, this does not deny the fact that even among these three models there are common institutional features of constitutional courts which distinguish them from ordinary courts. These common features are related to the functions and powers, composition and appointment, certain procedural aspects and the effects of decision of constitutional courts.[84]

3.1 The powers of constitutional courts

The first common feature of all constitutional courts is their function to conduct constitutional review in order to secure the respect for constitutional provisions, above all by the legislative.[85] This finds its reflection in the powers and jurisdiction of constitutional courts. The most typical

in mind that there cannot be a strict and total separation between legislation and adjudication. For more on this see Kelsen (n 20) 46 and Hans Kelsen, 'Who Ought to be the Guardian of the Constitution?' in Lars Vinx (ed.) *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (Cambridge University Press 2015) 184.

[78] Kelsen (n 20) 46. See also Schlaich and Korioth (n 77) 21: "Das BVerfG ist in seiner Funktion materiell ein Gericht."

[79] Claes (n 51) 394-396; and Comella (n 4) 265.

[80] Ferejohn and Pasquino (n 46) 1677.

[81] Kelsen (n 20) 47.

[82] Stone Sweet (n 16) 38, 46. More broadly on the purposes that may be served by constitutional courts see de Visser (n 8) 97-185.

[83] Comella (n 4) 267; and Ferejohn and Pasquino (n 46) 1681-1691. On particular models, see for instance on Italy Barsotti et al. (n 16); on Germany see Sturm and Detterbeck (n 77) paras. 4-19; and on France see Stone (n 65) and Stone Sweet (n 16) 41.

[84] Ferejohn and Pasquino (n 46) 1677-1678. Here they distinguish seven features.

[85] Kelsen (n 20) 43-44; and Comella (n 3) 5-6.

powers are the abstract review which is almost in all cases accompanied by a procedure of concrete review because they manifest the exclusive power of constitutional courts to decide on the validity of legislation.[86] In this sense, Comella argues that the 'purity' of constitutional courts is to be perceived through the level of importance that constitutional review plays compared to the other functions of constitutional courts.[87]

The abstract review is characterized by the fact that it is not related to any prior litigation but it represents a review of the legislative act *in abstracto*, without a direct reference to its actual application to a specific case in practice, based on a general claim that an act is not in conformity with the constitution.[88] Such a review could be initiated by a limited number of petitioners[89] before and/or after the promulgation of the legislative act. In this sense the abstract review could be *a priori* or *a posteriori*, preventive or repressive review of constitutionality.[90]

In Europe, all countries which have established constitutional courts have also foreseen the concrete review procedure along with an abstract review.[91] The concrete review represents a procedure initiated by the ordinary judiciary through a form of a preliminary reference procedure in the course of an ongoing case before them in which the issue of constitutionality of a legislative act to be applied in the case is raised.[92] In most countries these references are sent to constitutional courts if the issue of constitutionality of a legal act is crucial for the outcome of the case at hand and if the referring judge(s) has doubts on this constitutional

[86] In Germany these two procedures are parts of the general notion of 'Normenkontrol'. For more on abstract review see Sturm and Detterbeck (n 77) paras. 52-59; and on concrete review see Gerd Sturm and Steffen Detterbeck, 'Art. 100: Richtervorlagen zum Bundesverfassungsgericht' in Michael Sachs (ed) *Grundgesetz Kommentar* (8th edition C.H. Beck 2018) paras. 1-22.

[87] Victor Ferreres Comella, 'The Consequence of Centralizing Constitutional Review in a Special Court: Some Thoughts on Judicial Activism' (2004) 82 Texas Law Review 1707, in the same direction also Harding (n 30) 7, "most typical"; Tom Ginsburg and Zachary Elkins, 'Ancillary Powers of Constitutional Courts' (2008) 87 Texas Law Review 1431, "paradigmatic power"; and Stelzer (n 19) 198, "core element of the powers."

[88] Stone Sweet (n 16); and de Visser (n 8) 99.

[89] Belgium being the exception where individuals can bring a challenge for abstract constitutional review. On this see de Vesser (n 8) 128-130; and Comella (n 3) 7-8.

[90] On the difference between different constitutional courts in this regard and the specificities in France and Hungary see de Visser (n 8) 99ff. For the unique case of Portugal and the co-called anticipatory or prior review of constitutionality see Art. 278 of the Constitution of the Portuguese Republic and Prakke and Kortmann (n 51) 696.

[91] de Visser (n 8) 133; Sadurski (n 53) 91; Prakke and Kortmann (n 51); and Vaclav Pavlicek and Miluse Kindlova, 'The Czech Republic' in Constatnijn Kortmann, Joseph Fleuren and Wim Voermans (eds.) *Constitutional Law of 10 EU Member States: The 2004 Enlargement* (Kluwer 2006) II-59-60; Daiga Iljanova, 'The Republic of Latvia' in Constatnijn Kortmann, Joseph Fleuren and Wim Voermans (eds.) *Constitutional Law of 10 EU Member States: The 2004 Enlargement* (Kluwer 2006) V-50; Vaidotas A. Vaicaitis, 'The Republic of Lithuania' in Constatnijn Kortmann, Joseph Fleuren and Wim Voermans (eds) *Constitutional Law of 10 EU Member States: The 2004 Enlargement* (Kluwer 2006) VI-38; Alexander Brostl 'The Slovak Republic ' in Constatnijn Kortmann, Joseph Fleuren and Wim Voermans (eds) *Constitutional Law of 10 EU Member States: The 2004 Enlargement* (Kluwer 2006) IX-29-30; Arne Marjan Mavcic, 'The Republic of Slovenia' in Constatnijn Kortmann, Joseph Fleuren and Wim Voermans (eds.) *Constitutional Law of 10 EU Member States: The 2004 Enlargement* (Kluwer 2006) X-42. Luxembourg is the exception since it has only foreseen the power of concrete constitutional review of its Constitutional court, Prakke and Kortmann (n 51) 549.

[92] Kelsen (n 20) 65-66. On the comparative overview of concrete review see Otto Pfersmann, 'Concrete Review as Indirect Constitutional Complaint in French Constitutional Law: A Comparative Perspective' (2010) 6 European Constitutional Law Review 228-236.

matter.[93] In this way, the constitutional court is given an opportunity to conduct a concrete constitutional review of legislation in light of its actual application to a specific case before an ordinary court. It should be noted, however, that the level of abstractness does not often differ between the abstract and concrete review since constitutional courts are not dealing with the factual circumstances of the concrete case but only review the constitutionality of the disputed legislative act.[94] Actually, it is quite possible that a constitutional court has an indirect insight into the way a legislative act is being applied even in a case of abstract review.[95] Apart from certain procedural aspects pertaining to justiciability and self-restraint of courts sometimes present in concrete review procedures, the crucial difference between the two types of review is when and who can initiate a case before a constitutional court.[96] Accordingly, the concrete review procedure establishes the link between the constitutional courts and ordinary courts through which the latter become involved and play an important, though relatively passive, role in guaranteeing constitutionality in the legal system.[97]

Besides these most typical powers and forms of constitutional review by constitutional courts, there are two other important powers which in the practice of constitutional courts have played an important role in entrenching their authority and legitimacy. Both of these functions relate to constitutional review and were conceived by Kelsen as a rational part of constitutional courts' powers.[98] Those are the power of safeguarding constitutional rights and freedoms by constitutional courts through a procedure initiated by individual constitutional complaints and the power to decide on institutional disputes over vertical and horizontal division and exercise of competences.

The former is designed to enable constitutional courts to serve as a protector of constitutional rights and freedoms. Namely, private individuals have been provided with an additional avenue for safeguarding their rights after exhausting all legal and judicial remedies in cases in which they believe their rights have been violated by ordinary courts or administration in the course of application or interpretation of legal acts. In certain instances, such as in Germany, if the private individual's rights are directly violated by specific statutory provisions then a constitutional complaint could be lodged even against the statute itself.[99] In this manner, private

[93] Sturm and Detterbeck (n 86) paras. 1-22; on Italy see Giancarlo Rolla and Tania Groppi, 'Between Politics and the Law: The Development of Constitutional Review in Italy' in Wojciech Sadurski (ed) *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (Kluwer 2002) 144, 150-151; and Ferejohn and Pasquino (n 46) 1688.
[94] Sadurski (n 53) 91-92; and Marek Safjan, 'Poland: The Constitutional Court as a Positive Legislator' in Allan R. Brewer-Carias (ed), *Constitutional Courts as Positive Legislators: A Comparative Law Study* (Cambridge University Press 2011) 704.
[95] Comella (n 3) 66-70.
[96] Sadurski (n 53) 91-102. For instance, Austria restricted standing for concrete review to the highest courts. See Kelsen (n 27) 195.
[97] de Visser (n 8) 132-134; Stone Sweet (n 16) 45; and Ferejohn and Pasquino (n 46) 1689.
[98] Kelsen (n 20) 67, 72-75.
[99] Sturm and Detterbeck (n 77) paras. 77-81; on the case of Austria see Konrad Lachmayer, 'Constitutional Courts as Positive Legislators' in Allan R. Brewer-Carias (ed) *Constitutional Courts as Positive Legislators: A Comparative Law Study* (Cambridge University Press 2011) 254; and Stelzer (n 19) 201. See also Stone Sweet (n 16) 46. In Poland this is actually the only possibility, while the review of judicial decisions cannot be the subject of a constitutional complaint. On this Sadurski (n 53) 43; and Lech Garlicki, 'Constitutional Courts Versus Supreme Courts' 5 International Journal of Constitutional Law 2007 46, 60. In Spain this is not the case even though the constitutional complaint i.e. *recurso de amparo* is based on the German *Verfassungsbeschwerde*,

individuals are granted a standing before the constitutional courts, something that is not the case in the previous two forms of review.[100] As result, through review initiated by constitutional complaints, constitutional courts fulfil one of the basic requirements of rights protection under the principles of the new constitutionalism in Europe.[101]

While the constitutional complaint procedure has often come to dominate the workload and dockets of many constitutional courts, it has also drawn academic debates on its suitability to the original idea on the role and position of constitutional courts. Namely, there are certain influential authors on the topic, such as Stone Sweet, who argue that by having the power to protect fundamental rights constitutional courts inevitably become 'positive legislators' and thus put their legitimacy in doubts.[102] In this manner this added function of constitutional courts belies the original reasons and justifications for establishing these novel institutions. This claim is supported by the argument that, arguably, even Kelsen has clearly voiced his concerns about this by having a critical account on natural legal rules and ideals become a standard of constitutional review.[103]

However, these claims are not well-grounded, especially when it comes to the ideas behind the original design of the powers of constitutional courts. As a matter of fact, Kelsen has never explicitly argued for this in light of constitutional rights and freedoms but only for principles of natural law representing meta-positive norms which are neither turned into positive law nor are clearly defined.[104]

> "If it is to be prevented, the constitution must, if it appoints a constitutional court, abstain from all phraseology of this kind [ideals of 'justice', 'freedom', 'equality, 'equity', 'decency', and so on][105]; and if it wants to put up basic principles, guidelines, and limitations for the content of the statutes that are to be enacted, it must make sure to determine them as precisely as possible."[106]

Moreover, Kelsen in his article from 1928 has explicitly mentioned the possibility of fundamental rights review by constitutional courts, or more precisely, a protection of a legally protected interest violated by an individual legal act through an appeal to the constitutional court.[107] Therefore, it cannot be convincingly argued that rights protection has been conceived

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individuals cannot lodge an *amparo* against a statute or regulation having the force of statute law. On this see Enrique Guillen Lopez, 'Judicial Review in Spain: The Constitutional Court' (2008) 41 Loyola of Los Angeles Law Review 546; and Prakke and Kortmann (n 51) 780-781.

[100] With the exception of Belgium. On this see de Vesser (n 8) 128-130; and Comella (n 3) 7-8.

[101] Comella (n 3) 30-32; and Stone Sweet (n 16) 37.

[102] Stone Sweet (n 16) 36.

[103] Stone Sweet (n 59) 819; and Stone Sweet (n 16) 36.

[104] Kelsen (n 20) 59-61.

[105] Kelsen (n 20) 60, [text added].

[106] Kelsen (n 20) 61.

[107] Kelsen (n 20) 67, "If there is a possibility to challenge an individual legal act in the constitutional courts because of the alleged legal defectiveness of the general norm in whose - immediately legal - execution the act took place, then private parties will have an even stronger opportunity indirectly to contest general norms - in particular statutes and decrees - in the constitutional court than they enjoy by virtue of the possibility to bring challenge in the context of administrative proceedings." This was confirmed in Kelsen (n 27) 194. It is to be noted that this type of power of protection of the fundamental right of the ACC is still confined to administrative decisions and it cannot be exercised against judicial decisions. On this see Prakke and Kortmann (n 51) 59.

only later under the influence of new constitutionalism and that it has not been thought of during the initial stages of creation of constitutional courts. In this sense, being ascribed with rights protection function does not necessarily turn a constitutional court into a 'positive legislator'.

Lastly, one needs to point out the second power of constitutional courts which has played a significant role for the establishment of constitutional courts and their role in the institutional settings of many countries: namely, the power to review the division of powers along both vertical and horizontal lines.[108] In this sense, constitutional courts have been said to manifest their genuine importance in federal states, overseeing the division and exercise of competences in the relationship between the central authority and federal units.[109] Furthermore, the resolution of horizontal disputes has also become a frequent part of constitutional courts' powers.[110] The vertical and horizontal competence disputes could reach the constitutional courts in a form of both concrete or abstract and positive or negative disputes.[111]

While the abovementioned powers of constitutional courts are most frequently part of their core functions and purposes, as they occupy the biggest part of cases before these court, there are also other powers besides these four. These other constitutional courts' powers are referred to as 'ancillary powers'[112] not because they are generally less important but mainly because they do not reflect the main reasons and purposes for the establishment of constitutional courts.[113] The main reason for ascribing these powers to constitutional courts could be to "alleviate the need for the creation of special courts."[114] Among them most common ancillary powers are to determine whether political parties are unconstitutional, impeaching senior governmental officials, adjudicating elections, examining regularity and constitutionality of referendums or certifying states of emergency.[115]

3.2 Composition and appointment

The special character of constitutional courts as institutions and the specificity of their core function are also reflected in the composition of constitutional courts and the appointment procedure of constitutional justices. Since objections are raised over the need for democratic legitimacy required for exercising a legislative function, the institutional features of constitutional courts have been designed to tackle these objections through the involvement of

[108] de Visser (n 8)155-168; Ferejohn and Pasquino (n 46) 1688-1689; and Sturm and Detterbeck (n 77) paras. 41-50, 60-78.
[109] Kelsen (n 20) 72-75; de Visser (n 8) 156-163; Ferejohn and Pasquino (n 46) 1676-1677; Möllers (n 45) 131-134; and Harding (n 30) 9-10. For more on this issue see chapter 6.
[110] de Visser (n 8) 163-168.
[111] On the differences between Belgium, Spain, Italy and Germany see de Visser (n 8) 161-162; on Spain see Guillen Lopez (n 99) 545-546; and more generally see Prakke and Kortmann (n 51). For more on these powers of constitutional courts see chapter 6.
[112] Ginsburg and Elkins, (n 87) 1431ff.
[113] Ginsburg and Elkins (n 110) 1432.
[114] Kelsen (n 20) 54.
[115] For more on these powers see Ginsburg and Elkins (n 110) 1440ff; de Visser (n 8) 168-184; Bezemek (n 19) 120-121; Prakke and Kortmann (n 51); Pavlicek and Kindlova (n 91) II-59-62; Iljanova (n 91) V-50; Vaicaitis (n 91) VI-37-40; Brostl (n 91) IX-29-31; and Mavcic (n 91) X-42.

political or democratic institutions in the appointment procedure.[116] Additionally, the diversity of the composition of constitutional courts, consisting of highly experienced lawyers capable of authoritatively framing political questions into legal frames, can equally be used to rebut the democratic objections.[117]

Constitutional justices are dominantly recruited from experienced lawyers with diverse expertise and backgrounds, usually from the ranks of judges, university professors, lawyers or prosecutors.[118] The specific requirements and eligibility criteria, such as years of experience in practicing or teaching law, certain years of age, or other criteria are usually enlisted and specified in constitutions or specific legislation.[119] In certain cases, such as in France, Belgium or Italy, constitutional justices come also from the ranks of present or former politicians.[120] The presence of justices with political experience and background does not have to be necessarily taken as a negative aspect opposing the perception of constitutional courts as 'courts' since their insight in the political processes can substantially contribute to the political sensibility needed in light of the broad effects and implications of constitutional court decisions.[121] Constitutional justices are appointed for a limited term, most frequently between 9 and 12 years, and usually without the possibility of reappointment.[122] Regulated in this manner, the composition of constitutional courts should be able to reflect the dominant views in the society on fundamental constitutional values by being, at the same time, independent from the current political representatives.[123]

The appointment procedures vary across different constitutional courts but in all cases political institutions have a say in either nominating or appointing/electing constitutional justices.[124] Generally, the appointment procedures could be classified in three different models.[125] The first is characterized by the exclusive power of the legislative body both to nominate and appoint constitutional justices. The typical example would be Germany where the *Bundestag* and the

[116] Schwartz (n 1) 42: „Political influence in the appointment process is both inevitable and appropriate", Comella (n 3) 96-97. 98-100; and Grimm (n 40) 202-203.
[117] Comella (n 3) 43-44, 96-97.
[118] Comella (n 3) 40-41; Harding (n 30) 18-19; and Donald P. Kommers and Russel A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd edition Duke University Press 2012) 22. In Luxembourg though the constitutional justices are only from the rank of judges. On this see Prakke and Kortmann (n 51) 549.
[119] de Visser (n 8) 211-218; and Schlaich and Korioth (n 77) 25. For instance, in France there are no specific requirements foreseen in the constitution.
[120] Stone Sweet (n 16) 46; de Visser (n 8) 216-217; Comella (n 3) 41-43; Ponthoreau and Ziller (n 65) 127-128; and Prakke and Kortmann (n 51) 119.
[121] David Robertson, *The Judge as Political Theorist* (Princeton University Press 2010); Dominique Rousseau, 'The Conseil Constitutionnel confronted with comparative law and the theory of constitutional justice' (or Louis Favoreu's unatenable paradoxes)' (2007) 5 International Journal of Constitutional Law 40; Comella (n 3) 39-45; Rolla and Groppi (n 93) 147; and Ponthoreau and Ziller (n 65) 127-128.
[122] For instance, in Belgium and Luxembourg the justices have a life term, that is, until the mandatory age of retirement. On this see de Visser (n 8) 218; and Prakke and Kortmann (n 51) 119, 549. In the Czech Republic there is the possibility of reappointment. On this see de Visser (n 8) 220 and Sadurski (n 53) 28. For more on this see de Visser (n 8) 218-221; on the suitability of such rules on appointment and term, see Comella (n 3) 100-103.
[123] Schlaich and Korioth (n 77) 7, 28; and Kommers and Miller (n 118) 3.
[124] Stone Sweet (n 16) 46-49; and Schwartz (n 1) 42.
[125] de Visser (n 8) 207-210; Sadurski (n 53) 29-34; Harding (n 30) 16-18; and Ferejohn and Pasquino (n 46) 1681-1682, they distinguish three but they call them monocratic, majoritarian and super-majoritarian.

Bundesrat each appoint half of the members of the FCC with a qualified majority.[126] The second model is also known as the collaborative model, under which the legislative and executive branch collaborate in the appointment procedure. In countries which have adopted this model, there are different modes of collaboration depending on how the stages of the appointment procedure are allocated such as nomination and election/appointment between the two branches. For instance, in Belgium the parliament nominates the candidates while the government selects the future constitutional justices from the list of nominees.[127] However, in the Czech Republic the president nominates the candidates for constitutional justices to the Senate, the upper house of the Parliament, for approval.[128] The third model is characterized by the allocation of quotas to different institutions for appointment of constitutional justices. This means that constitutionally designated institutions separately appoint a specified number of constitutional justices. For instance, this is the case[129] in Italy where the president, the Parliament in a joint sessions and the senior courts (*Cassazione, Consiglio di Stato* and, *Corte dei conti*) can each appoint five justices.[130]

3.3 Standing

The exclusive power of constitutional courts to invalidate legislative acts has ramifications on certain procedural aspects. One of the most important procedural aspects which distinguishes constitutional courts from other ordinary courts is the question of standing especially when it comes to abstract review.[131] It is particularly the abstract review procedure which most precisely depicts the specific nature of the function of constitutional courts, which is legislative in essence, and raises the issue of public interest[132] that requires a particular rule on the actors which could initiate a case. Introducing a possibility of having an *actio popularis* would be irrational not only in light of the broader interest that an invalidation of statue raises but also for a more pragmatic reason of shielding the constitutional court from an overflow of unfounded challenges.[133] Therefore, a common procedural feature among constitutional courts is to limit the standing for the abstract review to public institutions, such as the parliamentary opposition, the parliamentary speakers, the president, the government, authorities of federal or regional units, the ombudsperson and other public institutions.[134] Taking into consideration

[126] Werner Heun, *The Constitution of Germany: A Contextual Analysis* (Hart 2011) 169-170; Gerd Sturm and Steffen Detterbeck, 'Art. 94: Bundesverfassungsgericht, Zusammensetzung und Verfahren' in Michael Sachs (ed) *Grundgesetz Kommentar* (8th edition C.H. Beck 2018) paras. 1-4; Schlaich and Korioth (n 77) 25-27; and Kommers and Miller (n 118) 23-24.
[127] de Visser (n 8) 207.
[128] de Visser (n 8) 207-208.
[129] France had this model of appointment; however, with the constitutional amendments of 2008 the model is made more collaborative than through allocation. On this see de Visser (n 8) 208. Spain has a similar model of allocation of 'quotas' as well, see Guillen Lopez (n 99) 534-538. Austria presents a specific and complex model which combines the collaboration model with that characterized by quotas. For more on this see Prakke and Kortmann (n 51) 58.
[130] Barsotti et al. (n 16) 43-46; Ferejohn and Pasquino (n 46) 1681; and de Visser (n 8) 208-209.
[131] Harding (n 30) 9; Schlaich and Korioth (n 77) 84-85; Norman Dorsen, Michel Rosenfeld, Andras Sajo and Susanne Baer, *Comparative Constitutional* Law (2nd edition West 2010) 168; Ferejohn and Pasquino (n 46) 1682-1691; and Comella (n 3) 7-8.
[132] Kelsen (n 27) 193; Schwartz (n 1) 28-33; and Kelsen (n 20) 67.
[133] Kelsen (n 20) 64-65.
[134] de Vesser (n 8) 99-128; and Prakke and Kortmann (n 51).

that often the hearings before the constitutional courts are public, these institutions as well as the representatives of the ones which have enacted the impugned act have the opportunity to voice their concerns and present their arguments concerning the (un)constitutionality.[135] As a direct result of these restrictive rules on standing in an abstract review the proceedings before a constitutional court represents another forum for deliberation of political issues through constitutional and legal arguments thus reflecting the specific character of constitutional courts.[136]

3.4 Legal effects of decisions

The reasons relating to legal certainty have been part of the traditional justifications for the establishment of constitutional courts and ascribing them with the exclusive power of constitutional review. Thus both the need for legal certainty as well as the monopoly over constitutional review has directly determined the effects of constitutional courts' decisions as one of the main institutional features. As a result of the fact that in civil law systems there is no *stare decisis* or any formal principle of precedents, constitutional courts' decisions invalidating a legal act are final and they have an *erga omnes* effect.[137] This means that there is no possibility of appealing their decision and they are applicable not only to the case at hand but to all cases, future or past, depending on the extent of retroactivity of decisions. Even in cases brought to the constitutional court through a concrete review procedure, constitutional courts' decisions are to be applied also to all other cases which involve the same legislative act.[138] Such an effect of constitutional court decisions declaring a legislative act invalid is because such an act of invalidation has a legislative character and in this sense it is the interest not only of the party which initiates the proceeding but also of the broader public interest.[139] When it comes to the temporal effect of decisions, there is a difference between *ex tunc* and *ex nunc* effect of decisions.[140] In the former type of decisions the effects take place from the moment of the promulgation of the unconstitutional legal act and spread to the annulment of legal effects that the unconstitutional act has caused, while for the latter the decision of

[135] Comella (n 20) 61.
[136] Ferejohn and Pasquino (n 46) 1680.
[137] Kelsen (n 27) 187, "the decision of constitutional courts which invalidates a statute due to its unconstitutionality have the same character as a statute." See also de Visser (n 8) 312; Schwartz (n 1) 23; and Dorsen et al. (n 131) 173. The exception from this rule is to be found in Belgium and it is related to BCC's decisions on invalidation of a legal act within a concrete constitutional review which generally are binding only for the court that has made the reference. However, this exception is narrowed through the 'reinforced relative authority'. On this see de Visser (n 8) 312-313. In Austria there also claims of exception from the general effect when the ACC decides on administrative decision when the effect is *inter partes*. On this see Lachmayer (n 99) 257. Similarly, in Portugal decisions taken in concrete review of constitutionality have an *inter partes* effect. See Joaquim de Sousa Ribero and Esperanca Mealha, 'Constitutional Court as Positive Legislators' in Allan R. Brewer-Carias (ed), *Constitutional Courts as Positive Legislators: A Comparative Law Study* (Cambridge University Press 2011) 728. In Italy, on the other hand, ICC's decisions which do not declare unconstitutionality do not have an *erga omnes* effect. On this see Rolla and Groppi (n 93) 149-151; and de Visser (n 8) 314-315.
[138] Understandably, there are certain limitations when it comes to *res judicata*. On the specific case of Italy see Rolla and Groppi (n 93) 145; and Visser (n 8) 312-313.
[139] Kelsen (n 27) 193; and Kelsen (n 20) 67.
[140] Initially on the extent of retroactivity of constitutional courts' decisions see Kelsen (n 27) 199. He claimed that constitutional court decisions should have an *ex nunc* effect with a limited retroactivity only to the case in the course of which the question of constitutionality was raised. However, this is the case only for the ACC; for instance, see Stelzer (n 19) 202. When it comes to other countries there are different rules on the temporal effect.

invalidation has its effect from the moment of its publication.[141] Nevertheless, not a single constitutional court has incorporated a pure form of either of these temporal effects. As a result the practice across Europe varies depending on the manner in which the temporal effect of constitutional courts' decisions has been precisely regulated.[142] From the early days of the establishment of constitutional courts they have found ways in which they would mitigate in certain cases the effect of their decision in order not to compromise legal certainty.[143] In any case, the effects of constitutional courts' decision are clearly distinguished from those of ordinary courts which are characterized by *inter partes* effect.

4 The struggle of constitutional courts in establishing their authority

Constitutional courts have been introduced as novel institutions into a traditionally organized institutional set-up in which the authority of other branches had already been established. Accordingly, they had to struggle for their authority and recognition within this set-up and since the very beginning faced challenges from other institutions. These challenges came from all three branches, but particularly from the legislature and judiciary with which constitutional courts are linked through their main powers and functions.[144] On the one hand, due to the legislative nature of constitutional review, especially with the abstract review, constitutional courts have been characterized as a third or second legislative chamber which extend the legislative process with another stage of constitutional reading.[145] On the other hand, through the concrete review and individual constitutional complaints, constitutional courts established a direct link with the judiciary that enhanced the constitutionalization of the legal systems. This latter process has, however, partly transformed the traditional role of ordinary courts and therefore led to occasional conflicts and obstructions.[146] Nevertheless, these challenges and struggles do not necessarily have to be perceived negatively but rather as an unavoidable part of the constitutional dialogue within new constitutionalism.[147] It should be noted, however, that these constitutional dialogues are merely enhanced and not introduced or established by the

[141] de Visser (n 8) 317; Wolfgang Zeidler, 'The Federal Constitutional Court of the Federal Republic of Germany: Decisions on the Constitutionality of Legal Norms' in Norman Dorsen, Michel Rosenfeld, Andras Sajo and Susanne Baer, *Comparative Constitutional Law* (2nd edition West 2010) 161-163.

[142] de Visser (n 8) 317-318. On the specificities of the effect of ICC's decisions, see Prakke and Kortmann (n 51) 530. On the rather particular situation in Slovakia see Jan Svak and Lucia Beridosva, 'Constitutional Court of the Slovak Republic as Positive Legislator via Application and Interpretation of the Constitution' in Allan R. Brewer-Carias (ed) *Constitutional Courts as Positive Legislators: A Comparative Law Study* (Cambridge University Press 2011) 773-775.

[143] For more on this de Visser (n 8) 318-320; and Kelsen (n 20) 63. On Italy see Groppi (n 30) 132-138; and Barsotti et al. (n 16) 82-91. On Germany see Kommers and Miller (n 118) 35-36; Heun (n 126) 177-178; and Sturm and Detterbeck (n 77) paras. 15-17; Simon (n 1) 39; and Lachmayer (n 99) 257-258, On Portugal Joaquim de Sousa Ribero and Esperanca Mealha (n 137) 727; on Poland see Safjan (n 94) 706; and on Austria Stelzer (n 19) 202.

[144] It goes without saying that initially it is very important for constitutional courts to be independent from the executive in a structural (that is administrative and budgetary) sense, but also indirectly through the power of the executive concerning legislative initiatives and the control of the parliamentary majority as well as the indirect review of administrative acts. On this see for instance Garlicki (n 99) 50; Kommers and Miller (n 118) 17; Sturm and Detterbeck (n 77) paras. 13-19; Heun (n 126) 168; and Schlaich and Korioth (n 77) 4-5.

[145] Stone Sweet (n 16) 50-51; Sadurski (n 53) 59; and Ponthoreau and Ziller (n 65) 137.

[146] Garlicki (n 99) 63-64 and Heun (n 126)182.

[147] Stone Sweet (n 16) 50ff; and Garlicki (n 99) 68. For instance, on the cases of the ICC see Barsotti et al. (n 16) 35-37

constitutional courts since they exist also in states which do not have them. In this sense, both the judicialization of politics and the constitutionalization, and through it politicization,[148] of the judiciary and legal systems are not the direct consequence of the establishment of a constitutional court because these tendencies have been part of a broader phenomenon of expansion of judicial power, generally, and the centrality of fundamental rights and freedoms.[149]

4.1 Constitutional courts and parliaments

In the relationships between constitutional courts and parliaments, there are three main points of contention. These contentions are understandable taking into consideration that constitutions place constraints on political institutions, legislative and executive, which constitutional courts are supposed to implement and protect from the parliamentary majority.[150] In other words, the main object of constitutional review are legislative acts.

The first contention is related to the legislative nature of constitutional review and the abandonment of the traditional doctrine of parliamentary supremacy. The function of constitutional courts has been famously described as that of a negative legislator[151] under which they decide only on the validity of legislative acts. In this sense, constitutional review comes at a later stage in which political decisions have already been made and thus constitutional courts are reviewing only whether these decisions are consistent with the constitution or not.[152] However, it cannot be denied that the border between a negative and positive legislator is blurred, and constitutional courts occasionally cross it which raises concerns over interference with the legislative power.

This argument is usually based on an overemphasized distinction between law and politics, despite their obvious relation, which classifies legislation as 'political' since it involves the process of creation of general norms and denies constitutional courts this sort of function.[153] However, the reality is a more complex than this. Just as Kelsen has argued, application of law necessarily involves its interpretation which could also represent a form of creation of law.[154] Consequently, courts in general are also involved in a form of 'political' function, creation of law, the main difference between legislation and adjudication being the level of discretion

[148] These notions and developments have actually been one of Carl Schmitt's core arguments of the case against constitutional review by constitutional courts. For more on this see Carl Schmitt, 'The Guardian of the Constitution' in Lars Vinx (ed) *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (Cambridge University Press 2015) 79-124. See also Alec Stone, 'The Birth and Development of Abstract Review: Constitutional Courts and Policymaking in Western Europe' 19 Policy Studies Journal 1990, 93; Grimm (n 40) 214; Kommers and Miller (n 118) 39; Bezemek (n 19) 117 and Simon (n 1) 16.
[149] Ran Hirschl, 'Resituating the Judicialization of Politics: Bush v. Gore as Global Trend' (2002) 15 Canadian Journal of Law and Jurisprudence 191.
[150] Grimm (n 40) 202.
[151] Kelsen (n 77) 194; and Kelsen (n 20) 46.
[152] Grimm (n 40) 216.
[153] Simon (n 1) 28-35; Kommers and Miller (n 118) 3, 33; Ponthoreau and Ziller (n 65) 130; and Grimm (n 40) 224.
[154] Kelsen (n 20) 22-25; Ponthoreau and Ziller (n 65) 137-138 referring to Michel Troper, 'Justice constitutionnelle et democratie' (1990) Revue francaise de droit constitutionnel 47; and Ross Carrick, 'The Procedural Democratic Legitimacy of Constitutional Courts' (2012) Research Paper Series No 2012/01, University of Edinburgh, School of Law, 45.

available to courts as well as the effects of their decisions. When it comes to constitutional courts, this is even more pronounced.[155] More specifically, it has to be taken into consideration that constitutional courts are strictly bound by the constitution in their decisions and not by political considerations or interest, generally they cannot initiate judicial proceedings on their own;[156] however their decisions have an *erga omnes*, that is, general effect. Based on the latter it could be argued that constitutional courts practice a 'political' function; however, this should not be exaggerated. Invalidation of legislative norms could also be perceived as an application of constitutional norms and thus not as creation of law. On the other hand, even ordinary courts could be perceived as being involved in the process of creation of law, even though through individual and not general norms.[157] In this sense, constitutional courts are definitely involved in creation of law through interpretation of constitutional provision.[158] In any case, courts lack the power to determine political goals which is one of the main differences between their function and legislation.[159] Accordingly, if one focuses on the effects of constitutional court decisions rather than the grounds on which constitutional courts support their decisions as well as the character of the process and proceedings taking place before them, one could claim that constitutional courts exercise a legislative function in its general sense.[160] However, Klaus Stern has argued, essentially reflecting the hybrid character of constitutional courts, that:

> "In der Rechtkonkretisation wächst der Gerichtsbarkeit naturgemäß ein schöpferisches, ein rechtsbildenden und –fortentwickelndes, d. h. ein wertendes und rechtsgestaltendes Element zu. Das mag man politisch nennen; aber es ist in einem ganz anderen Sinne politisch als das Handeln des Gesetzgebers oder der Regierung; denn es ist am vorgegebenen Rechtsmaßstab orientiert, es bleibt stets rechtimmanent, ist nur 'punktuell', nicht generell rechtserzeugend, ist Urteilslogik, nicht Gesetzlogik."[161]

Following on Stern's argument, regardless of the 'political' character of their main function, constitutional courts are designed to be independent from both the legislative and executive power[162] and also for this purpose are legally obliged to act as courts notwithstanding the specificities of constitutional courts.[163] Just as Ferejohn and Pasquino put it, "a constitutional court exercises legislative or normative power "in a judicial form"… in making its normative (norm-producing) decision operates under constraint that are typical of judicial bodies and that

[155] Cappelletti (n 7) 28-29; Carrick (n 154) 47; Kelsen (n 77) 183; Kelsen (n 20) 22-25; and Stone Sweet (n 16) 139ff.
[156] Such a power of constitutional courts to initiate a review *sua sponte* is provided only by exception. On this see Kelsen (n 27) 195; Brewer-Carias (n 18) 11; and Sadurski (n 53) 19-22.
[157] Kelsen (n 20) 46-47; and Cappelletti (n 7) 53-56.
[158] Sergio Bartole, 'Conclusions: Legitimacy of Constitutional Courts: Between Policy Making' in Wojciech Sadurski (ed) *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (Kluwer 2002) 412; and Ponthoreau and Ziller (n 65) 137-138.
[159] Grimm (n 40) 226-228.
[160] Comella (n 3) 17-18; and Rolla and Groppi (n 93) 146.
[161] Klaus Stern, *Verfassungsgerichtsbarkeit zwischen Recht und Politik* (Westdeutscher Verlag 1980) 21 [references omitted].
[162] Carrick (n 154) 11-12 and 15, "*institutional insulation* of the constitutional courts from political majoritarian forces of the *realpolitik*."
[163] Simon (n 1) 28: „Bundesverfassungsgericht ist rechtlich verpflichtet, als Gericht zu agieren."; Kelsen (n 20) 46-47.

differentiate them from a "legislative" legislator, the parliament."[164] After all, they are not called courts and tribunals for no reason.

The second contention has to do with the disputed democratic legitimacy of constitutional courts' involvement in the legislative process.[165] Constitutional courts have not only been a negative legislator, but have very often, through the interpretation of constitutional and legal norms, taken the role of positive legislators.[166] Therefore, it should not come as a surprise that the lack of democratic legitimacy has been raised as an issue. Nevertheless, apart from the democratic checks of constitutional courts through their constitutional underpinning and institutional features,[167] their legitimacy could also be result-driven and thus needs to be viewed through the results they produce.[168] As a matter of fact, constitutional review can contribute to the legitimacy of the democratic system as a whole by protecting and furthering the basic social consensus such as the safeguarding of fundamental rights and rule of law in general.[169] In this sense, the control exercised over the legislative as well as the overall political competition by legally framing political conflicts in order to protect the basic social consensus from the parliamentary majority is definitely not anti-democratic.[170] Additionally, and taking into consideration the circular nature of law, there are instruments which enable the legislative to invoke a constitutional override of constitutional courts' decisions to invalidate a legislative act which in turn decreases the force of the democratic legitimacy objection.[171] Therefore, the notion of the last word in the context of constitutional courts should definitely not be taken in absolute terms.[172]

Lastly, the third contention has to do with the so-called judicialization of politics[173] which has arguably resulted from an extensive influence of constitutional courts in the legislative process. Accordingly, it is claimed that this has the effect of constraining the political deliberation within the legislative process, as political actors need to take constitutional issues into consideration and anticipate possible invalidations on constitutional grounds.[174] Even though this argument is frequently employed it is not totally convincing in negatively portraying this

[164] Ferejohn and Pasquino (n 46) 1684.
[165] These objections mainly come from so-called political constitutionalists. For more on this see Carrick (n 154) 45.
[166] Generally, on constitutional courts as positive legislators see Brewer-Carias (n 18). On the different forms of decisions as examples of the ICC as a positive legislator see Rolla and Groppi (n 93) 151-153.
[167] On the democratic checks on the side of constitutional courts see Comella (n 3) 98-107.
[168] Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press 1997) 34; Bartole (n 157) 418; Carrick (n 153) 45; Hirschl (n 149) 213; and Harding (n 30) 26.
[169] Grimm (n 40) 22; and Simon (n 1) 20.
[170] Grimm (n 40) 216; Stone Sweet (n 16) 137-138; Carrick (n 154) 47 referring to John Hart Ely, *Democracy and Distrust* (Harvard University Press 1980) 73-104; and Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985) 9-32.
[171] Comella (n 3) 104-107.
[172] Rousseau (n 121) 39; Barsotti et al. (n 16) 235; Bartole (n 158) 420-421; and Sturm and Detterbeck (n 77) para. 4.
[173] This is one of the main pillars of Schmitt's argument against Kelsen's proposal, Schmitt (n 148) 96, 105-106; Stone (n 148) 93; Grimm (n 40) 214; Hirschl (n 148) 191ff; on the two meanings of the notion of judicialization see David S. Law, 'Constitutions' in Peter Cane and Herbert M. Kritzer (eds) *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010) 383-384. Even though it is claimed by some that it is a purely German phenomenon it is actually not. But cf. Simon (n 1) 28-29.
[174] Stone Sweet (n 16) 74; and Hirschl (n 149) 214.

tendency. Namely, the process of judicialization of politics is not solely the result of the establishment of constitutional courts but rather of a broader phenomenon of the global expansion of judicial power and thus is present also in countries without a constitutional court.[175] Furthermore, the judicialization is also the result of the delegation of authority by the constitutions to constitutional courts within the framework of 'relational' contracting.[176] This latter notion sees the creation of constitutions as a process of contracting which consists of reaching complex comprises where the basic goals and objectives are agreed upon while other details are left rather under-clarified.[177] As a result, constitutions delegate authority to constitutional courts not only by directly determining their powers but also through broad and open-ended provisions, as is a frequent feature of these legal documents, which thereby invites their further interpretation and concretization.[178] The disagreements over the constitutional issues will thus be often referred to constitutional courts which in turn will tend to increase their influence.[179] In this sense, the role of constitutional courts as well as the process of judicialization is something that is the direct consequence, though not always expected,[180] of the institutional choices made by the constitutional drafters and constitutional assemblies or parliaments.[181]

However, the judicialization argument is just one side of the coin. The other side of the coin is the politicization of the judiciary as seen through the anticipation by constitutional courts of the potential impact of their decisions and development and practice of political sensibility, particularly in certain cases with great political leverage. Once again, such a politicization is a natural and logical companion of constitutional courts' functions and practice and should not be negatively perceived if kept within certain limits.[182] They are obliged in this sort of practice because their judicial activism could backfire and their legitimacy might be put on the line due to possible rejections and non-compliance which constitutional courts cannot directly oppose.[183] In this manner, it could be observed that the influence between constitutional courts and parliaments goes both ways.

Taking all this into consideration, it cannot be convincingly argued that constitutional courts have jeopardized the position of the legislative even though the influence cannot be denied. On the contrary, constitutional courts have proven to serve as a constitutionally authorized check on the political institutions, particularly important in states which have had experience of a drastic form of tyranny of the political majority. Occasional frictions between constitutional

[175] On the reasons for this global expansion see more in Hirschl (n 149) 191ff.
[176] Stone Sweet (n 16) 42-43. Carrick calls this the institutional trusteeship characterized by the independence of the institutions to which authority is being delegated. See Carrick (n 154) 3-9.
[177] Stone Sweet (n 16) 41-44, 88; on contractual incompleteness see Carrick (n 154) 5, 12-13.
[178] Stone Sweet (n 16) 88; and Bartole (n 158) 432.
[179] Law (n 173) 384.
[180] Schönberger (n 55) 26, referring to Konrad Adenauer saying that: "Dat ham wir uns so nicht vorjestellt."
[181] Law (n 173) 384, "judicialization often occurs with the acquiescence or encouragement of powerful political actors", "judicial review is politically constructed" quoting Mark A. Graber, 'Constructing Judicial Review', 8 Annual Review of Political Science 2005, 427.
[182] Rolla and Groppi (n 93) 147, "a good system of constitutional adjudication is that which can identify a proper point of equilibrium' between politics and jurisprudence."; Ziller (n 65) 127; Schonberger (n 55) 52, "Im Idealfall kombiniert das Bundesverfassungsgericht den Sinn der Justiz für rechtliche Bindungen und Prozeduren mit politischen Sinn und Takt"; Rousseau (n 121) 40; and Barsotti et al. (n 16) 235.
[183] Stone Sweet (n 16) 90; Grimm (n 40) 216; Heun (n 126) 186; and Bartole (n 158) 419-421, 430-431.

courts and parliaments could thus in most cases be perceived as a constructive addition to the ongoing constitutional dialogue.[184]

4.2 Constitutional courts and ordinary judiciary

According to the original design of constitutional courts it had been inferred that through their introduction a strict dual structure of jurisdiction had been put in place distinguishing between application and interpretation of a constitution conducted by constitutional courts, on the one hand, and application and interpretation of statutes conducted by ordinary courts, on the other.[185] However, such a strict separation of jurisdiction is not sustainable especially in light of the powers of constitutional courts creating a direct link with the ordinary judiciary. In this sense, the concrete review procedure opened the possibility for ordinary courts to initiate a constitutional review and the individual constitutional complaints somehow created the perception of constitutional courts being placed above the ordinary judiciary. Namely, individuals through their complaints can in certain instances directly challenge ordinary court decisions for alleged infringement of their fundamental rights. In this way, constitutional courts become a sort of constitutional appellate court, or last instance courts on constitutional matters.[186]

Nevertheless, this procedural aspect of the relationship between constitutional and ordinary courts had been soon accompanied by a substantive aspect which caused a greater challenge to the position of ordinary courts. This has to do with a phenomenon termed constitutionalization of the legal system which occurred through three interrelated developments.[187]

First, in line with the requirements of the new constitutionalism constitutions were entrenched as the supreme law of the countries. As a result of the character of constitutional provisions, constitutional courts' case law gained importance due to the fact that the proper comprehension of the constitutions required taking this case law into serious consideration, especially with the growing tendency of direct application of constitutional norms.[188] Second, the constitutions, particularly through their fundamental rights provisions and their increasing horizontal effect, permeated almost all areas of the legal system.[189] This has made the viability of a strict dual jurisdictional structure ever more difficult.[190] Third, through this penetration of constitutional law, ordinary courts are required to take into consideration the case law of constitutional courts and use constitutional doctrines – such as proportionality for instance – in ordinary

[184] Bartole (n 158) 428; and Carrick (n 154) 49-50.
[185] Garlicki (n 99) 46-47; and Frank I. Michelman, 'The Interplay of Constitutional and Ordinary Jurisdiction' in Tom Ginsburg and Rosalind Dixon (eds) *Comparative Constitutional Law* (Edward Elgar 2011) 278-297.
[186] de Visser (n 8) 385-392; Schwartz (n 1) 26; Ferejohn and Pasquino (n 46) 1691; and Garlicki (99) 50-51. It is interesting to note that in the case of the Constitutional Court of Portugal the constitution foresees a regular possibility of appeal to this court in specific cases not related to the fundamental rights. For more on this see Article 280 of the Constitution of the Portuguese Republic and Prakke and Kortmann (n 51) 698
[187] On a different reading of constitutionalization as "the process by which a body of formal law becomes an effective source of limits on state power and government actors", see Law (n 173) 384; and Schlaich and Korioth (n 77) 13-14.
[188] Bartole (n 158) 410-412.
[189] Ponthoreau and Ziller (n 65) 136; Stone Sweet (n 16) 114-115; and Michelman (n 185) 286, "constitutional colonization of private law."
[190] Comella (n 4) 273.

adjudication. This has led to the broadening of the politicization of the judiciary to ordinary courts since they also need to adopt a form of politicized legal argument which is practiced by constitutional courts in applying and interpreting the constitution.[191] However, not only is the argument politicized but it is the constitution that is judicialized since it can be directly applied in ordinary adjudication.[192]

As a consequence of this constitutionalization of the legal system, constitutional courts expanded the field of possible conflicts with the recurrent practice of entering the role of a positive legislator. With the increasing relevance of constitutional law greater number of statutes came to be challenged. Aware of the potential negative impact of frequent invalidation of statutes as well as the possible backlash on their legitimacy of such a practice, constitutional courts have used different interpretative methods to condition the constitutionality of statutes instead of invalidating them.[193] As a result, constitutional courts deliver their constitutional interpretation of statutes to ordinary courts, that might diverge from the latter's statutory interpretation.[194]

Under such circumstances the ordinary courts, particularly the supreme courts, occasionally defy constitutional courts and their case law.[195] But these frictions need to be understood as a natural companion of the centralized constitutional review keeping in mind that constitutional courts distort the traditional understanding of separation of powers and the previously entrenched position of both political and judicial institutions.[196] If frictions occur among different structures within the ordinary judiciary, it goes without saying that this is even more intensive and frequent between constitutional and ordinary courts. As Garlicki puts it "the presence of tensions among the highest courts is systemic in nature."[197] As long as these frictions and tensions do not become pure struggles for power[198] they should be perceived as a constructive aspect of constitutional and judicial dialogue through the existing channels and links which would alleviate the possibility of conflicts.[199]

In the same manner as in the relationship with the parliaments also in the case of ordinary judiciary constitutional courts are not at complete liberty to impose their decisions and interpretation. Constitutional courts legitimacy and authority is very much dependent on their

[191] Möllers (n 45) 141; and Schwartz (n 1) 5.
[192] Garicki (n 99) 65.
[193] Ponthoreau and Ziller (n 65) 136. See for instance on the importance of different types of decision in the relationships with ordinary judiciary Rolla and Groppi (n 93) 150-151.
[194] Garlicki (n 99) 67; and Patricia Popelier, 'The Belgian Constitutional Court as Positive Legislator: In Search of a Balance Between Rights' Protection and Respect for Acts of Parliament' in Allan R. Brewer-Carias (ed), *Constitutional Courts as Positive Legislators: A Comparative Law Study* (Cambridge University Press 2011) 268.
[195] Sadurski (n 53) 35-43; on Germany, Italy and Poland see Garlicki (n 99) 50-63; on France see Ponthoreau and Ziller (n 65) 135; on Czech Republic see Priban (n 53) 380-382; on Romania see Renate Weber, 'The Romanian Constitutional Court: In Search of its Own Identity' in Wojciech Sadurski (ed) *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (Kluwer 2002) 299-300.
[196] Sadurski (n 53) 38; and Popelier (n 194) 266.
[197] Garlicki (n 99) 63 [reference omitted]. While this is more emphasized in countries with an authoritarian past, it is not absent in the others such as France and Belgium. On this see Garlicki (n 99) 64.
[198] Sadurski calls them "war of the courts". For more on these in the Czech Republic and Poland see Sadurski (n 53) 38-43. See also Priban (n 53) 381.
[199] Garlicki (n 99) 63; Bartole (n 158) 428; Priban (n 53) 380-381; and Ponthoreau and Ziller (n 65) 137.

acceptance which often results from their 'responsiveness'.[200] Thus the greatest threat to their authority is not so much the struggle or occasional conflicts which could be also perceived as constructive but the disobedience of their decisions by other institutions, above all the legislature and the judiciary.[201] Put in other words, since constitutional courts do not have the power to execute their decisions it is of the utmost importance that they produce legal reasoning which will be persuasive not only to other institutions but also to the broader public.[202] In this way a positive balance is being struck between constitutional courts and other institutions and if maintained this balance furthers the basic societal consensus and the values of constitutionalism. So far, constitutional courts have stood the test of time in many countries and based on their success and authority have become a widely accepted and one of the basic pillars of new constitutionalism.

5 Conclusion

The main objective of this chapter is to provide a relatively brief overview of constitutional courts as specialized constitutional bodies with the exclusive power to conduct constitutional review. Constitutional courts represent one of the most important institutions under the new constitutionalism which is often characterized by the existence of a centralized model of constitutional review. Discussing constitutional courts in this chapter three aspects were covered in detecting the main specificities and characteristics of these institutions. First, the main reasons behind establishing constitutional courts are discussed. The establishment of constitutional courts was dominantly related to the issues of legal certainty, expertise, separation of powers and democratic legitimacy. The witnessed dysfunctionality of the traditional understanding and implementation of the principle of separation of powers before the Second World War and the existing distrust towards ordinary judiciary and judges determined these reasons and paved the way for the introduction of constitutional courts in Europe. While these are the reasons that justified the establishment of constitutional courts, there are three factors which determined the further spread of these institutions not only in Europe but also around the world, thus becoming a widely spread institutional solution for guaranteeing constitutionality. These factors have to do with the institutional adaptability of constitutional courts to fit within the existing conception of separation of powers, their institutional features which enabled them to fulfill one of the key tasks of new constitutionalism, fundamental rights protection, and the diffusion process which was continuously reinforced through the positive track record of already existing constitutional courts. Second, through analyzing the specific institutional features of constitutional courts they are distinguished from other judicial bodies, part of the ordinary judiciary, with a constitutional jurisdiction. In explaining this distinction, the emphasis is placed on the specific aspects of the institutional design such as powers of constitutional courts, the composition and

[200] On the importance of acceptance, especially in Germany, see Simon (n 1) 27-28; Heun (n 126) 186; Schönberger (n 55) 54; and Bartole (n 158) 420 421, 430-431. For Italy Barsotti et al. (n 16) 35; and Rolla and Groppi (n 93) 151. For Romania see Weber (n 195) 298-303. On responsiveness see Law (n 172) 385; and on this type of 'institutional responsiveness' see Carrick (n 153) 16, 48.
[201] Rousseau (n 121) 42; Stone Sweet (n 16) 90; Grimm (n 40) 216; and Bartole (n 158) 419-421, 430-431.
[202] Rousseau (n 121) 39-41; and Ferejohn and Pasquino (n 46) 1680.

appointment of constitutional justices and certain procedural aspects, as well as the effect of their decisions. All these institutional features, determined by the same reasons for their establishment, enabled constitutional courts to fill the previously existing gap in protecting and guaranteeing constitutionality and also tackled some of the new challenges to constitutionalism. The third aspect covered in discussing constitutional courts is their institutional relationship with the other branches of state power, particularly those directly affected by their establishment, that is, the legislature and judiciary. Namely, constitutional courts have been introduced into an already existing institutional setting with long-established functions and powers of the other institutions. As a result, constitutional courts, in establishing and developing their authority and institutional role, are faced with certain institutional struggles which have brought to the surface objections and challenges to their position within the constitutional and political system. These objections and challenges are mainly related to the notions of constitutionalization of the legal order, judicialization of politics and politicization of the judiciary. Nevertheless, due to the specific character of constitutional courts and the particular nature of their function and role they have managed, in most cases, to successfully tackle these objections and further their authority and importance. While these internal institutional challenges have been surpassed in most cases, it is to be seen how they manage to cope with the new forms of external challenges arising from the ongoing processes of internationalization and Europeanization.

Chapter 2

Constitutional Courts Encounter EU Law and the CJEU – Close Encounters of the European Kind

1 Introduction

Constitutional courts in Europe as newly established institutions had a difficult period of securing their place within the national institutional structure. They faced many internal challenges and obstacles from the already well-established branches of state power in obtaining and fortifying their authority. Some of them still face these internal challenges. However, simultaneously to the spread of the centralized constitutional review in Europe, constitutional courts faced another group of external challenges as seen through the processes of Europeanization and internationalization of law. These processes, particularly the former, have led to the rapidly increasing influence and importance of judicial instances such as the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) which were and still are perceived as posing a competition or even a threat to the position and status of national constitutional courts. In other words, national constitutional courts have faced close encounters of the European kind, something that was often not foreseen and anticipated during their introduction.[1] In this sense, the centralized model of constitutional review was suddenly challenged through decentralizing tendencies resulting from the overlapping jurisdictional points between national constitutional courts, the ECtHR and the CJEU, especially with the adoption of the Lisbon Treaty and the legal binding effect of the Charter on Fundamental Rights of the EU.[2] This has created a judicial triangle in Europe, most importantly, on one area which has traditionally been *materia constitutionis*, namely the protection of fundamental rights. However, with the continuous widening of the scope of EU law and the blurring of jurisdictional borders between national and EU law, there were also

[1] Namely, Hans Kelsen, for instance in Hans Kelsen, Judicial Review of Legislation: 'A Comparative Study of the Austrian and the American Constitution' (1942) 4 The Journal of Politics 183; Hans Kelsen, 'On the Nature and Development of Constitutional Adjudication' in Lars Vinx (ed) *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (Cambridge University Press 2015) 22; Hans Kelsen, Who Ought to be the Guardian of the Constitution? in Lars Vinx (ed.) *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (Cambridge University Press 2015) 174, has elaborated in some detail on the relationship between constitutional courts and other national institutions, however, understandably to certain extent, neither his work nor the traditional notions of legal and constitutional theory have been able to provide accurate answers to the new challenges that surfaced with the development of, above all, EU law. On this theoretical elaboration and on the weaknesses and deficiencies of the traditional theories see more in Chapter 3.

[2] Jan Komarek refers to this as the 'rights revolution'. See Jan Komarek, 'National constitutional courts in the European constitutional democracy' (2014) 12 International Constitutional Law Journal 525, 527; Jan Komarek, 'The Place of Constitutional Courts in the EU' (2013) 9 European Constitutional Law Review 420, 421. But cf. Elias Deutscher and Sabine Mair, 'National constitutional courts in the European constitutional democracy: A Reply to Jan Komarek' (2017) 15 International Journal of Constitutional Law 801, 802-808; and Jan Komarek, 'National constitutional Courts in the European constitutional democracy: A rejoinder' (2017) 15 International Journal of Constitutional Law 815, 816-817.

overlaps in other significant constitutional areas which became equally important. In this sense, constitutional and legal theory was somehow caught unprepared and thus unable to provide answers and solutions. This situation in turn brought to an increasing scholarly interest on the topic of the relationships between legal orders on different levels as well as that between their respective judicial instances which resulted in an abundance of scholarly work covering different aspects of these relationships. This work essentially reveals, on the one hand, the complexity of this issue and the impact that these recent developments have had on national constitutional courts as well as their response to this, and on the other, the dissonance and conflicting interpretations among scholars on these very same topics.

Taking into consideration that this dissertation is focused solely on the role of constitutional courts in the European integration, the further discussion, not only in this chapter but also in the rest of this work, will deal with the relationship of these institutions with the CJEU and, in this manner, generally with EU law. With this hindsight and in order to enter into a serious discussion on the topic at hand, one must first examine two issues. First, what kind of relationship has been established between the constitutional courts and the CJEU so far? Second, what are the implications for the position of constitutional courts within the respective national institutional settings brought by the development of CJEU's case law and EU law in general? For this purpose, this second chapter aims to discuss briefly the constitutional courts' stance on the issues related to EU law and their attitude towards the CJEU and its case law by covering these two central questions, which will set the stage for a more detailed analysis provided in the subsequent chapters of this work.

The argument in this chapter will further proceed in three sections. The second section will provide a short overview of the history between constitutional courts and the CJEU by covering the different approaches used to analyze this relationship. Most importantly, this section will discuss the main subject areas which served as meeting points but also as areas of contention between these institutions and thus determined the different subsequent phases in the evolution of this relationship, starting with the fundamental rights protection, the issue of vertical division of competences in the EU, and specific national constitutional provisions.

The third and fourth sections will be devoted to the impact of the CJEU case law on the status of constitutional courts and their exclusive jurisdiction and monopoly to conduct constitutional review in the respective national constitutional systems. These two sections will cover two interrelated aspects of this impact on constitutional courts. More specifically, the third section will discuss the decentralizing tendencies that were brought by the *Simmenthal* mandate[3] of national ordinary courts, and it will be argued that the decentralizing tendency of the CJEU case law has been overstated since such tendencies have been present prior and parallel to this development as a consequence of the increasing constitutionalization of the national legal order. The fourth section, on the other hand, will discuss the so-called doctrine of displacement

[3] CJEU Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA* (*Simmenthal II*), ECLI:EU:C:1978:49. The phrase of 'Simmenthal mandate' is borrowed from Monica Claes, *The National Courts' Mandate in the European Constitution* (Hart 2006) 69ff.

of constitutional courts,[4] developed and practiced by the CJEU through its recent case law. This section will provide brief analyses on the extent that this doctrine has negatively influenced the mandate of constitutional courts. Lastly, a conclusion will summarize the main arguments.

2 Constitutional courts and the CJEU – the story so far

2.1 Preliminary remarks

The first pivotal question to be discussed in this chapter is the history and evolution of the relationship between constitutional courts and the CJEU and, through this, generally the former's stance towards EU law. This story has been told many times in a great number of academic works.[5] Therefore, it would be safe to say that there is no student of law which has not heard or read about the *Solange* saga of the FCC[6] or the *Frontini* decision of the ICC[7] and other significant constitutional court decisions related to EU law. However, amid this tide of information there is still a necessity to provide at least a brief overview of this relationship in order to set the stage for a more detailed elaboration on this matter. Thus, providing this overview is the main aim of this section. Without having an accurate account of the story so far one cannot cultivate a constructive vision of the direction in which this relationship should develop in future.

The CJEU has definitely served as a motor and catalyst of legal integration in the EU. The fundamental principles and doctrines of EU law were developed by this court in its case law. The primacy and direct effect of EU law served a significant role from the initial period in fostering further and deeper legal integration in Europe.[8] On the other hand, as one of CJEU's main counterparts at the national level, constitutional courts have played a significant role in developing doctrines and principles in national law through which EU law has found its

[4] Jan Komarek, 'National constitutional courts in the European constitutional democracy', 12 International Constitutional Law Journal 2014 525, 527ff; and Jan Komarek, 'The Place of Constitutional Courts in the EU' (2013) 9 European Constitutional Law Review 420, 428-444.

[5] See for instance Anne-Marie Slaughter, Alec Stone Sweet and Joseph H. H. Weiler (eds) *The European Court and National Courts: Doctrine and Jurisprudence* (Hart 1998); Allan F. Tatham, *Central European Constitutional Courts in the Face of EU Membership* (Nijhoff 2013); Jose Maria Beneyeto and Ingolf Pernice (eds) *Europe's Constitutional Challenges in the Light of the Recent Case Law of National Constitutional Courts* (Nomos 2011); Aida Torres Perez, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication* (Oxford University Press 2009); Patricia Popelier, Armen Mazmayan and Werner Vandenbruwaene (eds) *The Role of Constitutional Courts in Multilevel Governance* (Intersentia 2012); Sven Simon, *Grenzen des Bundesverfassungsgerichts im europäischen Integrationsprozess* (Mohr Siebeck 2016); Mattias Klatt, *Die Praktische Konkordanz von Kompetenzen* (Mohr Siebeck 2014); Franz C. Mayer, 'Multilevel Constitutional Jurisdiction' in Armin von Bogdandy and Jürgen Bast (eds) *Principles of European Constitutional Law* (Hart 2nd revised edition 2010) 399; Giuseppe Martinico and Oreste Pollicino (eds) *The National Judicial Treatment of the ECHR and EU Law: A Comparative Perspective* (Europa Law 2010) and many more.

[6] FCC, 2 BvL 52/71 (*Solange I*) decision of 29 May 1974 and 2 BvR 197/83 (*Solange II*) decision of 22 October 1986.

[7] ICC, Judgment 183/1973 (*Frontini*) of 18 December 1973.

[8] See for instance Damian Chalmers, Gareth Davies and Giorgio Monti European Union Law (Cambridge University Press 2nd edition 2010) 142-183.

appropriate place within the national legal orders of member states.[9] The constitutional courts' case law is thus equally important taking into consideration that, besides national constitutional provisions enabling and authorizing membership in the EU or international organizations generally, there are no other detailed constitutional provisions[10] related to the powers of constitutional courts or even ordinary courts which regulate the status and effect of EU law within the jurisdiction of theses courts and the manner of its application.[11] Since constitutional powers of constitutional courts do not even mention EU law, this issue is left to be dealt with in their case law. Nevertheless, this situation and approach in the domestic legal realm brings more flexibility to constitutional courts and the national legal orders in adjusting to legal integration in the EU characterized by high levels of dynamism.[12]

Just as there are differences between constitutional courts in certain aspects of their powers and institutional design,[13] there are also some variations among them when it comes to EU law and the CJEU.[14] Nevertheless, despite these differences, there are common threads also in regard to constitutional courts' attitude towards EU law and the CJEU which have resulted from an ever more frequent practice of consulting and invoking decisions of other constitutional courts in their reasoning, that is, through horizontal judicial dialogue. As a matter of fact, it could be convincingly argued that, judging by the tendencies within the case law of constitutional courts, there are certain signs of convergence, particularly as result of the great influence of the FCC. Namely, even though not the 'trailblazer' when it comes to direct judicial dialogue with the CJEU, the FCC has the most elaborate and consistent case law on EU law which has been continuously invoked by other constitutional courts.[15]

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[9] Monica Claes and Bruno De Witte, 'Role of National Constitutional Courts in the European Legal Space' in Patricia Popelier, Armen Mazmayan and Werner Vandenbruwaene (eds) The Role of Constitutional Courts in Multilevel Governance (Intersentia 2012) 93-94.

[10] On this 'loud silence' of national constitutions see Claes and De Witte (n 9) 93. On the classification of these type of constitutional provisions see Giuseppe Martinico, 'National Judges and Supranational Laws: Goals and Structure of the Research' in Giuseppe Martinico and Oreste Pollicino (eds) *The National Judicial Treatment of the ECHR and EU Law: A Comparative Perspective* (Europa Law 2010) 15-16. The most elaborate exception would be the Portuguese constitution which regulates this issue in details something not common among the other Member State constitutions. For more on this see Leonard F. M. Besselink, Monica Claes, Sejla Imamovic and Jan Herman Reestman, 'National Constitutional Avenues for Further EU Integration' (European Parliament 2014) 246ff and Stefan Griller, Stefan Keiler, Thomas Kröll, Georg Lienbacher and Erich Vranes, 'National Constitutional Law and European Integration' (European Parliament 2011) 21-22.

[11] Claes and De Witte (n 9) 93-94.

[12] Besselink et al (n 10); and Griller et al (n 10).

[13] For more on this see Chapter 1 section 3.

[14] See more generally in Oreste Pollicino, 'Conclusions: In Search of Possible Answers' in Giuseppe Martinico and Oreste Pollicino (eds) *The National Judicial Treatment of the ECHR and EU Law: A Comparative Perspective* (Europa Law 2010) 501-511; Besselink et al. (n 10); and Claes and de Witte (n 9) 81-82. On the difference between and Central and East European constitutional courts and West and South European constitutional courts see Marek Safjan, 'Central and Eastern European Constitutional Courts' in Michal Bobek (ed.) *Central European Judges Under the European Influence* (Bloomsbury 2015) 380; Michal Bobek, 'Conclusions: Of Form and Substance in Central European Judicial Transitions' in Michal Bobek (ed) *Central European Judges Under the European Influence* (Bloomsbury 2015) 413-414.

[15] Claes argues against this claim: see Monica Claes and Bruno de Witte, 'Competences: Codification and Contestation' in Adam Lazowski and Steven Blockmans (eds) *Research Handbook on EU Institutional Law* (Edward Elgar 2016) 71-73; and Monica Claes, 'The Validity and Primacy of EU Law and the 'Cooperative Relationship' between National Constitutional Courts and the Court of Justice of the European Union' (2016) 26 Maastricht Journal of European and Comparative Law 157-163. But cf. chapter 6 section 4.4; Peter M. Huber,

Taking this into consideration, there are four common threads among constitutional courts which could be recognized. First, constitutional courts have had a reactive approach towards the developments of EU law and the CJEU case law. Basically they have been taking a rather passive stance and reluctance to engage with EU law, particularly in the first decades of its development, and thus have reacted only when there was a major development in the realm of EU law that would potentially contradict fundamental constitutional provisions. For instance, even though one could argue that the *Solange I* decision was a proactive step made by the FCC that pushed the CJEU to enter into more intensive fundamental rights protection, it seems that the underlying intention of the FCC was to place constitutional restraints on the primacy of EU law as a reaction to the newly established doctrine.[16] Second, from early on constitutional courts have recognized the special nature of EU law, emancipated from both international and national law, and consequently they accepted relatively quickly the judge-made principles of EU law such as primacy and direct effect, as well as the *Simmenthal* mandate of national ordinary courts.[17] However, they have never accepted absolute primacy of EU law as promoted by the CJEU and have conditioned it with the respect for fundamental constitutional provisions.[18] Third, even though the status and effect of EU law have been determined by the CJEU itself, constitutional courts have continuously insisted, regardless of whether they adhere to monism or dualism, that the legal basis for the application of EU law in the respective member states is to be found in the national legal order.[19] Fourth, constitutional courts with few exceptions have not been keen on entering into direct judicial dialogue with the CJEU by submitting preliminary references.[20]

2.2 Different approaches in analyzing the relationship

There are several ways in which one could approach the relationship between constitutional courts and the CJEU. These three approaches could be recognized based on three different aspects of the relationship which are frequently present in the academic writings: the procedural, the jurisdictional, and the substantive approach.

'The Federal Constitutional Court and European Integration' (2015) 21 European Public Law 83, 90-93; and Tatham (n 5).

[16] Andreas Voßkuhle, '"European Integration Through Law": The Contribution of the Federal Constitutional Court' (2017) 58 European Journal of Sociology 145, 147-148.

[17] For a more detailed account see national reports in Slaughter, Stone Sweet and Weiler (n 5). On the Italian exception in which it took some time before the ICC accepted these principles and doctrines see Vittoria Barsotti, Paolo G. Carozza, Marta Cartabia and Andrea Simoncini, *Italian Constitutional Justice in Global Context* (Oxford University Press 2016) 205-222. On Germany see Karen Alter, Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe (Oxford University Press 2001) 80-177, and on France 157-173; Voßkuhle (n 16)148-150; and Simon (n 5) 55. On the experience of CEE constitutional court see contributions in in Adam Lazowski (ed), *The Application of EU Law in the New Member States* (Asser 2010); and Safjan (n 14) 375.

[18] Herbert Bethge, in Theodor Maunz, Bruno Schmidt-Bleibtreu, Franz Klein, Herbert Bethge et al., *Bundesverfassungsgerichtsgesetz: Kommentar Band 1* (54th edition C.H. Beck 2018) 144; Huber (n 15) 87; and Mayer (n 5) 410, 417-420.

[19] Huber (n 15) 86-87; Mayer (n 5) 410; Alter (n 17) 96; and Voßkuhle (n 16) 150.

[20] While BCC and ACC have been rather active from earlier in this regard, this has not been the case for other constitutional courts in the EU which have used this occasion in very few cases or in none at all. See Maartje de Visser, *Constitutional Review in Europe: A Comparative Analysis* (Hart 2014) 403-404; Barsotti et al. (n 17) 418; Mayer (n 5) 401-407. For more on this see chapter 5 section 4.1.

The first approach is procedural in nature. It is focused on the interaction between these institutions and whether the procedural mechanism for direct judicial dialogue is being employed by constitutional courts or there is recourse to indirect forms of interaction with the CJEU.[21] Constitutional courts have been rather creative in finding various avenues to avoid their obligation for sending preliminary references stemming from Article 267 (3) TFEU.[22] From this perspective, constitutional courts for a very long period were consistently avoiding any type of direct judicial dialogue and thus, with few exceptions, were not submitting preliminary references to the CJEU. Even though the situation has changed recently, the track record is not large enough to make any firm conclusions on the matter.[23] Instead of direct dialogue, however, constitutional courts have frequently opted for indirect forms of interaction. For instance, they have referred to and invoked the case law of the CJEU or used the method of signaling the CJEU through their reasoning on certain contentious issues between the national and EU legal order.[24] Such an attitude of constitutional courts is not necessarily negative but it could be perceived as a wise maneuver in evading direct conflicts with the CJEU which might create a legal deadlock not to be welcomed by either side.[25] In this sense, it is to be seen that the interaction between these courts is not always a matter of struggle or friction and the relationship is not characterized solely by the conflict potential. For instance, even though constitutional courts themselves avoided entering into a direct judicial dialogue, they have been very constructive in securing the respect for the preliminary reference procedure by national courts through the safeguard of the constitutional right to a lawful judge or the right to a fair trial, which in the cases involving EU law is the CJEU.[26]

The second approach is jurisdictional and it is related to the powers and mandate of constitutional courts in regard to EU law. Namely, Claes has analyzed this relationship by looking at both the national and EU perspective on the exercise of constitutional courts' powers to, potentially or actually, conduct *a priori* and *a posteriori* review of both primary and

[21] de Visser (n 20) 403- 407; Mayer (n 5) 401-407.

[22] Article 267 (3) TFEU: "Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court." For more on these tactics of avoidance see for instance, de Visser (n 20) 403-407; Mayer (n 5) 403-406; Michal Bobek, 'Learning to Talk: Preliminary Rulings, the Courts of the New Member States and the Court of Justice' (2008) 45 Common Market Law Review 1632 – 1633; Roberto Miccu, 'Toward a (Real) Cooperative Constitutionalism? New Perspectives on the Italian Constitutional Court' in Jose Maria Beneyto and Ingolf Pernice (eds.), *Europe's Constitutional Challenges in the Light of the Recent Case Law of National Constitutional Courts* (Nomos 2011), 128; Pierre-Vincent Astresses, 'The Return of Huron, or Naïve Thoughts on the Handling of Article 267 TFEU by Constitutional Court when Referring to the Court of Justice' (2015) 16 German Law Journal 1714-1715.

[23] For more on this see chapter on deliberative section 4.

[24] On different forms of interaction see Claes and De Witte (n 9) 98-100; Giuseppe Martinico, 'Judging in the Multilevel Order: Exploring the Techniques of 'Hidden Dialogue' (2010) King's Law Journal 258; Daniel Sarmiento, 'The Silent Lamb and the Deaf Wolves' in Matej Avbelj and Jan Komarek (eds.), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012) 285ff.

[25] Jan Komarek, 'The Place of Constitutional Courts in the EU' (2013) 9 European Constitutional Law Review 420, 442ff; and Florian Geyer, European Arrest Warrant, Court of Justice of the European Communities, Judgment of 3 May 2007, Case C-303/05, *Advocaten voor de Werd VZW v. Leden van de Ministerraad*, 4 European Constitutional Law Review (2008) 150; and Claes (n 3) 426.

[26] See for instance Voßkuhle (n 16) 150-151; and Mayer (n 5) 406-407. For a more detailed overview see chapter 4 on deliberative section 4.4.

secondary EU law.[27] While this approach is valuable from the viewpoint of constitutional courts' stance towards EU law, it does not include in all instances the relationship between constitutional courts and the CJEU since in certain types of review the latter does not have any jurisdiction in the cases at hand. More precisely, in cases of *a priori* review of either EU treaties or, theoretically, secondary EU law, the CJEU cannot have a say since the EU law at stake has not entered into force; thus there is no possibility of any type of interaction between them. In this manner, the jurisdictional approach does draw on the procedural one by reflecting on the indirect dialogue and it does reveal, to a certain extent, the groups of contentious issues on which there is a cleavage in the relationship between constitutional courts and the CJEU and accordingly EU law. However, this approach does not classify or analyze these contentious issues from the substantive aspect which reflects that it is not really concerned with the actual issues behind the contentions.[28]

The third approach is perceiving the relationship through substantive areas which serve as meeting points but also as areas in which lines of constitutional resistance have been drawn by constitutional courts.[29] Actually, this approach also includes procedural and jurisdictional aspects since focusing on substantive issues does not exclude examining the two other aspects of the relationship. In this manner, one obtains a more complete overview. Different from the jurisdictional,[30] the substantive approach does not restrict itself only to the *a posteriori* review of secondary EU law in determining the constitutional limits of EU law since constitutional resistance could be aimed at the interpretation of certain EU Treaty provisions especially related to the fundamental freedoms or, in the cases on the financial crisis, mandate of the CJEU. As a matter of fact, constitutional courts have utilized the weaker position of the CJEU on occasions of preventive review of EU treaties to enter into an indirect dialogue by addressing matters of constitutional limits and resistance to EU law. They have used these opportunities to send signals to the CJEU from a national constitutional perspective regarding how far it should go in interpreting the treaty provisions or even secondary EU law.[31] Therefore, both the direct and indirect judicial dialogues in their different forms are under consideration within this approach. More importantly, since the jurisdictional aspect of constitutional courts have not been able to reveal much, the substantive approach depicts, in the best possible manner, the common threads among constitutional courts' attitude towards EU law and the CJEU. In this sense, particularly visible is the resistance of constitutional courts in the context of various issues towards the absolute primacy of EU law as continuously declared by the CJEU.

Turning to the actual substantive areas, there are three such areas which have served as points of encounter and resistance at the same time. Those areas are: fundamental rights, vertical division and exercise of competences and specific constitutional provision of high importance

[27] Claes (n 3) 465-650.
[28] Claes and De Witte (n 9) 102-104.
[29] de Visser (n 20) 408-417; Mayer (n 5) 407-420; and Mattias Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty' (2005) 11 European Law Journal 262, 263ff.
[30] On this aspect of *a posteriori* review of secondary EU law see Claes (n 3) 559-650.
[31] Most obvious examples being FCC, 2 BvR 2134 and 2159/92 *Maastricht Treaty* (Brunner), judgement of 12 October 1993; FCC, Case 2 BvE 2/08, *Lisbon*, judgment of 30 June 2009.

to particular member states. The remainder of this section will go through these substantive areas.

2.2.1 Fundamental rights

Fundamental rights have represented the first point of serious encounter of constitutional courts with EU law and indirectly with the CJEU. Namely, two decisions in the early 1970s have set the pace for most of the future developments in this relationship. These decisions came as a sort of a reaction to the establishment of two fundamental principles of EU law, primacy and direct effect, through the renowned case law of the CJEU in the mid-1960s.[32] Both the FCC and ICC, after demonstrating their readiness to accept these two principles, turned to determine certain constitutional limits on EU law, bearing in mind the state of the European integration process at the time.[33] This state of integration was, among other things, characterized by lack of any bill of fundamental rights at the EU level and an underdeveloped case law by the CJEU.[34]

It was first the ICC in its *Frontini* decision in 1973[35] which elaborated on the constitutional limits of EU law by establishing the well-known counter-limits doctrine. This doctrine basically limits the primacy of EU law with the fundamental principles set in the Italian Constitution among which fundamental rights are seen as particularly important. Accordingly, these principles represent counter-limits to the limitation of sovereignty in the process of European integration.[36] This doctrine was later confirmed by several decisions of the ICC and is still valid.[37]

Very soon after the ICC introduced the counter-limits doctrine, the FCC delivered one of its most renowned decisions which initiated its case law on determining the constitutional limits of EU law. In 1974 the FCC in *Solange I*[38] addressed the issue of primacy of EU law through the prism of the level of fundamental rights protection at the EU level and established the foundation for the existence of constitutional limits of EU law in the national legal order as well as the limits on the transfer of sovereign rights according to the national constitutional provision. Namely, the FCC clearly declared its power to safeguard these national constitutional limits against EU law, particularly in the context of fundamental rights, as long as the standards of fundamental rights protection of the EU are not comparable and compatible with those provided for in the German Basic Law.[39]

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[32] CJEU, Case 26-62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* (*van Gend & Loos*), Judgment of 5 February 1963, ECLI:EU:C:1963:1; CJEU, Case 6-64, *Flaminio Costa v E.N.E.L*, Judgment of 15 July 1964, ECLI:EU:C:1964:66.

[33] See for instance Barsotti et al. (n 17) 215; and Griller et al (n 10) 67.

[34] The only important decisions predating *Frontini* being, CJEU, Case 29-69, *Erich Stauder v City of Ulm – Sozialamt* (Stauder), Judgment of 12 November 1969, ECLI:EU:C:1969:57; and CJEU, Case 11/70, *Internationale Handelsgesellschaft* v. *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (*Internationale Handelsgesellshaft*) Judgment of 17 December 1970, ECLI:EU:C:1970:114. See also Barsotti et al. (n 17) 215.

[35] ICC, *Frontini* (n 7).

[36] Barsotti et al. (n 17) 214.

[37] ICC, Judgment 70/1984 (*Granital*) of 8 June 1984; ICC, Judgment 232/89 (*Fragd)* of 21 April 1989; and ICC, Order 24/2017 (*Taricco*) of 23 November 2017.

[38] FCC, *Solange I* (n 6).

[39] For more on this see for instance Juliane Kokott, Report on Germany, in Anne-Marie Slaughter, Alec Stone Sweet and Joseph H. H. Weiler (eds)*The European Court and National Courts: Doctrine and Jurisprudence* (Hart 1998) 87; Rudolf Streinz, 'Art. 23: Verwirklichung der Europäischen Union, Beteiligung des Bundestages und

As result of these two decisions and the rationale behind them the CJEU was provided with a strong impetus and entered into developing a fundamental rights case law and their protection to comply with the constitutional limits declared by the ICC and the FCC. Thus these two constitutional courts induced and motivated the fundamental rights protection at EU level, something for which they have been praised. This has in turn led to the substantial development of the CJEU's fundamental rights case law which eventually brought to the enactment and the binding effect of the Charter of Fundamental Rights of the European Union.[40] As a matter of fact, one decade after this constitutional reservation was introduced, the FCC in *Solange II*[41] declared that due to the essentially comparable level of protection of fundamental rights at the EU level it would have only residual power to conduct a fundamental rights review of EU law and only in extraordinary cases.[42] In the latter case the applicants would have to convincingly argue that the opposite has occurred and that the protection of fundamental rights or of a specific right is not comparable with the German legal standards.[43] In this sense, there persists a rebuttable presumption that there are no reasons for the employment of the fundamental rights review by the FCC.

The issues revolving around fundamental rights are most commonly emphasized in academic writings; however, other very important aspects of *Frontini* and *Solange I* are somehow set aside. In both decisions the overarching idea was the establishment of certain constitutional limits on the primacy, and more generally the application, of EU law particularly that the CJEU gave this doctrine a very broad scope and interpretation.[44] More specifically, both *Frontini* and *Solange I* were obviously about drawing a line in the sand and determining broader constitutional limits of EU law. Even though the central point, fundamental rights, were not the only important issue. In view of that, it could be argued that, besides the fundamental rights review, these constitutional court decisions, particularly *Solange I,* provided the basis for constitutional identity review as well as the inspiration for *ultra vires* review. As a matter of fact, the notion of constitutional identity as a constitutional limit originates in this decision.[45] Ironically, it is exactly this overarching aspect of these decision that has been subject of criticism often by the very same authors that praise them for fundamental rights aspects.

Contrary to the expectation and perception of some scholars who have basically declared that fundamental rights cannot be credibly invoked as a constitutional limit in the future since the principle of equivalent protection has been further secured with the adoption of the Charter, we

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des Bundesrates', in Michael Sachs (ed) *Grundgesetz* (8th Edition C.H. BECK 2018) paras. 41-53; Mayer (n 5) 411; Griller et al (n 10) 67; and Simon (n 5) 56-57.

[40] This document was initially enacted by the European Parliament, the Council and the Commission as an instrument of soft law, [2000] OJ C364/1. Later Article 6(1) TEU, proclaimed that the modified version of the Charter, reprinted in [2010] OJ C83/389, that shall have a legally binding effect identical with the legal effect of the Treaties. On the influence of constitutional courts to the processes which led to the enactment of the Charter see Andreas Voßkuhle, 'Multilevel Cooperation of the European Constitutional Courts: *Der Europäische Verfassungsgerichtsverbund*' (2010) 6 European Constitutional Law Review 191-193.

[41] FCC, *Solange II* (n 6).

[42] Streinz (n 39) para. 101:"Reservekompetenz"; Mayer (n 5) 411-412; Kokott (39) 90-91; Simon (n 5) 60-61, 80 Voßkuhle (n 40) 192; Voßkuhle (n 16) 151-153.

[43] This was essentially confirmed in the FCC, 2 BvL 1/97, *Banana Market,* decision of 7 June 2000. See on this in Voßkuhle (n 40) 192.

[44] CJEU *Internationale Handelsgesellshaft* (n 34).

[45] Voßkuhle (n 16) 148.

have seen a kind of revival of this aspect of fundamental rights.[46] Namely, they have once again opened the door for potential constitutional resistance in the context of constitutional identity. The extensive interpretation of Charter's scope of application and arguably lowering the level of protection of fundamental rights in the EU due to the overarching interest of uniform and effective application of EU law have raised concerns among constitutional courts.[47] There are several instances in which constitutional courts have included certain fundamental rights as part of their respective constitutional identity and thus reintroduced fundamental rights as constitutional limits to EU law through the 'back door'. The conundrum over the Data Retention[48] and the ongoing EAW saga[49] are just two instances which make this point more than valid. It is actually the EAW saga that is also directly related to the manner in which the CJEU has interpreted the scope of application of the Charter which has raised eyebrows and faced constitutional courts' resistance.[50] In this respect, *Akerberg Franson* and *Melloni* have drawn strong criticism and resistance over the interpretation of Articles 51 and 53 of the Charter provided in these two CJEU decisions respectively which has substantially expanded the reach of the Charter.[51]

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[46] See for instance Besselink et al. (n 10) 23; but cf Kumm (n 29) 264.

[47] CJEU, Case C-617/10, *Åklagaren v Hans Åkerberg Fransson* (*Akerberg Fransson*), Judgement of 26 February 2013, ECLI:EU:C:2013:105 and CJEU, Case C-399/11, *Stefano Melloni v Ministerio Fiscal* (*Melloni*) Judgement of 26 February 2013, ECLI:EU:C:2013:107**.** A warning signal was immediately sent by the FCC in reaction to the *Akerberg Fransson* decision of the CJEU in FCC, Case 1 BvR 1215/07 Judgment of 24 April 2013, para. 91. On this reaction see for instance Tristan Barczak, *BVerfGG: Mitarbeiterkommentar zum Bundesverfassungsgerichtsgesetz* (De Gruyter 2017) 51-52, paras. 84-85.

[48] RCC, No 1.258 decision of 8 October 2009, FCC, 1 BvR 256/08, judgment of 2 March 2010; CCC, Pl. ÚS 24/10, decision of 22 March 2011; and HCC, no. 1746/B/2010, decision of 19 December 2012. The CJEU finally recognized some of the problematic aspects of the Data Retention Directive (EC Directive 2006/24 of 15 March 2006, O.J. 2006 L 105/54) upon a preliminary reference lastly sent by the Austrian Constitutional Court and the Irish High Court in CJEU, Case C-293/12 and C-594/12, *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources et al* and *Kärtner Landesregierung, Michael Seitlinger, Christof Tschohl and others*, ECLI:EU:C:2014:238. For more on this see for instance Ludovica Benedizione and Eleonora Paris, 'Preliminary Reference and Dialogue between Courts as Tools for Reflection on the EU System of Multilevel Protection of Rights: The Case of the *Data Retention Directive'* (2015) 16 German Law Journal 1727; Theodore Konstadinides, 'Destroying Democracy on the Ground of Defending It? The Data Retention Directive, the Surveillance State and Our Constitutional Ecosystem', 1 *European Current Law* (2012) 722; Hendrik Wieduwilt, 'The German Federal Constitutional Court Puts the Data Retention Directive on Hold' (2010) 53 The German Yearbook of International Law 917ff.

[49] See for instance Aida Torres Perez, 'The Challenges for Constitutional Courts as Guardians of Fundamental Rights in the European Union' in Patricia Popelier, Armen Mazmayan and Werner Vandenbruwaene (eds) *The Role of Constitutional Courts in Multilevel Governance* (Intersentia 2012) 66-75.

[50] PCT, P 1/05 Decision of 27 April 2005; CCC, Pl. US 66/04, Judgement of 3 May 2006; FCC, 2 BvR 2236/04, Judgement of 18 July 2005. For more on this see Torres Perez (n 49) 66-75; Jan Komarek, 'European Constitutionalism and the European Arrest Warrant: In Search of the Limits of "Contrapunctual Principles"' (2007) Common Law Market Review 9; Oreste Pollicino, 'European Arrest Warrant and Constitutional Principles of the Member States: A Case Law-Based Outline in the Attempt to Strike the Right Balance Between Interacting Legal Systems' (2008) 9 German Law Journal; Elies van Sliedregt, 'Introduction. The European Arrest Warrant: Extradition in Transition' (2007) 3 European Constitutional Law Review. On the latest decision see FCC, 2 BvR 2735/14, *EAW II*, order of 15 December 2015.

[51] Among a large number of critical accounts see Daniel Sarmiento, 'Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe', 50 Common Market Law Review (2013), 1267ff; Leonard F. M. Besselink, 'The Parameters of Constitutional Courts after Melloni' (2014) 39 European Law Review 4 531ff; Paul Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (Cambridge University Press 2015), 503-505; Voßkuhle (n 16) 152; Safjan (n 14) 382-383; Jan Komarek, 'National constitutional courts in the European constitutional democracy' 12 International Constitutional Law Journal 2014 528; Jan Komarek, 'National constitutional Courts in the European constitutional

2.2.2 Vertical division and exercise of competences in the EU

With the expanding scope of EU law, particularly with the Maastricht Treaty, another form and line of constitutional resistance immediately surfaced. The vertical division of competences between the member states and the EU as well as their exercise at the EU level very soon came under the spotlight and on the radar of constitutional courts. This has been even more intensified with the already existing rich case law in which the CJEU has extensively interpreted EU competences. The FCC was the first to introduce the *ultra vires* review and later on through its subsequent decisions has further elaborated and developed it.[52] FCC's *Maastricht* decision[53] in 1993 came as a clear reaction to the ongoing competence creep as well as the high likelihood of furthering this expansion of competences by the EU.[54] Even though the idea of constitutional courts policing the jurisdictional borders in the EU was not a new idea,[55] the Maastricht Treaty came as a breaking point due to the penetration of EU law in areas which were previously considered to be exclusively a matter of national constitutional law.[56] Accordingly, the FCC declared its residual power to control through the *ultra vires* review both the secondary EU law and the CJEU case law, which under the guise of treaty interpretation, could, *de facto*, introduce treaty amendments through which EU law would encroach on other policy areas outside its determined competences and scope of application.[57] In this sense, the *ultra vires* review became the second line of constitutional resistance that soon came to be embraced, tacitly or explicitly, by most of the other constitutional courts.[58] Judged by their decisions and reasoning, these constitutional courts seem to be quite aware and share a common view on the necessity for a certain level of judicial restraint that needs to be practiced by reserving the *ultra vires* review for exceptional situations.

The FCC's *Maastricht* decision was the moment of initiation for the *ultra vires* review; the latter was further developed, refined and qualified through subsequent case law, most

democracy: A rejoinder' (2017) 15 International Journal of Constitutional Law 815, 817-818. On the two different approaches taken by the FCC (Trennungsthese) and the CJEU (Kumulationsthese) see Barczak (n 47) 49-53, paras. 81-87. For a different account of these cases claiming that they have not brought anything new but only confirmed previous case law predating the Charter, see Deutscher and Mair (n 2) 803-807.

[52] For more on this see chapter 6 section 3.

[53] FCC *Maastricht Treaty* (n 31) para. 106ff.

[54] Simon (n 5) 62-64; Mayer (n 5) 412-415; Kokott (n 39) 92-107; Voßkuhle (n 16) 155-156; Huber (n 15) 88; and Alter (n 17) 104-108.

[55] de Visser (n 20) 413; Kokott (n 39) 95-96; and Simon (n 5) 234.

[56] Marco Dani, 'National constitutional courts in the European constitutional democracy: A reply to Jan Komarek' (2017) 15 International Journal of Constitutional Law 785, 794.

[57] FCC *Maastricht Treaty* (n 31) paras. 155-158; Voßkuhle (n 40) 193-194; Mayer (n) 412; and Simon (n 5) 235-237.

[58] See for instance, Mayer (n 5) 417, Tatham (n 5) 248-249; Ana Maria Guerra Martins and Miguel Prata Roque, 'Judicial Dialogue in a Multilevel Constitutional Network: The Role of the Portuguese Constitutional Court' in Mads Andenas and Duncan Fairgrieve (eds.) Courts and Comparative Law (Oxford University Press 2016) 312-314; Philippe Gerard and Willem Verrijdt, 'Belgian Constitutional Court Adopts National Identity Discourse: Belgian Constitutional Court No. 62/2016, 28 April 2016' (2017) 13 European Constitutional Law Review 182. But cf. Claes and de Witte (n 9) 71-73 and Monica Claes, 'The Validity and Primacy of EU Law and the 'Cooperative Relationship' between National Constitutional Courts and the Court of Justice of the European Union' (2016) 26 Maastricht Journal of European and Comparative Law 157-163.

importantly through the *Lisbon*,[59] *Honeywell*[60] and *OMT* (Gauweiler) decisions.[61] In these three decisions, *ultra vires* review was shaped in a manner that would serve both national constitutional law and EU law respecting the existing constitutional pluralism in Europe. While the FCC has introduced and meticulously developed the *ultra vires* review, so far it has never declared an EU act *ultra vires*.[62] However, the CCC was the first and so far the only constitutional court to declare an EU act, that is, CJEU *Landtova* decision[63], to be *ultra vires*.[64] Nevertheless, this precedent from 2012 has not had a deep impact on the relationship between constitutional courts and the CJEU and has been interpreted as an isolated incident.[65]

2.2.3 Specific national constitutional provisions

The third substantive area in the relationship between constitutional courts and the CJEU is related to specific national constitutional provisions. Different from the previous two, this substantive area is more diverse and is difficult to be classified more precisely. There are authors who have classified these specific provisions under the notion of constitutional identity[66] as a separate substantive area of constitutional resistance.[67] However, this does not do any favors to constitutional provisions which are not defined as part of the respective constitutional identity but, on the other hand, have been the subject of the relationship between constitutional courts and the CJEU. In this sense, the substantive area of specific national constitutional provisions does include both provisions which are part of a constitutional identity, and those which are not part of it but do regulate fundamental issues of national constitutional law.

Furthermore, there is another distinction to be drawn in this context when it comes to fundamental rights. Namely, in some cases they do represent an essential part of constitutional identity clearly defined by constitutional courts, while in others these are separated from a narrower view on constitutional identity that does not include, at least not all, fundamental rights. Depending on whether fundamental rights are viewed independently or as part of a constitutional identity, there is a differing perception of the overlap between the fundamental rights review and identity review in different member states. The case of the FCC is telling in this sense because it does distinguish three forms of review of EU law: fundamental rights, constitutional identity and *ultra vires* review.[68] However, it has been indicated by this court

[59] FCC *Lisbon* (n 31) para. 225ff.
[60] FCC, *Honeywell* 2 BvR 2661/06, order of 6 July 2010, para. 39ff.
[61] FCC, *OMT* decision 2 BVR 2728/13, judgment of 21 June 2016, para. 149ff. For more on the manner in which ultra vires review has been qualified respecting the principle of openness towards European Law, see chapter 7 (6) section 4.2.
[62] The FCC employed the *ultra vires* review in FCC, *Honeywell* (n 52) paras. 75-78; and announced it in FCC, *OMT* referral, 2 BvR 2728/13 of 14 January 2014, para. 23.
[63] CJEU, Case C-399/09 *Landtova*, 22 June 2011, ECLI:EU:C:2011:415.
[64] CCC, *Holubec*, Pl. US 5/12, plenary judgment of 31 January 2012.
[65] For more on this Michal Bobek, '*Landtova*, *Holubec*, and the Problem of an Uncooperative Court: Implications for the Preliminary Ruling Procedure' (2014) 10 *European Constitutional Law Review* 54 and Jan Komarek, 'Playing with Matches: The Czech Constitutional Court's *Ultra Vires* Revolution' (Verfassungsblog 22 February 2012).
[66] On the role of constitutional courts in safeguarding constitutional identity see chapter 5.
[67] See for instance de Visser (n 20) 415-417; and Besselink et al. (n 10) 23-24. This type of approach closely follows the development of the FCC's relationship with EU law and the CJEU.
[68] See for instance Besselink et al. (n 10) 24.

that there is a certain overlap between fundamental rights and constitutional identity review.[69] However, this is not the case with all constitutional courts. Even the ICC since the very beginning does not distinguish between these types of reviews and declares to have a single group of fundamental constitutional provision and principles which represent the counter-limits to EU law.[70] In the case of the constitutional courts of CEECs, we have a similar situation when it comes to the relationship between fundamental rights and identity review. Namely, as these states have entered the relationship with the EU law and the CJEU at a stage in which fundamental rights review was already assumed to be absolved, most of them turned to perceive fundamental rights as an essential part of their constitutional identity.[71]

Be that as it may, the specific national constitutional provisions are very often the ones that envisage the fundamental constitutional principles such as rule of law, democracy, republican status, secularism and similar principles which are often declared to be an integral part of the respective constitutional identity. However, there is no exclusive list or even an identical meaning to the same principles.[72] While most of these broad principles are common to the member states, they have a specific manifestation in different member states; thus this caveat needs to be borne in mind. These principles have also been differently interpreted and developed by national constitutional courts. For instance, a specific aspect of the principle of democracy as interpreted by the FCC, the principle of budget autonomy of the German Parliament, has given rise to a separate line of case law related to the financial and euro crisis.[73]

Besides these type of principles directly tied to the constitutional identity we have also other principles and specific national constitutional provisions which are only indirectly related to the constitutional identity but have been in one way or another an issue in the relationship between constitutional courts and the CJEU. The most recent examples have to do with the ban

[69] For instance, in the first case in which the FCC applied the identity review, FCC, 1 BvR 256/08 *Data Retention Directive*, judgment of 2 March 2010, the overlap between fundamental rights of the German Basic Law and constitutional identity became obvious. But cf. Opinion of Advocate General Bot in CJEU *Melloni* (n 47) para. 142. See de Visser (n 20) 417.

[70] Torres Perez (n 49) 64; and Besselink et al. (n 10) 22-25.

[71] Safjan (n 14) 387-388; and Torres Perez (n 49) 64.

[72] For an overview see Monica Claes, 'Negotiating Constitutional Identity or Whose Identity is It Anyway?' in Monica Claes, Maartje de Visser, Patricia Popelier and Catherine Van de Heyning (eds) Constitutional Conversations in Europe (Intersentia 2012) 222-226; Damian Chalmers, Gareth Davies and Giorgio Monti, European Union Law (Cambridge University Press 2nd edition 2010) 219-223; and contributions in Alejandro Saiz Arnaiz and Carina Alcoberro Livina (eds) *National Constitutional Identity and European Integration* (Intersentia 2013).

[73] FCC, 2 BvR 987/10 *EFSF*, judgment of 07 September 2011; FCC, 2 BvR 2728/13 *ESM*, order of 14 January 2014; FCC *OMT decision* (n 61). For more on these decisions see Huber (n 15) 99-105; and Simon (n 5) 68-75.

on nobility titles in Austria,[74] the status of the Lithuanian as the official national language[75] or the particular understanding of the principle of legality in Italy.[76]

3 The *Simmenthal* decision and the caveat of decentralization of 'constitutional review'

3.1 The *Simmenthal* mandate of national courts

The relationship between constitutional courts in the EU and the CJEU can also be perceived through the impact of the latter's case law from a rather procedural aspect on the status and position of the former. Namely, the development of EU law through the CJEU's case law has brought a long-standing debate on the external decentralizing tendencies on constitutional review.[77] The debate on the decentralizing tendencies has been initiated by a landmark decision in the *Simmenthal II* case.[78] This decision was basically the product of CJEU's objective to ensure the uniform interpretation and effective application of EU law by further strengthening the primacy of EU law. *Simmenthal II* also represented CJEU's reaction to the initially expressed national constitutional resistance by constitutional courts, particularly the ICC's strong insistence on maintaining its monopoly over the review of national legislation.[79] Namely, the ICC based on the international law approach towards EU law claimed that in such cases the principle of *lex posterior* applies and that every breach of EU law by the national legislation needs to be brought before it because this at the same time represents a breach of Article 11 of the Italian Constitution.[80] Therefore such a national rule should be subject of a constitutional review that is the exclusive competence of the ICC.[81]

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[74] This ban represents an implementation of the principle of equal treatment, however the CJEU has declared it to be related to the republican status as part of national identity under Article 4(2) TEU, see CJEU Case C-208/09**,** *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, Judgment of 22 December 2010, ECLI:EU:C:2010:806, para.92

[75] Interestingly, once again the CJEU has declared this issue to be part of national identity under Article 4(2) TEU, while the LCC has never declared this CJEU, Case C-391/09, *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others,* Judgement of 12 May 2011, ECLI:EU:C:2011:291, para. 86.

[76] ICC, Order 24/2017 (*Taricco*) of 23 November 2017.

[77] Victor Ferreres Comella, *Constitutional Courts and Democratic Values: A European Perspective* (Yale University Press 2009) 122-138; and Victor Ferreres Comella, 'The European model of constitutional review of legislation: Toward decentralization?' (2004) 2 *International Journal of Constitutional Law* 461, 477–482.

[78] CJEU, Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA (Simmental II)*, Judgement of 9 March 1978, ECLI:EU:C:1978:49. For a more detailed account of this decision and its significance in the development of EU law see the contributions devoted to the *Simmenthal II* decision in Luis Miguel Poiares Pessoa Maduro and Loïc Azoulai (eds) *The Past and Future of EU Law* (Hart 2010).

[79] Barsotti et al. (n 17) 213; de Visser (n 20) 419-420; Marta Cartabia, 'The Italian Constitutional Court and the Relationship Between the Italian Legal System and the European Union' in Anne-Marie Slaughter, Alec Stone Sweet and Joseph H. H. Weiler (eds) *The European Court and National Courts: Doctrine and Jurisprudence* (Hart 1998) 136-137, Francesco P. Ruggeri Laderchi, 'Report on Italy' Community' in Anne-Marie Slaughter, Alec Stone Sweet and Joseph H. H. Weiler (eds) *The European Court and the National Courts: Legal Change in its Social, Political, and Economic Context* (Hart 1998) 164, Victor Ferreres Comella, *Constitutional Courts and Democratic Values: A European Perspective* (Yale University Press 2009) 125.

[80] Barsotti et al. (n 17) 213; de Visser (n 20) 418; Cartabia (n 79) 135-136; Laderchi (n 79) 162; and Comella (n 79) 125.

[81] Barsotti et al (n 17) 213; Cartabia (n 79) 137; and Comella (n 79) 125.

Against this background, the *Simmenthal II* decision introduced the duty of national courts to conduct review of national legislations' compatibility with EU law. If a national rule is not compatible with EU law the national courts need to set it aside, regardless if it was adopted prior or subsequently, and apply EU law.[82] If this incompatibility cannot be clearly determined, the national courts where necessary should send a preliminary reference to the CJEU.[83] In conducting this duty, national courts do not need to address the issue to higher judicial instances nor a constitutional court and await the procedure before them to be completed.[84]

> "…a national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means."[85]

In this manner, the CJEU confronted ICC's reasoning and practice and established a *Simmenthal* mandate of national ordinary courts[86] to conduct a review of national legislation. In other words, the CJEU introduced a logic of 'comply or disapply' as a guiding rule for national courts.[87] But how is this mandate perceived to influence the status and position of constitutional courts in view of their constitutional mandate to have the exclusive power to conduct constitutional review?

3.2 The status and position of constitutional courts in light of the *Simmenthal* mandate

Simmenthal II has often been perceived as negatively influencing the position and role of constitutional courts by introducing a 'decentralized system of constitutional review' into the national legal order.[88] Actually the empowerment of national ordinary courts has been done to the detriment of the position of constitutional courts.[89] The latter have lost their monopoly over review of national legislation.[90] So, the argument goes, the national courts have instrumentalized this mandate also to circumvent constitutional courts.[91]

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[82] CJEU *Simmenthal II* (n 78) para. 21.
[83] CJEU *Simmenthal II* (n 78) para. 17.
[84] CJEU *Simmenthal II* (n 78) para. 26.
[85] CJEU *Simmenthal II* (n 78) para. 24.
[86] Claes (n 3) 108-114.
[87] Siniša Rodin, 'Back to the Square One – the Past, the Present and the Future of the Simmenthal Mandate' in Jose Maria Beneyto and Ingolf Pernice (eds) *Europe's Constitutional Challenges in the Light of the Recent Case Law of National Constitutional Courts* (Nomos 2011) 304.
[88] Rodin (n 87) 315-318; and Darinka Piqani, 'The Role of National Constitutional Courts in Issues of Compliance' in Marise Cremona (ed.), *Compliance and the Enforcement of EU law* (Oxford University Press 2012) 138.
[89] Claes and de Witte (n 9) 90; Torres Perez (n 49) 52-53, Rodin (n 87) 315; Michal Bobek, 'The Impact of the European Mandate of Ordinary Courts on the Position of Constitutional Courts' in Monica Claes, Maartje de Visser, Patricia Popelier and Catherine Van de Heyning (eds) *Constitutional Conversations in Europe* (Intersentia 2012) 288ff; Marta Cartabia, 'Europe and Rights: Taking Dialogue Seriously' 5 European Constitutional Law Review 2009, 28.
[90] Rodin (n 87) 315ff; and Piqani (88) 138.
[91] Karen J. Alter, 'Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration', in Anne-Marie Slaughter et al. (eds), *The European Court and National Courts*

While these claims and arguments sound very convincing at first glance, there are certain weaknesses to this line of thought. In this sense, there are three main arguments that need to be presented in rebutting such claims. First, *Simmenthal II* has not introduced a new form of constitutional review into the national legal order but rather a 'decentralized enforcement mechanism of EU law' by ordinary courts[92] that includes a certain form of judicial review. Accordingly, the *Simmenthal* mandate of national ordinary courts has at most introduced a new form of judicial review, that is, compatibility review of national legislation with EU law.[93]

Furthermore, *Simmenthal II* refers to national legislation and it does not imply constitutional provisions within the scope of the mandate of national courts.[94] In this sense, it does not entail anything that was not present already as a form of constitutional and judicial review in the member states. In France, for instance, the distinction between constitutional and compatibility review as seen through *control de constitutionalite* and *control de conventionalite* has existed even prior to this EU mandate in regard to international treaties.[95] The former is part of the CC's powers and the latter of ordinary courts. This power of ordinary courts has never been interpreted as jeopardizing the status of the CC. Moreover, constitutional review is conducted only in light of constitutional provisions as a standard of review, and in the case of compatibility review it is EU law that is at stake. Even if the EU's legal order is presented as a constitutional order, still the *Simmenthal* mandate is not confined only to EU's 'constitutional norms' but rather to EU law in general, thus including many legal rules that are far from 'constitutional' relevance.

Second, the decentralizing tendencies have been present within the national legal orders for some while. Actually there are even instances in which ordinary courts have been authorized to set aside and disregard certain statutes on basis of their perceived unconstitutionality.[96] Generally, though, the decentralization of constitutional review has mainly been the result of

– *Doctrine and Jurisprudence. Legal Change in its Social Context* (Hart Publishing 1998) 241-242; Claes (n 3) 257-258; and Komarek (n 25) 428.

[92] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press 2000) 163; or de Visser (n 20) 419: 'model of decentralized review for checking the conformity of national law with EU law'.

[93] Claes (n 88) 102 and Piqani (n 88) 134.

[94] CJEU *Simmenthal II* (n 78) paras. 17-18, 22, 24; see also Paul P. Craig, 'Report on the United Kingdom' in Anne-Marie Slaughter, Alec Stone Sweet and Joseph H. H. Weiler (eds) *The European Court and National Courts: Doctrine and Jurisprudence* (Hart 1998) 201. But cf. Rodin (n 87) 321; Bobek (n 89) 294; however, he supports his arguments by referring to cases in which constitutional provisions were not the subject of preliminary reference but rather indirectly invoked.

[95] Marie Claire Ponthoreau and Fabrice Hourquebie, 'France: The French Conseil Constiutionnel: An Evolving Form of Constitutional Justice' in Andrew Harding and Peter Layland (eds) *Constitutional Courts: A Comparative Study* (Wildy, Simmonds and Hill 2009) 96-97; Davide Paris, 'Constitutional Courts as Guardians of EU Fundamental Rights? Centralised Judicial Review of Legislation and the Charter of Fundamental Rights of the EU' (2015) 11 European Constitutional Law Review 389, 391-392; and Marc Bossuyt and Willem Verrijdt, 'The Full Effect of EU law and of Constitutional Review in Belgium and France after the *Melki* Judgment' (2011) 7 European Constitutional Law Review 359-360, in Belgium the compatibility review is referred to as cream cheese doctrine, 356-357.

[96] Victor Ferreres Comella, 'Spain: The Spanish Constitutional Court: Time for Reforms' in Andrew Harding and Peter Layland (eds) *Constitutional Courts: A Comparative Study* (Wildy, Simmonds and Hill 2009) 180; Victor Ferreres Comella, *Constitutional Courts and Democratic Values: A European Perspective* (Yale University Press 2009) 118-121, he has even argued for adjustment of the centralized model also in this direction. See also on the particular case of Portugal which has a hybrid model of constitutional review in Lucas Prakke and Constantijn Kortmann (eds.) *Constitutional Law of 15 EU Member States* (Kluwer 2004) 698.

the process of constitutionalization of the legal order which finds its manifestation in several forms.[97]

Constitutional rights provisions have permeated all areas of the legal order, thus leading to the necessary use of constitutional methods of reasoning by ordinary courts.[98] As a result, ordinary courts rely extensively on constitutional provisions as well as the case law of respective constitutional courts. Moreover, they enter into the process of determining the meaning of constitutional provisions and principles, thus bridging the traditional distinction between constitutional and ordinary legality.[99] On the other hand, concrete constitutional review has also led to a diffusion since ordinary judges in such instances enter into a preliminary or initial review and assessment of constitutionality of statutes in deciding whether to send the issue before a constitutional court.[100] Likewise, ordinary courts regularly enter into various forms of interpretation of national legislation in conformity with constitutional law, thus becoming heavily involved with safeguarding constitutionality by, where possible, assuming constitutional validity of these legal acts.[101] All these forms of decentralization have been welcomed and even promoted by constitutional courts, taking into consideration that most of these courts are rather overwhelmed with cases and large workloads.[102] Additionally, in all of these cases of decentralization, the issue at stake could still end up before the constitutional court either through a procedure of concrete review or constitutional complaint.[103] Thus, in cases in which national courts invoke their *Simmenthal* mandate to set aside a conflicting national legislative rule, the matter could also be brought before a constitutional court. For instance, a party to the case could claim that a certain constitutional right has been breached as result of such a disapplication of national legislation.[104]

Third, the *Simmenthal* mandate theoretically empowers all courts, including constitutional courts.[105] Hence constitutional courts are also potentially empowered by this mandate, as their constitutional powers never specifically include review of statutes in light of EU law and in most cases not even with international law. Under this mandate constitutional courts would

[97] Stone Sweet (n 92)114-126.
[98] Klaus Schlaich and Stefan Korioth, *Das Bundesverfassungsgericht: Stellung, Verfahren, Entscheidungen* (Beck 11th edition 2018) 13, they also speak of '*Ausstrahlungswirkung der Grundrechte*'.
[99] de Visser (n 20) 377-384; Stone Sweet (n 92) 115; Komarek (n 25) 442; Dani (n 56) 800; see also Frank I. Michelman, 'The Interplay of Constitutional and Ordinary Jurisdiction' in Tom Ginsburg and Rosalind Dixon (eds) *Comparative Constitutional Law* (Edward Elgar 2011) 278-297.
[100] de Visser (n 20) 383; and reference Tania Groppi, 'Italy: The Italian Constitutional Court: Towards a 'Multilevel System' of Constitutional Review' in Andrew Harding and Peter Layland (eds) *Constitutional Courts: A Comparative Study* (Wildy, Simmonds and Hill 2009) 131.
[101] de Visser (n 20) 383; Comella (n 96) 112- 118; Victor Ferreres Comella, 'The European model of constitutional review of legislation: Toward decentralization?' (2004) 2 *International Journal of Constitutional Law* 470-474, Groppi (n 100) 146.
[102] de Visser (n 20) 383-384; and Groppi (n 100) 135, 146.
[103] Pollicino (n 14) 510.
[104] Dani (n 56) 798-799.
[105] Claes (n 3) 453, Piqani (n 88) 135; Herve Bribosia, 'Report on Belgium' in Anne-Marie Slaughter, Alec Stone Sweet and Joseph H. H. Weiler (eds) *The European Court and National Courts: Doctrine and Jurisprudence* (Hart 1998) 21; Marta Cartabia, 'The Italian Constitutional Court and the Relationship Between the Italian Legal System and the European Union' Anne-Marie Slaughter, Alec Stone Sweet and Joseph H. H. Weiler (eds) *The European Court and National Courts: Doctrine and Jurisprudence* (Hart 1998) 138.

have the power to disapply or invalidate national legislation in conflict with EU law.[106] Therefore, it is rather questionable to which extent the empowerment of national ordinary courts has actually disempowered constitutional courts.[107] Nevertheless, this empowerment has remained an unused potential since constitutional courts have persistently refused to embrace and directly apply the *Simmnethal* mandate for different reasons.[108] Even though constitutional courts have been rather meticulous in securing that national courts abide by their *Simmenthal* mandate, they have never accepted this mandate as applicable for them.[109] Nevertheless, either acceptance or refusal of the *Simmenthal* mandate could not change constitutional courts' position and status concerning constitutional review as they continue to have the exclusive power and monopoly over invalidation of unconstitutional national legislation. Still the national courts must refer the issue in cases in which they doubt that a national legislation is incompatible with the constitution. However, it is true that national ordinary courts have used the *Simmenthal* mandate to circumvent constitutional courts since setting aside a national legislation is usually a faster option than staying the court proceedings and waiting for a constitutional court to decide, but also swifter than waiting for the CJEU to decide upon the preliminary reference.[110]

Based on these three lines of arguments, it could be convincingly argued that the effect of *Simmenthal II* has been rather overrated.[111] Neither a new form of constitutional review has been introduced nor the decentralizing impact has been directly related to constitutional review in order to significantly alter the status of constitutional courts. There is no doubt that *Simmenthal II* has led to the introduction of a parallel review of national legislation by ordinary courts, besides the one before constitutional courts; however this has not been something that has caused substantial changes to constitutional review.[112] Ordinary courts have not gained the status of 'miniature constitutional courts'.[113] Therefore, it should not come as a surprise that all constitutional courts eventually[114] accepted the *Simmenthal* mandate of national ordinary courts.[115] If it were really that obvious that constitutional courts' position would be jeopardized by this, they would have never accepted it that easily, as that would amount to interference with the centralized model of constitutional review as a fundamental constitutional structure. As a matter of fact, they have had very good reasons for accepting this decentralized

[106] Piqani (n 88) 135, referring the principles of effectiveness and equivalence as developed by the CJEU.
[107] Cf. Rodin (n 87) 315; and Bobek (n 89) 288ff.
[108] More specifically on this see Piqani (n 88) 136-138; Komarek (n 25) 422ff, he actually supports a more reserved attitude towards the acceptance of this European mandate by constitutional courts.
[109] Ironically, ICC in one of its decisions has declared a piece of legislation unconstitutional because of its incompatibility with EU law and thus accepted that EU law could serve as standard of reference as part of constitutional review. See ICC, Decision No. 102/2008 (*Regional Law of Sardinia*) of 13 February 2008. See Piqani (n 88) 137.
[110] Alec Stone Sweet, 'Constitutional Dialogues in the European Community' in Anne-Marie Slaughter, Alec Stone Sweet and Joseph H. H. Weiler (eds) *The European Court and the National Courts: Legal Change in its Social, Political, and Economic Context* (Hart 1998) 313-314; and Komarek (n 25) 428.
[111] Bobek (n 89) 296; Dani (n 56) 789.
[112] Barsotti et al (n 17) 207; de Visser (n 20) 420, she refers to this as coexistence; Dani (n 56) 788-789, he speaks of complementarity of EU compatibility review with constitutional review.
[113] Bobek (n 89) 294.
[114] ICC took some time before accepting the mandate, however it was the exception. On the long road of ICC's acceptance see for instance Barsotti et al (n 17) 205-217.
[115] Dani (n 56) 786; Claes and De Witte (n 9) 92-94; Bossuyt and Verrijdt (n 95) 388; and Pollicino (n 14) 505.

enforcement of EU law by national courts since this would reduce the pressure from the rather large workload which would in turn allow them to focus on truly fundamental constitutional issues. Thus the docket control and efficiency reasons play a significant role in this regard.[116] Additionally, this would also have potentially a positive effect on the safeguard of constitutionality and reduce the pressure from constitutional courts being accused of judicial activism.[117]

Lastly, the impact of *Simmenthal* should not be overestimated, because of the development of doctrines such as horizontal effect and the margin of appreciation the force of this mandate was tamed as setting aside of a national legislation became something that national courts are trying to use as a measure of last resort.[118] The national courts have tried to secure national legislation's compliance with EU law through its interpretation in conformity with the latter.[119] This very much resembles what national courts do in interpreting national statues in conformity with the constitution.

4 The displacement doctrine of the CJEU and constitutional courts

The rapid expansion of EU law's scope has deepened the dilemmas over the conditions under which the parallel types of review of national legislation could coexist. While *Simmenthal II* denied that it was mandatory for a national court to initiate a constitutional review before a constitutional court in order to determine incompatibility of a national legislation with EU law, it empowered national ordinary courts to set such a national legislation aside directly, thus circumventing constitutional review. Hence, the CJEU did not deny the possibility of having a sort of coexistence or parallelism between the two types of review. However, it did not dwell in *Simmenthal II* on the relationship between constitutional review and decentralized judicial enforcement of EU law. It was rather Simmenthal's progeny in which the CJEU was confronted with this rather complex issue that put at stake the role and status of constitutional courts. Accordingly, the debate on this issue intensified through time and led certain authors, such as Komarek, to speak of CJEU's developing 'doctrine of displacement' of constitutional courts.[120] The CJEU has in a series of decisions touched upon different aspects that influence the status of constitutional courts.

There are three types of questions which this case law has raised. First, limits were placed on the binding effect of constitutional court decisions in cases involving EU law. Second, the temporal effect of constitutional courts decisions was limited in cases in which the ordinary courts are willing to invoke their *Simmenthal* mandate. Third, the issue of sequence and priority between constitutional and EU law review was also the subject of CJEU's case law. Each of these three aspects of the relationship between constitutional courts and the CJEU will be

[116] Francesco P. Ruggeri Laderchi, 'Report on Italy' Community' in Anne-Marie Slaughter, Alec Stone Sweet and Joseph H. H. Weiler (eds.) *The European Court and the National Courts: Legal Change in its Social, Political, and Economic Context* (Hart 1998) 165; and de Visser (n 20) 384.
[117] De Visser (n 20) 384.
[118] For more on these limitations of the *Simmenthal* mandate see Rodin (n 87) 299-308.
[119] Pollicino (n 14) 510.
[120] Komarek (n 51) 527; and Komarek (n 25) 428-444.

briefly elaborated below in order to assess the exact impact of CJEU's case law on constitutional courts.

First, regarding the effect of decisions of constitutional courts which collide with EU law and the mandate of national ordinary courts to send a preliminary reference to the CJEU, one decision is very telling. In *Križan*[121] the CJEU was faced with a situation in which the Supreme Court of Slovakia was basically denied the possibility to opt for sending a preliminary reference to the CJEU by the Constitutional Court of Slovakia. The latter, deciding upon a constitutional complaint, annulled the Supreme Court judgement and remitted the case back to it with a clear instruction to abide solely by its decision. Thus the question raised was whether the Supreme Court could in these circumstances be allowed under Art. 267 TFEU to send a preliminary reference to the CJEU. The CJEU ruled quite clearly that national ordinary courts are free to decide whether to send a preliminary reference and, in this regard, are to set aside the national legal provision providing binding effect of constitutional court decisions.[122] Additionally, in such circumstances the Supreme Court is even under obligation to send a preliminary reference according to Art. 267 (3) TFEU since the possibility of challenging its decisions through a constitutional complaint before a constitutional court cannot discard its classification as a court of last instance against whose decision there is no judicial remedy.[123] Accordingly, *Križan* has introduced limits to the binding effect of constitutional court decisions in cases in which they are contrary to EU law and has essentially authorized ordinary courts not to abide by them.

Undoubtedly, this is a direct impact on the position and authority of constitutional courts. However, this could be perceived as a necessary consequence of the decentralized review of EU law and its judicial enforcement in member states. As a matter of fact, setting aside of judicial decisions was also mentioned in *Simmenthal II*[124] and thus *Križan* further developed this doctrine to apply to constitutional court decisions.[125] As a result of this decision, constitutional courts are essentially being pushed to address the contentious issues themselves or leave the matter to be decided by the ordinary courts.[126] In this manner, it seems that a possible way of avoiding such disobedience to their decisions is for constitutional courts to send a preliminary reference to the CJEU themselves before remitting a case back to ordinary courts. Nevertheless, constitutional courts so far have not shown to be eager to enter a direct judicial dialogue with the CJEU.[127] On the other hand, the CJEU needs to avoid rigid

[121] CJEU, Case C-416/10, *Jozef Križan and Others v Slovenská inšpekcia životného prostredia* (*Križan*), Judgement of 15 January 2013, ECLI:EU:C:2013:8.
[122] CJEU *Križan* (n 121) para. 73.
[123] CJEU *Križan* (n 121) para. 72.
[124] CJEU *Simmenthal II* (n 78) para 22: "Accordingly any provision of a national legal system and any legislative, administrative or *judicial practice* which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent Community rules from having full force and effect are incompatible with those requirements which are the very essence of Community law" [emphasis added].
[125] This was already established in regard to higher judicial instances within the member states in CJEU, Case C-210/06 *CARTESIO Oktató és Szolgáltató bt* (Cartesio) Judgment of the Court (Grand Chamber) of 16 December 2008, ECLI:EU:C:2008:723 and CJEU, Case C-173/09 *Georgi Ivanov Elchinov v Natsionalna zdravnoosiguritelna kasa* (Elchinov) Judgment of 5 October 2010, ECLI:EU:C:2010:581.
[126] de Visser (n 20) 426.
[127] For more on this see chapter 5 section 4.1.

generalizations and take a more nuanced approach in order to embrace certain exceptional situations that might justify an opposite stance than that taken in *Križan* that in turn better serves the effective application of EU law. Namely, there might be cases in which a constitutional court quashes, by invoking EU law and CJEU case law, an order of a national ordinary court for a preliminary reference due to a manifest abuse of this mandate. It could happen that a national ordinary court simply wants to prolong the ongoing court proceedings by addressing the issue to the CJEU. This might turn out to be against the right to a fair trial or the right to a lawful judge in cases in which a constitutional court determines this by arguing in light of the *acte clair* or *acte éclaire* doctrines.[128] Bearing in mind that neither constitutional courts nor the CJEU have been confronted with such an issue, it remains to be seen how this aspect of the relationship between the courts will further develop.

Second, in two cases involving the FCC and PCT, *Winner Wetten*[129] and *Filipiak*,[130] the CJEU was deciding on whether admonitory decisions of these two constitutional courts respectively involving unconstitutionality of national legislation are in breach with the *Simmenthal* mandate of national ordinary courts. More precisely, the CJEU in these two cases ruled that, if a national legislation that was declared to be unconstitutional but remains to be in force for a 'transitional' period specified in a decision of a constitutional court, is at the same time perceived to be incompatible with EU law by national ordinary courts, then the latter are at liberty to set aside the incompatible national legislation.[131] In this way, there is an empowerment of ordinary courts to disregard an admonitory constitutional court decision for the sake of preserving the unity and effectiveness of EU law. As Komarek puts it, this represents a disturbance of the temporal balance within the national legal order.[132]

However, the CJEU in *Winner Wetten* and *Filipiak* does not take into serious consideration the underlying reasons and justification provided by constitutional courts for delivering such decisions.[133] Namely, constitutional courts through admonitory decisions usually provide safeguards for values such as legal certainty and fundamental rights by preventing the occurrence of more severe consequences resulting from a decision of unconstitutionality that

[128] For more on this see chapter 5 section 4.4.

[129] CJEU, Case C-409/06 *Winner Wetten GmbH v Bürgermeisterin der Stadt Bergheim* (*Winner Wetten*), Judgement of 8 September 2010, ECLI:EU:C:2010:503.

[130] CJEU, Case C-314/08 *Krzysztof Filipiak v Dyrektor Izby Skarbowej w Poznaniu* (*Filipiak*), Judgement of 19 November 2009, ECLI:EU:C:2009:719.

[131] CJEU *Winner Wetten* (n 129) para. 60; CJEU *Filipiak* (n. 130) para. 84: interestingly it was even the government of Poland that in this case argued that actually under national law this is not at issue at all: the coexistence is secured since national ordinary courts are entitled to set aside incompatible national legislation.

[132] Komarek (n 25) 435.

[133] CJEU *Winner Wetten* (n 129) para 67. It should be noted that the CJEU reserved its right to address this issue in future even though in the specific case it declared that legal certainty cannot represent an overriding consideration capable of suspending the principle of primacy of EU law: "However, even assuming that considerations similar to those underlying that case-law, developed as regards acts of the Union, were capable of leading, by analogy and by way of exception, to a provisional suspension of the ousting effect which a directly-applicable rule of Union law has on national law that is contrary thereto, such a suspension, the conditions of which could be determined solely by the Court of Justice, must be excluded from the outset in this case, having regard to the lack of overriding considerations of legal certainty capable of justifying the suspension", para. 67. For more on this see de Visser (n 20) 425; and Komarek (n 25) 435-436.

would have an immediate instead of deferred effect.[134] Thus, the primacy and effectiveness of EU law need to be balanced against these values and rights before reaching a final decision. This is even more so if one takes into consideration that the ECtHR has already approved these types of constitutional court decisions to be in line with the ECHR when based on adequate reasons.[135] Whether the CJEU will recognize the special nature and character of constitutional courts and their decisions, and thus address and develop in future what it has implied in *Winner Wetten,* is not clear at this point, but it is something that should be promoted. Such considerations might be a connecting point of the coexisting parallel forms of review.

Third, finding itself in the middle of a national judicial struggle[136] brought to the EU level, the CJEU was confronted with the issue of determining the sequence and priority between constitutional and EU compatibility review. The case of *Melki and Abdeli*[137] was initiated by a reference from the French Court of Cassation which challenged the compatibility with EU law of the newly enacted priority question of constitutionality procedure[138] that provided the CC with significant power over concrete constitutional review. This procedure of concrete review in France, inspired by a similar one already in place in Belgium,[139] was introduced to remedy situations occurring from the duality of review within the national legal order that could lead to conflicts between the highest courts and the constitutional court.[140] Thus, bearing in mind the *erga omnes* effect of constitutional court decisions and concerns over legal certainty,[141] the concrete constitutional review by constitutional courts in these member states was given a priority over other forms of review. However, it did not exclude the parallel existence and functioning of any of the latter, including the review of compatibility with EU law or the possibility of parallel preliminary references.[142]

Against this background the CJEU in *Melki,* by referring also to the case law of the CC and the French Council of State,[143] decided that the coexistence of constitutional and compatibility review in light of EU law is foreseen under national law, and thus upheld the procedure for concrete constitutional review. However, its compatibility with EU law is conditioned by providing leeway to national ordinary courts in using the preliminary reference procedure at whatever stage of judicial proceedings and the possibility of setting aside a national legislation at the end of an interlocutory procedure of concrete review before the CC.[144]

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[134] For more on this de Visser (n 8) 318-320; and Kelsen (n 20) 63. For a more specific overview of this see Chapter 1 section 3.4.
[135] *P.B. and J.S. v. Austria*, Application no. 18984/02, ECtHR, 22 July 2010; *Walden v Liechtenstein*, Application no 33916/96, ECtHR, 16 March 2000. For more see de Visser (n 20) 425.
[136] Arthur Dyevre, 'The Melki Way: The Melki Case and Everything You Always Wanted to Know About French Judicial Politics (But Were Afraid to Ask)' in Monica Claes, Maartje de Visser, Patricia Popelier and Catherine Van de Heyning (eds) *Constitutional Conversations in Europe* (Intersentia 2012) 309-322.
[137] CJEU, Case C-188/10, *Aziz Melki and Sélim Abdeli*, Judgment of 22 June 2010, ECLI:EU:C:2010:363.
[138] Otto Pfersmann, 'Concrete Review as Indirect Constitutional Complaint in French Constitutional Law: A Comparative Perspective' (2010) 6 European Constitutional Law Review 236-248.
[139] Bossuyt and Verrijdt (n 95) 356.
[140] Bossuyt and Verrijdt (n 95) 366- 372.
[141] de Visser (n 20) 423.
[142] Komarek (n 25) 439; and Bossuyt and Verrijdt (n 95) 380-381,
[143] CJEU *Melki and Abdeli* (n 135) para. 48.
[144] CJEU *Melki and Abdeli* (n 135) para. 52-53.

> "On the other hand, Article 267 TFEU does not preclude such national legislation, in so far as the other national courts or tribunals remain free:
>
> – to refer to the Court of Justice for a preliminary ruling, at whatever stage of the proceedings they consider appropriate, even at the end of the interlocutory procedure for the review of constitutionality, any question which they consider necessary,
>
> – to adopt any measure necessary to ensure provisional judicial protection of the rights conferred under the European Union legal order, and
>
> – to disapply, at the end of such an interlocutory procedure, the national legislative provision at issue if they consider it to be contrary to EU law."[145]

As a result, in *Melki and Abdeli* the CJEU provided the conditions for the coexistence of the two types of review, thus entrenching the parallelism.[146] In this regard, it should be noted that the CJEU 'went the extra mile' to accommodate the position of the CC, something that was not the case later on, for instance in *Landtova*.[147] First, it moderated the requirement stemming from *Simmenthal II* under which national courts should immediately set aside national legislation conflicting EU law[148] by postponing this possibility till the end of the constitutional review, thus allowing a sequential existence of constitutional and compatibility review.[149] In this manner it recognized that there could be a priority of a constitutional review and this is not necessarily against EU law. Second, the CJEU in *Melki* basically confirmed the logic behind *Mecanarte*[150] which provided that there is no absolute priority of compatibility review with EU law and that an obligation to refer an issue to a constitutional court cannot prevent a national court either to send a preliminary reference to the CJEU or disapply an incompatible national legislation.[151] There is one exception, however, under which the decision and procedure on the validity of EU law, particularly directives, that according to *Foto-Frost*[152] needs to be taken by the CJEU, will need to have priority over constitutional review.[153] Lastly, both of these

[145] CJEU *Melki and Abdeli* (n 135) para. 57.
[146] Bossuyt and Verrijdt (n 95) 377. Such a stance was confirmed later in another case, CJEU, Case C-112/13, A v B and others, Judgment of 11 September 2014, ECLI:EU:C:2014:2195, in which the CJEU used the completely identical reasoning for providing bases for such a coexistence between the power of ACC and Simmenthal mandate. For more on this see Davide Paris, 'Constitutional Courts as Guardians of EU Fundamental Rights? Centralised Judicial Review of Legislation and the Charter of Fundamental Rights of the EU' (2015) 11 European Constitutional Law Review 389.
[147] CJEU, Case C-399/09 *Landtova,* 22 June 2011, ECLI:EU:C:2011:415; Komarek (n 25) 440, referring to CJEU, Case C-412/96, *Kainuun Liikenne Oy and Oy Pohjolan Liikenne Ab*, Judgment of 17 September 1998, ECLI:EU:C:1998:415, paras. 21-24, he argues "its [CJEU's] settled case law states that it is the interpretation of national law provided by the referring court it takes into account, not that submitted by a party or a government in its submissions."
[148] CJEU *Simmenthal II* (n 78) paras. 21 and 24. See also Torres Perez (n 49) 59; Bossuyt and Verrijdt (n 95) 371, 377; Paris (n 146) 404-405.
[149] CJEU *Melki and Abdeli* (n 135) para. 51-57. See also Torres Perez (n 49) 59; Bossuyt and Verrijdt (n 95) 376.
[150] CJEU, Case C-348/89, *Mecanarte - Metalúrgica da Lagoa Ld[a] kontra Chefe do Serviço da Conferência Final da Alfândega do Porto,* Judgment of 27 June 1991, ECLI:EU:C:1991:278.
[151] CJEU *Mecanarte* (n 146) para. 45; Komarek (n 25) 437-438.
[152] CJEU, Case C-314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* (Foto-Frost), Judgment of 22 October 1987 ECLI:EU:C:1987:452.
[153] CJEU *Mecanarte* (n 146) para. 56.

concessions to the priority of constitutional review are balanced with a possibility of national ordinary courts to adopt necessary measures protecting rights under EU law during an interlocutory procedure of constitutional review.

The CJEU's approach in accommodating constitutional review in *Melki* has not come out of the blue, and it was previously met not only by the interpretation provided by the CC but also by some of the other constitutional courts of member states where there is no such rule stipulating the priority of concrete constitutional review. For instance, the FCC[154] and the CCC[155] have clearly stated in their decisions that ordinary courts are free to choose between initiating either constitutional or compatibility review.[156] Whichever way ordinary courts choose to go, they will need to base their decision on solid reasons as these might be subject to constitutional complaints at a later stage.[157] In this manner, constitutional courts have retained a residual control over the judicial practice of ordinary courts but more importantly they have played a constructive role in securing that the European mandate of ordinary courts is being respected.[158]

Taking into consideration the position of the CJEU in *Melki* as presented above, the dilemma of whether this decision has generally weakened constitutional courts in Europe does not pose a great challenge to be resolved.[159] Reading *Melki* in line with *Mecanarte*, it should be easy to conclude that, even though constitutional courts have been influenced through this case law it cannot be said that they have been weakened.[160] After all, the priority of constitutional review was declared to be compatible with the *Simmenthal* mandate of national ordinary courts even though subject to certain conditions. In this sense, both constitutional courts and the CJEU have managed to provide the necessary conditions for the constructive coexistence of the parallel forms of review. Just as it was argued in the other instances of CJEU's procedural influence on constitutional courts' position, it certainly cannot be denied that constitutional review in Europe has been subject of external influence through the development of EU law. Nevertheless, the magnitude of this influence should not be overestimated in order for it to fit rightly into the discourse of the demise of constitutional courts in Europe.

[154] FCC, 1 BvL 4/00, Judgment 11 July 2006, para. 52.
[155] CCC, Pl. US 12/08, Order of 12 December 2008, para. 34: "The Constitutional Court leaves it entirely to the discretion of the ordinary court whether it will concern itself with reviewing the conflict with European Community law of the statutory provision which it should apply or will focus on the review of its conflict with the constitutional order of the Czech Republic. If it primarily focuses on the review of the conflict with European Community law and asserts, as in this case, that the statutory provision under review is in conflict therewith, it must draw from its conviction the consequences in accord with the Court of Justice's jurisprudence, that is, that the contested provision not be applied".
[156] Komarek (n 25) 437.
[157] CCC (n 150) para 34. The same rule is part of the national legislation in Belgium, that is Article 26 paragraph 4 of the Constitutional Court Act. For more on this see Bossuyt and Verrijdt (n 95) 370.
[158] Komarek (n 25) 437.
[159] De Visser (n 20) 423; Bobek (n 89) 298-300.
[160] Komarek (n 25) 442.

5 Conclusion

This chapter aimed at providing a condensed overview of the relationship between constitutional courts and the CJEU. Such an outline is supposed to provide the bases upon which a more detailed analysis is to be further developed in the subsequent chapters. Therefore, many of the issues dealt here were merely touched upon, while a comprehensive discussion is left for the chapters dealing with them specifically. In this sense, the overview provided here has addressed two aspects of the relationship – the substantive and procedural – and what kind of influence they have on the positions and status of constitutional courts.

The story so far has shown that, despite the diversity among constitutional courts in the EU member states there is still certain level of convergence when it comes to their stance towards the CJEU and EU law. In this sense, there are four common threads among constitutional courts: their reactive approach to the developments of EU law through the case-law of the CJEU; acceptance of the special nature of EU law and of its fundamental doctrines and principles as designed by the CJEU, however with certain reservations on the primacy of EU law; application of EU law is provided for and based upon a national legal basis; and there has been evident reluctance so far in entering into direct judicial dialogue with the CJEU through sending preliminary references. These common features can be observed through three different approaches which focus on the procedural, jurisdictional or substantive aspects of the relationship between constitutional courts and the EU. The latter approach essentially delivers the complete picture involving different aspects and provides a classification of the substantive issues which have represented both a meeting point and a point of constitutional resistance. Accordingly, these issues are related to fundamental rights, division and exercise of competences in the EU and specific national constitutional provisions.

When it comes to the proclaimed procedural primacy of EU law and CJEU, there is an ongoing debate revolving around the external decentralizing tendencies on constitutional review which were initiated by the *Simmenthal II* decision. While an impact on constitutional courts' position resulting from the *Simmenthal* mandate of national ordinary courts cannot be denied, still, as it is argued here, the debate has frequently overestimated this impact. This is mainly because neither a new form of constitutional review has been introduced nor was the decentralizing impact directly related to constitutional review to alter significantly the status of constitutional courts. In this sense, the coexistence of constitutional and EU law compatibility review does not endanger constitutional courts, and this is one of the main reasons they have accepted and acknowledged the *Simmenthal* mandate within the national legal orders.

On the other hand, the most recent CJEU case-law directly related to the *Simmenthal II* decision has touched upon three different aspects of the coexistence of constitutional and EU compatibility review: conditioning of the binding effect of constitutional court decisions in cases involving EU law (*Križan*); limiting temporal effect of constitutional courts decisions (*Winner Wetten* and *Filipiak*); and determining the sequence and/or priority between constitutional and compatibility review (*Melki and Abdeli*). These three lines of CJEU cases have raised concerns and led to an ongoing debate over the arguable development of a displacement doctrine by the CJEU. While theoretically the displacement doctrine as a notion

might have drawn scholarly attention, the practice, as argued in this chapter, has not (at least not yet) proven this conception as the most accurate one. Although the CJEU still does not demonstrate a satisfactory level of understanding and accommodation of the role and status of constitutional courts in national constitutional orders, this court and the constitutional courts themselves have begun to lay foundations for a possible constructive coexistence of the two types of review. However, since this is a development of a more recent date and requires further analysis in the future, firm conclusions over the relationship in this regard cannot be drawn at this point. Be that as it may, one thing nevertheless could be argued convincingly. Constitutional courts have not been subject of a fatal blow to their role, status and authority by the CJEU's case-law and development of EU law, and there is ample room for their constructive role in the European integration. But how this role is to be perceived and defined will be the subject of all the subsequent chapters.

Chapter 3

Constitutional Pluralism and Constitutional Courts

1 Introduction

The ability to strike the right balance between different values and priorities and to reach the optimal solution is perhaps one of the toughest challenges that we so often face in our day-to-day lives. It is no different in the realm of law either and it is actually one of its fundamental goals. In this sense, one contentious issue with a very strong gravity among legal scholars in constant search for the right balance is indeed the relationship between legal orders, particularly between national legal orders and the one of the European Union. The questions of supremacy, application, enforcement, effect and status of legal norms stemming from external legal orders have become central topics in the legal discourse.

The debate on these types of relationships has been ongoing for quite long, however its relevance has increased dramatically over the last few decades with the growing influence of globalization on law.[1] This phenomenon has led to the expansion and at the same time the layering and fragmentation of international law,[2] the increasing enmeshment of domestic and international law and the creation of specialized branches and regimes and their emancipation from international law; the EU being the most vivid example.[3] Another very important influence of globalization is perceived through the incremental shift of the law-making power to non-state actors - agencies and organizations - as the state is losing its monopoly over law-making, and its sovereignty. Consequently the existence of multiple legal sites creates circumstances under which the overlaps and intersections between different legal orders are very frequent and complex[4]. On the other hand the decentralization of law-making authority

[1] For more on globalization in this context see Anne Peters, 'The Globalization of State Constitutions' in Janne E. Nijman and Andre Nollkaemper (eds) *New Perspectives on the Divide Between National and International Law*, (OUP 2007) 252-254.

[2] Michel Rosenfeld, 'Rethinking Constitution Ordering in an Era of Legal and Ideological Pluralism' (2008) 6 International Journal of Constitutional Law 415, 424, explains these two notions quite clearly arguing: "Two other potential points of convergence in a post-Westphalian world revolve around segmentation of the legal universe. In such a world, the legal realm seems to become, at once, increasingly layered and fragmented. It becomes layered, along vertical axis – German constitutional polity cannot be seamlessly integrated into the EU in the same way California is into the U.S. – and fragmented, through the proliferation of single, segmented, self-enclosed and self-referential legal regimes stacked alongside one another in a horizontal sequence." For more on this issue see Martii Koskenniemi and Paivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 Leiden Journal of International Law 533. Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law 2006, International Law Commission 58th session, 2006. Grainne de Burca and Oliver Gerstenberg, 'The Denationalization of Constitutional Law' (2006) 47 Harvard International Law Journal 245, 246.

[3] Diramuid Rossa Phelan, *Revolt or Revolution: The Constitutional Boundaries of European Community* (Round Hall Sweet and Maxwell 1997) 21-37.

[4] Neil Walker, 'Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders' (2008) 6 International Journal of Constitutional Law 373, 378.

away from the state[5] leaves larger space for diversity that frequently is seen as putting at risk the unity and coherence of legal orders thus jeopardizing rule of law, as some would claim.[6]

Under these circumstances the traditional doctrines and theories on the relationship between legal orders are not able to cope with the complexity of this new reality, often referred to as post-Westphalian.[7] This reality cannot be framed through purely formalistic and binary reasoning. In this sense monism and dualism as theories that elaborate on the status and effect of international legal norms in the national legal orders, even though dominant in the legal discourse in the past, nowadays are losing their relevance. They are not able even to provide a descriptive account of the reality today, while their normative justifications have become very weak. Consequently, there is a strong argument that accepting either monism or dualism as the dominant doctrine on the interface between national and international law does not have much relevance for the actual status of international or more specifically EU law within the respective legal system. The debates about the choice between monism and dualism are now less useful for understanding the actual attitudes towards 'external' legal sources. Monistic states have proven to be not particularly open towards international law, and dualistic states have not been as international law unfriendly as might have been anticipated.[8]

The traditional doctrines are too state-centered and locked in the Westphalian pattern of reasoning where the state owned the stage as far as law-making authority was concerned, something that seems to be long behind us.[9] Consequently, the debate has shifted to assertions that "[monism and dualism] are intellectual zombies of another time and should be laid to rest, or "deconstructed"".[10] Similar rigid dichotomies of either strictly local i.e. statal or global perspectives of viewing legal orders are equally not fitting the present circumstances of substantial overlaps and intertwinement.[11] This is the main reason why the paradigm has been shifting towards broader acceptance of legal pluralism as the both descriptive and normative account of the relationship between legal orders.

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[5] Janne E. Nijman and Andre Nollkaemper, 'Beyond the Divide' in: Janne E. Nijman and Andre Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (OUP 2007) 349-351; Lars Viellechner, 'Responsiver Rechtspluralismus: Zur Entwicklung eines transnationalen Kollisionsrechts' (2012) 51 Der Staat 559, 563-564; Thomas Vesting, 'Die Staatslehre und die Veränderung ihres Gegenstandes : Konsequenzen von Europäisierung und Internationalisierung' in *Veröffentlichungen der Vereinigungen der Deutschen Staatsrechtslehrer 63* (2004) 47-58.

[6] Andre Nollkaemper**, '**Rethinking the Supremacy of International Law' (2010) 65 Zeitschrift für öffentliches Recht 65, 74. For more specific overview of this argument in the context of the EU see next section.

[7] Among others that frequently refer to this notion are: Walker Beyond (n 4); and Rosenfeld (n 2).

[8] Hellen Keller and Alec Stone Sweet, 'Introduction to the Project' in Hellen Keller and Alec Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, (OUP 2013); Karen Alter, *Establishing the Supremacy of European Law: The Making of International Rule of Law in Europe* (OUP 2001) 29.

[9] Walker (n 4); Rene Barents, 'The Precedence of EU Law from the Perspective of Constitutional Pluralism' (2009) 5 European Constitutional Law Review 421, 435.

[10] Armin v. Bogdandy, 'Pluralims, Direct Effect, and the Ultimate Say' (2008) 6 International Journal of Constitutional Law 397, 400. For a similar view see also Dana Burchardt, *Die Rangfrage im Europäischer Normenverbund: Theoretische Grundlagen und dogmatische Grundzüge des Verhältnisses von Unionsrecht und nationalem Recht* (Mohr Siebeck 2015) 29-30.

[11] See for example Daniel Halberstam, 'Local, Global and Plural Constitutionalism: Europe meets the World' in Grainne de Burca and Joseph H. H. Weiler (eds), *The Worlds of European Constitutionalism* (CUP 2011).

But why would this be relevant to the context of constitutional courts in Europe and their role in European Integration? Why would any type of paradigm shift from monism or dualism towards pluralism be of any importance for constitutional courts? Can we really expect that national institutions, particularly in this case, constitutional courts, could be immune from such substantial changes?

The answer seems to be rather straightforward at least at first glance and there are two general reasons for that. First, constitutional courts have been at the center of the legal conundrum surrounding the relationship between different legal orders since their very establishment. They have directly shaped the doctrines on the legal status and application of 'external' law and legal sources in the domestic legal realm, regardless of how precise constitutional provisions have regulated this matter. In this sense, due to their role as guardians of the constitution they are also one of the crucial institutions in this paradigm shift. Thus it would be barely imaginable to discuss these institutions and their role at the present time without going into the changing state of the interface among different legal orders.

Second, the European Union has been one of the hallmarks and most vivid example of the above mentioned trend. Even though it started as an international organization established on the basis of international treaties it soon emancipated itself from international law and state consent and claimed its autonomy as a separate legal order.[12] The uniqueness of the EU law is that it directly enters the national legal orders. EU legal acts are envisioned not only to be applied to the member states but, more importantly, within the states, meaning directly by their citizens. This fact shaped the attitude of the CJEU towards the national legal orders and it undermined one of the fundamental notions of constitutionalism, that being the idea of constitutional supremacy. This drew in the constitutional courts which got heavily involved in determining the relationship between the national legal order and the EU legal order. This process, I would argue, could best be described and justified as one of constitutional pluralism. Therefore, the European legal order and the relations and circumstances surrounding it have been driving the paradigm shift.

These latest developments have been subject to skeptical remarks on both the demise of constitutional courts as well as the negative impact that constitutional pluralism might have on the rule of law in general. Basically the claim is that constitutional courts are forced to leave their comfort zone of constitutional supremacy and well entrenched exclusivity of constitutional adjudication and enter an unmarked territory to which they are not capable of adapting. This has made some authors argue that there is the demise or creeping loss of relevance, *Bedeutungsverlust,* of these constitutional bodies under the pressure of an ever larger internationalization and Europeanization.[13] Constitutional pluralism on the other hand, together with the conduct of constitutional courts, is often criticized for undermining the grand project

[12] The CJEU lead this process beginning with its landmark judgments CJEU, Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen,* Judgment 5 February 1963, ECLI:EU:C:1963:1; and CJEU, Case 6/64 *Flamino Costa v ENEL,* Judgment 15 July 1964, ECLI:EU:C:1964:66. See for one of many important examples Joseph H. H. Weiler, 'The Transformation of Europe', (1991) The Yale Law Journal 2403.

[13] Christoph Schönberger, 'Anmerkungen zu Karlsruhe' in Matthias Jestaedt, Oliver Lepsius, Christoph Möllers and Christoph Schönberger (eds), *Das entgrenzte Gericht: Eine kritische Bilanz nach sechszig Jahren Budensverfassungsgericht* (Suhrkamp 2011) 57.

of further European integration based on the principles and values of EU law primacy, coherence, unity and efficiency.[14]

This chapter sets the theoretical foundation for arguing against such conceptions and argues not only a change of relevance, *Bedeutungsänderung/Bedeutungswandel*, but also, as part of an organic process of adaptation, the establishment of new roles for constitutional courts which are best observed through the constitutional pluralism in the context of the European Union. Constitutional pluralism enables the accommodation of competing and equally legitimate claims for ultimate authority in the European Union. So the aim here is to show how constitutional pluralism can achieve two interrelated goals, to further European integration by basing it on firmer legal foundations as well as maintaining, if not increasing, the significance of constitutional courts in Europe through promotion and furthering of their constructive role in this process.

Following this line of thought and argumentation this chapter in section two puts constitutional pluralism in the specific context of the European Union first by arguing the demise of traditional doctrines on the relationship between legal orders and then by presenting the main tenets of constitutional pluralism in the EU. Taking into consideration that besides the main tenets of constitutional pluralism there are different interpretations and views on the very same relationship between national and EU legal order section three turns to the analyses of three of these views which are arguably the most influential among them. In section four, main strengths and weaknesses of constitutional pluralism in general, but also of the specific views of this theory, are presented and analyzed. Based on this rather extensive overview of the theory/theories the final section puts forward through the lenses of constitutional pluralism the three new roles that constitutional courts have developed in the context of the European integration, namely providing constitutional legitimacy to EU law, protection of national identity and safeguard of the veritical division and exercise of competences in the EU.

2 The European Union and constitutional pluralism

2.1 Deconstructing the traditional doctrines of monism and dualism in the EU

The traditional theories and binary reasoning were dominant and in some circles still dominate the reasoning on the relationship between the legal orders in the European Union. Namely, according to these views the choice that is essentially supposed to be made is between two competing conceptions and narratives, a state-sovereignist conception with national constitutional supremacy at its core and European monism based on the supremacy of EU law. Different actors are promoting different types of supremacy i.e. ultimate legal rule and propone to have the final say.

[14] Julio Baquero Cruz, 'The Legacy of the Maastricht-Urteil and the Pluralist Movement' (2008) 14 European Law Journal 389.

The state-sovereignist conception is deeply rooted in dualism[15] according to which the two legal orders, national and EU, where the latter in essence, according to this view, is just another form of international law,[16] are just like "two spheres that at best adjoin one another but never intersect".[17] Thus there is the view that the two legal orders are totally separated and not integrated. EU law can be applied in the respective national legal order only as result of the constitutional authorization provided in the so-called 'European clauses' of the respective constitutions.[18] This is the prerequisite for its validity in the national legal order.[19]

In this sense, the states and their constitutions as the expression of the will of the true barer of sovereignty, the citizens, are the ultimate source of legal authority and the EU legal order derives its own from them and state consent.[20] Therefore the EU legal order derives from national legal orders. The EC/EU was created by the direct consent of its member states as manifested by signing and ratifying the founding treaties. In this way the states are the "masters of the treaties".[21] The actual status and effect of EU legal norms in the national legal order does not make any difference, because this status and authority was given by the constitution, which in the end has the supremacy. Hence the defining feature of national constitutionalism is the constitutional supremacy, something that has been traditionally acknowledged as decisive to the internally integrated and coherent legal order.

Such a conception was not only present in the academic debates but it rather found its place also in the case law of some constitutional courts, even though I would argue that some of this evidence was clearly taken out of the broader context and spirit of the actual decisions. What is noticeable in these decisions, particularly the ones of the FCC, is that at the very same time they make the argument that supremacy of EU law could be accepted only if the EU becomes

[15] See for an opinion that this conception is monist Klemen Jaklic, *Constitutional Pluralism in the EU* (OUP 2014) 3. However, see Walker (n 4) 378, making the argument that both monism and dualism have the same underlying meta-principal. For more on this state-sovereignist or national constitutionalist conception see Burchardt (n 10) 101-139.

[16] Barents (n 9) 434.

[17] Quoting Tripel in Janne E. Nijman and Andre Nollkaemper (n 5) 7-8.

[18] Monica Claes, 'Constitutionalizing Europe at its Source: The "European Clauses" in the National Constitutions: Evolution and Typology' (2005) 24 Yearbook of European Law 81; Anneli Albi, ''Europe' Articles in the Constitutions of the Central and Eastern European Countries' (2005) 42 Common Market Law Review 399. On the bridging function of the Acts of Approval of the European Treaties in Germany see Andreas Voßkuhle, 'The Cooperation Between European Courts: The Verbund of European courts and its Legal Toolbox' in Allan Rosas, Eglis Levits and Yves Bot (eds), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-Law* (T.M.C. Asser 2012) 84.

[19] The very fact that even in monistic countries it is as a result of constitutional provision which declares that international law dully ratified or EU law is essentially integral part of the domestic legal order is fundamentally dualistic. Thus even in countries that are notable examples of the true monistic approach, such as the Netherlands, this view of national constitutional supremacy is not false. On this point see Mattias Kumm, 'Constitutional Democracy Encounters International Law: Terms of Engagement' in Sujit Choudrhy (ed), *The Migration of Constitutional Ideas* (CUP 2007) 258. See also Franz C. Mayer and Mattias Wendel, 'Multilevel Constitutionalism and Constitutional Pluralism' in Matej Avbelj and Jan Komarek, *Constitutional Pluralism in the European Union and Beyond* (Hart 2012) 134.

[20] Miguel Poiares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in Neil Walker, *Sovereignty in Transition* (Hart 2003) 505: "There can be no competing sovereignties between the states and the EU but just a pooling, sharing or limiting of state sovereignty".

[21] See for example FCC, Judgment of 12 October 1993 2 BvR 2134, 2159/92 *Maastricht* [1993] BVerfGE 89,155; [1994]. See also Jaklic (n 15) 3; Barents (n 9) 434.

a federal state eventually.[22] However the courts are expected to abide by the ultimate legal rule, the constitution, and from an internal perspective it is irrelevant what kind of consequences breaking the international or EU law might cause. As long as they act according to the national legal order, they are on the safe side.

The second view, the idea of European monism,[23] is a monistic account of the relationship between legal orders that envisages a single hierarchically integrated order where the top spot is reserved for EU law. In this manner it uses Kelsen's pyramid[24] and declares EU law the *Grundnorm* and in this sense subsumes and subordinates national legal orders including their constitutions which through this basically surrender their autonomy.[25] According to this conception EU law is not ordinary treaty law but due to its, basically self-proclaimed, supranational character with an established political link between the peoples of Europe, as opposed to a mere expression of state consent[26], its application within the member states does not require any "domestic constitution-based mediation or reprocessing".[27] Therefore, it deserves a special status, which should be seen as constitutional in its nature. This means that the ultimate legal authority lies at the European level and with EU law as an autonomous legal order[28] and it should have primacy as declared by the ECJ through its case law.[29] The grounds for such a claim are mainly related to the basic rationale of integration and the principle of rule of law.[30] Namely, if there is no strict respect for the ultimate legal authority of EU law then the whole project of European integration will be called into question. As uniform interpretation and application of EU law is at the core of the EU supremacy claim any derogation from this principle of supremacy by the member states would be contagious and it would at the same time jeopardize the very coherence, unity, uniformity as well as legal certainty of the EU legal order.

Both of these conceptions are burdened by several shortcomings that make them mutually exclusive and any conflict between the two irresolvable. Consequently they are descriptively and normatively inconclusive for the relationship between the two legal orders.[31] This conclusion can be best illustrated by briefly explaining the main lines of conflicting arguments,

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[22] For a similar argument see Jaklic (n 15) 1-2.

[23] For a detailed elaboration of this position see Mattias Kumm, 'Who is the Final Arbiter of Constitutionality in Europe? Three Conceptions of the Relationship between the German Federal Constitutional Court and The European Court of Justice' (1999) 36 Common Market Law Review 351, 353 -362; Burchardt (n 10) 67-100; and Jaklic (n 15) 3-4.

[24] On monism see Hans Kelsen, *General Theory of Law and State* (Transaction 2006) 363-380.

[25] See more in Barents (n 9) 432-433; and Jaklic (n 15) 3.

[26] Maduro (n 20) 504; and Jaklic (n 15) 3.

[27] Rosenfeld (n 2) 418.

[28] Barents defines the self-referential and autonomous status of a legal order as such: "In principle, a legal order is self-referential system, that is a system in which the creation, validity, application and interpretation of a legal rule depend exclusively on the order of which that rule constitutes a part", Barents (n 9) 426 and goes further and argues: "if the self-referential character of a legal order is complete that order is according to itself, autonomous: the law in that order is the only law of that order" Barents (n 9) 427.

[29] CJEU *Costa v. E.N.E.L.* (n 12); CJEU Case C-11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Judgment of 17 December 1970, ECLI:EU:C:1970:114.

[30] Julio Baquero Cruz, 'Legal Pluralism and Institutional Disobedience in the European Union' in Matej Avbelj and Jan Komarek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012) 252-254.

[31] See Mattias Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty' (2005) 11 European Law Journal 262, 274.

that are presented without going into their analysis, related to the lack of democratic legitimacy of the supremacy claim for EU law, its (non)autonomous character and dependence on state consent.

According to the state-sovereignist conception the EU legal order cannot claim to be autonomous legal order emancipated from both international law and state consent as the founding Treaties and their revisions are, according to the treaty provisions as well[32], still directly dependent on state consent for their enactment and entry into force. This preserves the position of the member states as masters of the treaties. In this sense the European legal order derives from the national legal order based on national constitutional supremacy and the opposite can never be the case because of which the supremacy of EU law is denied. This argument is further supported by the democratic legitimacy argument[33] which points out that due to the lack of a European demos and barely existing links with the citizens of the member states, the EU suffers from a chronic democratic deficit that makes any claim for EU law supremacy unviable.

The counterargument of European monists is that while direct consent from member states is required for any treaty change,[34] there are an increasing number of issues that are regulated through a legislative procedure based on the qualified majority vote and through an increasing role of the European Parliament. This makes such situations possible in which certain member states that voted against specific legislation are still obliged to abide by it. Additionally, EU law is applied directly in the member states without the need of further constitutional authorization thus while state consent might be important for primary EU law this is not really the case for secondary EU law. This argument is further strengthened by the fact that even if member states are masters of the treaties, they have not abolished or derogated the longstanding principle of primacy as defined by the ECJ.[35] They had several opportunities to do so however this sort of change was never truly on the agenda. Moreover, if supremacy would be left to the national legal order then under those circumstances overall unity of EU law would be fundamentally impossible as its content and scope would be totally dependent on the constitutions of the member states.[36]

Summarizing the main arguments made by the traditional conceptions one can conclude that there are common tenets that totally reveal their fallacies and that make both of these extreme positions not well adjusted to the current reality. Neither of the two competing conceptions can completely and accurately describe the existing relationship between the legal orders which also includes the court practices, particularly among national constitutional courts. Being well

[32] See Article 48 Consolidated Version of the Treaty on the European Union [2008] OJ C115/13.
[33] Kumm, Jurisprudence (n 31) 274ff, he refers to this argument as 'We the People'.
[34] See also on the right to withdrawal and the duration of EU obligations afterwards Daniel Halberstam, 'Systems Pluralism and Institutional Pluralism in Constitutional Law: National, Supranational and Global Governance' in Matej Avbelj and Jan Komarek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012) 98.
[35] The state-sovereigntists would claim that the primacy principle is not clear at all and that for the purposes of their own legal order it is enough that the constitutional courts have voiced their concern. Vesting on the other hand argues that member states have become "Herren" (Master) and "Knechte" (Servant) of the treaties at the same time, see Vesting (n 5) 54.
[36] Barents (n 9) 430 and for a specific objection to constitutional pluralism in this regard Baquero Cruz (n 14)

entrenched in the hierarchical conception they are unable to present an overarching argument that will be able to create an order between the competing orders sought for by both conceptions.[37] In a situation where both claims over the ultimate legal authority seem to be equally valid and there is no objective criteria to break the tie there is no authoritative resolution in case of conflict between the two.[38] In this sense each hierarchical conception denies the existence of two autonomous legal orders. It is simply theoretically not possible to have a supremacy claim under which by default one order is subordinate to the other and to still maintain that both of the legal orders are autonomous, which is the reality at present. In order for the EU law to have its unquestioned supremacy the EU would need to transform into a federal state of some sort, something that is not foreseeable even in the more distance future. On the other hand the EU law and integration could not really proceed along this path if a traditional statist conception of constitutional supremacy is inflexibly maintained.[39] Therefore, any rigid hierarchical conception is essentially inadequate and alternative conceptions need to be accepted. Constitutional pluralism represents the most viable alternative and is at the center of the paradigm shift in Europe.[40]

2.2 The EU and constitutional pluralism

Oddly enough one could argue that legal scholars were more entrenched into these forms of traditional reasoning then the respective constitutional courts of the member states. Even though exceptional by their occurrence, mainly due to the scope of EC law at the time, still constitutional courts, in particular, of Italy (ICC) and Germany (FCC) through their case-law, manifested a departure from a rigid dualistic stance and shifted towards pluralism best perceived through the *Solange* doctrine of equivalent protection of fundamental rights of the FCC and the *controlimiti* doctrine of the ICC.[41] This academic inertia was finally disturbed by another landmark decision of the FCC in the decision reviewing the Maastricht Treaty. In this

[37] Walker (n 4) 373ff, speaks of an absence of an overarching meta-principle such as state sovereignty once was leading to disorder of orders.
[38] Barents (n 9) 435.
[39] Nick Barber, *The Constitutional State* (OUP 2011) 166, he speaks of the problem of assertion of finality by national and European jurisdictions. See also Mayer and Wendel (n 19) 136 and Barents (n 9) 428.
[40] See Kumm Jurisprudence (n 31) 282ff. Commenting on the spread of constitutional pluralism Weiler comments: "Constitutional pluralism is today the only party membership card which will guarantee a seat at the high tables of the public law professorate…I have begun to wonder: Is there anyone out there who is not a constitutional pluralist?…what begins as heterodoxy becomes prevailing orthodoxy, in the case of constitutional pluralism suddenly emerges as hopelessly politically correct" Joseph H. H. Weiler, 'Prologue: Global and Pluralist Constitutionalism – some doubts' in Grainne de Burca and Joseph H. H. Weiler (eds), *The Worlds of European Constitutionalism* (CUP 2011) 8.
[41] FCC Judgment of 29 May 1974 BvL 52/71 Solange I [1974] BVerfGE 31, 145; FCC Judgment of 12 October 1993 2 BvR 2134, 2159/92 Maastricht [1993] BVerfGE 89,155; [1994], ICC Judgement of 27 December 1973 *Frontini v Ministero delle Finanze*, in Andrew Oppenheimer, *The Relationship Between European Community Law and National Law* Vol 1 (CUP 1994) 640; and ICC Judgement of 8 June 1984 *Spa Granital v Amministrazione delle Finanze dello Stato* in Andrew Oppenheimer, *The Relationship Between European Community Law and National Law* Vol 1 (CUP 1994) 651. The Solange doctrine has served as an inspiration and pattern in recent cases of the ECtHR in Case 45036/98 judgment of 30 June 2005, Bosphorus v Ireland [2006] and the CJEU in Case T-315/01 Kadi v Council and Commission [2005] ECR II-3649. For a slightly different position on the latter case see Halbstream (n 11) who claims that the court did not employ this doctrine even though it should have just as the AG Maduro has done in his Opinion in this case.

way this constitutional court basically initiated the still enduring debate on constitutional pluralism.[42]

It was one article of Neil MacCormick[43] in which he basically defended the reasoning of the FCC in *Maastricht* and argued for the theoretical soundness of this reasoning that stirred the water and awoke scholars on both sides of the debate. MacCormick recognized the existence of constitutional pluralism even though he did not call it by that name.

Constitutional pluralism is based on two basic assumptions.[44] First, constitutionalism as a normative theory of power is not firmly tied to the state and it can exist outside of the state. Thus it assumes that constitutionalism can be present in other polities. Second, the constitutional discourse in the EU is much more advanced than any such form of discourse at the international level thus it assumes that there is a European constitutionalism with at least a 'thin' constitution, in a merely functional sense.[45] On the other hand, the particular level of homogeneity and initial and subsequent material convergence among EU member states under circumstances of the obvious lack of convergence on formal grounds make a very strong case for constitutional pluralism in the EU.[46] Even though we see many examples of pluralism in the international legal realm and an academic debate develops fast arguing for one or another

[42] Matej Avbelj and Jan Komarek (eds), 'Four Vision of Constitutional Pluralism', EUI Working Paper Law 2008/21, 11, 23. Such a stance has been followed by many constitutional courts in Europe particularly in the Central and Eastern European States. Very telling quote in this regard is from the Polish Constitutional Tribunal's decision on the Accession Treaty: "The concept and model of European law created a new situation, wherein, within each Member State, autonomous legal orders co-exist and are simultaneously operative. Their interaction may not be completely described by the traditional concepts of monism and dualism regarding the relationship between domestic law and international law. The existence of relative autonomy of both, national and Community, legal orders in no way signifies an absence of interaction between them. Furthermore, it does not exclude the possibility of a collision between regulations of Community law and the Constitution", PCC Judgment of 11 May 2005, K 18/04, *Poland's Membership in the European Union (The Accession Treaty)* para 12, Available at: http://trybunal.gov.pl/fileadmin/content/omowienia/K_18_04_GB.pdf last visited 07.10.2018.

[43] Neil MacCormick, 'The Maastricht-Urteil: Sovereignty Now' (1995) 1 European Law Journal 259.

[44] See below in 0 for a more detailed account of these two assumptions in the context of criticism against constitutional pluralism. Loughlin presents three assumptions, or as he terms the same as tenets of constitutional pluralism: the foundation of political authority lies in a constitution; that in the context of the EU political authority is constituted autonomously at the supranational as well as the national level and cannot be conceived in hierarchical terms; and that therefore the issue of ultimate authority either is to be left open(radical pluralism) or is re-integrated in a universal order of constitutional principles (pluralism under international law). Martin Loughlin, 'Constitutional pluralism: An oxymoron?' (2014) 3 Global Constitutionalism 9, 22.

[45] See more on this below in section 4.1.1.

[46] Rosenfeld (n 2) 422-424: "[W]hat is required, ultimately, to preserve cohesiveness and unity in a pluralist polity, therefore, is some combination of formal and material points of convergence. The formal would reflect an acceptance of the function of the prevailing constitutional and legal order as a means to settle issues over which no material agreement among the plurality of competing views within the polity seems possible. The material points of convergence, on the other hand, result from a normative commonality or overlap that spreads across a vast majority of competing normative outlooks within the polity." 422. See also Halberstam (n 34) 101, he emphasizes the mutual embedded openness and a sense of common cause – shared purpose in Europe, and Nollkaemper (n 6) 74-75; Neil Walker, 'Reconciling MacCormick: Constitutional Pluralism and the Unity of Practical Reason' (2011) 24 Ratio Juris 369, 377-378 but compare to Neil Walker, 'Constitutionalism and Pluralism in Global Context' in Matej Avbelj and Jan Komarek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012).

form of legal pluralism still, the European Union as the birthplace of constitutional pluralism remains the best suited site for this theory.[47]

Departing from the traditional theories constitutional pluralism represents a paradigm shift in providing a descriptive and normative account of the relationship between national and European legal order. It overcomes the inevitable deadlock of blindly following either of the equally valid and legitimate legal i.e. constitutional authority claims in Europe by accommodating them through a horizontal relationship between legal orders better known as heterarchy. The competing constitutional authority claims stem from autonomous and separated but interacting and overlapping legal orders that should leave the question of ultimate legal rule open because there are no objective criteria to determine a single all-purpose authoritative legal answer.[48] This enables the legal orders to co-exist as autonomous without being exclusive at the same time.[49] In order for this openness not to end up in chaos or anarchy[50] constitutional pluralism argues that institutional actors, the respective highest courts above all, need to recognize this new reality by developing an attitude of mutual respect and engagement, accommodation and interaction and dialogue in order to foster unity and coherence in the European legal realm.[51] Unity according to constitutional pluralism can be achieved through heterarchy.[52] In case of irresolvable conflict the ultimate way to solve the issue will be through political means while legal theory cannot provide a single solution.[53]

Based on the abovementioned, one can distinguish several fundamental tenets of constitutional pluralism. Those are: existences of multiple autonomous, separate and interacting legal orders, the horizontal positioning of the legal orders and mutual respect and accommodation among those orders. These orders are positioned in a heterarchy and imply the need for an attitude of mutual respect and engagement and accommodation within the legal orders. It is both the descriptive and normative account of constitutional pluralism that is revealed by these fundamental tenets.

2.2.1 Plurality of legal orders

Constitutional pluralism does not drastically depart from the very foundations of the two competing conceptions however it does provide for a different perspective that adapts them to the new reality existing in Europe.[54] It is true that its starting point is actually dualistic in the

[47] This is why legal pluralism might be suited for the global level, however for Europe constitutional pluralism is more suitable due to the existing constitutional claim on the EU side. For the differences between legal and constitutional pluralism see below in section 4.1.1. For very similar argument see Weiler (n 40) 12.
[48] MacCormick (n 43) 265-266.
[49] Neil Walker, 'Idea of Constitutional Pluralism' (2002) 65 The Modern Law Review 317, 346.
[50] Walker (n 4) 390, explaining the strong form of pluralism writes: "Under this perspective, the new state of nature is no longer an anarchy of formally identical states but an anarchy of highly differentiated units and nodes of legal authority".
[51] See particularly the contrapunctual principles Maduro (n 20).
[52] Avbelj and Komarek, Four Visions (n 42) 13.
[53] MacCormick, Maastricht (n 43) 265-266 and Kumm, Jurisprudence (n 31) 293. For more on the distinction between political and legal resolutions to such conflicts see Matthias Klatt, *Die Praktische Konkordanz von Kompetenzen* (Mohr Siebeck 2014) 134-154.
[54] Halberstam (n 11) 175.

sense that it assumes existence of separate legal orders however there are crucial differences.[55] While the core dualist idea is that essentially there are two legal orders, international and national, that at best adjoin each other, pluralism envisages the existence of multiple diverse orders that are in constant interaction and overlap.[56] Unlike dualism that puts emphasis on strict separation of orders on the basis of addressees and subject matter, pluralism's emphasis is on the intersection, and especially on the notion that EU law cannot be distinguished from national law on the same basis. After all, it is not required to transform EU law in order to be applicable in the national legal order, it has direct effect.[57] On the other hand, the intersection and overlaps between the orders do not contradict the claim that these multiple legal orders are autonomous. In this sense, for constitutional pluralism "any given constitution does not set up a normative *universum* anymore but is, rather, an element in a normative *pluriversum*".[58] This point brings us to the second fundamental tenet of constitutional pluralism, heterarchy.

2.2.2 Heterarchy

Constitutional pluralism reconciles some of the foundational features of state constitutionalism with the post-Westphalian order. It adapts and accommodates both national and EU internal perspectives on the common European legal order to the context of pluralism by placing the separate legal orders in a heterarchy.[59]

Heterarchy is a systemic relationship that includes both horizontal and vertical relations and interactions. It is a "system of spontaneous, decentralized ordering among various actors within the system…based on constitutional considerations, that is, in the values of constitutionalism itself".[60]

While vertical relations are characteristic for the internal perspective of the orders, horizontal ones are specific to the external perspective of the relationship between orders in the EU context. Unlike in this context, the horizontal relationship, that is well known to exist between different national constitutional sites, does not involve substantial overlaps between the orders but rather mutual exclusion based on the territorial and jurisdictional criteria.[61] Like this the

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[55] Bogdandy (n 10) 400-401; Kumm, Final (n 23) 375 fn. 48 "It is not dualist, because it does not preclude the possibility that there are more than two levels of legal orders", Miguel Poiares Maduro, 'Three Claims of Constitutional Pluralism' in Matej Avbelj and Jan Komarek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012) 82; and Mayer and Wendel (n 19) 137.

[56] MacCormick (n 43) 262: "[O]ne legal system when it applies norms from another legal system, treats them not as simple matters of 'fact', but as norms of law valid within the system. The relationship of EC law to the legal system of Member states is a case in point." On this lack of strict duality between the lega orders see also Herbert Bethge, in Theodor Maunz, Bruno Schmidt-Bleibtreu, Franz Klein, Herbert Bethge et al., *Bundesverfassungsgerichtsgesetz: Kommentar Band 1* (54th edition C.H. Beck 2018) 148.

[57] Mayer and Wendel (n 19) 137.

[58] Bogadandy (n 10) 401.

[59] Avbelj and Komarek (n 42) 12, 15, Vesting uses the term of "Netzwerk" (Network) to describe the same notion, Vesting (n 5) 64. Jaklic places a large emphasis on the "heterarchy minimized" being the common feature, the thinnest pluralist principle, being characteristic for theories within constitutional pluralism. Jaklic (n 15) 21-22, 170-171.

[60] Daniel Halberstam, 'Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States' in Jeffrey L. Dunoff and Joel P. Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP 2009) 337.

[61] Avbelj and Komarek (n 42) 8; and Mayer and Wendel (n 19) 134.

heterarchy embraces both hierarchy as specific for each legal order in its internal organization through a single rule of recognition and pluralism in the existence, and the interaction of different legal orders. The ultimate source of validity in each of the orders does not need to change. The constitutional court's point of reference will remain the domestic order and its constitution and EU law is the equivalent for the CJEU. EU law will continue to be validated and given authority in the member states on the basis of their respective legal order. However, constitutional pluralism requires adjustments of these views in order to accommodate the claims of the orders.

Lastly, heterarchy does not exclude all types of preeminence within the interaction of orders. What it rules out is an all-purpose superiority of one system over another.[62] Therefore heterarchy is not incompatible with hierarchy, on the contrary.[63] As a matter of fact, constitutionalism can also be achieved in the framework of heterarchy.[64] Weiler's criticism of constitutional pluralism in that it is juxtaposing essential elements of constitutional orders, namely hierarchy and pluralism, and solely focusing on the latter is losing its force in this sense.[65]

The most important consequence of this horizontal perspective on the relationship between orders is that due to law's inability to provide for the objective criteria in deciding between multiple claims of ultimate legal authority the question of ultimate rule and say is left open. This might give rise to conflict situations among norms stemming from the multiple legal orders but it should not be conceived that every potential conflict will lead to chaos and disorder. However, the conflicts that from a legal perspective remain incommensurable could be resolved by political means. After all, in this sense of affiliation with politics, law is a circular category.[66]

2.2.3 Mutual respect and accommodation

In order to avoid any potential risk of the inherent openness of heterarcy turning into a disorder the third essential element is complementing it by foreseeing certain patterns of approach towards diversity and multiplicity from both national and EU actors, especially courts.[67] Bearing in mind that the relationship of legal orders in the EU is very much built upon a mutual

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[62] Neil MacCormick, *Questioning sovereignty* (OUP 1999) 118, 120.

[63] See for example Alec Stone Sweet, 'The Structure of Constitutional Pluralism: Review of Nico Krisch, Beyond Constitutionalism: The Pluralist Structure of Post-National Law' (2013) International Journal of Constitutional Law 491, 493; for a very insightful discussion of the relationships of different legal orders and their respective legal norms and how they incorporate and reconcile both heterarchical and hierarchical relations in the "ordnungsübergreifenden Normenrelationen" of her "Europäischer Normenverbund" see Burchardt (n 15) 196-198, 331-334. See more on this below in section 3.3.

[64] Halberstam (n 60) 328.

[65] Weiler (n 40) 15.

[66] See more on this in Jan Komarek, 'Institutional Dimension of Constitutional Pluralism' Pluralism' in Matej Avbelj and Jan Komarek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012) 246-247.

[67] Maduro (n 55) 82, he explains that: "…dualism does not impose an obligation of mutual accommodation on both legal orders. They co-exist and prevalence of one or the other is a simple function of jurisdictional power. Constitutional pluralism, on the other hand, requires mutual recognition but also communication and accommodation".

embedded openness of orders[68] then it is expected that the relationship between the orders and their institutions should be based on mutual respect, recognition and accommodation of diversity and authority claims.[69] Thus constitutional pluralism tries to define the rules of engagement[70] between the courts and it basically "should tell constitutional courts under which conditions they should defer to the EU jurisdiction and instead when they could feel authorized to try to create new rules of the game".[71] Hence when deciding their cases at hand both national and EU courts should be careful to consider the broader circumstances as well as the effect and consequences of their decisions. When interpreting respective legal norms each court should have due regard to the claims and authority of the other legal orders, even in cases when they are seriously contested. If the shared vision is to establish a common European legal order[72] then it would be advisable for them to interact more with other legal orders and courts either through formal or informal paths of judicial dialogue generating legal and judicial cross-fertilization.[73]

In this manner doctrines such as consistent interpretation, equivalent protection of fundamental rights, respect for national i.e. constitutional identities, and arguably application primacy of EU law (*Anwendungsvorrang*), margin of appreciation and so on, are developed and employed by the courts on a regular basis, thereby proving the reality of pluralism and its constructive force.[74] They all serve the purpose of accommodation of diversity, a conditional deference, without necessarily eliminating but rather recognizing and fostering it.

Therefore one should not fall into the trap of identifying constitutional pluralism with a constitutional conflict in the EU, a sort of conflict extinguisher.[75] Constitutional pluralism provides the framework under which it will be possible to avoid or manage inevitable conflicts and not to perceive them as breaking points of the common European legal order but rather accepting them as an essential feature.[76]

3 The numerous perspectives of constitutional pluralism

The above described tenets of constitutional pluralism might leave a wrong impression that it is one single coherent theory that explains the new relationship between legal orders. However,

[68] Halberstam (n 34) 97-98; and Halberstam (n 11) 175.
[69] Halberstam (n 11) 161.
[70] See more on this in Maduro (n 20) 524ff.
[71] Avbelj and Komarek (n 21).
[72] Halberstam (n 34) 99-100.
[73] For more on these concepts see Anne Marie Slaughter, 'A Global Community of Courts' (2003) 44 Harvard International Law Journal 191. See also Miguel Poiares Maduro, 'Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism' States' in Jeffrey L. Dunoff and Joel P. Trachtman (eds) *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP 2009) 358.
[74] See for example Bogdandy (n 10) or on the matter of human rights and importance of margin of appreciation see also Ferdinand Kirchhof, 'Kooperation zwischen nationalen und europäischen Gerichten' (2014) 49 Europarecht 267, 275.
[75] Maduro (n 20) 532ff, he basically argues that constitutional pluralism is not only about exceptional situations of conflict but rather it should guide the ordinary state of affairs.
[76] Kumm (n 31) 269, Kumm argues that constitutional pluralism "Aims to ensure that remaining constitutional conflicts are procedurally transformed into moments of constructive deliberative engagement".

this is not the case. Constitutional pluralism encompasses divergent views and perspectives under its banner. These perspectives do share the tenets altogether, however they differentiate themselves on their level of pluralism and whether they are trying to tame this pluralism characterized by high probability of irresolvable conflicts with a more moderate forms of pluralism. Thus among the different theories, dependent on how much pluralism is tamed and framed, we can distinguish between radical and moderate versions of pluralism.[77] The former accepts the existence of incommensurable constitutional claims and perceives the potential conflicts not as destructive or immensely jeopardizing the rule of law, as law cannot find an objective tie-breaking criteria. However, despite recognizing the existence of two separated legal sites radical pluralists claim that the relations between the two are not constitutional.[78] The latter however tries to frame these potential conflicts either by providing meta-principles for judicial conduct and interpretation to avoid the conflicts or focus on common values as to how to legitimize them.[79] Jan Komarek and Matej Avbelj have distinguished six currents of pluralism in Europe. Those are socio-teleological constitutionalism, the epistemic meta-constitutionalism, the best fit universal constitutionalism (i.e. cosmopolitan constitutionalism), harmonious discursive constitutionalism, multilevel constitutionalism and pragmatic constitutionalism.[80] However, even such an exhaustive classification made from experts is contested. The most notable example is regarding the first one among the six.

Joseph Weiler has opposed any identification of his views with constitutional pluralism as he is essentially criticizing this theory. His theory on constitutional tolerance putting forward the notion of the voluntary acceptance and obedience to EU law by member states[81] does not fit well into the main features of constitutional pluralism.[82] It does reject the notion of heterarchy as not compatible with constitutionalism and insists on the value of hierarchy along with pluralism.[83]

Developing from a thought provoking and challenging intellectual exercise constitutional pluralism is slowly taking over the legal discourse on the relationship between legal orders.[84]

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[77] Neil MacCormick (n 62) 97-122 points to radical pluralism as opposed to the pluralism under international law, Walker (n 4) 390 makes a distinction between strong and moderate pluralism, Nico Krisch, 'The Case of Pluralism in Postnational Law' in Grainne de Burca and Joseph H. H. Weiler (eds), *The Worlds of European Constitutionalism* (CUP 2011) 219ff, he differentiates between systemic and institutional/interpretative pluralism.

[78] Neil Walker, 'Constitutionalism and Pluralism in Global Context' in Matej Avbelj and Jan Komarek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012), 24. For a more detailed argumentation see Krisch (n 77).

[79] See below section 3.2 on Maduro and section 3.3 on Kumm.

[80] Matej Avbelj and Jan Komarek, 'Introduction' in Matej Avbelj and Jan Komarek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012), 5-6. This classification is based on a previous one in Matej Avbelj, 'Questioning EU Constitutionalism' (2008) 9 German Law Journal 1, 11ff.

[81] Joseph H.H. Weiler, 'In Defence of the Status Quo: Europe's Constitutional Sonderweg' in Joseph H.H. Weiler and Marlene Wind (eds), *European Constitutionalism beyond the State* (CUP 2003) 21. Weiler is promoting a federal constitutional discipline which, however is not rooted in a statist-type constitution. However, there are authors that define this theory as constitutional pluralism, see Jaklic (n 15) 69-101.

[82] As a matter of fact, MacCormick as early as 1993 criticized a very similar Austin inspired view of habit-of-obedience sovereignty as being monocular view, which is not sustainable due to the complexity of the existing legal picture. See more on this Neil MacCormick, 'Beyond the Sovereign State' (1993) 56 The Modern Law Review 1, 5.

[83] Weiler (n 40) 13, 15-18.

[84] Weiler (n 40) 8.

Increasing number of authors are arguing for constitutional pluralism even in different contexts[85] or are using it to make other claims that sometimes are even quite remote form the theory itself.[86] While there are views that go beyond the judicial and systemic aspects in the EU context by broadening the concept to include other institutions the focus here is put on the European context and particularly on the judicial aspects of constitutional pluralism. This is mainly result of the view held here that the whole issue of competing constitutional claims in the EU unravels before the courts and they are the most visible sites of the frictions so far and presumably in the future.[87] Therefore the arguments presented here are mainly limited to the features that will help shed some light on the actual role of constitutional courts in the EU under this theoretical framework.

3.1 Laying the bait – Neil MacCormick

Neil MacCormick paved the way for constitutional pluralism with his groundbreaking article on the FCC's decision in the *Maastricht* case.[88] Through this article he sat the stage for his brainchild to occupy a prominent role in the legal discourse but then he became afraid of his own creation and partially abandoned it.

Inspired by certain sociological and anthropological accounts of legal pluralism as well as the theory of federalism[89] MacCormick analyzed the existing reality at the time in the EC context in the wake of the Maastricht decisions. He argued that under the circumstances of existences of autonomous legal orders, of the EU and its member states respectively, that are "distinct but interacting"[90] pluralistic analysis offers more convincing explanation than any other alternative view.[91] MacCormick averred that:

> Where there is a plurality of institutional normative orders, each with a functioning constitution (at least in the sense of a body of higher-order norms establishing and conditioning relevant governmental powers) it is possible that each acknowledge the legitimacy of every other within its own sphere, while none asserts or acknowledges constitutional superiority over another. In this case, 'constitutional pluralism' prevails.[92]

The reason why pluralism prevails is because it recognizes that in a case of a conflict between these legal orders there will be no possibility for a legal solution not due to the "absence of

[85] Arpita Gupta, 'Constitutional Pluralism, a Recent Trend in International Constitutional Law: European Origins and the Third World Concerns' (2011) 36 South African Yearbook of International Law 37. For views on constitutional pluralism in a broader, global context see for example Halberstam (n 11); and Walker (n 78).
[86] Tatjana Evas and Ulrike Liebert, 'Enhancing Democratic Legitimacy through Constitutional Pluralism? The Czech, German and Latvian Lisbon Rulings in Dialogue' in Tatjana Evas and Richard Bellamy (eds), *Multileyered Representation in the European Union: Parliaments, Courts and the Public Sphere* (Nomos 2012).
[87] Walker (n 78) 21, 24.
[88] MacCormick (n 43). For a longer overview of MacCormick's work related to constitutional pluralism see Jaklic (n 15) 13-30.
[89] Nico Kirsch, 'Who is Afraid of Radical Pluralism? Legal Order and Political Stability in the Postnational Space' (2011) 24 Ratio Juris 386, 387-388.
[90] MacCormick (n 43) 264.
[91] See on the two monocular views, national and European, in MacCormick (n 82) 388; and MacCormick (n 43) 264.
[92] MacCormick (n 62) 104.

legal answer to given problems, but of superfluity of legal answers."[93] In this manner "the supremacy of Community law is not to be confused with any kind of all-purpose subordination of Member State law to Community law".[94] Thus under this conception these problems are legally left open and transferred to the political arena. This is basically the definition of the radical pluralism as MacCormick himself labeled it.[95]

However MacCormick's fear of unstable and conflict prone radical pluralism[96] even though initially not an insurmountable obstacle and an acceptable caveat, soon turned out to be a major reason for his shift towards a kind of monism. He initially believed that radical pluralism will drive both national and EU courts to avoid, to a very large extent, irresolvable conflicts, thus he did not completely abandon it. However later he noticed that the openness of radical pluralism creates situations where the probability of irresolvable conflicts is too high. They lurk and inevitably lead to embarrassment and fragmentation of EC law. Without going deeper into the argument of the virtues of openness and the lack of finality that are brought by radical pluralism he makes these arguments very clear:

> "The problem is not logically embarrassing, because strictly the answers are from the point of view of different systems. But it is practically embarrassing to the extent that the same human beings or corporations are said to have and not have a certain right. How shall they act? To which system are they to give their fidelity in action?[97]
>
> Simply to remit state courts an unreviewable power to determine the range of domestic constitutional absolutes that set limits upon the domestic applicability of Community law would seem likely to invite a slow fragmentation of Community law. Yet it is a clear mutual international obligation of states not to fragment the Community by unilateral decisions either judicial or legislative (or, for that matter executive)."[98]

In such cases according to MacCormick the newly coined 'pluralism under international law'[99] provides a much more stable framework within which the conflicts between the legal orders are resolved through legal means.[100] Avoiding any political enmeshment in cases of conflict between the legal orders of member states and the EU, that remain in a pluralist relationship,

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[93] MacCormick (n 43) 265.
[94] MacCormick (n 43) 264. For further development of this in Amaryllis Verhoeven, *European Union in Search of a Democratic and Constitutional Theory* (Kluwer Law International 2002) 299.
[95] See more in Neil MacCormick, 'Risking Constitutional Collision in Europe?' (1998) 18 Oxford Journal Legal Studies 517; MacCormick (n 62); and Klatt (n 53) 14.
[96] MacCormick (n 62) 110, his fear of a situation of either revolt or revolution played a big role in his later shift as his article where he announces the shift is titled as "Risking Constitutional Collision in Europe". See MacCormick (n 95) 523, "The risk [of constitutional collision] is certainly there, but it need not materialize, and need not be incurable or disastrous if it does" alluding that under radical pluralism they could be incurable and disastrous, see also MacCormick (n 62) 121 for a milder formulation using only 'incurable'. For more on this see Neil Walker, 'Reconciling MacCormick: Constitutional Pluralism and the Unity of Practical Reason' (2011) 24 Ratio Juris 369, 377; and Krisch (n 89).
[97] MacCormick (n 43) 265.
[98] MacCormick (n 62) 120; and MacCormick (n 95) 531.
[99] MacCormick (n 95) 527.
[100] In the context of MacCormick's work on the pluralism under international law see Walker (n 96) 379-383 where he presents three options presenting possibilities on reaching unity of law under the conditions of plurality: covering-law universalism, reiterative universalism and "thinner bond universalism".

they are put under the umbrella of international law and its principle of *pacta sunt servanda.*[101] Even though directly contradicting his earlier critic of such a monistic view of subsuming both legal orders under international law[102] he ended embracing a concept that echoes Kelsen's monism much more than any pluralism.[103]

His elaboration stops at this point leaving a lot of unanswered questions on the modality of this type of conflict resolution.[104] It is very questionable if even with pluralism under international law the 'practically embarrassing' situation will be resolved. Namely, it is highly doubtful that the individual in such a case will be able to reach an eventual international arbitration. Thus the lack of absolute legal certainty and predictability that is characteristic even in national, hierarchically integrated, orders are present in such a case as well. More importantly under the present circumstances the crucial relationship between EU law and international law totally departs from his vision on this specific relationship. The *Kadi*[105] case has made things much more complicated and significantly more pluralistic than MacCormick has obviously anticipated.[106]

On the other hand, the fear of political solutions[107] does not seem to be justified if one takes the circular nature of law into consideration. Political solutions are most frequently made through legal means.[108] Basically every legally irresolvable conflict that occurs before the highest courts initiates a political process that ends in a law-making procedure creating bases for possible legal solutions to similar future conflicts. And as Komarek puts it "constitutional pluralism, with its contestation of finality only reinforces this circular exchange among various actors".[109]

While MacCormick made a drastic move from radical pluralism to pluralism under international law, this sort of taming of pluralism has been more subtly done by other authors who did not depart as much from the very foundations of constitutional pluralism.[110] Without any wish to underrate the importance and significance of other contributions to the issue,[111] the more moderate versions of constitutional pluralism that place judicial aspects at their center

[101] MacCormick (n 62) 108; and MacCormick (n 95) 520.
[102] MacCormick (n 43) 263-264.
[103] MacCormick (n 62) 121; see also Loughlin (n 44) 18. However, for a view that pluralism under international public law is still a pluralistic theory see Jaklic (n 15) 171.
[104] Walker (n 96) 379 and Maduro (n 20) 533.
[105] CJEU, Case C-402/05 and C-415/05, *P. Kadi and Al Barakaat International Fundation v. Council and Commission*, Judgment of 3 September 2008, ECLI:EU:C:2008:461.
[106] See for example, Stone Sweet (n 63) 498-499; Denis Preshova, "Legal Pluralism: New Paradigm in the Relationship Between the Legal Orders" in Marko Novakovic (ed), *Basic Principles of International Law: Monism & Dualism*, (PF, IUP, IMPP 2013).
[107] MacCormick (n 95) 531; and on these objections to political solutions by pluralist accounts of the relationship between legal orders see Burchardt (n 10) 31-32.
[108] Komarek (n 66).
[109] Komarek (n 66) 246. For a similar argument see Maduro (n 20) 537. The logical remark to such an argument would be: why haven't the Member States solved the supremacy conundrum then. Perhaps because the supremacy conundrum is in the phase of constitutional pluralism which is accepted and recognized by the relevant actors.
[110] Walker (n 78) 24.
[111] In this regard one must point out to the very influential and rich work of scholars such as Daniel Halberstam, Inglof Pernice, Franz C. Mayer to which I frequently refer.

such as Maduro's concept of contrapunctual law and Kumm's best fit principle renamed into cosmopolite constitutionalism are further covered.

3.2 Maduro – contrapunctal law – harmonious dissonance

Maduro's very influential theory of contrapunctual law represents an answer to the fears over radical pluralism raised by MacCormick.[112] His theory basically further develops some of MacCormick's recommendations on mutual regard of national and European courts on the authority claims and norms of other legal orders and envisages certain principles[113] and guidelines of judicial behavior when the interface of legal orders is concerned. The main goal is to achieve a European legal order that maintains its unity and coherence amid a context of pluralism. In order for such a relationship of legal orders not to jeopardize the unity and coherence of the European legal order it is necessary for the courts to be committed, voluntarily, to the fulfillment of four requirements that are named as harmonic principles of contrapunctual law. Those are: pluralism, the consistency and vertical and horizontal coherence, universalisability and institutional choice.[114]

In his view pluralism incorporates both the respect of identity between the legal orders, each being able to preserve its own viewpoint[115] on the same set of norms and the highest level of participation in order to achieve a judicial discourse in the European legal order that would be based on equal participation of different actors.[116] Therefore pluralism is characterized by heterarchy based on mutual recognition and accommodation and it should be accepted by the courts.

Under consistency and vertical and horizontal coherence as the second contrapunctual principle Maduro points to the underlying shared commitment among courts of building a common coherent legal order.[117] Generally taken, in deciding their cases courts in both legal orders should try to fit their rulings with the previous decisions of other courts. Namely, on both vertical, meaning the relationship between the national and EU courts, and on a horizontal level, between national courts of different member states themselves, there should be a judicial discourse based on coherence by respecting and furthering uniform application and interpretation of EU law by adjusting national law and EU law to these requirements. The perception of national courts that they are actually a contributing factor, along with all other courts, in a broader European legal order should serve as catalyst in strengthening the judicial discourse and thus accomplishing consistency and coherence.

The third principle of universalisability is closely linked to the second principle and it complements it. According to this principle, "any national decisions on EU law should be argued in 'universal' terms" and it "must be grounded in a doctrine that could be applied by

[112] He claims this to be a viable form of pluralism, see Avbelj and Komarek (n 42) 17. Jaklic classifies Maduro's theory as "interpretative and participative pluralism", more in Jaklic (n 15) 102-125.
[113] In Avbelj and Komarek (n 42) 11, he refers to them as meta-principles.
[114] See Maduro (n 20) 525ff.
[115] See Maduro (n 73) 373.
[116] Maduro (n 20) 526-527; and Avbelj and Komarek (n 42) 12.
[117] Maduro (n 20) 527-529 and Avbelj and Komarek (n 42) 17. On the horizontal coherence and coordination see also Viellechner (n 2) 573.

any other national court in similar situation".[118] This should prevent any deviations, from national courts in particular, from the path of coherence and unity in the European legal order.

Institutional choice is the last among the contrapunctal law principles. As pluralism is reality in the European legal order and the questions of the final say and ultimate rule are left unanswered *a priori* every court should be aware that it cannot be the only or final venue for conflict resolutions and that there are variety of institutional alternatives.[119] Therefore, due to such institutional choices there is a "need to do adequate comparative institutional analysis to guide courts and other actors in making those choices".[120] This principal entails, as he explains in his later work:

> "an element of meta-interpretation: which institution [either other courts or political institutions] is in a better position to give meaning to the values inherent in the relevant legal rules and to arbitrate the competing legal or constitutional claims that they give rise to."[121]

There are two lines of criticism of Maduro's contrapunctual law principles. First, the principles serve the purpose of avoiding constitutional conflicts without really tackling the possibility of actual occurrence of conflicts.[122] In the exceptional case of an ultimate constitutional conflict the contrapunctual law principles have not been effective and the story ends at this point. It seems like contrapunctual law principles are devised to guide only the ordinary state of affairs.[123]

Second, his overarching concerns and goals are the attainment of unity and coherence of the European legal order and the principles should assist to achieve this in the context of pluralism. Subsequently, the principles can be claimed to limit and suppress pluralism and diversity more than fostering them. Somehow Maduro insists on the convergence in Europe under EU law, to a certain extent disregarding national specificities, which would eventually turn constitutional pluralism in sort of a temporary phenomenon. Once the appropriate level of convergence is accomplished pluralism will not be the reality anymore. In this way the theory of contrapunctual law has a monist tone and no wonder that certain authors have tried to argue for this link with monism.[124]

The very logic of contrapunctual principles such as consistency and coherence and universalisability lack adequate level of flexibility that is necessitated by pluralism. They do

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[118] Maduro (n 20) 530. Viellechner terms this principle as 'Responsivität' under his 'Responsiver Rechtspluralismus', Viellecnhner (n 2) 569ff.
[119] Maduro (n 20) 530. See also Massimo La Torre, 'Legal pluralism as an evolutionary achievement of Community law' (1999) 12 Ratio Juris 182.
[120] Maduro (n 20) 531; Maduro (n 73) 359-360; and Avbelj and Komarek (n 42) 12.
[121] Maduro (n 73) 372.
[122] Jan Komarek, 'European Constitutionalism and the European Arrest Warrant: In Search of the Limits of "Contrapunctual Principles"' (2007) 44 Common Law Market Review 9, 33.
[123] Maduro (n 20) 532, even though he claims the opposite in his critic to MacCormick, Weiler and Kumm, see Maduro (n 20) 533.
[124] Alexander H. E. Morawa, 'Kafka, Kelsen and Supremacy: How European Courts Could Interact with a View to Fostering Constitutionalism' in Kyriaki Topidi and Alexander H.E. Morawa, *Constitutional Evolution in Central and Eastern Europe: Expansion and Integration* (Ashgate 2011) 117-118.

not seem to be responsive enough to certain national specificities that in very exceptional cases can justify a limited divergence. Even though he accepts, in a very limited and implicit sense, that there are certain national specificities that could be used as "constitutional exit" he adds a very strong qualification. Such specific cases should "be of such importance as to affect the entire constitutional relationship between the European Union and the Member State".[125] Additionally, the principles dictate a view that perceives national courts in their 'European' role and somehow overlooking their primary locus of legal fidelity to the national legal order and its constitution.[126] It is exactly this weakness of his argumentation that he addresses in his later elaboration of these principles and the implications of pluralism on courts and their interpretation of law. As he points out his assumption became much more modest as he argued that "courts act to maximize the integrity of their legal order, but that does not mean that they should not be aware of the external impact of or on their decisions".[127] This awareness is present due to the internal requirements on the legal order for such openness or as result of the stronger emphasis on the substantive rather than formal integrity of their legal order.[128]

This type of moderation of the initial arguments and principles in his later work indicates a certain influence that he has had from the debate surrounding constitutional pluralism. Therefore, the interpretation that Maduro has been influenced by Kumm's theory should not come as surprise. As a matter of fact Kumm's theory of best fit now renamed cosmopolitan constitutionalism, not only is compatible with Maduro's view but also complementary at the same time as it provides tools to cope with exceptional cases in which constitutional conflicts actually happen.[129] Because of this type of connection between the two theories Kumm's view will be presented next in order to complete the big picture of how a very influential tenet of constitutional pluralism can provide a sound theoretical framework to analyze the role of constitutional courts in pluralist Europe.

3.3 From the best fit principle to cosmopolitan constitutionalism – Mattias Kumm

Mattias Kumm was one of the first authors, following MacCormick, to articulate his pluralist conception of the relationship between legal orders in Europe. He laid the groundwork for his pluralist theory in an article that focused on the issue of the final arbiter on constitutionality in Europe in the context of the FCC's decision on the Maastricht Treaty.[130] Building upon the same underlying idea and logic that can be traced throughout his work he started first with the common European constitutionalist approach that further developed into the jurisprudence of

[125] Maduro (n 20) 534, this sort of qualification resonates very much like the Mangold formula on ultra vires review of the FCC.
[126] Maduro (n 20) 534:" The integrity and coherence of the pluralist legal order will stem from the obligation of any national legal order to construct their 'independent' conception of EU law in a manner that is compatible with the other conception and with a coherent European legal order" He does not provide an answer though what happens in cases where this is not possible. See on the latter also Avbelj and Komarek (n 42) 16.
[127] Maduro (n 73) 373.
[128] Maduro (n 73) 374ff. He restates the same principles again even though in a moderate from and he adds the importance of the use of foreign legal sources and comparative law as an instrument to enhance judicial dialogue particularly in contexts of internal pluralism such as in the EU.
[129] For the same type of reading of the two theories see Komarek (n 122) 22-31.
[130] Kumm (n 23).

constitutional conflict i.e. constitutionalism beyond the state[131] only to end at this point with a broader approach exceeding the borders of the EU named as cosmopolitan constitutionalism.[132] In this sense it is rather vivid how Kumm's focus has been dominantly on the question of who is the final arbiter of constitutionality in Europe[133] and it is basically the search for the answer or better said providing arguments how not to pose the question of who has the final say that is at the core of his theory.[134]

Kumm understands the final authority and ultimate say, similarly to MacCormick, as a matter of all-purpose institutional and jurisdictional superiority of one legal order over the other.[135] Therefore, arguing for his pluralist vision Kumm claims that this issue should be left open and refuses to provide any answer saying that "*within a pluralist framework, it does not make sense to speak of a final arbiter of constitutionality in Europe*".[136] However he provides guidelines and principles for situations of conflict in which either national courts or the CJEU ought to have the 'provisional final say'. In this way he implies the compatibility of heterarchy with a limited, provisional, form of hierarchy between the legal orders.

> "Instead, common principles underlying both national and international law provide a coherent framework for addressing conflicting claims of authority in specific contexts. These principles will sometimes favor the application of international rules over national – even national constitutional – rules. At other times they will support the primacy of national rules."[137]

It is arguable though, on which legal authority this type hierarchy will be based on. Kumm is arguing that it is this framework of principles that guides the conduct and is the source to legitimate authority. Such a stance, on the other hand, has inspired criticism of this type of account of the relationship as being just another form of monism thus denying it any pluralist character.[138]

In designing guidelines for courts Kumm starts off from a basic idea, common to most constitutional pluralists, that there are overarching liberal democratic principles that are common to the member states and to the EU.[139] Thus Kumm argues that "[l]egal and political practice both on the level of the EU and on the level of member states are informed by the same

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[131] Labeled by some as principle of best fit see Komarek (n 122) 10ff; Avbelj (n 80) 15; and Avbelj and Komarek (n 80) 5-6 or as institutional pluralism, see Jaklic (n 15) 126.
[132] For more detailed analyses of Kumm's work see Jaklic (n 15) 126-158, he distinguishes two phases or periods in Kumm's work.
[133] Jaklic (n 15) 148 comparing Maduro and Kumm in this regard.
[134] Kumm (n 23) 384; Kumm (n 31) 384 and see also on this Theodor Schilling, 'The Jurisprudence of Constitutional Conflict: Some Supplementations to Mattias Kumm' (2006) 12 European Law Journal 173, 173.
[135] Jaklic (n 15) 135.
[136] Kumm (n 23) 384, emphasis of the author.
[137]Mattias Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State' in Jeffrey L. Dunoff and Joel P. Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP 2009) 274.
[138] See for example Alexander Somek, 'Monism: A Tale of the Undead' in Matej Avbelj and Jan Komarek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012) and Schilling (n 134) 192-193. For more on this see the next section.
[139] See Article 2 Consolidated Version of the Treaty on the European Union [2008] OJ C115/13.

basic normative principles".[140] Both the European Union and its member states declare to be founded on the principles of liberty, equality, democracy, and the rule of law. These principles are not to be seen just in their abstract form but also as applied in the practice by institutions at both levels, courts in particular.[141]

Such common value foundations create conditions that make constitutional conflicts highly unlikely. Nevertheless, although exceptional, constitutional conflicts in Europe are still possible and there should be legal principles and guidelines in place to navigate courts in such conflict situations and not simply leave it right away to the political actors to solve the issue. While Maduro's concern is more related to the ordinary state of affairs in the relationship of the two orders, Kumm is generally dealing with the exceptional situations of constitutional conflicts between the orders in cases where the principles of mutual engagement of the orders and courts are not able to prevent such an occurrence. In this sense he provides guidance for courts in such situations and by this creates a further "legal" step in tackling the issue of conflicts between orders. This does not mean however that he excludes all types of political solutions as some tend to claim.[142] As a matter of fact not only does he not exclude political solutions[143] as such but he also recognizes the limitations that the law faces in such situations arguing that "[l]egal interpretation is no substitute for institutional reform".[144]

Under such circumstances in which both legal orders and practices are based on common values Kumm argues for a shift from the search of the ultimate legal rule to the principle of best fit.[145] According to this principle:

> "The task of national courts is to construct an adequate relationship between the national and the European legal order on the basis of the best interpretation of the principles underlying them both. The right conflict rule or set of conflict rules for a national judge to adopt is the one that is best calculated to produce the best solution to realize the ideal underlying legal practice in the European Union and its Member States." [146]

Even though it might seem that the principle of best fit has an easy task to achieve, several other countervailing principles do pull in different directions of legitimizing either the national or European constitutional supremacy claims. Thus Kumm's theory is trying to reach an optimal balance to the relationship of legal orders not by conceiving it "*as clash of absolutes*"[147]

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[140] Kumm (n 31) 289, also on this line see on the voice, rights and expertise as the three values form a kind of grammar of legitimacy. Halberstam (n 34) 99ff.
[141] Kumm (n 31) 289.
[142] Komarek (n 122) 34.
[143] Kumm (n 23) 361; and also see Kumm's exchange with Krisch, Mattias Kumm, Cosmopolitan Constitutionalism: A Response to Krisch, 2009, p. 2-3, available at http://www.ejiltalk.org/cosmopolitan-constitutionalism-a-response-to-nico-krisch/ last visited 07.10.2018.
[144] Kumm (n 23) 386. This can be seen as another mutual point with Maduro's contrapunctual principles particularly the principle of institutional choice. See similar also in Komarek (n 122) 38.
[145] Kumm (n 31) 286-288; and Kumm (n 23) 375 where the same principle was named as the principle of constitutional fit. For a very similar and further developed argument in the theoretical framework of "Europäische Normenverbund" see Burchardt (n 10) 185-340.
[146] Kumm (n 31) 286.
[147] Kumm (n 31) 290 emphasized by Kumm.

but through pluralist logic of envisaging "*more differentiated and contextually sensitive conflict rules [that] ought to be adopted, that allow the relevant principles to be realized to the greatest extent, given countervailing concerns*".[148]

The first principle that is strongly pulling in the direction of EU law supremacy is the formal principle of legality[149] or also termed as the 'principle of expanding rule of law'.[150] Under this principle, strongly promoted by the CJEU, unless EU law is applied throughout the Union in an effective and uniform manner thus safeguarding regularity, predictability and certainty and achieving a coherent and integrated legal order, then EU law loses its basic logic of integration and its *raison d'etre*. This would inevitably happen if national courts could easily derogate from EU rules, so the argument goes.[151] As the reasons stated are rather convincing Kumm claims that there should be a general presumption that EU law should be the one to be applied and abided by in cases of constitutional conflict.[152]

But how would a national court accept European constitutional supremacy when this goes directly against loyalty to the national legal order and one of its defining features?[153] Kumm explains that national constitutional supremacy is not "a defining feature of national constitutional practice"[154] thus a shift to accepting supremacy of EU law would not amount to a constitutional revolution.[155] "*Acknowledging the supremacy of EU law would merely be another step along a path of legal integration that has guided the development of national practice for some time".*[156] EU law has entered the national legal realm to such an unprecedented extent that acceptance of EU law supremacy cannot and should not be seen as

[148] Kumm (n 31) 290 emphasized by Kumm. Similarly, Burchardt develops the notion of structural principles in determining the relationship between different legal orders and balancing their legal norms in Burchardt (n 10) 263-283.
[149] Kumm (n 31) 299.
[150] Kumm (n 31) 290 – 293; and Kumm (n 23) 375-376.
[151] See the two hypothetical scenarios, Panglos and Casandra in Kumm (n 31) 291-293; for a critical view see Christoph U. Schmid, 'The Neglected Conciliation Approach to the "Final Arbiter" conflict: A critical comment on Kumm, "Who is the Final Arbiter of Constitutionality in Europe?" (1999) 36 Common Market Law Review 509, 511.
[152] Kumm (n 31) 299; and Mattias Kumm and Victor Ferreres Comella,'The Primacy Clause of the Constitutional Treaty and the Future of Constitutional Conflict in the European Union' (2005) 3 International Journal of Constitutional Law 473, 474.
[153] Schilling argues that there are two main reasons, legal and non-contingent and practical and contingent, why courts are restricted and generally have no choice between different *Grundnorms,* see Schilling (n 134) 177-178.
[154] Kumm (n 31) 286. This is the crucial point of Schilling's criticism over Kumm's theory see Schilling (n 134) 177 ff, particularly 187-193. He argues against such a stance and claims that there is no actual need for any constitutionalism beyond the state and that Kelsen's Pure Theory provides the instruments that allows the existing framework of analytical jurisprudence articulated in a "agreement to disagree" approach, under which there is no agreement among highest courts in Europe on the final legal authority, to provide a sufficiently strong reasoning of the present situation. However, Kumm's position is rather weakened by his other principles and particularly when analyzed in the context of his other writings such as, Mattias Kumm,'Rethinking Constitutional Authority: On the Structure and Limits of Constitutional Pluralism' in Matej Avbelj and Jan Komarek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012).
[155] Komarek (n 122) 36, he labels it more as constitutional evolution because it is a whole process, Schilling (n 134) 188-189, he claims that Kumm's theory basically forces national courts to act revolutionary, however Schilling draws a very problematic parallel with the role of courts in the context of political revolutions and the one they have in the EU context which substantially weakens his argument. Ingolf Pernice, *Das Verhältnis europäischer zu nationalen Gerichten im europäischen Verfassungsverbund* (De Gruyter Recht 2005) 48.
[156] Kumm (n 31) 285.

a controversial move. After all it has been accepted by all national courts, in one way or another, that EU law has primacy over national legislation, statutes. Nevertheless, the general presumption of EU law supremacy is not unconditional and it is rebuttable.[157]

A national court dealing with EU law should be informed by and take into account both national constitutional law and EU constitutional law.[158] When national constitutional provisions are interpreted, the broader EU context in which the respective member state is part of should be taken into consideration by national courts. As a matter of fact most constitutions do envisage such recourse in their European clauses, Article 23 GG being one of the examples.[159]

> "National constitutions should be read in light of a strong interpretative principle according to which nothing in the national constitutional provision prevents the enforcement of EU law, unless national constitutional provisions address or compensate for structural deficiencies on the level of the EU."[160]

In this sense it is claimed that there are certain limits to the supremacy of EU law. In fact, there are very strong reasons in specific areas for a justified resistance by national courts in which national constitutional supremacy seems to be a better option in the advancement of common underlying values. Accordingly principles directly related to the liberal democratic governance[161] clearly manifested in three areas of national resistance are presented by Kumm that can rebut the general presumption. In this sense they are competing and, occasionally, conflicting principles to the principle of expansion of rule of law on supranational level. Therefore these principles gain or lose their strength depending on the structural deficiencies present on the EU level particularly related to the liberal democratic governance and democratic legitimacy.[162]

The first is a substantive principle tied to the protection of fundamental rights. The second principle is jurisdictional and has to do with subsidiarity and jurisdictional boundary in Europe i.e. *Kompetenz-Kompetenz*. The last one is procedural, the principle of democratic legitimacy and specific national constitutional provisions.[163] Thus the effective and uniform application and the coherence of EU law cannot be taken as an absolute principle but just as a very important one competing with the principles presented above that under the present circumstances of structural deficiencies on the EU level legitimize a restricted deviation from EU law in favor of national constitutional law in situation of exceptional constitutional

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[157] Kumm (n 31) 299, "*This does not mean that acknowledging the supremacy of EU law is what national courts should be doing either now or after the Constitutional Treaty has been ratified."* Kumm (n 31) 285

[158] Kumm (n 31) 286.

[159] One of Kumm's main cliams in his fisrt article is that the German Basic Law was not normatively appropriately interpreted by the FCC its Maastricht decisions, see Kumm (n 23).

[160] Kumm and Comella (n 150) 483.

[161] Kumm does put all these under his third principle of liberal-democratic governance in his first article, see Kumm (n 23) 376.

[162] Kumm argues that such structural deficiencies will remain to be part of the EU in Kumm (n 31) 301, "The foreseeable future of European Constitutionalism, then, is a future in which the constructive negotiations over constitutional conflicts will remain an integral part". For the latest account see Kumm (n 154) 65.

[163] Kumm added this third line of resistance to the first two in his later article Kumm and Comella (n 150); Kumm (n 31); and also Kumm (n 154) 55-59. I will come back to this issue in the chapter 5 devoted to the respect of national identities of Member States. On these principles see also Burchardt (n 10) 266-271.

conflicts. Over the long run occasional or exceptional deviations from EU law can bring a lot more coherence than it could be foreseen from a rigid stance of unconditional application of EU law.[164] Constitutional conflicts in this way could be "procedurally transformed into moment of constructive deliberative engagement".[165]

This pluralist logic is best framed in one of the last articulations of his theory named as Cosmopolitan constitutionalism stating that:

> "The refusal of a legal order to recognize itself as hierarchically integrated into a more comprehensive legal order is justified, if that more comprehensive order suffers from structural legitimacy deficits that the less comprehensive legal order does not suffer from. The concrete norms governing the management of the interface between legal orders are justified if they are designed to ensure that the legitimacy conditions for liberal-democratic governance are secured. In practice that means that there are functional considerations that generally establish a presumption in favor of applying the law of the more extensive legal order over the law of the more parochial one, unless there are countervailing concerns of sufficient weight that suggest otherwise."[166]

It is clear that there is a strong emphasis in Kumm's theory on the common liberal democratic values in Europe and the structural deficiencies, particularly seen through democratic legitimacy aspects, on the EU level in arguing for pluralism in the European legal space. It might be perceived that he is partly siding with the argumentation developed by the national constitutional courts, especially the FCC.[167] Hence it can be interpreted as to mean that once this democratic legitimacy is achieved at the EU level then the possibility of conflicts will disappear. If the disappearance of structural deficiencies at the EU level means that it will mark a transformation of the EU to a federal state, then it might be arguable that under such circumstances there will be a very clear supremacy clause resembling the ones of other federal states. Consequently, there will be no room for conflicts of this kind. In any case this does not seem to be a reasonable expectation, not even in the more distant future.[168]

This particular feature of Kumm's theory has drawn some criticism. Some authors claim, rightly so, that constitutional conflicts will not eventually disappear as result of establishing a firmer democratic legitimacy in Europe. On the contrary, by expansion of EU law in more and more sensitive areas of national legal orders the points and occasions for friction might increase. For example, the improvement of structural deficiencies in the EU will not erase the problem of *Kompetenz-Kompetenz*, it might even increase it.[169] The fundamental rights protection will not cease to be an issue by providing a legally binding status to the Charter of

[164] Kumm (n 31) 304.
[165] Kumm (n 31) 269.
[166] Kumm (n 154) 43, 65.
[167] See for example remarks made by Baquero Cruz (n 42) 17-18.
[168] Kumm (n 31) 301: "The foreseeable future of European Constitutionalism, then, is a future in which the constructive negotiation over constitutional conflicts will remain an integral part".
[169] Jaklic (n 15) 151 and 153-155 claiming that the issue of *Kompetenz-Kompetenz* cannot be framed in the manner Kumm has done because it is detached as a problem from the issue of structural deficiencies in the EU because of which different rationale should be provided.

Fundamental Rights and accession to the ECHR. In any case they should not be exaggerated and these are concerns that Kumm has already anticipated.

Namely, Kumm points out three characteristic features of constitutionalism beyond state. First of all, it is universally applicable. Then it is dynamic because it is adaptable to changing realities in both national and EU legal orders. But above all, this theory provides "only a *starting point and structuring device* that facilitates the task of elaborating doctrines by asking the right questions and deals with the right problems".[170] In this way, reliance on democratic legitimacy and structural deficiencies is just a starting point and the resolutions in the three areas of national resistance will be dynamic and diverging. Additionally, the openness that Kumm promotes by arguing to leave the question of ultimate authority in Europe open is also an essential feature of all pluralists. Envisaging direct and specific guidelines firmly binding courts' conduct and which would eventually lead them into a binary choice would amount to a monistic perception, something he has also received criticism for by some.

This overview of the three very influential versions of constitutional pluralism enables one to understand how the common tenets of constitutional pluralism are interpreted and used as well as notice the differences, or the nuances, that exist between them. It is the combination of the main characteristics of these versions of constitutional pluralism that pave the way to making the case for the new perception of the role and place of constitutional courts in the realm of European integration. However, what this overview has not revealed and has not really dealt with, but only touched upon, is the issue of the main shortcomings or "sins" of constitutional pluralism and the counterarguments it provides by defending the "virtues" of the theory in face of mounting criticism.

4 'Sins' and 'virtues' of constitutional pluralism

Challenging old paradigms and questioning well entrenched doctrines, just as constitutional pluralism does, is not the best way to remain outside the reach of severe criticism putting the 'sins' out in the open. Neither is one able, on the other hand, to argue for his view without such an exchange of arguments. As a matter of fact, this sort of exchange pointing out the 'sins', shortcomings, is the only way to try and make a stronger case for constitutional pluralism emphasizing its 'virtues'.

In this sense constitutional pluralism has stirred criticism from both the EU and national constitutional camps. In essence there are four main areas in which one can classify all the critical accounts taken on behalf of this theory.[171] The *first* combines two themes that are generally related to the coupling of constitutionalism and pluralism and the assumption of EU constitutionalism that constitutional pluralism has at its core. The *second* line of criticism is oriented towards denying the very pluralist nature of constitutional pluralism claiming that it is just another form of monism and not a doctrine of its own. In the *third*, critics argue that

[170] Kumm (n 31) 300.
[171] For a similar approach to the shortcomings of constitutional pluralism see Walker (n 78); and Jaklic (n 15) 190-225.

constitutional pluralism jeopardizes the rule of law by underrating the emphasis on legal certainty and stability and as such puts the whole European integration project into danger. The *fourth* area on which critics are focused is related to the claims that constitutional pluralism is a purely descriptive theory without a strong normative value. They claim that this theory does not provide solid arguments justifying and promoting a stand that all its features and tenets are something that should be strived for because of which they perceive it as a rather temporary phenomenon.

Among these four areas of criticism the first two are aimed at the constitutional pluralism specifically while the rest of the four are objections to pluralism in general, be it radical or constitutional.

By tackling these major lines of criticism constitutional pluralism is able to neutralize the seriousness of its shortcomings and shows with its virtues that it is a very viable if not the right alternative for the new circumstances in Europe.

4.1 How constitutional is constitutional pluralism?

The criticism against constitutional pluralism under the banner of 'true' constitutionalism has been two folded. On the one hand, there is a challenge stemming from a broader debate on EU constitutionalism and finality that goes at the heart of constitutional pluralism's basic assumptions. On the other, it has been argued that constitutionalism and pluralism are essentially mutually exclusive notions that simply cannot be combined together. Thus there can be either a pluralist or a constitutionalist approach towards the relationship between orders the claim goes.

4.1.1 Is there an EU Constitution and EU constitutionalism?

Constitutional pluralism bases its logic on assumptions that the EU already has a kind of a constitution and that there is an EU constitutionalism.[172] These assumptions go deep into the long enduring debates on the legal nature of the European Union and whether it can have a constitution properly so called. As they are part of these contentious debates the very assumptions of constitutional pluralism are often put under heavy scrutiny that has produced a backlash for the credibility of this theory among some authors. Without going into the massive amount of literature devoted to these issues the argumentation here will be confined only to the very essential points rejecting such criticism and proving the abovementioned assumptions right.

The criticism over these issues is mainly originating from authors strongly promoting certain traditional conceptions of the constitution.[173] Their arguments can be summarized into three

[172] Maduro (n 55).

[173] Dieter Grimm, 'Does Europe Need a Constitution?' (1995) 1 European Law Journal 283; Dieter Grimm, The Constitution in the Process of Denationalization in Joakim Nergelius (ed), *Constitutionalism: New Challenges, European Law from a Nordic Perspective* (Martinuss Nijhoff 2008) 71; for generally on conceptions of the constitution and constitutionalism Christoph Möllers, Pouvoir Constituant – Constitution- Constitutionalisation in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (Hart 2006) 183; Mattias Kumm, 'Beyond Golf Clubs and the Judicialization of Politics: Why Europe has a Constitution Properly So Called', (2006) 54 American Journal of Comparative Law 505; for more on the criticism of modern

general points. First, they are insisting on an exclusive statal definition of the notion of constitution. Their state-centeredness is following the Westphalian paradigm of either state or international organization reasoning and it is not conceiving seriously enough the process of denationalization of the constitution and its consequences.[174] Their argument against constitutional pluralism is that one cannot speak of an EU constitution as EU itself is not a state and a non-state entity cannot have a proper constitution. Consequently the only way the EU can get its constitution would be for member states to explicitly decide on this and surrender their sovereignty by becoming part of a federal state instead of federation of states.[175]

Second, the EU does not have the necessary democratic credentials, above all an actual constituent power located in a genuine European *demos*, which are crucial preconditions for an enactment and existence of a constitution.[176] The EU is therefore missing this direct democratic link of legitimation of its authority that as such cannot be claimed to be autonomous but heteronymous instead.

Third, the EU's founding documents are international treaties by their legal nature[177] and are solely dependent on state consent that makes the claim of legal authority of the EU derivative of state authority. The treaties cannot fulfill the standards required for them to transform into a constitution. Those standards, according to Grimm, consist of democratic origin, supremacy and comprehensiveness.[178] Consequently, the member states are and remain masters of the treaties.

The criticism boils down to the question: can you really have a constitutional pluralism in a case where one of the claims to legitimate authority is not constitutional? If the answer is negative this would mean that a setting in which the EU is denied a claim to constitutional authority creates a situation under which the EU law, founded on international treaties, is subordinated, from a constitutional aspect, to national constitutions. In this sense the relevance of the foundational assumptions of constitutional pluralism are totally undermined.

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constitutionalism for its dominantly state-centered feature see Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 65 The Modern Law Review 320-321; for the constitutional narratives in the EU see also Matej Avbelj, Can European Integration be Constitutional and Pluralist – Both at the Same Time? in Matej Avbelj and Jan Komarek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012) 386-395; and for a summary of the objections for the claim of treaties as constitutions see also Rossa Phelan (n 3) 144.

[174] Even though he admits this phenomenon he still cannot come to terms with a view that the EU can have a constitution see Dieter Grimm, 'The Constitution in the Process of Denationalization' in Joakim Nergelius (ed) *Constitutionalism: New Challenges, European Law from a Nordic Perspective* (Martinuss Nijhoff 2008) 71.

[175] See also on this Grimm (n 174) 91. However Vesting claims that "[g]ibt man die Staatszentrierung des Öffentliches Rechts heute, im Zeitalter der Gloabalisierung, auf und stellt auf raumindifferente, normative Strukturen um, ist das folglich kein Bruch mit der liberalen Tradition, sondern ihre konsequente Weiterentwicklung." Vesting (n 5) 65.

[176] Weiler claims that: 'If a constitution by anything other than a European constituent power, it will be a treaty masquerading as a constitution', Weiler (n 81) 7-8.

[177] Bruno de Witte, The European Union as an International Legal Experiment in Grainne de Burca and Joseph H. H. Weiler (eds), *The Worlds of European Constitutionalism* (CUP 2011).

[178] Grimm (n 174) 89.

Even though these claims have a sound theoretical base and logic still the fact that they cannot come to terms with the changing reality and explain the actual legal practice in Europe[179] in the last couple of decades deprives these arguments of substantial strength. The changing role and status of states in the global context as well as the process of denationalization of the constitution requires a slightly more flexible approach.[180] Just as the notion of the state is altering so is the notion and meaning of the constitution subject to modification.[181]

> "…European integration not only challenges national constitutions (the usual terms of the debate); it challenges constitutional law itself. It assumes a constitution, without a traditional political community defined and presupposed by that constitution; or it requires a new form of political community. European integration also challenges the legal monopoly of States and the hierarchical organisation of the law (in which constitutional law is conceived of as the "higher law")…"[182]

Even some of the premises that this traditional conception of the constitution is based upon such as the state-centeredness and deep rootedness in the *pouvoir constituant* do not have an undisputed historical proof.[183] There are cases of constitutional treaties that have been concluded between states in the past which then became constitutions or founding documents of a new polity. One can take as examples the Constitution of the German Empire for the former or the Act of the Union when the UK is concerned for the latter claim.[184] This shows also that the legal nature of the EU Treaties cannot represent a decisive argument in this debate. In this sense Kumm points out that:

> "It is a defining feature of constitutions that they, unlike other laws, can not derive the status they claim from the procedure that was used to enact them. Constitutions can claim legitimate authority only by virtue of what they succeed in doing."[185]

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[179] Beside all the recent constitutional court decisions it is very much noteworthy to see that the FCC early on has acknowledged the constitutional character of the EC founding treaties "Der EWG-Vertrag stellt gewissermaßen die Verfassung dieser Gemeinschaft dar" BVerfGE 22, 293 (296) quoted in Pernice (n 155) 12.

[180] For this see more in Walker (n 4) and Neil Walker, Reframing EU Constitutionalism in in Jeffrey L. Dunoff and Joel P. Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP 2009).

[181] Pernice (n 155) 12; Kumm (n 173); Mayer and Wendel (n 19).

[182] Miguel Poiares Maduro, *We the Court: The European Court of Justice and the European Economic Constitution* (Hart 1998) 165.

[183] Kumm refers to these arguments as statist fallacy and the issue of genealogy See Kumm (n 173) 518 and 522. On the other hand, Weiler argues that "In many instances, constitutional doctrine presupposes the existence of that which it creates: the demos which is called upon to accept the constitution is constituted, legally, by that very constitution, and often that act of acceptance is among the first steps toward a thicker social and political notion of constitutional demos", Weiler (n 81) 9; and Pernice (n 155) 16. See also Ulrich K. Preuss, "Constitutional Powermaking for the New Polity: Some Deliberations on the Relations Between Constituent Power and the Constitution" (1993) 14 Cardozo Law Review 639.

[184] See more on constitutional treaties Christoph Möllers, Pouvoir Constituant - Constitution – Constitutionalisation in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (Hart 2006), MacCormik (n 62) 118. Interesting in this context is also Kumm's argumentation on the German Basic Law and the so-called dead-hand-of-the-past problem of the U.S. Constitution, Kumm (n 173) 520.

[185] Kumm (n 173) 520. He refers to the republican principles that they are trying to achieve and that are common among the member states of the EU.

On the other side, the level of development and expansion of the EU and its law particularly seen through its fundamental principles of direct effect and primacy, which make legal acts applicable directly for the citizens of the member states and not just for states themselves and sometimes regardless of the absence of state consent, implies certain constitutional credentials of the EU.[186] These characteristics of EU law do come in odds with any definition of a classical international organization particularly that all this is supported by a firmly established institutional structure and mechanisms of operation and control envisaged by the EU founding documents. The EU treaties in this regard fit perfectly well with the formal and functional,[187] i.e. material meaning of the constitution,[188] however they are certainly characterized with "the weakness of the self-authorization and societal element"[189] because of which one can speak of a "low intensity"[190] constitutionalism with a "thin" constitution.[191] Nevertheless not all pluralists share this view of "thin" constitutionalism for EU law. Namely Maduro and Kumm offer an alternative view of EU having a thick normative constitution. Maduro in making his point on the existence of the EU constitution speaks of a constitutional added value with respect to national constitutionalism as seen through the inclusiveness, regain of control over transnational processes and a form of self-imposed external constitutional discipline on national democracies that EU constitutionalism represents.[192] Kumm makes an even stronger claim of EU having a constitution properly so called in explaining that besides fitting in the formal and functional meaning it also represents a constitution in a strong normative sense by drawing its authority from the republican principles it embodies and not so much from the member states.[193] Nonetheless and regardless of these types of characterization it is claimed here that the EU has a legitimate claim for constitutional authority that is not unconditional particularly that there are existing structural deficits. In this sense a thinner conception of constitutionalism is taken into consideration here. Thus the question posed should be not if EU has a constitution at all but rather how it is or how much can it resemble a state constitution.[194]

This assumption however should not be exaggerated into a claim for a full-blown constitution of the EU that would very much resemble a federal constitution under which there is a clear-cut supremacy rule that does not allow for any contestation of its supreme authority. It would go directly against the very core idea of constitutional pluralism namely the existence of

[186] Kumm (n 173) 514, see more in Weiler (n 12) and Franz C. Mayer, The European Constitution and the Courts in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (Hart 2006).
[187] Grimm states that "Primary Community Law...fulfils most of the functions of constitutions in the member states", Grimm (n 174) 90. See also Pernice (n 155) 17.
[188] Kumm (n 173) 508.
[189] Walker (n 180) 162, for a different perspective of a sort of direct relationship of the EU law with the peoples in Europe see Ingolf Pernice, 'The Treaty of Lisbon: Multilevel Constitutionalism in Action' (2009) 15 Columbia Journal of European Law 349; Ingolf Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?' (1999) 36 Common Market Law Review 703; see also Barber (n 39) 175-176; very critical on this multilevel constitutionalism see, Giacinto della Cananea, 'Is European Constitutionalism Really "Multilevel"?' (2010) 70 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 284; and Rene Barents, 'The Fallacy of Multilevel Constitutionalism in Pluralism' in Matej Avbelj and Jan Komarek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012).
[190] Walker (n 180) 162.
[191] Avbelj and Komarek (n 42) 23; and Avbelj (n 173) 386-389.
[192] Maduro (n 55) 76-77.
[193] Kumm (n 173) 527.
[194] Walker (n 78) 23.

competing claims of constitutional authority in Europe.[195] Constitutional pluralism is not trying to frame the EU constitution and its claim of legitimate constitutional authority under national, statist, terms,[196] however it is also not willing to embrace unreservedly the vision promoted by the CJEU either.[197] On the contrary, constitutional pluralists aware of the structural deficiencies at the EU level that are difficult to overcome without substantial transformation argue that there are some limited grounds on which a claim for an ultimate authority from the EU level could be disputed and rebutted by the member states. As a matter of fact the states still retain the status of being the key locus for pursuing and accomplishing constitutional values but they are certainly losing their absolute centrality as other fora are gaining more influence.[198]

4.1.2 Constitutionalism v. pluralism

The previous discussion does not end the debate on the criticism over the 'constitutional' aspects of constitutional pluralism. Namely there is another objection to this theory that is defined as a "dispute within a family",[199] that is among pluralist themselves. It is basically a dispute over the 'purity' of constitutional pluralism and whether it is pluralist enough.[200]

It is claimed by pure or radical pluralists that pluralism should be decoupled from constitutionalism as they are mutually exclusive and incompatible. There are strong reasons, according to this argument, to proceed with a process of innovation, creating a totally new concept, instead of sticking with the old paradigm of constitutionalism and translating it to the European and global context.[201] The latter is not a viable option because it would require a drastic departure from conventional constitutionalism and that cannot be justified.[202] Constitutionalism,[203] especially in its "philosophical underpinnings",[204] is strongly founded on the "grand idea of order".[205] It is only through uniformity in the legal order that all other values of constitutionalism could be achieved.[206] Thus it is through the strict hierarchy of legal norms, which is protected by the ultimate arbiter, that diversity and differences are substantially

[195] Monica Claes and Maartje de Viser, 'The Court of Justice as a Federal Constitutional Court: A Comparative Perspective' in Elke Cloots, Geert de Baere and Stefan Sottiaux, *Federalism in the European Union* (Hart 2012) 85.
[196] Barber claims that the difference between legal and constitutional pluralism is in the point that the latter is "concerned with the overlap of states and not legal systems" whereas legal pluralism is concerned with the overlap of legal orders even within a single state. Barber (n 39) 172 and 182. I do not agree on this point as constitutional pluralism is concerned with the legitimate claim of constitutional authority and not so much with the legal nature of the EU. On this point see also Walker (n 173).
[197] Case 294/83 *Partie Ecologiste 'Les Verts' v. Parliament, Judgment of 23 April 1986, ECLI:EU:C:1986:166* and Opinion of the Court of Justice of 14 December 1991 delivered pursuant to the second subparagraph of Article 228(1) of the EEC Treaty – Opinion 1/91.
[198] Maduro (n 55) 77.
[199] Nico Krisch, 'Constitutionalism and Pluralism: Reply to Alec Stone Sweet' (2013) 11 International Journal of Constitutional Law 501, 501.
[200] Walker (n 78).
[201] Avbelj (n 173) 404.
[202] Avbelj (n 173) 404-409.
[203] As a social concept, according to Avbelj, it can be conceived in different ways, Avbelj (n 173) 386, conventional meaning; Avbelj (n 173), or foundational meaning; Krish (n 199).
[204] Avbelj (n 173) 390.
[205] Avbelj (n 173) 391.
[206] Values such as stability, finality, hierarchy, coherence, generality, universality, comprehensiveness, efficiency, exclusivity, unity, equality and respect for the rule of law, Avbelj (n 173) 391-392.

reduced and that eventually leads to uniformity. Even if we try to transplant or "translate" this idea, regardless of its deep entrenchment in the state, on the European or global level the logic will remain the same. There is no room for diversity and pluralism in any of these conceptions. As matter of fact this objection goes on in saying that constitutionalism is not able to cope with diversities even in the national context and not to mention the international or European where this level of diversity is greater.[207] The model of accommodation of diversity within a constitutional framework might present a viable compromise but it suffers from possible shortcomings that are endangering the basic foundations of constitutionalism. In essence they cannot reconcile the accommodation of diversity with hierarchy without jeopardizing the latter or causing instability.[208] However, by pointing out the deficiencies only, such as instability or disintegration and ineffectiveness of the decision-making process and through it of the rule of law itself, without referring to the successful examples of the model of accommodation, Krisch seems to overlook that this very same logic of objecting this model applies *a fortiori* to pluralism. Both of these concepts, accommodation and pluralism, rely extensively on the will and readiness of actors to mutual respect and accommodation, thus, to a certain extent, discarding this model of accommodation is not as convincing.

In this way, just as the attempts to fit the principle of accommodation of diversity into the framework of constitutionalism are to be welcomed, so too can the attempt to conceptualize constitutionalism in the European i.e. EU context be treated as legitimate.[209] We have seen above that the adaptation of the conventional meaning of constitution or constitutionalism should not be seen as a controversy to the extent that even some of its basic assumptions are disputed. This conventional account of constitutionalism and its values presumes that all these values are safeguarded by the uniformity and hierarchy in the legal system.[210] However the values that constitutionalism strives for can stand in a competing relationship and thus they should not be seen as absolutes. Namely, in certain cases rigidly insisting on uniformity can be more disastrous to stability and integration than taking a more flexible approach. Under circumstances of competing constitutional claims in Europe, insisting on total unity and uniformity will just cause more rifts and frictions, as the issue of ultimate authority cannot be solved absent a firm constitutional framework. Instead, constitutional pluralism tries to reconcile such pluralism with unity in Europe by promoting a more flexible approach that does not turn the blind eye to the constitutional character of the plurality of claims of legitimate legal authority that exist.

This is a viable proposition and goal due to the fact that pluralism is essentially part of constitutionalism.[211] On a national level pluralism can be perceived in all the processes of governance through the promotion of participation and inclusion where the aim of constitutionalism is to frame all of them into a constructive relationship and provide unity to

[207] Krisch (n 77) 212; see also Kumm n 143 3 claiming that the level of diversity and plurality is much greater and more difficult to cope with on national level as it involves issues of morality, religion, culture and similar, something that is not the subject of international legal regulation, not even of the European to that extent
[208] Krisch (n 77) 214-219.
[209] Maduro (n 55) 83.
[210] Stone Sweet (n 63) 496-497.
[211] Maduro (n 55) 78.

the extent possible. Besides all other forms of pluralism, it can also take the form of institutional and interpretative pluralism.[212] Thus, in the national realm there are always several institutions that compete over providing the proper meaning and interpretation of constitutional norms.[213] However, the crucial difference, emphasized by Krisch, from the EU context is that in the national context this competition is conducted under and over a single legal framework emanating from the national constitution.[214] As result this cannot be qualified as systemic pluralism, one that arises from separated legal orders and which operates without a common frame[215] that is argued for at the European level. This simplification nevertheless would amount to defying the reality and the practice of the status and application of external legal norms particularly in the case of the EU law or even the ECHR.[216] Courts have in certain cases extensively modified their inflexible stance towards external sources of law in a way that is departing from established doctrines of either a modified monism or dualism, which has been sometimes codified into a new constitutional norm.[217] On the other hand, it is still possible that different national institutions or courts, even within the internal judicial system, more specifically, try to claim their authority and supremacy by referring to a different authority of external norms.[218]

In this way constitutional pluralism provides an opportunity for the interface between legal orders whitin which occasional conflicts are to be framed by legal means, but not necessarily in a hierarchical manner, and not immediately left to a political solution. Put in the words of Walker

> "the constitutional pluralist seeks to retain from constitutionalism the idea of a single authorizing register for the political domain as a whole while at the same time retaining from pluralism a sense of the rich and irreducible diversity of that political domain".[219]

This extended hand of legal regulation creates a form of loose framework which provides principles and guidelines but does not impose given solutions. Frictions and conflicts that occur are most frequently related to fundamental constitutional issues, such as fundamental rights, division of competences or respect for constitutional identity.[220] Only if the conflicts are irresolvable then the political means should eventually be employed.

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[212] Maduro (n 55) 80.
[213] Halberstam (n 34) 109-124.
[214] Krisch (n 77) 222-223.
[215] Krisch (n 77) 226-227 and Krisch (n 199) 504.
[216] Interestingly in the case of fundamental rights according to Avblej "conventional constitutionalism usually boasts of a single human rights catalogue", Avbelj (n 173) 394. This stance totally belies the evident pluralist reality of fundamental rights protection in Europe. Such a rigid stance on constitutionalism can put at question the existence of conventional constitutionalism in most European states. Stone Sweet (n 63), Alec Stone Sweet, 'Rights Adjudication and Constitutional Pluralism in Germany and Europe' (2012) Journal of European Public Policy 92,
[217] See for example Article 23 Basic Law of FR Germany and The Görgülü case, BverfG 111, 307.
[218] A very illustrative example is the case of Belgium Supreme Court which has claimed its supremacy based on the supra-constitutional status of EHCR which defeats Kirsch's argument. See more on this in Stone Sweet (n 63) 496.
[219] Walker (n 78) 17-18.
[220] Krisch (n 199) 503; Stone Sweet (n 216).

4.2 How pluralist is constitutional pluralism?

While the radical pluralists claim that there should be no coupling of constitutionalism and pluralism as they are incompatible, other critics of constitutional pluralism claim that it already has too much constitutionalism in it thus it does not differentiate itself from other traditional doctrines. Thus the claim that constitutional pluralism as result of the essential characteristics of constitutionalism amounts to no more than a modified version of monism represents the flip side of the previous objection. In this sense constitutional pluralism finds itself in between two caveats, either it emphasizes convergence and unity and ends becoming a new monism or it does not provide any type of overarching frame thus being accused of becoming a theory of disintegration by allowing arbitrariness.[221]

All three of the previously presented variants of constitutional pluralism do come under fire of disputes of having a monistic overtone.[222] Actually the critics have very often used the example of Neil MacCormick's conversion to monism. As a result of his angst facing the possibility that radical pluralism provides for existence of irresolvable conflicts, he transformed his radical pluralist vision into pluralism under international public law; a very monistic conception, as he himself admits.[223] This proves the point of the critics that in essence this should be the case with all other theories based on his initial vision.[224] Namely, providing principles for mutual engagement of the legal orders most frequently results in substantial shrinkage of national constitutional courts' maneuvering space.[225] On the other hand, creating a framework of common principles that is supposed to guide courts in situations of conflict presumes the application of EU law.[226] In both cases pluralism is limited therefore opening the way to unity and uniformity under the banner of monism. Thus constitutional pluralism is becoming, if it is not already, a theory of convergence that resonates with European monism providing strong arguments for EU law supremacy.[227]

Furthermore Somek's strong criticism of pluralism claims that it is nothing other than a modified version of monism.[228] Interpreting monism in a pretty broad manner he starts his deconstruction of pluralism by striking at its starting point, namely, denying credibility to dualism as an opposing paradigm to monism. Abandoning most of the conventional definitions of monism, not claiming for unconditional supremacy of international law, and never properly defining it but only through *via negative definition* he seems to be putting everything in the monistic basket. Thus he argues that "[l]aw is intrinsically monistic" and that pluralism cannot

[221] Somek (n 138); Loughlin (n 103) 24; Jaklic (n 15) 191-200; Walker (n 173) 17; Walker (n 78); and Maduro (n 55) 82.
[222] Another pluralist conception of a kind very often tied to monism is multilevel constitutionalism as presented and authored by Ingolf Pernice, Pernice (n 189). For an argument that theory is essentially monist or European monism, Neil Walker, "Late Sovereignty in the European Union" in Neil Walker (ed) *Sovereignty in Transition* (Oxford: Hart Publishing 2003) 13-14.
[223] See section 3.1
[224] Somek (n 138) 347 fn. 21.
[225] Jan Komarek, 'European Constitutionalism and the European Arrest Warrant: In Search of the Limits of "Contrapunctual Principles"' (2007) 44 Common Market Law Review 9, 33; and Morawa (n 124) 159, 175-177.
[226] Schilling (n 134) 192-193.
[227] Schilling (n 134) 192-193.
[228] Somek (n 138) 344-350. Cf MacCormick's analysis on Kelsen and Hart on the relationship between legal orders, MacCormick (n 82) 8-11.

be legal as such, it is not possible.[229] Therefore there is no other theory besides monism. In this way constitutional pluralism cannot even provide the best descriptive account because what the practice shows is that it is only a modified form of monism under national law. National courts are not prevented from acting against EU law through so-called "false decisions", which do not bring any consequence of declaring EU acts void,[230] whereas the EU does not have an effective mechanism of enforcement of its law. Like this it is obvious that national law has the supremacy. Insisting on the inevitability of the legal solution to the competing constitutional claims in Europe his argumentation essentially boils down to the choice between monism and monism.[231]

This type of account obviously leaves out the nuances that EU law brings, such as the European mandate of national courts or the relatively high level of compliance and effectiveness without necessarily having legitimate power of coercion but through other forms of law implementation.[232] However, the "false decisions" argument can be turned on its head. Namely, one could argue that if the CJEU decides, as it did in the *Kreil* case,[233] alluding that a national constitutional provision is not in total compliance with EU law and if such a decision is accepted and implemented by national authorities by amending the relevant constitutional provision does this prove the supremacy of EU law? This would be 'false' from a national perspective after all. As a matter of fact, the decisions cannot be false or right if it is not seen through the prism of EU law which only confirms the European mandate of national courts in such cases to apply and interpret EU law. This point is not elaborated by Somek further, thus it leaves many gaps that need to be filled in order to have a real strength.

True, pluralism is tamed through constitutionalism but it is not suppressed. As a matter of fact, basic pluralist logic is at the heart of this theory. There is no all-purpose supremacy of any of the legal orders; there is no hierarchical relationship between them but heterarchy, which leaves the question of the ultimate authority and final say open. This is the crucial *differentia specifica* distinguishing constitutional pluralism from monism. This point is well formulated by Kumm writing that:

> "….constitutional pluralism: it is not monist and allows for the possibility of conflict not ultimately resolved by the law, but it insists that common constitutional principles provide a framework that allows for the constructive engagement of different sites of authority with one another."[234]

If such a pluralist account lacks this constitutional element it will lose its appeal, it will not be able to provide a proper descriptive account of reality and in the end it will be much more prone

[229] Somek (n 138) 372.
[230] "Hence it is not unreasonable to conclude that Member States retain the power to have their judges adopt false decisions, at any rate so long as states are willing to pay for it", Somek (n 221) p. 358.
[231] Somek (n 138) 363.
[232] Maduro (n 55) 71-75.
[233] CJEU, Case C-285/98 *Tanja Kreil v Bundesreplik Deutschland,* Judgment of 11 January 2000, ECLI:EU:C:2000:2.
[234] Mattias Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between in and beyond the State' in Jeffrey L. Dunoff and Joel P. Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP 2009) 272.

to criticism of jeopardizing the rule of law, and thus the stability of the legal orders, in turn causing disintegration. It is precisely the latter arguments that are also aimed against constitutional pluralism that will be analyzed next.

4.3 Rule of law under siege?

One of the basic tenets of constitutional pluralism is the heterarchy and that it leaves the issue of ultimate authority open, not framing it totally in a legal framework. This is actually the underlying idea, uniting all pluralist.[235] However this lack of hierarchy in the relationship of legal orders and the feature of openness has been one of the main practical concerns expressed against pluralism. Namely, it has been argued that pluralism jeopardizes one of the most important values of every constitutional order, which is basically the precondition for all other values which an order tries to accomplish, the respect for the rule of law.[236]

Baquero Cruz has provided the most frequently referred to critical account in which he elaborates several points criticizing pluralism. He claims that constitutional pluralism is not a neutral account, because it is impossible to stay neutral under the present circumstances of competing claims, and that it is much closer to national constitutional courts and their views.[237] In this manner it weakens the rule of law at the European level jeopardizing legal integration. In his first point he claims that constitutional pluralism endangers legal certainty and effective protection of fundamental rights by justifying rather instable institutional relations in Europe. Under such conditions it is just a matter of time before chaos unravels.[238] Second, the lack of uniformity and unity is resulting from the possibility of parallel interpretation of EU law by national constitutional courts thus undermining its authority and effectiveness. Unilateral declarations of derogation from EU law are not acceptable in this regard.[239] Third, the eventuality of the occurrence of irresolvable conflicts, as a feature of constitutional pluralism, results from the lack of any hierarchy, not even a generally accepted precedence of application of EU law. This ends up in a fierce competition among different jurisdictions where the only thing on the table is prestige and power while integration and rule of law are being undermined.[240] Even though in his later work[241] he provides a kind of justification for exceptional situations of resistance by national constitutional courts in a form of "tamed civil disobedience",[242] Baquero Cruz still maintains his point on these very same shortcomings of pluralism.[243]

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[235] This is the reason why I refer frequently to Krisch's arguments on virtues of radical pluralism as well.
[236] Baquero Cruz (n 14) and the exchange between Baquero Cruz and Kumm in Avbelj and Komarek (n 42) 29-30. For criticism on the count of jeopardizing the value of integrity see Pavlos Eleftheriadis, 'Pluralism and Integrity' (2010) 23 Ratio Juris 365 on this see also Jaklic (n 15) 205-209
[237] Baquero Cruz (n 14) 414.
[238] Baquero Cruz (n 14) 414.
[239] Baquero Cruz (n 14) 414-415.
[240] Baquero Cruz (n 14) 415-418.
[241] Baquero Cruz (n 30).
[242] Baquero Cruz (n 30) 259, and Baquero Cruz claims "I would be willing to accept, but only as a second best, moderate version of pluralism…" in Avbelj and Komarek (n 42) 19 and compare this to an earlier claim "…the argument from civil disobedience may work with individuals, but I don't know whether it can extrapolate to institutions", see Avbelj and Komarek (n 42) 30.
[243] Baquero Cruz (n 30) 255-256.

These arguments are very legitimate however they are very formalistically framed without going deeper into the effect and consequences of the ever more present constitutional pluralism in the EU. Even though he takes the perspective and arguments of only the EU law side, his points could easily be turned on their head and used as arguments for the defense of the positions of national constitutional supremacy. The pluralistic European legal order has neither come to an end nor disintegrated itself regardless of occasional frictions and minor disobediences, even in light of the *Landtova* case[244] and decision of the Czech Constitutional Court.[245] Furthermore, the potential threats of irresolvable constitutional conflicts in Europe are substantially lesser than usually presented. Constitutional pluralism does not perceive such episodes as tragically and disastrously as some European monists do. The latter are strongly adhering to a rigid and formal principle of supremacy without looking into the substance and principles underlying certain national, judicial, acts.

> "Any debate on overarching supremacy and hierarchy among orders is burdened by rigid formalism because supremacy is a formal principle, blind for substances and effect and rule of law, on the other hand, is not."[246]

As a matter of fact, such a rigid formalism could be less favorable to individual rights and overall development of law as it might appear at first glance. Therefore, the values of hierarchy, stability and predictability should not be turned into fetishism.

The value of hierarchy is very often overestimated. It does not lead to total uniformity and absolute stability in every case.[247] While national constitutional orders are seen as bastions of this type of hierarchy of legal norms this is not always the case. If one defines hierarchy through its characteristic that one entity has the final say, one might argue that even some developed European states are not characterized by this type of hierarchy even though they are often taken as examples for the respect of the rule of law.[248] Thus this formalistic vision of hierarchy, mirrored from the national realm to the European, should be relaxed in order to be able to accommodate and manage diversity and pluralism. Any type of preemption cannot be presumed rather it has to be earned on substance in every single case that reveals a potential conflict.[249] In this regard the major advantage of constitutional pluralism and the heterarchial positioning of orders is that it creates a situation "where no court and no political body can finally just stop listening because they get the final word"[250] thus through this self-reinforcing mechanism of judicial dialogue it essentially promotes stability much better than under rigid hierarchy**.**

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[244] C-399/09 *Marie Landtová v Česká správa socialního zabezpečení,* Judgment 22 June 2011, ECLI:EU:C:2011:415.
[245] CCC, Judgment of 31 January 2012 Pl. ÚS 5/12 (*Holubec*) of the Czech Constitutional Court.
[246] Nollkaemper (n 6) 73.
[247] See more on Kelsen's hierarchy and uniformity in Nick Barber, 'Legal Pluralism and European Union' (2006) 12 European Law Journal, 308-316.
[248] Gregory Shaffer, 'A Transnational Take on Krisch's Pluralist Postnational Law' (2012) 23 The European Journal of International Law 9.
[249] In the context of international law see Nollkaemper (n 6) 68.
[250] Avbelj and Komarek (n 42) 20.

The court practice, such as the *Solange* saga or *Kadi* decisions, has also shown that one should not jump to conclusions too quickly. These decisions, paradigmatic for constitutional pluralism, have led to an increase in the level of respect and protection of fundamental rights certainly more than it would have been the case otherwise.[251] In this sense constitutional pluralism has opened the doors for more experimentation and contestation that has improved the position of the individual.[252] By promoting contestation and debate it depicts the virtues of its openness leading to a limited convergence and thus stability, more than initially assumed.[253] This stability is mainly seen by the absence of such a fierce damaging competition between national and European courts. As a matter of fact, constitutional pluralism turns this relationship into a more constructive one than under circumstances of hierarchy. In this way constitutional pluralism serves as incentive for mutual accommodation and respect instead of a fierce competition and unilateralism. Barber explains this very well by saying that,

> "[c]ompeting claims of supremacy arm national and European courts with weapons that may help ensure mutual respect and restraint…in the event of actual conflict, one side will, probably, emerge from the crisis as a victor: whilst it is unclear who will win, each side has an interest in avoiding the contest."[254]

It cannot be denied that such a pluralistic constellation leads to a feeling of concern over legal certainty and predictability.[255] There will be perhaps a point when there will be abundance of constitutional review creating situations where an individual will not be able to tell to which law it should abide having no tiebreaking institution or rule. However, what constitutional pluralism envisages is that such situations will only last temporarily and no specific issue will be left unresolved, either through legal or political means. Nonetheless no general rule or authority will be given. But at the same time one should not exaggerate the level of legal predictability at a national level as well. National constitutions do not provide the answer to every constitutional problem very often all what they do is provide the guidelines and principles how to frame the issue.[256] Additionally institutional pluralism is very much present at the national level and such situations of unpredictability and uncertainty are not unimaginable.

Taking this into consideration constitutional pluralism cannot be discarded on the basis that it endangers rule of law. The substantive aspects of the rule of law should be taken into consideration along with the multiplicity of values that are frequently in a competing relationship in order to have a true stabile legal order. Stability does not always come from

[251] See for example Stone Sweet (n 63).
[252] Krisch (n 77) 257; and Koskenniemi (n 2) 26.
[253] Krisch (n 77) 260-261 see also Viellechner (n 2) 575 "a recurrent pattern of dialectical engagement, critique, and counsel, from which learning and innovation can emerge" quoting Robert B. Ahdieh, Between Dialogue and Decree: International Review of National Courts, (2004) 79 NYU Law Review 2029, 2035.
[254] Barber (n 246) 328, (emphasis added). For a very similar view see Jaklic (n 15) 53 quoting Neil Walker, "neither side is likely to go further than merely threatening the use of its judicial 'nuclear weapon' to strike down a properly constituted rule of the other side", Neil Walker, 'Sovereignty and Differentiated Integration in the European Union' (1998) 4 European Law Journal 355, 377.
[255] MacCormick has pointed put to this in his turn to monism, see on this in section 3.1.
[256] Krisch (n 77) 223.

imposition but through achieving the optimal balance between them. In this sense constitutional pluralism tries to achieve this by managing the competing constitutional claims.

4.4 Just a descriptive theory?

There is rarely a dispute that constitutional pluralism provides the best descriptive account of the pluralist reality in Europe. Neither of the traditional doctrines and views can provide such an account.[257] However there is an objection against constitutional pluralism that is expressed by both supporters [258] and critics[259] of this theory that its value stops at this descriptive account. There is nothing more to pluralism than its descriptive value, as argued by the critics. It is claimed that it lacks any normative account which makes it a rather temporary phenomenon. While pluralism can best explain the current relationship between the orders it cannot provide arguments why this is the preferable situation over other alternatives. In other words, heterarchy and openness will always be the second best solution after hierarchy, thus it is the latter that is promoted and strived for instead of any pluralism.[260] Thus this objection boils down to a claim which most often acknowledges the descriptive account of pluralism. However not only does it not accept to promote pluralism, but on the contrary, it tries to change this unwelcome situation into a new one that fits the traditional doctrines much better.[261]

Nevertheless, constitutional pluralism has its normative value and justification why it is better not to proceed with the perception of traditional doctrines and mindset. The above discussion has already drawn some of the contours to the main normative values therefore here they will be further developed.

The initial normative value of pluralism is based on the very descriptive superiority that it has. Namely there is a great normative value in having an "accurate understanding of the world".[262] It does represent the first step towards embracing and recognizing pluralist reality and thus helps the justification of its existence further. This recognition creates a motive to make the best out of it without ending up in illusions and constant feelings of threat and fear that the ideals of either of the constitutional sites, national or EU, will never be fulfilled. Thus it sheds new light on the self-understanding of crucial actors and their role in this reality.[263] This is the reason why Walker refers to this aspect of pluralism as epistemic pluralism, it creates the knowledge of a new starting point of analyzing the present conditions of competing constitutional claims.[264]

Constitutional pluralism does not stop here and it further differentiates between mere plurality and pluralism of legal orders.[265] Not only does this theory clearly depict the existence of

[257] Somek is among the few that do not share this view, see Somek (n 138).
[258] Barents (n 9) 439,444.
[259] Loughlin (n 103).
[260] Avbelj and Komarek (n 42) 19.
[261] Walker (n 173) 337-338.
[262] Avbelj and Komarek (n 42) 19.
[263] Walker (n 78) 22.
[264] Walker (n 173) 338.
[265] Avbelj and Komarek (n 42) 10, here Walker defines plurality as the objective reality while pluralism as the subjective stance, attitude towards reality.

plurality of legal (i.e. constitutional authority) claims it also envisages the means through which we can have these orders "interact and cohere in a sustainable fashion"[266] even under the present and enduring circumstances which do not pave the way to an authoritative resolution of this competition of overlapping legal orders.[267] It is this latter aspect that portrays the normative side, pluralism, as opposed to plurality. In this sense, constitutional pluralism designs the principles of mutual engagement between the orders in a way that forges loyalty and develops into a limited convergence among the orders and that brings a sustainability and stability of the relationship between the legal orders. This loyalty is being built not on the basis of a competition between courts but rather on the cooperation and trust that could be only foreseen in a heterarchy which does not promote any subordination but cooperation[268] and complementarity. Under such circumstances national courts, having the impression that they are a part of, and represent equal actors in, the European legal space, will make their role more constructive in developing a judicial dialogue and exchange. Only like this will it be possible to avoid and overcome the false alternative and choice between revolt against EU law or revolution in national constitutional law that national courts face under the traditional hierarchical accounts.[269] This promotes on the other hand the high level of adaptability provided by constitutional pluralism which is well suited to the changing and complex reality in a less formalized, more opened to redefinition, way than under the rigid requirements of the traditional doctrines.

One should not conclude however that constitutional pluralism demands total deference by national courts. On the contrary, when there are sufficiently strong reasons to contest the authority of EU law as seen through the decisions of the CJEU, then the national courts should take this challenge.[270] In a sense this is a welcome development as it will provide for checks and balances, not allowing any of the legal orders or consequently any court instances to take the dominant position and supremacy, thus being able to ignore the countervailing concerns of other actors within the heterarchical relationship. As a consequence of this equidistance of constitutional pluralism from either of the competing constitutional claims, but nonetheless comprehending them both, it leads to a development and advancement of the common values and principles shared among the member states and the EU itself, including the rule of law.

Taking this into consideration there is a strong case to promote and justify constitutional pluralism, not only as the dominant descriptive account but also because of the normative values that it promotes and advances.

5 New roles for constitutional courts

Turning away from a rather theoretical explication of the theory of constitutional pluralism this section serves as *passarelle* in order to reach the chapters discussing the practical relevance

[266] Walker (n 46) 376.
[267] Walker (n 78) 22.
[268] See for example on the "relationship of cooperation" in Judgment of 12 October 1993 2 BvR 2134, 2159/92 Maastricht [1993] BVerfGE 89,155; [1994].
[269] Rosa Phelan (n 3).
[270] For more on the contestation of the normative value of pluralism see Krisch (n 77).

and consequences of the principles and guidelines developed by different versions of constitutional pluralism.

The above overview and analysis has shown that constitutional pluralism is arguably the new paradigm in viewing the relationship between legal orders in Europe and there are strong reasons to accept it. However, if constitutional pluralism argues for the adaptation and change of deeply entrenched conventional conceptions of constitutionalism and traditional doctrines of relationship between legal orders then it could hardly be possible that this does not affect whatsoever the status and powers of national constitutional courts. On the contrary, by basically challenging or better said adjusting one of the foundational ideas of constitutionalism, the one of constitutional supremacy, constitutional courts have been deeply affected by this new reality. This reality though gave rise to critical observations of the role and place of constitutional courts in the changing legal world of internationalization and, even more, Europeanization. Constitutional courts have to cope with an increasing pressure of decentralization of the centralized model of constitutional review and the partial surrender of some of the powers, as important as the protection of constitutional rights, to supranational and international courts. Therefore, it could be said that this is a tough position for them as they are challenged from the CJEU and the ECtHR. One author has even claimed in the context of the Federal Constitutional Court of Germany, the most powerful and influential constitutional court, that there is a creeping loss of relevance of constitutional courts amidst this Europeanization and internationalization.[271] Consequently constitutional courts do hinder the process of furthering European integration. This would basically be the intuitive, even though one-sided, way of thinking about the issue. Nevertheless, constitutional pluralism can be used to prove the opposite.

Managing competing constitutional claims does not have to be a zero-sum game, something that has been the consequence of the binary logic of traditional doctrines. Accordingly constitutional courts are key sites where this is supposed to occur and they have a very delicate role to play.[272] They are most frequently at the heart of constitutional pluralism.[273] Therefore it is argued that constitutional pluralism foresees that the constitutional courts preserve their position and authority through preservation of their internal point of reference, by adjusting it to the new reality and at the same time abiding by the obligations stemming out of the European Union which are frequently defined in the respective provisions of national constitutions. It does not require national constitutional courts to abandon their internal perspective. Such a position, which is essentially required by European monists, would break the crucial tie that provides legitimacy to these institutions. Constitutional courts are "not to change their constitutional allegiance but to adjust their forms of reasoning and institutional role to their new constitutional context".[274] The same line of thought can be recognized in Kumm's work where he clearly acknowledges this position by saying that "[t]rue, national courts will rarely, if ever, be required to say that national constitutional rules are trumped by the presumption of

[271] Schönberger (n 13) 57.
[272] Walker (n 78) 21, Maduro (n 20) 530-531.
[273] On the court centeredness of constitutional pluralism see Komarek (n 122) 38-39.
[274] Maduro (n 73) 379.

international law's legality established by the cosmopolitan paradigm".[275] This type of adjustment means that they should recognize that they are part of a larger European legal space and they should function and decide in a manner that takes this into consideration. Being part of this broader legal space means, at the same time, that they have a greater possibility to influence and take part in shaping it. In this sense not only are constitutional courts not losing their relevance as much as argued by some but they are expanding their existing powers both in territorial and substantial scope. Not only are they compensating for their partial surrender of powers, but they are gaining influence. Thus the argument is made here that constitutional courts have developed new roles in the context of the European integration that are acceptable and beneficial as seen from both national and supranational perspectives. This is possible due to the fact that also through their new roles they will help shape and advance the common values shared by all actors in this European legal space. Constitutional courts are incorrectly being noticed in the European context only in periods of frictions and potential conflicts between the legal orders and their constructive role is often being overlooked. Their resistance should not always be perceived as threat. Constitutional courts are therefore supposed to be a "constructive corrective force" [276] or to have "*die Wächterfunktion der nationalen Gerichte*". [277] Just as constitutional pluralism is not merely a conflict management theory, and should not be identified only with constitutional conflicts in Europe, so do constitutional courts have their constructive role.[278]

The prism provided by both the contrapunctual principles and the jurisprudence of a constitutional conflict enables us to differentiate three new roles of constitutional courts in European integration. It is only through this prism, as it provides guidelines and principles for courts, that these roles could be best construed and understood. Under any other paradigm they would be strongly contested and not recognized, even though quite visible in the reality. In this sense being important actors in the European legal space constitutional courts have been providing constitutional legitimacy to EU law, protecting the respective constitutional identity and safeguarding the division of competences in Europe from unwarranted concentration of competences at the EU level.

This classification of the new roles might come under fire for leaving out one of the most important powers and functions of constitutional courts, protection of constitutional rights. This would be a very legitimate point. Nevertheless, the answer to such an objection could be summarized in two points. First, this important role of constitutional courts is not left out but included in the new role of protection of constitutional identity. It will be shown that under this specific new role there has been a strong intertwinement of fundamental right and constitutional identity and this is best seen by the first occasion in which the FCC has used its constitutional

[275] Kumm (n 137) 277. Also Stone Sweet shares this view in the context of ECHR claiming "[n]o constitutional pluralist…would expect a constitutional court to commit suicide, by formally subjugating the national constitutional order of the national constitutional order to the Convention", Stone Sweet (n 63) 497
[276] Kumm (n 31) 292.
[277] The guardian role of national court, Pernice (n 155) 55; or as Besson argues in a similar fashion constitutional courts should conduct a "cooperative constitutional control", Samantha Besson, 'From European Integration to European Integrity: Should European Law Speak with Just One Voice?' (2004) 10 European Law Journal 257, 278.
[278] Avbelj and Komarek (n 42) 25-26; and for more specifically for the FCC see Bethge (n 56) 146.

identity review, in the Data Retention case.[279] Second, the European dimension of protection of constitutional rights by constitutional courts has been a feature until now very strongly related to the European Convention on Human Rights and so it would involve a more robust triangulation of national courts, the ECtRH and the CJEU that exceeds the scope of this project.

5.1 Providing constitutional legitimacy to EU law

The first role has to do with providing constitutional legitimacy to EU law. The substantial dependency of EU law on national courts and institutions for its enforcement as well as the mandate of national courts to interpret and shape EU law necessarily leads to a conclusion of the bottom-up character of legitimacy of EU law.[280] Furthermore, it was mainly through preliminary references, stemming from national courts and litigants, that the CJEU was able to develop the authority of EU law.[281] Only through such a social acceptance it was possible for EU law to reach a point of making a constitutional claim.[282] Taking into consideration the status and role of constitutional court within the national institutional structure then it should not come as a surprise that they have a prominent role in this bottom-up building of EU law legitimacy. However, one should not be confused, it is not political legitimacy that is argued but constitutional legitimacy of EU law that is provided. Accordingly, it is through different processes and occasions of interaction with sources of EU law that constitutional courts are initiating a debate by allowing access under certain conditions to such a discourse to individuals and groups directly affected by EU law which otherwise could not be in a position to influence it[283] and also sensibilizing the broader public getting certain aspects of EU law closer to it. However, this is just one, internal, aspect of this deliberative role of constitutional courts. The external aspect is to be seen by entering into informal and formal forms of dialogue on a horizontal level with other constitutional courts by more frequently engaging with their case law as well as with the CJEU especially through the preliminary reference procedure. By being able to precisely frame constitutional issues arising from EU law they are leading the debate at a European level sending directly or indirectly signals to each other.

5.2 Protecting constitutional identity

Among the three lines of national constitutional courts resistance, fundamental rights, *Kompetenz-Kompetenz* and protection of constitutional identity, the last one is gaining the biggest space under the spotlight. Particularly since the Constitutional Treaty debate and then once Lisbon Treaty entered into force the respect for national identities of member states, Article 4(2) TEU, has become one of the central points in the relationship between legal orders. From the perspective of constitutional pluralism this specific provision has provided an EU law basis and at the same time legitimation for the exceptional cases of resistance. Therefore it should be no wonder that constitutional identity of member states gained such a prominence in

[279] Judgment of 2 March 2010, 1 BvR 256/08, 1 BvR 263/08 and 1 BvR 586/08 Data Retention [2010], BVerfGE 125,260. On the relationship between the three lines of review, fundamental rights, ultra vires and identity review see in Klatt (n 53) 120-121.
[280] Maduro (n 20) 517, Halberstam (n 11) 170.
[281] Maduro (n 20) 517-518, 522.
[282] Krisch (n 77) 260.
[283] Krisch (n 77) 230-234, Maduro (n 20) 523.

the legal discourse.[284] Taking into consideration that constitutional courts are best placed to provide the meaning to this type of constitutional identity they are at the forefront of its protection also in light of EU legislation.[285] That is the main reason why in its Lisbon Treaty decision[286] that the FCC developed the third thread of its often indirect scrutiny of EU law, the constitutional identity review. Many constitutional courts have followed suit. The first instance of this type of review by the FCC in the Data Retention case[287] actually showed how this rather abstract notion of constitutional identity is intertwined not only with the special constitutional commitments of respective states but also with specific constitutional rights.

5.3 Safeguarding vertical division of competence in the EU

It is a well-known fact that one of the driving forces for the introduction and spread of constitutional review was to achieve an adequate safeguard for structural constitutional provisions i.e. federalism. Thus, very often constitutional review and constitutional courts have been established for this purpose. As a matter of fact, Kelsen's original design of centralized constitutional review had this particular role at its heart. However, this feature of the centralized model is not present in all countries that have a constitutional court. Unitary states have not developed this power of constitutional courts as much as the ones in federal states. Accordingly, most of the constitutional courts have gained this new role in the European integration, which has many federal features, to safeguard subsidiarity and serve as a check on the unwarranted concentration of power at the EU level. They would counterbalance the existing centralizing tendencies in Europe.[288] As the spread of the authority and scope of EU law was most frequently related to the activity and case-law of the CJEU, the motor of legal integration, then the most suitable way to check on this spread of authority is through the check from constitutional courts. The early-warning mechanism alone cannot suffice without the judicial checks on the EU powers.

All three of these roles will be discussed in greater detail in each of the subsequent chapters respectively. Discussion will revolve not only around the descriptive aspect but also on the normative values. Guidelines will be provided in each case on how to optimize the relationship of constitutional court to European integration in order to increase their constructive role. The discussion will be also imbued with an analysis of a recent trend of the spread of constitutional review and debates on possible establishment of constitutional courts in countries with a weak or even without any experience with constitutional review. This trend will be tackled from an aspect that argues that countries are most frequently better off with a certain form of constitutional review and even more so with constitutional courts in the context of European integration.

[284] See for example Kumm and Comella (n 150).
[285] See for example CJEU, Case C-213/07, *Michaniki AE v Ethniko Simvoulio Radiotileorasis,* Opinion of AG Maduro 8 October 2008, ECLI:EU:C2008:544, para 30.
[286] Judgment of 30 June 2009, 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09, BVerfGE 123, 267.
[287] FCC *Data retention* (n 278).
[288] Avbelj and Komarek (n 42) 23, here Walker explains the two caveats over constitutional pluralism particularly the centralizing tendencies of federal structures entering a new type of hierarchy.

Chapter 4

The Deliberative Nature of Constitutional Courts and Their Place in the Judicial Dialogue in Europe

1 Introduction

Under the circumstances of the existing heterarchical relationship between the legal orders in the EU there is a great deal of importance put on determining the terms of mutual engagement[1] among the orders and their institutions. In preventing and managing the potential conflicts stemming from the inherent openness of heterarchy, constitutional pluralism develops avenues and mechanisms through which the process of accommodation of diversity could take place. In this sense constitutional pluralism as a theory which explains the multilevel cooperative exercise of judicial power[2] puts forward judicial dialogue as an instrument for achieving mutual recognition and accommodation among the legal orders as one of its main tenets. Therefore, judicial dialogue is very often promoted and its importance and constructive role emphasized as one of the main elements of constitutional pluralism.[3] Nevertheless, the question then arises why and how constitutional courts should be part of this judicial dialogue in the EU especially in light of earlier reluctance of constitutional courts to participate in such a dialogue. Moreover, considering that also according to Kelsen's initial design[4] constitutional courts are not part of the ordinary judiciary but positioned above the three branches of power, is there essentially any institutional feature of these courts which particularly qualifies or disqualifies them within the judicial dialogue in Europe? Are there any advantages when it comes to judicial dialogue that might be brought by these specialized constitutional institutions?

There is often a tendency in Europe today to discuss constitutional court's role in the European integration only when some problems occur in this process. Constitutional courts are frequently considered and set under the spotlight only when a potential conflict among the legal orders is on the verge of happening thus creating an image of these courts not having any substantial constructive role in the process of European integration. Such misconceptions often presented to 'neutralize' or discredit constitutional courts as a hindrance towards further integration are essentially hurting the very same process. By ignoring the fact that the constitutional courts have a different place and role in the EU compared to the ordinary national courts these views are turning a blind eye towards the specificities of these institutions and what they are bringing

[1] Miguel Poiares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in Neil Walker (ed), *Sovereignty in Transition* (Hart 2003) 524ff.
[2] Pola Cebulak, 'Constitutional Review of the European Post-Crisis measures by National Constitutional Courts: "no influence over either the sword or the purse', UK IVR Conference 2014, LSE Law.
[3] Miguel Poiares Maduro, 'Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism' States' in Jeffrey L. Dunoff and Joel P. Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP 2009) 374ff; and Aida Torres Perez, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication* (OUP 2009) 66ff.
[4] Hans Kelsen, *General Theory of Law and State* (Transaction 2006) 268-269.

to the European common legal space. One such feature of constitutional courts, as specialized constitutional institutions in charge of safeguarding the constitution positioned between law and politics, is their deliberative role in the constitutional and political system. In the national realm their legitimacy is based on the so-called deliberative expectations and reason-giving role for striking down legislative acts.[5] This deliberative nature of these institutions finds its positive manifestation also in the EU context even though this tends to be occasionally downplayed.

It is because of these reasons that this chapter is devoted to arguing the constructive role of constitutional courts as external deliberators at the European level, meaning, when EU law is concerned. The chapter will shed a new light on this role of constitutional courts in Europe claiming that when this institutional feature is manifested at a European level it has even an additional value if one bears in mind the chronic democratic deficit as well as the bottom-up construction of the legitimacy of EU law.[6] In this sense, the particularities of the constitutional discourse at the national level are partly reflected at the EU level which brings us to the specific aspect of this new role of constitutional courts.

Following this line of thought, this chapter will be further organized, subsequent to this introduction, in three sections. The second section will analyze the theoretical aspects of the special role of constitutional courts as deliberative institutions in European integration which is a direct result of their place in the national constitutional system as well as the particularity of the constitutional discourse.[7] Perceiving their function distinguished from adjudication of ordinary courts as well as the legislative function of the parliaments it shall become more obvious that while constitutional courts do have their own 'European mandate',[8] as do all other national courts, still their role in the legal integration is slightly different. The claim is that this difference is resulting also from the positioning and institutional logic of constitutional courts in the national legal order and because of those reasons it cannot be identified with either ordinary adjudication or legislation. Based on this abstract theoretical premise the next two sections contain a presentation of two manifestations of the deliberative nature of constitutional courts at the EU level. The third section initially discusses the two central notions of judicial dialogue and constitutional legitimacy. In this sense the section goes into the issue of how constitutional courts are directly involved in providing constitutional legitimacy to EU law especially through two forms of indirect judicial dialogue, constitutional review of EU treaties and their amendments but also through the review of national acts implementing secondary EU law. This legitimizing function is fulfilled by anchoring EU law in the national legal order, clarifying certain constitutional particularities and signaling potential contentious areas through their reasoning in cases involving EU law. The fourth section discusses the role of constitutional courts in the direct judicial dialogue with the CJEU through the preliminary

[5] John Ferejohn and Pasquale Pasquino, 'Constitutional Courts as Deliberative Institutions: Towards an Institutional Theory of Constitutional Justice' in Wojciech Sadurski (ed), *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (Springer 2003) 27.
[6] Maduro (n 1) 517.
[7] Victor Ferreres Comella, *Constitutional Courts and Democratic Values: A European Perspective* (Yale University Press 2009) 36.
[8] Monica Claes, *The National Court's Mandate in the European Constitution* (Hart 2006) 385ff.

reference procedure. After going through the main reasons behind the longstanding refusal of constitutional courts to enter the direct judicial dialogue this section focuses, through the lenses of constitutional pluralism and constitutional legitimacy, on the developing new trend of establishing the direct dialogue between constitutional courts and the CJEU. It is argued that this new trend once again proves how constitutional courts could have a constructive role in the judicial dialogue and European integration but at the same time claims that constitutional courts have good reasons to maintain their cautious attitude towards the direct judicial dialogue especially until their specific role is not recognized by the CJEU and some procedural adjustment have taken place. Lastly, this section reveals another constructive role of some constitutional courts in securing that ordinary judiciary respects its obligations to contribute to the uniform interpretation and application of EU law, through the use of the preliminary reference procedure, which are foreseen by EU law but also safeguarded under the national constitutional provisions. The chapter will end with a brief summary and conclusion of the arguments presented which prove that constitutional courts have a much more important role in the success of the European integration process and are definitely not marginal players in this process. Constitutional courts are no longer solely focused on the national legal order isolated from the external legal developments which might have been the case some time ago. In the recent period constitutional courts have become more and more engaged with EU law devising doctrines and notions which could serve the cause of thoroughly grounding integration in Europe on sound legal basis.

2 The constitutional discourse and the role of constitutional courts in European integration

2.1 The particularities of constitutional discourse and constitutional review

Constitutional courts are not an essential and unavoidable feature of the institutional design of a state. These institutions are relatively new dating only as back as 1921, or more precisely 1942. As a matter of fact, there are several states in Europe which have not incorporated the centralized model of constitutional review or have no constitutional review at all.[9] Therefore one has to take a look at what added value they bring to a political and constitutional system and what difference does their establishment bring. One of those added values[10] could be recognized in their specific deliberative performance which is directly related to the specificity of the constitutional discourse and constitutional review. Accordingly, discussing the deliberative nature of constitutional courts necessitates an overview of the nature of constitutional discourse and constitutional review. In this sense when arguing for the special role of constitutional courts in the legal discourse in Europe one has to look into the particularities of the constitutional discourse in general.

[9] For more on the European model of constitutional review see Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (OUP 2000), 31-49. Member States which do not have a centralized model of constitutional review or do not have constitutional review at all are: Estonia, Greece, Ireland, Sweden, Denmark, Finland, Cyprus, Malta and the UK.

[10] For a very elaborate overview of the advantages and disadvantages of the centralized constitutional review model see Cristopher F. Zurn, *Deliberative Democracy and Constitutional Review* (Springer 2002).

According to Victor Ferreres Comella the constitutional discourse, which is mainly created and led by constitutional courts, is characterized by its relative autonomy from other legal and political discourses.[11] Different from the other discourses "[c]onstitutional discourse, then, *at its idealized best*, is the moral discourse of the constitutional community."[12] It goes without saying that this is the result of the nature and content of the constitutional texts which necessitates a different approach towards the comprehension and interpretation of the constitutional provisions. However, the autonomy of the constitutional discourse also is the result of, in particular, two features of the institutional design and the place of constitutional courts in the national legal and political systems. The *first* feature has to do with the institutional positioning of constitutional courts as neither part of the ordinary judiciary nor of the legislature and outside of the *trias politica*.[13] As a result of this detachment, constitutional courts are not bound by the requirements and methods of either the legislative process or the ordinary adjudication even though they often have certain things in common. Therefore, constitutional courts develop their own specific form of conduct and methodology.[14]

The *second* one has to do with the diverse composition of these institutions.[15] They very often include both experienced lawyers, from the academia and the ordinary judiciary, and government officials, in some cases even former politicians.[16] This feature clearly indicates the often present diversity in the viewpoints and approaches of its members which are often reflected in the internal deliberations and decisions. Such a composition also brings a higher level of awareness of the effects of their decision as well as the political consequences which is another point of support for the claim of relative autonomy of the constitutional discourse.

In support of this relative autonomy of constitutional discourse one has to return to the claim that the main function of constitutional courts, constitutional review, could be distinguished from other related processes in the constitutional system with which constitutional review is usually associated. In keeping with the relative autonomy of the constitutional discourse, constitutional courts are not supposed to cross the line of becoming either a positive legislator or turning into an ordinary court.[17] Consequently, it could be argued that parliamentary legislation and adjudication by ordinary courts could be distinguished from constitutional review in several respects.

Adjudication represents a legal process, a form of legal problem solving exercise or function, which entails a rather technical application of norms to specific facts at hand. It consists of

[11] Comella (n 7) 45-50.
[12] Andras Sajo, 'Constitutional Adjudication in Light of Discourse Theory', quoting Michael J. Perry, Morality, Politics, and Law: A Bicentennial Essay 158 (1998) in Michel Rosenfeld and Andrew Arato (eds) *Habermas on Law and Democracy: Critical Exchanges* (University of California Press 1998) 364.
[13] Sajo (n 11) 338.
[14] The doctrine of proportionality of the FCC is perhaps the most prominent example or horizontal effect of constitutional rights and similar examples.
[15] Jan Komarek, 'The Place of Constitutional Courts in the EU' (2013) 9 European Constitutional Law Review, 425; and Allan F. Tatham, *Central European Constitutional Courts in the Face of EU Membership: The Influence of the German Model in Hungary and Poland* (Martinus Nijhof 2013) 37.
[16] The French *Conseil Constitutionnel* is the well-known example here. Namely, former presidents of the French Republic are members of the CC *ex officio*. Stone Sweet argues also for the example of Italy in same regards, Stone Sweet (n 9) 46-49. See also Comella (n 7) 42.
[17] Comella (n 7) 50.

syllogistic reasoning which does not require such a creative input by judges.[18] This sort of understanding of adjudication by the ordinary judiciary does not fit even the core function and role of constitutional courts. Claiming that constitutional courts merely adjudicate would substantially narrow their true function. In this sense one could argue that there are three main reasons why constitutional review is different from ordinary adjudication.

First, as result of the nature of constitutional provisions which often incorporate broad language, open ended clauses and ambiguous phrases, there is an obvious need for constitutional review to be more creative than adjudication.[19] The very fact that constitutional review involves a determination of constitutionality of statutory norms that consists of an analysis of abstract principles and comparison of legal norms with different legal strength surely makes the difference.[20] In other words, constitutional courts engage in a complex analysis of abstract principles of political morality that involves both normative and policy considerations.[21] Therefore it simply cannot be reduced to a pure legal syllogism.[22] In this sense it could be said that constitutional review is "more creative and discretionary than ordinary adjudication but less than legislation."[23] However this argument should also not be overemphasized because a constitution is part of the same legal order as all other ordinary laws and the application and interpretation of constitutional provisions cannot be fundamentally different from the application and interpretation of other legal acts. It should be borne in mind that decisions of constitutional courts are supposed to be implemented and abided by the ordinary judiciary as well and therefore they should follow their line of reasoning and methodology to certain extent.[24]

Second, the effect and scope of the decision of constitutional courts is a crucial point of differentiation from ordinary adjudication. Different from ordinary courts, the decisions of constitutional courts are valid *erga omnes* instead of *inter partes*. Furthermore, the effect of a constitutional review by constitutional courts could be the pronouncement of certain legal acts null and void and not only their non-application as it is the case in the decentralized model of constitutional review.[25] Lastly, there is no possibility of appeal against a decision of a constitutional court. Therefore, the leverage of a particular decision rendered by constitutional

[18] For more on this Sajo (n 11) 360-362.
[19] Mauro Cappelletti, *Judicial Review in the Contemporary World* (Bobbs-Merril 1971) 63; Mauro Cappelletti, *The Judicial Review Process in Comparative Perspective* (OUP 1989) 144; and Sajo (n 12) 361-362.
[20] Ferejohn and Pasquino (n 5) 30-31: "Constitutional adjudication seen this way seems inherently political, in the sense that a constitutional court must deliberate and choose from among alternative normative rules for regulating social conduct" and "Their powers were to be exercised by politically appointed judges, usually drawn from people particularly competent at making abstract comparisons among text, and with the capacity to deliberate about norms and explain decisions, and not necessarily from those with judicial experience", 31.
[21] Patricia Popelier and Aida Araceli Patino Araceli, 'Deliberative Practice of Constitutional Courts in Consolidated and Non-Consolidated Democracies' in Patricia Popelier, Armen Mazmanyan and Werner Vandenbruwaene (eds) *The Role of Constitutional Courts in Multilevel Governance* (Intersentia 2013) 221; Mauro Cappelletti, *Judicial Review in the Contemporary World* (Bobbs-Merril 1971) 63, 145; Comella (n 7) 46-47; and Sajo (n 12) 360-361.
[22] Cappelleti refers to it as technical application of statutes in Mauro Cappelletti, *The Judicial Review Process in Comparative Perspective* (OUP 1989) 133; also Cappelletti (n 20) 63.
[23] Corando Hübner Mendes, *Constitutional Courts and Deliberative Democracy* (OUP 2013) 74.
[24] Popelier and Araceli (n 20) 220; see also Ferejohn and Pasquino (n 5) 33-35; and Sajo (n 12) 363.
[25] Komarek (n 15) 424-425.

court is a lot bigger than those of ordinary courts. The consequences of such decisions are broader and more serious.

Third, very closely related to the previous point as well as to the appointment procedure and composition of constitutional courts is the issue of their political sensibility. Constitutional review involves not only a normative but also policy considerations and therefore it leads to a greater awareness of constitutional courts of the scope and effect of their decisions. It is already well known that "[c]onstitutional hard cases are qualitatively different from ordinary cases because of politics, not because of law".[26] In this way they are led and required to be more politically susceptible. Their legitimacy and their authority depend in many ways on the acceptance of the reasonability of their arguments which are addressed to a broader audience[27] as the constitutionality of a statute is a matter of public interest.[28] Accordingly, they need to have the ability to predict the level of acceptance or resistance to their views, first of all, by the political elites but also among the general public. Then again, the higher level of political susceptibility and responsiveness is determined by the diverse composition of constitutional courts and the method of appointment of constitutional judges.[29]

On the other hand, we should look at how constitutional review differs from ordinary legislation. In essence there are serious structural and procedural specificities between the two processes. There are two crucial points which prove that constitutional review is different from legislation.[30]

First, the character and scope of decisions of constitutional courts and parliaments is one of most serious differences. While constitutional courts are, at least theoretically, defined as 'negative legislators'[31] because they could only decide on the validity of legal acts, legislation, that is, the positive legislator is the one that actually enacts and gives content to legislation. In this sense constitutional courts are not involved in law-making *stricto sensu*[32] while this is the main function of parliaments.[33] Accordingly, constitutional review focuses on problematic areas which are supposedly not in conformity with the constitution through a procedure which cannot be initiated *sua sponte* but only externally, usually by a very limited circle of subjects.

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[26] Hübner Mendes (n 23) 80.

[27] Mark Van Hoecke, 'Constitutional Courts and Deliberative Democracy' in Patricia Popelier, Armen Mazmanyan and Werner Vandenbruwaene (eds) *The Role of Constitutional Courts in Multilevel Governance* (Intersentia 2013) 190-191, discussing the five 'communicative circles' which serve the purpose of legitimization, *first* involving the judge(s)and the parties to the trial, *second* involving more than one court within the same trial, *third* involving the professional interpretative community, *fourth* involving a public forum and *fifth* involving the whole public sphere of society. See also Sajo (n 12) 348.

[28] Hans Kelsen, 'Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution' (1942) 4 The Journal of Politics 187, 191; and Hübner Mendes (n 23) 80.

[29] Maria Dicosola, Cristina Fasone and Irene Spigno, 'Constitutional Courts in the European Legal System After the Treaty of Lisbon and the Euro-Crisis' (2015) 16 German Law Journal 1319; and Kelsen (n 28) 187-188.

[30] Komarek (n 15) 425. He essentially points out five distinct aspects why this is the case and they are related to time and resources of constitutional court and judges, possible participation of other institutions in the proceedings before them, attention of the general public and slight possibility to avoid hard cases, diverse composition and shorter term of office.

[31] Kelsen (n 28) 187ff, he argues that it is actually a legislative function but then again it really depends on the actual legal effect of the decision and whether they have a retroactive effect.

[32] Van Hoecke (n 27) 185.

[33] Hübner Mendes (n 23) 78.

Legislation, however, deals with the regulation of a specific subject in its totality and the process could usually be initiated both internally and externally.

Second, there are significant differences in the nature of the processes. While legislation is dominated by political debates and discourse,[34] constitutional review represents a specific form of a legal discourse. It is true that besides the normative considerations constitutional courts go into the policy implications nevertheless they are confined to law and by legal argumentation and reasoning on which their decisions are supposed to be grounded. Essentially their legitimacy and authority hugely depend on the reasonability of their legal arguments.

The singularity of the constitutional discourse and its relative autonomy from other types of legal, but also, political discourses reveal the specificities of constitutional courts. It becomes evident that these institutions which create and lead the constitutional discourse have special role in the national institutional setting. However, explaining the different nature of constitutional review as opposed to ordinary adjudication and parliamentary legislation and the detachment of constitutional courts from both the ordinary judiciary and parliaments does not reveal the actual perception of constitutional courts. Saying that something is *sui generis* does not tell what it is it only distinguishes it from other related categories. In this sense, *sui generis* is not a definition but only a demarcation. In order to argue for deliberative nature of constitutional courts one needs to dwell on the notions depicting and characterizing constitutional courts in this deliberative sense.

2.2 Constitutional courts as 'public reasoners', interlocutors or deliberators?

The complex nature and function of constitutional courts have lead authors to label this institution under different names such as guardians of the constitution,[35] guardians of the fundamental rights,[36] guardians of the transition towards the democratic rule,[37] guardians of the democratic order[38] and positive[39] or negative legislator.[40] However, these and similar notions of constitutional courts do not encompass all the images and roles that they possess today. Taking this diversity of perceptions of constitutional courts as the starting point of his research Hübner Mendes has distinguished five images or notions depicting the character of constitutional courts which have been presented in the literature so far.[41] The *first* two images are the ones that have dominated the debate on the constitutional courts and have been mentioned above. The first one is the image of constitutional courts as *veto force* under which

[34] However, see Stone Sweet (n 9) 73ff, who discusses the influence of constitutional courts on parliamentary debates turning law-makers in constitutional judges.
[35] Hans Kelsen, *Wer soll der Hüter der Verfassung sein?* (Mohr Siebeck 2008) Robert Chr. van Ooyen (ed); and Lars Vinx, *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*, (CUP 2015).
[36] Aida Torres Perez, 'The Challenge for Constitutional Courts as Guardians of Fundamental Rights in the European Union' in Patricia Popelier, Armen Mazmanyan and Werner Vandenbruwaene (eds) *The Role of Constitutional Courts in Multilevel Governance* (Intersentia 2013) 49-77.
[37] Wojciech Sadurski, *Rights before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer 2005) 43-44.
[38] Samuel Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (CUP 2015), 9.
[39] Allan R. Brewer-Carias, *Constitutional Courts as Positive Legislators: A Comparative Study* (CUP 2013).
[40] Kelsen (n 4) 268-269.
[41] Hübner Mendes (n 23) 2-3.

these courts are supposed to put checks on the law-making processes in the legislative and executive powers by ruling on the constitutionality of the decision taken in those processes.[42] In this sense the constitutional courts are working to establish the institutional balance within the system. The second image is broader and perceives the constitutional courts as *guardians of the constitution* essentially guarding the supremacy of the constitution in the legal order and the values and principles which are enshrined in it. This special role is bestowed by drafters of constitutions to these specialized constitutional institutions distinguishing them from the ordinary judiciary by their nature, institutional design and character and placing them outside of the traditional separation of powers doctrine.[43]

While these two images reflect the typical perception of the traditional function of the constitutional courts, the other three images are directly related to the discursive or deliberative nature of these courts. Characterizing constitutional courts as "exemplary deliberative institutions"[44] does not reveal the true depth of the deliberative nature of these institutions and requires further explanation of this idea. Therefore, by focusing on either the external or internal aspects[45] of this deliberative nature the three images are further clarifying the view that constitutional courts are deliberative institutions. These three images perceive constitutional courts as *public reasoners, interlocutors* and *deliberators.*

The starting point in discussing the three 'deliberative images' of constitutional courts is the notion of constitutional courts as 'custodians of public deliberation'.[46] This minimalist notion stems from the work of theorists of deliberative democracy, most notably Habermas,[47] and it depicts the role of these institutions in securing and promoting the procedures within the decision and law-making processes which are supposed to ensure deliberation. In other words, these courts should not have any substantive or paternalist role but rather serve as silent custodians which would only control the parliaments' work and not scrutinize its legislative outcomes. In this sense the focus of this notion is not on the deliberative performances of the constitutional courts themselves but rather their role of securing the deliberative aspects of the work of other institutions.[48]

Broadening such a narrow understanding of the deliberative aspects of constitutional courts Hübner Mendes distinguishes the three roles based on the level of their manifestation. These notions depict the engagement of constitutional courts in deliberation which "aims at critically evaluating, and perhaps changing, goals or preferences"[49] and not just safeguarding the deliberation in other institutions. In order to better understand this one could group the three

[42] Hübner Mendes (n 23) 2.
[43] Hübner Mendes (n 23) 2.
[44] Ferejohn and Pasquino (n 5) 22. See more on this in John Rawls, *Political Liberalism* (Columbia University Press 2005) 213-236.
[45] John Ferejohn and Pasquale Pasquino, 'Constitutional Adjudication: Lessons from Europe' (2004) 82 Texas Law Review 1692.
[46] Hübner Mendes (n 23) 85-86.
[47] Jürgen Habermas, *Between Facts and Norms: Contribution to a Discourse Theory of Law and Democracy* (MIT 1996)
[48] It is interesting to note that Komarek has taken Habermas' procedural paradigm of law and used it despite his vision of constitutional courts. See Komarek n 15 and Jan Komarek, 'National Constitutional Courts in the European Constitutional Democracy' (2014) 12 International Journal of Constitutional Law 525.
[49] Ferejohn and Pasquino (n 5) 23. This is essentially Aristotle's conception of deliberation.

images in two categories, external deliberation and internal deliberation. *First*, the external deliberative aspects are best seen through the notions of constitutional courts as *public reasoners* and *interlocutors*.[50] According to these images, constitutional courts are perceived through their interaction with other subjects from the political system and society in general without looking at how the deliberation takes place within the court itself.

The constitutional courts as *public reasoners* are essentially perceived as the one that deliver, through their decisions and opinions, the principles and public reason to the society upon which legitimacy of political authority is being founded. It is according to these principles and reason that an action should be judged in a society. Consequently, the broader social discourse should incorporate them. Thus, constitutional courts serve as 'forums of principles'[51] or 'exemplar of public reason'[52] which is created with development of 'sound and correct arguments' expressed by these courts. Furthermore, such an argumentation by the court is conducted through the exercise of 'Socratic contestation', questioning the rationality and legitimacy of certain public acts. In this sense, according to Kumm, constitutional courts represent a "form of legally institutionalized Socratic contestation".[53] Based on this notion one can observe that the constitutional courts as public reasoners engage in a one-sided deliberation. They provide the public reason and principles for the other branches and subjects and they are supposed to be respected within the constitutional and political system.

Through the second external deliberative image, constitutional courts are perceived as *interlocutors*. Here the constitutional courts are perceived as an institution which has the role to initiate and stimulate dialogue in which it participates both actively and passively.[54] Therefore, according to this notion, constitutional courts engage in an actual exchange of arguments and reasons, a true dialogue, with other institutions.[55]

As it could be seen, both of these notions are very much interrelated and there is only a subtle difference between the two. In the words of Hübner Mendes "the qualifying difference is that an interlocutor, unlike a public reasoner, is attentive to the arguments voiced by other branches and dialogically responds to them."[56] Accordingly, while the constitutional court as public

[50] Hübner Mendes (n 23) 86-91.
[51] Hübner Mendes (n 23) 87; and Gerhard van der Schyff, Judicial Review of Legislation (Springer 2010) 63, both of them referring to Ronald Dworkin. For more on law and judicial review as forum of principle see Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985) and Ronald Dworkin, 'The Forum of Principle' (1981) 56 New York University Law Review 469.
[52] Hübner Mendes (n 23) 87 referring to John Rawls, 'The Idea of Public Reason' in James Bohman and William Rehg (eds) *Deliberative Democracy: Essay on Reason and Politics* (MIT 1997).
[53] Mattias Kumm, 'Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review' (2007) 1 European Journal of Legal Studies 4.
[54] Barry Friedman,' Dialogue and Judicial Review' (1993) 91 Michigan Law Review 668. Referring to Michael J. Gerhard, 'The Role of Precedent in Constitutional Decisionmaking and Theory' (1991) 60 George Washington Law Review 84, Friedman argues that: "Courts play two roles in the dialogue: the role of speaker and the role of shaper or facilitator."
[55] Hübner Mendes (n 23) 90-91; or perhaps even conversations according to Margit Cohn, 'Sovereignty, Constitutional Dialogues and Political Networks' in Richard Rawlings, Peter Leyland and Alison Young (eds), Sovereignty and the Law: Domestic, European and International Perspectives (OUP 2013) 248; and Monica Claes, Maartje de Visser, Patricia Popelier and Catherine Van de Heyning, 'Introduction: Constitutional Conversations in Europe' in Monica Claes, Maartje de Visser, Patricia Popelier and Catherine Van de Heyning (eds), *Constitutional Conversations in Europe: Actors, Topics and Procedures* (Intersentia 2012) 3-5.
[56] Hübner Mendes (n 23) 87.

reasoner takes a kind of paternalistic approach by providing the public reason and principles which should be followed only through its active participation, the interlocutor takes on also the passive role of listener in the deliberation and tries to reflect upon the arguments presented by other institutions and participants in the broader deliberation on the specific issues at hand.

Second, the internal deliberative manifestations[57] are encompassed by the notion of constitutional courts as *deliberators*.[58] According to Ferejohn and Pasquino "[i]nternal deliberation by group is the effort to use persuasion and reasoning to get the group to decide on some common course of action."[59] Putting a large value on unity and coherence, legal systems with centralized form of constitutional review by constitutional courts tend to be more internally deliberative.[60] Nevertheless, this fact does not infer that they are involved to a lesser extent in external deliberation thereof, as the two are not mutually exclusive, but on the contrary.[61] Taking into account, not only the structure and composition of these institutions, but also their place within the institutional structure, the internal deliberation is certainly a defining feature which is not covered by the notions depicting the external deliberative aspects of these courts. While the previous two notions have set the constitutional courts in relation to the external actors and their influence thereupon, constitutional courts as deliberators reflect the actual deliberation within the institution itself. It reveals how constitutional justices interact in the 'decisional phase'[62] and what forms of 'collegial engagement'[63] are present in the process of making well-reasoned and coherent decisions. Lastly, this notion goes into the question which factors influence the internal deliberative performances of the courts.

This overview of the main notions depicting the true character of constitutional courts clearly shows the deliberative character of these institutions, both internal and external. Constitutional courts in the national realm not only deliberate within the institution but also, more importantly, initiate the debate outside of it in which they actively participate.

2.3 Constitutional pluralism and constitutional courts as deliberative institutions

Revealing the specific deliberative aspects of the function and nature of constitutional courts sheds perhaps a new light on these institutions but nevertheless it does not explain its relevance in the specific context of European integration. Therefore, one has to try and put the different notions of constitutional courts as deliberative institutions in this context and relate them to the theory of constitutional pluralism.

While all three notions discussed above are relevant for constitutional pluralism and the role of constitutional courts in the judicial dialogue in Europe it is the notions of constitutional courts as external deliberators which are supposed to be emphasized here. As a result of the

[57] For a more detailed account of internal deliberations in courts see Mitchel de S.- O. – l'E. Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (OUP 2009).
[58] This image of constitutional courts is the main focus of Hübner Mendes' book. With the general risk oversimplifying I am just referring to the main elements.
[59] Ferejohn and Pasquino (n 45) 1692.
[60] Ferejohn and Pasquino (n 45) 1692.
[61] Hübner Mendes (n 23) 93-99; but cf Ferejohn and Pasquino (n 45) 1692.
[62] Hübner Mendes (n 23) 109-113.
[63] Hübner Mendes (n 23) 108-109.

importance of the interactions between the distinct legal orders and between the judicial instances, respectively, the focus is put particularly on the notion of constitutional courts as external deliberator. This does not reflect, nevertheless, the intention of underestimating the internal aspect of deliberation of constitutional courts which is also very important. It only puts the focus on the external aspects for the purposes of the present discussion.

Even among the two notions of constitutional courts as external deliberators one can recognize the most fitting notion for constitutional pluralism in Europe. Constitutional courts as interlocutors are in the best position to contribute to the realization of the normative principles of constitutional pluralism. In contrast to the notion of constitutional courts as public reasoners, interlocutors are both 'active listeners' and 'active speakers' as they enter into two or more sided exchange of legal arguments. Seen from the perspective of the European Union they have a say in providing clear answers as well as posing well-reasoned questions relating to EU law. Under circumstances of existing constitutional pluralism constitutional courts cannot be the sole public reasoner in Europe as they are required to engage with, above all, CJEU but also other constitutional courts in the process of defining the public principles and reason of the common European constitutional area. Through their active engagement and participation in the judicial dialogue as interlocutors, constitutional courts become essentially more attentive and conscience of their potential constructive role in the EU.

Constitutional pluralism, unlike the traditional theories of the relationships of different legal orders, does not insist on the finality[64] and "last word"[65] in the legal discourse, which is usually the result of the hierarchical perception of this relationship, but it insists on the circularity[66] and heterarchy.[67] Consequent to this reality, as observed by constitutional pluralists, none of the highest judicial institutions in the different legal orders can deny participation in the judicial dialogue in Europe without taking a risk of being deprived of the opportunity to contribute to the common legal order[68] thus being potentially marginalized. It is only through contestation and dialogue under circumstances of heterarchy that convergence and stability could be secured.[69] Potential conflicts under constitutional pluralism could be managed only through the

[64] Stone Sweet (n 9) 115 and 132; Zurn (n 10) 285; Sajo (n 12) 367-368, he argues that "[…] constitutional adjudication is an opportunity for lawmaking to be carried out under the circumstances of rational discourse […]is not the end of a larger legislative social discourse, it is only a stage of modern lawmaking." Friedman (n 54) 643ff.
[65] Conrado Hübner Mendes, 'Neither Dialogue nor Last Word: Deliberative Separation of Powers III' (2011) 5 Legisprudence 1; Amaryllis Verhoeven, European Union in Search of a Democratic and Constitutional Theory, (Kluwer Law International 2002) 299; and Komarek (n 48) 532.
[66] Jan Komarek, 'Institutional Dimension of Constitutional Pluralism' Pluralism' in Matej Avbelj and Jan Komarek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012) 246-247; Sajo (n 12) 344-345; and Armen Mazmanyan,'Constitutional Courts: Perspectives from Consolidated and Non-Consolidated Democracies' in Patricia Popelier, Armen Mazmanyan and Werner Vandenbruwaene (eds), *The Role of Constitutional Courts in Multilevel Governance* (Intersentia 2013) 168-169.
[67] Daniel Halberstam, 'Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States' in Jeffrey L. Dunoff and Joel P. Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP 2009), 337; and Matej Avbelj and Jan Komarek (eds), 'Four Vision of Constitutional Pluralism', EUI Working Paper Law 2008/21, 12, 25.
[68] Matej Avbelj and Jan Komarek (eds), 'Four Vision of Constitutional Pluralism', EUI Working Paper Law 2008/21, 20.
[69] Lars Viellechner, 'Responsiver Rechtspluralismus: Zur Entwicklung eines transnationalen Kollisionsrechts' (2012) 51 Der Staat 559, 575; and Nico Krisch, 'The Case of Pluralism in Postnational Law' in Grainne de Burca and Joseph H. H. Weiler (eds) *The Worlds of European Constitutionalism* (CUP 2011) 260-261.

interaction of courts in Europe.[70] Furthermore, as Maduro claims, under circumstances of competitive legal sovereignty[71]the integrity and coherence of EU law are very much conditioned by the judicial dialogue.[72] This explains the strong emphasis that constitutional pluralism puts on the openness and dialogue particularly among judicial institutions in Europe.

Against this background, the notion of constitutional courts as interlocutors fits perfectly into the conception of constitutional pluralism. In the words of Hübner Mendes "[d]ialogical courts [interlocutors] know that, in the long run, last words are provisional and get blurred in the sequence of legislative decisions that keep challenging the judicial decisions irrespective of the court's formal supremacy."[73] In the more complex context of the EU, compared to the national one, Hübner Mendes' conclusion is mirrored into a larger image. While the national parliaments are being continuously deprived of effective power and the European parliament is struggling to find its place under the sun, national constitutional courts in relation to EU law are mostly 'challenged' by the CJEU.[74] The latter has stepped in to compensate for the absence of a stronger and genuine legislative power and has become 'the motor of legal integration' in Europe. In this way the interaction of the highest judicial instances of the legal orders has an increased significance in the process of legal integration. In this sense constitutional courts represent the most suitable interlocutors on constitutional issues in the constitutional discourse in Europe.[75]

Taking this into consideration one should look at another connecting point between constitutional pluralism and the notions of constitutional courts as external deliberators. Namely, Hübner Mendes in his discussion on constitutional courts as public reasoners refers to the work of Mattias Kumm, one of the most prominent representatives of constitutional pluralism. Hübner Mendes argues that Kumm is one of the authors which reflect the notion of constitutional courts as public reasoners by arguing that these institutions are incorporating a form of legally institutionalized practice of Socratic contestation.[76] This practice involves the critical assessment of whether the acts of public authorities are based on good reasons.[77] The critical assessment in essence represents the courts engagement with public authorities in which there is an exchange of arguments by posing question and receiving answers.[78] However, such an assessment and engagement are not really a one sided delivery of public reason by the constitutional courts, as claimed by Hübner Mendes. Rather, this represents a conversation in which "the parties are the ones that advance arguments" while the court is the one asking the

[70] Maduro (n 1) 524.
[71] Maduro (n 1) 521.
[72] Maduro (n 1) 519, Mattias Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty' (2005) 11 European Law Journal 302; Marta Cartabia, 'Europe and Rights: Taking Dialogue Seriously' (2009) 5 European Constitutional Law Review 7; and Verhoeven (n 65) 300-301.
[73] Hübner Mendes (n 23) 91.
[74] Van Hoecke (n 27) 188.
[75] Xavier Groussot, 'Constitutional Dialogues, Pluralism and Conflicting Identities' in Matej Avbelj and Jan Komarek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012) 327.
[76] Kumm (n 53) 3.
[77] Kumm (n 53) 13ff.
[78] Kumm (n 53) 15-16.

questions.[79] Therefore it seems like Kumm's views are inadequately simplified and conclusions are drawn based on the analysis of only one of his articles dealing with constitutional courts.[80] Additional arguments proving Hübner Mendes' conclusion wrong in this sense could be found elsewhere in Kumm's work. Namely in several of his articles Kumm perceives constitutional courts in the EU context essentially as interlocutors participating in the exercise of "mutual deliberative engagement"[81] as well as "constructive deliberative engagements."[82] This sort of engagement resembles very much the same one referred to within the practice of Socratic contestation. While in the latter constitutional courts are engaging a larger number of national public authorities, in the EU context they engage with their judicial counterpart, the CJEU. This broader view of Kumm's work leads us to the conclusion that he perceives constitutional courts much more as interlocutors than as public reasoners. Even if the practice of Socratic contestation is taken on its own, still, constitutional courts have a role to play in the European realm. The practice of questioning the basis of certain legal acts is the essential part of the judicial dialogue with the CJEU through the preliminary reference procedure.

Arguing that constitutional courts as interlocutors fit perfectly well within the perception of constitutional pluralism on the present relationship between legal orders does not, however, reveal much about the specific added value which these institutions bring to this relationship. Analyzed through the framework of constitutional pluralism it is argued that one can recognize three advantages of the involvement of constitutional courts in EU matters compared to other institutions in the national setting, above all ordinary judiciary.

First, constitutional courts adequately channel the dialogue by providing clarity[83] to the arguments of a contention against EU law providing an adequate deliberative forum pooling different types of interests and claims,[84] including those of the national disempowered groups as result of the European integration.[85] Constitutional courts, as both reason givers and interlocutors, are funneling the main arguments presented by different parts of the national institutional structure especially when delicate issues and fundamental constitutional principles are concerned.[86] In this sense they are bringing a qualitative difference at the EU level, mirroring their interlocutor image already existent at the national level. This qualitative difference is manifested also in relation to the ordinary judiciary which is often unsuitably positioned, especially in civil law countries, to grasp the particularity of the constitutional discourse amid the huge amount of workload and inapt judicial training in this regard.[87] The

[79] Kumm (n 53) 16.
[80] Hübner Mendes (n 23) 89-90.
[81] Kumm (n 72) 301-302.
[82] Kumm (n 72) 269.
[83] Ferejohn and Pasquino (n 5) 33. For the privileged position of the Austrian Constitutional Court as interlocutor of the CJEU and its roles Merli claims that "[d]er VfGH möchte...ein privilegierter Dialogpartner des EuGH sein, der österreichische Fälle *filtert*, sie bei entsprechenden Voraussetzungen selbst *klärt*, sonst für den EuGH *aufbereitet* und nach einer Vorabentscheidung die für das österreichische Rechtssystem passenden Konsequenzen auch mit genereller Wirkung zieht", Franz Merli,'Umleitung der Rechtsgeschichte', 20 Journal für Rechtspolitik (2012), 360, [emphasis added].
[84] Zurn (n 10) 289-290.
[85] Komarek (n 48) 543.
[86] Comella (n 7) 137.
[87] Cappelletti (n 20) 63-64; Cappelletti (n 21) 142-143. He claims that "[t]he bulk of Europe's judiciary seems pshycologically incapable of the value-oriented, quasi-political functions involved in judicial review...[t]heir

clarity that the constitutional courts bring in this sort of judicial dialogue is that they distinguish constitutional issues from technical legalism.[88]

Second, considering their institutional role constitutional courts are sending credible warning signals[89] to Luxembourg, also to other national and EU institutions, thus drawing their attention to the seriousness of issues at hand.[90] Building upon the previous point of clarity, one could argue that constitutional courts are explicitly indicating that fundamental questions of constitutional law are at stake for which there are usually no evident and clear answers as it is the case when a technical legalism is concerned.[91] Such signals should be welcomed by the CJEU in order for it to pay a particular attention to the issue at hand also in light of its duty to respect for constitutional identity of member states.[92] In this sense the principle of deference to certain claims made by the constitutional courts should be employed by the CJEU as well. Therefore, when it comes to constitutional issues constitutional courts are the most important counterparts for this court.

Third, aware of the impact of their decisions as result of both their institutional design and their placement between law and politics, constitutional courts are more likely to be prudent in exceptional situations of conflict between the legal orders. If this type of sensibility of the constitutional courts is already visible in the national realm it could be even more recognizable at the EU level where the possible impact of their decisions is even greater.[93] It should make constitutional courts more willing to enter and engage in a judicial dialogue with its European counterpart instead of isolation and one-sided rulings on issues based solely on the national perspective. Nevertheless, prudence is and should also be manifested in their relations with the CJEU.

[continental judges'] training develops skills in technical rather policy-oriented application of statutes. The exercise of judicial review, however, is rather different from the usual judicial function of applying the law." Zurn (n 10) 282. Zurn argues that "ordinary courts could not announce new or substantively elaborated principles of constitutional law in order to decide individual cases and controversies. They would be limited to those which were already established by the extant system of higher-law elaboration."

[88] Zurn (n 10) 282-284. There are also clear benefits from a deliberative democratic perspective of this sort of separation.

[89] Arthur Dyevre, 'Domestic Judicial Non-Compliance in the European Union: Isolated Accident or Omen of Judicial Armagedon' (2012), 28ff. available at: http://works.bepress.com/arthur_dyevre1/7 last visited 07.10.2018.

[90] Christoph Möllers, 'Constitutional *Ultra Vires* Review of European Acts Only Under Exceptional Circumstances; Decision of 6 July 2010, 2 BvR 2661/06, *Honeywell*' (2011) 7 European Constitutional Law Review 166, Dieter Grimm, 'The European Court of Justice and National Courts: The German Constitutional Perspective after the Maastricht Decision' (1997) 3 Columbia Journal of European Law 238, 241; and Comella (n 7) 137.

[91] Zurn (n 10) 289.

[92] Torres Perez (n 3) 114: "For the sake of the legitimacy of its interpretative decisions, the ECJ ought to be responsive to the different arguments brought before this Court, signaling to the participants that 'they have been heard and recognized as important participants in the debate whose arguments must be answered'"[references are omitted]; Joseph H. H. Weiler, 'Epilogue: The Juridical Apres Nice' in Grainne de Burca and Joseph H. H. Weiler (eds), *The European Court of Justice* (OUP 2001) 225: "Especially in its Constitutional jurisprudence it is crucial that the Court demonstrate in its judgments that national sensibilities were fully taken into account", and Leonard F. M. Besselink, 'Case C-208/09, *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, Judgment of the Court (Second Chamber) of 22 December 2010' (2012) 49 Common Market Law Review 2, 689: "The ECJ may be a more active censor than national constitutional courts, but *Sayn-Wittgenstein (and Omega)* suggests that it is more indulgent and tolerant if the national constitutional court has pronounced on the matter."

[93] Comella (n 7) 137.

One might object to these three roles of constitutional courts in Europe based on the argument that they are not exclusive and that also the ordinary judiciary could realize them as well. This argument might seem to be convincing, but only on a first glance. It is exactly due to the specificities of the constitutional discourse and the special place and mandate of constitutional courts that they have a special weight and leverage in fulfilling the three roles. Even though other ordinary courts might serve some of these roles they cannot, as result of the differences between ordinary adjudication and constitutional review, bring the true added value as constitutional courts could. As a matter of fact while ordinary courts might be fulfilling similar roles "[c]onstitutional courts, however, tend to do so with more force and more success, as a result of their special mandate and authoritative position in the national legal order."[94]

These advantages are best observed when put in two contexts. First, the constitutional legitimization of EU law in cases of constitutional review of EU legal acts. Second, the possible development of a constructive role of constitutional courts in the context of preliminary reference procedure, especially, after the latest shift in the attitude of these courts.[95] This sort of engagement of constitutional courts in direct or indirect forms of judicial dialogue will be the subject of the subsequent sections.

3 Constitutional courts and constitutional legitimacy of EU Law

The deliberative performances of constitutional courts in the EU could be best perceived in two contexts which are part of the broader phenomenon of judicial dialogue. One of these two specific contexts is related to a function of constitutional courts which is rarely discussed, also in the national realm, the legitimizing function of constitutional courts. This function becomes particularly evident in the EU context. In order to tackle and dwell on this specific role of constitutional courts in more detail, one needs to provide first the framework and define the crucial notions of judicial dialogue and constitutional legitimacy. Only after such an explanation can one turn to the specific aspects of constitutional courts' role in the judicial dialogue in Europe.

3.1 Judicial dialogue in Europe and constitutional courts

The interactions between national courts and the CJEU have been the driving force for legal integration in Europe. This relationship has played a significant role in the empowerment of the CJEU becoming the 'motor of integration' in Europe. Because of this reason it is of the utmost importance to put this relationship into a proper theoretical framework that could help

[94] Maartje de Visser, 'Changing the Conversation in the Netherlands? Two Recent Legislative Proposals Evaluated from a European and Comparative Perspective' in Monica Claes, Maartje de Visser, Patricia Popelier and Catherine Van de Heyning (eds), *Constitutional Conversations in Europe: Actors, Topics and Procedures* (Intersentia 2012) 365.

[95] Andrej Lang, 'Das Potential des Vorlageverfarherns für Europas Pluralistische Verfassungsverbund', from 28.11.2004 available at: http://verfassungsblog.de/wie-verfassungsgerichte-miteinander-reden-das-potential-des-vorlageverfahrens-fuer-europas-pluralistischen-verfassungsverbund/ (Verfasungsblog, 28.11.2014) last visited 07.10.2018.

us analyze the different patterns of interactions. In this sense, the dominant paradigm for the interaction between national courts and the CJEU has been the one of judicial dialogue.[96]

Judicial dialogue as a notion poses a great challenge in the endeavor of providing a single definition for it. Namely, there has been great confusion over the actual scope of the notion as well its precise meaning.[97] Different understandings of the notion range from exchange of information and ideas in diverse judicial networks,[98] the referral to decision of foreign and international courts[99] or the interaction between international and national courts.[100] Be that as it may, for the purposes of this chapter the third understanding seems to be most fitting as the overarching focus here is put on the interaction between national constitutional courts and the CJEU.

Having this understanding of judicial dialogue as a starting point one can distinguish three characteristics[101] of judicial dialogue. First, the judicial dialogue is rather prospective than retrospective in a sense that it does not involve review of previous decisions of other courts.[102] Thus the focus of the interaction is put on future cases and the resolution of future legal issues and the implications thereof. Therefore the only instance in which they turn to previous cases is for such purposes.[103] For example, the preliminary reference procedure is aimed at providing interpretation of EU law for resolving the case before the national courts and not for any type of review of their previous decisions by the CJEU.

The second one has to do with the bi-directionality of judicial dialogue.[104] It reflects the idea that both sides have equal opportunities to participate and contribute to the judicial dialogue. In this sense, if genuine judicial dialogue is to exist under circumstances of bi-directionality,

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[96] Anne-Marie Slaughter, 'A Typology of Transjudicial Communication' (1994) 29 University of Richmond Law Review 99, 135-136. However, there are numerous voices which decline judicial dialogue as a notion and suggest more suitable notions such as negotiation, Karen J. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (OUP 2003) 38; see also Dyevre (n 89) 8-9, or proposing conversation Claes, de Visser, Popelier and Van de Heyning (n 55); and Cohn (n 55). For a more detailed analysis on the judicial dialogue in the EU context see Torres Perez (n 3) 95ff.

[97] Torres Perez (n 3) 106ff.

[98] For more on judicial networks see Anne-Marie Slaughter, *A New World Order* (Princeton University Press 2005) 65ff; and Monica Claes and Maartje de Visser, 'Are You Networked Yet? On Dialogues in European Judicial Networks' (2012) 8 Utrecht Law Review 2.

[99] Laurence R. Helfer and Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 The Yale Law Journal 117: "judicial dialogue: the cross-citation of decisions by tribunals that have no direct relationship to one another.."; Monica Claes and Bruno De Witte, 'The Role of Constitutional Courts in the European Legal Space' in Patricia Popelier, Armen Mazmanyan and Werner Vandenbruwaene (eds) *The Role of Constitutional Courts in Multilevel Governance* (Intersentia 2013) 99; and Tara Leigh Grove, 'The International Judicial Dialogue: When Domestic Constitutional Courts Join the Conversation' (2001) 114 Harvard Law Review 2049.

[100] Carla Zoethout, 'On the Different Meanings of 'Judicial Dialogue'' (2014) 10 European Constitutional Law Review 176; and Dyevre (n 89) 7.

[101] Torres Perez (n 3) 118, argues for six prerequisites for judicial dialogue in her book which essentially coincides with the three characteristics here and their meaning. These six prerequisites for dialogue are: (1) differing viewpoint (2) common ground of understanding (3) lacking complete authority over the other (4) mutual recognition and respect (5) equal opportunity to participate and (6) continuity over time.

[102] Robert B. Ahdieh, 'Between Dialogue and Decree: International Review of National Courts' (2004) 79 New York University Law Review 2029, 2051; see also Torres Perez (n 3) 124.

[103] Ahdieh (n 102) 2051-2052.

[104] Ahdieh (n 102) 2050-2051. Through this judicial dialogue actually becomes one of the crucial parts of judicial comity. For more on judicial comity and its four strands see Slaughter (n 96) 82ff.

then the dialogue is supposed to be conducted among co-equals and under equal opportunities for participation.[105] Accordingly, there are no privileges for either of the sides and this is the result of lack of any type of subordination between the sides in this type of relationship. Therefore, even the possibility of mutual review of judicial decisions on both sides does exist under the bi-directionality. However, the bi-directional interaction does not mean that both or all sides will be equally active, especially not at the same time. How active one or another side will be essentially depending on the specificities at hand. On the other hand, for actual and genuine bi-directionality to take place there should be continuity over some time.[106] This is once again the result of the circularity of law and of judicial review,[107] particularly in the European context which necessitates a long term constructive dialogue, especially among courts, in order to reach an agreement or a solution by exercise of mutual respect, accommodation of diversity and convergence.[108] Also here the preliminary reference procedure serves as a very good example. National courts send questions on specific application and interpretation of EU law to the CJEU but how active they will be within this procedure will depend on them. Whether they will provide and suggest to the CJEU any alternatives for resolving the legal question at hand or not is also a matter of their own finding. The complete issue is not necessarily resolved in all cases with the first answer of the CJEU but it happens that the same or some other national court follows up on the ruling and reasoning of the CJEU particularly in cases when this does not seem to be satisfactory.[109] Additionally, in these latter situations, also disobeying certain aspects of the CJEU reasoning might be conceivable under bi-directionality.

The third characteristic of judicial dialogue is its voluntariness.[110] Courts are free to engage with other courts in this sort of interaction; they are not forced or strictly obliged to do it. This is also an aspect of the previous characteristic because it stems as well from the underlying idea of the limited role of judicial power in the dialogue between the courts. In the words of Ahdieh, "[n]either court enjoys authority over the other; hence, their engagement is a dialogue rather than a monologue."[111] Put again in the EU context, national courts have a certain level of discretion in deciding whether to send a preliminary reference to the CJEU or not.[112] Even in

[105] Rike Krämer and Judith Janna Märten, 'Der Dialog der Gerichte – die Fortentwicklung des Persönlichkeitsschutzes im europäischen Mehrebenenrechtsverbund' (2015) 50 Europarecht 174: „Kernstück eines Dialoges ist damit auch, das Gespräch auf Augenhöhe." And Torres Perez (n 3) 126ff.

[106] Torres Perez (n 3) 129; and Claes, de Visser, Popelier and Van de Heyning (n 55) 3, they term this as "*successive exchange of legal arguments by courts*", 3. Cf Bruno de Witte, 'The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty Revision Process' in Paul Beaumont, Carole Lyons and Neil Walker (eds.) *Convergence and Divergence in European Public Law* (Hart 2002) 41. He claims that in EU it is not the case.

[107] Jan Komarek, 'Institutional Dimension of Constitutional Pluralism' in Matej Avbelj and Jan Komarek (eds.), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012) 246-247; and Hübner Mendes (n 23) 90-9.

[108] On these positive effects of dialogue see Torres Perez (n 3) 112-130.

[109] Torres Perez (n 3) 129.

[110] Ahdieh (n 102) 2053.

[111] Ahdieh (n 102) 2053. This characteristic is also recognized by Torres Perez. She is terming it as a separate characteristic of judicial dialogue in which there is a lack of complete authority over the other in a sense that "[e]ach court should have the capacity to exercise some pressure over the other systems' courts, but not to impose its will." Torres Perez (n 3) 124.

[112] Torres Perez (n 3) 139-140 referring to Renaud Dehousse, *The European Court of Justice* (St. Martin's Press 1998); and Monica Claes, *The National Courts Mandate in the European Constitution*, (Hart 2006) 249.

the case of the highest national courts, when they decide in the last instance,[113] still there is substantial leeway for them not to refer the case to the CJEU.[114]

Furthermore, there are different types of classification of judicial dialogues. The first important classification is based on the status of the courts and whether the dialogue is led between counterparts with same status, such as between national courts only, or with different status. Accordingly there is horizontal and vertical judicial dialogue.[115] The former is related to the interaction of courts of same status regardless if national, supranational or international.[116] The most common example is the referral and use of case-law between the highest national judicial instances such as supreme or constitutional courts. On the other hand, there is ongoing horizontal judicial dialogue between international and supranational courts such as ECHR and CJEU.[117]

The vertical dialogue is the dialogue which is conducted between national courts and supranational or international courts. The prime example for this type of dialogue is the one that takes place between national courts and the CJEU, particularly within the framework of preliminary reference procedure. This dialogue is the most structured in comparison to other forms of vertical dialogue.[118]

Taking into consideration this distinction one should not, however, draw the wrong conclusion that vertical dialogue in essence draws to the hierarchical relationship between courts of different status.[119] More specifically even in a vertical judicial dialogue of courts of distinct but overlapping jurisdictions there is a lack of significant dimension of power.[120] Therefore terming this type of dialogue as vertical does not contradict the relationship of heterarchy of the different legal orders.[121] As a matter of fact, exactly this type of inaccurate assumption has guided certain authors[122] to argue for a horizontal dialogue among national courts and the CJEU even though they have a different status, national and supranational courts respectively. Nevertheless, these views could also be defended on the grounds of different importance given to the actual status of courts and focusing more on the judicial power dimension, or the lack of it, and the directness of the dialogue. Accordingly, as result of the lack of hierarchy between

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[113] CJEU, Case C-224/01 *Gerhard Köbler v Republik Österreich*, Judgment of 30 September 2003, ECLI:EU:C:2003:513.

[114] CJEU, Case C-283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, Judgment 6 October 1982, ECLI:EU:C:1982:335. See Daniel Sarmiento, 'The Silent Lamb and the Deaf Wolves' in Matej Avbelj and Jan Komarek, *Constitutional Pluralism in the European Union and Beyond* (Hart 2012) 313-314, on the wide discretion for national courts.

[115] Slaughter (n 96) 103ff.

[116] Slaughter (n 96) 103; and Allan Rosas, 'The European Court of Justice in Context: Forms and Patterns of Judicial Dialogues' (2007) 1 European Journal of Legal Studies 2, 13. The horizontal dialogue represents the fifth category in his classification of judicial dialogue.

[117] Slaughter (n 96) 105-106.

[118] Slaughter (n 96) 106ff; and Krämer and Märten (n 105) 175.

[119] Rosas (n 116) 6-7; and Krämer and Märten (n 105) 174.

[120] Ahdieh (n 102) 2056, 2157.

[121] In relation to this type of judicial dialogue the lack of hierarchy is argued even outside of the European context. See Tara Leigh Grove, 'The International Judicial Dialogue: When Domestic Constitutional Courts Join the Conversation' (2001) 114 Harvard Law Review 2058-2059.

[122] Groussot (n 75) 320. He claims that direct dialogue has a vertical character while indirect has a horizontal character as it is mostly conducted between national constitutional courts and the CJEU. See also Torres Perez (n 3) 117.

the judicial instances of different legal orders these authors perceive the interaction as horizontal.

The second classification is based on the level of responsiveness and mutuality of engagement of courts participating in the dialogue.[123] Accordingly, judicial dialogue could be direct or indirect. More precisely, the crucial criterion for distinguishing direct from indirect dialogue is "the awareness on the part of both participants of whom they are talking to and a corresponding willingness to take account of the response."[124] While this awareness is clearly present in the case of direct dialogue, this is not so clear when indirect dialogue is concerned.[125] On the one hand, applying this classification to the European context it could be claimed that we have a direct judicial dialogue when national courts are communicating with the CJEU through the preliminary reference procedure. On the other hand, indirect dialogue is conducted when the communication does not follow this structured path and without a direct interaction but rather arguments and views are communicated to the counterpart through a reasoning presented in decisions. Martinico refers to this type of interaction as a 'hidden dialogue' which is consisted of "unorthodox avenues of judicial communication, that is, methods of judicial communication other than the preliminary ruling procedure […] which are not formalized according to the letter of the treaties."[126]

Lastly, consistent with the distinction drawn in the previous section between constitutional discourse and other legal discourses and between constitutional courts and ordinary judiciary one is supposed to follow this line of thought also when judicial dialogue is concerned. Namely, when fundamental constitutional issues are part of this dialogue then national constitutional courts are potentially taking part in a particular form of judicial dialogue. This dialogue has been named by some authors as constitutional dialogue.[127] Nevertheless, and regardless of the fact that this needs to be kept in mind here the notions of judicial and constitutional dialogue will be used interchangeably. This is done in order to avoid the confusing debate over the exact meaning of constitutional dialogue and for the sake of clarity since there is obvious difficulty in distinguishing the two meanings.[128] On the other hand, constitutional dialogue has been first used in order to address a phenomenon of a different type of "exchanges" between courts

[123] Slaughter (n 96) 113.
[124] Slaughter (n 96) 113.
[125] Slaughter argues that this sort of interaction is not a dialogue at all but rather a monologue, Slaughter (n 96) 113.
[126] Giuseppe Martinico, 'Judging in the Multilevel Order: Exploring the Techniques of 'Hidden Dialogue', King's Law Journal (2010), 258. On other unconventional or 'silent' modes of judicial communications see Sarmiento (n 114) 285ff.
[127] Groussot (n 75); Alec Stone Sweet, 'Constitutional Dialogues in the European Community' in Anne-Marie Slaughter, Alec Stone Sweet and Joseph H. H. Weiler (eds.) *The European Court and the National Courts: Legal Change in its Social, Political, and Economic Context* (Hart 1998); and Sally J. Kenney, William M. Reisinger and John C. Reitz, *Constitutional dialogues in Comparative Perspective* (Palgrave 1999).
[128] On this differentiation see for example Monica Claes, *The National Courts Mandate in the European Constitution*, (Hart 2006) 391, 401, 423ff. She terms the constitutional dialogue taking place in the EU as constitutional – constitutional dialogue in order to distinguish it from the national constitutional dialogue. Tatham (n 15) 282. He defines constitutional dialogue as following: "Constitutional courts – together with other national actors e.g., national and regional parliaments and governments, as well as public opinion – participate in constitutional dialogues in Europe."

conducting constitutional review and legislative institutions in the purely national context.[129] While judicial dialogue seems to be a broader term than constitutional dialogue, still it is more precise for the present context as it addresses the judicial interactions, however on the issue of constitutional relevance. Therefore, the notions of judicial and constitutional dialogue will be used interchangeably.

In sum, discussing the role of constitutional courts in judicial dialogue in Europe it is quite reasonable that the focus here is put on the vertical dialogue, both direct and indirect. While the next section is discussing the direct vertical dialogue between constitutional courts and the CJEU in this section it will be further discussed how constitutional courts provide constitutional legitimacy to EU law through indirect dialogue with CJEU. But before I turn to the specific practice of how constitutional courts do this one should first define constitutional legitimacy.

3.2 The legitimizing function of constitutional courts and the constitutional legitimacy of EU law

There are many core functions of constitutional courts in the national legal and political systems. Stone Sweet argues that among the four basic functions of constitutional courts is also the one in which these courts legitimize public policy as enacted through statutes and government acts.[130] This legitimization function[131] provides a "certificate of authenticity"[132] for national legislation. However this legitimization is symbolic and it does not reflect any type of agreement or disagreement with the details of the enacted public policy as to their general appropriateness.[133] The most a constitutional court can do is check whether the legislative output could be "qualified as a collective judgment of reason"[134] based on the values and principles set out in the constitution. Thus the result of this function of constitutional courts can be perceived as the determination of existence of sufficient procedural assurances that the legal acts are not unjust.[135] In this manner law receives its constitutional legitimacy.

Nevertheless, this legitimizing function of constitutional courts is not as evident as one might conclude. Namely, out of all the member states of the EU, only in the Italian constitution is constitutional legitimacy related to the constitutional court. No other constitution in Europe has

[129] For instance constitutional dialogue has been first used and it is most often used in the national context as a dialogue taking place between courts conducting judicial/constitutional review and the legislative or other political institutions, see for example Peter W. Hogg and Allison A. Bushell, 'The Charter Dialogue between Courts and Legislators (Or Perhaps the Charter of Rights Isn't a Bad Thing after All)' (1997) 35 Osgoode Hall Law Journal 79; Friedman (n 54) 655-658; Cohn (n 55) 239-243; and Mazmanyan (n 66) 170.

[130] Stone Sweet (n 9) 137-138. The other three functions are: (1) they operate as 'counterweight' to majority rule (2) they pacify politics and (3) they protect human rights.

[131] Alec Stone Sweet, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective* (OUP 1992) 110. Referring to Louis Favoreu he argues that this is the universal functions of constitutional courts. See also Sajo (n 11) 337 and 369.

[132] Stone Sweet (n 131) 110.

[133] Stone Sweet (n 131) 112; and Grzegorz J. Wasiewski, 'Constitutional Jurisdiction in Poland and Germany: A Note', *Review of Central and East European Law* (2007) 443, 453, commenting the *Southwest* decision he argues that "its [FCC's] task was not to examine the wisdom of the act but, rather, the legality thereof."

[134] Kumm (n 53) 27. Kumm essentially argues for two conditions for constitutional legitimacy which need to be cumulatively fulfilled. One is related to the political process while the other is related to the outcome of the process.

[135] Randy Barnett, 'Constitutional Legitimacy' (2003) 103 Columbia Law Review 1, 113.

such a wording on this matter.[136] Nevertheless, while constitutional legitimacy in this case is used as synonymous for constitutionality of only national sources of law[137] the same notion in our context is slightly broader. It involves a bit more than just a symbolic exercise of testing the conformity of one legal text with another.

But how is this legitimizing function of constitutional courts relevant for EU law? As a matter of fact, this function of constitutional courts is, although not as apparent, even more important in the EU than in the national context. Bearing in mind the lack of genuine legislative power in the EU and the continuing democratic deficit, it becomes easier to claim that the legitimacy of EU law is drawn from a complex relationship between national and EU institutions. As Maduro argues "EU law is the product of discourse among the actors of a broad European legal community in which the voice of some of those actors may even oppose the will of the Court of Justice."[138] Within this European legal community national constitutional courts are very important actors and sometimes oppose the CJEU on fundamental constitutional issues. In this sense it could be easily claimed that the EU law legitimacy is constructed from the bottom-up.[139] The input of national courts and particularly of national constitutional courts is very important because they are contributing to the development of the constitutional discourse in Europe. As participants in the interpretation and application of EU law under their European mandate they are very important in this construction of legitimacy.[140]

As a result of this understanding of constitutional legitimacy and the legitimacy of EU law it is argued here that constitutional courts have developed a specific role in Europe in which they are providing EU law with constitutional legitimacy in the national legal order.[141] Constitutional courts are best placed and represent the only national institutions which are empowered to deliver the constitutional legitimacy to EU law. Their deliberative nature, or better said, constitutional courts as interlocutors through their different communicative arrangements directly contribute to the legitimacy of EU law since these types of arrangements

[136] The Constitution of the Italian Republic, Art. 134, Art.136 and Art. 137, see also Lukas Prakke and Constantijn Kortmann (eds) *Constitutional Law of 15 EU Member States* (Kluwer 2004) 528-531, Giuseppe Franco Ferrari, 'The Conceptual Definition of the Constitutional Court in Italy' in Shimon Shetreet (ed) *The Culture of Judicial Independence: Rule of Law and World Peace* (Martinus Nijjhof 2014) 159.

[137] The Constitution of the Italian Republic, Art. 134. However, see Franco Ferrari (n 135) 166ff speaking about the review of constitutional legitimacy of European law as a "European walk".

[138] Maduro (n 1) 520.

[139] Maduro (n 1) 517, 522.

[140] Maduro (n 1) 518. The study of the role of national courts and other national legal actors is crucial to an understanding of the legitimacy and effectiveness of Community law and the way in which the latter is developed by the Court of Justice.

[141] Tomas Dumbrovsky, 'In the Name of the Republic: Constitutional Courts and European Union Legitimacy', in Merle J. –C. (ed) *Die Legitimität von supranationalen Institutionen der EU: Die Debatte in den neuen und alten Mitgliedstaaten* (LIT 2012) 164, 168-171. He argues that the basically the legitimizing function of constitutional courts in EU governance is conducted through three roles: (1) they contribute to the debate on legitimacy, (2) they moderate this debate and (3) they provide legitimacy to the system itself. See also on the general legitimazing function of the balancing of principles and values in the context of pluralism and more specifically in her "Europäischen Normenverbund" in Dana Burchardt, *Die Rangfrage im Europäischer Normenverbund: Theoretische Grundlagen und dogmatische Grundzüge des Verhältnisses von Unionsrecht und nationalem Recht* (Mohr Siebeck 2015) 264-266.

are rather broken in the EU.[142] Therefore it should not come as a surprise, for instance, why arguments relating to the constitutional legitimacy of EU law have been used in debates on the introduction of a constitutional court in some countries which do not have one, such as the Netherlands.[143]

While the democratic legitimacy is provided through the consent of national parliaments, constitutional legitimacy of EU law is provided by constitutional courts.[144] The latter is done through several means. First, it is done through the determination of the specific place and force of EU law in the national legal order and the conformity with the constitutional provisions. Second, it is through signaling the national institutions and the EU institutions, including the CJEU, concerning specific issues related to the legitimacy of EU law that constitutional courts are contributing to EU law gaining constitutional legitimacy. Lastly, this type of legitimacy is provided to EU law by constitutional courts by triggering a broader social debate on the process of European integration and EU law.[145] On the other hand, even more specifically, constitutional courts also provide a deliberative forum and voice for the so-called disempowered groups or the ones that are not involved in the mobility scheme of using the advantages of the European integration and its four freedoms.[146] They are enabling them to tackle the 'inherent bias in favor of the mobile.'[147] Even though constitutional legitimacy in this sense is mostly provided through a form of indirect dialogue, in the process of constitutional review of EU primary law or indirect review of secondary EU law, it could be argued that it is also done within the direct dialogue between national constitutional courts and CJEU.

Furthermore, one has to take a look at the actual practice of constitutional courts and also the CJEU and to which extent they have embraced these abstract and theoretical arguments. It is rather evident that there is a large discrepancy between the constitutional courts and the level of their engagement with EU law and the CJEU.[148] While indirect dialogue has been present for some time now the direct dialogue between constitutional courts and the CJEU through the mechanism of preliminary ruling is a very recent phenomenon. Accordingly, in order to be able to draw conclusions and more specific recommendations one has to analyze the concrete aspects of indirect and direct dialogue between constitutional courts and the CJEU through the prism of constitutional pluralism and constitutional legitimacy.

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[142] Komarek (n 48) 530, 538, 542. Komarek explains that: "In the context of the EU, this communicative arrangement is broken: to reverse or even criticize any decision (not just the ECJ's) in the EU is very difficult. The balancing mechanism must therefore come from somewhere else: member state institutions.", 538.

[143] The Netherlands Scientific Council for Government Policy (WRR), *Rediscovering Europe in the Netherlands*, (Amsterdam University Press 2007), 102 (hereinafter Rediscovering). See also Maartje De Visser, 'Changing the Conversation in the Netherlands? Two Recent Legislative Proposals Evaluated from a European and Comparative Perspective' in Monica Claes, Maartje de Visser, Patricia Popelier and Catherine Van de Heyning (eds), *Constitutional Conversations in Europe: Actors, Topics and Procedures* (Intersentia 2012) 365ff.

[144] Rediscovering (n 143) 102.

[145] van Hoecke (n 27) 184, 193. This social debate is also initiated through the media informing on the proceedings and decision of the constitutional courts. On this type of media gravity of constitutional courts and the role of media in legitimization of EU law see Rediscovering (n 143) 103.

[146] Komarek (n 48) 541ff.

[147] Komarek (n 15) 427.

[148] De Visser (n 143) 365 and Claes and De Witte (n 99) 81.

3.3 Constitutional courts, constitutional legitimacy and indirect dialogue in the EU

Indirect dialogue has been argued to represent the "unorthodox avenues of judicial communication"[149] which do not follow the regular and structured path of judicial interaction between national courts and the CJEU. Hence all other forms of interaction between national courts and the CJEU aside from the preliminary ruling procedure as regulated in Article 267 TFEU and interpreted in the CJEU case-law are referred to as indirect dialogue.

Martinico identifies six techniques of indirect or, as he names it, 'hidden dialogue' through which constitutional courts have facilitated the application of EU law in harmony with the constitutional provisions by preserving the position of constitutional courts at the same time.[150] Nevertheless, he does not dwell on the overarching function of these and similar techniques. Namely, constitutional courts realize their constructive role of providing constitutional legitimacy to EU law through indirect dialogue, first, by anchoring and empowering EU law in the national legal order[151] and second, by contributing to the development of European constitutionalism and increasing the effectiveness of EU law.[152]

There are essentially two avenues through which constitutional courts enter into an indirect dialogue. First, the main avenue of indirect dialogue and for legitimizing EU law is through the constitutional review of the EU treaties or their subsequent revisions.[153] While for some courts this power has been envisaged in the constitution[154] others had to develop special paths, sometimes very contentious, in order to reach this possibility on deciding on the constitutionality of primary EU law.[155] The second avenue is through the review of national implementing acts of EU secondary law. Very often constitutional courts have resorted to this avenue as they were trying to avoid dealing directly with EU law and potentially entering into a direct conflict with the CJEU.

These two avenues have been determined by procedural and jurisdictional aspects of constitutional review. Namely, when it comes to the review of primary law, indirect dialogue is the only alternative since there is no possibility for preliminary reference to the CJEU in such cases. On the other hand, indirect review of EU secondary law is usually determined by the fact that in most cases we have so-called *incidenter* proceedings as part of a concrete control

[149] Martinico (n 126) 258.
[150] Martinico (n 126) 261.
[151] Martinico (n 126) 271; Claes and De Witte (n 99) 92ff; and Claes (n 112) 491-492.
[152] Claes and De Witte (n 99) 94, they are discussing about the development of a common constitutional heritage.
[153] For more on this see Claes (n 112) 465-494. Additionally, in the case of the CEEC there was also a review of the accession treaties.
[154] For example, France, Spain and most of CEECs have a possibility of *ex ante* review, while in other countries have (also) *ex post*, such as in Italy, Hungary and Poland in the case of the Lisbon Treaty even though there was a possibility for *ex ante* review which was not used. See more in Mattias Wendel, 'Lisbon before the Courts: Comparative Perspectives' (2011) 7 European Constitutional Law Review, 96; Prakke and Kortmann (n 136) and Constantijn Kortmann, Joseph Fleuren and Wim Voermans, *Constitutional Law of 10 Member States: The 2004 Enlargement* (Kluwer 2006).
[155] Germany and the highly contentious Article 38 GG doctrine, for example Alexander Proelß, *Bundesverfassungsgericht und überstaatliche Gerichtsbarkeit: Mechanismen zur Verhinderung und Lösung von Jurisdiktionskonflikten* (Mohr 2014), 250. Compare this to the Austrian CC in Mattias Wendel. 'Lisbon before the Courts: Comparative Perspectives' (2011) 7 European Constitutional Law 96, 112 fn. 96; and Claes and De Witte (n 99) 87 -88.

instead of a main, *principaliter*, proceedings in an abstract control case. In the latter cases constitutional courts are the first and last instance and accordingly are obliged, at least formally, to send a preliminary reference to the CJEU under Article 267 TFEU. Contrary, in the *incidenter* proceedings constitutional courts are just resolving the constitutionality issue of a legal act as a preliminary question in a specific ongoing case before the ordinary judiciary.[156] Nevertheless, this means that constitutional courts in such cases might not be obliged to send a preliminary reference. However they can decide to do this anyway, of course, if they find it appropriate.[157] This line of thinking in essence draws on the debate over the importance of the so-called issue of 'last word' and 'first word' when it comes to the initiative for preliminary reference.[158] Be that as it may, for a long period of time this is has been part of theoretical debate only and therefore the two main avenues of indirect dialogue have been crucial in providing EU law with constitutional legitimacy.

3.3.1 Constitutional review of EU Treaties

It has been previously emphasized constitutional review of EU treaties represents the main avenue of indirect dialogue, and at the same time, of legitimizing EU law. Even though this type of review was not as important during the first decades of the European Communities, it drew significant attention in the aftermath of the creation of the EU with Maastricht Treaty and the rapidly increasing scope and penetration of EU law into the national legal order. The FCC and ICC, the only two constitutional courts[159] among the founding member states, until the entry of Spain and Portugal in the EC, have not paid so much attention to EC law especially not until the 70's. During this period these constitutional courts have managed to accommodate EC law within the existing doctrines on the relationship between national constitutional law and international law and further on even devised the particular status of EC law.[160] Nevertheless, since the Maastricht Treaty and the decisions on the, direct or indirect, constitutionality review by the constitutional courts, above all the FCC, this form of indirect

[156] On this point Claes (n 112) 440 and especially on ICC see Guiseppe Martinico, 'Preliminary Reference and Constitutional Courts. Are You in the Mood for Dialogue?' in Filippo Fontanelli, Giuseppe Martinico and Paolo Carrozza (eds), *Shaping Rule of Law Through Dialogue: International and Supranational Experiences* (Europa Law 2009) 224 and 227-237. However, the *incidenter* has been overcome as an obstacle for sending a preliminary reference to the CJEU with the ICC preliminary reference to CJEU, see ICC Order from 18 July 2013, No. 207. For more on this latter decision see Giorgio Repetto, 'Pouring New Wine into New Bottles? The Preliminary Reference to the CJEU by the Italian Constitutional Court' (2015) 16 German Law Journal 1461-1464.

[157] CJEU *CILFIT* (n 114); and CJEU, Case C-314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost*, Judgment 22 October 1987, ECLI:EU:C:1987:452. For latest example see FCC, Case 2 BvR 2735/14 order of 15 December 2015, see in particular para. 125. For English summary see the FCC Press Release No.4/2016 of 26 January 2016.

[158] Koen Leanerts, 'Kooperation und Spannung im Verhältnis von EuGH und nationalen Verfassungsgerichten' (2015) 50 Europarecht 3, 7.

[159] It is rather a debatable issue whether CC has been a genuine constitutional court prior to constitutional reforms of 2008 or a political body. For an excellent summary of this debate in light on the views of Louis Favoreu on the character of the CC and the opposing arguments see Dominique Rousseau, 'The Conseil Constitutionnel Confronted with Comparative Law and the Theory of Constitutional Justice (or Louis Favoreu's Untenable Paradoxes)' (2007) 5 International Journal of Constitutional Law 28-43; and see also Xavier Philippe, 'Constitutional Review in France: The Extended Role of the Conseil Constitutionnel Through the New Priority Preliminary Rulings Procedure (QPC)' *Annales Universitatis Scientiarum Budapestinensis de Ronaldo Eötvös Nominatae Sectio Juridica Tomus LIII Annus 2012* (2012) 65-94.

[160] Mehrdad Payandeh, 'Constitutional Review of EU Law after Honeywell: Contextualizing the Relationship between the German Constitutional Court and the EU Court of Justice' (2011) 48 Common Market Law Review 12.

dialogue has been taken rather seriously.[161] The review of EU treaties has offered the constitutional courts an opportunity to anchor EU law in the national legal order by determining and clarifying, among other things, its status within the hierarchy of norms, declaring the limits of application of EU law and the manner in which the scope of EU law has to be interpreted. For this purpose, constitutional courts have created specific constitutional doctrines. Through them constitutional courts have designed the framework within which EU law could be applied and enforced in the member states. They have clarified how EU law could fit under the often very broad and unclear national constitutional provisions.[162] On the other hand, constitutional courts have safeguarded the domestic procedural requirements for the entry of an external source of law into the domestic legal order. In this way they have provided constitutional legitimacy understood in its narrower sense. As Sadurski puts it constitutional courts have tried securing that "[p]arliament must not change the Constitution "by the back door" for example by ratifying a Treaty containing provisions that conflict with it, but rather that any change to the Constitution can be only made by using the proper amendment procedures."[163]

At the same time, through this constitutional courts have signaled and warned both national institutions and EU institutions on the possible shortcomings of EU law and possible incompatibility with the existing constitutional provisions. This has often been done in lengthy and extensive decisions of constitutional courts often stating abstract and theoretical arguments supporting them. Taking into consideration that the treaties are living instruments, these decisions have served as a basis or framework on their own for future decisions in which specific doctrines would be developed and shaped or reshaped in order to adapt to the circumstances.[164] In this manner the indirect dialogue has been furthered and in certain cases it has led to the establishment of direct dialogue.

There are numerous examples that could be pointed out supporting the above argument. In this regard perhaps one should take the practice of the most influential constitutional court in

[161] Xavier Groussot, Spirit, are you there? Reinforced Judicial Dialogue and the Preliminary Ruling Procedure, Eric Stein Working Paper No 4/2008, 20ff. For more on the review of EU Treaties and its implications see Closa Montero and Castillo Ortiz, 'National Courts and Ratification of the EU Treaties: Assessing the Impact of Political Contexts in Judicial Decisions' in Tatjana Evas, Christopher Lord and Ulrike Liebert (eds) *Multilayered Representation in the European Union (Nomos 2012)* 129-155. For instance, while the Maastricht Treaty has been subject to five constitutional reviews by national constitutional courts, *Conseil Constitutionnel* doing this on three occasions, in the case of the Constitutional Treaty there were in total four constitutional reviews and the Lisbon Treaty was subject to twelve reviews by national constitutional courts.

[162] Claes and De Witte (n 99) 93.

[163] Wojciech Sadurski, 'EU Enlargement and Democracy in New Member States' in Wojciech Sadurski, Adam Czarnota and Martin Krygier (eds) Spreading Democracy and the Rule of Law? The Impact of EU Enlargement for the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders (Springer 2006) 41.

[164] Claes (n 112) 468. She argues that "Obviously, the difficulty with the European Treaties is that they are living documents, which are interpreted by the Court of Justice as they go along…[n]o constitutional court has the ability to see what the future will bring, and it is difficult to foresee all possible frictions between the constitutional principles and the treaties beforehand." See also Monica Claes, 'Negotiating Constitutional Identity or Whose Identity is It Anyway?' in Monica Claes, Maartje de Visser, Patricia Popelier and Catherine Van de Heyning (eds) *Constitutional Conversations in Europe* (Intersentia 2012) 208-213.

Europe, the FCC. Actually, this constitutional court, along with CC[165] and SCT[166], has started this practice of constitutional review of EU treaties and EU primary law. First it was in its *Maastricht* decision[167] and then in its *Lisbon* decision [168] that it drew significant attention. In these two, widely discussed, decisions the FCC has in a rather extensive manner [169] reviewed the compatibility of these treaties with the constitutional provisions and principles. Through a highly contentious constitutional maneuver the FCC created a sort of *actio popularis* for the review of the compatibility of EU law through a broad interpretation of the right to vote envisaged in Article 38 GG.[170] Even though in essence its decisions had an Euro-friendly outcome conditioning the ratification of the treaties with the enactment of certain legal acts and provisions in the national legal order, the FCC nevertheless took the opportunity to address contentious and potential conflicting aspects of the treaty provisions, but also of the actual practice of the European integration. In doing so it has positioned and accommodated EU law in the national legal order by designing new constitutional doctrines which on the one hand declare the openness of the German constitutional order towards EU law but on the other set limits to EU law and European integration.[171] Thus, in its *Maastricht* decision FCC has drawn the line on the issue of the genuine source of sovereignty declaring that Germany and the member states of the EU are in essence the Masters of the Treaties – *Herren der Verträge* – arguing for the right of withdrawal of Germany, something that was not envisaged in the Maastricht Treaty.[172] For the first time the FCC set up a new instrument of constitutional review of EU law which is in breach of the principle of limited attribution of powers to the EU and is thus out of the scope of powers and competences of the EU as bestowed to it by Germany through its constitution and consent. These so-called *ultra vires* acts of the EU, if declared as such by the FCC, could not be applied by any institution in Germany. The *ultra vires* review of EU law would be conducted solely by the FCC. Lastly, building up on the *Solange* saga, the FCC declared that when it came to the protection of fundamental constitutional rights and the issue of applicability of EU secondary law in Germany it was positioned towards the CJEU in a *relationship of co-operation*.[173]

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[165] The CC has reviewed the Maastricht Treaty on three occasions, CC, *Treaty of Maastricht I*, n. 92–308 DC of 9 April 1992; CC, *Treaty of Maastricht II*, n. 92–312 DC of 2 September 1992; and CC, *Treaty of Maastricht III*, n. 92–313 DC of 23 September 1992. For more see Claes (n 112) 470-471.

[166] SCT, *Treaty of* Maastricht, n. 1236/92 of 1 July 1992 in A Oppenheimer, *The Relationship Between European Community Law and National Law*, Vol. 1 (CUP 1994) 712. For more on this see Claes (n 112) 477-478.

[167] Federal Constitutional Court of Germany, *Maastricht* Treaty (Brunner) 1992 Constitutionality Case, 2 BvR 2134 and 2159/92 in Oppenheimer (n 165) 556.

[168] FCC, Case *2 BvE 2/08 Lisbon Decision*, judgment of 30 June 2009.

[169] For instance, the Lisbon decision is very illustrative on this point with approximately 75 pages.

[170] For an excellent critical analysis of the issue of Article 38 GG see Michael Sachs, 'Grundrechtsschutz der Staatlichkeit und der Staatsstrukturprinzipien?' in Michael Sachs and Helmut Siekmann (eds), Der grundrechtsgeprägte Verfassungsstaat, Festschrift für Klaus Stern zum 80. Geburtstag, (Duncker & Humblot 2012) 597-612. See also Proelß (n 155) 250; and Wendel (n 155) 109. Also critical over this "Subjektivierung des Demokratieprinzips" see Herbert Bethge, in Theodor Maunz, Bruno Schmidt-Bleibtreu, Franz Klein, Herbert Bethge et al., *Bundesverfassungsgerichtsgesetz: Kommentar Band 1* (54th edition C.H. Beck 2018) 162-163, 165-166.

[171] Here only those relevant for the constitutional legitimacy of EU law will be discussed.

[172] Federal Constitutional Court of Germany, Maastricht Treaty 1992 Constitutionality Case, 2 BvR 2134 and 2159/92, in Andrew Oppenheimer, *The Relationship Between European Community Law and National Law* Vol 1 (CUP 1994) 556, 574.

[173] Claes (n 112) 605-606.

In the *Lisbon* decision the FCC followed a similar reasoning[174] in which in an even more extensive manner it tackled, among others, the main issues of the status and place of EU law in the national legal order. Following up on *Maastricht* it conditioned the ratification of the Lisbon Treaty with the enactment of legal provisions which would protect the powers and influence of the *Bundestag* in EU matters. As a matter of fact, this was another example in the line of efforts of the FCC to support the democratic legitimacy of EU law and the support for a more significant role, place and power of national parliaments in the EU.[175] Taking this opportunity the FCC also used an older principle of friendliness of the constitution towards international law - *Völkerrechtsfreundlichkeit*[176] – in order to establish the principle of friendliness of the constitution towards EU law – *Europarechtsfreundlichkeit.*[177] With this principle it stated that the constitution was to be interpreted and applied in a Euro-friendly manner, within certain limits, acknowledging the constitutional bases and obligation for Germany's European integration.[178] This principle should be also borne in mind when the determination of the limits of the application of EU law is concerned.[179] In this sense, parallel to the *ultra vires* review, it designed a new instrument of review of conformity of EU laws with the constitutional identity of Germany. Relating the constitutional identity of Germany with Article 4(2) TEU the FCC has provided itself with the power to conduct this type of review.[180]

In both of these cases the Court was subject to severe criticism from both domestic and international 'Euro-friendly audience' for creating new obstacles for European integration, for being trapped in an anachronistic and nationalist understanding of sovereignty and democracy, and caring only for its own power and status.[181] As a matter of fact every single decision of this court on EU matters has been put under heavy scrutiny. However, because of the significance of the constitutional framework of abstract principles and doctrines under which EU law should be applied that were designed in this type of constitutional review they came under the 'magnifying glass' of critics. Nevertheless, with the benefit of hindsight one could argue that

[174] On the parallels drawn between these two decision see for example in Frank Schorkopf, 'The European Union as an Association of Sovereign States: Karlsruhe's Ruling on the Treaty of Lisbon', 10 German Law Journal 8 (2009), 1219ff.
[175] Davor Jancic, 'Caveats from Karlsruhe and Berlin: Whither Democracy after Lisbon', 16 Columbia Journal of European Law (2010) 339ff
[176] For this doctrine of the FCC see, Case 1 BvR 636/68 *Spainer*, order of 4 May 1971, para. 43, Case 2 BvR 1481/04 *EGMR* order of 14 October 2004, para. 33, Case 2 BvR 955/00, 1038/01 *Bodenreform III*, order of 26 October 2004, para. 93.
[177] FCC *Lisbon* (n 168) para. 225, see also Frank Schorkopf, 'Case Nos. 2 BVE2/08, 2 BVE 5/08, 2 BVR 1010/08, 2 BVR 1022/08, 2 BVR 1259/08, and 2 BVR 182/09. 123 BVERFGE 267 (2009)' (2010) 104 American Journal of International Law 265; Jacques Ziller, 'The German Constitutional Court's Friendliness towards European Law: On the Judgment of *Bundesverfassungsgericht* over the Ratification of the Treaty of Lisbon' (2010) 16 European Public Law 1, 53ff, and Andreas Voßkuhle, 'Multilevel Cooperation of the European Constitutional Courts: *Der Europäische Verfassungsgerichtsverbund*' (2010) 6 European Constitutional Law Review (2010) 179-180, 188.
[178] Voßkuhle (n 177) 179-180.
[179] FCC *Lisbon* (n 168) paras. 240-241.
[180] See much more on this in chapter 5.
[181] Anneli Albi, 'An Essay on how the Discourse on Sovereignty and on the Co-operativeness of National Courts Has Diverted Attention from the Erosion of Classic Constitutional Rights in the EU' in Monica Claes, Maartje de Visser, Patricia Popelier and Catherine Van de Heyning (eds), *Constitutional Conversations in Europe: Actors, Topics and Procedures* (Intersentia 2012) 68; Jancic (n 175) 381. For more detailed account see the Special Section: The Federal Constitutional Court's Lisbon Case (2008) 10 German Law Journal 8.

such criticism was obviously overblown.[182] The underlying argument has come to be that every critical observation of EU law and European integration must be seen as euro-skepticism and a conservative nationalist attitude creating obstacles for further integration in Europe.[183] Nevertheless, these and similar decisions of other constitutional courts need to be seen in a specific context and reevaluated from the perspective of constitutional legitimacy and the deliberative role of constitutional courts. Their input in the protection of the rule of law in Europe should not be undervalued as well as their constructive role in the integration process.

Both *Maastricht* and *Lisbon* have drawn serious social and academic attention. The abundance of literature clearly demonstrates the level of debate that these decisions have initiated, academic as well as broader social debates, which have served the purpose of EU legitimatization. As a matter of fact certain decisions have filled the gap left from the lack of substantial political debate on European integration by initiating the 'constitutional' or 'legal debate', such as in the case of the *Maastricht* decision.[184] On a more specific note, they have served as basis for further judicial dialogue, both indirect and direct, between the national courts and the CJEU but also of the very same constitutional courts.[185] For instance, the issue of constitutional identity and *ultra vires* review both found their important place in the preliminary reference and decision of the FCC on the issue of the OMT.[186] Additionally, the FCC through the constitutional complaint on a breach of Article 38 GG, even though seriously contested, has enabled a broader group of potential applicants, which do not have a say and are not represented in the parliament during the ratification procedure, to have access to the court and present their arguments. In this manner, constitutional courts have demonstrated their deliberative role as both interlocutors and public reasoners by expanding the deliberative forum on EU issues in the national realm.

Other courts have followed this pattern set by the FCC. The FCC has had a huge influence in this sense on several constitutional courts,[187] but particularly on the constitutional courts of Central and Eastern European countries in general.[188] In a similar fashion other courts have followed this pattern of creating new constitutional doctrines in order to accommodate and set limits for unwarranted expansion of the scope of EU law. The SCT has, for instance, in its Constitutional Treaty decision distinguished between supremacy and primacy thus drawing the

[182] Jancic (n 175) 381, Komarek (n 48) 542 and Peter Lindseth, 'The Maastricht Decision Ten Years Later: Parliamentary Democracy, Separation of Powers, and the Schmittian Interpretation Reconsidered' (2003) European University Institute Working Papers RSC No. 2003/18.
[183] Albi (n 181) 41-42; and Anneli Albi, 'From the Banana Saga to a Sugar Saga and Beyond: Could the Post-Communist Constitutional Courts Teach the EU a Lesson in the Rule of Law?' (2010) 47 Common Market Law Review 791-794.
[184] Juliane Kokott, Report on Germany, in Anne-Marie Slaughter, Alec Stone Sweet and Joseph H. H. Weiler (eds)*The European Court and National Courts: Doctrine and Jurisprudence* (Hart 1998) 131; and Tatham (n 15) 102.
[185] FCC, *Honeywell* decision, 2 BvR 2661/06 of 6 July 2010, FCC, *Data Retention* decision *1BvR 256/08, 1BvR 263/08, 1 BvR 586/08* of 2 March 2010; but also FCC, Case 2 BvL 1/97, *Banana Market,* of 7 June 2000.
[186] FCC, *OMT* referral, 2 BvR 2728/13 order of 14 January 2014.
[187] The general influence of the FCC in the design of the constitutional courts of some of the South European countries such as Spain and Portugal has been more than obvious. See for instance Tamas Gyorfi, 'Against the New Constitutionalism' (Edgar 2016) 30.
[188] Tatham (n 15) 38 and 276ff.

line between the status of the constitution in the national legal order and the place of EU law.[189] In the same way it has also made the distinction between dis-application and non-application of national acts not conforming to EU law.[190] The CEEC constitutional courts have often referred to and incorporated the FCC doctrines in their decisions however they have not always had the same combative style.[191] In certain cases, these constitutional courts have been procedurally confined to only *a posteriori* review as their constitutions envisage both ex ante and ex post constitutional review of international agreements.[192] Namely, their hands were rather tied as with the ratification of a treaty international obligations are accepted and thus the state is obliged to obey the treaty regardless of its conformity with the constitution. Therefore, any decision of unconstitutionality might have broader international consequences and compromise countries international standing. Therefore, the practice of ex post, or *a posteriori*, review of EU primary law has not proven to be well suited for this type of indirect dialogue.[193]

3.3.2 Indirect dialogue through constitutional review of national implementing acts

The indirect dialogue does not stop at the level of constitutional review of EU treaties. As a matter of fact, the latter has in certain instances served as a trigger for the development of an even larger case law that deals with indirect review of secondary EU law, that is, through the review of national implementing acts. This line of case-law has frequently been used to further develop, discuss and adjust the doctrines and principles elaborated in previous decisions and sometimes even to design new doctrines and principles generally aimed at providing or even revoking the constitutional legitimacy of EU law in national legal realm. On the other hand, one could also notice that the subsequent decisions have come as a reaction to the CJEU case law in which it has developed certain aspects of EU primary law and the need to adjust the already designed doctrines to the new reality and court practice. The overarching reasons why constitutional courts have opted for this type of indirect dialogue instead of entering a direct dialogue through preliminary reference have to do with their initial tendency not to get involved with EU law and to avoid any type of direct conflict with the CJEU, especially when the case at hand does not involve a fundamental constitutional issue.[194] Taking into consideration the rapid expansion of the scope of EU law one could easily question whether this type of approach of the constitutional courts is the most appropriate one. EU law scholars have frequently criticized this reluctance of constitutional courts to enter a direct dialogue especially in light of the obligation for national courts of last instance stemming from Article 267 TFEU.

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[189] SCT, *Declaration on Establishing a Constitution for Europe*, *DTC 001/2004* of 13 December 2004, para 4. See also Martinico (n 126) 265ff; and Matthias Klatt, 'Balancing Competences: How Institutional Cosmopolitanism Can Manage Jurisdictional Conflict', 4 Global Constitutionalism 2 (2015), 208-209.
[190] Martinico (n 126) 269ff.
[191] Tatham (n 15) 277. See for instance PCT, *Accession Treaty*, *Dec. K 18/04* of 11 May 2005, CCC, *Lisbon Treaty II*, Pl. ÚS 29/09, of 3 November 2009, HCC, *Treaty of Lisbon*, Case 143/2010 (VII. 14.) of 12 July 2010 and LCC, *Treaty of Lisbon*, Case 2008-35-01 of 7 April 2009.
[192] Wendel (n 155)106-108. See HCC, Case 143/2010 (VII. 14) *Treaty of Lisbon*, judgment of 12 June 2010; and PCT, Case K 32/09 *Treaty of Lisbon*, judgment of 24 November 2010.
[193] See for example Austrian Constitutional Court, Case SV 1/10-9 *Treaty of Lisbon II*, order of 12 June 2010. For more on this Wendel (n 155) 111-112.
[194] Florian Geyer, 'European Arrest Warrant, Court of Justice of the European Communities, Judgment of 3 May 2007, Case C-303/05, *Advocaetn voor de Werd VZW v. Leden van de Ministerraad*, 4 *European Constitutional Law Review* (2008) 150.

There are numerous instances in which this type of indirect dialogue has turned out to be very constructive. Constitutional courts have continuously taken over their three roles of providing clarity to the issue at stake, signaling potential problems while at the same time being prudent over the possible negative consequences of their decisions and their possible domino effect. Perhaps the clearest example for this has been the so-called *Solange* saga. Even though at the beginning seriously condemned among scholars[195] the FCC through the two *Solange* decisions has achieved much more than any other constitutional court through a preliminary reference.[196] *Solange I* has essentially initiated the process in which the EU and CJEU started developing an EC/EU approach to protection of fundamental rights. On the other hand, *Solange II*'s doctrine of equivalent protection has become so influential that both the CJEU[197] and the ECtHR have 'borrowed' it in their case law and thus has become the cornerstone of the development of fundamental rights in Europe and management of the triangle between ECHR, CJEU and national constitutional courts.[198] Furthermore, in *Solange II* the doctrine of primacy in application in Germany, as a type of collision norm based on national constitutional law,[199] has been clarified by distinguishing between the primacy in application and primacy in validity entailing the differentiation between primacy and supremacy which enabled the perception of the horizontal relationship between the legal orders.[200] The FCC has frequently referred to it, the last instance being in the *Lisbon* decision, for the purpose of accommodating the EU law and its primacy doctrine with the status of constitutional provisions in the domestic legal order.[201]

While the *Solange* decisions were delivered prior to the practice of constitutional review of EU treaties many other examples of this sort of indirect dialogue can be traced in correlation to the decisions reviewing treaties. Since the outset of the practice of constitutional review of EU primary law one could recognize a pattern in the relation between the different types of indirect dialogue. Namely, once the framework has been set in an extensive and detailed reasoning with a rather strict tone the subsequent decisions on the conformity of national implementing acts are delivered in a more moderate manner. Taking the FCC, but also some of the more activist

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[195] Donald P. Kommers and Russell A. Miller, The Constitutional Jurisprudence of the Federal Republic of Germany (3rd edition Duke University Press 2012), 332 fn. 58 referring to Hans Peter Ipsen, 'BVerfG versus EuGH re. Grundrechte' (1975) 10 Europarecht 1; Ulrich Scheuner, 'Der Grundrechtsschutz in der Europäischen Gemeinschaft und die Verfassungsrechtsprechung' (1975) 100 Archiv des öffentlichen Rechts 30; and Hans-Uwe Erichsen, 'Bundesverfassungsgericht und Gemeinschaftsgewalt' (1975) 66 Verwaltungsarchiv 177.

[196] Dyevre (n 89) 38.

[197] CJEU, Case C-402/05 and C-415/05, *P. Kadi and Al Barakaat International Fundation v. Council and Commission*, Judgment of 3 September 2008, ECLI:EU:C:2008:461.

[198] ECtHR, Application no. 45036/98 *"Bospohorus Airways" v Ireland,* Judgment as of 30 June 2005. See on this Andreas Voßkuhle, 'The Cooperation Between European Courts: The *Verbund* of European Courts and its Legal Toolbox' in Allan Rosas and Egils Levtis (eds) *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law* (Asser 2013) 92-93

[199] Proelß (n 155) 84ff.

[200] Kokott (n 184) 83; Bethge (n 170) 139-140; Tatham (n 15) 286, but see also on the replication of this distinction in the case-law of the Hungarian, Polish and Austrian Constitutional Courts in fn. 109, Franz C. Mayer, The European Constitution and the Courts, in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (Hart 2006) 292, Franz C. Mayer, 'The European Constitution and the Courts: Adjudicating European Constitutional Law in a Multilevel System' (2003) Jean Monnet Working Paper 9/30, 63; Voßkuhle (n 177) 190-191; Proelß (n 155) 82ff.

[201] Franz C. Mayer, 'The European Constitution and the Courts: Adjudicating European Constitutional Law in a Multilevel System' (2003) Jean Monnet Working Paper 9/30, 18-19, 52.

constitutional courts, as an example one can notice this pattern through several examples. First in this line of examples is the *Banana saga*.[202] The *Banana Market II*[203] essentially was a follow up to the *Solange* decisions and the *Maastricht* decision.[204] In this decision, which was delivered several years after the *Maastricht* decision and its declaration of the relationship of cooperation in the sphere of fundamental rights, the FCC confirmed the equivalent protection doctrine and practically left the jurisdiction for protection of fundamental rights and review of EU law to the CJEU, while reserving for itself the possibility of review of EU law and national implementing acts only under exceptional circumstances.[205] This doctrine and principle is applied in cases where EU law does not leave any type of margin of discretion for national implementing authorities.[206] On the other hand, another important doctrine, the *ultra vires* review, originating from the *Maastricht* decision, was qualified by a subsequent decision, the *Honeywell* decision,[207] further clarifying the way in which this type of review would be conducted.[208] This decision of the FCC came after a much debated and criticized *Mangold* decision of the CJEU.[209] In this manner the FCC made certain concessions in regard to EU law and the CJEU which eventually led to the first preliminary reference following the *ultra vires* review procedure as set with the *Honeywell* decision.

Another line of examples involving several other constitutional courts in Europe had to do with the national implementing acts transposing provisions from secondary EU law which foresee certain level of discretion for the member states. In the first example the constitutionality of the national acts implementing the framework decision on the European Arrest Warrant (EAW) as well as the validity of the Framework Decision was challenged before several constitutional courts.[210] The courts have mainly resorted to an indirect review of EU law sending clear signals to the CJEU and national institutions on the contentious aspects of the EAW even though different constitutional courts have used different methods to do this.[211] However, this type of

[202] For more on this see Kokott (n 184) 117.
[203] FCC, Case 2 BvL 1/97, *Banana Market,* order of 7 June 2000.
[204] Franz C. Mayer, The European Constitution and the Courts, in: Armin von Bogdandy and Jürgen Bast (eds) *Principles of European Constitutional Law* (Hart 2006) 296; and Voßkuhle (n 177) 192.
[205] Mayer (n 204) 296, Voßkuhle (n 175) 192. The same position was confirmed in another decision later, FCC Case 1 BvF 4/05 *Single Payment Intervention Act*, order of 14 October 2008; for more see in Tatham (n 15) 124, see also Klatt (n 189) 219-223.
[206] Gerd Sturm and Steffen Detterbeck, 'Art. 100: Richtervorlagen zum Bundesverfassungsgericht' in Michael Sachs (ed) *Grundgesetz* (8th Edition C.H. BECK 2018) para. 6a; Tatham (n 15) 124; and Bethge (n 170) 166-167.
[207] Honeywell decision
[208] For a detailed analysis see Mehrdad Payandeh, 'Constitutional Review of EU law After Honeywell: Contextualizing the Relationship between the German Constitutional Court and the EU Court of Justice' (2011) 48 Common Market Law Review 9-38.
[209] CJEU, Case C-144/04 *Werner Mangold v Rüdiger Helm*, Judgment 22 November 2005, ECLI:EU:C:2005:709. Voßkuhle (n 177) 194; Giuseppe Martinico and Oreste Pollicino, *The Interaction between Europe's Legal Systems: Judicial Dialogue and the Creation of Supranational Laws*, (Edward Elgar 2012) 80ff. See also the reaction of Roman Herzog and Lüder Gerken, Stop the European Court of Justice, *EUObserver*, 10 September 2008.
[210] Torres Perez (n 35) 66-67; Tatham (n 15) 122-124; and Connie Rijken, Elspeth Guild and Luisa Marin (eds.), *Still not resolved? Constitutional Issues of the European Arrest Warrant*' (2011) 48 Common Market Law Review 642-644.
[211] On the difference in the approaches of the PCT, FCC and CCC see in Oreste Pollicino, 'European Arrest Warrant and Constitutional Principles of the Member States: A Case Law-Based Outline in the Attempt to Strike the Right Balance Between Interacting Legal Systems' (2008) 9 German Law Journal 1313; Elies van Sliedregt, 'Introduction. The European Arrest Warrant: Extradition in Transition' (2007) 3 European Constitutional Law

dialogue has not always born tangible results and it seems like the CJEU has not even taken into consideration the fact that several constitutional courts have raised concerns over EAW and signaled this through their decisions and reasoning. Even the FCC decision on the unconstitutionality of the national implementing act, on bases of infringement of constitutional rights, has not influenced the CJEU in this regard. This stance has not changed also in light of preliminary references from three constitutional courts - direct dialogue - that is from the Belgian,[212] French[213] and Spanish Constitutional Tribunal[214] on the one side, and the CJEU, on the other, on different aspects of the very same issue.[215] Finally, apparently also as a response to the *Melloni* decision of the CJEU, the FCC has reacted on the matter of EAW for the second time[216] and the problems concerning the trial *in absentia* in Italy by reversing and remanding a decision of a Higher Regional Court on extradition of a foreign national to Italy due to a possible breach of fundamental rights protected and safeguarded by the German Basic Law and the Framework Decision. In this sense it did not question the validity of either the Framework Decision or the national implementing act. However, declaring the possibility of applying identity review in cases of lowering of standards of protection of constitutional rights the FCC, in light of *Melloni,* sent a warning signal[217] against the existing interpretation of CJEU on Article 53 of the Charter[218] thus reviving the *Solange* doctrine as in its first EAW decision.[219] In all of these cases the role of the constitutional courts has been to protect the constitutional rights and the values related to the rule of law and not to demonstrate a Euro-skeptic attitude.

Review 244; and Jan Komarek, 'European Constitutionalism and the European Arrest Warrant: In Search of the Limits of "Contrapunctual Principles"' (2007) 44 Common Law Market Review 9.

[212] CJEU, Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad,* Judgment 3 May 2007, ECLI:EU:C:2007:261. For more on this case Elke Cloots, 'Germs of Pluralist Judicial Adjudication: *Advocotaten voor de Wereld* and other References from the Belgian Constitutional Court' (2010) 47 Common Market Law Review 649ff.

[213] CJEU, Case-168/13 PPU *Jeremy F. v Premier ministre,* Judgment of 30 May 2013, ECLI:EU:C:2013:358. For more on this see Arthur Dyevre, 'If You Can't Beat Them, Join Them: The French Constitutional Council's First Reference to the Court of Justice', 10 *European Constitutional Law Review* (2014), Franz C. Mayer and Maja Walter, 'Das Röhren der Hirsche: Erste Vorlage des Conseil constitutionnel an den EuGH' (Verfassungsblog 15 April 2013); and Franz C. Mayer and Maja Walter, 'Es geht eben doch: Nochmals zur ersten Vorlage des Conseil constitutionnel an den EuGH' (Verfassungsblog, 12 July 2013).

[214] CJEU, Case C-399/11, *Stefano Melloni,* Judgment of 26 February 2013, ECLI:EU:C:2013:107. On this see Aida Torres Perez, '*Melloni* in Three Acts: From Dialogue to Monologue' (2014) 10 European Constitutional Law Review 308 - 331.

[215] Albi (n 181) 46-61.

[216] FCC (n 157) paras. 78, 82 and 92.

[217] Similar warning signal was already sent by the FCC in reaction to the *Akerberg Fransson* decision of the CJEU in FCC, Case 1 BvR 1215/07 Judgment of 24 April 2013, para. 91. Even the President of the FCC in an extra judicial comment has made this quite clear arguing that "[r]ecently, the *Åkerberg Fransson* decision swept like a blast – or even a storm – through the mobile I have described. In the aftermath of *Åkerberg*, it is perhaps important to stress the following: as much as a uniformly high human rights standard in Europe is desirable, it is not the task of the Luxembourg Court, but that of Strasbourg and the ECtHR, to safeguard it internationally." Andreas Voßkuhle, 'Pyramid or Mobile? – Human Rights Protection by the European Constitutional Courts' in *Dialogue between judges, European Court of Human Rights, Council of Europe*, (2014) 39. The CJEU responded to this criticism over the interpretation of Article 51 of the Charter by defining and specifying with the so-called Siragusa criteria what it understands by 'implementing Union law'. See CJEU, Case C-206/13, *Siragusa,* Judgment of 6 March 2014, ECLI:EU:C:2014:126, para. 24-25. For more on this Tristan Barczak, *BVerfGG: Mitarbeiterkommentar zum Bundesverfassungsgerichtsgesetz* (De Gruyter 2017) 52, para. 86.

[218] See for instance Daniel Sarmiento, 'Awakenings: the "Identity Control" decisions by the German Constitutional Court' (Verfassungsblog, 27 January 2016); and Komarek (n 15) 432. For a similar claim in the Belgian cases related to EAW see Cloots (n 212) 661.

[219] Martinico and Pollicino (n 209) 80.

In certain cases, the level of protection of constitutional rights, such as in Spain and Germany, has caused concerns over the true role of the Charter and its Article 53, and the CJEU in protection of fundamental rights as well as over the true relationship of these fundamental rights with the national constitutional rights. Nevertheless, the CJEU has put the uniform application of EU law and the absolute primacy of EU law on a first place.[220]

In a similar situation involving again several constitutional courts[221] over the Data Retention Directive[222] once again the indirect dialogue was widely employed in signaling the problems regarding both the validity of the directive and the threat to fundamental rights that certain provisions of the directive pose. However, in this saga the direct dialogue has proven to be more effective than in the EAW as the CJEU finally recognized some of the problematic aspects of the Directive upon a preliminary reference lastly sent by the Austrian Constitutional Court and the Irish High Court.[223]

In both of these sagas the CJEU has left the impression not to take into account the special role and place of constitutional courts in the European legal realm, somehow denying the specificity of these institutions and of constitutional discourse including the specific deliberative qualities of the constitutional courts. Even though the indirect dialogue has involved numerous constitutional and high courts, the CJEU has remained on its rather rigid position of blindly sticking to the 'absolute' primacy doctrine and its practice with only occasional and exceptional instances in which it has taken the position of constitutional courts into consideration.[224]

Based on the discussed above the indirect judicial dialogue between constitutional courts and the CJEU is definitely not a one-act but rather a multi-act 'play', involving a certain level of continuity in the indirect judicial dialogue and its intertwinement with direct dialogue.[225] This form of dialogue definitely serves as a constructive form of interaction however rather often

[220] See for instance Albi (n 183) 796ff; Torres Perez (n 214) 322; and Leonard F. M. Besselink,'The ECJ as the European "Supreme Court": Setting Aside Citizens' Rights for EU Law Supremacy' (Verfassungsblog, 18 August 2014).

[221] RCC, No 1.258 decision of 8 October 2009; FCC, 1 BvR 256/08, judgment of 2 March 2010, CCC, Pl. ÚS 24/10, decision of 22 March 2011; and HCC, no. 1746/B/2010, decision of 19 December 2012. For more on this see for instance Ludovica Benedizione and Eleonora Paris, 'Preliminary Reference and Dialogue between Courts as Tools for Reflection on the EU System of Multilevel Protection of Rights: The Case of the *Data Retention Directive'* (2015) 16 German Law Journal 1727; Theodore Konstadinides, 'Destroying Democracy on the Ground of Defending It? The Data Retention Directive, the Surveillance State and Our Constitutional Ecosystem' (2012) 1 European Current Law 722; Hendrik Wieduwilt, 'The German Federal Constitutional Court Puts the Data Retention Directive on Hold' (2010) 53 The German Yearbook of International Law 917ff; and Albi (n 183) 824-829.

[222] EC Directive 2006/24 of 15 March 2006, O.J. 2006 L 105/54.

[223] CJEU, Case C-293/12 and C-594/12, *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources et al* and *Kärtner Landesregierung, Michael Seitlinger, Christof Tschohl and others*, Judgment 8 April 2014, ECLI:EU:C:2014:238. A request for making a preliminary reference to the other constitutional courts was made by the petitioners in their respective such as in the case before the FCC but this was refused and the focus was put solely on the national constitutional issue raised by the implementing acts. For more on this see Tatham (n 15) 124ff. For a critical view of the FCC in this regard see Eva Julia Lohse, 'The German Constitutional Court and Preliminary References – Still a Match not Made in Heaven?' (2015) 16 German Law Journal 1501-1503.

[224] Leonard F.M. Besselink, 'Case C-208/09, Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien, Judgment of the Court (Second Chamber) of 22 December 2010' (2012) 49 Common Marker Law Review 689. For a more detailed account on the CJEU attitude towards the constitutional courts see Komarek (n 15).

[225] Torres Perez (n 3) 110-112.

the CJEU has proven not to be aware of the leverage, especially of certain constitutional courts, making it more difficult for the latter to enter the dialogue. While perhaps substantial and tangible results have often been missing still the value of the indirect dialogue is not to be underestimated as it subtly serves its constructive purpose of clarifying and signaling. Additionally, the prudence of the constitutional courts has been shown to be in the avoidance of direct conflict with the CJEU while still managing to fulfill their role. Therefore this role is also a matter of judicial wisdom in avoidance of direct confrontation that should not be mistaken for a judicial ego.[226] As Bobek formulates it "[t]rue cooperation may not always mean to be active. Perhaps even more importantly, sometimes it includes the sensible decision to remain silent, i.e., not to ask certain questions."[227] Nevertheless, with the developing trend of constitutional courts starting to resort to direct dialogue this judicial 'play' has become more complex often involving more than two interlocutors. In which way this new trend is to be perceived will be discussed in the next section.

4 Direct dialogue through preliminary reference

Just as in everyday life, in some cases, direct dialogue cannot be replaced by anything else and one simply needs to have its say directly in order to get his or her points across. Therefore, the role of constitutional courts as the most important interlocutors on constitutional matters in Europe, might be argued, could be best perceived through their direct dialogue with the CJEU. Through this type of dialogue essentially arguments are brought from the hidden dialogue out into the open.[228] In this way the potentially constructive role of constitutional courts in the process of European legal integration and the constitutional legitimization of EU law are even more visible, particularly through the looking glass of constitutional pluralism. Their active but cautious participation in this dialogue might be mutually beneficial for both their status, nationally and in Europe, and for the overall European integration. Nevertheless, this benefit is not as straightforward and therefore the constitutional courts have been reluctant to enter the direct judicial dialogue. This attitude has been subject to change lately. The reasons behind this new development and how one could perceive constitutional courts' participation, as well as its limits, in the direct judicial dialogue from the perspective of constitutional pluralism will be discussed in this section.

4.1 The evolution of the attitude of constitutional courts towards the preliminary reference

The preliminary reference procedure as regulated with Article 267 TFEU represents the most developed and structured form of direct judicial dialogue between courts of different legal orders. While the legal integration in Europe has benefited greatly from the direct judicial dialogue between ordinary national courts and the CJEU for a long time national constitutional

[226] Komarek (n 47) 543ff; and Joseph H. H. Weiler, 'Judicial Ego' (2011) 9 International Journal of Constitutional Law 1.
[227] Michal Bobek, '*Landtova*, *Holubec*, and the Problem of an Uncooperative Court: Implications for the Preliminary Ruling Procedure' (2014) 10 European Constitutional Law Review 89.
[228] Monica Claes, 'Luxembourg, Here We Come? Constitutional Courts and the Preliminary Reference Procedure' (2015) 16 German Law Journal 1337.

courts have avoided using this instrument of judicial dialogue. Particularly until 2008 only two constitutional courts[229] of the EU member states had developed a practice of entering into a direct dialogue with the CJEU. The grounds on which constitutional courts have refused to employ the instrument of preliminary reference to the CJEU could be put in three categories. *First*, constitutional courts have claimed that they are not "courts or tribunals" under the respective articles of the EU treaties[230] but more of 'a court of courts' or 'a court beyond mere courts'[231] and thus they are under no obligation to refer a case to the CJEU.[232] *Second*, they have distinguished between the role of ordinary courts to apply EU law as well as to conduct so-called compatibility review between national and EU or international law and the role of constitutional courts to conduct a constitutional review thus avoiding of getting involved with EU law.[233] *Third*, closely related to the second ground or category, some constitutional courts have used procedural peculiarities such as the constitutionally set time constraints[234] or the nature of the proceedings before them, meaning the *incidenter* or concrete constitutional review,[235] which represented an obstacle for sending a preliminary reference.

[229] Austrian CC with five and Belgian CC with 26 preliminary references, even though the latter court prior to 2007 was named Court of Arbitration with initially a different institutional role and powers which were narrower than that of constitutional courts but which have been increased throughout the years. For more on this see Monica Claes, 'The Validity and Primacy of EU Law and the 'Cooperative Relationship' between National Constitutional Courts and the Court of Justice of the European Union' (2016) 26 Maastricht Journal of European and Comparative Law 165-166.

[230] The CJEU has never really clarified this for the constitutional courts specifically in its case-law. It has hinted on two occasions: ECJ Annual Report 1998 and 2002; and CJEU, Case C-239/07 *Sabatauskas and Others*, Opinion AG Kokott of 12 June 2008, ECLI:EU:C:2008:344, paras. 15-19. See Aleksandra Kustra,'Reading the Tea Leaves: The Polish Constitutional Tribunal and the Preliminary Ruling Procedure' (2015) 16 German Law Journal 1544.

[231] Bobek (n 227) 84.

[232] For example, the ICC. See Claes (n 112) 439; Repetto (n 156) 1455; Michal Bobek, 'Learning to Talk: Preliminary Rulings, the Courts of the New Member States and the Court of Justice' (2008) 45 Common Market Law Review 1632 – 1633; Cartabia (n 72) 24; Zdenek Kühn and Michal Bobek,'What About that 'Incoming Tide'?'The Application of EU Law in Czech Republic' in Adam Lazowski (ed) *The Application of EU Law in the New Member States* (Asser 2010) 349-350.

[233] Darinka Piqani, 'The Role of National Constitutional Courts in Issues of Compliance' in Marise Cremona (ed), *Compliance and the Enforcement of EU law* (OUP 2012) 136-137. In France this is related to the differentiation between *constitutionalite* and *conventionalite.* See for example CC, Decision No. 2010-605, decision of 12 May 2010, at point 16; also Pierre-Vincent Astresses,'The Return of Huron, or Naïve Thoughts on the Handling of Article 267 TFEU by Constitutional Court when Referring to the Court of Justice' (2015) 16 German Law Journal 1714-1715. Belgium has applied the same differentiation see Marc Bossuyt and Willem Verrijdt, 'The Full Effect of EU law and of Constitutional Review in Belgium and France after the *Melki* Judgment' (2011) 7 European Constitutional Law Review 359 and 362. For Italy see Claes (n 112) 440; Cartabia (n 72) 24; and Repetto (n 156) 1453-1455. For Spain and generally see Martinico (n 156) 224-225. For the Czech Republic see on the case of Czech Republic see Kühn and Bobek (n 232) 346-347.

[234] On this point see The Constitution of the Fifth French Republic, 1958, Article 61(3) "In the cases provided for in the two foregoing paragraphs, the Constitutional Council must deliver its ruling within one month. However, at the request of the Government, in cases of urgency, this period shall be reduced to eight days." Ordinance no 58-1067 constituting an institutional act on the Constitutional council, Section 23-10, "The Constitutional Council shall give its ruling within three months of the referral being made to it", Dyevre (n 213) 159 and Francois-Xavier Millet and Nicoletta Perlo,'The First Preliminary Reference of the French Constitutional Court to the CJEU: Revolution de Palais or Revolution in French Constitutional Law' (2015) 16 German Law Journal 1471.

[235] On the case of ICC see Roberto Miccu, 'Toward a (Real) Cooperative Constitutionalism? New Perspectives on the Italian Constitutional Court' in Jose Maria Beneyto and Ingolf Pernice (eds), *Europe's Constitutional Challenges in the Light of the Recent Case Law of National Constitutional Courts* (Nomos 2011) 128; Martinico (n 156) 229; and Repetto (n 156) 1451ff. For PCT see Kustra (n 230) 1556 and 1564-1567.

These peculiarities could also be traced to other jurisdictional limitations of constitutional courts and the constitutional procedural law, such as in Germany, under which there are rare occasions in which EU law is directly concerned and invoked before the constitutional court.[236] In any case, some constitutional courts have not openly denied the possibility of sending a preliminary reference but have simply foreseen that for the future without ever actually using it.[237] Therefore one could argue that, in essence, the underlying reason seemed to be related to the avoidance of entering a direct conflict[238] with the CJEU and the preservation of the status of these institutions and their constitutional monopoly of constitutional review which seemed to be jeopardized by the CJEU, the doctrines of EU law and the decentralizing tendencies of its *Simmenthal* doctrine.[239] More precisely, constitutional courts were careful not be placed in a subordinate position to the CJEU by entering a direct judicial dialogue.

Against this background, the increasing number of referrals from constitutional courts starting from 2008 represents a beginning of a new or recent trend and development. One can recognize several factors why 2008 has demarcated a turning point in constitutional courts position towards preliminary reference. Namely several developments on EU, but also on national level, have influenced their decisions to start using preliminary reference.[240] The *first* factor is the enactment of the Lisbon Treaty. This treaty incorporated the Charter on fundamental rights and thus provided it with a legally binding force. This meant that the EU and the CJEU have gained a greater impact in the sphere of fundamental rights and in that manner entered a very sensitive area of jurisdiction of constitutional courts.[241] On the other hand, the Lisbon Treaty envisages in Article 4(2) TEU a very important obligation for EU institution to respect national identity of member states. This latter provision and the protection of constitutional identity have actually been interpreted by the constitutional courts as their last bastion of safeguarding the national constitutions from EU law.[242] Actually it could be argued that this provision has encouraged constitutional courts to enter a judicial dialogue reassuring them that at the end of the day they might have the provisional 'last say' i.e. have a legal possibility in exceptional situations to disobey the ruling of the CJEU.[243]

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[236] More specifically on Germany see Lohse (n 223) 1492 – 1498. On the same point in the case of Italy see Miccu (n 235) 117.

[237] Bobek (n 232) 1632.

[238] Preferring to resort to a 'mute conflict' instead, Marta Cartabia, 'Europe as a Space of Constitutional Interdependence: New Questions about the Preliminary Ruling' (2015) 16 German Law Journal 1792. See also in Damian Chalmers, 'The Dynamics of Judicial Authority and the Constitutional Treaty' (2004) Jean Monnet Working Paper 5/04 33. He claims that reason for non-referral by constitutional courts might found elsewhere. "Even a brief perusal of the cases suggest this was not some systematic rejection of the Court of Justice's authority. The overwhelming majority of cases involved significant commercial interests where speedy resolution and legal certainty were considered to be particularly important. If a matter was not general and important, national courts of last resort do not refer."

[239] Dicosola, Fasoneand and Spigno (n 28) 1319-1320; Torres Perez (n 35) 61; Cartabia (n 72) 28; Andreas Orator, 'The Decision of the Austrian Verfassungsgerichtshof on the EU Charter of Fundamental Rights: An Instrument of Leverage or Rearguard Action?' (2015) 16 German Law Journal 1442ff; and Lohse (n 223) 1491.

[240] Dicosola, Fasone and Spigno (n 28) 1321-1325; and Claes (n 228) 1340.

[241] Cartabia (n 72) 5ff; Bobek (n 227) 34; and Miryam Rodriguez-Izquierdo Serrano, 'The Spanish Constitutional Court and Fundamental Rights Adjudication after the First Preliminary Reference' (2015) 16 German Law Journal 1517 and 1526.

[242] For more on this see chapter 5.

[243] Claes, de Visser, Popelier and Van de Heyning (n 55) 9.

Second, the combination of an increasing scope of both EU law and constitutional review has made the constitutional courts revise their approach towards the preliminary reference. Namely, it was on the one hand, the euro crisis and the introduction of new legal instruments in an effort to tackle it which have caused a concern over the unwarranted broadening of the scope of EU law.[244] On the other hand, the increasing constitutionalization of many areas of law at the national level[245] along with the rapidly increasing general scope of EU law especially with the Lisbon Treaty has somehow forced constitutional courts to get more involved with EU law and consider entering a direct dialogue with the CJEU. This higher level of direct exposure of different areas of law to both EU law and constitutionalization broadened the areas in which constitutional courts have powers and jurisdiction and where they cannot avoid getting involved with EU law. This has brought to a changing perception of constitutional courts concerning EU law and their place in the European integration.[246] Their adjustment to this new perception has brought to a developing shift from a defensive to a more cooperative attitude.[247] The perception shift and adjustment by the constitutional courts also has its national dimension as their position not only to the CJEU but also their relation to other high instance domestic courts has been affected and jeopardized as result of the empowerment of the ordinary judiciary through EU law.[248]

Nevertheless, these factors have not led to an unconditional acceptance of the preliminary reference but to a less reserved position of constitutional courts. Even though 9 out of 18 constitutional courts in the EU have already sent a preliminary reference to the CJEU for most of these courts this has been done only in exceptional situations.[249]

Even though criticized for their rigid position, constitutional courts have enough arguments to maintain their cautious attitude[250] especially under circumstances in which the CJEU still does not recognize the special place and role of constitutional courts[251] which is supposed to be reflected at the EU level from their place and role in the national constitutional systems. The CJEU has never taken into serious consideration the difference between ordinary and constitutional legality and between supranational and constitutional legality.[252] While it might be true what Monica Claes argues that the preliminary reference procedure does involve a

[244] Dicosola, Fasone and Spigno (n 28) 1323-1325; and Claes (n 228) 1340.
[245] Stone Sweet (n 9) 114ff; and Zurn (n 10) 284.
[246] Dyevre (n 213) 155-156.
[247] Torres Perez (n 35) 63; Dyevre (n 213) 156; and Bobek (n 227) 34.
[248] See for example on this Orator (n 239) 1442. He even terms this as a "rearguard action" by the ACC.
[249] For instance, the ICC has sent three, the FCC two, CC one, LCC one, the SCC one and Slovenian Constitutional Court one preliminary reference to the CJEU. See Claes (n 229) 165-166 or the contributions in the Special Issue, 16 German Law Journal 6 (2015). However, this does not apply for the Austrian and Belgian constitutional courts which have regularly sent issue through the preliminary reference procedure to the CJEU. For instance, in Belgium it occurs that the constitutional court is transferring internal issue to CJEU on which it does not want to decide. See Cloots (n 212) 654; Dyevre (n 213) 156 he terms this as "outsourcing" and Sarmiento (n 114) 309, "national courts see a 'European answer' to a question they are not eager to solve themselves."
[250] Dicosola, Fasone and Spigno (n 28) 1319; Komarek (n 15) 443ff; and Cloots (n 212) 669.
[251] Torres Perez (n 35) 65 and Repetto (n 156) 1470. Perhaps the only serious instance where some recognition of the position of constitutional courts could be recognized is the *Melki* decision. Torres Perez (n 35) 58-60 *Melki* as example of a constructive dialogue by qualifying the *Simmenthal* doctrine, Dyevre (n 213), Bossuyt and Verrijdt (n 233) 377, but also on a note of caution see 391 for the positive underpinning of Melki, also for a more cautious approach see Komarek (n 15) 442; and Claes (n 228) 1342.
[252] Komarek (n 15) 442-446 and Repetto (n 156) 1470.

jurisdictional exclusivity rather than hierarchical superiority,[253] still one cannot deny that it involves an assumption of obedience.[254] This assumption is the result of two factors. First, the preliminary reference procedure is based on logic of a single procedural round where further exchange on the specific issue at hand is not possible.[255] The only possibility to have any further exchange of arguments is by re-referrals over the same issue. Second, it is related to the actual purpose of the preliminary ruling procedure. Namely, the main rationale behind the preliminary reference is the uniform and effective interpretation and application of EU law. One could also argue that behind this rationale hides the underlying goal which consists of further strengthening of the principle of primacy of EU law.[256] Nevertheless, the direct rationale is not, for example, the protection of fundamental rights. On the other hand, the latter, along with the safeguarding of constitutionality, are the main roles and purposes of constitutional courts in the national legal order.[257] Therefore, the direct judicial dialogue is being conducted between institutions with goals which do not always overlap. Bearing this in mind, the differing institutional rationale, the cautious attitude of constitutional courts seems reasonable. The principle of uniform application cannot represent an overriding argument in this sense especially in light of other values and principles which are, *inter alia*, safeguarded by constitutional courts.[258] For instance, it was also because of this reason that the *Melloni* decision of the CJEU has been often criticized by constitutional scholars[259] in view of lowering the constitutional standards for fundamental rights protection. In the words of the CJEU a higher national standard of protection of fundamental rights might be applied according to Article 53 of the Charter "provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised."[260]

It is exactly this latter development in *Melloni*[261] which was the main reason for the FCC's reaction in its second decision on EAW, labeled by some as Solange III,[262] sending a clear

[253] Claes (n 112) 433 and Cartabia (n 238) 1795.
[254] Komarek (n 15) 433. De Witte terms this as a form of a European diktat. See De Witte (n 105) 41.
[255] Komarek (n 15) 433 and De Witte (n 105) 41.
[256] Jan Komarek, 'In the Court(s) We Trust? On the Need for Hierarchy and Differentiation in the Preliminary Ruling Procedure' in Filippo Fontanelli, Giuseppe Martinico and Paolo Carrozza (eds), *Shaping Rule of Law Through Dialogue: International and Supranational Experiences* (Europa Law 2009), 96 and Besselink (n 220).
[257] Komarek (n 15) 445. See more on the difference between market freedoms and fundamental freedoms and the CJEU favoring the former in Franz C. Mayer, Multilevel Constitutional Jurisdiction in: Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (2nd edition Hart 2009) 433, Torres Perez (n 35) 62ff speaks of structural reasons for constitutional courts to act as counterbalance to the CJEU related to different viewpoints of courts, and Bossuyt and Verrijdt (n 233) 387.
[258] See more on this in the chapter 3. See also Komarek (n 256) 93-99. For a detailed analysis on the effectiveness of protection of human rights in light of the effectiveness of EU law see Bossuyt and Verrijdt (n 233) 383 – 391.
[259] Torres Perez (n 214), Daniel Sarmiento, 'Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe' (2013) 50 Common Market Law Review 1267ff; Sarmiento (n 218); Besselink (n 220); Leonard F. M. Besselink, 'The Parameters of Constitutional Courts after Melloni' (2014) 39 European Law Review 531ff; and Paul Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (CUP 2015) 503-505.
[260] CJEU *Melloni* (n 212) para. 60.
[261] Besselink (n 259) 25: "For the moment this [the changed interpretation of the SCC on the narrow definition of the right to a fair trial] has avoided an overt constitutional conflict. But new material for an outbreak of such conflict is provided by the Court of Justice in Melloni itself."
[262] Mathias Hong, Human Dignity and Constitutional Identity: The Solange-III-Decision of the German Constitutional Court (Verfassungsblog 18 February 2016).

warning signal[263] also by referring to *Melloni* that this development goes out of constitutional bounds.[264]

Nevertheless all the above still does not represent a decisive argument for complete insulation and isolation of constitutional courts from using the preliminary reference procedure regardless of the point made above that their approach towards it should remain cautious particularly until the CJEU becomes more responsive to national constitutions' particularities and constitutional courts.[265] Through their direct engagement constitutional courts could demonstrate their constructive role in the legal integration more successfully and get engaged in the common endeavor of constructing the common European constitutional area. More importantly, by entering the dialogue they will be able to compensate for the limits set on its national monopoly and exclusivity for constitutional review by being able to contribute and influence the creation and development of legal doctrines and values on a European level.[266]

4.2 The role of constitutional courts in direct dialogue through the prism of constitutional pluralism

Placing the cautious approach in a theoretical framework, only at first glance might this specific approach of constitutional courts contradict constitutional pluralism. As a matter of fact, constitutional pluralism does speak of intersections and overlaps between the legal orders, but nevertheless this does not deny in any way the existing autonomy of the legal orders and the protection thereof.[267] Accordingly, the orders are not interchangeable and therefore any absolute subordination of constitutional courts to the CJEU and to EU law denies the existing relationship between the legal orders and the specific role of constitutional courts.[268] But which are the specific roles and added value of constitutional courts in regard to their participation in direct judicial dialogue in Europe as seen through the prism of constitutional pluralism?

Analyzing the direct judicial dialogue within the framework of constitutional pluralism we need to get back to the constructive roles of constitutional courts as interlocutors and their place as part of constitutional pluralism in the judicial dialogue generally. Namely, constitutional courts bring an added value by making their roles in the EU particularly evident in the context of the preliminary reference procedure. Through the engagement of constitutional courts in direct judicial dialogue in Europe they actually bring up the existing pluralism to the fore in Europe confronting the CJEU and EU as whole with this type of diversity thus neutralizing the risk of possible constitutional homogenization.[269] Even though it might be too early to discuss this recent development since there are not so many referrals, and only from half of the

[263] An implicit warning signal was sent also by the SCC itself by making reference to its previously set *contralimiti* doctrine. For more on this see Torres Perez (n 214) 14.
[264] FCC (n 156) 76, 82; and Sarmiento (n 218).
[265] On this relation especially in the context of game theory see Michal Bobek, 'New European Judges and the Limits of the Possible' in Adam Lazowski (ed), *The Application of EU Law in the New Member States* (Asser 2010) 151-153.
[266] Voßkuhle (n 177) 197.
[267] Neil MacCormick, 'The Maastricht-Urteil: Sovereignty Now' (1995) 1 European Law Journal 259.
262; and Neil Walker, 'Constitutionalism and Pluralism in Global Context' in Matej Avbelj and Jan Komarek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012) 22.
[268] Komarek (n 15) 446.
[269] Cartabia (n 72) 27.

constitutional courts in the EU, still one could recognize certain advantages of the involvement of constitutional courts in the dialogue based on the particularities of these institutions and constitutional review in general.

In order to have a true constitutional conversation[270] in Europe constitutional courts need to enter into a direct judicial dialogue with the CJEU. This is the main reason why Comella argues that "[t]he constitutional courts should be the entity that talks to Luxembourg in the name of ultimate principles rooted in the national constitution."[271] The main reason behind this is that references brought by ordinary judges are not formulated as questions about constitutional matters.[272] It frequently occurs that ordinary courts are neither good at recognizing the relevant EU law nor at properly phrasing the actual questions and issues in the preliminary reference to CJEU, especially when at stake are constitutional issues or more abstract norms or principles.[273] Constitutional courts, however, as result of their specificities, as well as of the ones of the constitutional discourse, are able to better funnel the constitutional arguments and issues at stake and therefore could be perceived as the only viable interlocutors of the CJEU in a direct constitutional dialogue in Europe. Furthermore, even the constitutional tradition of constitutional review itself has influenced the attitude of ordinary courts towards entering a direct judicial dialogue which has led authors to call for 'juristocracy' in some countries lacking this tradition and belonging to so-called majoritarian democracies.[274] In this sense constitutional courts bring their added value both directly and indirectly when it comes to judicial dialogue.

Discussing the difference between lower ordinary courts and the last instance courts there have been proposals and suggestions according to which the highest national courts as courts of last instance, including constitutional courts, would be the only interlocutors in the preliminary reference procedure. Such a narrowing of the possibility to refer a question to the CJEU would essentially limit the preliminary reference to truly important issues. Thus this proposal is primarily based on the arguments related to rationalization of the preliminary reference procedure before the CJEU putting it in a position of becoming a genuine supreme or constitutional court of the EU by dealing with fewer cases involving fundamental legal issues and increasing the quality of the national judicial procedure by respecting the internal judicial hierarchy.[275] As a matter of fact it is inherent in the actual design of the procedure of

[270] According to De Witte the preliminary reference procedure between ordinary courts and the CJEU cannot be even termed as a true dialogue. See De Witte (n 105) 39-41.
[271] Comella (n 7) 137.
[272] De Witte (n 105) 40-41; and Torres Perez (n 3) 137.
[273] Perhaps the best illustration of this lack of capacity of ordinary court could have been seen in Portugal during the latest financial crisis and the introduction of austerity measures. For this see Francisco Pereira Coutinho, 'Austerity on the Loose in Portugal: European Judicial Restraint in Times of Crises' (2016) 8 Perspectives on Federalism 121-122, available at: http://on-federalism.eu/attachments/249_download.pdf last visited 08.10.2018.
[274] See for example Jens Elo Rytter and Marlene Wind, 'In Need of Juristocracy? The Silence of Denmark in the Development of European Legal Norms' (2011) 9 International Journal of Constitutional Law 470ff; and Marlene Wind, Dorte Sindbjerg Martinsen and Gabriel Pons Rotger, 'The Uneven Legal Push for Europe: Questioning Variation when National Court go to Europe' (2009) 10 European Union Politics 64ff. However, cf. Morten Broberg and Niels Fenger, *Preliminary Reference to the European Court of Justice* (OUP 2010) 49-52.
[275] For more on this see Komarek (n 256); Broberg and Fenger (n 274) 33-34; and in the context of *Landotva* case Bobek (n 227) 77. Also on this but in the context of the discussion on advisory opinions by the ECHtR see Jean

preliminary reference in the EU, which has been based on national procedures for addressing constitutional courts with preliminary constitutional questions, under which procedure only important issues (i.e. constitutional issues) are sent to the court.[276] However the analogy with the national procedures should not be overemphasized in other areas due to evident differences and the existence of the element of hierarchical relationships between the different national judicial instances.[277]

Accordingly, what constitutional courts bring to the preliminary reference is more leverage by raising complex constitutional issues before the CJEU.[278] By doing this, constitutional courts are essentially feeding constitutional principles directly to the CJEU which are supposed to lead the latter into providing strong and more reasoned arguments in delivering its decisions creating the impression of a shared endeavor.[279] Constitutional courts are thus clarifying certain national specificities and demarcating and enriching the general principles of EU law and one of their primary sources –the constitutional traditions common to the member states.[280] This depicts more clearly the external or EU dimension of the role of providing clarity to constitutional issues and arguments. Constitutional courts by addressing the issues at the same time are signaling the possible conflicts and incompatibilities between the orders, however, different from the forms of indirect dialogue they are addressing them directly to the CJEU and forcing it to respond to them.[281]

In turn the more responsive the CJEU is in such an occasion the more the constitutional courts would be encouraged to enter into direct dialogue.[282] Unfortunately, judged by the dominant style employed by the CJEU in its decisions that is often subject to criticism also because of ignoring national sensibilities, the prospects of drastic expansion of such dialogue is not that

Paul-Jacque, 'Preliminary Reference to the European Court of Human Rights' in *Dialogue between judges, European Court of Human Rights, Council of Europe*, (2012), 23.

[276] Komarek (n 256) 109. On the practice in Germany see Sturm and Detterbeck (n 206) paras. 29-30; and Heiko Sauer, *Jurisdiktionskonflikte in Mehrebenensystemen: Die Entwicklung eines Modells zur Lösung von Konflikten zwischn Gerichten unterschiedlicher Ebenen in vernetzten Rechtsordnungen* (Springer 2008) 147- 148.

[277] Sauer (n 276) 152-153. Here he argues that: „Aufgrund dieser Bestimmungen kann das Konfliktfeld zwischen den Verfassungsgerichtsbarkeiten im bundesstaatlichen Mehrebenensystem auch gerade kein Modellfall für ebenenübergreifende Jurisdiktionkonflikte sein: Denn zwischen Bundesverfassungsgericht und Landverfassungsgerichten ist mit Vorlagepflicht und Bindugswirkung bei aller Eigenstäendigkeiten der Landesverassungsgerichtsbarkeit eine gewisses Hierarchieverhäeltnis angelegt."

[278] Orator (n 239) 1445; and Repetto (n 156) 1450 where he claims that the ICC is "injecting constitutional blood at EU level."

[279] Torres Perez (n 35) 64; and Claes and De Witte (n 99) 96-97.

[280] CJEU, Case C-4/73 *Nold KG v Commission*, Judgment of 14 May 1974, ECLI:EU:C:1974:51; or Treaty on the European Union (Maastricht), Official Journal C191, 29.07.2011, former provision F and later Article 6 and Article 2. See additionally Claes and De Witte (n 99) 94ffl; Tatham (n 15) 302; Cloots (n 212) 653 claiming that the constitutional court is elucidating the specificities of the Belgian federal system, Torres Perez (n 35) 64; Cartabia (n 72) 26. Cartabia even designates a sort of *amicus curiae* of the CJEU role to constitutional courts. Nevertheless, this could be the case only when a constitutional court sends the preliminary reference directly and not in any other way. For the actual problem in *Ladntova* in this regard see in Bobek (n 227) 28; Torres Perez (n 3) 117. According to her it should be noted that the more state courts engage in dialogue, the more influence they might have in defining the meaning of supranational rights where the influence of constitutional courts is crucial.

[281] Torrez Peres (n 35) 64; and Cloots (n 212) 654.

[282] This response can be either 'loud' or 'silent'. On the latter see Sarmiento (n 114) 285ff.

promising.[283] Therefore one is inclined to conclude that there is a lack of care for a true judicial discourse by the CJEU.[284]

One might argue that constitutional matters are not exclusive only to constitutional courts and that such matters have occasionally been brought also by the highest ordinary courts i.e. supreme courts.[285] This fact cannot be denied, indeed, supreme courts deal with questions and issues of law and the unity in its application leaving the determination of facts to the lower court instances. However this does not contradict the difference between supreme and constitutional courts as earlier discussed.[286] Nevertheless, even the highest ordinary courts of the member states are involved in a form of regular adjudication thus applying legal norms to the facts of a case. They are not able to cope with the differentiation between ordinary and constitutional legality[287] which incorporates the difference between the technical application of law to facts and deciding on the validity of legal norms based on abstract constitutional principles.[288] Judges even at the highest instances are often not in a position to engage in the elaboration of abstract constitutional principles and values as they are more concerned with the goal of case solving in an efficient manner. This is also often the result of the fact that their dockets are quite full thus they are also facing a heavy time constrain which makes the abstract form of reasoning rather impractical and inefficient.[289] In this sense, comparing the constitutional courts with the US Supreme Court, Zurn rightly argues that when it comes to the latter "the relevant constitutional issues are systematically distorted by their consistent entanglement with the technical legal principles designed for the management of appellate adjudication."[290]

Furthermore, most of the judiciaries in Europe are based on the principle of career judiciary and bureaucratic hierarchy which essentially means that ordinary judges are neither in a position to use nor well equipped with the interpretative methods and argumentation required by constitutional review.[291] The latter requires a more elaborate style of reasoning which is different from the mere adjudication also conducted by the supreme courts.[292]

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[283] Joseph H. H. Weiler, 'Epilogue: The Judicial Apres Nice' in Grainne De Birca and Joseph H. H. Weiler (eds) *The European Court of Justice* (OUP 2001) 225; Komarek (n 15) 433; and Cartabia (n 72) 29-30.
[284] Ulrich Haltern, 'Verschiebungen im europäischen Rechtsschutzsystem' (2005) 95 *Verwaltungsarchiv* 345-346, Komarek (n 256) 108; Cartabia (n 72) 29; and Weiler (n 278) 219.
[285] Claes (n 228) 1333.
[286] On the need for specialization in constitutional review particularly through a centralized model and on the differentiation between constitutional review and technical legalism see Zurn (n 10) 281 – 286. This fact is also behind the logic of introducing a mechanism of concrete control in which ordinary courts are obliged to send the issue to the constitutional courts in cases in which this is raised as a preliminary question.
[287] Habermas (n 46) 217; Komarek (n 15) 442-446; and Repetto (n 156) 1470
[288] For examples from Italy see Repetto (n 156) 1463-1464.
[289] Michal Bobek, *Comparative Reasoning in European Supreme Courts* (OUP 2013) 44-45. See also in Komarek (n 256) 112 -113, on the role of higher courts referring to Mirjan Damaska, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press 1986) 16-28.
[290] Zurn (n 10) 284.
[291] Cappelletti (n 20) 63; Cappelletti (n 21) 143; and Nuno Garoupa and Tom Ginsburg, *Judicial Reputation: A Comparative Theory* (University of Chicago Press 2015) 8ff.
[292] For an example from the Belgian practice see Patricia Popelier and Aida Araceli Patino, 'Deliberative Practices of Constitutional Courts in Consolidated and Non-Consolidated Democracies' in Patricia Popelier, Armen Mazmanyan and Werner Vandenbruwaene (eds) *The Role of Constitutional Courts in Multilevel Governance* (Intersentia 2013) 221 – 222.

In order for this dialogue to be constructive, constitutional courts need to have a proactive role providing alternative solutions and reading of the contentious issues forcing the CJEU to reflect. The style, beside the leverage of the court,[293] of the reference can play a decisive role as on it depends whether constitutional courts will force the CJEU to take their arguments into serious consideration and respond to them adequately, be it even in a 'silent judgment'.[294] The reference should depict one of the main discursive roles of constitutional courts through funneling and refining the arguments which even in certain instances have already been previously made by other judicial instances. By doing this constitutional courts bring order and clarity in the debate by providing all the required information and explain the importance of the constitutional issue at stake.[295] This clarity, as well as importance, would be further increased if constitutional courts would use a wording and reasoning in phrasing the questions which is more universal and which other judicial instances and legal order of other member states could relate to, thus achieving a certain level of universality of the issue at hand.[296]

Taking into consideration the design of the preliminary reference procedure, with only one single possibility for the court to present the arguments as they are excluded from further proceedings before CJEU,[297] it is recommendable for constitutional courts to provide alternative solutions and answers. Actually this goes in line with a proposal at the EU level for the introduction of the so-called 'green light' procedure[298] in which the highest courts, and particularly constitutional courts, could have a crucial input.[299] According to this procedure upon a preliminary reference in which a national court, preferably, includes suggestions how to answer the question the CJEU has two options.[300] One is to give the green light to the suggestions made by the national court or, the other, to enter into a more elaborate disposition of the case. This is a procedure which has already been part of the German legal system and practice in which ordinary courts need to put forward their suggestions in their references to the FCC for a concrete constitutional review.[301]

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[293] Claes and De Witte (n 99) 98.
[294] Sarmiento (n 114) 285ff.
[295] Tatham (n 15) 317; Komarek (n 256) 113; and Cloots (n 212) 654ff.
[296] Maduro terms this as the universalizability principle in the interaction between judicial instances. See Maduro (n 1) 530.
[297] Claes (n 228) 1342.
[298] European Parliament resolution of 9 July 2008 on the role of the national judge in the European judicial system (2007/2027(INI)), 9 July 2008; Francis Jacobs, 'The European Courts and the UK – What Future? A New Role for English Courts', *Bar Council Law Reform Committee Lecture* 2014, 4, available at http://www.barcouncil.org.uk/media/313255/lecture_delivered_by_professor_sir_francis_jacobs_3_11_14.pdf last visited 08.10.2018; Brober and Fenger (n 274) 30-31, they also refer to the 'red light procedure' as well; and Tatham (n 15) 317-318.
[299] Groussot (n 161) 5 and Alan Dashwood and Agnus Johnston, 'Synthesis of the Debate' in Alan Dashwood and Agnus Johnston (eds), *The Future of the Judicial System of the European Union* (Hart 2001) 68. Broberg and Fenger argue that the main problem concerning the green light procedure is exactly in identifying the relevant EU law and even more difficult task of coming up with a well-reasoned suggestion for answering the question which requires a solid knowledge of EU law as well as the national law. Therefore, the constitutional courts could play a decisive role in this procedure also. See Brober and Fenger (n 274) 31.
[300] See the contrasting experience of BCC on EAW in 2005 and 2009, Cloots (n 212) 655-656.
[301] Tatham (n 15) 317; and Henry Schermers, 'Problems and Prospects' in Alan Dashwood and Agnus Johnston (eds) *The Future of the Judicial System of the European Union* (Hart 2001) 34; and Dashwood and Johnston (n 299) 68.

While there are different classifications of the character of preliminary references from different constitutional courts as constructive or aggressive,[302] it should be argued that the style of the reference should be analyzed above all from the aspect of the debate that it initiates and the outcome it has.[303] For instance the referral from the SCC in the *Melloni* case has been praised on many grounds nevertheless the outcome and the answer of the CJEU has often been criticized.[304] On the other hand the OMT referral of the FCC, often criticized for its aggressive tone and setting ultimatums to the CJEU, seems like it has forced the CJEU to dwell on the issue more seriously in search of middle ground. It has in the end led to a 'peaceful settlement' of the issue, under certain conditions.[305] If the latter are not met it might lead to reopening of the issue once again.[306] As a matter of fact, the second preliminary reference of the FCC[307] to the CJEU on the Quantitative Easing, which is closely related to the ECB's OMT program being also part of the instruments and measures aimed to resolve the financial crisis in the EU, can be interpreted as a continuation of this judicial dialogue. Although in a slightly different context, this reference clearly refers to the general interpretation and conditions of monetary policy instruments in the EU as defined by the CJEU in *Gauweiler*.[308] In this sense, the OMT saga has opened the door for further judicial dialogue requiring clarifications of certain previously unresolved questions. Lastly, the ICC's third preliminary reference in the *Taricco* case[309] is the latest instance of an initiated judicial dialogue between a national constitutional courts and the CJEU which clearly resembles the FCC's stance and the OMT saga however with a rather conciliatory tone.[310] It has raised a lot of interest over its outcome particularly

[302] See for example Samuel Dahan, Olivier Fuchs and Marie-Laure Layus, 'Whatever It Takes? Regarding the *OMT* Ruling of the German Federal Constitutional Court' (2015) 18 Journal of International Economic Law 138, characterizing the FCC's approach in the OMT referral basically as a stretched arm with a closed fist, on the style and approach of the FCC in OMT reference; see also Mattias Kumm, 'Rebel Without a Good Cause: Karlsruhe's Misguided Attempt to Draw the CJEU into a Game of "Chicken" and What the CJEU Might do About It' (2014) 15 German Law Journal 203; and Franz C. Mayer, 'Rebels Without a Cause? A Critical Analysis of the German Constitutional Court's OMT Reference', 15 German Law Journal (2014) 111 and Claes (n 228) 1341; and Monica Claes and J H. Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the *Gauweiler Case*' (2015) 16 German Law Journal 917ff; Torres Perez (n 35) 61 arguing that constitutional courts attitude generally has been 'defensive and overtly confrontational'.

[303] Cloots (n 212) 653ff and 666; and Torres Perez (n 3) 100 -112.

[304] For more on this see Torres Perez (n 214) 329-331.

[305] Martin Nettesheim, 'Vorlage, EuGH-Entscheidung und Endentscheidung des BVerfG haben die Dialogbereitschaft und –fähigkeit der beiden Institutionen eindrücklich belegt' (Verfassungsblog 24 June 2016).

[306] FCC, Constitutional Complaints and Organstreit Proceedings Against the OMT Programme of the European Central Bank Unsuccessful, Press Release No 34/2016 of 21 June 2016.

[307] FCC, *Quantitative Easing*, 2 BvR 859/15 et al order of 18 July 2017. See also Matthias Goldman, Summer of Love: Karlsruhe the QE Case to Luxembourg (Verfassungsblog 16 August 2017) available at: http://verfassungsblog.de/summer-of-love-karlsruhe-refers-the-qe-case-to-luxembourg/ last visited 08.10.2018.

[308] CJEU, Case C–62/14, *Gauweiler v. Deutcher Bundestag*, 16 June 2015, ECLI:EU:C:2015:400.

[309] ICC Order 24/2017 of 23 November 2017, English version available at: http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/O_24_2017.pdf last visited 08.10.2018.

[310] Davide Paris, 'Carrot and Stick. The Italian Constitutional Court's Preliminary Reference in the Case Taricco' (2017) 37 Questions of International Law 5, 6 and 15; and Pietro Faraguna, 'The Italian Constitutional Court in re Tarricco: "Gauweiler in the Roman Campagna"' (Verfassungsblog 31 January 2017), available at: http://verfassungsblog.de/the-italian-constitutional-court-in-re-taricco-gauweiler-in-the-roman-campagna/ last visited 08.10.2018. The further development of this *Taricco* saga, the ruling of the CJEU and the decision of the ICC upon the preliminary reference rulling, has not proven to be totally conciliatory and it has left an ample room for future dialogue or even conflict as the issue has not been completely settled. See CJEU Case C-42/17, *M.A.S. and M.B.*, judgment of 5 December 2017 ECLI:EU:C:2017:936; and ICC Judgment 115/2018 of 10 April 2018

because this reference directly challenges CJEU case law and it confronts the CJEU with the constitutional identity doctrine forcing it to address this contentious issue of broader importance.

Be that as it may the track record so far does not allow drawing any firm conclusions yet. Even though the CJEU has declared the preliminary reference to be an instrument of cooperation,[311] still this instrument, as Voßkuhle argues:

> "decisively depends on the extent to which the CJEU is willing to include national legal traditions in the interpretation of Union law and to admit differing interpretations as well should the occasion arise."[312]

Based on the limited experience of preliminary reference by national constitutional courts so far one could argue that this is not really the case when the CJEU is concerned. For instance, in the case of *Data Retention Directive* and the preliminary reference, *inter alia*, from the ACC the CJEU turned out to be rather receptive only after mounting pressure from several other constitutional courts and supreme courts in the previous years.[313] On the other hand, in the *OMT* case referred to the CJEU by the FCC there was only partial recognition of the arguments of the constitutional court[314] while in *Melloni*, referred by the SCC, there was almost none.[315] Actually this latter decision of the CJEU has caused the anticlimax of the SCC which in its final decision on the matter avoided acknowledging the binding effect of the preliminary reference treating the decision of the CJEU as a mere interpretative tool thus moving away from any dialogue following the attitude of the CJEU.[316] This was accompanied by a reference to the *controlimiti*[317] which depicted the SCC's "reluctance to be placed under interpretive authority of the CJEU."[318] Therefore, it could be easily argued that the much criticized preliminary ruling of the CJEU, on the one hand, muted the judicial dialogue with the SCC, but on the other provoked reactions from other constitutional courts. When it comes to the well-known Italian doctrine in this context, the *controlimiti*, it remains to be seen how the issues raised in the *Tarrico* saga will be tackled in future as they remain partly unsettled and could potentially have much broader impact when it comes to the relationship not only between the judicial instances but also legal orders in the EU. Thus these developments in the Taricco saga

(*Taricco Decision*), English version available at: https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_2018_115_EN.pdf last visited 30.01.2019. For more on this saga see Lukas Staffler, 'Verfassungsidentität und strafrechtliche Verjährung; Das (vorläufige) Ende des Konflikts zweier Höchstgerichte in der Rechtssache Taricco' 45 Europäische Grundrechte Zeitschrift (2018) 613-619; and Chiara Amalfitano and Oreste Pollicino, 'Two Courts, two Languages? The Taricco Saga Ends on a Worrying Note (Verfassungsblog 5 June 2018), available at: https://verfassungsblog.de/two-courts-two-languages-the-taricco-saga-ends-on-a-worrying-note/ last visited 30.01.2019.

[311] CJEU, Case C-167/01 *Inspire Act*, Judgment of 30 September 2003, ECLI:EU:C:2003:512.

[312] Voßkuhle (n 196) 90.

[313] CJEU *Digital Rights* (n 223) and see all the references in fn. 219.

[314] CJEU *Gauweiler* (n 308).

[315] Besselink (n 259) 9; Komarek (n 15) 433-434; and Torrez Perez (n 212) 318.

[316] Besselink (n 259) 9, 21; and Torrez Perez (n 212) 321ff.

[317] Torrez Perez (n 212) 320.

[318] Torrez Perez (n 212) 323.

have the potential to determine some of the future developments based on willingness of the CJEU to take the arguments of national constitutional courts into serious consideration.[319]

4.3 Disobeying the CJEU and EU law as part of the judicial dialogue

There is another reason related to constitutional pluralism why constitutional courts are the best interlocutors when it comes to constitutional issues. According to the theory of judicial dialogue, there is no dialogue between two courts if there is an element of hierarchy. In this sense bi-directionality, as an essential feature of judicial dialogue, exists only among co-equals.[320] As De Witte argues the dialogue cannot be led under circumstances of either European or national diktat.[321] Therefore by denouncing the 'last word' conception constitutional pluralism, basically, fosters the establishment of this type of direct judicial dialogue. Influenced or informed by constitutional pluralism one could argue[322] that constitutional courts are continuously adjusting their position towards EU law. In this sense constitutional courts with their reasoning and by developing new doctrines, when EU law is concerned, are essentially creating flexible legal solutions and thus serving the purpose of legitimizing EU law also by establishing the direct dialogue. Namely, constitutional courts have been constructive in anchoring EU law and providing instruments for its direct application in the national legal order, but also they have set the limits and provided themselves with the role of putting checks on the CJEU.[323] In this manner constitutional courts have designed a conditional acceptance of EU law primacy, which in contrast is promoted by the CJEU in an unconditional and absolute manner.[324]

Taking the latter into consideration and placing it in the framework of judicial dialogue it could be argued that only if constitutional courts are able, under very limited circumstances, to disobey a decision of the CJEU is it possible to have a true dialogue which is not burdened by the 'last word' or struggles over supremacy.[325] As a matter of fact and as a result of the accommodation and adjustments made in the process of providing EU law with constitutional legitimacy constitutional courts' disobedience and non-subordination can, according to the heterarchical relationship of legal orders, be legitimized and explained through EU law and, at the same time, not represent infringement of EU law.[326] Furthermore the disregard by constitutional courts under circumstances in which neither interpretative efforts nor discursive engagement with the CJEU has born any result in the safeguarding of fundamental

[319] Paris (n 310) 17-20: Staffler (n 310); and Amalfitano and Pollicino (n 310).
[320] Dumbrowsky (n 141) 177-178; and Torres Perez (n 3) 126ff.
[321] De Witte (n 105) 41 referring to Joseph H. H. Weiler and Ulrich R. Haltern, 'Constitutional or International? The Foundations of the Community Legal Order and the Question of Judicial Kompetenz-Kompetenz' in Anne-Marie Slaughter, Alec Stone Sweet and Joseph H. H. Weiler (eds) *The European Court and National Courts – Doctrine and Jurisprudence: Legal Change in Its Social Context* (Hart 1998) 364. See also Krämer and Märten (n 105) 174, they claim that „[d]ie Unterwerfung unter eine andere Autorität ist kein Dialog."
[322] On this influence of the pluralist discourse in assessing decision of constitutional courts see Albi (n 183) 791-797 and 824.
[323] Torres Perez (n 35) 62; and Claes and De Witte (n 147) 87.
[324] Klatt (n 189) 203.
[325] Matej Avbelj and Jan Komarek, 'Four Vision of Constitutional Pluralism', EUI Working Paper Law 2008/21, (2008) 11 and 20.
[326] Mayer (n 255) 434; and Mayer (n 199) 67.

constitutional principles[327] can be perceived as one of the basic presumptions of constitutional pluralism and its descriptive and normative account of the current relationship between legal orders in Europe.[328] This is the reason why it has been claimed that in certain cases "[t]he degree of principled judicial disobedience compensates for the judicial obedience" to a CJEU diktat.[329]

The risk of abuse of such a possibility of disregard and judicial non-compliance is contained by the prudence of constitutional courts and their awareness of the possible effects of such decisions and their limits in present institutional setting. More precisely, constitutional courts need to pay attention to the views of other relevant judicial and political bodies in order not to end up isolated and discredited in their disobedience, especially under circumstances of a broad consensus among these institutions and the public opinion on both the issue at hand and a strong pro-European stance.[330] Additionally, since a decision of non-compliance to EU law and a CJEU decision has leverage also outside of national bounds and can cause a negative domino effect, the constitutional courts would definitely resort to such an option only under very restrictive circumstances. Departing from this logic might cause a serious blow to the credibility and authority of constitutional courts. Therefore in such a situation Dyevre rightly argues that "[f]ar from an indication of strength, the decision to disapply EU law may in fact constitute evidence of domestic court's institutional weakness".[331]

Following this line of thought it could be argued that constitutional courts have started entering into a direct judicial dialogue because of their 'ace up their sleeve', that is the respect for constitutional values and principles of the member states through identity or *ultra vires* review. This sort of reasoning is also reflected in the extra-judicial opinion of the president of the FCC, Voßkuhle, where he clearly argues that the 'emergency brake mechanism' best serves when not used.

> "'Emergency brake mechanisms' are most effective if they do not have to be applied. Precisely because of their existence – and not despite their existence – it has never 'come to the crunch'. This has made it possible for the Federal Constitutional Court to complement the ultra vires review with the identity review in its Lisbon judgment without having to fear that it would more frequently get into conflict with the Court of Justice."[332]

This emergency break idea[333] is the one that is supposed to make the CJEU more responsive, receptive and sensitive to the claims and arguments made by national constitutional courts creating a balance between these institutions. Such a balance could be sustained only if the threats for disobeying EU law are credible and not previously discredited or driven by wrong

[327] See for the case of Belgium Cloots (n 212) 658 and 611 arguing the "lack of respect for the constitutional traditions of Member States which is reflected in the ECJ's rulings".
[328] Sarmiento (n 114) 289.
[329] Besselink (n 259) 24.
[330] Dyevre (n 89) 14.
[331] Dyevre (n 89) 5.
[332] Voßkuhle (n 177) 195-196 and for the German version see Andreas Voßkuhle, 'Der europäische Verfassungsgerichtsverbund', *TransState Working Papers No. 106* (2009), 20.
[333] On this see also Dyevre (n 89) 29 making a similar point over the 'coexistence or containment equilibrium'.

reasons.[334] Moreover, the FCC in its recent case law related to EU law, namely, the OMT preliminary reference and decision and its latest decision on the EAW, has made this sort of stance rather clear and arguably in a rather aggressive manner. In both of these cases the FCC has introduced and announced the possibility of using the constitutional identity review mechanism in case the CJEU radically departs from the suggested reasoning and interpretation of the FCC that is deemed to be compatible with the constitution. The ICC has recently developed its *contralimiti* doctrine in its third preliminary reference on the *Taricco* case in the same direction as the FCC. Using a milder tone the ICC has faced the CJEU with very important questions as well as the possibility of Italian national courts not applying CJEU *Taricco* judgment[335] as result of its incompatibility with the fundamental principles of the Italian constitution.[336]

Contrasting this type of approach, the CCC, in a very drastic and impulsive response in the *Slovak Pensions* saga, actually used the emergency brake mechanism Voßkuhle refers to. The CCC in its *Holubec* decision declared the *Landtova* decision of the CJEU[337] on the matter of Slovak pensions to be *ultra vires*.[338] The reaction was rather overblown and did not really achieve its goal besides drawing significant attention to the actual internal institutional conflict between the Supreme Administrative Court and the CCC. Nevertheless, the CCC's decision could be partly justified by the evident lack of sensibility of the CJEU on this complex and unique matter as well as its involvement in an internal institutional struggle in which it has ignored the CCC's arguments. Namely, the CJEU has rejected, on procedural grounds, the letter from the CCC explaining its stance and reasoning on the matter as there was no other way for this national court to communicate its views in the proceeding. The Czech government took the side of the Supreme Administrative Court and thus it did not really reflect on the stance of the CCC in its position before the CJEU. Therefore, the CCC was left in a position not only of its case law being subject to direct attack before the CJEU but also without any opportunity to be represented in the proceedings.[339]

This attitude of the CJEU comes in stark contrast with its attitude towards the CC, for instance, in the *Melki* case in which we had a very similar internal institutional struggle in France.[340] Not only has the CJEU acted uncharacteristically swiftly under the expedited procedure, paying

[334] Dyevre (n 89) 20ff. He discusses more especially on the difference in this regard between certain constitutional courts in Europe.
[335] CJEU, Case C-105/14 *Taricco*, Judgment of 8 September 2015 ECLI:EU:C:2015:555.
[336] Paris (n 310) 15. Even with the latest development in this saga some of these issues remain to be opened and that would probably lead to another episode of judicial dialogue. For more on this see Staffler (n 310); and Amalfitano and Pollicino (n 310).
[337] CJEU, Case C-399/09 *Landtova,* Judgment of 22 June 2011, ECLI:EU:C:2011:415. For a comment of this decision and its potential consequences see Jan Komarek, 'Playing with Matches: The Czech Constitutional Court's Ultra Vires Revolution' (Verfassungsblog 22 February 2012); and Arthut Dyevre, 'The Czech Ultra Vires Revolution: Isolated Accident or Omen of Judicial Armageddon?' (Verfassungsblog 29 February 2012).
[338] CCC, Pl. US 5/12 *Holubec*, plenary judgment of 31 Jan. 2012. For a more detailed account of the whole *saga* see Bobek (n 227).
[339] Bobek (n 227) 79-80.
[340] For a detailed analysis of this internal struggle see Arthur Dyevre, 'The Melki Way: The Melki Case and Everything You Always Wanted to Know about French Judicial Politics (But Were Afraid to Ask)' (2011) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1929807 last visited 08.10.2018; also on *Melki* see Bobek (n 227) 79; Bossuyt and Verrijdt (n 231) 379.

due attention to the procedural constraints surrounding the proceedings before the CC,[341] but it has also had a broad radar for the messages and explanations sent by CC in its other unrelated decisions; that is, through an indirect dialogue with the CJEU.[342] Different from *Landtova* though, the CC's position was reflected by the national government in its observations before the CJEU.[343] This raises the issue of the possible differentiated treatment of courts of different member states as well as the deficiencies of the preliminary reference procedure.

The outcome of the *Slovak pensions* saga, additionally, opens the dilemma whether the CCC should have sent a preliminary reference on its own, thus taking the advantage of having the 'first say'. However, while this might have avoided a direct clash in this case it would not have prevented similar situations occurring in future. Additionally, such a pre-emptive strike would open the race of exclusion of the other domestic interlocutors and constitutional courts being often the last instance or last resort court would be disadvantaged.[344] Equally problematic for this sort of situations is the approach of resending a preliminary reference by a constitutional court subsequently to an already sent, by an ordinary national court, and answered preliminary reference. In this sense the CJEU would have a broad possibility to declare such a preliminary reference coming from a constitutional court inadmissible because the issue has already been resolved.[345]

Therefore it becomes very evident that the absence of a reverse preliminary reference mechanism in which the CJEU could refer a question to a national constitutional courts or any other way in which, for example the CCC in this case, could have elaborated its views on the matter has taken its toll and, *inter alia*, led to the first ever decision of a constitutional court declaring a CJEU decision *ultra vires.*[346] This type of mechanism, which has been promoted for some time now, would be totally compatible with the bottom-up legitimization of EU law which was discussed above.[347] In this way the reverse preliminary reference would serve an important purpose when significant and fundamental constitutional issues are at stake. Additionally, the reverse preliminary reference would also provide opportunity for the highest courts including constitutional courts to bring back the benefits of the national judicial hierarchy through the back door in instances in which lower ordinary court have referred the

[341] See also the preliminary reference from CC to CJEU *Jeremy F*. (n 213). On this point see The Constitution of the Fifth French Republic, 1958, Article 61(3) "In the cases provided for in the two foregoing paragraphs, the Constitutional Council must deliver its ruling within one month. However, at the request of the Government, in cases of urgency, this period shall be reduced to eight days." Ordinance no 58-1067 constituting an institutional act on the Constitutional council, Section 23-10, "The Constitutional Council shall give its ruling within three months of the referral being made to it"; Dyevre (n 213) 159; and Millet and Perlo (n 234) 1471.
[342] See CC decision No 2010-605 (n 233) points 14-16; also see Dyevre (n 213) 158-160.
[343] Bobek (n 227) 79.
[344] Bobek (n 227) 81; and Serrano (n 241) 1527.
[345] Bobek (n 227) 81-82.
[346] Monica Claes, National Identity: Trump Card or Up for Negotiation? In Alejandro Saiz Arnaiz and Carina Alcoberro Llivina (eds) National Constitutional Identity and European Integration (Intersentia 2013) 136; Cartabia (n 238) 1796; and Bobek (n 227) 83 and Florence Giorgi and Nicolas Triart, 'National Judges, Community Judges: Invitation to a Journey through the Looking-glass- On the Need for Jurisdictions to Rethink the Inter-Systemic Relations beyond the Hierarchical Principle' (2008) 14 European Law Journal 716
[347] Maduro (n 1) 517, 522.

case to the CJEU without allowing it to go through this hierarchy.[348] For that reason, this example of negative consequences resulting from a dysfunctional judicial dialogue manifests the importance of this sort of judicial interaction. The introduction of a reverse preliminary reference from the CJEU to constitutional courts, under limited conditions which would not overburden the judicial procedure, could increase the presence of bi-directionality and the quality of judicial dialogue. Especially when the case-law of a constitutional court is being challenged before the CJEU, such as in *Landotva*, the CJEU should be obliged to provide the constitutional court with an opportunity to reflect on the matter.[349] Similarly, a reverse reference could be considered in instances in which it is evident that a fundamental constitutional issue is at stake and there is no relevant case-law from the respective constitutional court. This sort of procedure would be based on an existing proposal of 'mechanism of prior involvement of the CJEU' designed for streamlining the relationship between the ECtHR and CJEU upon the accession of the EU to the ECHR,[350] or it could potentially resemble the so-called certification procedure present in the judicial federalism in the US where federal courts refer questions concerning state law to state courts.[351] In this sense, the introduction of the reverse preliminary reference would represent a firm step in reserving for constitutional courts the place which they should occupy in the European constitutional order.

4.4 Constitutional courts as guardians of the constitutional obligation of ordinary courts to send preliminary references

Constitutional courts role in the direct judicial dialogue in Europe cannot be judged only by their direct involvement. Constitutional courts have resisted for a long time to make a reference for a preliminary ruling to the CJEU and they have only recently begun to loosen up their rigid, cautious attitude. However, they have found another path[352] to encourage and support judicial dialogue in Europe which often seems to be undervalued.

Following the lead of the FCC several constitutional courts with a constitutional power to protect constitutional rights and freedoms through the mechanism of a constitutional complaint have coupled the obligations stemming from Article 267(3) TFEU and the respective constitutional provisions related to different aspects of the right to judicial protection. Embracing the heterarchical relationship between the legal orders constitutional courts have created a link and translated the EU law obligation in to a constitutional one adding a new power in the realm of protection of constitutional rights. More precisely, these constitutional

[348] Komarek (n 256) 112-114. On such benefits of the proper functioning of the national judicial hierarchies see Gertrude Lübbe-Wolff, 'How can the European Court of Human Rights Reinforce the Role of National Courts in the Convention System?', *Dialogue between judges, European Court of Human Rights, Council of Europe*, (2012) 12.

[349] Bobek (n 227) 81.

[350] Council of Europe, Fifth Negotiation Meeting between the CDDH ad hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights: Final report to the CDDH', 47+1(2013)008rev2, 10 June 2013, 13,18 and 27, referred to also by Bobek (n 227) 84.

[351] Mayer (n 255) 423-424. For more on this procedure see in Jonathan Remy Nash, 'Examining the Power of Federal Courts to Certify Questions of State Law' (2003) 88 Cornell Law Review 1673ff.

[352] For indirect influence of constitutional review in constitutional democracies in Europe on the attitude of ordinary courts towards preliminary reference see section 4.2 text accompanying fn. 274.

courts have created a constitutional obligation, together with the one envisaged in the EU Treaties, for national courts of last instance to refer questions for preliminary ruling to CJEU in cases where the interpretation and validity of EU law is at stake and crucial for resolving the case at hand. The arbitrary refusal[353] of these national courts to refer has been interpreted to represent an infringement of specific constitutional rights which could be protected through the instrument of constitutional complaint.

The importance of such a safeguard of the constitutional rights and of EU law obligations is even greater if one takes into consideration that the preliminary reference procedure is essentially left to ordinary courts.[354] There are two reasons for this. First, it is the division of labor between powers of ordinary and constitutional courts regarding the distinction between constitutional review and so-called review of compatibility.[355] Second, it has to do with the fact that constitutional courts are rarely directly faced with EU law issues and often not in the capacity of a court of last instance, that is, EU law is frequently invoked in an *incidenter* procedure or procedure of a concrete constitutional review.

This engagement of constitutional courts can be observed differently. Some authors, like Groussot,[356] have tended to classify this role of constitutional courts as an indirect dialogue. However, this misses the very nature of this role. This role of constitutional courts is primarily aimed at ordinary courts and respect of their constitutional obligation related to EU law and in this way it is directly assisting the functioning of the direct dialogue between ordinary national courts and the CJEU. Constitutional courts, different from other forms of indirect dialogue in which they have entered so far, are not addressing the CJEU and messages are not supposed to be conveyed to the latter. On the other hand, in these cases constitutional courts are not acting as courts of last instance and thus are not under the obligation stemming from Article 267(3) TFEU to enter into a direct dialogue.[357] Therefore instead of focusing on the abstract classification of the type of judicial dialogue this role fits in, one should focus on the function it fulfils in order to comprehend it adequately. Through this instrument constitutional courts have basically dispelled a longstanding myth which goes that national superior courts are not favoring the access of the lowers courts to the CJEU and are also creating obstacles for the implementation of judgments of the CJEU in the national legal order.[358]

Effectuating this instrument of protection of constitutional rights, based on whether CJEU is recognized as a lawful judge or not,[359] constitutional courts have taken two approaches. The

[353] On the different meaning of the notion of arbitrary in the case law of constitutional courts in this context see Cleila Lacchi, 'Review by Constitutional Courts of the Obligation of National Courts of Last Instance to Refer a Preliminary Question to the Court of Justice of the EU' (2015) 16 German Law Journal 1677- 1686. See also Bethge (n 170) 175 and Barczak (n 217) 53, para. 89.
[354] Lohse (n 223) 1498.
[355] For an example from the Czech Republic of longstanding division of task between ordinary courts and constitutional courts in this respect see Kühn and Bobek (n 232) 347; and from Spain see Serrano (n 241) 1512 and 1514.
[356] Groussot (n 75) 326
[357] Regina Valutyte, 'Legal Consequences for the Infringement of the Obligation to Make a Reference for a Preliminary Ruling Under Constitutional Law' (2012) 19 Jurisprudence 1174-1175.
[358] Bobek (n 227) 75.
[359] The CJEU has been recognized as a lawful court in *Solange II*. See on this Claes (n 112) 427; Martinico and Pollicino (n 209) 83.

first one treats such an arbitrary refusal as a violation of the right to a lawful judge,[360] while the second as the violation of the right to an effective judicial protection[361] or the right to a fair trial.[362] As for the latter, also the ECtHR has stepped in with several decisions confirming this interpretation that the arbitrary refusal of national courts to refer to CJEU for a preliminary ruling goes against the right to a fair trial as regulated with Article 6 ECHR.[363]

In analyzing whether there is an infringement of individual rights constitutional courts have also differed from one another. Even though starting from the CJEU standards still constitutional courts have designed and added new procedural elements to the abstract principles of *acte clair* and *acte eclaire* enabling them to monitor the respect of these constitutional obligations.[364] The character and the level of arbitrariness of the decisions for non-referral as well as the substantiation of these decisions by the national courts of last instance have been subject to differently developed set of standards.[365] In any case, regardless of all these differences the outcome under both of these approaches and diverging standards has been the same, constitutional courts have created a new constitutional avenue for the indirect review and enforcement of EU law obligations by national courts of last instance.[366]

By taking these measures and employing the mechanism of constitutional complaint in this regard the respective constitutional courts have been manifesting and fulfilling their constructive role which could be perceived from three aspects.

First, under the existing conditions in which on the one hand, there is no effective legal remedy for either the enforcement or review of implementation of the obligation of the last instance courts in light of Article 267(3) TFEU, on the other hand the *CILFIT* principles provide a great

[360] FCC, *Solange II*, 2 BvR 197/83 of 22 October 1986, of 11 December 1995, however ACC confined this possibility only in the case of administrative decision and not decision of either administrative or ordinary courts; CCC, *Pfizer*, Case No. II. ÚS 1009/08 of 8 January 2009; and SCC has announced that it has such a power of review and protection of the constitutional right to a lawful judge and the right to a fair trial; SCC, Case No. III. US 151/07 of 29 May 2007 and Case No. IV. US 206/08-50 of 3 July 2008. For more see Lacchi (n 353) 1669-1673; Valutyte (n 357) 1175-1180; for Germany see Christoph Degenhart, 'Art. 101: Ausnahmegerichte' in Michael Sachs (ed) *Grundgesetz* (8th Edition C.H. BECK 2018) paras. 19-20; Bethge (n 170) 172-173; Barczak (n 217) 53, para. 88-89 and for Slovakia see Michal Bobek and Zdenek Kühn, 'Europe Yet to Come: The Application of EU Law in Slovakia' in Adam Lazowski (ed), *The Application of EU Law in the New Member States* (Asser 2010) 374-375.

[361] SCT, Case No. STC 58/2004, 19 April 2004. For more see Lacchi (n 353) 1674-1677, Valutyte (n 357) 1180-1181 and Serrano (n 341) 1516.

[362] SCC, Case No. Up-1056/11, 21 November 2013. For more see Lacchi (n 353) 1677.

[363] ECtHR, *Dhahbi v. Italy*, App. No. 17120/09, 8 April 2014 and ECtHR, *Schipani and others v. Italy*, Appl. No. 38369/09, 21 July 2015. See also Regina Valutyte, 'State Liability for the Infringement of the Obligation to Refer for a Preliminary Ruling Under the European Convention on Human Rights' (2012) 19 Jurisprudence 7-20.

[364] CJEU *CILFIT* (n 114) para. 21. See Lacchi (n 353) 1689ff; and Valutyte (n 357) 1177.

[365] There are essentially 3 different approaches in which arbitrary decision not to refer represents a violation of constitutional rights: (1) First approach is German/Austrian where there are three cases in which this could occur 1) fundamental disregard of the obligation to make a submission, 2) deliberate deviation without making a submission and 3) incompleteness of the case law of the CJEU, (2) Second approach is Czech/Slovenian and is connected to the fact whether national judges gave reasons for their refusal to send a preliminary reference and (3) Third approach is the one of the Spanish CT according to which a national judge cannot decline to apply a national provision without a prior confirmation of the CJEU through a preliminary reference within the limits of the *acte clair* and *acte erclair* doctrines. For more see Lacchi (n 353) 1677- 1686; and Valutyte (n 357) 1175-1181.

[366] Lacchi (n 353) 1668.

margin of discretion for national courts,[367] constitutional courts have supported the effectiveness and uniform application of EU law.[368] More precisely, constitutional courts, along with the ECtHR, through their practice have filled in the legal gap which exists in EU law in creating constitutional instruments for the enforcement of the obligation of the highest national courts.[369]

Second, constitutional courts have created a possibility to remedy and thus assist the member states in avoiding its state liability under EU law. Namely, the CJEU through its *Köbler* decision[370] has taken control over the respect of last instance court's obligation to refer a preliminary question to the CJEU by declaring that individuals are entitled to a right of payment of damages for state liability for judicial decision.[371] By reviewing the decisions of last instance courts not to refer to the CJEU in light of a possible infringement of constitutional right, constitutional courts have provided a constitutional instrument which could help the member states remedy situations which could lead to its state liability for damages under EU law.[372]

Third, through this practice, constitutional courts have created another constitutional avenue for the protection of individual rights in light of EU law obligations. In this regard constitutional courts have strengthened the judicial protection of individuals by broadening the interpretation of specific constitutional rights to include the obligation of national courts under EU law and the constitutional control over the respect of these obligations.[373]

5 Conclusion

This chapter presents the first role which constitutional courts in Europe have developed in their relationship with the CJEU and EU law. This role consists of providing constitutional legitimacy to EU law through different forms of judicial dialogue. In this sense it reflects a procedural aspect of the relationship between these institutions. While it could be argued that this role is also fulfilled by national ordinary courts, the particular institutional features of constitutional courts lead to the conclusion that their input in the judicial dialogue in Europe has a certain added value which needs to be recognized. Since constitutional review is differentiated from ordinary adjudication and legislation it could be convincingly argued that constitutional courts bring something to the judicial dialogue in Europe that cannot be brought by other national institutions. This is due particularly to their deliberative nature closely tied to the special character of constitutional discourse which finds its specific reflection at the EU level. In this sense, constitutional courts represent the most appropriate interlocutors of the CJEU on constitutional matters in Europe. First, they provide clarity by channeling the dialogue. Second, as result of their main institutional role, they are able to send credible warning signals over serious constitutional inconsistencies involving EU law. Third,

[367] On the need for the reform of the *CILFIT* doctrine see Sarmiento (n 114) 313-315.
[368] Lacchi (n 353) 1693.
[369] Lacchi (n 353) 1700; and Valutyte (n 357) 1172.
[370] CJEU *Köbler* (n 113).
[371] Komarek (n 256) 97; and further Lacchi (n 353) 1693ff.
[372] Lacchi (n 353) 1695.
[373] Valutyte (n 357) 1172 and 1182.

constitutional courts due to their political sensibility are more prudent than ordinary courts when engaging in the judicial dialogue. These advantages of constitutional courts are manifested in different forms of both the direct and indirect judicial dialogue particularly if seen through the lenses of constitutional pluralism.

When it comes to the indirect dialogue, the most frequent opportunities so far in fulfilling constitutional courts' role of providing EU law with constitutional legitimacy have been through the constitutional review of EU Treaties and of domestic legislation implementing EU law. Even though often underestimated, the indirect judicial dialogue has been rather instrumental in anchoring EU law and providing instruments for its direct application in the national legal orders. Thus constitutional courts' constructive role has been demonstrated also in these instances regardless of the fact that they have taken such opportunities of indirect dialogue also to set certain limits or condition the application of EU law. Taking into consideration that until now there are no situations in which constitutional courts have placed insurmountable obstacles to any form of EU law it could be convincingly argued that they have taken accommodation and mutual respect of EU law in the national legal order rather seriously.

Contrary to the frequency of indirect judicial dialogue, constitutional courts have not been fond of entering into direct judicial dialogue with the CJEU through preliminary references. On the other hand, the emerging trend of intensification of direct judicial dialogue between constitutional courts and the CJEU is still at an early stage which does not allow drawing firm conclusions. However, the reluctance of constitutional courts does not have be taken negatively as their cautious attitude towards direct judicial dialogue finds strong justification in the procedural deficiencies at the EU level and, generally, the stance of the CJEU towards constitutional courts. Under such circumstances the possibility of irresolvable legal conflict occurring is rather higher and therefore this cautiousness is even welcomed. In any case, the involvement of constitutional courts in the direct judicial dialogue enables the feeding of constitutional principles directly to the CJEU which are supposed to lead the latter into providing strong and more reasoned arguments in delivering its decisions. Furthermore, constitutional courts constructive contribution to direct judicial dialogue is not limited to their direct involvement in either indirect or direct forms of judicial dialogue. On the contrary, constitutional courts have been engaged in safeguarding the respect by the national ordinary courts of their obligation stemming from both EU law and national constitutions for sending preliminary references to the CJEU. In this manner, looking at the arguments presented in this chapter, the case for the special role and added value of constitutional courts in the judicial dialogue in Europe is firmly grounded.

Chapter 5

Constitutional Courts as Guardians of the Constitutional Identity in the EU

1 Introduction

The second in the row of new roles developed or acquired by the constitutional courts in light of the European integration is the one of being guardians of the constitutional identity. This role of constitutional courts has never been envisaged in their respective constitutions and has surfaced as result of a triggering external factor. Namely, the introduction of the new wording of the duty for the EU institutions to respect national identity of the member states in the Lisbon Treaty, and the importance given to this provision in the recent case-law of several constitutional courts have made this duty a very strong line of defence of the national legal order from the absolute primacy of EU law as well as, to some extent, a defence from the on-going EU competence creep.[1] In this manner the EU national identity clause has drawn significant attention in a very short period and has become one of the central issues in discussions on the relationship between EU law and national constitutional law.

Even though such a clause existed since the Maastricht Treaty, it never found a firm place in the legal radar of either constitutional courts or the CJEU. It was conceived more as a political declaration than as a legal obligation for the EU. However, the latest changes and clarifications made to this provision, even though minor at a first glance, added a truly new feature. Above all it tied the national identity to the respective constitutional identity of member states, or better said it has given substantial grounds for such an interpretation. In this manner this feature, it has been argued, meant that the EU law has become more open to national constitutions[2] and thus national constitutions have received a firmer status, visibility and recognition in EU law.[3] This sort of respect of constitutional identity and recognition of national constitutions in EU law could raise some high hopes of finally solving the conundrum of the relationship between the two legal orders in creating a 'meeting point' instead of a 'battleground'.[4] Nevertheless the practice has still not confirmed these claims because neither a true meeting point nor a battleground has occurred over this provision, yet.

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[1] Barbara Guastaferro, 'Beyond the *Exceptionalism* of Constitutional Conflicts: The Ordinary Functions of the Identity Clause' (2012) 31 Yearbook of European Law 263. She divides these two aspects and labels them as exceptional and ordinary functions of the identity clause.

[2] Armin von Bogdandy and Stephan Schill, 'Die Achtung der nationalen Identität unter dem reformierten Unionsvertrag. Zur unionsrechtlichen Rolle nationalen Verfassungsrechts und zur Überwindung des absoluten Vorrangs' (2010) ZaöRV Heft 4 715.

[3] Bruno De Witte, 'The Lisbon Treaty and National Constitutions. More or Less Europeanisation?' in C Closa (ed), *The Lisbon Treaty and National Constitutions* (ARENA 2009) 32.

[4] I borrow the phrases from Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law: Cases and Materials* (2nd edition CUP 2010), 202: "interpretations of Article 4 (2) TEU will become the battleground or the meeting point, where the limits of the authority of EU law lie". See also more on the analysis on this comment in Denis Preshova 'Battleground or Meeting Point? Respect for National Identities in the European

But why is this provision so important for the role of constitutional courts in European integration? The importance is twofold. First, from a theoretical aspect this provision - and through it issues related to constitutional identity, its content, scope and application in both the national and EU legal realm - is making the conceptions and framework set by the theory of constitutional pluralism very visible and plausible. In this sense this clause puts an additional emphasis on the importance of judicial dialogue and moderation of the rigid supremacy stances on both sides of the debate making constitutional courts a more constructive counterpart. Second, from an institutional aspect this provision has additionally increased the role and visibility of constitutional courts at the EU level as it has given them the sword and/or the shield,[5] hence empowering them in their endeavour to advance their position on the relationship between the two legal orders. The national identity clause could be easily interpreted as representing a certain limit to further European integration, however, this should not be construed in absolute terms. Following this line of thought this chapter will present the arguments confirming these two points.

Accordingly, this chapter will be divided into three sections. The first, a brief overview of the wording, scope and context of the national identity clause - that is the exegesis and the systemic analysis - will be presented in order to shed some light on the actual origin and meaning of the national identity clause. The second, the recent case-law of both national constitutional courts and the CJEU related to this clause will be analysed. It will be seen how the whole issue developed since the *Solange* decision up until the latest *OMT* saga by the German Federal Constitutional Court going through the most important decisions of the constitutional courts and the CJEU. The third section is devoted to the theoretical analyses of the national identity clause and the role of constitutional courts within the framework of this clause as seen through the lenses of constitutional pluralism, particularly by focusing on two of its main tenets, heterarchy and judicial dialogue, which is argued are incorporated by this clause. These theoretical notions and arguments are applied to a recent episode in the constitutional identity story, the OMT, in order to depict the possible weaknesses and shortcoming of the approach taken in the preliminary reference and decision which should illuminate the way forward for constitutional courts on this matter. At the end a summary of the main arguments on the national identity clause and the role of constitutional courts in light of the constitutional pluralism will be presented in the conclusion.

2 Respect for national identities of the member states – Article 4 (2) TEU

2.1 The background of the national identity clause

The respect for national identities has existed before its enactment in the Constitutional Treaty (CT) and as of latest in the Lisbon Treaty. Thus this provision is *nihil novi.* This type of duty

Union – Article 4 (2) of the Treaty on European Union' (2012) Croatian Yearbook of European Law and Policy, 267.

[5] Theodore Konstadinides, 'Constitutional Identity as a Shield and as a Sword: The European Legal Order within the Framework of the National Constitutional Settlement' (2010) 13 Cambridge Yearbook of European Legal Studies 195.

for the institutions of the EU first appeared in the Treaty of Maastricht (TM) in Article F (1).[6] The enactment of this clause basically represented a sort of concession resulting from the huge leap forward made in the European integration expanding the scope of action. Namely, this Treaty brought the establishment of a new entity, the European Union, and introduced provisions which, directly or indirectly, 'invaded' powers and matters that were traditionally related to and formed part of national constitutions and sovereignty.[7] Powers related to the Economic and Monetary Union, the EU citizenship or cooperation in the realm of security and foreign affairs and justice and home affairs are the most evident examples. Nevertheless, one could not argue that this provision served the purpose of setting the external limits of European integration[8] or truly balancing national sovereignty with the visible federalist tendencies at the EU level.[9] Nothing changed even with the renumbering of this provision in the Treaty of Amsterdam (TA). The best proof for such a position is the fact that the national identity clause from both TM and TA was not invoked by the CJEU in its case-law.[10] Among the national constitutional courts this clause was invoked only once by the Federal Constitutional Court in its *Maastricht* decision.[11]

This lack of significance of the national identity clause did not, however, reflect the true stance of the member states towards the federalist tendencies. Therefore, the rewording and strengthening of the status of this clause was set high on the agenda during the deliberations and drafting of the Constitutional Treaty.[12] In order to achieve this aim there were several proposals or models which were suggested by different sides at the Convention ranging from suggestion to enlist the core and exclusive competences of member states (Constitutional Model) through the negative EU competence clause (Community Model) and the Charter of Member States' Rights (Political Model) ending with a suggestion on adjustment and supplementation of the existing national identity clause (Union Model).[13] In the end the so-called Christophersen Clause inspired by the compromise based on the Constitutional and Union Model that produced the final version of Article I-5 of the CT regulating the relationship between the Union and member states.[14] This compromise consisted of providing a clarification of the notion of national identity by tying it to the fundamental structures inherent in the

[6] "The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy". Treaty on the European Union (Maastricht), Official Journal C191, 29.07.2011.
[7] De Witte (n 3) 33.
[8] Thomas Oppermann, *Europarecht* (2nd edn C.H. Beck 1999) §11, para 885; and Thomas Oppermann, Claus Dieter Classen and Martin Nettesheim, *Europarecht* (4th edn C.H. Beck 2009) §5 para 8. Cf Armin von Bogdandy and Stephan Schill, 'Article 4 EUV' in Eberhard Grabitz, Meinhard Hilf and Matthias Ruffert (eds), *Das Recht der Europäischen Union, Kommentar I* (C.H. Beck 2011) para 38.
[9] Jan-Herman Reestman, 'The Franco-German Constitutional Divide: Reflections in National and Constitutional Identity' (2009) 5 European Constitutional Law Review 374, 376.
[10] Leonard F.M. Besselink, 'National and Constitutional Identity before and after Lisbon' (2010) 6 Utrecht Law Review 41.
[11] Federal Constitutional Court of Germany, *Maastricht* Treaty 1992 Constitutionality Case, 2 BvR 2134 and 2159/92 in Andrew Oppenheimer, *The Relationship Between European Community Law and National Law* Vol 1 (CUP 1994) 556, 574.
[12] For a more detailed overview of the procedure see Guastaferro (n 1); and Adelheid Puttler, 'Article 4 EUV' in Christian Calliess and Matthias Ruffert (eds), *EUV/AEUV Kommentar* (5th edition C.H. Beck 2016) paras. 5-7; and CONV 251/02, 3.
[13] Guastaferro (n 1) 274-275.
[14] Guastaferro (n 1) 289.

political and constitutional structures of the member states including regional and local self-government but excluding other elements and notions.[15]

After the unsuccessful ratification of the CT the national identity clause was inserted, with certain modifications, in the Lisbon Treaty as Article 4(2) TEU. An additional element was added to it on the national security as an essential state function. Basically it is again part of an article which regulates the relationship between the EU and the member states even though Article 4 does not carry that title. Certain authors have referred to this article in different ways thus either labelling in an EU-friendly 'principles of fundamental federal structure'[16] or having a more realist approach in viewing this article as 'a strong reaffirmation of the non-federal nature of the European Union'.[17]

2.2 The exegesis and systemic interpretation of the national identity clause

Article 4 TEU regulates different aspects of the relationship between the Union and the member states and consists of several important principles. In order to grasp the proper understanding of the national identity clause one has to begin this endeavour with analysis consisting of two components.[18] First, determine the meaning of the specific provision through the analysis of the exact wording of the provisions. Second, analyse how this meaning fits in the specific context of the respective provision meaning the relationship with other paragraphs of the very same article and then with the other treaty provisions. Only after this type of exegesis and systemic analysis, which will shed light on the meaning and the scope of the clause, can one turn to the case-law of the national constitutional courts and the CJEU in order to complete the picture.

2.2.1 The meaning and the scope of the national identity clause

Article 4 TEU incorporates several principles: the reaffirmation of the principle of conferral of powers or limited powers of the EU in the first paragraph;[19] the loyalty or fidelity principle in

[15] See CONV 357/02, 10-12 and CONV 400/02, 13. *Inter alia* those were language, national citizenship and church-state relations. Some of these elements however found their place in other provisions of the Lisbon Treaty. Article 3(3) TEU and Article 22 Charter on language, Article 20 TFEU on national citizenship. However, see the CJEU, Case C-202/11 *Anton Las v PSA Antwerp NV*, Opinion of AG Jaaskinen 12 July 2012, ECLI:EU:C:2012:456, para. 59 fn. 39 where he draws a distinction between 'national identity' (Article 4(2)TEU) and 'linguistic diversity' (Article 3(3)TEU) stating: "The concept of 'national identity' therefore concerns the choices made as to the languages used at national or regional level, whereas the concept of 'linguistic diversity' relates to the multilingualism existing at EU level." Nevertheless, the wording and content recommended in CONV 357/02 p 10-12 was only partly adopted and it did not include the choice of language. See also on this Reestman (n 9) 381.

[16] „*Prinzipien der föderativen Grundstruktur*", von Bogdandy and Schill (n 8).

[17] De Witte (n 3) 35.

[18] More on the actual value of different methods of interpretation of Article 4(2) TEU see Elke Cloots, *National Identity in EU Law* (OUP 2015) 127ff.

[19] Article 4(1) refers to Article 5, where conferral of power principle is basically regulated, and restates the last sentence of paragraph two. See more in Jean-Claude Piris, *The Lisbon Treaty: A Legal and Political Analysis* (CUP 2010) 84. See also CONV 375/02 in the context of the CT referring to the objective of Article I-5: "The article would therefore not constitute a definition of Member State competence, thereby wrongly conveying the message that it is the Union that grants competence to the Member States, or that Union action may never impact on these fields".

regard to accomplishment and achievement of Treaty tasks, obligations and objectives in the third; and reserves the second paragraph for the three duties prescribed for the Union institutions. The latter are often seen as central in the interpretation of Article 4, particularly when the relationship between Union law and national constitutions is concerned. The three basic duties set forth for the Union institutions by Article 4(2) TEU are the respect for equality of member states before the Treaties,[20] the respect for national identities and the respect for the essential state functions.[21]

The vagueness of the previous identity clause as enacted in Article F(1) TM and Article 6(3) TA necessitated the change of the wording that would clarify the meaning and the scope of the provision. This has been mainly due to the vagueness of the notion of national identity and the separate component notions 'nation' and 'identity'. The difficulty of precisely defining the latter two notions is even more evident for the notion of national identity. In this regard Reestman argues that even "[under the] most common reading of national identity it is very hard, if not impossible to define with any measure of objectivity what the Union's duty to respect the national identity of its member states entails."[22] In this sense this notion "fans out in all direction" but it seems hardly towards any connection to constitutional structures.[23] The common understanding of national identity is more frequently associated with the social, political, cultural and even psychological aspects of this notion than with any legal or constitutional aspect.[24] As result of such a broadness and generality this provision has been regarded more as a political declaration than as a legal provision capable of any significant legal effect.[25]

There is another difficulty in the proper comprehension of this provision, Article 6(3) TA, related to the usage of national identity in a plural form in the English version.[26] Specifically, the use of national identities could have been easily associated and interpreted with the existence of different types of identities in diverse societies such as national, ethnic, religious or linguistic identity. Under such an interpretation a very broad scope of this provision could have been conceived one which would include cultural,[27] historical, political and other

[20] Giuliano Amato and Jacques Ziller, *The European Constitution* (Edward Elgar 2007) 108: "This reference did not add anything new to the Union's institutional arrangements, though it did underscore the need to avoid an asymmetrical federalism. The definitive version of article I-5 loses in elegance that which it gains in precision [. . .]". Compare Federal Constitutional Court of Germany, Lisbon decision, 2 BvE 2/08 from 30 June 2009, para. 292; and also to Piris (n 18) 85-86.
[21] von Bogdandy and Schill (n 2) 709.
[22] Reestman (n 9) 380.
[23] Reestman (n 9) 379, 376.
[24] Bengt Beutler, 'Article 6' in Hans von der Groeben and Jürgen Schwarze (eds), *Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaft, Band 1 Art 1-53 EUV* (6th edition Nomos 2003), para.201 states: „Nationale Identität bedeutet aber auch mehr als Verfassungsidentität. Über diese Mehr entscheidet der Mitgliedstaat selbst. Als Beispiel werden in diesen Zusammenhang Sport, Kultur und Bildung aber auch die interne Staatsorganisation, die Familienstrukturen und die sozialen Sicherungssysteme…". von Bogdandy and Schill, (n 2), 712 citing *Flaggenbeschimpfungs*-Beschluss of the FCC "Nationale Identität meint dann gleichgerichtete psychische Vorgänge der Staatsbürger."
[25] Guastaferro (n 1) 286.
[26] The German version operates with "nationale Identität" in a singular form.
[27] Christoph Strumpf, 'Artikel 6' in Jürgen Schwarze (ed), *EU-Kommentar* (2nd edition Nomos 2009) para. 39. In the context of working languages of the EU Institutions see Oppermann (n 8) § 6, para.18.

identities. In this manner it could have been possible to argue that every national singularity could have served as a justification to limit the exercise of the EU competences.[28]

It is mainly because of these reasons that the new Article 4(2) TEU, being based on the previous Article 6(3) TA, tries to clarify the notion of national identity by relating it to the fundamental and constitutional structures of the member states, inclusive of regional and local self-government.[29] Therefore it is argued that the new national identity clause brings a specific aspect of this identity, namely, the constitutional identity, to the surface and by putting emphasis on the fundamental political and constitutional structures it excludes the other dimension and aspects of the national identity from the scope of this provision.[30] If one reads the English version this conclusion is even more evident. This version of the provision operates with the notion of 'inherent' instead of 'finds expression through' (*Zum Ausdruck kommt*) in the German version which makes the link between the national and constitutional identity stronger in the context of this provision.[31] In this sense it could be argued that only the core fundamental values of the constitutions making up their identity are to be respected leaving out pre-constitutional elements and features from the scope of this provision.[32] By such a demarcation of the notion of national identity in this provision it's too extensive comprehension was to be avoided. As a matter of fact we can see this intention of the drafters by reserving other provision for certain other national particularities such as the linguistic and cultural diversity[33] in Article 3(3) TEU and Article 22 of the EU Charter regulating EU institutions' duty to respect this. This is in contrast to Article 149(1) TEC, where such a duty of respect did not exist.[34] Nevertheless, it should not be concluded that by relating national identity to constitutional identity all conundrums and riddles are solved. The notion of constitutional identity might be more precise than national identity but it certainly is not easy to define.[35]

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[28] Besselink, (n 10) p 42-43.

[29] „The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government....“ TEU available at http://register.consilium.europa.eu/pdf/en/08/st06/st06655.en08.pdf last visited 05.10.2018.

[30] Puttler (n 12) para.14; von Bogdandy and Schill (n 8) para.14; and Besselink, (n 10) 44. Cf. Rudolf Geiger 'Art. 4 EUV' in Rudolf Geiger, Daniel-Erasmus Khan and Markus Kotzur (eds), *EUV/AEUV* (6th edition C.H. Beck 2017) para.3.

[31] Armin von Bogdandy and Stephan Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' (2011) 48 Common Law Market Review, 1427-1428; von Bogdandy and Schill, (n 8), para.14.

[32] On the difference between national and constitutional identity see Jose Luis Marti, 'Two Different Ideas of Constitutional Identity: Identity of the Constitution V. Identity of the People' in Alejandro Saiz Arnaiz and Carina Alcoberro Livina (eds) *National Constitutional Identity and European Integration* (Intersentia 2013) 31-32. But cf Cloots (n 18) 165-170 where she argues that even though there are certain overlaps and significant connection national identity and constitutional identity cannot be equated in this context.

[33] For a secondary role of cultural identity under Article 4(2) TEU see Besselink, (n 10) 44.

[34] "[R]especting the responsibility of the Member States for the content of teaching and the organization of education systems and their cultural and linguistic diversity" Art. 149 TEC. See also CJEU, Case C-160/03 *Kingdom of Spain v Eurojust*, Opinion of AG Maduro 16 December 2004, ECLI:EU:C:2004:817, para 24. He has referred to both Article 6 TEU and 149 TEC thus showing that both of these articles regulate the linguistic identity i.e. diversity.

[35] On the issue and difficulties of defining constitutional identity see Jose Luis Marti (n 31), how he discusses two different meanings of constitutional identity: the identity of the constitution and the identity of the people or the political authority ruled by such constitution. Michel Rosenfeld, 'Constitutional Identity' in M Rosenfeld and A Sajo (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2011) and G.J. Jacobsohn, *Constitutional identity*, (Harvard University Press 2010); see also Cloots (n 18) 165-170.

Apart from the difficulties of the definition of the notion of national identity this clause leads also to the question of determination of the extent of obligation or duty that is placed on EU institutions. In this context it can be claimed that the notion of 'respect' refers to a legal obligation[36] for the Union and not just a political commitment as might have been previously implied. However, the precise scope of this legal obligation is open for discussion. In this sense von Bogdandy and Schill argue that the duty to respect national identity in Article 4(2) TEU does not necessarily conceive an absolute protection or preservation of national identity,[37] and consequently does not imply the absolute primacy of constitutional provisions regulating specific constitutional values over EU law as a matter of principle.[38] However this does not negate that this type of duty to respect represents a legal obligation for the Union. This obligation basically foresees the need of striking a balance, compromise and co-operation between the institutions of the legal orders in cases of conflicts of values and norms between them. Nevertheless, the particular mode of this co-operation and the way in which the balance is to be reached is a matter of contention. Numerous issues are open for debate such as which institutions will be determining national constitutional identity, the scope of application of the identity clause and whether this should be left to judicial or political institutions and how, if any, division of competences should there be among these institutions at both national and EU level. Contrasting these sorts of conceptions of the national identity clause there are voices which promote a more rigid stance. For instance, Puttler claims that basically the national identity clause just confirms what is clear in national law, the supremacy of the national constitution. In a case of conflict between the core values and principles of the constitutional identity of the member states and the exercise of Union competences, which would occur only in exceptional situations, the former should prevail.[39] According to this view then there is no room for any type of balancing in this sort of situations. On the other hand, the duty to respect the national identity is said to incorporate two functions: exceptional, the constitutional limitation of the primacy of EU law; and ordinary, which is related to the additional limits or derogations on the exercise of EU competences.[40]

This does not mean that there are no other open questions when the exact wording of the national identity clause is concerned. Article 4(2) TEU relates the national identity of the member states to the fundamental constitutional structures and makes no mention of the constitutional values or principles. In this way it leaves the door open for a possible restrictive reading[41] which the notion 'structure' invokes. Accordingly it could be argued that the national identity clause under the common understanding of the notion 'structures' essentially refers to matters of institutional design and organization of state power while not covering the fundamental constitutional and political values.[42] Even though this might have been a strong

[36] Von Bogdandy and Schill (n 8) para 33; and Puttler (n 12) para. 22.
[37] Cf Beutler (n 23) para. 201 „Sie [Die Achtung] nicht nur Respektierung, sondern vor allem auch Förderung der jeweiligen nationalen Identität,".
[38] von Bogdandy and Schill (n 8) para.33.
[39] Puttler (n 12) para.22.
[40] Guastaferro (n 1)
[41] Cf CJEU, Joined Cases C-428/06 to C-434/06, *Unión General de Trabajadores de La Rioja (UGT-Rioja) v. Juntas Generales del Territorio Histórico de Vizcaya and Others*, Opinion AG Kokott of 8 May 2008, ECLI:EU:C:2008:262, para. 54.
[42] De Witte (n 3) 34.

argument as there is a substantial difference between 'structures' and 'values' still neither the *travaux preparatoire* nor the case-law of the CJEU and the academia leave a lot of room for such a restrictive interpretation.[43] National identity which is inherent in the fundamental structures of the member states, both political and constitutional, cannot exclude major 'fundamental decisions' such as the principle of separation of powers, rule of law, protection of constitutional rights and similar principles and values envisaged in the fundamental structures.[44] All these are essentially elements of the national identity as clarified by the latest changes in this provision.

Lastly, besides the fundamental political and constitutional structures Article 4(2) TEU invokes another element to clarify the understanding of national identity. Thus besides the central, the national dimension of this notion the identity clause refers also to the regional and local-self-government in the member states, which was another addendum to the previous wording of Article 6(3) TA.[45] Therefore regional and local self-government are emphasized as being a part of the fundamental political and constitutional structures which gives the notion of national identity a particular focus in comparison to the previous version of the clause.[46] Taken together[47] with the inclusion of these structures within the subsidiarity principle this aspect of the identity clause only reinforces the duty on the side of the Union to respect this aspect of the national identities of the member states.[48] Nevertheless, regional and local self-government remain, at the EU level and according to the CJEU, indirectly related to the national identity, thus through the member states and their constitutions.[49]

2.2.2 Systemic analysis of Article 4(2) TEU

Even though the textual analysis shed some light on the meaning and scope of the identity clause the limits of the exegesis are already known. This is the reason why one turns to the systemic analysis in the quest to comprehend the complex treaty context in which this provision is placed. Therefore, Article 4(2) TEU must be read, first in the context of Article 4 itself and then in relation to other related provisions such as Articles 2, 5, 7 and 3(3) TEU. Accordingly, the national identity clause should be interpreted in the light of, above all, the principle of

[43] On the *travaux preparatoire* see for instance CONV 357/02 and CONV 400/02, more on this in Guastaferro (n 1) 9ff; Ingolf Pernice, 'Der Schutz nationaler Identität in der Europäischen Union' (2011) 136 Archiv des öffentlichen Rechts 185 189,190 von Bogdandy and Schill (n 8) para.28 and Puttler (n 12) para.16. On the case law of the CJEU on this issue see in the next section.
[44] Pernice (n 43) 189,190. He referes to them as Strukturentscheidungen der nationalen Verfassungen.
[45] Puttler (n 12) para.216. Also cf Beutler (n 23) para.204, focusing on the regional self-government.
[46] Amato and Ziller (n 19) 81; CJEU, Case C-324/07 *Coditel Brabant SPRL v Commune d'Uccle and Région de Bruxelles-Capital,* Opinion of AG Trstenjak 4 June 2008, ECLI:EU:C:2008:317, para 85.
[47] See also Article 263(3) TFEU which gives the Committee of Region the right to file actions before the CJEU for infringements of the infringements of the subsidiarity principle by legislative acts of the Union.
[48] Amato and Ziller (n 19) 190.
[49] This is best illustrated by the fact that within the German constitutional identity embodied in Article 79(3) local self-government is not part of this identity while regional self-government is. See Puttler (n 12) para.19.

conferred powers[50], and then the subsidiarity[51], proportionality[52] and loyalty principle.[53] In this way the national identity clause should be understood as representing the limits on the exercise of EU competences conferred on it by the member states hence tackling the encroachment of the EU in member states competences not directly conferred, i.e. the competence creep.[54] According to Guastaferro and based on her analysis of the context of Article 4(2) TEU and its 'legislative history' the identity clause represents 'a general clause on the exercise of Union competences protecting some national core responsibilities.'[55] Even in the case of Article 6(3) TA it has been argued by some that regardless of the status of this Treaty provision it did incorporate the same limits on the exercise of competences.[56] On the other hand, the identity clause should be read in relation with the loyalty principle of 'full mutual respect'[57] which infers the duty of the Union not to take any actions that would undermine the fundamental political and constitutional structures of the member states. This conclusion is strengthened by the fact that the loyalty clause is placed in a subsequent paragraph in Article 4, right after the identity clause. Therefore the identity clause qualifies the loyalty principle with an additional duty for the Union institutions incorporating the respect of national identity of member states.[58]

An additional argument related to the content of Article 4 itself is in line with the claim that the identity clause represents a general clause on the exercise of the Union competences. Namely, the insertion of the first paragraph regulating the principle of residual powers of the member states and, in essence, repeating the same principle which is stated in Article 5 can be also interpreted that Article 4 has to do mainly with the issue of competences. As a matter of fact, even in the context of the CT Article I-5 was discussed in the framework of the issue of delimitation of powers between the Union and its member states.[59]

Even if there are strong arguments which would claim that the respect for national identity entails an external limit for the exercise of Union competences still it is not clear whether this limit is absolute and to what extent the Union institutions can be limited in this sense. The answers are provided by reading Article 4(2) TEU in conjunction with Article 2 TEU. The limitation on the exercise of the conferred powers to the Union cannot run counter to the values of the EU as provided in the latter article.[60] In case an interpretation of these limitations, as seen through the respect for national identity, breaches the values set in Article 2 TEU as

[50] Articles 5(1), 4(1) and 2 TEU; Guastaferro (n 1) 288.
[51] Article 5(3) TEU; Beutler (n 23) para.205; and Christoph Strumpf (n 26) para. 38, in the context of Article 6(3) TA.
[52] Article 5(4) TEU; von Bogdandy and Schill (n 8) para.33, put the emphasis on the proportionality and are not referring to the subsidiarity para.33; while Puttler refers to both, see Puttler (n 12) para.10.
[53] See Article 4(3) TEU; Guastaferro (n 1) 282. Further she claims that this conclusion is even more evident in the Lisbon Treaty, 285.
[54] See more on this 'ordinary' function of the identity clause which is also confirmed by the debates and drafting procedure during its initial enactment in the Constitutional Treaty, *travaux preparatoires* of the 'Christophersen clause' in Guastaferro (n 1) 271ff.
[55] Guastaferro (n 1) 289.
[56] Beutler (n 23) para.206.
[57] Article 4(3) TEU „Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in *full mutual respect*, assist each other in carrying out tasks which flow from the Treaties" (emphasis added).
[58] Puttler (n 12) para.10.
[59] Puttler (n 12) para.14.
[60] In the context of Article 6(1) and (3) TA see Beutler (n 23) para. 205.

interpreted by the CJEU then this court could intervene and assess national identity in light of EU law and deny claims of limitation of this sorts.[61]

While this conventional legal interpretation sheds light on the actual status it is only through the analysis of the case-law of both the national constitutional courts and the CJEU that the scope and meaning of this clause is slightly clearer. However, once the stances of the courts are reviewed it will be possible to discuss the actual role of constitutional courts in this complex issue of constitutional identity and argue for the constructive role of this institution.

3 The role of constitutional identity and Article 4(2) TEU in the case-law of national constitutional courts and the CJEU

The complexity of the issue as well as the vagueness of the wording of the national identity clause necessitate getting an insight from the case-law of the constitutional courts and the CJEU in the endeavour of further determining the meaning and scope of the national identity clause. In doing this one needs to discuss and provide answers to several crucial questions surrounding the respect of national identity in the EU. These questions address the issue of the responsibility for determining the manner in which this clause would be applied. Who is competent to determine the content of the national/constitutional identity? Who is supposed to decide on the conformity of EU acts and actions with this identity? The search for the answers to these and similar questions leads us through the case-law of national constitutional courts and the CJEU in order to be able to comprehend the practical relevance of this provision and later analyze its broader influence on the relationship between the legal orders as well as their respective judicial structures.

3.1 The relevance of constitutional identity in the case-law of national constitutional courts on EU matters I: Setting the stage

3.1.1 Relating constitutional identity with national identity in light of Article 4(2) TEU

If the above analysis has shown that national identity in the context of Article 4(2) TEU is directly related to the constitutional identity and if this latter term is most frequently related to the notions, values and principles treasured by the constitutions, then the constitutional courts are supposed to be best placed institutions to determine their meaning and scope. In other words, if the national identity clause is associated with the actual identity of the constitutions then these institutions as result of their role and position are the ones to be addressed. This has been confirmed even in some of the opinions of AG Maduro.[62] One might argue that actually

[61] Mattias Kumm, 'Rebel Without a Good Cause: Karlsruhe's Misguided Attempt to Draw the CJEU into a Game of "Chicken" and What the CJEU Might do About it', (2014) German Law Journal 203, 209 fn. 14, he labeled this as 'reverse ultra vires' referring to an earlier concept of von Bogdandy and his team of reverse Solange.

[62] CJEU, Case C-213/07, *Michaniki AE v Ethniko Simvoulio Radiotileorasis,* Opinion of AG Maduro 8 October 2008, ECLI:EU:C2008:544, para 30; CJEU, Case C-53/04, *Cristiano Marrosu and Gianluca Sardino v Aziedna Ospidaliera Ospedale*, Opinion of AG Maduro 20 September 2005, ECLI:EU:C2005:569, para 40; von Bogdandy and Schill, (n 2). Laurence Burgorgue-Larsen, 'A *Huron at the Kirchberg Plateau* or a Few Naïve Thoughts on Constitutional Identity in the Case-law of the Judge of the European Union' in Alejandro Saiz Arnaiz and Carina Alcoberro Livina (eds) *National Constitutional Identity and European Integration* (Intersentia 2013) 285.

the political institutions, especially the representative bodies, are the ones that should be determining this type of identity. Perhaps, but this cannot be an absolute power of these institutions especially in cases where constitutional courts are established as specialized bodies empowered and entrusted with the task of guarding the constitution and thus also providing the adequate interpretation and meaning of the constitutions.[63]

At the EU level, on the other hand, the CJEU's competences are clearly delineated in this sense. As a matter of fact, the establishment of the meaning and scope of the national identity would necessarily involve interpretation of national law which according to Article 19 TEU is not part of the competences of this court. However, the CJEU would nevertheless be involved in the interpretation of the national identity clause concerning its application and meaning in the EU law and determination of the limits of this clause and thus of constitutional identity in light of Article 2 TEU.

But, then again, how did constitutional courts link the constitutional identity with EU law and was this result of Article 4(2) TEU only?

Almost every European constitution contains a provision which declares, regulates or at least alludes to the core elements of constitutional identity.[64] However the direct link between the national identity as regulated in Article 4(2) TEU and the relevant constitutional provision has been of more recent date. Namely, the Federal Constitutional Court (FCC) was the first constitutional court to directly establish the link between the national identity clause and constitutional identity as envisaged in Article 79(3) of the German Basic Law (GG). In this sense, Rideau argued that essentially besides Germany only France and Poland explicitly refer to the constitutional identity while some of the other member states such as Italy, Spain, Hungary and the Czech Republic only alluded to such an identity.[65] However, this situation has changed in 2016 and 2017 when three new constitutional courts explicitly referred to constitutional identity in the context of EU law, those being ICC, BCC and HCC.[66]

Nevertheless, one should not draw the wrong conclusion that constitutional identity has not played a substantial role in cases involving both primary and secondary EU law. The notion of national or constitutional identity has not been alien to the national constitutional courts in cases dealing with EU law. In the past years and decades, they have been invoking constitutional provisions that express core values of the constitutional identity in order to resist, more in an abstract and preventive manner, the excessive exercise of Union competences and the absolute primacy of EC/EU law.

As with every other discussion on the relationship between the national constitutions and EU law, and also here, one has to begin with the already well-known case-law of the constitutional

[63] Cloots (n 18) 149-150; and Herbert Bethge, in Theodor Maunz, Bruno Schmidt-Bleibtreu, Franz Klein, Herbert Bethge et al., *Bundesverfassungsgerichtsgesetz: Kommentar Band 1* (54th edition C.H. Beck 2018) 142.
[64] Joel Rideau, 'The Case-law of the Polish, Hungarian and Czech Constitutional Courts on National Identity and the 'German Model'' in Alejandro Saiz Arnaiz and Carina Alcoberro Livina (eds) *National Constitutional Identity and European Integration* (Intersentia 2013) 243.
[65] Rideau (n 64) 243.
[66] See more on this below in this section.

courts of Germany and Italy, that is claimed by some authors to have shaped the national identity clause.[67]

In the early 1970s the FCC started writing the first concrete chapter on the relationship between national constitutional law and EU law that influenced so much the future development of this never-ending story. In *Solange I*[68] this court reasoned that:

> "it (Article 24 GG) does not open the way to amending the basic structure of the Basic Law, which forms the basis of its identity, without a formal amendment to the Basic Law, that is, it does not open any such way through legislation of the interstate institution." [69]

This view has been affirmed and developed along this line in its future case-law in first place by the *Solange II*[70] and *Maastricht* decision which referred to Article F(1) Treaty of Maastricht in the context of subsidiarity, proportionality and conferral of powers.[71] Most significantly the value of constitutional identity in light of Article 4(2) TEU has been later emphasized and contextualised in the *Lisbon* decision.[72]

The Italian Constitutional Court (ICC) at almost the same time formed its counter-limits ('*controlimiti*') doctrine that puts limits to the primacy of EU law by implying the constitutional identity.[73] In the *Frontini* case,[74] the ICC made clear that EC powers or the exercise thereof cannot in any case "violate fundamental principles of our (Italian) constitutional order or the inalienable rights of man." In a case of violation, which according to this court is quite unlikely to occur, the ICC has competences to review the acts or actions of the EC and now EU institutions. The ICC has affirmed this standard in two other landmark cases, *Granital*[75] and *Fragd*[76], but nevertheless, to this date has neither precisely defined what this abstract formulation stands for, or better said which principles and values it entails, nor has it applied it to EU law. However, the latest development over the CJEU's *Taricco* decision[77] and the third

[67] Reestman (n 9) 380.
[68] Marti (n 31) 17, fn. 1. The FCC has referred to the notion of constitutional identity well before this decision, Southwest Case, 1 BVerfGE 14 (1951) and Privacy of Communication Case (Klass Case), 30 BVerfGE 1 (1970). However, this was the first decision that used the notion of constitutional identity in the context of EU law.
[69] Federal Constitutional Court of Germany, Solange I, 2 BvL 52/71 of 29 May 1974 in *Decisions of the Bundesverfassungsgericht – Federal Constitutional Court –, Federal Republic of Germany, Volume 1/I: International Law and Law of the European Communities 1952-1989*, (Nomos 1992) 275.
[70] Federal Constitutional Court of Germany, Solange II, 2 BvR 197/83 of 22 October 1986 in *Decisions of the Bundesverfassungsgericht – Federal Constitutional Court –, Federal Republic of Germany, Volume 1/I: International Law and Law of the European Communities 1952-1989*, (Nomos 1992) 625.
[71] Federal Constitutional Court of Germany, Maastricht Treaty 1992 Constitutionality Case, 2 BvR 2134 and 2159/92, in Oppenheimer (n 11) 556, 574. More on these three cases see Franz C. Mayer, 'The European Constitution and the Courts' in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (Hart 2006) 295-300.
[72] For more on this see below section 3.1.2.
[73] More on the ICC's attitude towards constitutional identity see Federico Fabbrini and Oreste Pollicino, 'Constitutional Identity in Italy: European Integration as the Fulfillment of the Constitution' EUI Working Papers Law 2017/06, 8-15.
[74] ICC, *Frontini v Ministero delle Finanze* of 27 December 1973, in Oppenheimer (n 11) 640.
[75] ICC, *Spa Granital v Amministrazione delle Finanze dello Stato* of 8 June 1984, in Oppenheimer (n 11) 651.
[76] ICC, *Fragd v Amministrazione delle Finanze* of 21 April 1989, in Oppenheimer (n 11) 657.
[77] CJEU, Taricco ECLI:EU:C:2015:555 judgment of 8 September 2015.

preliminary reference of the ICC[78] to this court over the very same decision seems to pave the way towards refining the constitutional identity in the case law of the ICC. The latter has clearly threatened in its reference to invoke the constitutional identity review in case the CJEU does not reconsider and adjust its interpretation of Article 325 TFEU which is seen to be incompatible with the established constitutional principle of legality as part of the fundamental constitutional principles of the Italian constitution.[79] Even though in the end this 'threat'of applying identity review did not materialize in the ICC decision on the *Taricco* saga, still, this decision has left ample room for this to occur in the not so distant future.[80]

Another court has contributed to this debate in the recent years even though its status as a proper constitutional court has been sometimes disputed. The French Constitutional Council (CC) has voiced its view on the limits of EU law. In this sense at the beginning the CC used a broader formula which indicated that in cases in which an act of secondary EU law is in contradiction with "an express contrary provision of the Constitution" then the EU legal act would be disobeyed.[81] Later the court refined this argument and stated that such an disobedience of EU law would occur if it is in conflict with a rule or principle inherent to the constitutional identity of France, except when the constituting power consents thereto [to the application of EU law]. [82] In any case, the bottom line remains the same, the doctrine of '*reserve de constitutionnalite'* as embodied through the constitutional identity sets limits on the exercise of EU competences and absolute primacy of EU law.[83]

Nevertheless, perhaps crucial for the greater awareness and significance of the national identity clause both in France and Spain, and obviously broader, prior to the enactment of Article 4(2) TEU as part of the Lisbon Treaty, are the decisions of the CC and the Spanish Constitutional Tribunal (SCT). In the respective decisions one could easily recognize that in essence the views of the two institutions on the meaning of the then Article I-5 CT in regard to Article I-6 CT,

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[78] ICC Order 24/2017 (*Taricco*) of 23 November 2017, English version available at: http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/O_24_2017.pdf last visited 06.10.2018

[79] ICC *Taricco* (n 77) para. 6.

[80] ICC Judgment 115/2018 of 10 April 2018 (*Taricco Decision*), English version available at: https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_2018_115_EN.pdf last visited 30.01.2019. For more on this see Lukas Staffler, 'Verfassungsidentität und strafrechtliche Verjährung; Das (vorläufige) Ende des Konflikts zweier Höchstgerichte in der Rechtssache Taricco' 45 Europäische Grundrechte Zeitschrift (2018) 613-619; and Chiara Amalfitano and Oreste Pollicino, 'Two Courts, two Languages? The Taricco Saga Ends on a Worrying Note (Verfassungsblog 5 June 2018), available at: https://verfassungsblog.de/two-courts-two-languages-the-taricco-saga-ends-on-a-worrying-note/ last visited 30.01.2019.

[81] When the constitutionality of primary law is at stake, then the phrase used by the Council, which represents its standard of control in the process of ratification, is for the commitments taken by the treaties not to "call into question constitutionality guaranteed rights and freedoms or adversely affect the fundamental conditions of the exercising of national sovereignty". See French Constitutional Council *Decision No 2004-505 DC* of 19 November 2004, para 7, and also *Decision No 2007-560 DC* of 20 December 2007, para 9.

[82] This point was reaffirmed in *Decision No 2011-631 DC* from 9 June 2011, para. 45. More on the provisions which are specific to France and thus are part of the constitutional identity see Reestman, (n 9) 388. Here a note should be taken of the possible area of conflict between, the policy, or better said lack of any, on the respect and recognition of racial and ethnic minorities in France and the values of the Union envisaged in Article 2 TEU which also include the respect for the rights of persons belonging to minorities.

[83] Xavier Groussot, 'Supr[i]macy à la Française: Another French Exception?' (2008) 27 Yearbook on European Law 89, 105-107.

the primacy clause, are shared. It was stated that the relation and positioning of the two provisions is a clear sign that national identity represents the limit to the primacy of EU law over the national constitutions and this is why they did not find the primacy clause to be in conflict with the constitution since it did not alter the scope of the already existing doctrine.[84]

Since 2004, on the other hand, the pattern created by the FCC and ICC, and now shyly applied by the CC, has been followed by the other constitutional courts of the new member states that lead Sadurski to name this trend as 'Solange Chapter 3'.[85] However, this trend has been characterized by an interesting paradox that is definitely noteworthy. While in the period prior to accession to the EU these states put a lot of effort in promoting the integration process as the only path for their further democratization, after the accession they have set the limits to EU law rooted in constitutional provisions declaring the democratic character of the state based on the rule of law.[86]

The Czech Constitutional Court (CCC) is an interesting example in discussing the national identity clause. The CCC set the tone towards EU law[87] in its first case concerning a national implementing act in the so-called the *Sugar Quotas* Case.[88] In its *Lisbon I*[89] decision the CCC stated that the application of Union law in the Czech Republic has its limits in the "untouchable" material core of the constitution. The material core is stemming out of the principles of the "democratic state governed by the rule of law" of Article 9(2) and Article 1(1) of the Constitution.[90] In the follow up to this decision, *Lisbon II*, it has resisted the pressure from the applicants and firmly declined to list the non-transferable competences[91] or precisely declare the elements of the material core of the constitution in advance[92] by which it belied the idea of fundamental resemblance with the FCC's case law.[93] The logic behind the reasoning appears to be very sound and legitimate. It opted for a division of tasks with the political branches (i.e. the legislature) in defining the constitutional identity. The approach taken was to avoid the severe criticism that the FCC has undergone for its judicial activism in the *Lisbon* decision and *inter alia* for going too far with the definition and scope of constitutional identity

[84] French Constitutional Council, *Decision 2004-505 DC* Treaty Establishing a Constitution for Europe, paras. 12-13; Spanish Constitutional Tribunal, Declaration on Establishing a Constitution for Europe, *DTC 001/2004*, para 4.

[85] Wojciech Sadurski, 'Solange, Chapter 3: Constitutional Courts in Central Europe - Democracy - European Union' (2008) 14(1) European Law Journal 1. On this phenomenon present among several Central and Eastern European Member States of following the German model and pattern of constitutional review see also Allan F. Tatham, Central European Constitutional Courts in the Face of EU Membership: The Influence of the German Model in Hungary and Poland (Kluwer 2013); and Rideau (n 64).

[86] Sadurski (n 85) 4. Polish Constitutional Tribunal, *Judgment K 18/04* of 11 May 2005, Hungarian Constitutional Court, Decision 17/2004 (V. 25.), Latvian Constitutional Court, *Case no. 2008-35-01* of 7 April 2009.

[87] Rideau (n 64) 254-258.

[88] CCC, *Decision PL. US 50/04* of 8 March 2006.

[89] More on the decision of constitutional courts in the EU on the Lisbon Treaty Mattias Wendel, 'Lisbon before the Courts: Comparative Perspectives' (2011) 7 European Constitutional Law Review, 96, 135.

[90] CCC, *Treaty of Lisbon I*, *Decision PL. US 19/08 of 26* November 2008, paras. 85, 89, 94, 91, 93 and 114. See also Rideau (n 64) 256.

[91] CCC, *Treaty of Lisbon II*, *Decision PL. US 29/09*, para. 111. Rideau (n 64) 257.

[92] CCC, Lisbon II (n 91) para. 112.

[93] The Editors note and Jan Komarek, 'The Czech Constitutional Court's Second Decision on the Lisbon Treaty of 3 November 2009', (2009) 5 European Constitutional Law Review 345.

and essential state functions. Therefore the CCC justified this move by stating that if it decided differently it would cross the line of its competences and in that way encroach the decision-making powers of political bodies because of which it would unavoidably be labelled as an activist court.[94] However, such a stance should not be interpreted as a complete restraint of the CCC from issues related to constitutional identity. It retained the power, in exceptional situations, to review the exercise of competences of the EU when there are indications that constitutional identity is being encroached upon. As a matter of fact, this position was confirmed in the *Slovak Pensions* case where the CCC clearly summarized its positions towards EU law along these same lines.[95]

The Polish Constitutional Tribunal (PCT) was slightly more 'observant' of the pattern set by the FCC even though not completely. In its *Lisbon* decision it identified the national constitutional identity through enumeration of certain core constitutional provisions[96] which regulate the powers and competences that may not be subject to transfer to the EU. The safeguard for such a limited conferral is foreseen in Article 90[97] of the Constitution.[98] In this manner it determined the constitutional identity as the ultimate limit to the conferral of competences to the EU. Similarly to the FCC the PCT relates the constitutional identity, as it defines, to Article 4(2) TEU stating that "[a]n equivalent concept of constitutional identity in the primary EU law is the concept of national identity."[99] Nevertheless, different from the FCC, it leaves the actual determination of the democratic legitimacy of a measure foreseen by the Treaty to be applied by the EU institutions to the legislature and the Polish constitution maker.[100] Additionally, the PCT in this decision provided a substantive overview of the case-law of several other European constitutional courts on the constitutional review of the Lisbon Treaty where it recognized the role of constitutional courts in relation to the respective constitutional identity. The PCT referring to the common constitutional traditions of member states and the importance of constitutions for state sovereignty determined that "the constitutional judiciary plays a unique role as regards the protection of constitutional identity

[94] CCC, Lisbon II (n 91) para.113.
[95] CCC *Holubec Pl. US 5/12* of 31 January 2012, para. VII.
[96] Roberto Toniatti, 'Sovereignty Lost, Constitutional Identity Regained' in Alejandro Saiz Arnaiz and Carina Alcoberro Livina (eds) *National Constitutional Identity and European Integration* (Intersentia 2013) 68-69.
[97] The Constitution of Poland Article 90: (1) The Republic of Poland may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of State authority in relation to certain matters. (2) A statute, granting consent for ratification of an international agreement referred to in para.1, shall be passed by the Sejm by a two-thirds majority vote in the presence of at least half of the statutory number of Deputies, and by the Senate by a two-thirds majority vote in the presence of at least half of the statutory number of Senators. (3) Granting of consent for ratification of such agreement may also be passed by a nationwide referendum in accordance with the provisions of Article 125. (4) Any resolution in respect of the choice of procedure for granting consent to ratification shall be taken by the Sejm by an absolute majority vote taken in the presence of at least half of the statutory number of Deputies.
[98] PCT *Lisbon Treaty Decision* K 32/09 of 24 November 2010, item III 2.1, "The normative manifestation of that principle is the Constitution, and in particular the provisions of the Preamble, Article 2, Article 4, Article 5, Article 8, Article 90, Article 104(2) and Article 126(1) in the light of which the sovereignty of the Republic of Poland is expressed in the inalienable competences of the organs of the state, *constituting the constitutional identity of the state*" (emphasis added).
[99] PCT Lisbon (n 98) III 2.1, 23, The CT further states that "[t]he constitutional identity remains in a close relation with the concept of national identity, which also includes the tradition and culture."
[100] PCT Lisbon (n 98) III 2.6, 36; Tatham (n 85) 252; and Rideau (n 64) 253.

of the member states, which at the same time determines the Treaty identity of the European Union."[101]

Even though the enumeration of core competences and the strong stance on the supremacy of the Constitution and sovereignty might leave an impression of an utterly rigid stance towards EU law,[102] a more EU friendly approach could be recognized. An interesting and in some instances awkward balance between Euro-friendliness and strong emphasis on state sovereignty still leaves some room for a more constructive interpretation of the PCT's stance towards EU law. Namely, the insistence on avoiding direct collision with EU law is also a feature of PCT's case-law the *EU Regulation* decisions[103] arguably being the last example in this light.[104] Following the *Honeywell* decision of the FCC, the PCT expressed its obligation to use the preliminary reference option in order to determine the actual content of the EU secondary norm prior to deciding on its constitutionality thus declaring its willingness to enter a judicial dialogue on the matter.[105]

The most recent line of case law of national constitutional courts invoking constitutional identity in the context of EU law is of the Belgian Constitutional Court and Hungarian Constitutional Court. In a decision from 2016 the BCC[106] reviewed the constitutionality of *inter alia* the Act approving the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union on several grounds which were raised by numerous applicants and also included the question of breach of the budgetary responsibility and autonomy of the Belgian Parliament. In an *obiter dictum* the BCC for the first time announces specific limits to the primacy of EU law. Besides the safeguard of the principle of limited attribution or conferral of powers to the EU, the BCC has reasoned that EU law has primacy as long as it does not breach the national identity or the basic values of constitutional rights protection.[107] Thus the most Europhile national constitutional court in Europe has clearly declared its power to conduct identity review of EU law which most probably will be applied with substantial restraint.[108]

In another case from 2016, the HCC provided an abstract constitutional interpretation of the European Council decision 2015/1601 of 22 September 2015[109] on establishing provisional measures in the area of international protection for the benefit of Italy and Greece, which basically introduced the migrant quota system strongly opposed by the Hungarian government

[101] PCT Lisbon (n 98) III 3.8.
[102] Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law: Cases and Materials*, (CUP 3rd edition 2014) 222, singling out Poland with its rigid stance treating Treaties as all other international treaties.
[103] PCT *EU Regulation* Decision SK 45/09 of 16 November 2011 III 2.6.
[104] For instance, the PCT, EAW Decision P 1/05 of 27 April 2005 and Jan Komarek, 'European Constitutionalism and the European Arrest Warrant: In Search of the Limits of "Contrapunctual Principles"' (2007) Common Law Market Review 9, 33.
[105] EU Regulation (n 94); and Tatham (n 85) 235.
[106] BCC No. 62/2016 of 28 April 2016. For more on this decision see Philippe Gerard and Willem Verrijdt, 'Belgian Constitutional Court Adopts National Identity Discourse: Belgian Constitutional Court No. 62/2016, 28 April 2016' (2017) 13 European Constitutional Law Review 182
[107] Gerard and Verrijdt (n 106) 196.
[108] Gerard and Verrijdt (n 106) 205.
[109] HCC, Decision 22/2016. (XII.5.) AB on the Interpretation of Article E) (2) of the Fundamental Law, decision of 30 November 2016.

led by Victor Orban. In this high profile political case, the HCC essentially served as the last bastion of Orban's anti-migration policies and delivered a rather dubious reasoning introducing the limits of EU law supremacy through fundamental rights review and *ultra vires* review.[110] The latter review, according to the HCC is consisted of sovereignty and identity review[111] and it is supposed to protect and safeguard the Hungary's sovereignty[112] and constitutional identity rooted in its historical constitution.[113] While the HCC puts some effort to justify its reasoning by referring to the FCC's and other national constitutional courts' case law on the relationship with EU law, it seriously departs from this path of promoting constructive relationship between the legal orders. Not only does the HCC provide an extensive understanding of constitutional (self-) identity[114] by referring also to an ambiguous notion of historical constitution,[115] but it does not mention any possibility of entering into a direct dialogue with the CJEU by sending a preliminary reference before it conducts an *ultra vires* review generally reserved for the HCC only.[116] Even though the HCC roots its identity review to Article 4(2) TEU and reasons that this sort of review should be "based on the principle of equality and collegiality, with mutual respect to each other"[117] the general reasoning of the HCC does not resonate with a constructive stance in regard to EU law. In this sense, the HCC developed a very uncooperative stance through the invocation of constitutional identity which contradicts the principle of sincere cooperation of the Article 4(3) TEU as well as the values upon which the EU is being based on as regulated in Article 2 TEU.[118]

3.1.2 The Lisbon decision of the FCC

The decision of the FCC on the Lisbon Treaty has drawn serious criticism because of its, arguably, Euro-skeptic tone particularly in projecting its understanding of democracy on the EU.[119] Some authors went as far as declaring that 30 June 2009, the date when the *Lisbon*

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[110] HCC, *Decision 22/2016* (n 109) para. 46. Gabor Halmai, 'National(ist) Constitutional Identity?: Hungary's Road to Abuse' (2017) EUI Department of Law Research Paper No. 2017/08, p. 8ff available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2962969 See also Gabor Halmai, 'The Hungarian Constitutional Court and Constitutional Identity' *Verfassungsblog* 18 January 2017 available at: http://verfassungsblog.de/the-hungarian-constitutional-court-and-constitutional-identity/ last visitied 06.10.2018 and Timea Drinoczi, The Hungarian Constitutional Court of the Limits of EU law in the Hungarian Legal System, International Journal of Constitutional Law Blog, 29 December 2016, available at: http://www.iconnectblog.com/2016/12/the-hungarian-constitutional-court-on-the-limits-of-eu-law-in-the-hungarian-legal-system/ last visited 06.10.2018.

[111] HCC, *Decision 22/2016* (n 109) para. 54.

[112] HCC, *Decision 22/2016* (n 109) paras. 58-60.

[113] HCC, *Decision 22/2016* (n 109) paras. 61-67.

[114] HCC, *Decision 22/2016* (n 109) para. 64. "The Constitutional Court of Hungary interprets the concept of constitutional identity as Hungary's self-identity and it unfolds the content of this concept from case to case".

[115] HCC, *Decision 22/2016* (n 109) paras. 64-65; and Gabor Halmai, 'National(ist) Constitutional Identity?: Hungary's Road to Abuse' (2017) EUI Department of Law Research Paper No. 2017/08, p. 16 available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2962969 last visited 06.10.2018.

[116] HCC, *Decision 22/2016* (n 109) paras. 63 "The protection of constitutional identity should be granted in the framework of an informal cooperation with EUC[sic]", Cf. Concurring opinion of Egon-Dienes-Oehm HCC, *Decision 22/2016* (n 109) para. 76.

[117] HCC, *Decision 22/2016* (n 109) para. 63.

[118] Halmai (n 115) 15-17.

[119] Christian Tomuschat, 'The Ruling of the German Constitutional Court on the Treaty of Lisbon', (2009) German Law Journal 1259; Daniel Halberstam and Christoph Möllers, 'The German Constitutional Court says "Ja zu Deutschland!"' (2009) German Law Journal 1242; Frank Schorkopf, 'The European Union as An Association of Sovereign States: Karlsruhe's Ruling of the Treaty of Lisbon' (2009) German Law Journal 1220; Christoph

decision was delivered, will be remembered as a black day in the history of Europe.[120] Nevertheless, the issue of constitutional identity and its association with the identity clause were not the target of harsh criticism as it will presented below.

There are two main reasons why the *Lisbon* decision of the FCC is discussed separately from the case-law of the other national constitutional courts. First, the importance of this decision is doubtless when Article 4(2) TEU is concerned in the sense of directly establishing the link with the constitutional identity. Second, as it could be noticed in the previous section, the overall influence and importance of this institution in shaping the relationship between the national constitutional law and EU law is evident.

Following and further developing[121] the position and principles introduced in its previous decisions, above all in the *Maastricht* decision, the FCC in its *Lisbon* decision[122] clarifies and contextualises the constitutional identity of Germany on both the national and European level. Respecting the aforementioned continuity the court identified the constitutional identity through Article 23(1) GG[123] in conjunction with Article 79(3) GG[124], the so-called 'eternity clause', and accordingly its duty to protect and guarantee this identity through the instrument of 'identity review', hence adding a new avenue for review of EU law.[125] For this new instrument of review in addition to the previous *Solange* and *ultra vires* review doctrines[126] it finds support not only in the GG but also in the TEU, or more precisely Article 4(2). In this sense it recognized the mutuality of the obligation under both legal orders that at the same time is in conformity with the principle of openness of German law towards EU law and the loyalty

Schönberger, 'Lisbon in Karlsruhe: Maastricht's Epigones At Sea' (2009) German Law Journal 1202; but compare this to Alejandro Saiz Arnaiz and Carina Alcoberro Livina, ' Why Constitutional Identity Suddenly Matters: A Tale of Brave States, a Mighty Union and the Decline of Sovereignty' in Alejandro Saiz Arnaiz and Carina Alcoberro Livina (eds) *National Constitutional Identity and European Integration* (Intersentia 2013) 14 fn 44, pointing to Maduro's view that the Lisbon decision of the FCC is shift from a 'defensive constitutional pluralism' to an 'aggressive constitutional pluralism', referring to Miguel Poiares Maduro and G Grasso, 'Quale Europa dopo la sentenza della Corte costituzionale tedesca sul Tratatto di Lisbona?' (2009) 3 Il Dritto dell'Unione Europea, 501, 527ff; and Chalmers, Davies and Monti, (n 102) 225 "The judgment [Lisbon] is not, however, a bald restatement of national constitutional sovereignty."

[120] Alfred Grosser, 'The Federal Constitutional Court's Lisbon Case: Germany's "Sonderweg" – An Outsider's Perspective' (2009) German Law Journal 10, 1264.

[121] Halberstam and Möllers (n 119) 1241ff; and Dieter Grimm, 'Defending Sovereign Statehood against Transforming the European Union into a State' (2009) 5 *European Constitutional Law Review* 358, 365.

[122] FCC, *Lisbon Decision, 2 BvE 2/08* judgement of 30 June 2009.

[123] Article 23 (1) "With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social, and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law...".

[124] Cf Christian Tomuschat, 'Lisbon - Terminal of the European Integration Process? The Judgment of the German Constitutional Court of 30 June 2009' (2010) ZaöRV Heft 2, 278, in which it is claimed that this provision has the aim of preventing anti-democratic forces taking over power. See also Schorkopf (n 119) 1223.

[125] FCC Lisbon (n 122) para 240; Andreas Voßkuhle, 'Multilevel Cooperation of the European Constitutional Courts – Die Europäische Verfassungsgerichtsverbund' (2010) 6 *European Constitutional Law Review* 175, 193; Halberstam and Möllers (n 119) 1246; Grimm (n 121) 353, 370; Schönberger (n 119) 1205; and Kostadinides (n 5) 209-210.

[126] On this see Jacques Ziller, 'The German Constitutional Court's Friendliness towards European Law: On the Judgment of *Bundesverfassungsgericht* over the Ratification of the Treaty of Lisbon' (2010) 16 European Public Law 66-67.

clause.[127] It declared that "the guarantee of national constitutional identity under constitutional and under Union law *go hand in hand* in the European legal area."[128] With this reasoning the FCC established the direct link between constitutional identity of Germany and the national identity clause in the TEU.

However, it did not stop here and went further discussing which competences and powers of the German state cannot be transferred to the Union under the existing constitutional provisions, a point which led some scholars[129] to conclude that the notion of constitutional identity includes also some other competences of the state, enumerated in the *Lisbon* decision.[130] On the other hand, the authors that noticed this issue criticised the court's stance as far-reaching.[131] Indeed, it is undeniably true that it is far-reaching in a sense of being selective without any strong grounds and criteria in distinguishing certain competences from others as necessary state functions. However, this does not have to be read in a way directly relating the list of competences to the constitutional identity.

An alternative reading of the decision might be plausible on this issue. Challenging the afore-mentioned interpretation of the FCC's reasoning, Reestman wrote that "[t]hey (the five domains of state power) are, moreover, domains in which the chances of an encroachment of other principles belonging to the German constitutional identity seem particularly great" and "they are closely connected to it (constitutional identity) via the principle of democracy". [132] It is also affirmed by Grimm that "the list fulfils the function of warning sign: touching these matters *implies* a danger to the identity of the member states."[133] This view can also be traced in the wording and reasoning of the FCC[134] and it corresponds as well to the one expressed by CCC, to a certain extent influenced by the FCC, also in the *Lisbon II* decision where it

[127] Voßkuhle (n 125) 193; Von Bogdandy (n 30) 1450, 1452, arguing that the FCC actually established this principle in the Lisbon decision. FCC Lisbon (n 122) para. 267, 347.
[128] FCC Lisbon (n 122) para. 240 (emphasis added) and para. 235: „The obligation under European law to respect the constituent power of the Member States as the masters of the Treaties corresponds to the non-transferable identity of the constitution (Article 79.3 of the Basic Law), which is not open to integration in this respect. Within the boundaries of its competences, the Federal Constitutional Court must review, where necessary, whether these principles are adhered to."
[129] Geiger (n 30) links constitutional identity with the powers enumerated in FCC (n 76) para 260. Also see Puttler (n 12) para 17.
[130] Para 252: "Particularly sensitive for the ability of a constitutional state to democratically shape itself are decisions on substantive and formal criminal law (1), on the disposition of the monopoly on the use of force by the police within the state and by the military towards the exterior (2), fundamental fiscal decisions on public revenue and public expenditure, the latter being particularly motivated, *inter alia*, by social policy considerations (3), decisions on the shaping of living conditions in a social state (4) and decisions of particular cultural importance, for example on family law, the school and education system and on dealing with religious communities (5)." See paras. 253 – 260 where the court separately explains these five groups of decisions.
[131] Halberstam and Möllers (n 119) 1249-1251; Schorkopf (n 119) 1229-1230; Schönberger (n 119) 1208-1210; but also von Bogdandy and Schill (n 2) 724.
[132] Reestman (n 9) 386.
[133] Grimm (n 121) 368 (emphasis added). Udo Di Fabio, the judged-rapporteur in the Lisbon decision, seems to be also on these lines. See his *Spiegel* interview available at http://www.spiegel.de/international/germany/spiegel-interview-with-ex-german-high-court-justice-it-is-a-mistake-to-pursue-a-united-states-of-europe-a-805873.html last visited 05.10.2018
[134] FCC, *Honeywell* decision, 2 BvR 2661/06 of 6 July 2010 para 65 referred to also in FCC, *OMT* referral, 2 BvR 2728/13 of 14 January 2014, para 25.

demarcated the non-transferable competences from the elements of the material core.[135] Even though these competences are related to the democratic principle, by using the wording "[p]articularly sensitive for the ability of a constitutional state to democratically shape itself"[136] it is not firmly establishing them as inherent part of the constitutional identity and, in light of Article 4(2) TEU, they cannot be seen in every case as the fundamental constitutional structures. It is in this sense that one has to bear in mind also the third duty regulated in the identity clause i.e. the duty to respect the essential state functions in support of this interpretation.[137] The relation to the national identity clause is present. However, it does not mean that these two duties for the Union are identical. The essential state functions do not have to be in every case part of the fundamental constitutional structures of the member states. This is even more so when one notices that the court states that "principle of democracy... does not mean that a pre-determined number or certain types of sovereign rights should remain in the hands of the state."[138]

Within the framework of identity review and defining the constitutional identity another criticism has been cast on the grounds of the approach taken by the FCC in this decision towards judicial dialogue. The FCC has taken a rigid stance on its right to rule on whether an EU act is ultra vires or whether it encroaches upon the constitutional identity,[139] but it has not spoken in favour of a genuine judicial dialogue between national and supranational courts.[140] This sort of approach resonates with a national constitutionalist tone which does not comply with the perspectives of constitutional pluralism that should lead to a constructive relationship between the legal orders as will be discussed in the next section.

3.1.3 The post-Lisbon development of the FCC's doctrine of identity review

The strong criticism on some issues in the *Lisbon* decision has toned down, as has the court's actual tone in this decision, has been made more visible in light of the subsequent decisions of the FCC. Thus the best way to interpret the main points in this decision is to put them in the broader context of the case-law of the FCC. In this sense it could be argued that the *Lisbon* decision is not just an isolated case as shown by two other cases dealing with EU matters that immediately followed this decision. The *Data retention*[141] and *Honeywell* decisions[142] showed FCC's restraint and narrow application of the principles introduced or restated in the *Lisbon* decision. As a matter of fact, in some instances it could be said that the FCC has resorted to an unjustified judicial restraint that prevented this court from making a constructive intervention

[135] CCC Lisbon II (n 91) paras. 111 and 112. The second paragraph in which this court addresses the content of the material core from Article 1(1) of the Constitution separately from the non-transferable competences begins with the words "[f]or the same reason".
[136] FCC Lisbon (n 122) para. 252.
[137] Geiger (n 30) para.4 referring to FCC Lisbon (n 122) para. 351 and the way the new EU powers should be exercised in the future.
[138] FCC Lisbon (n 122) para. 248. See also Grimm (n 121) 368.
[139] FCC Lisbon (n 122) para. 241.
[140] Konstadinides (n 5) 211; and Tatham (n 85) 307-308.
[141] FCC, *Data Retention* decision *1BvR 256/08, 1BvR 263/08, 1 BvR 586/08* of 2 March 2010. See Anna-Bettina Kaiser, Case Note: 'German Data Retention Provisions Unconstitutional in their Present Form; Decision of 2 March 2010, NJW 2010' (2010) 6 European Constitutional Law Review 503.
[142] FCC *Honeywell* (n 134) para. 65.

in the realm of the common European constitutional order. On the first occasion after *Lisbon* to deal with an EU secondary act and to invoke the constitutional identity, the Data Retention Directive,[143] the FCC focused on the leeway provided by the directive for the national legislator and the national implementing act. In this way it avoided the need to make a preliminary reference to the CJEU even though it mentioned the possibility.[144] Furthermore, it invoked the constitutional identity in the context of Article 10 GG - privacy of correspondence, posts and telecommunications[145] – however it did not enter into a review of the EU secondary act but only of the implementing act and its conformity with the aforementioned constitutional right. It conducted a strict scrutiny since the CJEU already decided earlier dismissing an *ultra vires* challenge of the directive from Ireland.[146] Here the FCC missed an excellent opportunity to make recourse to preliminary reference to the CJEU and challenge the directive on the basis of its encroachment on the fundamental rights and thus constitutional identity,[147] something that was successfully done a couple of years later by both the Austrian Constitutional Court and the High Court of Ireland.[148] In this manner the FCC addressed the issue of safeguarding constitutional identity and the way it should have implemented the directive to the *Bundestag* and not to the CJEU.[149]

In *Honeywell*[150] the FCC withdrew from the rigid tone on judicial dialogue in the *Lisbon* decision and it embraced a friendlier approach towards EU law by substantially qualifying[151] the *ultra vires* review by 'invent[ing] meta-standards'.[152] It reasoned for providing more leeway for the CJEU recognizing the need to let the CJEU have its say on the concrete issue at hand before deciding whether an EU act is *ultra vires* while at the same time according the CJEU with the right of tolerance of error.[153] Additionally the FCC strengthened also its commitment

[143] Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC [2006] OJ L105/54.
[144] Guataferro (n 1) 314-315, Mattias Wendel, 'Exceeding Judicial Competence in the Name of Democracy: the German Federal Constitutional Court's OMT reference' (2014) European Constitutional Law Review 263, 264, 306.
[145] FCC *Data Retention* (n 141) para. 218, referring directly to the Lisbon decision: "It is *part of the constitutional identity* of the Federal Republic of Germany that the citizens' enjoyment of freedom may not be totally recorded and registered, and the Federal Republic must endeavour to preserve this in European and international connections" (emphasis added). Translation taken from the FCC Press release no. 11/2010 of 2 March 2010.
[146] CJEU, Case C-301/06 *Ireland v Parliament and Council* Judgement of 10 February 2009, ECLI:EU:C:2009:68.
[147] The FCC was aware that the Data Retention Directive was challenged of being *ultra vires* prior to its decision, see Ireland v Parliament and Council (n 124).
[148] CJEU, Joined Cases C-293/12 and C-594/12 *Digital Rights (Data Retention II)*, Judgement of 8 April 2014, ECLI:EU:C:2014:238. Sent as a preliminary reference by the Irish High Court and the Austrian Constitutional Court.
[149] Konstadinides (n 5) 213.
[150] This decision will be analyzed over the *ultra vires* review in more details in chapter 6. See more on this decision in Christoph Möllers, 'Constitutional *Ultra Vires* Review of European Acts Only Under Exceptional Circumstances; Decision of 6 July 2010, 2 BvR 2661/06, *Honeywell*' (2011) European Constitutional Law Review 161; Christian Tomuschat, 'The Defence of National Identity by the German Constitutional Court' in Alejandro Saiz Arnaiz and Carina Alcoberro Livina (eds) *National Constitutional Identity and European Integration* (Intersentia 2013) 214-217; Matthias Mahlmann, The Politics of Constitutional Identity and its Legal Frame – the Ultra Vires Decision of the German Federal Constitutional Court, (2010) 11 German Law Journal 1407.
[151] Judge Landau disagreed with these qualifications in his dissenting opinion, FCC Honeywell (n 134) para. 94ff.
[152] Möllers (n 150) 166.
[153] FCC Honeywell (n 134) para. 74.

towards the instrument of preliminary referencing to the CJEU.[154] In this sense it forged ahead with the relationship of cooperation.[155]

A new and even more relevant chapter in the story on the place of constitutional identity review in the case law of the FCC has been opened with the financial and euro crisis in the EU and the resulting expansion of powers of EU institutions in tackling it. These cases have dealt with a particular aspect of the constitutional identity referred to in the *Lisbon* decision, the budgetary autonomy and responsibility of the Bundestag, through the prism of the principle of democracy and the right to vote. In a series of four interrelated cases, EFSF,[156] ESM,[157] OMT[158] and reference on the Quantitative Easing to the CJEU,[159] the FCC has established and defined the budgetary autonomy as a specific aspect of constitutional identity which in this regard is supposed to be understood in a flexible manner rather than in absolute terms. In any case, these decisions and references have in the end reflected the restraint with which identity review should be applied. After the strong criticism of the tone used in the OMT reference as well as the reasoning on identity review the FCC in its subsequent decisions has put effort to present the constitutional identity and identity review as compatible with EU law and the constitutional principle of openness to EU law.[160]

As a matter of fact, this sort of constructive tone was based on the first FCC decision after the OMT reference in which identity review was applied. Namely, in the FCC's order from 15 December 2015[161] which involved human dignity, through the principle of individual guilt, as part of the constitutional identity of the GG in the context of enforcement of the EAW, the FCC dealt with the relationship of safeguarding constitutional identity and its compatibility with EU law taking due consideration of its effectiveness and uniform application.[162] It emphasized the restraints placed on the application of identity review, which is to occur in exceptional situations and applied only by the FCC.[163] These restraints are also to be seen in the strict admissibility criteria envisaged for constitutional complaints invoking this sort of review.[164] In this manner the FCC set the path to reconciling identity review with EU law, at least according to its understanding.

This brief outline of the respective case-law of national constitutional courts has revealed several tendencies among these courts. First, it can be observed that, perhaps apart from the FCC which has referred to this notion in other contexts as well, all constitutional courts have used this notion, explicitly or implicitly, specifically in the context of EU law, thus making constitutional identity instrumental in EU matters. As a matter of fact, the notion of

[154] Möllers (n 150) 165.
[155] FCC *Honeywell* (n 134) para. 100; and Konsatdinides (n 5) 215.
[156] FCC, *EFSF*, 2 BvR 987/10 judgment of 7 September 2011.
[157] FCC, *ESM*, 2 BvR 1390/12 judgment of 12 September 2012.
[158] FCC, OMT referral, 2 BvR 2728/13, order of 14 January 2014; and FCC, *OMT decision*, 2 BvR 2728/13, judgment of the Second Senate of 21 June 2016.
[159] FCC, *Quantitative Easing (QE)*, 2 BvR 859/15, order of 18 July 2017
[160] See for instance FCC, *OMT decision* (n 158) 141.
[161] FCC, *EAW II*, Case 2 BvR 2735/14 order of 15 December 2015.
[162] FCC *EAW II* (n 161) paras. 43-46.
[163] FCC *EAW II* (n 161) para. 43.
[164] FCC, *EAW II* (n 161) para. 50.

constitutional identity received its prominence and substantial spot in the constitutional discourse solely because of its use in EU related issues with a strong influence coming from the FCC. An interesting argument in this line could be found in the dissenting opinion of the judges of the PCT, Miroslaw Granat, in the *Stability Mechanism* decision where he pointed out the notion of constitutional identity was introduced for the first time by the PCT in its *Lisbon* decision.[165]

Second, there is a certain level of convergence among constitutional courts in terms of the definition and meaning of constitutional identity in light of Article 4(2) TEU also in conjunction with Article 2 TEU.[166] The approach taken by most of the constitutional courts, regardless of whether they have directly or only indirectly invoked the notion, has been that the constitutional identity has set external limits on EU authority and the exercise of the transferred competences. Values, principles and competences envisaged in the constitutions and also invoked by the constitutional courts in their reasoning are most frequently related to the EU values regulated in Article 2 TEU. This claim, though, does not intend to underestimate singularities of national constitutional identities of member states or deny the fact that there is still diversity between the identities in terms of interpretation or understanding of these same values in different states.[167]

Third, it can be additionally observed from the case-law that even in instances in which constitutional courts have entered into some kind of designation or enumeration of values and core competences that are part of the constitutional identity they have still left substantial manoeuvring space to decide upon this further in the future on a case-by-case manner. The subsequent case-law of the constitutional courts, meaning after the initial linking of constitutional identity with the national identity clause, proves this view right. Therefore, the FCC's case-law, also the *Lisbon* decision, as analysed here and under this interpretation, might also be seen as part of the general tendency of national constitutional courts. The question that remains open is how far the FCC as well as other courts are willing and able to go both in light of their international obligations taken over through the EU treaties, which will be also reviewed by the CJEU, and their respective constitutional provisions. It appears to be evident by the number of cases that involve direct confrontation with the EU law and the CJEU, and by the reasoning in their cases, that surely a certain level of self-restraint is being applied.[168]

[165] PCT *Stability Mechanism* K 33/12, Dissenting Opinion Miroslaw Granat. of 26 June 2013. "In the context of that case [Lisbon treaty], the Tribunal introduced "constitutional identity" into its aquis."
[166] Monica Claes, 'National Identity: Trump Card or Up for Negotiations' in Alejandro Saiz Arnaiz and Carina Alcoberro Livina (eds) *National Constitutional Identity and European Integration* (Intersentia 2013) 126-128, on the case-law in France and Spain.
[167] Claes (n 166) 125, commenting on the Lisbon decision of the FCC states that "what the *Bundesverfassungsgericht* is really concerned with, is not these core constitutional principles in themselves, but the *German* version thereof, as protected under the *German* Basic Law and interpreted and guaranteed by the *German* Constitutional Court."
[168] Cloots (n 18) 54-55.

3.2 CJEU's stance on the national identity clause

3.2.1 The CJEU and the respect for national identity under Article 6(3) TA

Under the relevant treaty provisions determining the powers of the CJEU, Article 46 TEU as of Treaty of Nice (TN), the national identity clause regulated in Article 6(3) TA was not to be applied or interpreted by the Court. This determined the relevance of this provision in the case-law of the CJEU prior to its clarification in Article 4(2) TEU and accordingly its justiciability. Therefore, national identity has played only a supporting role, if one wants to be generous with its status prior to the Lisbon Treaty. There is not a single judgement of the CJEU where this court has drawn attention to the duty of the Union institutions to respect the national identity as articulated first in Article 6(3) TA.[169] In the cases where previously the Advocate Generals (AG) have invoked these provisions the Court did not find it adequate to do the same.[170] Yet the Court, before the enactment of the Lisbon Treaty, has implicitly, and only partly, recognized the Union's duty to respect the national identity of the member states this being different from recognizing national identity as a legitimate aim in *Commission v. Luxembourg.*[171] Basically, it was only in cases involving the derogations from the fundamental freedoms of the member states justified by the fundamental rights that the Court took into consideration specific constitutional provisions as interpreted by the national courts.

The first important case from this group is the *Omega* case. This case dealt with derogation from the freedom to provide services based on public policy, protection of human dignity, as regulated in the German Basic Law (GG). There are three main points from this case important for the issues at hand here. First, the CJEU held that the protection of fundamental rights constitutes a legitimate interest within the public policy of the member states and justifies derogation from the fundamental freedoms of EC. Restating on this point what the ICC in *Fragd*[172] already had held, the CJEU declared that the legitimate interest pursued does not have to correspond to a conception shared by all member states. Second, the protection of fundamental rights as a public policy has to be interpreted strictly so that its scope cannot be determined unilaterally by each member state without any control by the Community institutions.[173] Third, adding to the previous the CJEU held that such derogation from fundamental freedoms can be justified only if it passed the proportionality test. It is precisely at this last point that it relied heavily on the assessment of the Federal Administrative Court of Germany which can be interpreted as recognition of the exclusive jurisdiction of national courts to decide the content of constitutional identity, fundamental rights in this case, and for it to

[169] Konstadinides (n 5) 200.
[170] CJEU Michaniki Opinion AG Maduro (n 62) para. 30; Opinion AG Maduro of 20 September 2005, CJEU Marrosu Opinion AG Maduro (n 62) para. 40; CJEU, Joined Cases C-428/06 to C-434/06, *Unión General de Trabajadores de La Rioja (UGT-Rioja) v. Juntas Generales del Territorio Histórico de Vizcaya and Others*, Opinion AG Kokott of 8 May 2008, ECLI:EU:C:2008:262, para. 54; CJEU, Case C-160/03, *Kingdom of Spain v. Eurojust*, Opinon AG Maduro of 16 December 2004, ECLI:EU:C:2004:817, para. 24.
[171] CJEU, Case 473/93 *Commission v Luxembourg*, Judgment of 2 July 1996, ECLI:EU:C:1996:263.
[172] ICC *Fragd* (n 76) 657
[173] CJEU, Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundestadt Bonn*, Judgment of 14 October 2004, ECLI:EU:C:2004:614, para 30. This strict interpretation according to the court entails that 'public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society'. See also para 31.

review this interpretation in light of EC/EU law. The same logic was followed in later case-law. *Laval*[174] and *Viking Line*[175] cases are very illustrative in this regard. In the latter the CJEU clearly set the roles of both the national courts and the CJEU. Thus it can be concluded that the CJEU simply left it to the national courts to determine the proportionality of national acts while providing guidance for this discretion.[176]

The common denominator of this group of cases is that they all balance between the fundamental freedoms of the EU and the fundamental rights as regulated in national constitutions. Due to this fact one cannot be too enthusiastic because the CJEU is rather following the well-established practice, basically since the *Solange I* of the FCC, of respect for fundamental rights that now are also partly incorporated into the Treaties through the Charter of fundamental rights. Nevertheless, the degree of protection might turn out to be an issue and at this point national identity clause could play a role.

The crucial point of these cases is that the legal basis for allowing member states to derogate from the application of the EU law was found in provisions other than the national identity clause, namely, articles 39 and 46 TEC, or better said the latter were not read in conjunction with Article 6(3) TA. Maybe it seems that it does not really matter which of these provisions are being invoked as the legal consequences are the same, EU law is not applied to the situation at hand. However, the difference between them is that whereas provisions regulating exceptions in the application of the fundamental freedoms is totally within the jurisdiction of the CJEU, Article 6(3) TA, as clarified before, was not. Crucially, the latter provision "clearly refers back to the member states."[177] It is not to be inferred from this view that the CJEU should invoke only the national identity clause, but rather to affirm the duty that it has under Treaty provisions to respect the fundamental constitutional structures of the member states as declared in their constitutions and interpreted by their national constitutional courts.

In contrast to the previous cases in *Michaniki,*[178] a case involving a question of (in-) compatibility of a constitutional provision with an internal market directive, the CJEU did not follow the same approach as the constitutional provision at stake was not of the same importance as the ones regulating fundamental rights.[179] As a matter of fact the court did not put any attention to the constitutional dimension of the case and it basically trivialised the

[174] CJEU, Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet*, Judgment 18 December 2007, ECLI:EU:C:2007:291, paras 91-92.
[175] CJEU, Case C-438/05 *International Transport Workers' Federation, Finish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti*, Judgment of 11 December 2007, ECLI:EU:C:2007:772, paras. 85-90. Paragraph 85 reads 'it must be pointed out that, even if it is ultimately for the national court, which has sole jurisdiction to assess the facts and interpret the national legislation, to determine whether and to what extent such collective action meets those requirements, the Court of Justice, which is called on to provide answers of use to the national court, may provide guidance, based on the file in the main proceedings and on the written and oral observations which have been submitted to it, in order to enable the national court to give judgment in the particular case before it.'
[176] Groussot (n 83) 117; and Tatham (n 85) 294-295.
[177] Franz C. Mayer, 'Supremacy – Lost?', Walter Hallstein-Institut - Paper 2/06, 8. available at: http://www.whi-berlin.eu/documents/whi-paper0206.pdf last visited 06.10.2018
[178] CJEU, Case C-213/07, *Michaniki AE v Ethniko Simvoulio Radiotileorasis*, Judgement of 16 December 2008, ECLI:EU:C:2008:731.
[179] Besselink (n 10) 48.

meaning of the respective constitutional provision.[180] But, is it up to this court to decide which constitutional provision is trivial for the EU law? Exactly this question draws on the conclusion that "a risky enterprise to project an EU ranking of values onto national constitutional law"[181] occurred in this case which arguably would not be quite in line with the national identity clause.

The AG Maduro was cautious[182] in his opinion, which practically followed the reasoning of the court in some of the previously mentioned cases, and he drew attention to the respect of national identity[183] and the fact that this case involved a provision that was subject to a prior national constitutional assessment.[184] He affirmed the national courts' discretion to rule upon the content and scope of such provisions which is subject to judicial review in regard to assessment of the proportionality of the specific national provision.[185] By taking this view Maduro alluded to the sensitivity of the issue and considerations that needed to be taken into account in the application of the proportionality test even though, just as the CJEU itself, he did not really go into the Greek context which raises the concern for the appropriateness of the finding.[186]

The CJEU, on the other hand, in its decision ignored most of these crucial points and applied the principle of primacy of EU law as articulated in *International Handelsgesellschaft* by which it suggested the inconformity of the national constitutional provision with the specific directive. The decision was not warmly welcomed and it underwent some criticism also because it was made in a particularly sensitive moment which could arguably have widened the gap between the CJEU and national constitutional courts in the context of the *Lisbon* decision of the FCC.[187]

Comparing *Michaniki* with *Omega*, and other related cases, one can notice certain patterns that could be illuminating. Namely, when fundamental rights are concerned the CJEU seems to be rather 'cooperative' and accepts and adheres to the discretion of national courts to determine the content, scope and importance of the specific legitimate interest that is the fundamental constitutional right. If, however, other constitutional provisions are concerned the CJEU is not willing to be so resilient. Bearing in mind that the constitutional identity does not only include fundamental rights but also some other elements, it will be difficult for the national constitutional courts and the CJEU to resolve issues related to the respect for national identity.

3.2.2 The CJEU and the respect for national identity under Article 4(2) TEU

The enactment of the Lisbon Treaty and the change of the former Article 46 TN which confined the powers of the CJEU concerning the national identity clause, Article 4(2) TEU, meant that

[180] Vasiliki Kosta, Case Note 'Case C-213/07, Michaniki AE v Ethniko Simvoulio Radiotileorasis, Ipourgos Epikratias' (2009) 5 European Constitutional Law Review 510.
[181] Besselink (n 10) 49.
[182] CJEU Michaniki Opinion AG Maduro (n 62) opening remarks point 1: "What makes the present case unusual, however, is the fact that the national legislative measure in question is a constitutional provision. Should this fact affect the response to be given?".
[183] CJEU Michaniki Opinion AG Maduro (n 62) para 31.
[184] CJEU Michaniki Opinion AG Maduro (n 62) para. 30.
[185] CJEU Michaniki Opinion AG Maduro (n 62) para. 34 and 35. See also Konstadinides (n 5) 201.
[186] Kosta (n 180) 512.
[187] Kosta (n 180) 507.

this provision could be applied and interpreted by the CJEU. Following this substantial change, the CJEU has, however, invoked this provision and duty of the Union institutions only on five occasions so far. Three of them dealt specifically with the status of the official language in the member states while one, that being the first case, had to do with a particular aspect of a national or constitutional identity of Austria, a ban of nobility titles under the banner of equal treatment, and the last one on the national procedural autonomy and the division of competences in a federal state.

In the *Sayn-Wittgenstein* decision[188] the CJEU invoked Article 4(2) TEU for the first time.[189] This case involved a ban on registration and carrying of nobility titles, Austrian or foreign, in Austria as part of a person's name provided in a statute (Law on the abolition of the nobility) of constitutional rank implementing a constitutional principle of equal treatment and the compatibility of this ban with the freedom of movement in the EU as regulated in Article 21 TFEU. Similar to some of the cases mentioned before, the CJEU decided that a derogation of the freedom of movement under Article 21 through such a ban in a member state can be justified and proportional. The latter was determined by the CJEU itself, even though AG Sharpston stated that the national court should assess proportionality[190], on public policy grounds while invoking the duty for respect of the national identity of member states only as a secondary argument.[191] Here there are two points that need to be emphasized for the purpose of the argument presented in this chapter.

First, the CJEU stated quite clearly that element of national identity, such as the Law on the abolition of nobility, which was the only one in this case "*may be taken into consideration* when a balance is struck between legitimate interests and the right of free movement of persons recognized under European Union law."[192] By doing this the CJEU inserted national identity within the framework of public policy justification and made this a purely free movement case not really distinguishing it from any other earlier similar cases regardless of the fact that the new national identity clause entered into force.

Second, Article 4(2) TEU was invoked in the context of the status of Austria as a Republic[193] in applying the proportionality test that raises a set of questions. Namely, while the whole case dealt with the equal treatment of citizens and its implementation through the ban on nobility titles, the republican status was not really at stake and could not be interpreted as an "obvious reason" for the outcome of the case.[194] The fact that a certain state is a republic does not necessarily mean that it must ban nobility titles and interpret equal treatment in such a manner

[188] CJEU, Case C-208/09 *IIonka Sayn-Wittgenstein v Landeshauptmann*, Judgment 22 December 2010, ECLI:EU:C:2010:806.
[189] For more on this case Leonard F.M. Besselink, 'Case C-208/09, Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien, Judgment of the Court (Second Chamber) of 22 December 2010' (2012) 49(2) Common Law Market Review 671-93.
[190] CJEU, Case C-208/09 *IIonka Sayn-Wittgenstein v Landeshauptmann,* Opinion of AG Sharpston 14 October 2010, ECLI:EU:C:2010:608, para 68.
[191] Guastaferro (n 1) 295; and von Bogdandy and Schill (n 30) 1424.
[192] CJEU *Sayn-Wittgenstein* (n 188) para. 83 (emphasis added).
[193] CJEU *Sayn-Wittgenstein* (n 188) para. 92. "*It must also be noted*….." [emphasis added].
[194] For a different view see Sinisa Rodin, 'National Identity and Market Freedoms after the Treaty of Lisbon' (2011) 7 Croatian Yearbook of European Law and Policy 30-31.

as Austria does. Thus in this case the republican status is not really an argument for declaring the ban proportional. Additionally, the reason for such an outcome of this case can also be explained through the clear and explicit decision of the Constitutional Court of Austria upon the matter declaring an act by the Austrian authorities different from the aforementioned ban as unconstitutional.[195] Under such circumstances, any other outcome of this case would put the CJEU on a line of direct confrontation with the Constitutional Court something that it obviously tried to avoid also by invoking Article 4(2) TEU.

Bearing all this in mind it could be easily claimed that the proportionality test in essence was not applied in this case, something similar to *Omega,* which was referred to by the CJEU in this case.

> "The Court has repeatedly noted that the concept of public policy as justification for a derogation from a fundamental freedom must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without a control by the European Union institutions…Thus, policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society." [196]

This stance of the CJEU leads to a shrinkage of any substantial meaning or purpose of the national identity clause thus making Article 4(2) TEU very much redundant.[197]

In *Runevič-Vardyn,*[198] the CJEU dealt with an issue that involved the Lithuanian rules on the spelling of names in the birth and marriage certificates and their compliance with Article 21 TFEU. These rules were applied in issuing the marriage certificate of a couple, Ms. Runevič-Vardyn, a Lithuanian citizen with Polish origin, and a Polish citizen, Mr. Wardyn, who got married in Lithuania. Among the three separate aspects[199] that were recognized by the court only in one that had to do with the discrepancy in spelling of the surname of the husband in the marriage certificate, Vardyn instead of Wardyn, the court declared that it could represent a restriction to the freedom of movement. Such a restriction could be justified by national identity concerns such as the protection of the Lithuanian language that has a constitutional status confirmed by a decision of the Lithuanian Constitutional Court as pointed out by the CJEU.[200]

This second case discussed in this part is important for the issue at hand because of two reasons. First, it has been made clear in this case that national identity can represent an independent justification ground for the derogation of a member state from freedom of movement. The national identity grounds for justification for the first time within the framework of Article 4(2) TEU, however, are not related to fundamental rights but rather to the constitutional status of

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[195] Constitutional Court of Austria from 27 November 2003, B 557/03; CJEU *Sayn-Wittgenstein* (n 188) para. 25.
[196] CJEU *Sayn-Wittgenstein* (n 188) para. 86
[197] For an opposing view see Besselink (n 189) 684-686.
[198] CJEU, Case-C 391/09 *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others*, Judgment 12 May 2011, ECLI:EU:C:2011:291. For more on this case, see Hanneke van Eijken, 'Case-C 391/09, Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others Judgment of the Court (Second Chamber) of 12 May 2011' (2012) 49 Common Law Market Review 809-826.
[199] CJEU *Runevič-Vardyn* (n 198) para. 51.
[200] CJEU *Runevič-Vardyn* (n 198) para. 27.

the Lithuanian language.[201] This might be a hint for a new development along the one that was presented in the previous section related to fundamental rights as a ground for derogation from fundamental freedoms in the pre-Lisbon period. Additionally, Article 4(2) TEU has been put in a correlation with Article 3(3) TEU which is an interesting aspect of this decision. This correlation shows that the question of the official language of the member state is not unequivocally part of the fundamental political and constitutional structures.[202]

Second, the Court in this context has left to the national court to decide whether the spelling rules cause a serious inconvenience for the applicants by assessing the proportionality between the free movement and right to private life under both Article 7 of the Charter and Article 8 of the ECHR on one hand, and national identity on the other.[203] This can be seen as a significant shift in regard to *Sayn-Wittgenstein* by providing the necessary leeway for national courts in deciding national identity issue.

Only two weeks after *Runevič-Vardyn,* the CJEU delivered its next decision related to the national identity clause. In *Commission v Luxembourg,*[204], the case was brought by the Commission under the failure to fulfil obligations procedure instead of the preliminary reference procedure which was the case in the previous two cases. The issue at stake was whether the nationality condition to access the profession of the civil-law notary conflicts with the freedom of establishment. The Luxembourg government unsuccessfully invoked the national identity argument, however, only in the alternative. It argued that since the use of the Luxembourgish language was necessary for the performance of notarial activities the nationality condition should be seen as a part of preserving of the national identity of Luxembourg.[205] The CJEU once again accepted that the respect for national identity can indeed represent a legitimate aim however it declared that the introduction of the nationality condition was not proportionate to the achievement of this legitimate aim.[206] In short, the CJEU did not enter into any application of the proportionality test and just decided on this issue.

Another case that refers to the national identity clause in the context of protection of national languages is the *Las* case.[207] In this case the Belgian authorities through the Decree on Use of Language enacted a duty for all undertakings established in the Dutch-speaking region to have all acts and documents required by law and all documents intended for their staff to be drawn up by employers in Dutch language. In this sense the preliminary reference from a Belgian court put the question whether such a rule infringed the freedom of movement for workers, Article 45 TFEU. Justifying such a rule the Belgian Government argued that it intended to protect and promote one of the official languages in Belgium. The CJEU accepted and once again repeated that the respect for national identities represents an independent legitimate aim or interest which could justify restrictions to the freedom of movement for workers. In doing

[201] CJEU *Runevič-Vardyn* (n 198) paras. 86-87.
[202] More on this within the debate of the interpretation of Article 4(2) TEU in light of the other treaty provisions see in previous section fn. 15 and the text accompanying it.
[203] *Runevič-Vardyn* (n 198) para. 91.
[204] CJEU Case C-51/08 *Commission v Luxembourg*, Judgment of 24 May 2011, ECLI:EU:C:2011:336.
[205] CJEU *Commission v Luxembourg* (n 204) para. 72.
[206] CJEU *Commission v Luxembourg* (n 204) para. 124.
[207] CJEU Case C-202/11 *Anton Las v PSA Antwerp NV,* ECLI:EU:C:2013:239.

so, it repeated the same argument from *Runevič-Vardyn* and it made the same correlation between Article 3(3) TEU and Article 22 of the Charter with Article 4(2) TEU in regard to the linguistic diversity and protection of the official language or languages.[208] Interestingly AG Jaaskinen was not totally on the same page with this line of reasoning as he tried to draw a sharper distinction between the linguistic diversity and the respect for national identity in his opinion, basing it on a rather selective legislative history and originalism.[209] The CJEU then entered into a vague proportionality test without leaving any leeway for the referring court explicitly declaring the Decree to be contrary to the Article 45 TFEU. This basically puts the very approach of the CJEU in this case in a stark contrast to *Runevič-Vardyn* in which case also the issue of the status of the official language as part of the constitutional identity was referred to.

The latest in the line of relevant cases involving the national identity is *Digibet*.[210] In this case at stake was the issue of national procedural autonomy in light of existence of different parallel regimes of regulation of betting and gaming in a federal state such as Germany. The relevance of Article 4(2) TEU is, again, of secondary importance compared to the rules of freedom to provide services as regulated in Article 56 TFEU and its exceptions. However, the CJEU clearly reasoned that division of competences in a federal state benefits from the protection envisaged in Article 4(2) TEU.[211] In this sense, according to the CJEU, it is up to the federal member state to decide on how it would regulate the specific sector in the context of fulfilment of its obligations in implementing relevant EU law.[212]

Looking at these five cases one could recognize certain tendencies, not draw firm conclusions though, that are followed by the Court even though there are only a limited number of cases on this matter after the enactment of Article 4(2) TEU not seriously involving the fundamental constitutional and political structures of the member states. The CJEU has shown that it is not as reluctant of invoking the national identity clause as it has previously been the case.[213] Nevertheless the CJEU fits the national identity clause, either as part of the already existing grounds or lately as an independent ground, into the foreseen derogations of EU law particularly in the realm of freedom of movement. Essentially, this means that the rule of strict interpretation of the grounds for derogations to fundamental freedoms continues to apply generally without any additional leverage being brought by relying on the national identity.[214]

Additionally, depending on the interest at stake, the CJEU has not been consistent in providing margins of discretion for the national courts in cases involving the freedom of movement. In the only case so far where it left it to the national court to conduct the proportionality test, in *Runevič-Vardyn,* at stake was essentially the balancing between the fundamental right to privacy and family life and the linguistic diversity and identity of the state. In contrast to this

[208] Compare *Las* (n 207) para. 26 and *Runevič-Vardyn* (n 198) para. 86.
[209] CJEU *Las* Opinion of AG Jaaskinen (n 15) para. 59. See more on this above in fn.15 and accompanying text.
[210] CJEU *Digibet* C-156/13, judgment of 12 June 2014 ECLI:EU:C:2014:1756.
[211] CJEU *Digibet* (n 210) para. 34. But see also FCC *OMT decision* (n 158) para. 140.
[212] 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' (2015) 16 German Law Journal 935.
[213] Kostadinides (n 5) 203.
[214] See for example *Sayn-Wittgenstein* (n 188) para 86.

case in *Las*, even though the Belgium government relied on the constitutional importance of the status of official languages as part of the constitutional identity, the outcome in this regard was different.[215] Once the economic activity came into play the CJEU was not that willing to provide such discretion to the national court but it adopted the outcome approach once again.[216]

Be that as it may, none of these developments are really anything new or revolutionary in the case-law of the CJEU. The comparison of the case-law from the pre- and post-Lisbon period does not show any serious sign that the CJEU has taken the national identity clause seriously.[217] The CJEU actually showed to be very successful in minimizing the effect of the national identity clause interpreting it as another independent derogation from EU law.[218] Regardless of the recognition of the national identity as an independent legitimate interest in derogation of EU law still in the cases dealing with the status of the official language of the member states they could have been interpreted as another public policy pursued by the respective governments similar to *Sayn-Wittgenstein*.[219] Understandably, this development generated an even greater disjunction[220] between the positions of the CJEU and the constitutional courts on the issue of constitutional/national identity which essentially provoked the latter to respond.

3.3 The relevance of constitutional identity in the case law of national constitutional court on EU matter II: The response

The overview of the CJEU case-law and approach to constitutional identity as part of Article 4(2) TEU shows that this court has not really embraced or adapted to the duties foreseen in this respective treaty provision. Therefore, the CJEU case-law on constitutional identity was very soon met with a sharp criticism from the most influential constitutional courts. The FCC took on the first more suitable occasion in order to send a serious warning signal to the CJEU. The decision on the Outright Monetary Transactions (OMT) of the Governing Council of the European Central Bank (ECB) of 6 September 2012 which empowers the ECB to an unlimited purchase of bonds of individual member states of the euro area on the secondary market was challenged *inter alia* to be an *ultra vires* act because it oversteps the exclusively monetary powers provided by the EU Treaties to the ECB. The FCC decided for the first time to send the issue to the CJEU through the preliminary reference procedure envisaged in Article 267 TFEU.

[215] Kostadinides (n 5) 205, 207 claiming that invoking Article 4(2) TEU is not sufficient and it still depends more on the uniqueness of the right in question and the potential collision impact between EU law and national law.
[216] Guastaferro (n 1) 299, 292 on the meaning of the outcome decisions and approach.
[217] For example, see CJEU *Commission v Luxembourg* (n 171) para. 35; and *Commission v Luxembourg* (n 204) para. 72. More on this comparison in Larsen (n 62) 299ff.
[218] Kostadinides (n 5) 195.
[219] The Austrian government itself invoked the public policy justification and related the issue to the constitutional identity. See CJEU *Sayn-Wittgenstein* (n 188) paras. 74 and 76.
[220] Guastaferro (n 1) 289: "There is a *striking difference* between the use of the clause by the national constitutional courts and by the CJEU, which deserves to be explored"(emphasis added); Kostadinides (n 5) argues that while the CJEU has used the national identity clause as a shield the FCC has used it as a sword; see also Claes (n 166) 134; and Monica Claes, 'Negotiating Constitutional Identity or Whose Identity is It Anyway?' in Monica Claes, Maartje de Visser, Patricia Popelier and Catherine Van de Heyning (eds) *Constitutional Conversations in Europe* (Intersentia 2012) 205, 207-208 and 229: "the CJEU and the constitutional courts do not seem to be talking the same language when they talk about the national constitutional identity."

Even though mainly analysed in light of the application of the *ultra vires* review and also because of its significance as the first ever preliminary reference to the CJEU by the FCC, it has also important features on the understanding of this court of the notions of constitutional identity and review in light of Article 4(2) TEU. While the *Lisbon* decision was foremost aimed at the political institutions, largely at the national level, in its OMT preliminary reference the FCC addressed the CJEU on this issue. Essentially the identity review has been used as a very intimidating backup option to the *ultra vires* claims.[221] In the part of the reference prior to the actual questions sent to the CJEU the FCC entered into an overview of the relevant legal provisions and jurisprudence which *inter alia* revealed its position on the respective CJEU case-law on constitutional identity and the respect thereof.[222]

While the FCC has initially claimed the correlation between the constitutional identity and the national identity clause in its OMT referral it has made the argument that they do not correspond. The FCC in the *Lisbon* decision has reasoned that "the guarantee of national constitutional identity under constitutional and under Union law *go hand in hand* in the European legal area."[223] Similarly, the Polish Constitutional Tribunal also related the constitutional identity, as it defines this notion, to Article 4(2) TEU stating that "[a]n equivalent concept of constitutional identity in the primary EU law is the concept of national identity."[224] While reiterating some of the main points in the *Lisbon* decision that the principles stated in the eternity clause, Article 79(3) GG, may not be balanced with other legal interests,[225] the FCC claims that this is something that has been done by the CJEU in its case-law continuously. Referring basically to the CJEU decisions analysed in the previous section it claimed that "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."[226]

Furthermore, in contrast to the *Lisbon* decision where there was no mentioning of any judicial dialogue in the context of constitutional identity, in the OMT referral the FCC mentions the relationship of cooperation in relation to the constitutional identity.[227] However, here its understanding of the national identity clause also appears to depart from the seemingly settled understanding of the judicial cooperation under Article 4(2) TEU in the theory. It seems like the FCC forgets that the national identity clause is an EU legal norm after all and it will be up to the CJEU and not the FCC to interpret it, regardless that this clause definitely draws back to the national constitutional courts.[228] Thus the claim made by the FCC that, after receiving the

[221] OMT reference (n 158) paras. 102 and 103, Franz C. Mayer, 'Rebels Without a Cause? A Critical Analysis of the German Constitutional Court's OMT Reference' German Law Journal (2014) 111, 131 and Kumm (n 61) 208.
[222] OMT reference (n 158) para. 29.
[223] FCC Lisbon (n 122) Headnote 5 and para. 240 (emphasis added). Daniel Thym, 'Attack or Retreat? Evolving Themes and Strategies of the Judicial Dialogue between the German Constitutional Court and the European Court of Justice' in Monica Claes, Maartje de Visser, Patricia Popelier and Catherine Van de Heyning (eds) *Constitutional Conversations in Europe* (Intersentia 2012) 247.
[224] PCT *Lisbon* (n 89), the PCT further states that "[t]he constitutional identity remains in a close relation with the concept of national identity, which also includes the tradition and culture."
[225] FCC Lisbon (n 122) para. 216 and OMT (n 158) para. 29.
[226] OMT (n 158) para. 29 (emphasis added).
[227] FCC OMT referral (n 158) para. 27.
[228] Kumm (n 61) 209-210.

interpretation of the OMT decision by the CJEU, it could directly apply the identity review on this decision or its implementing acts without referring another question for a preliminary ruling, specifically aimed at Article 4(2) TEU,[229] is a sign of inclination for a unilateral action in a compound legal setting.[230] Then again, this would not be totally in line with the principle of openness towards EU law.[231] It could be argued that the constitutional identity could serve as a limit to absolute primacy of EU law[232] as the FCC is correctly suggesting[233] also by invoking all the numerous cases from the highest courts of different member states on this issue pointing to a common or very similar approach towards constitutional identity taken by a large number of EU states.[234] Still, detaching the identity review completely from Article 4(2) TEU was a step too far.

Lastly, the substantive aspect of the constitutional identity and its use in justifying the position of the FCC in this case has been criticized as being on arguably shaky foundations. By introducing budgetary autonomy as part of the constitutional identity through the democracy principle it substantially overstretches the constitutional identity.[235] If it follows this extensive line of reasoning the FCC could fit into the constitutional identity issues and areas that no one would ever imagine as being part of this notion. On the other hand, the OMT can be perceived as a realization of what has been announced by the *Lisbon* decision in relation to the areas and decisions which are "[p]articularly sensitive for the ability of a constitutional state to democratically shape itself" which also include "fundamental fiscal decisions on public revenue and public expenditure."[236]

This latter point had been already addressed by the FCC in the decisions related to the euro crisis. Namely, the budgetary autonomy of the Bundestag took the central position as one of the main aspects of constitutional identity through the principle of democracy and right to vote of the German citizens.[237] Such a budgetary autonomy is not to be framed in absolute terms, but it rather means that the Bundestag should be able to freely express its will on fiscal matter affecting Germany thus remaining "the master of its decisions" (*Herr seiner Entschlüsse*).[238]

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[229] OMT (n 158) para. 130; Wendel (n 144) 285-286 and Mayer (n 221) 131-133. Nevertheless, the CJEU might not even address the issue of national identity at all in this case which makes this sort of interpretation of the FCC very rigid.
[230] Mayer (n 221) 133.
[231] FCC Lisbon (n 122) para. 240. This principle was established in this decision for the first time see Voßkuhle (n 103) 188.
[232] Mayer (n 221) 129-130; and Kumm (n 61) 209.
[233] OMT (n 158) para. 29.
[234] OMT (n 158) para. 30. Mayer criticizes the FCC unconvincingly on this point as being inconsistent because the only other court to have used the *ultra vires* review against an EU act so far is the Czech Constitutional Court. The FCC does not refer to these decisions concerning *ultra vires* but rather because of constitutional identity and the limits on the transfer of powers to the EU. At the very beginning of this paragraph the FCC clearly states: "[t]he above-mentioned principles concerning the protection of the constitutional identity and of the limits of the transfer of sovereign powers to the European Union can also be found, with modifications depending on the existence or non-existence of unamendable elements in the respective national constitutions, in the constitutional law of many other Member States of the European Union.". See Mayer (n 221) 133-134. This has been made clearer in FCC *EAW II* (n 161) 47; and FCC *OMT Decision* (n 158) 142.
[235] Mayer (n 221) 132; and Kumm (n 61) 210.
[236] FCC Lisbon (n 122) para. 252.
[237] FCC, *EFSF* (n 156) paras. 120-121, 127; and FCC *ESM* (n 157) paras. 103-110.
[238] FCC *EFSF* (n 156) para. 127, FCC *ESM* (n 157) paras. 109-114; and FCC *OMT Decision* (n 158) para. 214.

In this sense the budgetary autonomy has become the most developed aspect of the constitutional identity of Germany.[239] This stance of the FCC was later also confirmed in both the *OMT* decision[240] and the *Quantitative Easing* referral to the CJEU[241] by directly linking the budgetary autonomy to possible use of the identity review in case of considerable limitation of this sort of autonomy and responsibility of the Bundestag. However, these decisions are not relevant only because of this link.

The *OMT* decision, in particular, has to a certain extent remedied some of the weaknesses of the OMT referral which were addressed above. Namely, by referring to the *EAW II* order of the FCC from 15 December 2015 it put extensive efforts to reconcile the identity review with Article 4 (2) TEU, contrary to the referral and perhaps also responding to AG Cruz Villalon,[242] and frame the identity review as compatible with the principle of sincere cooperation from Article 4 (3) TEU. In this sense it reasons that:

> "Art. 4 sec. 2 sentence 1 TEU essentially provides for identity review and therefore it also conforms to the institutional situation of the European Union. The European Union is an association of sovereign states, of constitutions, administrations, and judiciaries (Staaten-, Verfassungs-, Verwaltungs- und Rechtsprechungsverbund)"[243]

As result, according to the FCC, under such an understanding of the identity review in light of the relevant treaty provision the principle of openness to European integration would not be compromised.[244] This claim is supported with the restraint with which the identity review needs to be applied. This restraint includes that identity review is reserved for the FCC and to be applied only after a preliminary reference to the CJEU, with due respect to the methods employed by the CJEU in its preliminary ruling and its interpretation.[245] This was confirmed in FCC's second preliminary reference to the CJEU on the issue of Quantitative Easing.[246]

A very similar restraint in framing the potential application of the identity review was also manifested by the ICC in its third preliminary reference to the CJEU.[247] First, ICC in its referral was seeking from the CJEU to reconsider and possibly adjust the interpretation provided in its *Taricco* decision due to the fact that the application of Article 325 TFEU, as interpreted in this

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[239] Claes and Reestman (n 212) 927.
[240] FCC *OMT Decision* (n 158) para. 138.
[241] FCC *QE* (n 159) para. 56.
[242] CJEU *Gauweiler* C-62/14, Opinion AG Cruz Villalon of 14 January 2015, ECLI:EU:C:2015:7, para. 59-61. "The first is that it seems to me an all but impossible task to preserve *this* Union, as we know it today, if it is to be made subject to an absolute reservation, ill-defined and virtually at the discretion of each of the Member States, which takes the form of a category described as 'constitutional identity'. That is particularly the case if that 'constitutional identity' is stated to be different from the 'national identity' referred to in Article 4(2) TEU.", para. 59.
[243] FCC *OMT decision* (n 158) para. 140 referring to FCC EAW II (n 161) para. 44.
[244] FCC *OMT decision* (n 158) para. 141.
[245] FCC *OMT decision* (n 158) para. 154-161.
[246] FCC *QE* (n 159) para. 55.
[247] ICC *Taricco* (n 77) para. 5, "It is certainly not for this Court to attribute to Article 325 TFEU a meaning different from that which it was found to have by the Court of Justice;". The identity review was not applied by the ICC in its decision upon CJEU's preliminary rulling. See ICC Taricco decision (n 80) and CJEU Case C-42/17, *M.A.S. and M.B.*, judgment of 5 December 2017 ECLI:EU:C:2017:936. Cf FCC OMT decision (n 158) para. 161.

decision, directly collides with the principle of legality which is part of the constitutional identity of Italy.[248] In this manner, the ICC demonstrated its devotion to the values of judicial dialogue. Second, through coupling of the identity review with Article 4(2) TEU and arguing for its compatibility with the principle of loyal cooperation in Article 4(3) TEU, the ICC tried to argue that a limited level of diversity between the legal systems of the member states cannot jeopardize the unity of EU law as long as it is confined to the fundamental principles of the constitutions.[249]

This overview of the relevant case law ushers us in the actual contextualization of the national identity clause and its relation to constitutional pluralism and the role of constitutional courts. The question then arises: how does the development in the respective case-law conform to the ideas behind constitutional pluralism and why is the national identity clause claimed to be the gateway to constitutional pluralism? The next section addresses the implications of the national identity clause at both the national and EU level and, more particularly, for the future role of national constitutional courts in light of this theory.

4 National identity clause, constitutional pluralism and the role of constitutional courts

Looking at the case-law of the respective courts we can see that the national identity clause has created a stir in the relationship between the legal orders which is reflected extensively in the academic debate. There are several views on the way in which the national identity clause has impacted or perhaps could impact the balance in the relationship between the EU and national legal orders. On the one hand, we have authors which have argued that Article 4(2) TEU has created the ultimate limits of absolute primacy of EU law from within.[250] On the other hand, we have authors which are denying this impact on absolute primacy as being far-fetched arguing that this clause will essentially provide the obligation for a substantial judicial dialogue over the issue of constitutional identity.[251] It seems that this contrasting is being slightly exaggerated[252] as the two approaches are not mutually exclusive and therefore this clause essentially brings in large parts of both. Particularly because of these reasons it is often argued that the national identity clause is perhaps the clearest manifestation of constitutional pluralism in EU law.[253] It touches upon the two main tenets of constitutional pluralism. First, by creating a strong legal ground for a non-hierarchical, that is heterarchial, relationship between the legal orders by narrowing the scope of absolute primacy of EU law. Second, the national identity clause through its two aspects and components tends to emphasize the need for judicial

[248] ICC *Taricco* (n 77) para. 6.
[249] ICC *Taricco* (n 77) para. 6.
[250] See for example Von Bogdandy and Schill (n 30); and Besselink (n 10).
[251] Monica Claes, 'Negotiating Constitutional Identity or Whose Identity is It Anyway?' in Monica Claes, Maartje de Visser, Patricia Popelier and Catherine Van de Heyning (eds) *Constitutional Conversations in Europe* (Intersentia 2012) 205, 207-208; Claes (n 166) 111-112; and Giuseppe Martinico, What Lies Behind Article 4(2) TEU? in Alejandro Saiz Arnaiz and Carina Alcoberro Livina (eds) *National Constitutional Identity and European Integration* (Intersentia 2013).
[252] Such an exaggeration could be noticed in Claes (n 166); Claes (n 220); and Guastaferro (n 1).
[253] Toniatti (n 96) 67-68.

cooperation and dialogue among the national constitutional courts and the CJEU. Both of these tenets of constitutional pluralism are revealed in light of the empowerment of constitutional courts through this clause as they are the most suitable interlocutors to the CJEU on this matter.[254]

4.1 Invitation to struggle or invitation to debate?

What seems to be the inevitable consequence of Article 4(2) TEU is the bringing together and streamlining of the relationship between two opposing poles.[255] The overview of the national and EU case-law depicts and reveals two positions of the respective courts. Even though there might have been certain expectations from the new identity clause to solve this conundrum, still the constitutional courts and the CJEU are not on the same page when it comes to the role of constitutional identity.[256]

The constitutional courts, obviously, tend to see Article 4 (2) TEU as the final stage of the recognition and result of the dialectic between constitutional courts and the CJEU starting from *Solange I*.[257] They conceive constitutional identity as the Europeanization of the counter-limits doctrine through its incorporation in Article 4(2) TEU.[258] Phrases such as the 'material core', 'constitutional identity', and 'fundamental principles' are a common feature of the reasoning of national constitutional courts in determining the limits of the application of EU law,[259] that now also found their clearer articulation in EU law through Article 4(2) TEU. One can argue, judging by the attitude of constitutional courts and their interpretation of national identity clause, pre and post-Lisbon, that they see this clause as the 'weak spot' of primacy of EU law.[260] Perhaps a clear signal was sent by the FCC in the *Lisbon* decision by reserving to it, within the national legal order, the duty to define and protect the constitutional identity therefore to have the last word on it and, through this, avoid the possibility of being circumvented in this regard by lower courts through preliminary references to the CJEU.[261]

Be that as it may, one should not rush with getting the impression of constitutional courts being rigidly bound to the national perspective strongly protecting national constitutional supremacy. Several interesting tendencies have been exposed through the case-law on constitutional identity which could be conceived as a form of judicial restraint and concessions in favour of EU law. First, constitutional courts introduced a duality of constitutional norms in light of EU

[254] Cloots (n 18) 149-151; Claes (n 220) 229-330; and Claes (n 166) 134.
[255] Mattias Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty' (2005) *European Law Journal* 262, 266ff he terms these two poles as National Constitutional Supremacy and European Constitutional Supremacy.
[256] Claes (n 166) 134; and Claes (n 220) 229.
[257] Martinico (n 251) 95; and Kostadinides (n 5) referring to this use of constitutional identity as a sword.
[258] Von Bogdandny and Schill (n 30) 1418.
[259] Von Bogdandny and Schill (n 30) 1435; and Tatham (n 85) 299.
[260] Chalmers, Davies and Monti (n 4) 201.
[261] FCC Lisbon (n 122) para. 241, 299, 331 and 333; and Ziller (n 126) 71.

law thus creating 'safeguard clauses'[262] against unwarranted encroachment of EU law.[263] Thus only the core values and principles of the national constitutional orders could serve as limits to the exercise of European Union authority and not every single constitutional provision.[264] These safeguard clauses are intended to safeguard the national legal order from EU law or further pooling of competences on the EU level which would negatively affect the values and principles innate to the constitutional identity. Second, in defining these safeguard clauses constitutional courts however tend to counterbalance by putting emphasis on the constitutional obligations towards European integration present in their constitutions which could be seen as mirroring the fidelity principle or principle of loyal cooperation as regulated under Article 4(3) TEU.[265] The FCC seems to be the most obvious example here with the principle of openness to European law along with its accepted duty to address the CJEU when there is a claim of encroachment of constitutional identity by EU law.[266] Lastly, constitutional courts have continuously claimed that using this type of ultimate limits to EU authority would occur only under very exceptional circumstances.[267]

On the other hand, we have the CJEU case-law which shows that this court has not really seriously embraced the constitutional identity into its doctrine. It might be argued that the cases so far were not of that rank, that is, they were involving trivial questions[268] mainly related to the cultural aspects of constitutional identity not really touching upon the fundamental political and constitutional structures.[269] Therefore it could be argued that the cases so far have not provided the CJEU with an adequate opportunity to develop its stance on the national identity clause. That could be the reason why the CJEU has still not taken constitutional identity seriously even though one has to be realistic with the expectations. Yet, it is unrealistic to expect that the CJEU will authorise under EU law that constitutional identity could serve as a direct ground for immediate unilateral non-compliance with EU law. This would require the abandonment of a long line of case-law of the CJEU on the primacy of EU law and the uniform and effective application of EU law. It is essentially the same line of argument that from a national perspective is even more fitting for the justification of the position of constitutional courts on national constitutional supremacy. Thus an outright abandonment of the absolute principle is not really viable but a narrowing of its scope seems to be inevitable in order to avoid or, better said, mitigate conflicts.[270]

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[262] Marta Cartabia, 'Constitutional Courts between Constitutional Law and European Law', input paper on the XVI Congress of the Conference of European Constitutional Courts, Vienna 12-14 May 2014, 1-2, available at https://www.cortecostituzionale.it/documenti/relazioni_internazionali/relazioneCartabia.pdf last visited 06.10.2018.
[263] Tatham (n 85) 299.
[264] Tatham (n 85) 299; Von Bogdandy and Schill (n 30) 1430-1431; and Besselink (n 10) 47-48.
[265] Von Bogdandy and Schill (n 30) 1451-1452.
[266] Wendel (n 144) 264; and Thym (n 223) 247.
[267] ICC *Fragd* (n 76) 657, "highly unlikely"; FCC, Lisbon, (n 122), para. 340, "exceptionally"; FCC, *EAW II* (n 161) paras. 43, 45, "in exceptional cases and narrowly defined conditions"; FCC, OMT decision (n 158) para. 141, "by way of exception and under strict circumstances"; and CCC *Lisbon I* (n 90) 84, 110 and 139, "exceptional cases".
[268] Thym (n 223) 247 fn. 66.
[269] Claes (n 220) 229. This was the reason why Article 4(2) TEU was related to Article 3(3) TEU.
[270] Tatham (n 85) 298 – 299, but cf to Guastaferro (n 1) 309-311.

The CJEU has interpreted the national identity clause either through its incorporation into the already existing grounds for derogation from EU law or, as it was lately the case, as an independent ground or legitimate interest for derogation. In this manner the national identity is being balanced with other provisions and EU freedoms in the same manner as the other legitimate aims, that is, restrictively.[271] In other words the CJEU has not really adapted its legal reasoning to the newly enacted national identity clause and has not provided any margin of appreciation or discretion to the member states which would manifest a form of deference to national interests.[272] Taking in account the common position of constitutional courts on this issue accompanied by the strong wording they use necessitates the narrowing of the absolute primacy when the constitutional identity is being encroached by EU law.[273] Along this line the CJEU should depart from the point of AG Bot who put this rather straightforward in his opinion in the *Melloni* case[274] by arguing that "[a] Member State which considers that a provision of secondary law adversely affects its national identity may therefore challenge it on the basis of Article 4(2) TEU."[275] This needs to be conducted through mutual engagement of both national courts and the CJEU in determining the exact scope of Article 4(2) TEU necessarily involving the national constitutional courts. Accordingly, this relation between the highest court instances of the two legal orders stemming out of Article 4(2) TEU and touching upon the scope of primacy of EU law needs to be put in the framework of a genuine "relationship of cooperation."[276] Under such cooperation the constitutional courts should play the role of "a constructive corrective force"[277] in the European Union.

In light of the above, how is one to locate the meeting-point of the national courts and CJEU in the context of Article 4(2) TEU that would require the departure from the initial rigid stance on supremacy of these courts?

4.2 Terms of mutual judicial engagement under the national identity clause

The terms of engagement under the existing constitutional pluralist setting in the relationship between the legal orders make judicial dialogue in light of the national identity clause indispensable.[278] This clause incorporates two aspects in its understanding and application. The first one is the content and scope of constitutional identity that needs to be determined by the respective national courts, above all constitutional courts, because it is a matter of national

[271] *Omega* (n 141) para.30; and CJEU *Sayn Wittgenstein* (n 188) para. 86; see also Chalmers, Davies and Monti (n 102) 235-236.
[272] Guastaferro (n 1) 282, 291 and Matthias Klatt, *Die Praktische Konkordanz von Kompetenzen* (Mohr Siebeck 2014) 389. For more on the margin of appreciation in the EU context see in Gerards Janneke, 'Pluralism, Deference and the Margin of Appreciation Doctrine' (2011) *European Law Journal* 80.
[273] Von Bogdandy and Schill (n 30); cf Guastaferro (n 1) 309-311.
[274] CJEU, Case C-399/11, *Stefano Melloni,* Judgment of 26 February 2013, ECLI:EU:C:2013:107. Interesting to note that there is no mention of constitutional identity.
[275] CJEU, Case C-399/11, *Stefano Melloni,* Opinion of AG Bot of 2 October 2012, ECLI:EU:C:2012:600 para. 139.
[276] FCC *OMT reference* (n 158) para, 27. However, not totally in the manner which is understood by the FCC, see next section; Besselink, (n 10) 45, borrowing the wording of the FCC from the *Maastricht* decision, (n 11). See more on this point in Paul Kirchhof, 'The Balance of Powers Between National and European Institutions' (1999) 5 European Law Journal 225, 230, 233.
[277] Kumm (n 255) 292.
[278] Claes (n 220) 230.

law. The second is the normative relevance of this provision in regard to the limits that it sets on the application of EU law and exercise of EU competences which must be determined by the CJEU.[279] Following such an understanding of this clause the two aspects also reflect the division of labour that is foreseen with Article 4(2) TEU between the national constitutional courts and the CJEU along these lines.

National constitutions do not explicitly refer to constitutional identity, as it was seen previously, but it is rather the creation of constitutional courts' interpretation largely in light of the newly coined national identity clause.[280] Therefore it is evident that the content of this clause clearly refers back to national law, or better said, to the interpretation of the constitutional courts. Since the introduction of the new wording of the national identity clause this provision received its legal meaning, besides the political meaning that existed before, and it also gained its justiciability after the entry into force of the Lisbon Treaty. Therefore, while the political institutions in the member states certainly have a large role to play in determining the political meaning of the constitutional identity in EU law, constitutional courts have a crucial role to play when it comes to the content of the respective constitutional identity in its legal meaning.[281] In the words of AG Maduro:

> "Doubtless the national authorities, in particular the constitutional courts, should be given the responsibility to define the nature of the specific national features that could justify such a difference in treatment. Those authorities are best placed to define the constitutional identity of the Member States which the European Union has undertaken to respect"[282]

Even though the above answers the question of who is best placed in the national setting to determine the content of constitutional identity, obviously placing a leading role for constitutional courts, it does not answer where the meeting-point with the CJEU is. The significance of the national identity clause in this sense is in the idea that the best way of invoking the constitutional identity argument for a possible derogation from EU law is by sending a direct preliminary reference to the CJEU explaining how and why EU law encroaches upon constitutional identity. This would represent the initiation of a dialogue on this issue. The importance of initiating such a dialogue is even greater if one bears in mind that none of the constitutional courts have so far provided an exhaustive list of values, principles or competences which are part of the constitutional identity leaving it to be determined in a case-by-case manner. Nevertheless such a determination should not lead to a so-called interpretative anarchy under which constitutional courts would stop at the point of providing content to constitutional identity expecting absolute deference of the CJEU.[283] On the contrary, the constitutional courts in determining the scope of the constitutional identity should be led by

[279] Wendel (n 89) 134-135; von Bogdandy and Schill (n 30) 1448.
[280] See more on this in Constance Grawe, 'Methods of Identification of National Constitutional Identity' in Alejandro Saiz Arnaiz and Carina Alcoberro Livina (eds) *National Constitutional Identity and European Integration* (Intersentia 2013) 37; Toniatti (n 96); and Marti (n 31).
[281] Claes (n 166) 135-136, see also CCC *Lisbon II* (n 91) para 113.
[282] CJEU *Marrosu* Opinion of AG Maduro (n 62) para 40. See more on this in Larsen (n 62) 284.
[283] Martinico (n 251) 97.

Maduro's contrapunctual principles, i.e. in a manner which will accept pluralism and strive for consistency, coherence and universalisability as far as their institutional role allows them to do so.[284] This requires the courts to enter an exercise of translating the issue from a national perspective into a European one.[285] Nevertheless arguments related to this notion could be brought up also under other procedures before the CJEU not initiated by the constitutional courts or even other national courts which does not substantially diminish the role of constitutional identity in such proceedings.

Regardless of the manner in which the issue of constitutional identity is being raised, the normative relevance of the constitutional identity argument in light of Article 4(2) TEU needs to be determined by the CJEU. Article 19 TEU does not provide jurisdiction for the CJEU to determine the content of a specific national identity, which as seen refers back to national law, but a total exclusion of any type of jurisdiction over issues related to the national identity clause would be implausible.[286] After all it is a Treaty provision that is concerned which tends to be forgotten by the constitutional courts. In exercising its powers the CJEU has to confirm that the respective structures of national identity in the end do not infringe the values of the Union set forth in Article 2 TEU or cause significant obstruction to the achievement of the underlying principles of the European integration.[287] In this sense an invocation of constitutional identity of the member states might not be seen as infringing the European constitutional identity.[288] Accordingly in realizing this task the CJEU needs to take into account the definition of constitutional identity[289] provided by the constitutional courts which on the other hand also requires them to be more involved in this dialogue.[290] Even in instances where there is no direct involvement of the constitutional courts or referral to their case-law in supporting the constitutional identity claims the CJEU should use its competence under Article 24 of the

[284] See more on contrapunctual principles in chapter 3 section3.2.
[285] Claes (n 220) 232; and Franz C. Mayer, 'The European Constitution and the Courts: Adjudicating European Constitutional Law in a Multilevel System' (2003) Jean Monnet Working Paper 9/30, 67.
[286] Besselink (n 10) 45; and von Bogdandy and Schill, (n 2) 707.
[287] Von Bogdandny and Schill (n 30) 1448. For instance, the way the HCC has invoked the constitutional (self-) identity comes really close to abuse of this notion and might be argued that it runs against some of the values and principles of EU law. See above fn. 109.
[288] Daniel Sarmiento, 'The EU's Constitutional Core' in Alejandro Saiz Arnaiz and Carina Alcoberro Livina (eds) *National Constitutional Identity and European Integration* (Intersentia 2013) 17, he basically argues for the European constitutional identity as counterbalance to the national constitutional identity. On the core "constitutional" principles and values of the EU. See CJEU, Case C-402/05 and C-415/05, *P. Kadi and Al Barakaat International Fundation v. Council and Commission,* Judgment of 3 September 2008, ECLI:EU:C:2008:461. On this case see for example Grain De Burca, 'The European Court of Justice and the International Legal Order After *Kadi*' (2010) 51 *Harvard International Law Journal* 1, 44; Juliane Kokott and Christoph Sobotta, 'The *Kadi* Case – Constitutional Core Values and International Law – Finding the Balance?' (2012) 23 *European Journal of International Law* 1015; and Nikolaos Lavranos, 'Revisiting Article 307 EC. The Untouchable Core of Fundamental European Constitutional Law Values and Principles' in Filippo Fontanelli, Giuseppe Martinico and Paolo Carrozza (eds) *Shaping rule of law through Dialogue: International and Supranational Experience* (Europa Law Publishing, Groningen 2010) 119.
[289] Avoiding a situation that might seem like they are entering a forbidden zone of defining constitutional identity similar to what AG Bot has done in his Opinion in the *Melloni* case.
[290] Claes (n 220) 230, she distinguishes between fundamental rights and constitutional identity review; and Mayer (n 221) 130-131, on the difference between the identity review and *ultra vires*.

Statute of the Court[291] in obtaining the necessary information of the issue thus try to compensate for the lack of reverse preliminary reference to the constitutional courts.[292]

In this sense the CJEU needs to show a certain level of deference towards the fundamental national constitutional commitments framing them under a banner of margin of appreciation or discretion that needs to be left to the member states.[293] In other words, Article 4(2) TEU introduces an instrument which is supposed to break with the inertia of the former constitutional blindness at the EU level.[294] Therefore the actual balancing or the application of the proportionality test should be left to the national courts instead of using it to neutralize the national identity clause from any substantial meaning.[295]

Be that as it may, the CJEU will have to decide which path to choose under the circumstances present in a specific case. It could either go with a more flexible approach embracing a limited level of constitutional diversity which might affect the effective and uniform application of EU law[296] and limit the exercise of EU competences or stay on its firm stance of rigidly abiding to these principles not willing to balance them with other legitimate interests of member states. If the CJEU does not provide very strong justifications and arguments for not providing any leeway to member states on an issue of fundamental constitutional relevance, thus encroaching on its constitutional identity, then this latter path might lead to a constitutional conflict. The national constitutional court not convinced with the argumentation provided by the CJEU might decide to opt for the national constitution instead of EU law which would be in line with its institutional role. Even though such an act would represent a breach of EU law it would be in accordance with the national legal order and thus legitimate.

4.3 The national identity clause and Kumm's principle of best fit

The occurrence of such conflicts, however, should not always be seen as something catastrophic. As matter of fact many scholars who are proponents of the concept of constitutional pluralism take this as an acceptable risk or consequence of the heterarchical relationship, though under exceptional and limited circumstances.[297] Among different views on constitutional pluralism in the European Union, Mattias Kumm has directly included considerations of the national identity clause, even under the Constitutional Treaty, and its

[291] Article 24 of Protocol No3 on the Statute of the Court of Justice of the European Union
(1) The Court of Justice may require the parties to produce all documents and to supply all information which the Court considers desirable. Formal note shall be taken of any refusal. (2) The Court may also require the Member States and institutions, bodies, offices and agencies not being parties to the case to supply all information which the Court considers necessary for the proceedings.
[292] Von Bogadandy and Schill (n 30) 1449. In this way avoiding situations such as in Slovak pensions case, CCC *Holubec* (n 95).
[293] Guastaferro (n 1) 295ff.
[294] Claes (n 166) 114.
[295] Konstadinides (n 5) 195; and Claes (n 220) 229.
[296] Effective and uniform application of EU is not an absolute principle and it has been often balanced with other principles, interests and values also of the member states which could be clearly seen through numerous exceptions, opt-outs or protocols excluding certain member states from the respect of this principle. See chapter 4.
[297] Von Bogdadny and Schill (n 30) 1449.

impact on the relationship between national law and the EU law, especially in the context of primacy, in developing his vision of constitutional pluralism.[298] Within the framework of the Constitutionalism Beyond State (CBS) and its principle of best fit as a normative jurisprudential account of constitutional conflicts, developed by Kumm, it is claimed that the national identity clause authorises member states to set aside EU law on constitutional identity grounds and that it is something that under certain limited conditions[299] should be accepted by the CJEU. These limited conditions involve a prior balancing of four principles, first, the formal principle of legality which favours the effective and uniform application of EU law and the other three principles to which it should be balanced, the substantive principle of effective protection of fundamental rights of citizens, jurisdictional principle of subsidiarity and procedural principle of democratic legitimacy.[300] Following this last principle which draws to the still existent democratic deficit on the EU level Kumm argues that:

> "When EU law conflicts with clear and specific national constitutional norms that reflect a national commitment to a constitutional essential, concerns related to democratic legitimacy override considerations relating to the uniform and effective enforcement of EU law."[301]

In arguing his position Kumm further explains certain conditions for both national constitutional courts and the CJEU in making this type of constitutional conflicts a moment of constructive deliberative engagement[302] and transform the role of constitutional courts in a one of "a constructive corrective force"[303] in the EU. Thus constitutional courts using this clear and specific test need to be restrictive in their interpretation in a sense that:

> "it can not be sufficient that the national constitutional court makes the interpretative determination that an unclear, vague or evaluatively open constitutional clause (relating to, for example, property or the freedom to pursue a profession or safeguarding 'sovereignty') has implications that are not compatible with EU law."[304]

Therefore the underlying principle of best fit,[305] as opposed to the ultimate legal rule premise, is aimed to lead national courts to rely on both national and EU law.[306] Thus in a case of conflict claims should not be made as to which legal order will have primacy but it should be an act of balancing between competing principles in a way that will best suit the common values

[298] For more on this see Kumm (n 255), Mattias Kumm and Victor Ferreres Comella, 'The Primacy Clause of the Constitutional Treaty and the Future of Constitutional Conflict in the European Union' (2005) International Journal of Constitutional Law 473; and Klemen Jaklic, *Constitutional Pluralism in the EU* (OUP 2014) 126 -155.
[299] Kumm (n 255) 302-304.
[300] See more on this Chapter 3.
[301] Kumm (n 255) 298.
[302] Kumm (n 255) 269.
[303] Kumm (n 255) 292.
[304] Kumm (n 255) 298.
[305] Kumm (n 255) 286 "The task of national courts is to construct an adequate relationship between the national and the European legal order on the basis of the best interpretation of the principles underlying them both. The right conflict rule or set of conflict rules for a national judge to adopt is the one that is best calculated to produce the best solution to realize the ideal underlying legal practice in the European Union and its Member States." See more on this in chapter 3.
[306] Kumm (n 255) 282–288.

underlying both legal orders and practices. Article 4(2) TEU is supposed to be invoked by the constitutional courts in relation to their constitutional identity by arguing that a certain act or norm of EU law is unlawful as a matter of both national and EU law.[307] The above mentioned exercise of translation from a national to European perspective is precisely what is meant here. Setting aside of EU law by the constitutional courts under such circumstances should be accepted by the CJEU as the ultimate consequence of Article 4(2) TEU and should only come after a necessary reference to the CJEU by the constitutional courts as discussed previously.[308]

Therefore, different from some authors[309], the "trump card" is still on the table or up the sleeve of constitutional courts in very exceptional situations in which the judicial dialogue does not mitigate the friction. It is arguably the ultimate option for constitutional courts that makes the dialogue viable.[310] By having this option, constitutional courts would more readily enter a judicial dialogue with this sort of leverage[311] and "no longer fear that a preliminary ruling request might raise the expectation of passive obedience to another court."[312] Preliminary reference should not be perceived as "part of a hierarchically structured system of judicial review" but rather as a part of the "idea of a functional allocation of judicial responsibilities in a multi-levelled setting."[313] Additionally the added value of such an interpretation of the national identity clause would be to "secure the commitment of all constitutional actors to play a vigorous role in preserving coherence and polyphony within the member states as independent units of the EU legal order."[314] On the other hand, though, the very possibility of using Article 4(2) TEU as a sword or a trump card serves as a reminder for EU institutions of their duty to respect national identity.[315] Like this the CJEU would take the preliminary references coming from constitutional courts or from ordinary courts signalling constitutional identity issues at stake more seriously thus preventing or mitigating a potential constitutional conflict. Under these circumstances, not only will a Pandora's Box[316] of constitutional conflicts remain locked, but also through the engagement of national constitutional courts a relation of complementarity between the courts in achieving a common constitutional tradition in Europe and furthering European integration will be fostered. Chaos neither came about nor is it on the verge of happening but on the contrary a constructive relationship could be forged and strengthened.[317] Such a dialogue could be very instrumental and lead to a certain level of convergence of constitutional identities and thus building a common constitutional identity.[318]

[307] Claes (n 220) 232.
[308] Kumm (n 255) 303.
[309] Claes (n 166) 111.
[310] Von Bogdadny and Schill (n 30) 1449, 1452.
[311] Claes (n 220) 232.
[312] Cartabia (n 213) 3.
[313] Wendel (n 144) 264.
[314] Kostadinides (n 5) 218.
[315] Kostadinides (n 5) 218.
[316] Wendel (n 89) 135.
[317] Kumm, (n 255) 291-292, see the part on the Cassandra and the Pangloss scenarios, and Tatham (n 85) 303.
[318] Aida Torres Perez, Conflicts of Rights in the European Union: A Theory of Supranational Adjudication (OUP 2009) 112-113.

4.4 Is the OMT referral a pattern for future judicial dialogue?

In order to make the above abstract discussion more tangible and to illustrate the role of constitutional courts under the national identity clause the FCC's *OMT* preliminary reference could serve as an illustration.[319] The *OMT* reference is one of the most noticeable developments and a good starting point when it comes to the analysis of constitutional identity in light of constitutional pluralism. However, it must be emphasized that constitutional identity is of a secondary concern in this case, though not an insignificant one. With these qualifications taken into account it remains rather questionable to which extent this decision could serve as a pattern or template for other constitutional courts especially bearing in mind the manner in which the national identity clause was treated. Namely there are five interrelated points which will be briefly discussed: first, the actual value of FCC's first preliminary reference; second, the attempt for universalisability of the whole issue of constitutional identity and on coalition building among constitutional courts; third, cutting the link between the constitutional identity and the national identity clause; fourth, the narrow understanding of the relationship of cooperation in the context of Article 4(2) TEU and; fifth, the extensive approach taken in defining the constitutional identity.

The first two could be termed as rather positive developments while the other three speak against the approach taken in the OMT on constitutional identity which should be redefined in a possible preliminary reference by the FCC or any other constitutional court in future.

First, the OMT represents the first ever preliminary reference by the FCC to the CJEU and at the same time the first reference which involves constitutional identity. From this perspective it could be argued that this decision is a step forward in finally establishing a direct dialogue, besides other forms of dialogue,[320] between the most influential constitutional court in the EU and the CJEU. In any case, it should not be doubted that this move by the FCC will further encourage other constitutional courts to reach for the same instrument and enter into a direct dialogue with their counterpart on the EU level. This definitely represents a positive development in these inter-court relations which could be also seen as resulting from the empowerment of constitutional courts brought by the national identity clause. Namely, initiating this dialogue the FCC openly criticized the CJEU's approach towards constitutional identity and tried to provide arguments why it could make recourse to identity review of the OMT in the future which should be taken into consideration by the CJEU. In this sense the FCC in this referral argued for the possible invocation of the constitutional identity review as an alternative option, in case the CJEU does not reason in its decision along the lines drawn by the FCC, thus invoking it as a weapon of last resort.[321] This positive development served as the a direct basis for the second preliminary reference on Quantitative Easing[322] which seems to

[319] Therefore, some aspects presented in section 3.4 are being assumed and followed up in the context of the national identity clause.
[320] Tatham (n 85) 282; Claes (n 166) 134; Guiseppe Martinico, 'Judging in the Multilevel Legal Order: Exploring the Techniques of 'Hidden Dialogue'' (2010) King's Law Journal 257; and Daniel Sarmiento, The Silent Lamb and the Deaf Wolves in Matej Avbelj and Jan Komarek, *Constitutional Pluralism in the European Union and Beyond* (Hart 2012) 285.
[321] Chalmers, Davies and Monti (n 102) 235.
[322] FCC *QE* (n 159).

remedy, at least, some of the weaknesses of the first preliminary reference in a sense that it relates identity review much more to EU law and is compatible with the constitutional principle of openness towards EU law. Additionally, this further encourages other constitutional courts to engage more seriously with EU law and into a direct dialogue with the CJEU drawing its attention to national constitutional aspects thus encouraging a process of convergence.

Second, in arguing its views on the protection of constitutional identity and limits on the transfer of sovereign powers to the EU the FCC relies on more than a dozen decisions from several member states' constitutional and supreme courts. In this way it supports the drawing of a red line based also on constitutional identity essentially trying to build a coalition of national constitutional courts over a common position towards the limits of EU authority. Therefore it aims at stabilizing the role of identity review as the new basis for challenging EU law.[323] Such reasoning strives for the universalisability[324] of the doctrine of identity review and the underlying notion of constitutional identity being the ultimate limit to the applicability of EU law.[325] This move of the FCC was not immune to strong criticism especially from Claes, who essentially claims that this represents a false claim to a common ground among constitutional courts thus blurring of a reality by the FCC in its try to strengthen its position before the CJEU.[326] However, as observed in the overview of the relevant case law of national constitutional courts there is definitely a convergence of positions of these courts on the issue of limits of EU law supremacy also through constitutional identity and this claim is strengthened by the latest development in this case law. As a matter of fact, the path paved by the FCC is now followed by several other constitutional courts, even though the HCC seems to deviate from it besides its efforts to present the opposite.

Third, although some effort is invested in it this attempt for universalisability is not met with an adequate 'translation' of this national perspective on an EU level. The FCC, in its OMT referral tried to detach the identity review from the national identity clause and its understanding of constitutional identity from the national identity foreseen in Article 4(2) TEU. Departing from its *Lisbon* decision and the "hand in hand" approach the FCC[327] is not really following the restraint demanded by the principle of openness towards European law and its responsibility towards the European integration project[328] pursuing its own separate path of identity review approaching a stance of an absolute national constitutional supremacy. If such an unqualified unilateral action is also followed by the other national constitutional courts it would seriously jeopardize the effective and uniform application of EU law and the legal stability and certainty in the Union. However, this was quickly overturned by FCC's

[323] Kostadinides (n 5) 217.
[324] More on this contrapunctual principle see chapter 3 section 3.2.
[325] FCC OMT (n 158) para. 29.
[326] Monica Claes, 'The Validity and Primacy of EU Law and the 'Cooperative Relationship' between National Constitutional Courts and the Court of Justice of the European Union' (2016) 26 Maastricht Journal of European and Comparative Law 157-163; and Claes and Reestman (n 212) 941ff.
[327] Arnaiz and Livina (n 97) 14, on Maduro's defensive constitutional pluralism and; Chalmers, Davies and Monti (n 102) 235, arguing that the Lisbon decision "is not a bold restatement of national constitutional sovereignty."
[328] FCC Lisbon (n 122) para. 340.

subsequent decisions, particularly the *EAW II* and the *OMT* decision, restraining the identity review and coupling it with Article 4 (2) TEU.[329]

Fourth, the path chosen by the FCC draws on a 'specific' understanding of the relationship of cooperation. While acknowledging the distinction between the content and normative relevance in the context of the Article 4(2) TEU it seems to reiterate[330] its role of having the last word on the limits of application of EU law based on constitutional identity. In doing this, however, the FCC is not mentioning that this would be done only in exceptional situations or by balancing it to other constitutional principles such as the friendliness towards EU law.[331] This could be also inferred by the sequence of steps and proceedings that are supposed to form the relationship of cooperation between the two courts according to the FCC. In this cooperation the FCC initiates the exchange by sending preliminary reference questions, the CJEU provides interpretation of the challenged EU act and then FCC decides whether this act encroaches on the constitutional identity. Consequently, the role of the CJEU in this relationship of cooperation is reduced solely to providing interpretation of the EU legal act in question, but not providing interpretation of Article 4(2) TEU or whether reliance on constitutional identity would represent a breach above all of Article 2 TEU.

Furthermore, even though the FCC recognizes its general obligation to send a preliminary reference to the CJEU before actually applying the identity review on an EU legal act, though without referring to the *Data Retention* decision where it adopted such a duty,[332] it did so in a very restrictive manner when it came to the actual case at hand. It denied the need of making any subsequent referral to the CJEU when it comes to any act implementing the *OMT* decision even though it was not at all clear if the CJEU will go into the constitutional identity in its reasoning.[333] As a matter of fact, the CJEU made no reference in its preliminary ruling so the question is raised whether the FCC would still not send another preliminary reference in case it activated its threat of applying constitutional identity which was a subsidiary option anyway. It could be argued that such a rigid stance of the FCC has some logic behind it in a sense that the CJEU is being informed and its attention drawn to the issues raised from the perspective of constitutional identity and thus it should be interpreted that the CJEU is not willing to engage with this matter and therefore there is no reason for sending another preliminary reference. However, this does not change the fact that the protection of constitutional identity was not the main issue but rather the claims of ultra vires act of the ECB. In this manner, in a case in which the identity review is directly to be applied a preliminary reference should be sent to the CJEU. ICC's preliminary reference illustrates this point well taking into consideration that the CJEU's *Taricco* decision, which is being disputed, was delivered as ruling to a preliminary reference sent by an Italian ordinary court and it did not deal with the issue of constitutional identity.[334]

[329] FCC *OMT decision* (n 158) para. 140 referring to FCC *EAW II* (n 161) para. 44.
[330] FCC Lisbon (n 122) para 299, 331 and 332.
[331] See for example FCC Lisbon (n 122) Lisbon para. 340; FCC *EAW II* (n 161) paras. 43, 45; FCC *OMT decision* (n 158) para. 141,
[332] Wendel (n 144) 264; and Thym (n 223) 247.
[333] FCC OMT (n 158) para. 102-103; Wendel (n 144) 285-286 and Mayer (n 221) 131-133.
[334] CJEU, *Taricco* (n 76).

Fifth, the content given to the constitutional identity evidently goes beyond Kumm's clear and specific constitutional rule test which leads the FCC away from being a constructive corrective force. The democratic principle is so broad that it could be overstretched to include many aspects of the particularly sensitive areas stated in the *Lisbon* decision which were already criticized to have been drawn arbitrarily.[335] Even if it could be argued that ECB's OMT decision is *ultra vires* and it cannot be taken to be part of the monetary mandate of the ECB it is hardly imaginable that a decision such as the one on OMT could be able to encroach on the constitutional identity in such a manner that would legitimize the move of setting it aside. Hence the FCC should adopt a narrower definition of constitutional identity which would as result lead to higher level of authority and legitimacy of its claims also for other courts in the EU.

Looking at this preliminary reference in light of constitutional pluralism one has to ask: Was this an *en garde* or a *touché* aimed at the CJEU? In the same way as the *Lisbon* decision was analysed also the OMT needs to be put in a broader context of FCC case-law in order not to exaggerate the effects of this case. As stated before the OMT referral in light of the constitutional identity issue needs to be interpreted as a warning signal which points out the dissatisfaction of the FCC on the use and interpretation of Article 4(2) TEU in the CJEU's case-law. As a matter of fact, it was accurately argued by Möllers in his case note on *Honeywell* where he commented on the possibility of the FCC sending a preliminary reference to the CJEU.

> "The preliminary ruling procedure may in this context be interpreted as a warning signal. When we send one of our cases to you we are ready to fight, therefore, you should better take care of the problem yourself."[336]

Nevertheless, this does not deny the fact that detaching identity review from the national identity clause, extensive interpretation of the constitutional identity as well as narrowing of the content of the relationship of cooperation are not the most suitable forms of forging a dialogue. Even though this reference is very important because of the initiation of a circular process of dialogue,[337] nevertheless future preliminary references from constitutional courts should adjust the presented weakness in order to have a more constructive use of the national identity clause. As a matter of fact, this seems to be already taking place judging by the recent preliminary references from the FCC and ICC. The latter reference seems as a rather constructive even though the ICC demonstrates a rather clear stance on the fundamental constitutional principles at stake. Thus, it remains to be seen how the CJEU will respond as the issue of constitutional identity as a potential limit to EU law's absolute primacy is directly raised and it will have to deal with it.[338]

[335] Halberstam and Möllers (n 119) 1249-1251. For more see the section 3.1.2.
[336] Möllers (n 150) 166; and Grimm (n 121) 241.
[337] Jaklic (n 298) 176.
[338] Paris (n 80) 17-20; and Fabbrini and Pollicino (n 73) 11-15.

5 Conclusion

Contrary to some early expectations that the national identity clause has the potential to solve the conundrum of the relationship between the legal orders in Europe, this has not come to be true. So far it has neither been the meeting point nor the actual battleground of the national constitutional law and the EU law. Nevertheless, this chapter has demonstrated that even though the national identity clause has not met these expectations it still has brought a new feature in this relationship impacting the balance between the courts in Europe. This clause has served as bases for the empowerment of constitutional courts adding a new role for them as guardians of constitutional identity in Europe, a role never foreseen or regulated in the respective national constitutions. This empowerment and shift of balance in favour of constitutional courts could be perceived through two main points. First, by setting limits to the doctrine of absolute primacy of EU law, the exercise of EU competences as well as the future transfer of competences to the EU through the respect of constitutional identity guarded by constitutional courts. Second, adding leverage to constitutional courts' position in a future direct judicial dialogue with the CJEU and providing an incentive for these courts to enter such a dialogue more readily.

Such a conclusion has been reached through three lines of argumentation. The textual and systemic analysis of the clause was the first. It showed that the actual clarification of the previous version of the national identity clause has not been a minor undertaking with a lack of significance. Judging by the wording used to explain the national identity of the member states and the legislative history documents, along with the placement of this provision in the Constitutional Treaty, and later in the Lisbon Treaty, it could be argued that it hints that this clarification has a potential for a broader impact with its newly gained legal meaning.

Nevertheless, this latter point could be better grasped only by looking into the second line of argumentation, being the case-law of the constitutional courts and the CJEU. The first line in the sand was drawn by the constitutional courts as they related the national identity clause to the constitutional identity and interpreted it as the ultimate limit of EU law authority. Here it was the *Lisbon* decision of the FCC which clearly set the stage for such a conclusion also by the introduction of the new instrument of identity review. The CJEU did not seem to be bothered too much leaving the impression that the national identity clause is not taken seriously. However, the response from the constitutional courts came rather soon. Particularly the most recent preliminary reference from the FCC and ICC sent a clear warning signal expressing the dissatisfaction with the treatment of the constitutional identity at the EU realm. ICC's preliminary reference on the *Taricco* decision could potentially represent a 'game changer' in a sense that a judicial dialogue over the constitutional identity was initiated and that the whole story over the relevance of this notion might develop more intensely. In this way the sequence of decisions showed that the national identity clause definitely created a new avenue in the relationship between the courts shifting the balance towards the constitutional courts.

The third line of argumentation proves what the previous two have not been able to do completely. As a matter of fact, put in the context of constitutional pluralism, the national identity clause incorporates two very important tenets of this theory which in a most direct way point to the empowerment of the constitutional courts. On the one hand, the constitutional courts' claim for limits of absolute primacy of EU law has essentially been seen as entrenching the heterarchy existing between the two legal orders, national and EU. Particularly Kumm's CBS makes the argument clear that constitutional courts have a legitimate claim under certain limited circumstances and conditions to legitimately set aside EU law if it contradicts the constitutional identity. On the other hand, constitutional courts have strengthened their position through the national identity clause in the ongoing process of establishing the direct judicial dialogue between them and the CJEU. This development should lead to their more active participation in the creation of the common legal space in Europe as long as constitutional courts act as a genuine constructive corrective force, unlike the HCC's most recent invocation of constitutional identity.

Accordingly, what is even more important for constitutional pluralism is that through the normative component of this theory, the path has been illuminated, especially through the example of OMT referral, for constitutional courts to represent a genuine constructive corrective force in Europe and something that will positively serve the process of European integration.

Chapter 6

Constitutional Courts and the Distribution and Exercise of Competences in the European Union

1 Introduction

The issue of distribution and exercise of competences in multilevel settings has always been a contentious issue. The resolution of such contentions requires arbitration by a neutral arbiter which is perceived to be impartial and legitimate and that is not always an easy task to achieve. Therefore, the search for an appropriate vertical balance of powers among the different levels of government and the proper structural mechanisms to oversee and preserve the balance has been subject of many theoretical debates. Constitutional courts have a very important place in these debates. Namely, constitutional review has been closely related with federalism and the safeguard of vertical separation of powers.[1] There are even authors which have argued that actually federalism has led to the introduction of judicial and constitutional review.[2] In the case of Belgium for instance, such a relationship between federalism and constitutional review has been quite obvious.[3] This has been the case because constitutional courts have often been perceived as neutral arbiters confined by law to legal arguments receiving their legitimacy directly from the constitutions that necessarily include a large bulk of provisions dealing with the distribution of powers and competences which constitutional courts are supposed to protect. Therefore, this federal mandate of constitutional courts, i.e. adjudication of vertical competence disputes, has found a prominent role among constitutional courts' powers, especially in federal states but also in states that are declared as regional.[4]

The European Union as a multilevel structure[5] is faced with the same challenge of dealing with a similar competence conundrum. The division of competences between the EU and the

[1] Lars Vinx, *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (CUP 2016) 72; Maartje de Visser, *Constitutional Review in Europe: A Comparative Analysis* (Hart 2014) 55-57, 155-163.

[2] Daniel J. Elazar, *Exploring Federalism* (University of Alabama Press 1987) 183; Martin Shapiro, 'The Success of Judicial Review' in Sally J. Kenny, William M. Reisinger and John C. Reitz (eds), *Constitutional Dialogues in Comparative Perspective* (Palgrave Macmillan 1999) 194-196; Martin Shapiro, 'The Success of Judicial Review and Democracy' in Martin Shapiro and Alec Stone Sweet (eds), *On Law, Politics and Judicialization* (OUP 2002) 149-151; Vinx (n 1) 72; Tom Ginsburg, 'The Spread of Constitutional Review' in Keith E. Whittington, Daniel R. Kelemen and Gregory A. Caldeira (eds) *The Oxford Handbook of Law and Politics* (OUP 2008) 85; but cf. Tom Ginsburg and Mila Versteeg, 'Why Do Countries Adopt Constitutional Review?' (2014) 30 Journal of Law, Economics and Organization 587.

[3] de Visser (n 1) 56-57.

[4] de Visser (n 1) 156-163; and Monica Claes and Maartje de Visser, 'The Court of Justice as a Federal Constitutional Court: A Comparative Perspective' in Elke Cloots, Geert De Baere and Stefan Sottiaux (eds) *Federalism in the European Union* (OUP 2012) 86-96.

[5] Werner Vandenbrwaene, 'The Judicial Enforcement of Subsidiarity: The Quest for an Appropriate Standard. Comparative Insights on Judicial Methodology' in Patricia Popelier, Armen Mazmanyan and Werner Vandenbrwaene (eds) *The Role of Constitutional Courts in Multilevel Governance* (Intersentia 2012) 133. Here Vandenbrwaene uses the term multilevel government and argues that this is a system in which "public power is

member states has not been smooth and without problems. Principles such as conferral of powers, subsidiarity and proportionality have found a prominent place in the treaties and debates over the division and exercise of competences in the EU. However, shortcomings have been continuously present. Even though political safeguards have been advanced especially with the latest treaty reforms, still the judicial safeguards have not been properly tackled. As a matter of fact, the CJEU has come to be known as the motor of integration mainly because of the extensive interpretation of fundamental freedoms and overstretching of EU competences through which it furthered integration. This development has led to a perception of the CJEU as a 'constitutional court' of the EU which is required to have the last say on these matters drawing certain parallels with federal states in the EU and abroad.[6] Such a conception, which is also based on certain treaty provision such as Article 19 TEU, as well as the respective case law of the CJEU has been very often subject to serious criticism.

Bearing this in mind, several dilemmas arise. How can the CJEU be solely responsible for solving the competence riddle and have the last say on competence disputes in the EU under the existing heterarchical relationship between the legal orders and institutions? How could one assume that the EU could represent a clear-cut federal structure without an unambiguous supremacy of EU law? Isn't there an inherent need of placing external checks on the CJEU under circumstances of existing constitutional pluralism in the EU? Who could serve this purpose of externally controlling the respect for the basic principles of conferral of powers, subsidiarity and proportionality?

These and similar dilemmas have been creating headaches in the EU for decades. In providing answers to them this chapter argues that constitutional courts are the most suitable institutions to take over the role of judicial checks on the CJEU when it comes to distribution of competences and their exercise in the EU. Such a role of constitutional courts should be limited to exceptional situations and with due consideration for the principle of loyal cooperation as well as the unity of the EU legal order which is not to be overemphasized though. This type of external check is totally in line with constitutional pluralism both descriptively as well as normatively and only modalities of this type of review should be adapted to optimally suit the interests of both the EU and member states. Through this sort of control and review constitutional courts have gained a new power which has not been foreseen in the respective national constitutional provisions but has stemmed directly from the process of European integration and the adaptation of constitutional courts to the new reality. Even national constitutional courts of unitary states enter into the review and control of the vertical distribution and exercise of competences in the EU.

In making the case and arguing for this new role of constitutional courts one needs to clarify certain notions in order to place the issues within a proper framework because misconceptions have led to a debate in which scholars sometimes seem to talk past each other. In the second section the notion of federalism in the EU context will be discussed and how the use of this

exercised at different levels, with each layer retaining a degree of autonomous decision-making power vis-à-vis the other(s)." [references omitted]

[6] On this sort of analogies see for instance Koen Lenaerts, 'Federalism: Essential Concepts in Evolution – The Case of the European Union' (1997) 21 Fordham International Law Journal 746.

notion under the same meaning and in a same manner as in the case of states leads to certain misplaced implications and allusions which are ignoring the reality of neo-federalism and constitutional pluralism in the EU. In the third section the main principles of distribution and exercise of competences in the EU contained in Article 5 TEU will be discussed. This section will reveal that strengthening the political safeguards for the respect of subsidiarity have also had certain positive effects on the judicial safeguards but, nevertheless, the main weaknesses are still not resolved and therefore there is the necessity for the existence of external check on the CJEU in this regard. The fourth section will discuss why and how constitutional courts are the most suitable national institutions to conduct the external control on the CJEU, through the *ultra vires* review of EU acts, in relation to the distribution and exercise of EU competences which are conferred to it by the member states. If the main weakness is located in the approach and practice of the CJEU then it is quite logical that there is a need for an external judicial check through an exercise of a so-called external federal mandate. In this section, the evolution of this type of review will be analyzed through its elements, scope and comparative overview as seen through the case law of the constitutional courts in the EU. The fifth section, puts the *ultra vires* review in the framework of constitutional pluralism in order to discuss in which manner the external federal mandate of constitutional courts can be used to fend off excessive centralization without unreasonably jeopardizing the effectiveness and unity of EU law. Therefore, the *ultra vires* review needs to be reconceived and its substantive and procedural elements readjusted in order for the external federal mandate to be perceived as a constructive external check in the process of further integration. The conclusion will summarize the main arguments.

2 The federalism discourse and the relationship between the legal orders in the EU

2.1 The development of the federalism discourse in the EU

Since the very beginning of European integration, the whole project has been continuously related to federalism. Whether it was Winston Churchill[7] at the initiation or Joschka Fisher announcing the idea of creating an EU Constitution as an essential feature of a future federation,[8] proponents of 'United States of Europe' and of the EU as a federal super-state of some sort have projected their visions of future political goals of European integration through their federalism discourse.[9] As a matter of fact 'federalists' have implied the so-called *finalite* of the integration process through this form of discourse. As a result, even though federalism could be associated with different tendencies when it comes to the relationships between the

[7] Winston Churchill, speech delivered at the University of Zurich, 19 September 1946, available at: https://rm.coe.int/16806981f3 last visited 15.10.2018.

[8] Joschka Fischer, From Confederacy to Federation – Thoughts on the finality of European Integration, Humboldt University in Berlin, 12 May 2000, available at: http://ec.europa.eu/dorie/fileDownload.do?docId=192161&cardId=192161 last visited 15.10.2018.

[9] On the multitude of these discourses which often have different motives behind them see Stefan Oeter, 'Federalism and Democracy' in Armin von Bogdandy and Jürgen Bast (eds) *Principles of European Constitutional Law* Second Revised Edition (Hart 2008) 55ff; see also Mark Gilbert, 'European Federalism: Past Resilience and Present Problems' in Sergio Fabbrini (ed) *Democracy and Federalism in the European Union and the United States: Exploring Post-National Governance* (Routledge 2005) 27ff.

central authority and component entities, an integrative and centralist overtone has always been clearly associated with the federalism in the EU.[10] This is the main reason, bearing in mind the European tradition of federalism,[11] why there is a huge reluctance among the member states for using the "F" word and why the term federalism has not found its place in any of the founding documents of the EU, that is, the EU Treaties.[12] Such federalism discourses in the EU context have challenged two main pillars of the European tradition. These pillars are related to that only a state could be a federation and that the sovereignty is indivisible and thus there can be no dual sovereignty in the EU as it rests solely with the member states and it cannot be divided.[13] Therefore one could observe that there is continuously a lack of so-called federal intent and clear will among the member states to become federalized in the EU which intent and will are usually expressed in a constitution.[14]

Be that as it may, the projection of political goals through a specific form of discourse or reflection on the overly broad debate on whether the EU is a federation or not has been almost an obsession of political scientists, especially in drawing parallels with the U.S. federalism, since the enactment of the Maastricht Treaty.[15] However, this does not mean that contextualizing the EU in federalist terms does not have any legal implications which are rather important for the debate over the relationship between the legal orders and their respective institutions. Such an argument resonates even more loudly if one bears in mind that federalism and its development in most cases carry a judicial mark.[16] Focusing only on this legal aspect of the debate over EU and federalism it is argued that this debate has had a certain effect on

[10] For more on the different meaning of federalism such as integrative and devolutionary see Lenaerts (n 6) 749; and on centralizing and decentralizing tendencies of federalism see Elazar (n 2) 198-223.
[11] For more on this tradition see Robert Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (OUP 2009) 30-38.
[12] Mary L. Volcansek, 'Judicially Crafted Federalism: EU and USA' (2005) EUSA Ninth Biennial International Conference 4, available at: http://aei.pitt.edu/3019/2/Judicially_Crafted_Federalism-1.doc last visited 15.10.2018, she claims that this is also the case for the US Constitution though and therefore this cannot represent a decisive argument. On the reference to federalism in practice see Andreas Auer, 'The Constitutional Scheme of Federalism' (2005) 12 Journal of European Public Policy 419, 423.
[13] Schütze (n 11) 30-38.
[14] Soren Dosenrode, 'Federalism' in Soren Dosenrode(ed) Approaching the European Federation? (Ashgate 2007) 21, Thomas von Danwitz, Vertikale Kompetenzkontrolle in föderalen Systemen: Rechtsvergleichende und rechtsdogmatische Überlegungen zur vertikalen Abgrenzung von Legislativkompetenzen in der Europäischen Union (2006) 131 Archiv des öffentlichen Rechts 510, 558ff; and Daniel J. Elazar, 'The United States and the European Union: Models for Their Epochs' in Kalypso Nicolaidis and Robert Howse (eds) *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (OUP 2001) 52.
[15] For instance see George A. Bermann, 'European Community Law from a U.S. Perspective' (1995) 4 Tulane Journal of International and Comparative Law 1, 5; Leslie Friedman Goldstein, *Constituting Federal Sovereignty: The European Union in Comparative Context* (The Johns Hopkins University Press 2001); Elke Cloots, Geert De Baere and Stefan Sottiaux (eds) *Federalism in the European Union* (OUP 2012); Andrew Glencross and Alexandre H. Trechsel (eds) *EU Federalism and Constitutionalism: the Legacy of Altiero Spinelli* (Lexington Books 2010); Anand Menon and Martin A. Schain (eds), *Comparative Federalism*: *The European Union and the United States in Comparative Perspective* (OUP 2006); Kalypso Nicolaidis and Robert Howse (eds) *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (OUP 2001); Florentina Harbo, *Towards a European Federation?: the EU in the Light of Comparative Federalism* (Nomos 2005) and etc.
[16] Volcansek (n 12) 1; and Hans-Peter Schneider, Jutta Kramer and Beniamino Caravita di Toritto (eds) *Judge made Federalism? The Role of Courts in Federal Systems* (Nomos 2009).

the role of constitutional courts of placing external check on the distribution and exercise of competences in the EU.

2.2 The EU as a federal and heterarchical structure – introducing neo-federalism

There are numerous definitions which are being used as a starting point in discussing whether the EU represents a federal structure or not. For instance, Volcansek borrows a rather broad and neutral definition from Daniel J. Elazar who defines federalism as:

> "the mode of political organization that unites separate polities within an overarching political system by distributing power among general and constituent governments in a manner designed to protect the existence and authority of both."[17]

Another definition is the one used by Claes and de Visser in which it is stated that federalism represents:

> "a vertical divided powers system based on a constitutional document which lies beyond the reach of any of the levels acting alone under the procedure for the adoption of ordinary legislation."[18]

These and similar definitions have outlined several elements and features of federalism through which it is usually assumed that the EU is a federation. Those are related to the existence of a central authority with an established set of institutions;[19] which institutions are entrusted with certain competences through a document of a constitutional character that enacts the division of powers between the central authority and the component entities;[20] this document creates rules for safeguarding the autonomy of both the central authority and component entities[21] and these rules are politically safeguarded as well as, usually, judicially enforceable in situations where the political process proves to be unsuccessful.[22] Even though these features are present in the EU still there are some elements which are heavily disputed.

All these definitions and conceptions share common flaws. They all end up in the 'blueprint trap'[23] which is the result of misapplication of notions and terms initially related and developed for the nation state without any further adjustments or clarifications to an EU context and thus make inaccurate analogies between a nation state and the EU, even though the EU is not a

[17] Volcansek (n 12) 4. It is interesting to note that Elazar himself clearly claimed that the EU is a confederation, see Elazar (n 14) 38ff. However, despite this some authors such as Weiler used his work to argue for the EU as a federation, for instance see Joseph H. H. Weiler, 'Federalism without Constitutionalism: Europe's Sonderweg in Kalypso Nicolaidis and Robert Howse (eds) *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (OUP 2001) 54ff.
[18] Claes and de Visser (n 4) 86 [emphases added].
[19] Schütze (n 11) 52-56, he labels this as the institutional dimension of the federation and Lenaerts (n 6) 752ff.
[20] Schütze (n 11) 56, he calls this division a functional dimension of the federation; Auer (n 12) 423-426; Elazar (n 2) 157ff, 166.
[21] Lenaerts (n 6) 752, 781, 795, he puts emphasis on this balance between the autonomy and the central authority; Auer (n 12) 421-422; and Elazar (n 2) 64ff.
[22] Claes and de Visser (n 4) 85; Lenaerts (n 6) 796-797; and Auer (n 12) 426.
[23] Franz C. Mayer and Mattias Wendel, 'Multilevel Constitutionalism and Constitutional Pluralism' in Matej Avbelj and Jan Komarek (eds) *Constitutional Pluralism in the European Union and Beyond* (Hart 2012) 132.

state.[24] According to the European tradition of federalism there is a nationalist perspective which ties federation to a state and argues only for the constitutional nature of the federation, thus denying the possible international foundational element.[25] Based on this sort of conception, one is faced with an oversimplified binary choice of the EU being categorized as either a federal state or an international organization which at best is confederal.[26] Not being able to define the EU as a federal state under the present circumstances or in the conceivable future one is left with the only choice of defining the EU as a mere international organization based on the initial character of its foundational documents, its treaties. However, this is a mistaken conclusion as the emancipation of the EU and its legal order from international law has been accomplished decades ago with the crucial difference being that EU legal norms are being directly applied in the member states through its doctrine of direct effect.[27] Thus, regardless of the fact that the EU was initially established through an international treaty, now the EU primary law is part of a new autonomous legal order.[28] Such a view is very much supported by the foundational dimension of the American tradition of federalism which proves that a federation could have a mixed or compound nature of incorporating both elements of an international and national character.[29] This is one of the main reasons why this American tradition has been taken as bases for arguing the EU federalism. However, this approach has its own limits as well due to the specificities of both the U.S. federalism and the EU. Therefore, currently the EU could at most be labeled as a pre-federal *Staatenverbund* structure.[30] This is exactly what the FCC has, from the onset, declared in its case-law starting from the *Maastricht* decision terming the EU a *Staatenverbund* as an association of sovereign national states which

[24] Federico Fabbrini, 'The European Multilevel System for the Protection of Fundamental Rights: A 'Neo-Federalist' Perspective' (2010) Jean Monnet Working Paper 15/10 27-28; Ulrich Everling, 'The European Union as a Federal Association of States and Citizens' in Armin von Bogdandy and Jürgen Bast (eds) *Principles of European Constitutional Law* (2nd Revised Edition Hart 2008) 731ff; on the general lack of epistemology of federalism see Francois-Xavier Millet, 'The Respect for National Constitutional Identity in the European Legal Space: An Approach to Federalism as Constitutionalism' in Loic Azoulai (ed) *The Question of Competence in the European Union* (OUP 2014) 267; and Guillaume Tusseau, 'Theoretical Deflation: The EU Order of Competences and Power-conferring Norms Theory' in Loic Azoulai (ed) *The Question of Competence in the European Union* (OUP 2014) 39-40, calling these as the defect of 'federalism talk.

[25] Schütze (n 11) 30-38. On treaty federalism see Sergio Fabbrini, 'Is the EU Exceptional? The EU and the US in Comparative Perspective' in Sergio Fabbrini (ed) *Democracy and Federalism in the European Union and the United States: Exploring Post-National Governance* (Routledge 2005) 9.

[26] Fabbrini (n 25) 9, "The EU process of federalization asks for a reconsideration of the various federal species to verify whether their traditional distinctions resist the test of empirical analysis. This test concerns primarily the historical distinction between *federation* and *confederation*." See also, Pavlos Elefthieriadis, 'Federalism and Jurisdiction' in Elke Cloots, Geert De Baere and Stefan Sottiaux (eds) *Federalism in the European Union* (OUP 2012) 46-47; Schütze (n 11) 58-69; and Everling (n 24) 731.

[27] Martin Shapiro, 'The US Supreme Court and the European Court of Justice Compared' in Anand Menon and Martin A. Schain (eds), *Comparative Federalism*: *The European Union and the United States in Comparative Perspective* (OUP 2006) 210; and Fabbrini (n 25) 9-10. Also on this see chapter 3.

[28] ECJ, Case 6/64 *Costa v ENEL* in Andrew Oppenheimer, *The Relationship Between EC Law and National Law: The Cases* (CUP 1994) 66-67. See also Joseph H. H. Weiler and Ulrich R. Haltern, 'Constitutional or International? The Foundations of the Community Legal Order and the Question of Judicial *Kompetenz-Kompetenz*' in Anne-Marie Slaughter, Alec Stone Sweet and Joseph H. H. Weiler (eds) *The European Court and National Courts – Doctrine and Jurisprudence: Legal Change in Its Social Context* (Hart 1998) 340-341.

[29] Schütze (n 11) 69-73; and Claes and de Visser (n 4) 84-85.

[30] von Danwitz (n 14) 558 -560. But cf. Herbert Bethge, in Theodor Maunz, Bruno Schmidt-Bleibtreu, Franz Klein, Herbert Bethge et al., *Bundesverfassungsgerichtsgesetz: Kommentar Band 1* (54th edition C.H. Beck 2018) 137-138.

does not represent a federal European state[31] and where the member states preserve their core sovereignty.[32] While this stance of the FCC essentially reflects the postulates of the European federal tradition and the doctrine of the nation state still it does not reflect the reality in which this state sovereignty has essentially been limited with the membership in the European Union.[33] As result this notion of *Staatenverbund* has been the base for some other counter-notions such as *Verfassungsverbund* or multilevel constitutionalism which found its place in the case-law of the FCC just recently.[34]

Another common flaw has to do with an assumption which is related to the hierarchical relationship[35] between the different levels of the federation and their legal orders that is present in all definitions of federalism and could also be recognized in the above two definitions through the phrases of '*overarching political system'* and '*constitutional document'*.[36] Such an assumption, which is the result of the coupling of federalism with a state-centered view, inherently belongs to the so-called federal principles or requisites of federalism according to constitutional lawyers.[37] As a matter of fact this is clearly argued by Claes and de Visser claiming that "[t]he supremacy of the federal constitution is essential in a full-fledged federal

[31] FCC, *Maastricht Treaty* (Brunner) 2 BvR 2134 and 2159/92, judgement of 12 October 1993, paras. 90, 112; FCC, Case *2 BvE 2/08 Lisbon*, judgment of 30 June 2009, para. 229; FCC, 2 BvR 2735/14, order of 15 December 2015, para. 44; FCC, *OMT* 2 BVR 2728/13, judgement of 21 June 2016, para 140. Different form these decisions the FCC in *Honeywell* noted that "highly federalised, cooperative organizational structure of the European Union, which is analogous to a state in many areas both as to the scope of its competences and in the organizational structure and procedure, but does not have a character of a federal state." FCC, *Honeywell* 2 BvR 2661/06, order of 6 July 2010, para. 65.

[32] On this see also Paul Kirchhof, 'The Balance of Powers Between National and European Institutions' 5 European Law Journal (1999) 225, 230; and in the context of the *Lisbon Treaty* decision Mayer and Wendel (n 23) 143.

[33] Everling (n 24) 732.

[34] FCC, 2 BvR 2735/14, order of 15 December 2015, para. 44; FCC, *OMT* decision 2 BVR 2728/13, judgment of 21 June 2016, para 140. On this see also Everling (n 24) 732; and Mayer and Wendel (n 23) 132, 143.

[35] Elazar (n 2) 200-201: "The study of federal systems not to speak of the understanding of federalism itself has suffered because political scientists [same applies for lawyer] have generally accepted the center-periphery and hierarchical models as normative and have tried to force federal systems into their mold, not only their terminology (for example, when they speak of "levels" of government in the federal systems as in others an obvious contradiction in terms) but, far more important, by obscuring accurate analysis."

[36] Hans Kelsen was rather critical over this type of hierarchy calling it a 'paradox of the theory of the federal state', see in (Vinx n 1) 72-75. But see also Millet (n 24) 268, where he argues that "both the word and the idea behind it [integration or integrative federalism] emphasize the establishment of a hierarchically organized unity made up of an upper and a lower level" [references omitted]

[37] Kalypso Nicolaidis, 'Constitutionalizing the Federal Vision?' in Anand Menon and Martin A. Schain (eds), *Comparative Federalism*: *The European Union and the United States in Comparative Perspective* (OUP 2006) 60-61; Auer (n 12) 421-423; Elazar (n 2) 157-168; Amie Kreppel, 'Understanding the European Parliament from a Federalist Perspective: The Legislature of the United States and European Union Compared' in Anand Menon and Martin A. Schain (eds) *Comparative Federalism*: *The European Union and the United States in Comparative Perspective* (OUP 2006) 262; Adam Sheingate, 'Agricultural Biotechnology: Representative Federalism and Regulatory Capacity in the United States and European Union' Anand Menon and Martin A. Schain (eds), *Comparative Federalism*: *The European Union and the United States in Comparative Perspective* (OUP 2006) 314; Olivier Beaud, 'The Allocation of Competences in a Federation – A General Introduction' in Loic Azoulai (ed) *The Question of Competence in the European Union* (OUP 2014) 24; Mauro Cappelletti, Judicial Process in Comparative Perspective (OUP 1989) 312-313; Koen Lenaerts, 'Constitutionalism and Many Faces of Federalism' (1990) 38 The American Journal of Comparative Law 205, 263: "Federalism is present whenever a divided sovereign is guaranteed by a national or supranational constitution and umpired by the supreme court of the common legal order."

system"[38] and even more elaborately by Weiler pushing for the federalist analogy arguing that in the EU:

> "there is the grand principle of supremacy every bit as egregious as that which is found in the American federal constitution itself…. [put] differently, the constitutional discipline which Europe demands from its constitutional actors – the Union itself, the Member States and State organs, European citizens, and others – is in most respects indistinguishable from that which you would find in advanced federal states."[39]

Such statements and conclusions have been extensively used to confirm and entrench the supremacy of EU law and support the constitutional narrative in the EU.[40] In this sense the federalism argument has been instrumental in denying the existing reality of seriously disputed absolute supremacy of EU law by the constitutional and supreme courts of several member states. Even if it is argued that the EU has a constitution in a functional sense this does not change anything as its supremacy is contested.

Furthermore, the hierarchy assumption has been also applied in securing the ultimate say of the central authority, which is the EU, in judicially enforcing EU law through the CJEU, and in this manner promoting judicial supremacy.[41] Accordingly, it is argued that federalism requires a single legal and jurisdictional framework, instead of plural, which could guarantee the basic values of constitutionalism such as the rule of law and legitimacy.[42] Therefore Eleftheriadis argues that 'if there is no central constitutional law and no central scheme of jurisdiction, there is no federation.'[43]

However, in the same manner as for EU law the ultimate authority of the CJEU has also been questioned by the highest judicial instances of the member states.[44] Additionally, the CJEU cannot really represent an absolute central judicial authority in classic federalist terms especially if one bears in mind that it does not have a jurisdiction or power to conduct direct review of national law by interpreting or invalidating it in light of their (in)compatibility with

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[38] Claes and de Visser (n 4) 85. But see also Auer (n 12) 426; Heidrun Abromeit, 'Constitution and Legitimacy' in Soren Dosenrode (ed) *Approaching the European Federation?* (Ashgate 2007) 40; Dosenrode (n 14) 22; and Gilbert (n 9) 29.

[39] Weiler (n 17) 56.

[40] Lenaerts (n 6) 776, 778; and Matej Avbelj, 'The Pitfalls of (Comparative) Constitutionalism for European Integration' (2008) Eric Stein Working Paper No. 1/2008 6-7.

[41] Jan Komarek, 'Institutional Dimension of Constitutional Pluralism' in Matej Avbelj and Jan Komarek (eds) Constitutional Pluralism in the European Union and Beyond (Hart 2012) 234; Lenaerts (n 6) 796-797; Kreppel (n 37) 262; and Avbelj (n 40) 11. This is sort of hierarchy very much resembles to the relationship existing between constitutional courts in Germany, federal and Lander. However, Sauer himself denies this analogy claiming that "[z]war hat das Bundesverfassungsgericht mit der dargestellten Entscheidung der Hierarchisierung Vorschub geleistet, aber die Verfassungsgerichtsbarkeiten stehen eben nicht so unverbunden und ohne jede klare Hierarchie nebeneinander wie die Gerichte in überstaatlichen Mehrebenensystemen." For more see Heiko Sauer, *Jurisdiktionskonflikte in Mehrebenensystemen: Die Entwicklung eines Modells zur Lösung von Konflikten zwischn Gerichten unterschiedlicher Ebenen in vernetzten Rechtsordnungen* (Springer 2008) 152-153.

[42] Eleftheriadis (n 26) 53-59.

[43] Eleftheriadis (n 26) 53.

[44] Daniel Halberstam, 'Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States' in Jeffrey L. Dunoff and Joel P. Trachtman (eds) *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP 2009) 335; and Avbelj (n 40) 11-12.

EU law. Therefore, this 'indication of the presence of federalism'[45], argued by Lenaerts, is denied under circumstances of existing heterarchy in the relationship between legal orders in the EU today. Without a legitimacy and acceptance by the national courts, the CJEU is not able to tune up the federal legal framework, as Elazar puts it.[46] The EU, conceived under such classic federalist terms, is totally incompatible in this sense[47] with constitutional pluralism which is both descriptively and normatively superior to any other existing conception or theory. The only way of mitigating these counter-arguments to the hierarchy assumption is to note that this challenge to supremacy of EU law and CJEU's ultimate authority is only related to its absolute character while the relative primacy is accepted, however, under the respective national constitutions.[48]

Even if one extensively broadens the features of the American tradition of federalism still this last flaw cannot be fixed and thus the EU could not be declared a fully-fledged federation even according to this tradition. The supremacy clause of the U.S. Constitution cannot be simply put aside. Therefore this sort of analogy between the EU and the U.S. has no other intention then the one of promoting "a monist, hierarchical, functionally state-like vision of integration."[49] The existing interpretative pluralism in the U.S. mainly refers to the horizontal relationship of the federal institutions and not to the vertical separation of powers or the existence of separate but overlapping constitutional orders within the overarching political system.[50] One has to note that even according to the much referred author on this issue, Schütze, the EU has elements of cooperative or horizontal federalism but only if the argument is confined to the legislative implementation as opposed to executive application or any other aspect of federalism.[51] Therefore his claims should not be overstretched in the legal context of the EU and federalism discussed here.

Against this background, only if one recognizes that federalism and the federal principle under the changing circumstances in Europe can exist beyond the state and detaches federalism from a purely hierarchical perspective the EU could be declared a federal structure. Therefore, in the absence of any alternative conception there is a need for a new broader view on federalism which could define the EU structure and existing relationship between it and its member states.[52] As a matter of fact, Elazar has argued for this detachment of the federal principle from

[45] Lenaerts (n 6) 778.
[46] Elazar (n 2) 159.
[47] Claes and de Visser (n 4) 85.
[48] Avbelj (n 40) 21-22.
[49] Avbelj (n 40) 25. Fabbrini misses the point by criticizing that Avbelj, as many other European scholars, has misunderstood the true nature of American federalism Fabbrini (n 24) 31.
[50] Halberstam (n 44) 329-336, drawing the difference between constitutional and interpretative pluralism. On this note I disagree with Fabbrini's reading of Goldsworthy's arguments claiming that the U.S. system knows no hierarchy or monist constitutional arrangement. See Fabbrini (n 24) 30 and Jeffrey Goldsworthy, 'The Debate About Sovereignty in the United States: A Historical and Comparative Perspective' in Neil Walker (ed) *Sovereignty in Transition* (Hart 2003) 423.
[51] Schütze (n 11) 5-10, making the parallel with the American tradition. On a different understanding of dual and cooperative federalism see Dosenrode (n 14) 25; Armin von Bogdandy and Jürgen Bast, 'The Federal Order of Competences' in Armin von Bogdandy and Jürgen Bast (eds) *Principles of European Constitutional Law* Second Revised Edition (Hart 2008) 285; and Fabbrini (n 25) 14.
[52] Tusseau (n 24) 61. He argues that "[u]sing the vernacular of federalism could be regarded as a kind of compensatory attitude in front of the disruption of established habits of thinking and their inappropriateness to

the state or any other specific set of institutional setting and instead to focus on the institutionalization of the relationship between the actors within the multilevel setting.[53] Through such a broader understanding of federalism, focused on the actual dynamics of this type of relationships, one is provided with some space for redefinition of the notion of federalism and the federal principle in the EU context. Therefore, paraphrasing Tusseau, the federal lens will be used to tackle the developments in the EU for the sole purpose of rationalizing legal analysis.[54]

In this sense a 'neo-federalist' approach which bundles federalism with constitutional pluralism could be used as a conceptual framework that would better elucidate the issue of distribution and exercise of competences in the EU which is the true functional dimension of federalism and basis for the balance between the interests and autonomy of both the EU and its member states.[55] Accordingly, one would couple the shared goal of both federalism and constitutional pluralism which is related to achieving a fair balance between unity and diversity.[56] Actually, such a new approach has been proposed by Koopmans as early as 1992[57] and the birth of the EU declaring the quest for proper federal discourse for the EU among the existing conditions a wrong debate and proposed, back then, to link federalism to legal pluralism.[58] As matter of fact Elazar clearly points out that "[t]he model that is needed to build the European Union is a matrix or a mosaic and not a power pyramid or a center-periphery model".[59] Accordingly, one could state that under the neo-federal understanding the EU represents a 'federative but not a hierarchical structure' existing beyond the state.[60] Under such a conception federalism represents "a *species* of the *genus* constitutional pluralism"[61] according to which there is a different reading of both the traditional doctrine and principles of federalism and the basic doctrines of EU law and its safeguards on the distribution and exercise of powers in the EU which leads to a rather practical significance instead of a purely theoretical debate.[62] This move would tackle two issues, the conundrum of (in)divisible sovereignty, that is one of the biggest

confront current phenomena, as exemplified in the EU legal order, but which are more general (the disaggregation of the post-Westphalian order, the end of former hierarchies, the empowerment of new transnational actors, the heterarchical relationships between autonomous legal spheres, the fragmentation of international law into a multiplicity of specialized regimes, societal constitutionalism, global constitutionalism, global administrative law, etc.)."[reference omitted], Daniel Halberstam, 'Systems Pluralism and Institutional Pluralism in Constitutional Law: National, Supranational and Global Governance' in Matej Avbelj and Jan Komarek (eds) Constitutional Pluralism in the European Union and Beyond (Hart 2012) 93; Fabbrini (n 25) 9, "A federal political system or federalism is a genus to which different empirical species arguably belong" and Beaud (n 37) 30.

[53] Elazar (n 2)11-12.

[54] Tusseau (n 24) 62.

[55] For more on neo-federalism see Fabbrini (n 24). Weiler and Haltern use a notion of "neo-constitutionalism" to describe this reality, Weiler and Haltern (n 28) 363. See also Schütze (n 11) 56-58; Koen Lenaerts, 'EU Federalism in 3-D' in Elke Cloots, Geert De Baere and Stefan Sottiaux (eds) Federalism in the European Union (OUP 2012) 13-15; Millet (n 24) 266-275, he is speaking of a new kind of federalism in the European Union, Beaud (n 37) 23, referring to Marcel Bridel, *Precis de droit constitutionnel et public suisse* (Lausanne: Payot, Vol. I, No. 66, 1965) 170, and 30-37.

[56] Millet (n 24) 266, 274.

[57] Thijmen Koopmans, 'Federalism: The Wrong Debate' (1992) Common Law Market Review 1047-1052.

[58] Lenaerts (n 55) 13-15.

[59] Elazar (n 14) 42.

[60] Armin von Bogdandy and Stephan Schill,'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' (2011) 48 Common Law Market Review 1417, 1425.

[61] Fabbrini (n 24) 30-31.

[62] Eleftheriadis (n 26) 47.

problems with the European tradition which is successfully solved through the American experience, and the lack of a strict hierarchy among the legal orders.

If this theoretical explanation is taken as a starting point, then how is this structure supposed to tackle the centralizing tendency that is present in every proper federation due to their structural bias becomes the first question through which neo-federalism should manifest its practical relevance.

3 The centralizing tendencies in the EU, the constitutional principles of EU law and the insufficiency of the safeguard

Just as every federal structure has centralizing tendencies, also the development of federal features has inevitably led to a similar outcome of centralization.[63] It could be argued that these tendencies could be recognized by looking at the high level of judicial activism of the CJEU, especially in the past, through the creation of the fundamental doctrines of EU law which were applied in expanding the scope of EU competences by providing them with a functional definition. In this sense the legal basis for EU action was broadened through judicial means and interpretation. In certain instances, the centralizing tendencies in the EU were even more noticeable than in other full fledge federations. Ironically, the calls for further integration and integrative federalism have assumed more centralization even though this essentially contradicts the very essence of the notion of federalism which implies more autonomy and power for the federal units.[64] Therefore once the question of deepening of European integration through the establishment of the European Union was put on the agenda the issue of safeguarding sovereign rights, competences and autonomy of member states was opened.[65] In this sense, the introduction of the basic constitutional principles, already present in federal states, such as the conferral of powers, subsidiarity and proportionality, which would serve the purpose of safeguarding the vertical division of powers and competences in the EU, came as a logical step.[66] Thus, ever since the Maastricht Treaty these principles have been an essential part of the EU treaties and, in regard to subsidiarity and proportionality, they have been further developed with the adoption of protocols introducing additional guidelines and mechanisms for their application and safeguard.

Despite all these developments there are still serious doubts expressed whether these principles are adequately designed for the circumstances existing in the EU and continuous criticism is addressed to the CJEU for not adequately and effectively tackling the issues related to the competence conundrum. This sort of perception has been one of the underlying reasons for the strengthening of the safeguards and the introduction of the early warning mechanism in the

[63] Fabbrini (n 24) 30; Alec Stone Sweet, *Judicial Construction of Europe* (OUP 2004) 8; Weiler (n 17) 55; Carlo Panara, 'The Enforceability of Subsidiarity in the EU and the Ethos of Cooperative Federalism: A Comparative Law Perspective' (2016) 22 European Public Law 305, 310, 315; Volcansek (n 12) 8ff; and von Danwitz (n 14) 520.
[64] Elazar (n 2) 154; and Koopmnas (n 57) 1047, 1051.
[65] Paul Craig and Grainne De Burca, EU Law: Texts, Cases and Materials Fifth Edition (OUP 2011) 94.
[66] George A. Bermann, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States' (1994) 94 Columbia Law Review 331, 335.

protocols of the Lisbon Treaty.[67] While the early warning mechanism, as well as the impact assessment reports of the Commission, has provided valuable information for the CJEU in its review of subsidiarity and proportionality this, however, has not remedied the main weaknesses of the judicial safeguard of these principles which remains a concern for the member states. Therefore, the lack of effective judicial safeguard has caused and provided justification from the onset for some constitutional courts in Europe to declare their power to intervene on instances in which the vertical division and exercise of competences in the EU is not adequately safeguarded by the CJEU. In this manner constitutional courts have gained another new role of what is here referred to as an external federal mandate better known as *ultra vires* review.

In order to better understand the crucial reasons and justifications for the establishment and development of such a new role for constitutional courts, particularly in light of constitutional pluralism, one needs to first take a look at the meaning and role of these constitutional principles in the EU after which the specificities of the political and judicial safeguards of both subsidiarity and proportionality need to be addressed along with the main weaknesses.

3.1 The principles of conferral of powers, subsidiarity and proportionality in the EU

The division and exercise of competences in the EU is regulated with Article 5 TEU which incorporates three principles for that purpose.[68] The first one is the principle of conferral of powers, the broadest and most general but at the same time the weakest, and has to do with the overarching distribution of competences.[69] The principle of conferral states that all competences of the EU stem from the member states and the EU is limited only to those which have been conferred upon it. Additionally, this provision defines that residual powers, meaning, those which are not conferred upon the EU by the member states, belong to the latter.[70] The conferred competences are supposed to be used in order for the EU to achieve the objectives foreseen in the Treaties. In this sense, the conferral of powers does define and determine the general limits of EU competences however their exercise and also their scope, in light of the objectives, are a matter that is supposed to be determined with the principles of subsidiarity and proportionality.[71] In more practical terms, the conferral of powers looks whether there are appropriate legal basis for the EU to act and regulate at all, while the latter two principles are concerned with the exercise of EU competences.[72]

In this sense, when it comes to whether and how EU competences should be exercised the principles of subsidiarity and proportionality are supposed to provide the answer. The underlying idea of subsidiarity is that the central authority should act and exercise its

[67] Panara (n 63) 321-322.
[68] Bearing in mind the great abundance of literature on this specific topic these principles will not be dealt with in great detail and the discussion will be limited to details which are related to the general argument in this chapter and reasons that serve as justification for an active role of national constitutional courts.
[69] Gareth Davies, 'Subsidiarity: The Wrong Idea, In the Wrong Place, At the Wrong Time' (2006) 43 Common Market Law Review 63, 66; and Albrecht Weber, 'Article 5: Principles on the Distribution and Limits of Competences' in Hermann-Josef Blanke and Stelio Mangiameli (eds) *The Treaty on European Union (TEU): A Commentary* (Springer 2013) 259-261.
[70] Article 5(2) TEU
[71] Craig and de Burca (n 65) 95.
[72] Weber (n 69) 258, on the distinction between distribution and exercise as seen through these three principles.

competences only if this cannot be done effectively enough at a level closer to the citizens.[73] In this way the central authority has a subsidiary function.[74] As in the EU, this relationship is between the EU and its member states. Article 5(3) TEU regulates that subsidiarity concerns the exercise of non-exclusive EU competences which is conditioned by the fact that "the objectives of a proposed action cannot be sufficiently achieved by the member states, either at central level or at regional and local level", but nevertheless these objectives could be better achieved at the Union level "by reason of the scale or effects of the proposed action."[75] Therefore the main consideration of subsidiarity is to determine which level is the most appropriate in achieving the legislative objectives which are part of non-exclusive competences. Such understanding inevitably embeds a certain assumption in favor of the lower level of government because the central authority acts only if specific conditions are met.[76] This assumption is based on several considerations which are related to efficiency, democracy and identity which are all legitimate concerns of the member states and they need to be weighed when subsidiarity is concerned.[77] However, in the EU, as in most federal states, under subsidiarity the goals and objectives of the central authority seem to be privileged as observed also through the case law of the CJEU.[78] This has caused the perception of a hierarchy of objectives which favors the federal or central ones under the principle of subsidiarity making this principle rather unsuitable to serve the purpose of balancing between EU and member states competences.[79]

Once it is determined that the Union level is the appropriate one, the manner in which a competence or objective is achieved through EU actions needs to be looked into. Namely, the principle of proportionality as regulated with Article 5(4) TEU is supposed to determine

[73] Robert Schütze, 'Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism?' (2009) 68 The Cambridge Law Journal 525; and Weber (n 69) 261.
[74] Schütze (n 73) 525; and Schütze (n 11) 244-245.
[75] Article 5(3) TEU.
[76] George A. Bermann, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States' (1994) 94 Columbia Law Review 331, 339; and Gabriel A. Moens and John Trone, 'Subsidiarity as Judicial and Legislative Review Principles in the European Union' in Michelle Evans and Augusto Zimmermann (eds) *Global Perspectives on Subsidiarity* (Springer 2014) 171.
[77] Mattias Kumm, 'Constitutionalising Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union' (2006) 12 European Law Journal 503, 518ff; however, this is even more elaborately explained Bermann (n 76) 339-344. He numbers all of values that need to be taken into consideration when the subsidiarity principle is being applied. Those are: 1) Self-determination and accountability; 2) Political Liberty; 3) Flexibility; 4) Preservation of Identities; 5) Diversity; and 6) Respect for Internal Division of Component States.
[78] Davies (n 69) 67; Millet (n 24) 262; and Elazar (n 14) 42.
[79] Davor Jancic, 'The Game of Cards: National Parliaments in the EU and the Future of the Early Warning Mechanism and the Political Dialogue' (2015) 52 Common Market Law Review 939, 943, he calls this a hidden hierarchy. See also Elazar (n 14) 42-44, according to him, judging by its origin subsidiarity is intended to reduce hierarchy, however it inherently includes it as opposed to federalism. This type of hierarchy of objectives finds its reflections also on the values which are protected manifesting an 'uneven pace' in protecting certain values more than other, such as the difference between the Union's social and economic dimension. On this see more Mark Dawson, 'The Political Face of Judicial Activism: Europe's Law-Politics Imbalance' in Mark Dawson, Bruno de Witte and Elise Muir (eds) *Judicial Activism at the European Court of Justice* (Edward Elgar 2013) 25-26, he claims that "when balancing market and non-market values, makes an implicit hierarchy between them" [reference omitted], at 26. On a narrower comparison of unequal protection of values such as between human rights and implementation of federal values see Jacob Öberg, 'The Rise of the Procedural Paradigm: Judicial Review of EU Legislation in Vertical Competence Disputes' (2017) 13 European Constitutional Law Review 248, 274.

whether the content and form of union action exceeds what is necessary to achieve the objectives of the Treaties or not.[80] However proportionality is not limited only to non-exclusive competences. As a matter of fact, the principle of proportionality is also relevant for issues in which we have areas of exclusive competences thus also related to the conferral of powers.[81]

The principle of proportionality is applied through a three-prong test as developed by the CJEU.[82] First, it is assessed whether the disputed measure is appropriate to achieve legitimate objectives. Second, whether this measure is necessary to achieve this objective. Third, at the end it is assessed whether the measure at issue is the least intrusive on the applicant's or member states' interests.[83] While the proportionality test within the exercise of EU competences carries a lot of resemblance with the proportionality test used in cases of fundamental rights still there are grounds for differentiation, especially in light of the general interests which are being protected. On the one hand we have autonomy of the individual when proportionality is applied in cases involving fundamental rights, and on the other, the autonomy of the member states to regulate certain issues when it comes to the exercise of EU competences. In the latter case the legitimate objectives that are supposed to be achieved by the EU are being limited to the ones that comply with the principle of subsidiarity, while in the former case this specific type of limitation does not exist. As result of this proportionality is closely tied with subsidiarity when the balancing is conducted in light of the member states autonomy.[84]

The wording of Article 5 TEU as well as the main logic behind these three principles clearly demonstrates the strong relationship between them. After all they are part of a single article which regulates the issue of division and exercise of competences in the EU thus there is a strong link between the principles. In this sense the conferral of powers determines whether there are legal bases for certain EU legal action. Once this is determined then subsidiarity and proportionality further determine whether the exercise of non-exclusive competences is done at the appropriate level, Union or member state, and how these competences are exercised by the EU in regard to the achievement of the legitimate objective. As a matter of fact, the phrase of 'insofar as' in the provision regulating subsidiarity clearly goes in line with the claim of close intertwinement of subsidiarity and proportionality.[85] The strong tie between subsidiarity and proportionality is to be clearly seen through the fact that the legitimate objective or purpose and whether this is better achieved at the Union level is something that is determined through subsidiarity. The way in which the legitimate objective or purpose for EU action is defined and determined is crucial in claiming that the EU institutions have been in compliance with

[80] Art 5(4) TEU.
[81] Weber (n 69) 266.
[82] CJEU, Case C-331/88 *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte FEDESA and Others*, Judgment of 13 November 1990, ECLI:EU:C:1990:391, para. 13.
[83] CJEU *Fedesa* (n 82) para. 13. See more on this in Damian Chalmers, Gareth Davies and Giorgio Monti, European Union Law (2nd Edition CUP 2010) 367-368; Weber (n 69) 266, he also refers to CJEU, Case 40/72, *Schröder KG v Germany*, Judgment of 7 February 1973, ECLI:EU:C:1973:14, para. 32.
[84] On this difference see Kumm (n 77) 523-524; and Schütze (n 73) 533. On the difference how, proportionality is applied with regard to Member States as opposed to EU institutions see Chalmers et al (n 83) 368.
[85] Panara (n 63) 322.

subsidiarity.[86] On the other hand, how this purpose is achieved is determined by proportionality. As it was stated above proportionality is directly tied to the legitimate objective and the way it is intended to be achieved. Therefore, just as the legitimate objective is an essential element of the proportionality test so is subsidiarity or *vice versa*, proportionality is one of the crucial components of subsidiarity.[87] Perceived in this way, subsidiarity needs to be seen through the lenses of federal proportionality.[88] Following this line of thought, the principle of subsidiarity would actually answer whether an EU act interferes with the autonomy of member states disproportionately.[89] This also follows the logic and order of Article 5 TEU, starting from a general principle and ending with the principle going into details while all of them relate to and regulate the same issue of division and exercise of competences.[90]

Accordingly, broader interpretation and implementation of the principles of subsidiarity and proportionality easily leads to the broadening of the EU competences, thus breaching the principle of conferral of powers, or seen differently, creating a situation in which EU law is broader than EU competences.[91] In this manner the EU law could regulate an area which is not really or completely part of EU competences.

Lastly, bearing in mind that these principles are regulating the division and exercise of competences between the EU and member states, it becomes very logical that striking a balance between the interests of the two levels lies at the heart of these principles. Understood in this way, all these principles inherently involve an obvious need to take into due consideration the interests of member states and their respective autonomy as the division and exercise of competences are matters related to the autonomy of both levels. However, this is not something that is done by the CJEU in deciding issues of competences.[92]

Nevertheless, even according to this sort of understanding, which is not completely accepted by the CJEU so far, not all problems are to be solved regarding the competence conundrum. As matter of fact many question still remain open and subject to differing interpretations such as the meaning and scope of "legitimate objective",[93] what is required for one level to "sufficiently" achieve an objective,[94] the necessity of certain EU measures and actions and

[86] Davies (n 69) 64, 67, 72-75. This is basically the reason why he claims that essentially subsidiarity is the wrong idea.
[87] Xavier Groussot and Sanja Bogojevic, 'Subsidiarity as a Procedural Safeguard of Federalism' in Loic Azoulai (ed) *The Question of Competence in the European Union* (OUP 2014) 236; referring to Graine de Burca, 'The Principle of Subsidiarity and the Court of Justice as an Institutional Actor' (1998) 36 Journal of Common Market Studies 217, 220; Jörgen Hettne, 'Making Sense of Subsidiarity and the Early Warning Mechanism – A Constitutional Dialogue?' (2014) European Policy Analysis 3; and Kumm (n 77) 518ff.
[88] Schütze (n 73) 532-533.
[89] Schütze (n 73) 533.
[90] Kumm (n 77) 518; Davies (n 69) 66; and Schütze (n 73) 533.
[91] On the latter see Lena Boucon, 'EU Law and Retained Powers of Member States' in Loic Azoulai (ed) *The Question of Competence in the European Union* (OUP 2014) 174-175: "Therefore, the Court's case law shows that the scope of EU law is not conditional upon the existence of Treaty. There is thus a disconnection between the scope of EU law and the scope of EU powers, the former being broader than the latter." See also Groussot and Bogojevic (n 87) 234.
[92] Kumm (n 77) 522ff.
[93] Kumm (n 77) 506-517, 530-531.
[94] Davies (n 69) 69-70.

whether they should be balanced with member state interest. As a result of the dynamic nature of the division and exercise of competences, but also the innate limits of law, these issues cannot simply be encapsulated in just a few legal provisions which would answer all possible dilemmas. In this sense, while distinguishing between the three categories of EU competences, which was done in the Lisbon Treaty, might have brought some clarity it has definitely not solved the burning issues revolving around the division and exercise of competences in the EU.[95] Nevertheless, since the introduction of these principles into EU law there have been several attempts to remedy the existing shortcomings in the process of understanding, interpreting and applying these principles in practice. Those attempts have mainly oriented towards the political safeguards of subsidiarity and proportionality instead of directly tackling the shortcomings of the judicial safeguards that caused more reasons for concern.

3.2 Political safeguards on the distribution and exercise of competences in the EU

Since the enactment of the provisions of subsidiarity and proportionality in the Maastricht Treaty there have been several attempts to strengthen the implementation of these two principles due to the manifested weaknesses in their interpretation and application.[96] Based on the idea that subsidiarity is primarily a political principle,[97] different aspects of the pre-legislative and legislative procedures in the EU were subject to additional regulation. The main instruments and safeguards for subsidiarity and proportionality were frequently put in protocols attached to the treaties.

Based on the European Council conclusions from Edinburgh, the Amsterdam Protocol[98] introduced, above all, procedural guidelines for all EU institutions to comply with these principles.[99] This obligation was particularly emphasized for the pre-legislative and legislative procedures in which a Community action needed to be justified through quantitative and qualitative indicators which would indicate the compliance with subsidiarity and proportionality.[100]

Driven by the wish of further strengthening the *ex ante* political control of subsidiarity and proportionality, and based on the conclusions of the European Convention, the Lisbon Treaty has introduced certain changes in this direction. Namely, the main pillar of the reform in the sphere of subsidiarity and proportionality was conducted by providing national parliaments an active reviewing competence through the establishment of the early-warning mechanism (EWM).[101] The EWM was introduced in the Lisbon Protocols on subsidiarity and

[95] Von Bogdandy and Bast (n 51) 277; and Jancic (n 79) 951.
[96] Robert Schütze, *European Constitutional Law* (CUP 2012) 178-179.
[97] See European Convention, CONV 286/02. Also Schütze (n 73) 527; Jancic (n 79) 943; and Moens and Trone (n 76) 171; but cf. Theodor Schilling, 'Subsidiarity as a Rule and a Principle, or: Taking Subsidiarity Seriously' (1995) The Jean Monnet Center for International and Regional Economic Law and Justice, available at: http://www.jeanmonnetprogram.org/archive/papers/95/9510ftns.html last visited 15.10.2018.
[98] Protocol 30 on the Application of the Principles of Subsidiarity and Proportionality (Amsterdam Protocol 1997).
[99] Schütze (n 11) 251-253; Schütze (n 73) 527; and Jancic (n 79) 943.
[100] Amsterdam Protocol Article 4, Schütze (n 73) 527.
[101] More on this mechanism in Philipp Kiiver, *The Early Warning System for the Principle of Subsidiarity: Constitutional Theory and Empirical Reality* (Routledge 2012).

proportionality[102] and the role of national parliaments in the EU[103] and found its reflection also within Article 5 (3) TEU.[104]

The EWM foresees an active controlling power of national parliaments in the legislative procedure. Under this mechanism there is an obligation for forwarding draft legislative acts, primarily originating from the Commission but also other EU institutions, to national parliaments along with the legislative proposals of the European Parliament and positions of the Council, so these acts can be reviewed in the course of eight weeks in regard to their compliance with subsidiarity.[105] In case a national parliament is not convinced that such compliance exists then they can issue a reasoned opinion which is sent to all three EU institutions (European Parliament, European Commission and Council of the EU) involved in the legislative procedure. If the view expressed in a reasoned opinion is shared and supported by national parliaments which represent at least one-third of the total votes allocated to parliaments, taking into consideration that each parliament has two votes regardless of its structure, the Commission must take this reasoned opinion into consideration and review the draft. Nevertheless, the Commission is not obliged to abide by the opinion and if it decides to maintain the proposal it will provide its reasons in a decision.[106] This is the so-called yellow card procedure.

Under the second procedure, frequently named as orange card procedure, which is foreseen for the ordinary legislative procedure, if a reasoned opinion of national parliaments for non-compliance of the draft legislative act with the principle of subsidiarity is supported from national parliaments which count for at least a simple majority of the votes, then this act must be reviewed by the Commission. However, the latter is not bound by the reasoned opinion. If the Commission wants to maintain the proposal, then it has to issue a reasoned opinion of its own. Additionally, and different from the yellow card, the European Parliament and the Council have the opportunity to terminate the legislative procedure upon the proposal if they decide with a majority vote or 55 per cent of the members, respectively, to side with the reasoned opinion of national parliaments.[107]

The EWM, along with the continuing obligation for the Commission to conduct wide consultations in the pre-legislative procedure as well as to produce the impact assessment reports,[108] represent the crucial pillars of political safeguards of subsidiarity in the post-Lisbon era. Nevertheless, these political safeguards have shown shortcomings which put their efficiency into doubt.

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[102] Article 6 of the Lisbon Protocol No. 2 on the Application of the Principles of Subsidiarity and Proportionality.
[103] Articles 3 and 4 of the Lisbon Protocol No.1 on the Role of National Parliaments in the EU.
[104] Article 5(3) TEU: "The Institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure the compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol."
[105] Article 6 Lisbon Protocol No. 2. (n 102).
[106] Article 7(2) Lisbon Protocol No. 2. (n 102).
[107] Article 7(3) Lisbon Protocol No. 2. (n 102).
[108] For more on the so-called Barosso initiative see Jancic (n 79) 948-949; and Davor Jancic, 'The Barroso Initiative: Window Dressing or Democracy Boost?' (2012) 8 Utrecht Law Review 78.

More specifically, the EWM has five major shortcomings.[109] First, the control conducted by national parliaments is applicable only to legislative acts thus it does not include delegated acts or judgments of CJEU.[110] This limitation also runs against the very wording of Article 5(3) TEU which calls on all EU institutions to respect this principle. In this sense this shortcoming became even more visible with the euro crisis and the increasing influence of the ECB which was also at issue in the *OMT* case.[111] Second, the EWM is limited to subsidiarity and thus it does not include the closely related principle of proportionality or even the principle of conferral. This has created a situation in which the national parliaments have a very limited scope of monitoring dealing only with the issue of whether it is better for the Union to act or not.[112] Third, the period of eight weeks seems to be very short for any serious review to be conducted by national parliaments. While this deadline has not proven to be a great obstacle for individual national parliaments as there have been a respectable number of reasoned opinions,[113] however, the same could not be claimed where mobilization of a critical support for a yellow or orange card procedure is required.[114] Moreover, this is easily concluded if one takes into consideration that so far there have been only two instances in which the yellow card procedure was initiated, however in both cases without a significant success, and not a single instance in which the orange procedure has been applied.[115] Fourth, since the reasoned opinions of national parliaments are not totally binding for the Commission they seem to lack strength and thus efficiency. In none of the three situations in which a reasoned opinion is sent to the Commission it is not obliged to withdraw or alter the proposal.[116] The fifth shortcoming has to do with ignoring the fact that in most cases the parliamentary majorities stand behind the governments in the member states which accompanied with the high level of political party discipline makes it rather infeasible for national parliaments to object to something that is supposed to be supported by the government and its ministers in the Council.[117] Therefore, it should not come as a surprise that the bulk of the reasoned opinions from national parliaments have originated from ten member states in which the parliaments are able to act independently in this sense from the executive power.[118]

When it comes to the impact assessment reports, the main shortcoming of this mechanism in practice has been that while the report is being written by the Commission in a pre-legislative phase its legislative proposal could be subject to amendments later on. Consequently, the report might happen not to accurately reflect the potential impact of parts of the enacted legislative

[109] Groussot and Bogojevic (n 87) 237-238; and Jancic (n 79) 952-953.
[110] Hettne (n 87) 6-7.
[111] CJEU, Case C–62/14, *Gauweiler v. Deutcher Bundestag*, Judgment of 16 June 2015, ECLI:EU:C:2015:400.
[112] Janicic (n 79) 952-961; Groussot and Bogojevic (n 87) 237; and Hettne (n 87) 7.
[113] Jancic (n 79) 948-949.
[114] George A. Bermann, 'National Parliaments and Subsidiarity: An Outsider's View' (2008) 459, Marta Zalewska and Oskar Josef Gstrein, 'National Parliaments and their Role in European Integration: The EU's Democratic Deficit in Times of Economic Hardship and Political Insecurity' Bruges Political Research Papers 28/2013 14-15; and Moens and Trone (n 76) 174-175.
[115] For more on this see Groussot and Bogojevic (n 87) 239-241; and Jancic (n 79) 945-948.
[116] Millet (n 24) 262; Groussot and Bogojevic (n 87) 237; and Moens and Trone (n 76) 174-175.
[117] Bermann (n 114) 458; and Franz C. Mayer, 'Competences-reloaded? The Vertical Division of Powers and the New European Constitution' (2005) 3 The Journal of International Constitutional Law 493, 502.
[118] Jancic (n 79) 948.

act which have been changed during the legislative procedure in the Council and the European Parliament.[119]

Summing up the arguments on the *ex ante* political safeguard of subsidiarity, one could argue that even though the EWM as well as the other instruments have led to the advancement of the political dialogue[120] between the EU institutions and the national parliaments, they have still not adequately tackled the main issue which has led to their establishment and the overarching goal of subsidiarity; that is, the competence creep and gradual centralization of competences on the EU level.[121] Essentially the roots for the latter two developments could be located in the CJEU case law, through the expansive interpretation of EU objectives regulated under Article 114 TFEU[122] and the flexibility clause as regulated by Article 352 TFEU,[123] which has been accompanied by the extensive legislative reach of the Commission.[124] Nevertheless, the information produced through the *ex ante* safeguard of subsidiarity could be highly relevant for the process of judicial safeguard of subsidiarity by the CJEU and serve as a good information bases for a stricter scrutiny and review.[125] Such a scrutiny would not represent a substitution of the opinion and judgment of the EU legislative institutions but would only serve the purpose of taking subsidiarity more seriously.[126]

3.3 The CJEU and the judicial safeguard of distribution and exercise of competences

In circumstances in which the political processes manifest their weaknesses judicial activism inevitably steps in.[127] The judicial activism of the CJEU of broadening of EU competences which followed a straight line under the banner of further integration, approximation and harmonization has been among the main reasons for the introduction of the three principles and the strengthening of their political safeguards since the Maastricht Treaty.[128] Actually it was

[119] Groussot and Bogojevic (n 87) 242-243. This shortcoming has actually found its manifestation in the ECJ case law. See CJEU, Case C-343/09 *Afton Chemical*, Judgment of 8 July 2010, ECLI:EU:C:2010:419 paras. 30 ff. For more on this Öberg (n 79) 264.
[120] Or constitutional dialogue, see Hettne (n 87) 1.
[121] Jancic (n 79) 941.
[122] Previously Articles 94 and 95 TEC, approximation of laws, see more on this in for instances Monica Claes and Bruno de Witte, 'Competences: Codification and Contestation' in Adam Lazowski and Steven Blockmans (eds) *Research Handbook on EU Institutional Law* (Edward Elgar 2016) 63-65; and Öberg (n 79) 253.
[123] Previously Article 308 TEC. For more on this see Claes and de Witte n (122) 61-63; Weber (n 69) 277-278; and Paul Craig, 'Subsidiarity: A Political and Legal Analysis' (2012) 50 Journal of Common Market Studies 72, 72-73.
[124] Jancic (n 79) 953.
[125] Bermann (n 114) 457-458; Groussot and Bogojevic (n 87) 241; and Craig n (123) 78. As a matter of fact, this link between the *ex ante* political safeguard and the *ex post* judicial safeguard of subsidiarity is also present in the protocols where it is foreseen that a case could be brought before the CJEU on behalf of the national parliaments, see article 8 Protocol 2, and see also Hettne (n 87) 4.
[126] CJEU, Case C-58/08 *Vodafone and others*, Opinion AG Maduro ECLI:EU:C:2009:596, para 30; see also Moens and Trone (n 76) 177; and Vanderbruwaene (n 5) 155-156.
[127] Bermann (n 114) 458: "A widespread belief in the failure of federalism's political safeguards – coupled with a disbelief that they could effectively be constructed – operated as a stimulus to greater judicial activism on the federalism front, fueling the further belief that if federalism matters, the courts must take up the challenge since few other realistic safeguards of federalism exist and the difficulty and unlikelihood of creating them are so great." See also Marta Cartabia, 'Europe and Rights: Taking Dialogue Seriously' (2009) 5 European Constitutional Law Review 5, 6.
[128] On this line of judicially crafted federal order see Volcansek (n 12) 23; Joseph H. H. Weiler, *The Constitution of Europe* (CUP 1999) 100-101; and von Bogdandy and Bast (n 51) 286-287.

the fear of the member states of further unwarranted expansion of EU powers which needed to be remedied through these principles.[129] However the latter have not really substantially influenced the CJEU's approach. Subsidiarity has never taken an important spot in its case law.[130] As a matter of fact there is only one decision, the *Tobacco Advertising* judgment,[131] in which the CJEU quashed an EU act for disproportionately overstepping the EU competence as interpreted through Article 95 TEC.[132] However, none have been annulled on basis of subsidiarity.[133] These facts along with several other reasons lie behind the wide spread criticism of the Court's doctrine and approach towards the distribution and exercise of competences in the EU. Even some authors have raised their voice and called for the establishment of a new specialized court dealing only with these issues, thus somehow implying the structural bias and inadequacy present at the CJEU.[134] Accordingly the reasons for these perceptions could be located, above all, in the actual approach and judicial doctrine of the CJEU towards the issue of EU competences and the structural bias, such as federal and jurisdictional bias, present at this court.

3.3.1 CJEU's approach

Taking into consideration the CJEU approach towards division and exercise of competences one can recognize three closely related lines of criticism. The first line concerns the understanding and judicial safeguard of subsidiarity. The second line is related to the way in which proportionality is applied to EU acts in competence disputes. The third line of criticism is addressing the lack of an integrated framework which brings together the two principles under one jurisdictional test which is the only way to adequately balance the EU and member states interests and autonomy. The overarching argument against the CJEU approach, in general, is that as result of the high level of deference to the legislative discretion of the EU exhibited by the Court by applying low intensity review the Court is not adequately protecting or even taking into consideration the regulatory autonomy of member states. However, by distinguishing these lines of criticism the intention here is not to diminish the importance of the principle of conferral of powers and the overall relationship between the three principles. As a matter of fact, the conferral of powers is deeply intertwined with both the subsidiarity and proportionality that their breach might also mean a breach of this principle as well. This actually

[129] On the expectations of national authorities see Renaud Dehousse, *The European Court of Justice* (St. Martin's Press1998) 158-160.
[130] von Bogdandy and Bast (n 51) 287; and Craig (n 123) 74.
[131] CJEU, C-376/98 *Germany v Parliament and Council (Tobacco Advertising)*, Judgment of 5 October 2000, ECLI:EU:C:2000:544.
[132] For more on this decision see Kumm (n 77) 503ff and Claes and de Witte (n 122) 64.
[133] More on this discussion see Craig (n 122) 80-81.
[134] See for instance on the first occasion where such institutional solutions were developed Joseph H. H. Weiler, Ulrich R. Haltern and Franz C. Mayer, 'European Democracy and Its Critique' (1995) 18 Western European Politics 4; for more on such institutional proposals see Franz C. Mayer, *Kompetenzüberschreitung und Letztentscheidung: Das Maastricht-Urteil des Bundesverfassungsgerichts und die Letztentscheidung über Ultra vires-Akte in Mehrebenensystemen* 332ff available at http://www.whi-berlin.eu/mus150.pdf last visited 15.10.2018; but see also von Bogdandy and Bast (n 51) 302 referring to the proposals made by Siegfried Broß, Bermann (n 114) 454; and cf. Everling (n 24) 726; see also Marcus Höreth, 'The Least Dangerous Branch of European Governance? The European Court of Justice under the Checks and Balances Doctrine' Mark Dawson, Bruno de Witte and Elise Muir (eds) *Judicial Activism at the European Court of Justice* (Edward Elgar 2013) 54-55.

means that the expansion of EU competences through their functional definition leads to a situation in which the principle of conferral of powers is blurred and weakened.[135]

3.3.1.1 Subsidiarity

The CJEU reviews the compliance with subsidiarity from two aspects, procedural, as established by the protocols, and substantive, as regulated by Article 5(3) TEU.[136] The procedural aspect essentially represents the judicial safeguard of the obligations set for the EU institutions as envisaged by the Lisbon Protocol No. 2 for providing detailed statements on compliance with subsidiarity and proportionality and why, taking into consideration the objectives behind the draft legislative act, such objectives could be better achieved at the EU level.[137] However, the CJEU has denied that these obligations impose a duty for the EU institutions to state detailed reasons in regard of these two principles. A general statement, or recital in the preamble of the specific EU legislative act without referring to subsidiarity, suffices in order to fulfill this obligation.[138] Thus the CJEU does not deem it necessary for EU institutions to state reasons in their detailed statements why specific provisions, which obviously raise questions of subsidiarity, are not compromising this principle.[139] This stance of the CJEU calls for a consideration of the approach taken by it on the substance and justification of the detailed statements made by EU legislative institutions.

The substantive conditions for the respect of subsidiarity consist of determining whether the foreseen objectives could be better achieved by the EU than the member states. However, the CJEU does not really enter or apply the test of comparative efficiency[140] nor does it actually enter into a thorough analysis at all. Such an analysis would involve reviewing the justification provided not only by looking into the benefits for the Union but also what type of problems or costs a certain EU act does incur if the matter is left for the member states to regulate.[141] Instead of entering such an inquiry the CJEU heavily relies on the reasons stated in the pre-legislative and legislative procedure and only demonstrates circular argumentation supporting these very

[135] Christian Kirchner, 'The Principle of Subsidiarity in the Treaty on European Union: A Critique from a Perspective of Constitutional Economics' (1998) 6 Tulane Journal of International and Comparative Law 291, 301. "The doctrine of enumerated powers has been explicitly incorporated into the EC Treaty but has been weakened by the functional definition of competencies." The issue of conferral was also raised in the CJEU (n 111) para. 41.
[136] CJEU, C-547/14 *Philip Morris Brands and Others* ECLI:EU:C:2016:325, para. 217.
[137] Article 5 Lisbon Protocol No. 2 (n 102).
[138] See for instance CJEU, C-233/94 *Germany v Parliament and Council*, Judgment of 13 May 1997 ECLI:EU:C:1997:231, paras 26-28; and CJEU, C-377/98 *Netherlands v Parliament and Council*, Judgment 9 October 2000, ECLI:EU:C:2001:523, para. 33. For more see Chalmers et al. (n 83) 366-367; and Moens and Trone (n 76) 164-165. See also on this but also on the one exception from this practice expressed in CJEU, Case C-310/04 *Spain v Council*, Judgment of 7 September 2006, ECLI:EU:C:2006:521; in Öberg (n 79) 266ff and 269.
[139] CJEU, C-508/13 *Estonia v Parliament and Council*, Judgment of 18 June 2015, ECLI:EU:C:2015:403, para. 60, here the CJEU is referring to a decision dating before the adoption of the Lisbon Treaty and respective protocols; CJEU, C-100/99 *Italy v Council and Commission*, Judgment of 5 July 2001, ECLI:EU:C:2001:383, para. 64.
[140] Craig and de Burca (n 65) 94; and Chalmers et al. (n 83) 364.
[141] Maduro *Vodafone* (n 126) para. 30.

same reasons.[142] This creates circumstances under which the EU legislative institutions are not taking subsidiarity seriously, both substantively and procedurally.[143]

Demonstrating this high level of deference to legislative discretion, the CJEU applies a 'light touch' scrutiny by providing a broad legal basis under Article 114 TFEU (previously Article 95 TEC) for EU acts which have as their objective the establishment and functioning of the internal market through the removal of obstacles to trade and distortion to competition. Under such an approach of the CJEU towards the exercise of competences EU acts could also regulate in areas which are not initially part of EU competence but in which such obstacles or distortions to trade and competition could allegedly be traced.[144] The most recent case, *Philip Morris*, dealing with an issue of exercise of competences, thus subsidiarity and proportionality, proves this argument right.

> "In that regard, while a mere finding of disparities between national rules is not sufficient to justify having recourse to Article 114 TFEU, it is otherwise where there are differences between the laws, regulations or administrative provisions of the Member States which are such as to obstruct the fundamental freedoms and thus have a direct effect on the functioning of the internal market."[145]

Thus, the CJEU does not distinguish between the areas of regulation and whether they are related to an economic activity but only focuses on the objectives which justify EU intervention.[146]

> "The Court has also held that, provided that the conditions for recourse to Article 114 TFEU as a legal basis are fulfilled, the EU legislature cannot be prevented from relying on that legal basis on the ground that public health protection is a decisive factor in the choices to be made."[147]

This understanding of legal basis and justification for exercise of competences creates a situation in which basically it is impossible to claim that an EU legislation or act runs against subsidiarity.[148] As long as the objectives set in the specific EU act fall within the realm of Article 114 TEU it cannot breach the principle of subsidiarity since they are defined as EU

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[142] Öberg (n 79) 264. He argues that "the Court's procedural enquiry is limited to considering whether the EU legislator has stated a justification, and not whether this justification is coherent with the grounds for excercising the competence under the relevant competence-conferring provision." See also Panara (n 63) 320ff.
[143] Maduro *Vodafone* (n 126) para. 30.
[144] Davies (n 69) 72-74; and Kumm (n 77) 508, 516.
[145] CJEU *Philip Morris* (n 136) para. 58. See also CJEU, C-376/98 *Germany* v *Parliament and Council*, Judgment 5 October 2000, EU:C:2000:544, para. 84 and 95; CJEU, C-491/01 *British American Tobacco (Investments) and Imperial Tobacco*, Judgment 10 December 2002, EU:C:2002:741, para. 59 and 60; CJEU, C-434/02 *Arnold André*, Judgment 14 December 2004, ECLI:EU:C:2004:800, para. 30; CJEU C-210/03 *Swedish Match*, Judgment 14 December 2004, ECLI:EU:C:2004:802, para. 29; CJEU, C-380/03 *Germany* v *Parliament and Council*, Judgment of 12 December 2006, ECLI:EU:C:2006:772, para. 37; and CJEU, C-58/08 *Vodafone and Others*, Judgment 8 June 2010, ECLI:EU:C:2010:321, para. 32.
[146] Kumm (n 77) 516-517.
[147] CJEU *Philip Morris* (n 136) para. 60. See also CJEU *British American Tobacco (Investments)* (n 145) para. 62; CJEU *Arnold André* (n 145) para. 32; CJEU *Swedish Match* (n 145) para. 31; and CJEU, *Germany* v *Parliament and Council* (n 145) para. 39.
[148] Davies (n 69) 74- 75.

objectives and they could almost by default be better achieved at the Union level. Furthermore, even when one or more of the stated purposes or objectives of the respective EU acts could be better achieved at a member state level it does not necessary lead to the conclusion of an invalidity of the EU act due to the interdependence with the other stated objectives. Thus, by bundling of legislative purposes or objectives the EU institutions are circumventing the principle of subsidiarity and the CJEU has given this approach a clear go-ahead without any proper assessment in light of subsidiarity.[149]

More specifically, the CJEU has taken the same approach even in a case in which it was shown that one member state could actually better achieve one of the objectives and purposes of the enacted EU act.[150] This has not even led the Court to second guess the reasons provided by the EU institutions for the enactment of the Directive even though there was a clear indication that Estonia has managed to achieve the objectives sufficiently well.

> "It follows that the principle of subsidiarity cannot have the effect of rendering an EU measure invalid because of the particular situation of a member state, even if it is more advanced than others in terms of an objective pursued by the EU legislature, where, as in the present case, the legislature has concluded on the basis of detailed evidence and without committing any error of assessment that the general interests of the European Union could be better served by action at that level."[151]

In this way, invoking the argument that subsidiarity principle is to be seen and applied generally in deciding the appropriate level for the accomplishment of EU legislative objectives the CJEU has dismissed the claim made by this member state without any attempt to thoroughly justify this stance or to take it into consideration when the principle of proportionality is concerned.[152] The very fact that a qualified majority of member states have voted for an EU act does not by itself confirm that the principle of subsidiarity has not been breached and that the CJEU should apply self-restraint by not properly reviewing the legislative act.[153] Even the conscious agreement among them to decide in breach of the principle which represents a factual Treaty amendment cannot be taken as an argument.[154]
These reasons have led to assertions that Article 114 TFEU represents the EU Commerce Clause which at the moment is even broader than its US counterpart. While the US Supreme Court has succeeded to reduce the scope of the Commerce Clause especially for non-economic

[149] CJEU *Philip Morris* (n 136) para. 222. See also CJEU *Vodafone and Others* (n 145) para. 78; and CJEU *Estonia* v *Parliament and Council* (n 139) para. 48.
[150] CJEU *Estonia* (n 139).
[151] CJEU *Estonia* (n 139) para. 54.
[152] CJEU *Estonia* (n 139) para. 39.
[153] This is actually part of the broader debate on favoring political over judicial safeguards of federalism. Such a stance was very prominent in the U.S. and was embraced by the majority in the U.S. Supreme Court in *Garcia v San Antonio Metropolitan Transit Authority* 469 US 528 at p. 552 (1985). However, this decision was soon overruled in *New York v United States* 505 US 144 at p. 160 (1992). See on this in Moens and Trone (n 76) 168. But cf. Craig (n 123) 81 where he makes the argument that a qualified majority in the Council is a sufficient indication that there was no breach of subsidiarity.
[154] Also on this matter the U.S. federal practice, for instance the clear statement rules on federal pre-emption, has served as an inspiration for putting forward certain solutions for EU issues. See for instance Kumm (n 77) 526 and Schütze (n 73) 533-534.

activities in *Lopez*[155] and *Morrison*[156] the CJEU has so far left a significant leeway to legislative discretion.[157] In this manner the CJEU has enabled the EU institutions to broaden the scope of EU law even outside of its competences.[158] Ironically, these were the exact reasons why the principle of subsidiarity was introduced in the first place, to prevent justifications for this sort of extensive and broad interpretation of legislative objectives which would justify the enactment of EU acts in areas in which the EU lacks competence and member states could regulate at least equally good.[159]

3.3.1.2 Proportionality

Once it is determined that a certain issue should be regulated at the EU level, the CJEU also looks into the question whether such a regulation is conducted in a manner that is proportionate. However, here the CJEU is again criticized for the 'light touch' review. Namely, the proportionality test for EU acts is substantially less intensive than when applied to the member state measures which limit the fundamental freedoms for instance.[160] This could be easily observed if one looks into the standard which is applied in the former case. The review of proportionality of EU institutions is limited only to the standard test which requires the applicant to prove that an EU act is "vitiated by a manifest error of assessment or a misuse of powers or whether it has manifestly exceeded the limits of its discretion."[161] Under such a standard of review the legislative discretion is rather broad.[162]

On the other hand, in determining the proportionality of the EU legislative act through the 'manifestly inappropriate' standard the CJEU only considers whether the act is proportionate in relation to the fulfillment of the stated legislative objectives but not if it is proportionate when the loss of autonomy of the member states is concerned.[163]

[155] U.S. Supreme Court, *United States v Lopez* 514 US 549 (1995).
[156] U.S. Supreme Court, *United States v Morrison* 529 US 598 (2000).
[157] Kumm (n 77) 516 and Andreas Voßkuhle, 'Multilevel Cooperation of the European Constitutional Courts: *Der Europäische Verfassungsgerichtsverbund* (2010) 6 European Constitutional Law Review 182: "Its decisions have frequently taken issue of economic law as their starting point, in particular the fundamental freedoms of the internal market. However, they have also had an effect on matters which have remained the competence of the member states, such as, for instance, education, sports and the organization of the armed forces" [references omitted].
[158] Boucon (n 91) 171-175.
[159] Barbara Guastaferro, 'Coupling National Identity with Subsidiarity Concerns in National Parliaments' Reasoned Opinions' (2014) 21 Maastricht Journal of European and Comparative Law 320, 321ff, she is drawing on the same conclusion over this contradiction between the reasons for introduction of the principle of subsidiarity and its actual operationalization.
[160] Chalmers et al (n 83) 368.
[161] Maduro *Vodafone* (n 126) para. 38 and CJEU, C-127/95 *Norbrook Laboratories Ltd v Ministry of Agriculture, Fisheries and Food*, Judgment 2 April 1998, ECLI:EU:C:1998:151, paras. 89-90; nevertheless, this approach and lenient review standards date even further back see for instance also CJEU *Schröder* (n 83) para. 14, 'the observation suffices that these measures do not appear on issue as obviously inappropriate for the realization of the desired objective'; on this see Dehousse (n 129) 130; and Weber (n 69) 266.
[162] CJEU *Estonia* (n 139) para. 29; and CJEU *Phillip Morris* (n 136) para. 166. For more on this see Öberg (n 79) 250ff.
[163] Maduro *Vodafone* (n 126) para. 37; but also Davies (n 69) 81-82; and Kumm (n 77) 522-524.

> "Consequently, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue."[164]

By omitting the autonomy and interest of the member states when this sort of federal proportionality test is being applied the CJEU is essentially taking away the strength of this principle and instrument. This sort of application of proportionality compromises the very logic and purpose of this principle and therefore the standard of review should definitely be revised especially if one takes into consideration that such a light touch review could not be seen even in some of the federal states in Europe.[165] By considering the autonomy of member states within the proportionality principle the CJEU would essentially recognize the obvious link with subsidiarity and thus perceive it through the prism of federal proportionality and create a coherent framework and doctrine which is lacking.[166] The concern for the member states autonomy and rather stricter scrutiny was expressed by AG Maduro in *Vodafone*,[167] however this remained just a lonely attempt as the CJEU did not take it into consideration even in the very same case.

There are generally two counter-arguments which try to discard this sort of reasoning over a stricter proportionality review in the realm of division and exercise of competences. The first one invokes the policy considerations in which the CJEU would necessarily have to enter if it takes proportionality and its third prong more seriously. This would include a large scale of judicial activism, the argument goes, and that is not what the CJEU should do.[168] However, entering policy considerations is something that courts, especially constitutional courts, regularly do also when applying the proportionality test by balancing against individual interests.[169] Actually, this is done regularly by the CJEU when proportionality is used in regard to national measures limiting fundamental freedoms.[170]

The second argument is the one forwarded by Craig who argues that in cases in which a non-compliance with subsidiarity and proportionality was claimed by the parties the stricter scrutiny of proportionality, even within a single framework with subsidiarity, would not have influenced the outcome of the specific cases.[171] This sort of argument misses the larger picture which is not solely related to the actual outcome but much more to the fact whether subsidiarity and proportionality are taken seriously. At stake here is the credibility and legitimacy of the CJEU also from the viewpoint of national courts, including the national constitutional courts. Furthermore, the change in its approach not only will reduce the amount of criticism that CJEU

[164] CJEU *Estonia* (n 139) para. 29; and CJEU *Phillip Morris* (n 136) para. 166.
[165] See for instance Panara (n 63) 309-314; Kramer and di Toritto (n 15); Moens and Trone (n 76) 168.
[166] Schütze (n 73) 532-533; Davies (n 69) 83; and Kumm (n 77) 518ff; however, cf Craig (n 123) 82-84.
[167] Maduro *Vodafone* (n 126) paras. 37 and 44.
[168] Panara (n 63) 308, he overstates this worry by labeling this review as a 'full unlimited scrutiny'.
[169] Schütze (n 73) 534-535; and Kumm (n 77) 518, 528; and Moens and Trone (n 76) 180.
[170] Davies (n 69) 82-83; and Dehousse (n 129) 131.
[171] Craig (n 123) 80-81.

is faced with and by it gain the much-needed trust of the national courts but it will also influence the legislative process clarifying the requirements under these principles.[172]

3.3.1.3 The lack of a single framework of subsidiarity and proportionality

An additional line of criticism builds upon the previous two and involves another aspect of the CJEU's approach or better said the lack of a coherent approach. Namely, the Court throughout its case law refuses to design a single coherent framework in which it would recognize that the exercise of non-exclusive competences in the EU needs to be reviewed by bringing together both subsidiarity and proportionality.[173] As argued by Kumm, both principles should be placed in a single jurisdictional test where subsidiarity determines the legitimate purpose and its scope, while proportionality determines the way this purpose is being achieved through EU legislative acts. In this sense the three prongs of legitimate purpose, necessity and balancing with this single jurisdictional test are being split between subsidiarity and proportionality. The third prong would also involve the balancing of the legitimate purpose with the autonomy of the member states. Applied in this manner this single framework would adequately reflect the spirit and proper meaning of Article 5 TEU and the understanding of subsidiarity in terms of federal proportionality.[174]

3.3.2 Structural bias

The approach taken by the CJEU on the division and exercise of competences has invited strong criticism and has led to questioning of its legitimacy and credibility in this regard. However, its legitimacy is being also put under doubt as result of the structural bias that is being recognized by some authors.[175] This sort of doubts and questioning necessarily compromise the perception on the CJEU as a neutral arbiter which is able to strike a fair balance between the EU and member states interests. The structural bias in this sense has two dimensions: federal and jurisdictional.

The first dimension is related to the fact that the CJEU is an EU institution and as such an institution of a central authority. The CJEU has for a long time been at the forefront of the integration process through its doctrines and principles developed throughout the years which created the perception that it tends to favor EU's interests and expand competences.[176] Even though this type of bias is present in every federal structure such an initial perception and assumption of a lack of neutrality of federal constitutional courts is often rebutted through the constitutional structure and framework which provides clear legal basis for this neutrality.[177] Equally important is the case law of these federal courts which demonstrates that the respective courts are seriously engaged with achieving a fair balance.[178] Accordingly, this draws the

[172] Challmers et al (n 83) 365-366.
[173] Kumm (n 77) 518-524; and Schütze (n 73) 532-533.
[174] Kumm (n 77) 518-524.
[175] Davies (n 69) 63-65; and Kumm (n 77) 525-526.
[176] Dehousse (n 129) 72-75; Guastaferro (n 159) 321ff; Kumm (n 77) 63; Öberg (n 79) 253; and Höreth (n 134) 46.
[177] Vinx (n 1) 74; Davies (n 69) 63; and Höreth (n 134) 47.
[178] Davies (n 69) 63.

attention back to the actual approach of the CJEU, which has already been discussed, and to another question connected to the jurisdictional bias of the CJEU.

Following this line of thought, the second dimension of the structural bias depicts the jurisdictional limitations for the CJEU when deciding on issues of competence. Namely, when balancing between the EU and member states interests in competence disputes the CJEU is not competent to interpret or invalidate national constitutions or laws but only EU law. In contrast, the federal constitutional and supreme courts in federal states under the banner of supremacy of the federal constitutions and federal laws have the power to consider and review state constitutions and laws and thus invalidate them. Taking this into consideration the CJEU is placed between legal and policy requirements which are rather unbalanced.[179] This is mainly the result of the confined jurisdiction of the CJEU over national law and the high level of deference to EU's policy consideration which are often contested by member states and to which different meanings are given. Although the instruments of the political safeguards of subsidiarity and proportionality provide the CJEU with substantial information concerning these two principles from the dialogue between member state and EU institutions in the pre-legislative and legislative procedure, the CJEU has not changed its approach. Therefore, this represents another weakness of the judicial safeguard of the division and exercise of competences in the EU which is coupled with its 'light touch' scrutiny of subsidiarity and proportionality. This weakness is even greater if one realizes that in the EU the 'federal stakes' are much higher in comparison to full-fledged federal states.[180] The importance of member states autonomy in the EU is way more emphasized and deeply entrenched in comparison to any other federal structure.[181]

All these arguments on the structural bias just build up on the previous ones related to CJEU's approach and reveal that in essence there have been no substantial adjustments or changes of this approach and that the judicial safeguards for division and exercise of competences in the EU not only do not create proper solutions, but, on the contrary, remain a cause of concern. This is also due to the fact that there are no EU internal incentives for the CJEU to change its approach. There are no reasons stemming from the treaties or their reforms, including the Lisbon Treaty, for a change in the judicial review of competence issues. Bearing in mind that the treaty reforms, despite the statements made during the European Convention,[182] have not really directly addressed the CJEU case law on the matter of division and exercise of competences then one cannot recognize any incentives for the Court to change or adjust its case law.[183] The reforms have mainly focused on the procedural aspects of the safeguard and not really at the root cause for certain concerns among the member states. Therefore, the CJEU has not really altered the general line of reasoning and argumentation present in its case law. It could be observed that the relevant case law and doctrines date back even to the pre-Lisbon

[179] Davies (n 69) 64-66; and Dawson (n 79) 28-29.
[180] Kumm (n 77) 526-527; and Dawson (n 79) 28-29, where he claims that the actual contestation of the polity itself creates a situation in which the EU polity 'heightens the stakes'.
[181] Kumm (n 77) 518.
[182] Schütze (n 73) 531.
[183] Millet (n 24) 258; Dawson (n 79) 19; Höreth (n 134) 44 he links this problem to the so-called "lack of countervailing powers"; and Kumm (n 77) 527-528.

period. As a result of this it becomes very logical that national courts, above all constitutional courts, would need to step in to prevent unwarranted centralization.

4 Constitutional courts and the *ultra vires* review of EU acts

The resolution of competence disputes and jurisdictional conflict has been one of the key reasons for the proliferation of constitutional review and constitutional courts as institutions.[184] While the resolution of horizontal competence conflicts has been a necessary component of constitutional courts' powers, the prominence of the resolution of vertical conflicts has not been less important.[185] Actually, there are certain authors who argue in support of a strong relationship between federalism and the development and spread of constitutional review as well as constitutional courts.[186] Such claims have actually been rather concretely manifested in two federations, Austria and Belgium, where the structural and functional elements of federalism such as division of competences represented a driving force in establishing or strengthening the constitutional courts.[187] In the words of the renowned scholar of constitutional review, Cappelletti, "[h]istorically, constitutionalism and federalism have been the two major political forces leading to, and providing the intellectual justifications for, judicial review of legislation."[188] In this sense, not only has constitutional review been propelled by federalism but also the process of establishment of constitutional courts. In the words of Hans Kelsen "[c]onstitutional adjudication attains its greatest importance, however, in a federal state."[189] Constitutional courts in this sense represent an objective authority and at the same time a forum in which disputes of an arguably political nature could be presented and dealt as questions of law.[190] This is the case because in every federal structure one of the most important political disputes which are subject to constitutional review are the disputes over jurisdictional boundaries of different levels of authority, that is, the issue of distribution and exercise of competences. Therefore, it could be easily claimed that constitutional courts have played a very important role in federal, but also quasi-federal, states. Even though

[184] Vinx (n 1) 72; and de Visser (n 1) 55-57, 155-163.
[185] Christoph Bezemek, 'A Kelsenian Model of Constitutional Adjudication: The Austrian Constitutional Court' (2012) 67 Zeitschrift für Öffentliches Recht 115, 117; de Visser (n 1)163-168; Ginsburg (n 2) 85-86; Martin Shapiro, 'The Success of Judicial Review and Democracy' in Martin Shapiro and Alec Stone Sweet (eds) *On Law, Politics and Judicialization* (OUP 2002) 153, his goes from federalism to division of powers hypothesis explaining the spread of constitutional review.
[186] Stone Sweet (n 63) 7-8; Cristoph Möllers, The Three Branches: A Comparative Model of Separation of Powers (OUP 2013) 131, "indeed constitutional courts came into existence only because a federal constitutional system had been established." See further references in (n 2).
[187] On Belgium see for instance de Visser (n 1) 56-57. On Austria see for instance Manfred Stelzer, *The Constitution of Austria: A Contextual Analysis* (Bloomsbury Publishing 2011) 199: "the initial idea of establishing a Constitutional Court, which is equipped with the power to review laws: to settle disputes between the Federation and the states over the allocation of competences"; Bezemek (n 185) 122, Austria federalism and constitutional courts Ginsburg (n 2) 85. The same argument could be applied also to some so-called regional states, on Spain see for instance Alec Stone Sweet, *Governing with Judges* (OUP 2002) 107: "the Tribunal has become a kind of permanently constituted forum for the clarification and revision of the constitutional rules governing Spanish federalism", on both Italy and Spain see de Visser (n 2) 158-163.
[188] Cappelletti (n 37) 169. See also Ginsburg (n 2) 88, he claims that "constitutional review has evolved from an institution primarily directed at enforcing structural provisions of constitutions, such as federalism, to a close identification with rights and democracy."
[189] Vinx (n 1) 72.
[190] Vinx (n 1) 73; and de Visser (n 1) 56.

constitutional courts are established as federal institutions, the federal bias has been avoided, to a certain extent, by placing them outside of the traditional institutional structure and separation of powers scheme within the states. Additionally, the emphasis has been put on the fact that their mandate and legitimacy are stemming directly from the constitution therefore acquiring certain aura of neutrality.[191] Accordingly it should not come as a surprise that all federal and quasi-federal or regionalized states in the EU do have a constitutional court which is assigned with this specific task.[192] Thus, on a national level, constitutional courts have been perceived to be the most suitable institutions to have this type of federal mandate determining jurisdictional boundaries between different levels of government.

Nevertheless, with the substantial influence of the EU and integration process the questions arises what kind of role constitutional courts should have in a neo-federal structure such as the EU. Therefore it should be determined what kind of place and influence they have in determining the answer to the 'decisive question' of whether there is a single institution according to law which will make a final decision on matters related to claims of EU acts being *ultra vires*.[193] Competence disputes have crucial importance and are embodied within the nature and function of national constitutional courts in the EU, therefore it is argued here that under certain conditions constitutional courts should be entitled to exercise the reverse or external federal mandate through the *ultra vires* review of EU acts when these jeopardize the distribution of competences in the EU and lead to an unchecked expansion of EU competences.

Taking this into consideration, there are two important issues that need to be resolved in order for one to convincingly argue for the *ultra vires* review of EU acts by the constitutional courts of the member states. The first issue is related to the reasons behind this type of review of EU acts which are not related to the purely national and ideational arguments revolving around sovereignty and democracy, but are rather more functional and neutral, thus do not carry any type of bias either related to the EU or member states. The second issue is related to the actual design, elements and conditions under which a reverse or external federal mandate is to be exercised by the constitutional courts through their *ultra vires* review. This review is being conceived here in a manner which does not jeopardize the overall unity of EU law and the institutional balance in the EU and it complies with normative values of constitutional pluralism, however, at the same time preserves jurisdictional boundaries as authorized by national constitutions. The remainder of this section will address both of these issues.

4.1 Reasons behind the external federal mandate – placing the *ultra vires* review in the frames of constitutional pluralism

The most important grounds upon which certain constitutional courts have argued for their EU federal mandate to be exercised in the form of the *ultra vires* review have been related to

[191] de Visser (n 1) 55; and Martin Shapiro, 'The Success of Judicial Review' in Sally J. Kenny, William M. Reisinger and John C. Reitz (eds) *Constitutional Dialogues in Comparative Perspective* (Palgrave Macmillan 1999) 211.
[192] On the increased number of cases in Spain and Italy on issues of division of competences see de Visser (n 1) 162-163.
[193] Theodor Schilling, 'The Autonomy of the Community Legal Order: An Analysis of Possible Foundations' (1996) 37 Harvard International Law Journal 389, 404; and Weiler and Halter (n 28) 332ff.

sovereignty and democracy as ideational reasons and justifications.[194] More precisely, the argument goes that through the limited transfer of sovereign powers to the EU, the member states have not relinquished their right to exclusively determine the jurisdictional boundaries, meaning that the so-called *Kompetenz-Kompetenz* has not been transferred to the EU.[195] Therefore as 'Masters of the Treaties'[196] and based on the principle of democracy,[197] member states, also through their highest courts, retain the last say on competence conflicts in the EU.[198] This sort of state centered approach, which has often been subject to criticism, under circumstances of a multilevel structure such as the EU and existing plurality of constitutional orders is doubtfully conducive to the coherence and unity of EU law as it pushes for the supremacy of the national constitutions as opposed to the supremacy of EU law. Under such circumstances the chances of irresolvable conflicts are greater as both propositions are mutually exclusive. As matter of fact the claim for a judicial *Kompetenz-Kompetenz* by, above all, the FCC and some of the other constitutional courts is essentially once again introducing the strict hierarchical relationship between different legal orders[199] which is neither compatible with or fitting the actual reality in the EU and its neo-federal character, nor with the normative assumption of how it is supposed to be according to constitutional pluralism. In this way, by insisting on having the last word the national judicial supremacy and '*Diktat*' is essentially replacing the European one leaving no room for flexible legal solutions which are being required especially on competence disputes.[200] Therefore this sort of *Kompetenz-Kompetenz* should be left open and undecided because determining who has the final say on competence issues in the EU proves to be rigid and inflexible as opposed to balancing of competences by

[194] Herve Bribosia, 'Report on Belgium' in Anne-Marie Slaughter, Alec Stone Sweet and Joseph H. H. Weiler (eds) *The European Court and National Courts – Doctrine and Jurisprudence: Legal Change in Its Social Context* (Hart 1998) 21-28; Jens Plotner, 'Report on France' in Anne-Marie Slaughter, Alec Stone Sweet and Joseph H. H. Weiler (eds) *The European Court and National Courts – Doctrine and Jurisprudence: Legal Change in Its Social Context* (Hart 1998) 50-54; Juliane Kokott, 'Report on Germany' in Anne-Marie Slaughter, Alec Stone Sweet and Joseph H. H. Weiler (eds) *The European Court and National Courts – Doctrine and Jurisprudence: Legal Change in Its Social Context* (Hart 1998) 78; Marta Cartabia, 'The Italian Constitutional Court and the Relationship Between the Italian Legal System and the European Union' in Anne-Marie Slaughter, Alec Stone Sweet and Joseph H. H. Weiler (eds) *The European Court and National Courts – Doctrine and Jurisprudence: Legal Change in Its Social Context* (Hart 1998) 142-144; Monica Claes and Bruno de Witte, 'Report on the Netherlands' in Anne-Marie Slaughter, Alec Stone Sweet and Joseph H. H. Weiler (eds) *The European Court and National Courts – Doctrine and Jurisprudence: Legal Change in Its Social Context* (Hart 1998) 187-188; Paul Craig, 'Report on the United Kingdom' in Anne-Marie Slaughter, Alec Stone Sweet and Joseph H. H. Weiler (eds) *The European Court and National Courts – Doctrine and Jurisprudence: Legal Change in Its Social Context* (Hart 1998) 206-209. On reasons related to public international law see Schiling (n 193) 389ff; but cf. Weiler and Haltern (n 28) 331ff.

[195] Joseph H. H. Weiler, 'Prologue' in Anne-Marie Slaughter, Alec Stone Sweet and Joseph H. H. Weiler (eds) *The European Court and National Courts – Doctrine and Jurisprudence: Legal Change in Its Social Context* (Hart 1998) vii; on the specific context of the FCC see Bethge (n 30) 138-139 and for a paradigmatic case law on this doctrine see the case law of the FCC starting with FCC *Maastricht* (n 31). Ironically, however, it could be argued that constitutional courts actually do not have *Kompetenz-Kompetenz* regardless of the fact that they are the guardians of the constitutions. On this see Sauer (n 41) 166-168.

[196] FCC *Maastricht* (n 31) para. 55.

[197] On the principle of democracy in this context see Rudolf Streinz, 'Art. 23: Verwirklichung der Europäischen Union, Beteiligung des Bundestages und des Bundesrates'in Michael Sachs (ed) *Grundgesetz* (8th edition C.H. BECK 2018) paras. 24-26; and more elaborately see Simon (n 197) 164ff.

[198] This is termed as judicial *Kompetenz-Kompetenz* by Weiler and Haltern (n 28) 342ff.

[199] Mattias Klatt, 'Balancing Competences: How Institutional Cosmopolitanism Can Manage Jurisdictional Conflicts' (2015) 4 Global Constitutionalism 217-218; and Bribosia (n 194) 22.

[200] Weiler and Halter (n 28) 364.

deciding which approach is more apt for solving possible jurisdictional conflicts in the EU.[201] In this sense putting aside the *Kompetenz-Kompetenz* justification does not mean an outright denial of the justification of *ultra vires* review based on the principle of democracy and sovereignty but rather excludes a hierarchical perception which calls for the existence of a 'last word' power placed in the member states and their institutions, above all constitutional courts.[202] Therefore the ideational reasons for *ultra vires* review revolving around democracy and sovereignty should be reconfigured to the new reality. More important place should be given to other rather neutral and functional arguments which would justify constitutional courts intervention in determining jurisdictional boundaries. This, however, would not exclude the invocation of the very same constitutional and legal bases for the employment of the external federal mandate of constitutional courts.[203]

Contrary to the ideational reasons behind the *ultra vires* review which are very much imbued with traditional notions rooted in the nation-state there are functional reasons for such a review of EU acts by national constitutional courts. Actually, these functional reasons are rather neutral and different from the ideational reasons and they are not based on traditional notions which are often used and instrumentalized for either member state or EU supremacy or exclusivity, thus introducing a bias which is damaging the constructive division of competences. The functional reasons actually reduce the pressure created by the traditional ideational reasons behind the *ultra vires* review by constitutional courts which strongly gravitate toward the national constitutional supremacy and (re)introduce hierarchical ordering of the legal orders in the EU. There are three general functional reasons behind the involvement of constitutional courts in matters of distribution and exercise of competences in the EU which do not imply a hierarchical relation between the national and EU legal order.

The first reason has to do with the fact that the EU represents a neo-federal structure which as a result of coupling federalism with constitutional pluralism necessitates the redefinition of the established principles of federalism, above all the principle of supremacy of the federal legal order and the federal judiciary.[204] However, not only is neo-federalism requiring this redefinition but also there are doubts whether federalism is truly compatible with this type of hierarchy.[205] Namely, Hans Kelsen has clearly argued that the promotion of any type of subordination to federal law and the precedence of this law over the legal order of the constituent members is in itself paradoxical and not compatible with the idea of a federal state.[206] According to Kelsen it is the federal mandate of a constitutional court to ensure that:

> "[a] legal act of the union that steps over the boundary drawn for it by the constitution of the whole, and that penetrates into the sphere of competences of the constituent state,

[201] Miguel Poiares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in Neil Walker (ed) *Sovereignty in Transition* (Hart 2003) 522; and Klatt (n 199) 207, 218.
[202] Also, the same logic could apply in an opposite situation in which the last word is placed with the CJEU.
[203] For instance, in Germany Art 23 GG and the Act of Approval for more on this see Streinz (n 197) paras. 98-99 or for the Czech Republic Article 10a of the Constitution.
[204] See for instance Fabbrini (n 24).
[205] Elazar (n 14) 42, "Federalism, however, is anti-hierarchical".
[206] Vinx (n 1) 74.

has, from a legal point of view, no more right to exist than the legal act of a constituent state that interferes with the competence of the union."[207]

The best proof that these arguments which Kelsen had made are not only of theoretical value is the fact that in Belgium there is no primacy clause in the constitution which would regulate precedence of federal law over the law of federal units.[208]

Taking all this into consideration, if legal hierarchy of this sort is not in line with the idea of a federal state but has in essence resulted, perhaps most importantly, from the aspiration to further the centralizing tendencies in federations under the banner of uniformity and coherence, then this should resonate even stronger in a neo-federal structure such as the EU. If it is quite common for a federation to determine the division of competences as a federal rule under which both the competences of the central and constitutive authorities are being determined, in the EU as neo-federal structure this is not the case.[209] The EU treaties do not determine the member states' exclusive competences, but they are rather confined solely to EU competences. This was the direct result of the strong will of member states during the Convention to avoid this federal logic and impression.[210] Furthermore, this type of regulation of competences finds its reflection also on the CJEU powers which do not include the review of national constitutions and laws because of which it cannot claim the judicial *Kompetenz-Kompetenz*. Consequently, if the EU does not incorporate all the elements of a federal structure then there is no logic for it to include judicial supremacy and safeguards which are foreseen in federal states. Therefore, whenever the safeguards of this neo-federal structure are not fulfilling their function of respecting and preserving the heterarchy between legal orders and neutralize strong centralizing tendencies then this further creates a situation in which there is a strong case and justification for intervention by the national constitutional courts. The design, character and nature of the safeguarding instruments in the EU actually lead to the other two reasons for *ultra vires* review.

The second functional reason behind the *ultra vires* review is related to a specific design of some of the safeguards against compromising the division and exercise of powers in favor of the EU. Namely, the EWM which was introduced with the Lisbon Treaty is actually an instrument which is not present in any of the other federal systems. Therefore, the EU as a neo-federal structure has an actual safeguard of member state competences which is completely new and redefines the position and possibility of direct intervention of national institutions in the EU legislative processes without them being part of an EU institution, such as the Council of the EU. In this way national parliaments are conducting an *ex ante* political safeguard and a form of legislative control or review limited to proportionality and subsidiarity. Taking this into consideration there is a case for making the argument that the intervention of constitutional courts in light of the nature of their constitutional review, which nature is much more legislative than judicial, in the *ex post* judicial safeguard of proportionality and subsidiarity in the EU

[207] Vinx (n 1) 75.
[208] de Visser (n 1) 56; and Tusseau (n 24) 40.
[209] Beaud (n 37) 27.
[210] European Convention, Final report of Working Group V, CONV 375/1/02 REV 1. See also Claes and De Witte (n 122) 75.

would be justifiable in this sense. In both *ex ante* and *ex post* review of EU legislative acts one would have national institutions involved, both parliaments and constitutional courts, which are acting as positive and negative legislators respectively. Therefore, under specific conditions where the CJEU does not provide an adequate safeguard for the division and exercise of competences in the EU, then the constitutional courts would have every right to step in with their external federal mandate. The latter would thus compensate for the evident weakness of the EWM but also weaknesses of the judicial safeguard. In this sense, the actual design of the competence safeguards is closely related to their actual functioning in practice which is even more important.

The third functional reason supporting the external federal mandate is related to the fact how the safeguards of division and exercise of competences actually work in practice and whether they are able to neutralize strong centralizing tendencies in a (neo)federal order of competences such as the EU. As a matter of fact, if there is a new reading of federalism in the EU context, then also the principles and mechanisms relating to the focal functional dimension of the federal principle, the division and exercise of powers, need to be reconceptualized. They need to be reassessed from this new perspective and additional mechanisms need to be introduced in order for traditional federal principles of conferral of powers, subsidiarity and proportionality to be protected and their safeguards to be adjusted to the needs of a neo-federal structure.

In this sense, if the CJEU has been the EU institution which fashioned a constitutional framework for a federal-type structure in Europe then it is reasonable to claim that there should be an external judicial check to this sort of development which has resulted also from a certain disregard towards EU law by the member state institutions at the outset of the creation of the fundamental legal principles which represent the basic legal features of the EU as a (neo)federal structure.[211] Furthermore, by sticking to a functional definition of competences the CJEU has essentially weakened the principle of conferral of powers and has expanded the scope of also the EU competences.[212] Therefore, the need for an external judicial check comes as a direct result of not only the inconsistency of the strict hierarchical relationship of the legal orders with (neo)federalism existing in the EU, but also as result of the weaknesses of the existing safeguards of the EU which have not been able to truly cope with the centralizing tendencies and the introduction of hierarchy through the back door.[213]

As discussed above, both the political and judicial safeguards of the division of competences have manifested serious flaws. The introduction of the EWM was meant to remedy the federal bias issue on the side of the CJEU manifesting centralizing tendencies, however it has not been

[211] Doctrines such direct effect, primacy and etc. are among the key ones. This is best expressed by Eric Stein through its frequently cited account of the role of CJEU in the integration process claiming: "Tucked away in the fairyland Duchy of Luxembourg and blessed, until recently, with benign neglect by the powers that be and the mass media, the Court of Justice of the European Communities has fashioned a constitutional framework for a federal-type structure in Europe." Eric Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 American Journal of International Law 1.
[212] Kirchner (n 135) 301.
[213] Adam Cygan, 'National Parliaments as Guardians of the Principle of Subsidiarity' in Adam Lazowski and Steven Blockmans (eds) *Research Handbook on EU Institutional Law* (Edward Elgar 2016) 127.

perceived to be successful. On the one hand, the limited scope and insufficiency of the EWM have not been able to prevent the negative effects of the narrow understanding and application of proportionality but even more so when it comes to subsidiarity. As a matter of fact, the latter instead of softening and diluting hierarchy in the EU is actually further entrenching a 'hidden hierarchy' also in the area of exercise of non-exclusive competences.[214] The CJEU, on the other hand, is supposed to remedy the weaknesses of the EWM but instead has continued to extensively interpret EU competences thus, by not completely respecting the principles of conferral, proportionality and subsidiarity, further manifested the contested federal bias. The intervention of the national constitutional courts under specific circumstances would play a constructive role following the logic of 'emergency brake'[215] or 'nuclear option'[216] which serves best when not used. However, this latter point should not be misinterpreted that such a break should not be used under any circumstances, as it is often claimed lately[217] because this runs against the very reason of existence of an emergency brake. If it is not supposed to be ever used, then there is no reason for it to be there as it would only represent a useless waste of time and resources giving a false impression of its purpose. On the contrary, if the emergency break is frequently used then this would be an obvious signal that something is totally out of line and the system is not working as it should, thus requiring major reforms. Therefore, the logic behind the emergency brake in this context, as in every other, is that it should be used very cautiously and in emergency situations only. This logic on its own determines that any abuse should necessarily lead to raising a question of responsibility for such a (mis)conduct. In this sense, if the extensive reading of competences through a judge made law by the CJEU has been the root cause of member states concerns in this regard, then it is up to their judicial instances to place a check on the CJEU.[218] As Bogdandy and Bast put it "[a] restraint on judge-made law requires other instruments than a modification of the order of competences."[219] This other instrument should be the external federal mandate of national constitutional courts.

Determining the reasons and justification for an external federal mandate of national constitutional courts is just creating the bases for such an intervention. Nevertheless, it does not answer the question of the design, actual application and limits of the *ultra vires* review. Before turning to these aspects of *ultra vires* review one needs to first take a look at the origin and development of this review of EU acts from the viewpoint of the case-law of respective constitutional courts.

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[214] Elazar (n 14) 42; Kirchner (n 135) 300; and Jancic (n 79) 5.
[215] Voßkuhle (n 157) 195-196; and for the German version see Andreas Voßkuhle, 'Der europäische Verfassungsgerichtsverbund' (2009) *TransState Working Papers No. 106* 20.
[216] Weiler and Haltern (n 28) 362; Matthias Goldmann, 'Constitutional Pluralism as Mutually Assured Discretion: The Court of Justice, the German Federal Constitutional Court, and the ECB' (2016) 26 Maastricht Journal of European and Comparative Law 119.
[217] Mattias Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' (2014) 10 European Constitutional Law Review 263, 291; and Franz C. Mayer, 'Rebels Without a Cause? A Critical Analysis of the German Constitutional Court's OMT Reference' (2014) 15 German Law Journal 111, 139.
[218] See for instance Schilling (n 193) 408; and Dieter Grimm, Europa, ja – Aber Welches? Zur Verfassung der europäischen Demokratie (C. H. Beck 2016) 214-216. There are even structural reasons which favor the judicial dialogue instead of other forms of constitutional dialogue. For more on this see Dawson (n 79) 18-19.
[219] von Bogdandy and Bast (n 51) 277.

4.2 The origins and evolution of the *ultra vires* review

The *ultra vires* review of EU acts and measures, or as it is referred here, the external federal mandate of national constitutional courts, has once again been established and developed by the FCC, similarly to other doctrines on the relationship between the legal orders in the EU. Even though this sort of review was announced or alluded in earlier decisions,[220] the FCC has unequivocally established its powers to directly review EU acts in this light in its *Maastricht* decision. In the *Maastricht* decision the FCC referred quite clearly to the so-called ideational reasons for declaring this type of review power, such as the state origin of EU powers and the need for democratic legitimization by national institutions, reasoning that through the conferral of sovereign powers the member states have not also conferred the *Kompetenz-Kompetenz* to the EU and that the member states remain the 'Masters of the Treaties'.[221] This is the direct result of the fact that even though EU law is autonomous, it still does not have an original source and origin.[222] This means that there is no possibility of expanding limited EU competences beyond the ones which are conferred by avoiding and circumventing the treaty amendment procedure through judicial interpretations of EU law and its principles.[223] Therefore, such an EU act which is not covered by the competences conferred upon the EU will constitute an *"ausbrechenden Rechtsakt"* and German institutions are under a constitutional duty not to apply such an act.[224] Accordingly, whether the EU institutions have acted within limited competences conferred to them will be reviewed by the FCC. The constitutional and legal basis for such a review is directly related to the so-called European integration agenda which is set with the Act of Approval (*Zustimmungsgesetz*) in accordance with Article 23(1) GG and which review could also be activated through Article 38(1) GG protecting the right to vote.[225] Even though the *ultra vires* review has been further developed with subsequent decisions the legal basis for the review has remained the same.

The *Lisbon* decision has confirmed the reasoning on *ultra vires* review laid down in the *Maastricht* decision, however, it framed it within the newly established principle of openness towards European law.[226] This has led to certain clarifications and qualifications over the possible exercise of the *ultra vires* review. Namely, the *ultra vires* review is to be considered only under exceptional circumstance as an *ultima ratio* in case a legal protection cannot be

[220] FCC, *Kloppenburg* 2 BvR 687/85, order of 8 April 1987. For more on this see Monica Claes, *The National Court's Mandate in the European Constitution* (Hart 2006) 603; Claes and de Witte (n 122) 70; Simon (n 197) 235-236; Mehrdad Payandeh, 'Constitutional Review of EU Law after Honeywell: Contextualizing the Relationship between the German Constitutional Court and the EU Court of Justice' (2011) 48 Common Market Law Review 14; and Sauer (n 41) 183-184.
[221] FCC *Maastricht* (n 31) para. 112. Also on this see Bethge (n 30) 156-158.
[222] Simon (n 197) 241; and Claes (n 220) 606.
[223] Payandeh (n 220) 14; and Claes and de Witte (n 122) 70-71.
[224] FCC, *Maastricht* (n 31) para. 106. See also Simon (n 197) 236, Payandeh (n 220) 15 and de Visser (n 1) 413-414.
[225] FCC, *Maastricht* (n 31) para. 58ff. See Streinz (n 197) paras. 96-102, Michael Sachs, 'Grundrechtsschutz der Staatlichkeit und der Staatsstrukturprinzipien?' in Michael Sachs and Helmut Siekmann (eds), Der grundrechtsgeprägte Verfassungsstaat, Festschrift für Klaus Stern zum 80. Geburtstag, (Duncker & Humblot 2012).
[226] FCC *Lisbon* (n 31) para. 225 ff. See also on this Bethge (n 30) 158-159.

obtained at EU level.[227] Further, taking into consideration the viability as well as the unity and coherence of EU legal order the FCC declared a monopoly on the exercise of *ultra vires* review.[228] Lastly, even though the *Maastricht* decision mentioned the principle of subsidiarity in this context the FCC in the *Lisbon* decision established the link between the *ultra vires* review and the respect for the principle of subsidiarity.[229]

There has been one issue argued by some authors which is related to a terminological difference between the *Lisbon* and *Maastricht* decision of the FCC. More specifically it has been argued that the introduction of a new wording through '*ultra vires*' in the *Lisbon* decision instead of the earlier '*ausbrechenden Rechtsakt*'[230] has led not only to a change in wording but also in character. In this sense, on the basis of one paragraph of the *Lisbon* decision, the *ultra vires* review is to be perceived as a doctrine of public international law argued by some authors.[231] While it is a fact that generally *ultra vires* review originates from public international law, it is also a fact that in this particular relationship between the legal orders of the member states and the EU this review is based also on the specificities of EU law. Therefore, the *ultra vires* review is justified and practiced with regard to these specificities and treatment of EU law through which this law is deliniated from public international law.[232] Accordingly, one has to bear in mind that the clarifications presented in the *Lisbon* decision are directly the result of the respect for the newly created principle of openness towards European law.[233] As a matter of fact, perceiving the EU legal order as different from the international legal order carries even stronger arguments for justifying the *ultra vires* review.[234] In this sense, the notion of the last word under relationships between the legal orders, which the FCC itself declares to represent "contexts of political order which are not structured according to strict hierarchy",[235] is even more emphasized through the prism of public international law than through the constitutional or the prism of constitutional pluralism. Furthermore, the use of the phrase of "*ultra vires* review" adds to the universalisability, which is called upon by Maduro and Kumm in the context of constitutional pluralism, in order for this sort of review to be understood and applied universally by all constitutional courts in the EU thus engaging in a compatible and comparable practice of review.[236]

Nevertheless, just as in the *Maastricht* decision, and also in the *Lisbon* decision, *ultra vires* review was discussed on a more abstract level, confirming the power to conduct an *ultra vires*

[227] Streinz (n 197) para. 101. The FCC seems to have expressed doubts about the existing safeguards in the EU, see FCC *Lisbon* (n 31) para. 251, 305; and Cygan (n 213) 127.
[228] Streinz (n 197) para. 100, he argues that this was a *preater legem* move by the FCC.
[229] FCC *Lisbon* (n 31) para. 240-241. See also Payandeh (n 220) 15-16; and Simon (n 197) 236.
[230] FCC *Maastricht* (n 31) para. 106 and FCC *Lisbon* (n 31) para. 240. See Simon (n 197) 237.
[231] FCC *Lisbon* (n 31) para. 340; and Simon (n 197) 237.
[232] Christoph Möllers, 'Constitutional *Ultra Vires* Review of European Acts Only Under Exceptional Circumstances; Decision of 6 July 2010, 2 BvR 2661/06, *Honeywell*' (2011) 7 European Constitutional Law Review 161, 165-166.
[233] FCC *Lisbon* (n 31) para. 225.
[234] On this see the debate between Schilling (n 193); and Weiler and Haltern (n 28).
[235] FCC *Lisbon* (n 31) para. 340.
[236] Maduro (n 201) 529-530; and Mattias Kumm, 'Who is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship Between the German Federal Constitutional Court and the European Court of Justice' (1999) 36 Common Law Market Review 351, 381. For a comment on these two positions Klemen Jaklic, *Constitutional Pluralism in the EU* (OUP 2014) 105, 123 and 132.

review as a matter of principle without further clarification on how it would be applied or the basis of the elements of this review, especially in light of the principle of openness towards European law. Against this background and development, the *Honeywell* decision seems to be the most important in this regard. Namely, in this decision in which the FCC was called to review the strongly disputed *Mangold* decision of the CJEU[237] and whether it was *ultra vires*, the FCC actually provided the elements and design of the *ultra vires* review for the first time.[238]

The FCC in *Honeywell* determined that in order to respect the principle of openness towards European law, as well as the primacy and unity of EU law,[239] *ultra vires* review needs to be qualified.[240] In this sense the *ultra vires* review will be exercised reservedly and only in cases where the breach of competences is sufficiently qualified. The latter would occur only when the EU act is, first, manifestly in violation of competences, that is specifically violating the principle of conferral, and, second, the challenged EU act is highly significant in the structure of competences between the member states and the Union.[241] However the FCC would exercise the *ultra vires* review only after it sends the issue through a preliminary reference to the CJEU so it could consider the validity and interpretation of the EU act at question unless it has not already done so.[242] In assessing the preliminary ruling in such a case the FCC is supposed to show certain level of deference over the methodology employed by the CJEU as well as the result by according it with a right to tolerance of error.[243] Nevertheless, such deference is not to blur the line which needs to be drawn between the interpretation and development of EU law by the CJEU and unwarranted expansion of EU competences which essentially amounts to a *de facto* amendment of the Treaties.[244]

The FCC applied all these elements of the *ultra vires* review on the *Mangold* decision however it decided that it was not an *ultra vires* act.[245] Even though the review was applied the standards that it includes remained unclear.[246] While the FCC had several opportunities to tackle this issue[247] it took it six years to once again address the standards within the elements of the *ultra vires* review.

In the preliminary reference sent to the CJEU on the OMT the FCC clearly confirmed the *Honeywell* test and discussed it in the context of the OMT decision of the ECB.[248] The FCC

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[237] CJEU, Case C-144/04 *Werner Mangold v Rüdiger Helm*, Judgment of 22 November 2005, ECLI:EU:C:2005:709.
[238] FCC, *Honeywell* decision, 2 BvR 2661/06 of 6 July 2010, paras. 39-42; and Payandeh (n 220) 21.
[239] FCC, *Honeywell* (n 238) paras. 57-58.
[240] More on this see Simon (n 197) 238-240; Möllers (n 232) 165-166; Payandeh (n 220) 16, 21ff; Tristan Barczak, *BVerfGG: Mitarbeiterkommentar zum Bundesverfassungsgerichtsgesetz* (De Gruyter 2017) 46-47, paras. 75-76; and Bethge (n 30) 159-160.
[241] FCC, *Honeywell* (n 238) para. 61.
[242] FCC, *Honeywell* (n 238) para. 60.
[243] FCC, *Honeywell* (n 238) para. 66.
[244] FCC, *Honeywell* (n 238) para. 62; also Möllers (n 232) 16; and Malte Beyer-Katzenberger, 'Judicial Activism and Judicial Restraint at the Bundesverfassungsgericht: Was the *Mangold* Judgement of the European Court of Justice an *Ultra Vires* Act' (2011) 11 ERA Forum 517, 519.
[245] FCC *Honeywell* (n 238) paras. 75-78.
[246] Möllers (n 232) 165.
[247] FCC, *Data Retention* decision 1BvR 256/08, 1BvR 263/08, 1 BvR 586/08 of 2 March 2010; and FCC, *Alcan* 2 BvR 1210/98, order of 17 February 2000.
[248] FCC, *OMT* referral, 2 BvR 2728/13 of 14 January 2014, para. 23.

clearly hinted that the OMT might be declared *ultra vires* unless the CJEU interprets this decision in line with what has been argued by the FCC.[249] Therefore the reference has not introduced any further clarifications of the standards in the *ultra vires* review.[250] However, this was different with the *OMT decision* of the FCC which was delivered after the CJEU preliminary ruling.

The FCC in its *OMT decision*[251] has introduced further clarifications to the standards of the *ultra vires* review, however, with a strong critical undertone for the CJEU and the shortcomings of its judicial safeguard for the division and exercise of competences in the EU.[252] After confirming the basic elements and standards of the *ultra vires* review as established in the *Honeywell* decision, the FCC went on to provide some additional clarification which gives it more leeway in exercising the *ultra vires* review thus by lowering the thresholds of its standards making this review less restrained compared to *Honeywell*.

First, a manifest exceeding of competences of an EU act is in the case when "the competence cannot be justified under any legal standpoint".[253] Additionally, determining this standard or element is not conditioned by an existence of a consensus even among the academia, politics or media. This means that "[a]n exceeding of competences can be "manifest" even if it results from a careful and meticulously reasoned interpretation".[254]

Second, an EU act would represent a structurally significant shift to the detriment of the member states "if the exceeding of competences carries considerable weight for the principle of democracy and the sovereignty of the people" which means that "it is capable of altering fundamental competences of the European Union" and that in essence it would require a treaty amendment or the employment of an evolutionary clause.[255]

Third, and perhaps most important, the FCC seriously reduced the leeway provided with the CJEU's right of tolerance of error by providing certain limits. Namely, in applying its methods of interpretation,[256] which are based on common constitutional traditions of the member states, the CJEU should not manifestly ignore "the traditional European methods of interpretation, or more broadly, the general legal principles that are common to the legal system of the Member States"[257] and thus act "in a way that is objectively arbitrary".[258] This third point is actually a lot clearer and gains force when the FCC directly criticizes the type and standard of review employed by the CJEU in safeguarding the division of competences between the EU and the

[249] FCC *OMT* referral (n 248) para. 99.
[250] But cf. Jürgen Bast, 'Don't Act Beyond Your Powers: The Perils and Pitfalls of the German Constitutional Court's *Ultra Vires* Review' (2014) 15 German Law Journal 167, 178-179.
[251] FCC, *OMT decision,* 2 BvR 2728/13, judgment of the Second Senate of 21 June 2016.
[252] Daniel Sarmiento, 'An Instruction Manual to Stop a Judicial Rebellion (before it is too late, of course)' *Verfassungsblog* 2 February 2017, available at: http://verfassungsblog.de/an-instruction-manual-to-stop-a-judicial-rebellion-before-it-is-too-late-of-course/ last visited 15.10.2018.
[253] FCC *OMT decision* (n 251) para. 149.
[254] FCC *OMT decision* (n 251) para. 150.
[255] FCC *OMT decision* (n 251) para. 151.
[256] On the importance of the choice of interpretation methods see Grimm (n 218) 210: "In der Methodenwahl fallen Vorentscheidungen für das Ergebnis."
[257] FCC *OMT decision* (n 251) para. 160; but cf. FCC, *Honeywell* (n 238) para. 66.
[258] FCC *OMT decision* (n 251) para. 161; but cf. FCC, *Honeywell* (n 238) para. 66.

member states and particularly the respect of the principle of conferral[259] as a principle of EU law which also incorporates constitutional principles from the member states.[260] In this sense, the FCC criticizing the weak judicial review argues that "[i]f fundamental interests of the Member States are affected, as is generally the case when dealing with competences in a union (*Verbandskompetenz*), judicial review may not simply accept the asserted positions of organs of the European Union without verification."[261]

The most recent instance in which *ultra vires* review has been referred to by the FCC is its second preliminary reference to the CJEU which has confirmed the elements and standards of this type of review established in the previous case law. Namely, the FCC's preliminary reference on the Quantitative Easing or more precisely the Public Sector Purchase Program of the ECB and the issue of the relationship between the monetary and economic or fiscal policy in the EU has entrenched the link between *Honeywell* and *OMT decision* on the *ultra vires* review without adding any new elements.[262] While the FCC has changed the tone of the reference compared to the *OMT referral*, which tone is now friendlier and reserved, the reasoning closely resembles the *OMT decision* thus leaving any potential clarifications to be made upon receiving the ruling from the CJEU.[263] In this sense, for the time being the state of FCC's *ultra vires* review remains the same as from the *OMT decision*.

4.3 The scope of *ultra vires* review and its relationship with other forms of review

While the standards and elements of the *ultra vires* review have been clarified to a certain extent in the case-law of the FCC some aspects of this review remain unanswered. These aspects relate directly to the scope of the review and the status of *ultra vires* review in relation to the so-called identity review and fundamental rights review.

The FCC in its case-law has argued for the limited scope of the *ultra vires* review especially in light of specific constitutional principles but also with consideration for the interests of the EU legal order. Namely, this could be argued by looking at the elements of this type of review which at the same time represent procedural and substantive limits. The former relate to the declared monopoly of the FCC to conduct *ultra vires* review and only after the CJEU has an opportunity through the preliminary reference sent by the FCC itself to decide on the interpretation and validity of the EU act at stake, unless the CJEU has already dealt with the same issue before. The latter, substantive, limits are related to the manifest breach of competences and the significant structural shift threshold. However, there is another dimension of the scope of the *ultra vires* review which needs to be resolved in order to better position and evaluate it in the framework of constitutional pluralism. From the case law of the FCC it is not clear whether the *ultra vires* review is aimed at respect of the principle of conferral only, which would be a narrow understanding of this review, or if it also includes the review of the respect

[259] FCC *OMT decision* (n 251) paras. 181-189.
[260] FCC *OMT decision* (n 251) paras. 184-185, referring to FCC, *Lisbon* (n 31) para. 234.
[261] FCC *OMT decision* (n 251) para. 186.
[262] FCC *Quantitative Easing referral*, 2 BvR 859/15 et al order of 18 July 2017 paras 52-53.
[263] Matthias Goldmann, Summer of Love: Karlsruhe the QE Case to Luxembourg, *Verfassungsblog* 16 August 2017 available at: http://verfassungsblog.de/summer-of-love-karlsruhe-refers-the-qe-case-to-luxembourg/ last visited 15.10.2018; and FCC *Quantitative Easing referral* (n 262) para. 53

for the principle of subsidiarity thus having an *ultra vires* review in a broader sense.[264] Hence, the question that is raised here is whether the FCC confines the *ultra vires* review to the principle of conferral or if it assumes that this review also includes the principle of subsidiarity taking into consideration the relationship between the two principles. This issue is not a purely theoretical one as it does reveal the understanding of the FCC on how competences are conceived in the EU and accordingly the manner in which an *ultra vires* review should be employed.

In both the *Maastricht* and *Lisbon* decisions the FCC has declared the link between the issue of review and safeguard of the division and exercise of competence in the EU with the principle of subsidiarity. In *Maastricht* this was done indirectly by defining subsidiarity and its relation to the principle of conferral by stating that "if a power to act is conferred by Treaty, the principle of subsidiarity shall be used to determine whether and how the European Community may act"[265] and that "[t]he principle of subsidiarity, the observance of which is to be monitored by the European Court of Justice, is intended to protect the national identity of the member states and to preserve their powers."[266]

In the *Lisbon* decision of the FCC the link between the *ultra vires* review and subsidiarity was directly established[267] through reasoning that:

> "the Federal Constitutional Court examines whether legal instruments of the European institutions and bodies keep within the boundaries of the sovereign powers accorded to them by way of conferral whilst adhering to the principle of subsidiarity under Community and Union law."[268]

Against this background, when it came to clarify this abstract reasoning of the FCC on *ultra vires* suddenly there was no mentioning of subsidiarity in this context. More specifically in *Honeywell* and *OMT* decision in the respective paragraphs which discuss the *ultra vires* review it is only the principle of conferral which is being in the spotlight. This raises questions also regarding the constitutional bases for the *ultra vires* review, Article 23 (1) GG, because this constitutional provision might be interpreted in a way that infers that the respect of subsidiarity should be included in the *ultra vires* review of EU acts as well.[269]

One explanation for the reason behind this approach of the FCC is that in none of the issues raised in these cases the matter of respect of the principle of subsidiarity was at stake. They were all related to competences which were exercised by the EU institutions but were claimed not to have been transferred upon the EU. However, this explanation omits one feature. If we take into consideration that the FCC in these decisions went into generally clarifying the elements and standards of *ultra vires* review before actually applying it, then ignoring the principle of subsidiarity becomes a notable point. As a matter of fact, in the *OMT decision* the

[264] On the original distinction between narrow and broad understanding of *ultra vires* see Mayer (n 134) 24-25.
[265] FCC *Maastricht* (n 31) para. 160.
[266] FCC *Maastricht* (n 31) para. 161, referring to the European Council in Edinburgh (1992).
[267] Payandeh (n 220) 15.
[268] FCC *Lisbon* (n 31) para. 240, [references omitted].
[269] Streinz (n 197) paras. 37-40.

FCC openly criticized the CJEU for its light touch scrutiny of the division of competences, i.e. the conferral of powers principle, but it did not invoke the actual exercise of non-exclusive conferred powers and thus subsidiarity, which is a major concern.[270] Therefore, it is not clear whether this means a departure from a broader understanding of *ultra vires* review which was obviously adopted in earlier cases, *Maastricht* and *Lisbon*, and replacing it with an *ultra vires* review in a narrower sense. Nevertheless, there are serious indications that this is taking place. First, it was the introduction of the second substantive standard of 'significant structural shift' which excludes a review of a more nuanced and subtle way of acquiring powers by the EU institutions. Second, has to do with the way the FCC views competences generally and their division between member states and the EU. It is argued that the FCC views the EU competences more as ones based on fields rather than as competences based on aims, that is functional competences.[271] As result it might be possible to claim that this sort of understanding of competences could have influenced the FCC to put aside the review of the respect of subsidiarity through the framework of *ultra vires* review and instead focus solely on the principle of conferral of powers.

Another issue which has occupied the interest of scholars is the standing of *ultra vires* review in relation to the identity review and the fundamental rights review. Simon argues, for instance, that the difference between these three types of review is exaggerated and that they should be approached together due to their structural commonalities.[272] Against such views there are strong arguments for the independent existence of *ultra vires* which in the end were also confirmed by the FCC. When it comes to the differences between the *ultra vires* review and fundamental rights issues[273] they are generally related to the reasons why a certain EU act or measure is challenged and the consequences which result from these two types of review. First, in the case of *ultra vires* review the reason for one act to be declared *ultra vires* is a certain defect which is related to the breach of competences. In the case of an infringement of fundamental rights this could occur because of procedural reasons on the side of the level of protection exercised by the CJEU or simply because of a diverging understanding and different definitions of certain fundamental rights.[274] Thus, in such a case it does not imply a defect of an EU act. Second, declaring an EU act *ultra vires* necessarily includes its reproach and it applies to all member states since the defect is related to the division of competences between all member states and the EU. With fundamental rights this is not the case as the level of protection and definition of fundamental rights could have certain specificities in separate

[270] FCC *OMT decision* (n 251) paras. 181-189.
[271] Bast (n 250) 175; and Dieter Grimm, Die große Karlsruher Verschiebung, Frankfurter Allgemeine Zeitung, 8 September 2010, available at: http://www.faz.net/aktuell/politik/staat-und-recht/kompetenzverteilung-die-grosse-karlsruher-verschiebung-11039797.html last visited 15.10.2018.
[272] Simon (n 197) 120.
[273] On the similarities in the evolution of fundamental rights and *ultra vires* review see Payandeh (n 220) 29-30; and see also Möllers (n 232) 165. On the intertwinement of these two types of review see Barczak (n 240) 49, para. 80.
[274] Franz C. Mayer, The European Constitution and the Courts, in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (Hart 2006) 413.

member states because of which the infringement of fundamental rights could be sort of localized.[275]

The later point is also applicable to the relationship between *ultra vires* and identity review, as the elements of the constitutional identity could be country specific, however there is another point which is more important. This point is related to what the subject of the review is. In this regard the FCC has directly given the answer itself and put the scholarly discussion to rest for the time being. In the *OMT decision* the FCC clearly distinguished *ultra vires* from identity review, even though they are based on same constitutional grounds, by stating that while the former is reviewing the EU acts from a jurisdictional aspect the latter is focused on the substantive aspect.[276] Under the identity review it is not relevant whether the impugned act is in breach of the transferred competences or not. What matters in such a case is whether there is a breach of the fundamental constitutional principles which form part of the constitutional identity. Even objections to this sort of separation between the two types of review based on the claim that every EU act which breaches the constitutional identity is essentially an act *ultra vires* cannot be accepted as this is oversimplifying the situation in which the issue of constitutional identity could be raised. The third preliminary reference of the ICC on the *Taricco* issue exemplifies this point quite strongly. In this reference the claim for a potential breach of constitutional identity was not related to a claim of an *ultra vires* EU act.

4.4 *Ultra vires* review in a comparative perspective

The *ultra vires* review of EU acts has been first established and developed by the FCC. However, doubts are being raised whether this is an exclusively German doctrine which is not really accepted and applied by other constitutional courts in the EU. The FCC itself has stated that its stances and doctrines on EU law including the *ultra vires* review are shared by many national constitutional courts in the EU.[277] This has been subject of scholarly debates. For instance Claes, in her recent work, has voiced skepticism and serious criticism of this attempt of the FCC to present its doctrines as widely accepted by the other constitutional courts thus representing a pattern of a common European approach.[278] Accordingly the *ultra vires* review of EU acts remains more or less to be a purely German legal phenomenon to which some of the other national constitutional courts in the EU have referred but have never developed any clear theory of competence review.[279] Nevertheless, the arguments presented by Claes are not focused solely on *ultra vires* review but usually are presented together and somehow interchangeably with the ones on identity review. This actually reveals the gaps in the argumentation, the same thing for which the FCC is being criticized.

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[275] Mayer (n 274) 413.

[276] FCC *OMT decision* (n 251) para. 153. See also a critical note on this Merhrdad Payandeh, 'The OMT Judgement of the German Federal Constitutional Court: Repositioning the Court within the European Constitutional Architecture' (2017) 13 European Constitutional Law Review 400, 414.

[277] See for instance FCC *OMT* referral (n 248) para. 30; and FCC *OMT decision* (n 251) para. 142.

[278] Claes and de Witte (n 122) 71-73; and Monica Claes, 'The Validity and Primacy of EU Law and the 'Cooperative Relationship' between National Constitutional Courts and the Court of Justice of the European Union' (2016) 26 Maastricht Journal of European and Comparative Law 157-163. Also see Bast (n 250) 167; and Wendel (n 217) 263.

[279] Claes and de Witte (n 122) 71.

Perhaps it was as the result of this and other similar negative accounts that the FCC in its *OMT decision* has extended the list of decision of national constitutional courts and supreme courts which share its views on the limited precedence of EU law in light of limited conferred competences and constitutional identity.[280] Still, one should look into some of these decision in order to analyze the extent to which *ultra vires* review is accepted by other constitutional courts in Europe because the FCC makes this account on a broader basis relating to the relativity of the primacy or precedence of EU law.

While Claes basically claims that not even the clearest instances of acceptance of the *ultra vires* review developed by the FCC are convincing enough, the case law of several constitutional courts proves these claims wrong. The CCC, PCT and HCC have unequivocally stated that they would have the power to conduct such a review while Belgium, as one of the most Europhile courts, and Spain have clearly alluded such a possibility.[281] In the case of the CCC, this constitutional court was the first to actually directly apply the *ultra vires* review and declare a decision of the CJEU *ultra vires* and inapplicable in the Czech Republic. Regardless of the actual effects of this decision which were very much confined to this specific member state it cannot be denied that it is obvious that the CCC accepts the power to conduct *ultra vires* review. The latter was clearly declared in both of its *Lisbon* decisions.[282] Namely, in the *Lisbon Treaty II* decision by referring to the decision *Lisbon Treaty I* the CCC declared that:

> "the Constitutional Court of the Czech Republic too will (may) although in view of the foregoing principles – function as an ultima ratio and may review whether any act by Union bodies exceeded the powers that the Czech Republic transferred to the European Union pursuant to Article 10a of the Constitution. However, the Constitutional Court assumes that such a situation can occur only in quite exceptional cases; these could include, in particular, abandoning the identity of values and, as already cited, exceeding of the scope of conferred competences."[283]

In adopting the *ultra vires* review the CCC closely followed FCC's footsteps by restraining this type of review to exceptional cases in which there are no legal remedies at the EU level. However, there is no mentioning of an obligation for sending a preliminary reference to the CJEU before exercising an *ultra vires* review. In its *Holubec* decision,[284] in which this review was applied, the *ultra vires* review was neither further developed nor were any elements of restraint in its application presented, since the CJEU had already ruled on the same matter and this decision was subject to review and declared as *ultra vires* by the CCC.

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[280] FCC, *OMT decision* (n 251) para. 142.
[281] On Belgium see the recent decision BCC, No. 62/2016, 28 April 2016 and case note by Philippe Gerard and Willem Verrijdt, 'Belgian Constitutional Court Adopts National Identity Discourse: Belgian Constitutional Court No. 62/2016, 28 April 2016' (2017) 13 European Constitutional Law Review 182. They openly claim that the BCC directly follows the general reasoning of the FCC's *Lisbon* and *Honeywell* decisions, regardless of the constitutional differences between the two countries. However, the BCC has only announced the limits of EU law supremacy without going into further details and without any explanation on the elements or standards of review.
[282] CCC *Lisbon Treaty I*, Pl. ÚS 19/08, decision of 26 November 2008, para. 120; and CCC, *Lisbon Treaty II*, Pl. ÚS 29/09, decision of 3 November 2009, para. 150.
[283] CCC *Lisbon Treaty I* (n 282) para. 120
[284] CCC *Holubec*, Pl. US 5/12, plenary judgment of 31 Jan. 2012.

Also, contrary to Claes' arguments,[285] the PCT has also endorsed *ultra vires* review. It is true that the PCT has not elaborated in detail on this type of review or completely taken over all the elements and standards from the FCC, but nevertheless it has assumed its power to conduct such a review. This was already inferred in the *Accession Treaty*[286] and *Lisbon Treaty* decision by clearly claiming Poland's *Kompetenz-Kompetenz* thus paving the way for *ultra vires* review.[287] The *EU Regulation* decision confirmed the power of the PCT to conduct *ultra vires* review as a subsidiary review which would be exercised only as an ultima ratio.[288]

The HCC has declared to have the power to conduct *ultra vires* review even before the enactment of the new constitution – Fundamental Law – in 2011 with its *Lisbon Treaty* decision.[289] However, its further dealings with *ultra vires* review are rather puzzling. Namely in the criticized[290] recent decision from 2016 the HCC puts forward a very confusing reasoning on this matter, but also on other issues related to the relationship of national constitutional law with EU law. Even though it accepts the *ultra vires* review the HCC departs in many aspects from the one developed by the FCC. First, the *ultra vires* review according to the HCC's approach consists of two types of review, sovereignty and identity review.[291] Second, the *ultra vires* review does not foresee a review of EU acts including decisions of the CJEU.[292] Thirdly, there is nothing on sending a preliminary reference to the CJEU prior to the conduct of *ultra vires* review.[293] Actually the HCC has demonstrated an odd understanding of constitutional dialogue in the EU mainly conceived in an indirect form by referring to the case law of other constitutional and supreme courts thus unsuccessfully imitating the FCC.[294] Be this as it may,

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[285] Claes and de Witte (n 122) 72; and Claes (n 278) 159.

[286] PCT, *Accession Treaty*, K 18/04, judgment of 11 May 2005. De Visser claims that *ultra vires* was established as early as this decision, see de Visser (n 1) 413; see also Sven Höbel, 'Polish and German Constitutional Jurisprudence on Matters of European Community Law: A Comparison of the Constitutional Courts' Approaches' (2007) 3 Croatian Yearbook of European Law and Policy 515, 525; and Aleksandra Kustra, 'Reading the Tea Leaves: The Polish Constitutional Tribunal and the Preliminary Ruling Procedure' (2015) 16 German Law Journal 1543, 1550. However, if you see point 15 of the judgment it is not clear the general statement that the Member States retain the power to determine whether EU acts have enacted outside of competence bounds does not mean a power for the Constitutional Tribunal.

[287] PCT, *Lisbon Treaty*, K 32/09, decision of 24 November 2010 para. III.2.3. More on this see Allan F. Tatham, *Central European Constitutional Courts in the Face of EU Membership: The Influence of the German Model in Hungary and Poland*, (Martinus Nijhof 2013) 248-249.

[288] PCT, *EU Regulation*, SK 45/09, judgment of 16 November 2011, paras. III 2.6. and III.2.7.

[289] Tatham (n 287) 181, 190, 202, 278; but cf Leonard F. M. Besselink, Monica Claes, Sejla Imamovic and Jan Herman Reestman, *National Constitutional Avenues for Further European Integration*, (2014) European Parliament's Committees on Legal Affairs and on Constitutional Affairs 226-227, available at: http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493046/IPOL-JURI_ET(2014)493046_EN.pdf last visited 15.10.2018.

[290] See the concurring opinions of HCC, Decision 22/2016. (XII. 5.) AB on the Interpretation of Article E) (2) of the Fundamental Law, decision of 30 November 2016. Gabor Halmai, 'The Hungarian Constitutional Court and Constitutional Identity' (Verfassungsblog 18 January 2017) available at: http://verfassungsblog.de/the-hungarian-constitutional-court-and-constitutional-identity/ last visited 15.10.2018; and Gabor Halmai, 'National(ist) Constitutional Identity?: Hungary's Road to Abuse' (2017) EUI Department of Law Research Paper No. 2017/08 available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2962969 last visited 15.10.2018.

[291] HCC *Decision 22/2016* (n 288) para. 54.

[292] HCC *Decision 22/2016* (n 288) para. 56; but cf. para. 101 of the concurring opinion of Istvan Stumpf.

[293] HCC *Decision 22/2016* (n 288) para. 101 of the concurring opinion of Istvan Stumpf.

[294] HCC *Decision 22/2016* (n 288) para. 33ff. The HCC has basically referred to the same decisions as the FCC in its OMT decision with further analysis of some of them however the conclusion and analogies drawn are not really reflecting the actual reality and meaning of these decisions.

once again it is obvious that another constitutional court in the EU has embraced the power to control the division and exercise of the competences in the EU.[295]

Lastly, when it comes to the SCT the situation is the least clear when it comes to *ultra vires* review. The SCT has stated in its *Constitutional Treaty* decision that there are constitutional limits on the exercise of EU competences which were conferred by the member states.[296] While it could be easily inferred from this stance that the SCT reserves a power for itself to review this, nevertheless the SCT has never made this explicit or developed it any further.[297]

As it could be observed there are several national constitutional courts in the EU which have already adopted the *ultra vires* review therefore this type of review cannot be claimed to be a purely German legal phenomenon.[298] It is true that the FCC, as in several other aspects of the relationship between national constitutional law and EU law, is at the forefront of the establishment and development of legal doctrines which have been later adopted by other constitutional and supreme courts and *ultra vires* review is just another example. While certain constitutional courts still need to define the elements and standards of the adopted type of review it is very much expected that some of the other constitutional courts will join this group in the not so distant future. As a matter of fact, there is another group of constitutional courts which have already set constitutional limits to European integration following a similar logic and reasoning without declaring their power to review the division and exercise of competences in the EU.[299]

Beyond any type of categorization or classification, the very fact that the *ultra vires* review is not adopted explicitly by some of the other constitutional courts in Europe as part of their review powers regarding EU law does not deny the arguments why this review is normatively

[295] Cf Besselink et al (n 289) 157.

[296] SCT, DCT 1/2004, statement of 13 December 2004, "the powers the exercise of which is transferred to the European Union could not, without a breach of the Treaty itself, be used as grounds for the European rulemaking the content of which would contrary to the fundamental values, principles, or rights of our Constitution", cited in Ricardo Alonso Garcia, 'The Spanish Constitution and the European Constitution: The Script for a Virtual Collision and Other Observations on the Principle of Primacy' (2005) 6 German Law Journal 1001, 1011-1012.

[297] Claes and De Witte (n 122) 71-72.

[298] Besselink et al (n 289) 24-25.

[299] Interestingly enough, even the AG Cruz Villalon accepts the critical mass of acceptance of this reasoning among national constitutional courts in the EU, see CJEU, Case C–62/14, *Gauweiler v. Deutcher Bundestag*, Opinion AG Cruz Villalon 14 January 2015, ECLI:EU:C:2015:7, para. 37. For more on this see Besselink et al (n 289) 24-25; on Lithuania see Besselink et al (n 289) 235 referring to LCC, Case No. 17/02-24/02-06/03-22/04, decision of 14 March, 2006, chapter III, para. 9.4.; on Latvia Besselink et al (n 289) 233, referring to Constitutional Court of Latvia, *Lisbon Treaty* Case, 2008-35-01, decision of 7 April 2009, para. 18.3.; on Portugal Besselink et al (n 289) 247-248 referring to Portuguese Constitutional Tribunal, No. 353/12, decision of 5 July 2012; but also Mads Andenas book 312-314; on Slovakia Besselink et al (n 289) 252; see also Ana Maria Guerra Martins and Miguel Prata Roque, 'Judicial Dialogue in a Multilevel Constitutional Network: The Role of the Portuguese Constitutional Court' in Mads Andenas and Duncan Fairgrieve (eds) *Courts and Comparative Law* (OUP 2016) 312-314; Mayer (n 274) 417: "Overall, there is a certain tendency in the jurisprudence of a not entirely insignificant number of Member States"; even on the UK see Craig (n 194) 207-209; see Bruno de Witte, 'Sovereignty and European Integration: the Weight of Legal Tradition' in Anne-Marie Slaughter, Alec Stone Sweet and Joseph H. H. Weiler (eds) *The European Court and National Courts – Doctrine and Jurisprudence: Legal Change in Its Social Context* (Hart 1998) 299-300; and Alec Stone Sweet, 'Constitutional Dialogues in the European Communities' in Anne-Marie Slaughter, Alec Stone Sweet and Joseph H. H. Weiler (eds) *The European Court and National Courts – Doctrine and Jurisprudence: Legal Change in Its Social Context* (Hart 1998) 322-323.

acceptable and even desirable under certain conditions when placed in the framework of constitutional pluralism and in light of the fact that the EU is not a full-fledged federation. In this sense whether the FCC is a 'leader of a pack' or not[300] does not have a great normative value.[301] Consequently, what needs to be looked at is under which conditions and in which form an *ultra vires* review should be exercised in order to optimally fit the reality of constitutional pluralism and EU law.

5 The compatibility of *ultra vires* review with EU law and constitutional pluralism

The key issue when discussing any type of decentralized review of EU law by national constitutional courts through establishing constitutional limits to EU law is the modality in which this sort of review is to be conducted. In this sense, the general task in designing this type of review in a (neo)federal structure, such as the EU, is in ensuring efficiency of the (neo)federal order while avoiding excessive centralization of regulatory power.[302] Accordingly, the greatest challenge is actually how to conceive an external federal mandate of constitutional courts, when it comes to review of the division and exercise of competences in the EU, which would not compromise the unity and coherence of EU law and thus the overall European integration but would still create incentives for the CJEU to adjust its reasoning and case-law to accommodate diversity by taking into consideration the autonomy of the member states.[303]

In this regard, the *ultra vires* review, particularly with the latest OMT episode in the relationship between the CJEU and the FCC,[304] has come to occupy an important part of the debate. This debate has revolved also around the issue of compatibility of *ultra vires* review by constitutional courts with both national constitutional law and EU law whereby certain authors have expressed their clear dismay over this sort of power of the FCC and national constitutional courts in general.[305] Nevertheless, as result of the multiple aspects that this debate has brought to the surface it is very important to confine the discussion here to the claims which argue for the (in)compatibility of *ultra vires* review with EU law, since going into national specificities of each and every member state would not shed light on the bigger picture in the relationship between the legal orders. The national constitutional aspects are undoubtedly very important in this regard to the extent that they provide the constitutional bases for the exercise

[300] Claes (n 278) 157.
[301] Cf. Wendel (n 217) 303-304. While his arguments might be convincing, it so only at first glance because it should be borne in mind that a shared tendency or even doctrine needs to be initiated by someone or somewhere. One should not forget that the Solange doctrine was not shared by other constitutional courts for a long time even though the ICC developed the *contralimiti* doctrine which resembles it, but no one denied its normative value.
[302] Groussot and Bogojevic (n 87) 234; Craig (n 123) 73; and Schütze (n 11) 247.
[303] Millet (n 24) 258.
[304] CJEU *Gauweiler* (n 111); FCC *OMT referal* (n 248); and FCC *OMT decision* (n 251).
[305] See for instance Mayer (n 217) 116-117; Heiko Sauer, 'Doubtful it Stood…: Competence and Power in European Monetary and Constitutional Law in the Aftermath of the CJEU's OMT Judgment' (2015) 16 German Law Journal 971, 983, 985; Wendel (n 217) 14; Zdenek Kühn, '*Ultra vires* Review and the Demise of Constitutional Pluralism: The Czecho-Slovak Pension Saga, and the Dangers of State Courts' Defiance of EU Law' (2016) 26 Maastricht Journal of European and Comparative Law 185, 194.

of this type of review of EU acts, however, not in light of the national procedural requirements of constitutional review or national constitutional standards. Therefore, while it is true that the compatibility of the *ultra vires* review with the national constitutional law is equally important,[306] the task here is to analyze the potential constructive role which the *ultra vires* review has and can possibly have in European integration.

Following this line of reasoning, the arguments which make the case for the constructive role of *ultra vires* review are related to different aspects of this review. The first aspect is related to the issue of having an accurate perception of the *ultra vires* review. In this sense it is to be put forward that the perception of *ultra vires* review as an external federal mandate of national constitutional courts is the one that best catches the essence of this review. The second tries to argue that certain doctrines such as *Kompetenz-Kompetenz* and the last word are misconceived as result of which the *ultra vires* review is argued to be incompatible with EU law and European legal integration. The shortcomings of these doctrines reveal that the whole debate about the judicial supremacy on the issue of distribution and exercise of competence in the EU is quite misplaced. The third aspect is to address the need for certain adjustments in the design and substantive and procedural standards of the *ultra vires* review which would limit it however without making it toothless and as such redundant. This would require adjusting the substantive and procedural restraints in order to optimally suit the European integration process and at the same time adequately reflect the constitutional pluralism in the EU.

5.1 *Ultra vires* review as an external federal mandate of national constitutional courts

The first step to argue for the constructive role of *ultra vires* is to create an adequate perception of *ultra vires* review based on the true reasons which support and justify it. Namely, the *ultra vires* review needs to be perceived as an external federal mandate of national constitutional courts in the EU which represents a confined form of decentralized review of EU law. Such a mandate is the direct result of two factors, structural and institutional. First, it is the neo-federal structure through which the EU is being identified and which does not allow the application of traditional federal doctrines, such as hierarchy of legal orders or exclusivity of the central authority in resolving competence disputes between them, in the context of the EU. These federal doctrines are in obvious contradiction with constitutional pluralism which presents the dominant descriptive and normative account of the relationship between legal orders.[307] Taking into consideration that the EU is not a full-fledged federation one cannot simply apply the same traditional federal doctrines and instruments in the EU.[308] In this sense the arguments put forward that this external federal mandate of national constitutional courts is not in compliance with the centralized judicial review in the EU, inter alia also of competences, as a typical feature of a federal polity,[309] accordingly also with EU law, are misplaced. There are exceptions to the centralized review by the CJEU and for good reasons even under EU law. As a matter of fact,

[306] A large part of the criticism on the FCC's *ultra vires* review in the OMT saga is related to the national constitutional aspect and objections. See for instance Sauer (n 41) 192.
[307] For more on constitutional pluralism see chapter 3.
[308] Schilling (n 193) 405; Millet (n 24) 267; Tusseau (n 24) 39-40; and Mayer and Wendel (n 23) 132.
[309] Bast (n 250) 171; and Mayer (n 217) 117.

the whole idea of a decentralized judicial review on competence issues is not so unimaginable even in federal states, as it is often presented.[310]

The second factor is related to the inherent link between constitutional review and constitutional courts and the review of the division and exercise of competences. This is the same logic which stands behind the jurisdiction of the CJEU to conduct one form of a judicial safeguard of the division and exercise of competence in the EU under its general mandate regulated with Article 19 TEU. However, as result of both the structural reasons related to the EU and the functional reasons behind the *ultra vires* review, the need for an external form of review by a national counterpart to the CJEU as seen in national constitutional courts is more than evident. It is exactly because of these reasons that the checks placed on EU law and CJEU which are designed and applied by national constitutional courts result from both the institutional position of the CJEU and national constitutional courts.[311] The review of the division and exercise of competences is an unavoidable part of the constitutional powers of national constitutional courts therefore as result of their institutional features these national institutions are best equipped and qualified to employ *ultra vires* review as an *ultima ratio* instrument when other legal remedies are not available in the EU. As a matter of fact, the claims that this review should be left to the political institutions somehow omits the fact that the CJEU as a motor of integration has been behind the expansion of EU competences, either with activism or active passivism.[312]

Such an understanding of these two factors closes the argumentative gap between the substantive limits of EU competences, as seen through fundamental rights and identity review, and the procedural or jurisdictional competence of the national constitutional courts to review EU law because the functional reasons behind the *ultra vires* review also reveal the structural specificities of the EU which necessitate this sort of external check.[313] This understanding and perception of the *ultra vires* review simply shies away from insisting on *Kompetenz-Kompetenz* and opens a possibility of perceiving the issue of competences as a matter of both national constitutional law and EU law.

5.2 The fallacy of the *Kompetenz-Kompetenz* and the last word doctrines

The national constitutional courts led by the FCC have put great emphasis on the so-called "ideational reasons" justifying their external federal mandate in the EU. All of these reasons are summarized through the German doctrine of *Kompetenz-Kompetenz* as applied to the EU context.[314] This context reveals that through the transfer or conferral of limited powers to the EU the member states have not transferred their power to decide on their own competences. This notion implies a hierarchical relationship of legal orders in the EU and thus assumes a last

[310] Schilling (n 193) 407; and Vinx (n 1) 74-75.
[311] Schilling (n 193) 408; and Grimm (n 218) 214, 215. Grimm adds another reason which he refers to as "Der unpolitische Entscheidungsmodus" and claims that: "Weitreichende Entscheidungen für die Mitgliedstaaten fallen so auf administrativen und judikativen Wegen in einem unpolitischen Modus."
[312] Weiler and Haltern (n 28) 361.
[313] On this gap see Payandeh (n 220) 23.
[314] Schilling (n 193) 406; Kokott (n 194) 92ff; and Payandeh (n 276) 416: „Conceptually, the Court overloads its review functions with foundational principles such as democracy, human dignity and the rule of law and almost mythological notions of sovereignty and identity. "

word reserved for national institutions, particularly constitutional courts. However, this is a very simplified way of understanding the relationship and it contradicts the existing pluralism in the EU as it fails to cope with the actual reality. Nevertheless, this reality is equally not grasped by the claims that the CJEU has the exclusive competences, according to the treaties, to decide on the competence disputes in the EU.[315]

The division of competences in the EU, different from the situation in other federal structures, is not conducted by a federal rule which decides on the exclusive competences of both the EU and the member states.[316] In this way, the issue of competences is not related to the interpretation of a single federal rule, but on the contrary, it needs to incorporate both national and EU perspectives. On the other hand, the member states have transferred to the EU, but not relinquished, their powers and they have done this according to their own national constitutional requirements and authorization. Therefore, the issue of division and exercise of competences in the EU is to be perceived from both EU law and national constitutional perspective[317] and not only as a matter of doubling standards[318] by reviewing EU law against the German, or more broadly, member states' interpretation of EU law. After all, the exercise of competences not conferred on the EU, strictly speaking, cannot really be part of EU law. No wonder the FCC in its case law has continuously referred to EU law and its principles and doctrines besides the national constitutional principles in designing and applying the *ultra vires* review. Accordingly, the logic goes, if one is to perceive the matter of competences from both an EU law as well as a national constitutional perspective, then the matter of the last word should remain open and every insistence on it by any of the highest judicial instances would go against this reality.

The scholarly debate reveals great deal of complexity which needs to be further discussed, also some myths have to be dispelled in order to argue for the legitimacy of *ultra vires* review. One of the arguments which are being frequently emphasized is that while the member states still have the *Kompetenz-Kompetenz,* in the EU, it is the CJEU that has the judicial *Kompetenz-Kompetenz* and therefore has the exclusive competence to decide on competence disputes between the EU and member states.[319] This stance is proven by invoking specific EU Treaty

[315] Weiler and Haltern (n 28) 333ff.
[316] See for instance Grimm (n 271), "die Kompetenzverteilung in den europäischen Verträgen erheblich unklarer ist als in den Verfassungen von Bundesstaaten."
[317] See for instance FCC *Lisbon* (n 31) para. 234; FCC *OMT decision* (n 251) para. 185: "The principle of conferral is not only a principle of Union law but also incorporates constitutional principles from the Member States."
[318] Mayer (n 217) 117; Mayer (n 274) 412; and Bast (n 250) 171. Cf. Sauer (n 41) 193.
[319] On the issue of 'Jurisdiktionsvorrang' see Bethge (n 30) 145-146; Weiler and Haltern (n 28) 333ff; Sauer (n 41) 88, 180-181; and Sauer (n 305) 983.

provisions (specifically Article 19 TEU,[320] Article 263(4) TFEU[321] and Article 344 TFEU[322]) which arguably confirm this power of the CJEU to which member state have consented. These arguments, however, are not very convincing.

First, there is no strong case in making a distinction between the two types of *Kompetenz-Kompetenz*, especially in the EU. Such a distinction is faced with an obvious contradiction. Namely, the EU institutions with the support of the CJEU have continuously expanded their powers through the interpretation of the EU Treaties.[323] This has been enabled by the CJEU through exercising a light touch scrutiny on issues of division and exercises of conferred competences and by turning a blind eye on the matter.[324]As result, this approach has signaled the EU institutions that they actually have a sort of limited *Kompetenz-Kompetenz* unless they overstep the competence boundaries in a manifest manner which is particularly unlikely in a federal order in which you have so-called functional competences. Therefore, having a court which has a judicial *Kompetenz-Kompetenz* unavoidably leads to the expansion of powers and thus legislative *Kompetenz-Kompetenz*.[325] This tendency of expansion is particularly strengthened by the structural and federal bias present in the EU. [326] This makes the distinction between the two forms of *Kompetenz-Kompetenz* unsustainable. Under circumstances in which a clear and explicit federal rule on division of competences is lacking in EU Treaties, the problem that might occur by adopting this logic is even greater. Namely, the remedy for a situation in which the CJEU provides interpretations to treaty provisions that lead to the expansion of EU competences is only through a treaty amendment enacting a provision which would override this sort of interpretation. Bearing in mind that this is a hugely cumbersome process which everyone tries to avoid the CJEU could easily take advantage of this fact knowing this is the only way to overrule its decisions and further proceed with its approach towards the issue of competences.[327] This would be even more worrisome if one takes into

[320] Particularly Article 19 (1) TEU: "The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed." See more on this in Simon (n 197) 266; Sauer (n 41) 180-181; and Sauer (n 303) 983.
[321] Article 263 (4) TFEU: "It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers." See more on this in Simon (n 197) 266; Sauer (n 41) 180-181; and Sauer (n 305) 983.
[322] Article 344 TFEU: "Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein". On this see Mayer (n 217) 116-117.
[323] On a very vocal criticism of this approach of the CJEU see Roman Herzog and Lüder Gerken, 'Stop the European Court of Justice' EU Observer, 10 September 2008, available at: https://euobserver.com/opinion/26714 last visited 15.10.2018.
[324] See for instance Panara (n 63) 309-314; and Moens and Trone (n 76) 168.
[325] Grimm (n 218) 57, quoting Georg Jelinek, *Algemeine Staatslehre*, 7.Aufl., Berlin (1960), 495: "Souverän ist diejenige Einheit, die über die Aufteilung der Hocheitsrechte zwischen Zentralstaat und Gliedstaaten entscheidet Ausschlaggebend ist folglich die *Kompetenz-Kompetenz*. In einem föderalen System zieht sich die Souveränität in die *Kompetenz-Kompetenz* zurück. Souverän ist, wer die *Kompetenz-Kompetenz* hat."
[326] See Kokott (n 194) 96, basically arguing that if there is no effective national check on the usurpation of competences then the *Kompetenz-Kompetenz* would lie with the EU.
[327] Grimm (n 218) 214: "Der EuGH ist also wegen des Verfassungsrangs in Verbindung mit Umfang und Inhalt der Verträge viel starker gegenüber demokratischen Einflüssen immunisiert als nationale Gerichte." On the particular difficulties related to the possible override of judicial decisions by Member States see Höreth (n 134) 39-44; and Dawson (n 79) 17.

consideration that the EU treaties contain so many provision which regulate so many areas and issues which in member states are never part of constitutional but just of statutory regulation.[328]

On the other hand, while the FCC is claiming to have the last word as result of the *Kompetenz-Kompetenz* it has severely restricted the *ultra vires* review with the substantive and procedural requirements.[329] In this sense the FCC is somehow acknowledging that the EU and CJEU have *Kompetenz-Kompetenz* as long as they do not enact and confirm EU acts and measures which are manifestly breaching competences and which lead to a significant structural shift to the detriment of member states.[330] As a result, the whole debate over *Kompetenz-Kompetenz* seems to be displaced and its invocation has implications which are not compatible with the character and legal order of the EU. Therefore, the *Kompetenz-Kompetenz* as an ideational reason has been the main source of criticism of the *ultra vires* review. In this sense, regardless of the disagreement on the origins of EU competences the claim for exclusive jurisdiction either by the national constitutional courts or by the CJEU to decide on them is not based on strong arguments.

But is there really no rule which allows the CJEU to exclusively decide on competence disputes in the EU? This question brings us to the second argument which essentially gives a definite answer. To put it simply, if the CJEU has the exclusive power to rule on these types of disputes then it will have the power to decide on which are the exclusive competences of the member states as this could be put by the CJEU within the scope of Article 5 TEU.[331] This is very much against the whole idea of the division of competences in the EU. The CJEU cannot decide on legal disputes which are not purely a matter of EU law. The three provisions which are frequently invoked, Article 19 TEU, Article 263(2) TFEU and 344 TFEU, need to be interpreted taking into consideration the previous. In this sense, if the legal issue is not purely and solely a matter of EU law then the exclusivity of CJEU's jurisdiction under the treaties is not applicable as the latter refer to EU law only in the context of the CJEU's competences and jurisdiction.

Furthermore, the treaty provisions do not conceive that the CJEU itself could be out of EU competence bounds through its interpretations and decisions. Therefore, it could be convincingly argued that they can indeed be *ultra vires*.[332] While there is a strong presumption of abiding by EU law and CJEU's decisions, still, there is a need for the existence of certain constitutional limits. This argument is in accordance with, what Paulson and Schilling refer to as, the distinction between material and formal authorization to interpret law.[333] While the latter

[328] See on this in Grimm (n 271); and Grimm (n 218) 212-214.
[329] FCC *Honeywell* (n 238) para. 61ff; see also Möllers (n 232) 165-166; and Payandeh (n 220) 16, 21ff.
[330] Sauer (n 305) 985.
[331] Cf Bast (n 250) 172ff, invoking the *Consorzio* doctrine on rendering an act non-existent due to certain legal defects without the need for declaration of invalidity. See more in CJEU, Case 15/85, *Consorzio Cooperative d'Abruzzo v Comm'n*, Judgment of 26 February 1987, ECLI:EU:C:1987:111. Somehow Bast is forgetting that it is the CJEU that allows this decentralized review and that in such a case constitutional courts would conduct a review under CJEU's mandate, thus imposing standards which are already subject to serious criticism. In this sense the central authority of the CJEU would be confirmed.
[332] Kumm (n 236) 370.
[333] Stenley L. Paulson, 'Material and Formal Authorisation in Kelsen's Pure Theory' (1980) 39 The Cambridge Law Journal 172; and Schilling (n 193) 406-407.

provides the authorization to interpret EU law generally and without paying attention to the material constraints of the constitutional legal order(s) and limits placed on to the actors conducting it, the former is conditioning this authorization with this interpretation being 'right'.[334] By 'right' interpretation it is meant that there is a material authorization only if the conferral of powers is respected through respecting the constraints that it imposes. However, even if such a 'right' interpretation is missing, the act at stake will not be invalid as there are no other legal means to decide on its invalidity.[335]

Applying this reasoning to the EU context where there is a heterarchical relationship between the legal orders, even if the CJEU declares a certain EU act to be in respect of the principle of conferral of powers or subsidiarity, this does not mean that the national constitutional courts should obey such a decision which is based on an interpretation contrary to the restraints that these principles imply. However, such an EU act cannot be declared invalid since there are no other legal means strictly under EU law since this is the exclusive jurisdiction of the CJEU and it has already pronounced the validity of the act. But there are good reasons that this act could be declared inapplicable by a national constitutional court based on two grounds. First, the matter of competences is not a matter of only EU law thus the constraints stemming from the national constitutional orders should be taken into serious consideration. Second, as a result of the previous, an EU act could be declared inapplicable if the interpretation of EU competences and of an EU act by the CJEU is done in a manner which is erroneous (legal *errata*) in light of the true meaning of these principles under both EU law and/or national constitutional law. In this sense, there is a strong presumption of the CJEU having formal authorization and that its decisions on EU law are final due to interests of the EU legal order. But when it comes to competences, as in our case, this presumption could be rebutted. Once certain exceptional circumstances are present the binding nature of the decision is lost, and it has only persuasive authority.[336]

The logic behind these arguments thus shows that strict jurisdictional exclusivity, as represented by the 'last word' notion, is definitely not suitable for the reality of constitutional pluralism in the EU. No wonder certain scholars have reiterated that the issue of the last word should be best left unresolved.[337] Following this line of reasoning, one could strongly argue that *ultra vires* review conducted by national constitutional courts is also compatible with EU law and it essentially stems from the neo-federal structure and reasons related to its functional dimension. This type of external federal mandate of national constitutional courts reflects the uniqueness of the EU legal order and strengthens the values of constitutionalism in the EU.[338] In achieving this, the external federal mandate of national constitutional courts should

[334] Paulson (n 333) 188; and Schilling (n 193) 406-407. Ironically, this argument has been, willingly or not, completely omitted by Weiler and Haltern in their critical analysis of Schilling's article in Weiler and Haltern (n 28).
[335] For more on this see Paulson (n 333) 189, 192-193.
[336] Schilling (n 193) 407; and Mattias Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty' (2005) 11 European Law Journal 262, 300-301.
[337] Maduro (n 201) 522-523, Goldmann (n 216) 130 and Mayer and Wendel (n 23) 135 and Kumm (n 236) 384-385 referring also to Schmitt, *Verfassungslehre* 9th ed. (Duncker & Humblot 1993) 373: "Es gehört zum Wesen des Bundes, dass die Frage der Souveränität zwischen Bund und Gliedstaat immer offen bleibt".
[338] Maduro (n 201) 522-523.

definitely be exercised with restraint in order to preserve the legal order of the EU and at the same time abide by the respective constitutional obligations of the member states.

5.3 Restraining *ultra vires* review while maintaining its credibility and legitimacy

The restraint in applying the *ultra vires* review is of crucial importance as any extensive and arbitrary application would jeopardize the EU legal order and its unity and coherence placing the judicial instances on a track of, often legally complex, conflicts. Additionally, this would represent a breach of domestic constitutional provisions and principles favoring the European integration processes. However, determining the limits of the external federal mandate needs to be done and balanced in such a manner as not to diminish the credibility of this sort of review while serving its purpose of constructively checking the division and exercise of competences in the EU. In contrast, the restraint should not follow the ill placed interpretation behind the 'emergency brake' logic of not using the *ultra vires* review at all.[339] Therefore the overarching qualification of the *ultra vires* review should be based on serious considerations of the interests of the European integration and the EU legal order and practiced in the spirit of cooperation and the common interest in the respect of the rule of law and values of constitutionalism in the EU.

In this sense, the FCC has introduced substantive and procedural requirements on the *ultra vires* review in its case law. The *Honeywell* decision was even interpreted to go too far in its restraints making it hardly possible for any EU act to be in manifest breach of competences and create a structurally significant competence shift thus declared *ultra vires*.[340] However, the OMT episode of the FCC has partly denied this impression. On the one hand, there were realistic possibilities of declaring the ECB's decision *ultra vires* by the FCC. On the other hand, the FCC slightly lowered the threshold of the *ultra vires* review substantive standards.[341] Through this the FCC put the *ultra vires* review back into the spotlight revealing its shortcomings and weaknesses which need to be addressed, especially when it comes to the substantive restraints. In doing this the FCC was subject to mounting criticism, which is not always supported by well-founded arguments against it. This criticism has somehow either created or followed a trend of putting the FCC in a negative context while protecting the status of the CJEU.[342] These weaknesses could be analyzed from three different aspects. The first aspect is related to the clarity and determinacy of the substantive standards. The second analyzes the importance, or lack of it, of the respect of the principle of subsidiarity within the framework of the external federal mandate on the division and exercise of competences in the EU. The third one has to do with the procedural requirement to bring the matter before the CJEU through the preliminary reference procedure before declaring an EU act *ultra vires*.

[339] Wendel (n 217) 291; and Mayer (n 217) 139.
[340] Möllers (n 232) 166; FCC *Honeywell* (238) Landau dissent; and Grimm (n 271).
[341] FCC *OMT decision* (n 251) paras. 149-151. Also see Payandeh (n 276) 411.
[342] Wendel (n 217); Mayer (n 217); Mattias Kumm, 'Rebel Without a Good Cause: Karlsruhe's Misguided Attempt to Draw the CJEU into a Game of "Chicken" and What the CJEU Might do About It' (2014) 15 German Law Journal 203; and Payandeh (n 276) 410ff.

5.3.1 The issue of determinacy of substantive standards of ultra vires review

In establishing the substantive standards of the *ultra vires* review the FCC has not provided a detailed test or criteria. The standards of manifest breach and structurally significant shift, as established in *Honeywell*, are quite broad and in this sense they have remained rather unclear even after the *OMT decision* which has produced some clarifications.[343] It is interesting to note that the FCC in *Honeywell*, in determining whether a breach of the principle of conferral is sufficiently qualified, referred to the standards established by the CJEU in its *Fresh Marine* judgment.[344] However, in this judgment the CJEU invokes only the manifest breach standard but it is equally or even more unclear than the FCC's. On the other hand, invoking CJEU standards by the FCC in exercising the *ultra vires* review is not the wisest step. While it is of the utmost importance to have due regard for the EU legal order, the FCC should bear in mind that it is employing a review which is above all based on the GG. That is supposed to remedy the lack of proper judicial safeguards for the division of competences by the CJEU which also results from its weak standards and scrutiny, as exemplified by the approach taken in *Fresh Marine*. Furthermore, by invoking the CJEU's standards, the FCC enters the description which is criticized here of doubling standards by introducing an interpretation of German origin of EU law based on EU standards.[345] It was perhaps because of these and similar concerns that the FCC changed its approach and did not refer to the CJEU case law in clarifying the standards of review in the *OMT* decision.

The lack of clarity over the standards in the FCC case-law has been criticized lately.[346] However, there are strong reasons why such a lack of clarity under certain circumstances is actually beneficial for the relationship between the highest judicial instances. First, it is very difficult to introduce strict definitions on standards as this would make the *ultra vires* review very inflexible particularly in a setting in which competences are developed and interpreted very dynamically and there is a need of continuous adaptations and adjustments. Since there are no objective criteria in determining the two standards,[347] the openness and lack of clarity of the standards gives the *ultra vires* review leverage and credibility that should have a positive influence on the stability of the relationship with the CJEU.[348] FCC's discretion in determining the standards of its external federal mandate needs to mirror and respect at the same time the very same discretion of the CJEU in order to achieve the constructive effects of balancing and stabilizing. Therefore the FCC correctly recognizes this discretion of the CJEU even though it openly declares that this discretion has its limits.[349] Goldmann refers to this relationship as a mutually assured discretion which follows the same logic as Voßkuhle's 'emergency brake'[350] or Weiler and Haltern's 'mutually assured destruction'.[351] Perfectly aware of the destructive

[343] Möllers (n 232) 165; and Payandeh (n 276) 410-411.
[344] FCC *Honeywell* (n 238) para. 61, referring to CJEU, Case C-472/00 P *Commission v Fresh Marine*, Judgment of 10 July 2003 ECLI:EU:C:2003:399.
[345] Mayer (n 217) 117; Mayer (n 274) 412; and Bast (n 250) 171.
[346] Sauer (n 305) 1000; Möllers (n 232) 165; and Payandeh (n 276) 411.
[347] This is obvious from both FCC *Honeywell* (n 238); FCC *OMT decision* (n 251); as well as CJEU, *Fresh Marine* (n 342).
[348] Goldmann (n 216) 127.
[349] FCC *OMT decision* (n 251) para. 161.
[350] Voßkuhle (n 157) 195-196.
[351] Weiler and Haltern (n 28) 362.

potential, this approach would properly function only in an environment in which the mutual trust and shared values are not compromised.[352] In case the contrary occurs, the mutual assured discretion is abused[353] and the legitimacy of the 'emergency brake' is put into serious doubt. The contrasting experiences in the *Slovak Pensions* and the *OMT* sagas illustrate this idea very well. It also illustrates how a case of unilateral but not thoroughly substantiated revolt against the CJEU might even endanger the position and legitimacy of a national constitutional court thus risking of being isolated, both domestically and internationally, such as the CCC in *Holubec*.[354] Nevertheless, the lack of clarity and uncertainty that stem from the external federal mandate of national constitutional courts is something that has been a constant companion of the EU legal order which managed to channel them into a constructive force.[355] The unrestrained attempts of *ultra vires* review would be surely condemned by political institutions of the very same member states or even of the others but also their highest judicial instances including the national constitutional courts probably through indirect form of horizontal judicial dialogue. Accordingly, this would legitimize a reaction by the EU institutions that would possibly end up before the CJEU.

5.3.2 Including the review of the respect of the principle of subsidiarity within the framework of ultra vires review

The qualification of the *ultra vires* review through the establishment of substantive and procedural standards which manifest a certain level of deference to both political institutions and the CJEU has its positive effects particularly on the unity and coherence of the EU legal order. Extensive use of the *ultra vires* review would definitely put at risk the effectiveness and coherence of the EU legal order. It would go against the deference that national constitutional courts should have for decisions of political institutions both national and of the EU, as well as for those of the CJEU, which is even required with the national constitutional principles. Nevertheless, there is one negative consequence of this qualification and far reaching restraint of the FCC, as seen through the case law related to the exercise of conferred power on the EU, which has the potential of rendering the *ultra vires* review toothless.

In introducing and developing the *ultra vires* review in the *Maastricht* and *Lisbon* decision the FCC established a very strong link between the principle of conferral and the principle of subsidiarity.[356] However, this link totally disappeared and the FCC in *Honeywell* and the *OMT referral* and *decision* only referred to the principle of conferral. Namely, in these decisions the *ultra vires* review has been totally detached from the review of the respect of the principle of subsidiarity by the EU institutions, above all the CJEU. By introducing the second standard of the *ultra vires* test which is that the challenged EU act should be highly significant in the

[352] Goldmann (n 216) 129.
[353] See for instance on the problem of judicial ego in situations of differing views between the courts Kühn (n 305) 192 – 193.
[354] For more on this Michal Bobek, '*Landtova*, *Holubec*, and the Problem of an Uncooperative Court: Implications for the Preliminary Ruling Procedure' (2014) 10 European Constitutional Law Review 54; and Jan Komarek, 'Playing with Matches: The Czech Constitutional Court's *Ultra Vires* Revolution' (Verfassungsblog 22 February 2012).
[355] Goldmann (n 216) 129ff; but also Sauer (n 305) 1001.
[356] FCC *Maastricht* (n 31) paras. 160-161; and FCC *Lisbon* (n 31) para. 240.

structure of competences between the member states and the Union[357] the FCC focuses only on the immediate effect of the specific violation without looking at the possible structural shift which could result from the accumulation of such violations in the future.[358] Such an accumulation could be recognized in cases in which the CJEU puts forward an interpretation which serves to expand the competences of the EU in a manner which is characterized by incrementalism rather than by single step structural shifts and most importantly without paying due attention to the member states' interests and autonomy. Therefore, the FCC and other national constitutional courts should focus even more on the CJEU decisions when it comes to shift in competences through weak scrutiny of the principle of subsidiarity.

It could be argued that the FCC somehow lost sight of the actual nature of competences in the EU which are based on their functional understanding and instead sticks to the competences based on fields by focusing on the conferral.[359] The FCC turns a blind eye to the serious problem of competence creep in the EU and the obvious incrementalism which is characterizing the expansion of EU competences.[360] The latter has been the direct result of the structural problems in the EU of not taking the division and exercise of competences seriously and the lack of proper political and judicial safeguards for subsidiarity and proportionality.[361] All this is necessitating a broader scope of *ultra vires* review which would include the review of the respect of these two principles. Therefore, the second standard of the review should be adapted to this need. Namely, it should be interpreted to include the review also of possible transgression of competences which would be the result of a breach of the principle of subsidiarity bearing in mind its relationship with the principle of conferral of powers.[362] This would mean that the *ultra vires* review would look whether the interpretation and justification of the challenged type of EU act could prospectively entail a significant structural shift of competences instead of focusing on the actual violation in the specific case at hand. The *OMT referral* and *OMT decision* seem to go in this direction withdrawing from the extensive restraints put on the *ultra vires* review with *Honeywell* which could be a ground for including subsidiarity in the *ultra vires* review.[363] The FCC in the *OMT decision* has stated that there is a significant structural shift in cases where an EU act or measure is capable of altering the fundamental competences of the EU that would essentially require a treaty amendment or making use of an evolutionary clause.[364] If this shift is to be prospectively realized from an interpretation and justification provided or confirmed by the CJEU through a problematic weak scrutiny of EU legal acts, obviously breaching the principles of subsidiarity, then this should

[357] FCC *Honeywell* (n 238) para. 61. This standard for instance was not part of *Maastricht* and *Lisbon*, in which the FCC only mentioned the manifest breach.
[358] This is basically the logic behind the creeping competences. See Dissenting opinion of Justice Landau FCC, *Honeywell* decision, 2 BvR 2661/06 of 6 July 2010 paras. 102-103. See more on this in Grimm (n 271). These are the limitation of the courts, but this could be tackled by sending signals to the CJEU drawing attention to this sort of negative development.
[359] Bast (n 250) 175; and Goldmann (n 216) 130 who labels it as a purpose oriented understanding of competences.
[360] Landau (n 358) para. 103; Grimm (n 271); and Herzog and Gerken (n 323).
[361] For more on this see sections 3.2 and 3.3.
[362] It should be born in mind that here also the principle of proportionality could be included in this sort of review as it should be the essential part of the review of the CJEU as well when it comes to exercise of competences. For more on this link see section 3.1 text accompanying footnotes 85-90.
[363] Cf. Bast (n 250) 179-180.
[364] FCC *OMT decision* (n 251) para. 151.

definitely be reviewed by national constitutional courts. This stance could also have its effect on loosening or adjusting of the manifest breach standard but according to the latest reasoning of the FCC in the *OMT decision* it would not be necessary as it is already broad enough especially when it comes to the erroneous interpretation of the CJEU.[365] As a matter of fact these same arguments are equally applicable to the safeguard of the principle of subsidiarity. Therefore, the justification for broadening the *ultra vires* review of this principle of exercise of competences in the EU is already present.

Such a broadening of the *ultra vires* review due to the structural problems in the EU was embraced by Kumm as even being required by constitutional pluralism. He clearly put a particular emphasis on the principle of subsidiarity in justifying the jurisdictional dimension of the power of national constitutional courts to review EU law.[366] In his recent article though, dealing with this issue in the framework of the *OMT referral*, he seems to withdraw from his previous positions justifying this through the increased sensibility of the CJEU on competences and the absence of structural deficits in the EU.[367] However, as it was discussed previously, there is definitely no strong evidence proving this stance. In supporting his argument Kumm refers to two annulment decisions of the CJEU, brought before it by the Commission mainly on charges of the impugned acts being based on wrong legal basis, which do not even involve Article 5 TEU or mention the principle of conferral or subsidiarity.[368] Thus they could not be convincingly invoked in this regard as they do not show any change in the approach of the CJEU towards the issue of competences or the principles regulating their division and exercise in the EU. The structural problems obviously are still persisting be it either related to the role of political institutions in safeguarding the principles of subsidiarity and proportionality or the judicial safeguards by the CJEU. Therefore, Kumm's earlier arguments are still more than valid in the present context which view is not to be blurred by the contentious developments over

[365] FCC *OMT decision* (n 251) para 149. But see also the criticism of the FCC on the way the CJEU reviews the division and exercise of competences: "Nevertheless, the manner in which the law was interpreted and applied in the Judgment of 16 June 2015 meets with serious objections on the part of the Senate in respect of the establishment of the facts of the case (aa), the principle of conferral (bb), and the judicial review of acts of the European Central Bank that relate to the definition of its mandate (cc) (para. 181), "Generously accepting as fact asserted aims while at the same time granting wide margins of assessment to bodies of the European Union and considerably decreasing the intensity of judicial review is well-suited to enable institutions, bodies, offices, and agencies of the European Union to autonomously decide upon the scope of the competences that the Member States have attributed to them (cf. BVerfGE 123, 267 <349 et seq.>). Such an understanding of competences does not sufficiently take into account the constitutional dimension of the principle of conferral." (para. 184), "The principle of conferral is not only a principle of Union law but also incorporates constitutional principles from the Member States (cf. BVerfGE 123, 267 <350>)." (para. 185) "The principle of conferral's interface function must have an effect on the methodical review of whether it is being respected. If fundamental interests of the Member States are affected, as is generally the case when dealing with competences in a union (*Verbandskompetenz*), judicial review may not simply accept the asserted positions of organs of the European Union without verification." (para. 186).

[366] Kumm (n 336) 295, 300; and Mattias Kumm and Victor Ferreres Comella, 'The Primacy Clause of the Constitutional Treaty and the Future of Constitutional Conflict in the European Union' (2005) 3 International Journal of Constitutional Law 473, 475.

[367] Kumm (n 342) 213.

[368] Kumm (n 342) 213 referring to CJEU, Case C-137/12 *Commission v Council*, Judgment of 22 October 2013, ECLI:EU:C:2013:675; and CJEU, Case C-376/98 *Germany v Parliament and Council*, Judgment of 5 October 2000, ECLI:EU:C:2000:544.

the OMT saga.[369] Accordingly, the *ultra vires* review is still perfectly compatible with constitutional pluralism and it even needs to be broadened to include the principle of subsidiarity as there are legitimate concerns for the lack of adequate respect for this principle.

The exercise of this sort of review would take place after the CJEU has the possibility to have its say on the matter at hand and possibly as result of an unsuccessful attempt of the national parliaments to conduct a political safeguard of subsidiarity. In the case of Germany there is a constitutional provision which foresees such a constitutional possibility for the *Bundestag* and the *Bundesrat*.[370] Nevertheless, this constitutional possibility for national parliaments is not a mandatory prerequisite for constitutional courts to enter an *ultra vires* review in light of subsidiarity as they could send a preliminary reference to the CJEU in cases in which this court has not had the opportunity to rule on the particular issue.

Once this procedural requirement is fulfilled the national constitutional court would in the context of the impugned EU act assess the interpretation of the CJEU and the adequacy or the lack of any safeguard for the principle of subsidiarity, accordingly of the member states' interest and autonomy, and thus declare a manifest breach of competences.[371] If the constitutional court establishes that the approach and practice of the CJEU would amount to a significant structural shift in the competences to the detriment of the member states as applied to the case at hand then it should declare the EU act *ultra vires* and thus inapplicable.

5.3.3 The ultra vires review and the preliminary reference procedure

Besides the substantive requirements the FCC has also established a procedural one in *Honeywell*. Namely, emphasizing the restrictive and cautious use of *ultra vires* review the FCC has declared that the CJEU needs to be provided with an opportunity to have its say on the matter at hand, unless it has already ruled on it, in the context of a preliminary ruling procedure. This requirement is justified in light of the interests of the EU legal order as well as the constitutional principles and doctrines such as the openness towards EU law and the spirit of the cooperative relationship with the CJEU.[372] In this manner the CJEU as the only authorized institution under EU law to decide on the interpretation and validity of EU law would be afforded a chance to remedy the legal errata done by the legislative institutions in the EU, or by its previous judicial interpretations, which have led to the questioning of the so-called material authorization of the CJEU to interpret EU law.

The FCC has confirmed this stance in the *OMT decision* in which it paid a particular attention to the limits of the tolerance of error for the CJEU in light of its interpretation and more specifically on its understanding of the principle of conferral and the high level of deference to

[369] Large part of the criticism was addressed to the FCC mainly relating to the national constitutional aspect of the jurisdiction of the FCC as well as its justification for the exercise of *ultra vires* review.
[370] Art. 23 1a GG. See FCC *OMT decision* (n 251) para. 171, the FCC sees this as a constitutional obligation, applying to all constitutional organs, to take steps actively to ensure that the European integration agenda is respected.
[371] FCC *OMT decision* (n 251) para. 149.
[372] Mayer (n 217) 130-131, he denies the possibility of having a cooperative relationship between in the *ultra vires* review

EU institutions, in the specific case the ECB.[373] In this way the *ultra vires* review would not be solely applied on the EU act but could also be broadened to the CJEU decision and interpretation which has confirmed the legal basis for such an enactment. Through the involvement of the CJEU the argument that this issue of competences should be left to political institutions[374] additionally loses its force as this involvement would prove that the issue needs a legal resolution. On the other hand, this would provide the national constitutional courts with a sound justification to put checks on the CJEU contentious interpretation of competences. Thus, once the preliminary ruling is made by the CJEU there are good reasons for stricter scrutiny by the FCC.[375] Understandably such a review would be restrained and cautious and following the requirement of universalisability as well as the substantive requirements.

This procedural restraint is perfectly in line with constitutional pluralism and respects the need for having an *ultra vires* review which would take into serious consideration the arguments stemming from both legal orders and thus balance them. In this sense it creates the dialogical bridge through which arguments relating to both EU law and national constitutional law would be weighed and reconsidered in order to reach an optimal solution. The OMT case has shown exactly why this is so important for building and developing a common European legal order in which occasional conflicts should be perceived as grounds for improvement.

Nevertheless, while the FCC has been praised for making this commitment of using the preliminary reference procedure and actually sending its first reference in the OMT case, still several scholars raised serious concerns over the downside of such a reference within the framework of *ultra vires* review. These concerns amount to claims of actual abuse of the preliminary reference procedure by the FCC as it has made clear that it might not respect the CJEU's ruling in exceptional cases. The argument goes that in such a case the preliminary reference from a national constitutional court would be reduced to a mere phase of the *ultra vires* review[376] or even make the procedure potentially irrelevant and unnecessary.[377] All this could lead to a situation in which:

> "a request to the Court of Justice to give a preliminary ruling could even end by having the undesirable effect of embroiling the Court in the chain of events ultimately leading to the breakdown in the 'constitutional compact' underlying European integration."[378]

Accordingly, as Mayer argues, through the exercise of *ultra vires* review there would be no place for a relationship of cooperation between the judicial instances due to the effects of declaring an EU act *ultra vires*. First, this would imply that there is a defect in the act which

[373] FCC *OMT decision* (n 251) paras. 160-161.
[374] On this argument see Sauer (n 305) 991.
[375] Möllers (n 232) 165.
[376] CJEU *Gauweiler* AG Cruz Villalon (n 299) paras. 45-46.
[377] Wendel (n 217) 290.
[378] CJEU *Gauweiler* AG Cruz Villalon (n 299) para. 51 [references omitted]. This is sort of exaggerations are mirrored in the Dissenting opinion of Lübbe-Wolff FCC, *OMT* referral, 2 BvR 2728/13 of 14 January 2014 paras. 3-9; and see also Mayer (n 217) 134.

concern is not confined to a specific member state. And second, this would represent an encroachment on the CJEU and the European legal order.[379]

All these arguments against the preliminary reference within the framework of the *ultra vires* review represent a slight exaggeration of the effects of this sort of review. It seems that this is the reason why the CJEU in *Gauweiler* did not raise this issue at all, as opposed to the opinion AG Cruz Villalon. The CJEU has referred only to its case law which confirms the binding nature of its preliminary rulings in the main proceedings because of which a preliminary reference was sent.[380] Following Wendel's reasoning this would mean that the CJEU has expressed its tacit acceptance of the *ultra vires* review by the national constitutional court.[381] In the specific context of preliminary reference the general abidance of the national constitutional courts would be excluded only under very exceptional cases. Such exceptions would not put into question the general respect for CJEU's preliminary rulings which would remain protected even by the national constitutional courts.[382] On the contrary, constitutional courts would send a clear warning signal to the CJEU and would thus provide it with another chance to reconsider its stance in light of the arguments and reasoning presented by the national constitutional courts in their references.[383] As a matter of fact, the actual practice so far, as seen through the *Slovak Pensions* and *OMT* cases, proves this claim right. In the former the CCC, by declaring a CJEU judgment *ultra vires*, had not caused such disastrous effects, bearing in mind that the CCC had no opportunity to defend its position before the CJEU. As for the latter, the *OMT decision* of the FCC, regardless of the harsh criticism of scholars, especially on the tone and approach taken by this court in its preliminary reference, the outcome has produced the desired effects of direct judicial dialogue. Messages and signals have been sent and a certain common ground has been reached while reservations and differences of views still exist. Even if an EU act is declared *ultra vires*, while observing the restraints placed on the *ultra vires* review that does not deprive the national constitutional court of the material authorization to intervene in the interpretation of EU law, this would not bring down the EU. It would be a cause for renewed deliberations seeking legal and political solutions for the newly occurred

[379] Mayer (n 217) 130 -131.

[380] CJEU *Gauweiler* (n 111) para. 16, referring to CJEU, C-173/09 *Elchinov*, Judgment of 5 October 2010, ECLI:EU:C:2010:581; and CJEU, Case C-446/98 *Fazenda Publica*, Judgment of 14 December 2000, ECLI:EU:C:2000:691. See also the case note on this judgment, Vestert Borger, 'Outright Monetary Transactions and the Stability Mandate of the ECB: *Gauweiler*' (2016) 53 Common Market Law Review 139, 167.

[381] Wendel (n 217) 291, "Should Luxembourg declare the reference admissible in terms of Article 267 TFEU (which seems likely in political terms), it would therefore have to strictly avoid that this could be (mis)understood as a tacit approval of Karlsruhe's claimed right to carry out *ultra vires* reviews… The ECJ would in any case have to make it crystal clear that it responds to the preliminary questions only on the premise that the referring court subsequently accepts the interpretation given by the Court of Justice... To avoid any semblance of an implicit approval of Karlsruhe's claim to *ultra vires* review, a clarification would also and particularly be necessary in case the interpretation by the ECJ partially resembled that of the FCC."

[382] These and similar situations are not totally unfamiliar even in federal state based on a model of a so-called cooperative federalism. Namely, a legal revolt of a state court against a federal court decision or a federal rule could not bring the federation to a collapse. But it would rather create a new momentum and incentives for a renewed legal and political process tackling the issue at hand. In theory this phenomenon is labeled as 'uncooperative federalism'. For more on this in the US context see Jessica Bulman-Pozen and Heather K. Gerken, 'Uncooperative Federalism' (2009) 118 The Yale Law Journal 1256.

[383] Grimm (n 271).

situation.[384] In this sense the exception to the general binding nature of preliminary rulings should be accepted by the CJEU as it would be the direct result of the existing constitutional pluralism and neo-federal structure of the EU under which there is a heterarchical relationship also between the respective judicial instances.

6 Conclusion

This chapter has tackled a very contentious and complex issue related to the division and exercise of competences in the EU and what kind of role should constitutional courts have in this regard. The overarching argument here is that constitutional courts should have an external federal mandate through the conduct of ultra vires review of EU acts when it comes to competence issues. Such a review would represent an external check on the unsatisfactory practice of the CJEU on the distribution and exercise of competences which has directly contributed to an unwarranted expansion of EU competences and the resulting centralizing tendencies in the EU. In arguing for the constructive role of this sort of review of constitutional courts three lines of argumentation were put forward. The first line or group of arguments are related to the critical analysis of the federalism discourse in the EU which tries to project political goals on the future of the EU and has its implications on the status of EU law. This discourse has demonstrated serious weaknesses by replicating the same doctrines developed in the context of a nation-state onto the EU, thus somehow turning a blind eye to the fact that the EU is not a state. As a matter of fact, two assumptions made as result of this discourse on the supremacy of EU law and the judicial supremacy of the CJEU remain to be subject to heavy contestation by the national constitutional courts, especially in this specific area. Accordingly, the relationship between the different levels within the multilevel structure in the EU should be perceived through the prism of neo-federalism which couples the federal features of the EU with constitutional pluralism.

The second group of arguments are related to the doubts over the effectiveness of both the political and judicial safeguards on the exercise of competences in the EU. The Lisbon Treaty introduced new political safeguards as seen mainly through the establishment of the EWM, however, this has not successfully tackled the previously existing problem of a light-touch review of subsidiarity and proportionality by the CJEU. Structural and jurisdictional bias on the side of the EU have led to this light-touch review which enabled the continuous expansion of EU competences which in the end compromises the principle of conferral of powers.

The third group of arguments go into the reasons behind the establishment of the *ultra vires* review by the constitutional courts. The traditional reasons behind this type of review do not seem to be well adjusted to the circumstances in the EU and thus functional reasons are the ones that need to have the primacy in justifying the *ultra vires* review. These functional reasons should be embraced by all constitutional courts which have so far accepted their power to

[384] It is in the essence of the circular nature of the legal and political processes to react and seek new and better solutions to issues which have occurred with the application and interpretation of the law. One should not forget that the *Holubec* episode of the Slovak Pensions saga was essentially muted after the regular changes in the composition of the CCC, and this fact should not be omitted. On this see Kühn (n 305) 193.

conduct *ultra vires* review on EU law. They, above all the FCC, should broaden the scope of review since the substantive limits of *ultra vires* review unreasonably narrow it.

While the three groups of arguments make the case for justifying the exercise of *ultra vires* review of EU acts, they do not deal with the issue of appropriately designing and adjusting the *ultra vires* review for it not to unreasonably jeopardize the effectiveness and uniformity of EU law. Therefore, constitutional pluralism is being employed in adjusting this review making it an instrument for the constructive role of constitutional court in European integration. In this sense, *ultra vires* review needs to be perceived as an external federal mandate of constitutional courts due to structural reasons behind the EU and institutional reasons related to constitutional courts. Exactly these two reasons necessitate that the issue of division and exercise of competences in the EU needs to be looked at from both national and EU law perspectives. This argument is confirmed through the fallacies of the traditional doctrine of *Kompetenz-Kompetenz* and the notion of the last word which needs to be left open. On the other hand, the substantive elements of the ultra vires review need to be readjusted as to create a situation in which this review will not be toothless and that the 'emergency brake' is not only theoretically possible. In this manner, the 'mutually assured discretion' will be genuinely assured and it will serve to guarantee the balance among legal orders and it will strengthen the values of constitutionalism in the EU.

Conclusion

The relationship of constitutional courts with EU law and the CJEU has definitely been one of those topics which have drawn significant academic attention ever since the first decisions of the ICC and FCC. Many academic contributions have been written in covering different aspects and angles of this topic. Therefore, dealing further with this relationship could be perceived as an exercise of stating the obvious and the already well known. However, just as other relationships, also this one is subject to evolution and characterized by a dynamism which could easily alter the entrenched perceptions and dominant narratives. It is exactly such perceptions and narratives over the role and place of constitutional courts in European integration that are the subject of this dissertation. In this sense, the dissertation tackles and analyses an arguably old topic through new lenses. Accordingly, the main emphasis of this work has been placed on deconstructing two contradictory narratives on the role of constitutional courts in European integration. On the one hand, there is the narrative of the global spread and rise of constitutional courts, based on the success of the centralized model of constitutional review, not only in Europe but also in other parts of the world, often seen as one of the crucial institutions which safeguard rule of law and further democratization. On the other hand, there is a relatively recent narrative which claims the demise and creeping loss of relevance of constitutional courts faced with an increasing supranationalisation of national law resulting from the expanding scope of EU law and growing influence of the CJEU.

Belying the expectation of choosing between the two narratives, this dissertation actually places the main thesis on a path of an apparently even more paradoxical and contradictory argumentation that, when it comes to European integration, constitutional courts are indeed on the rise while falling. Only at first glance this stance and argumentation is confusing. While it cannot be denied that constitutional courts have been deeply impacted by European integration in a sense of decreasing their influence and position, at the same time, resulting from the process of adaptation to the new circumstances caused by supranationalisation, they have been developing new roles vis-à-vis EU law and the CJEU not previously foreseen in any of the domestic constitutional and legal provisions. These new roles are directly related to three crucial dimensions of the relationship between constitutional courts and the CJEU: procedural, substantive and jurisdictional. More specifically, constitutional courts are pivotal national institutions in providing constitutional legitimacy to EU law through different forms of judicial dialogue in Europe, they have taken over the role of protecting the constitutional identity of the member states, and lastly, these courts are overseeing the jurisdictional boundaries through safeguarding the vertical division and exercise of competences in the EU. Bearing in mind the institutional specificities of constitutional courts, these three roles represent the added value that these institutions bring to the legal integration in Europe and through which they should fulfil their potentially constructive corrective force. However, before discussing the three new roles and in which direction they should further be developed several issues are clarified related to the institutional features of constitutional courts and the history and evolution of their

relationship with the CJEU and EU law in order to recognize their potential added value in European integration.

As specialized constitutional bodies with exclusive power to conduct constitutional review, constitutional courts are a relatively recent institutional phenomenon compared to the other central national institutions. They were introduced and established mainly as a consequence of the shortcomings of the traditional understanding of separation of powers, which culminated in the first half of the 20th century, resulting with a high tendency of abuse of power seriously compromising the rule of law. Based on their institutional purpose for remedying such shortcomings and their success in dealing with the frequent challenges related to this purpose they soon became a very popular institutional solution for safeguarding constitutionality and the rule of law in numerous countries. Some of the crucial reasons and factors for this diffusion of constitutional courts were related to their institutional adaptability and also their specific institutional features which enabled them to cope with frequent internal and external challenges to their status and authority. The internal challenges came mainly from the other national institutions who felt that their established positions were put under question with the functioning of the constitutional courts. However, it soon became clear that external challenges caused far more concerns for these institutions as they had to do with the core functions and powers of constitutional courts.

Among the external challenges the supranationalisation of national legal orders through the process of legal integration in Europe rather quickly became the most serious one. In dealing with this challenge constitutional courts, regardless of the diversity of these institutions in different countries in several respects, have developed certain common threads in their attitude and stance towards EU law and the CJEU. Their approach to the development of EU law has been generally reactive and their acceptance of the special nature of EU law and its fundamental doctrines and principles has been conditional and always based upon a national legal basis. Additionally, constitutional courts have almost in all cases manifested reluctance of entering into a direct judicial dialogue and using the preliminary reference procedure mainly out of fear to jeopardize their position in relation to the CJEU. Such fears, often not so well-founded, have been strengthened with the overestimated impact of the *Simmenthal II* decision and its progeny on the alleged external decentralizing effects on constitutional review and the arguable development of the doctrine of displacement of constitutional courts by the CJEU through its case law.

Employing the substantive approach in analyzing the relationship between constitutional courts and the CJEU there are three main areas which represent both meeting points and points of constitutional resistance and contention. Those are directly related to fundamental rights, division and exercise of competences in the EU and specific national constitutional provisions. It is precisely around these areas that constitutional courts have developed their new roles which could enable them to be a constructive player. Nevertheless, the explanation and justification of this place for constitutional courts does not seem to comply with the traditional theories and doctrines to which also constitutional courts frequently refer.

The weaknesses of the traditional theories and doctrines, such as monism and dualism, have proven them to be unsuitable to provide an accurate normative and descriptive account of the complex reality of legal integration in Europe. This has left large space for new theoretical frameworks to emerge. In this sense, constitutional pluralism as a theoretical framework which accommodates the competing claims for ultimate constitutional authority of both the EU and national legal orders represents the best alternative to the traditional theories. Accepting and embracing the existence of plurality of intersecting and overlapping constitutional orders in Europe, constitutional pluralism provides strong reasons for placing these orders in a heterarchical relationship requiring continuous accommodation and mutual respect among them. Taking into serious consideration this heterarchy, constitutional pluralism denies the existence of an ultimate legal rule or an exclusive right of a last say because there are no objective criteria to determine a single all-purpose authoritative legal answer. Applied to a specific institutional context of exercise of judicial power, in a broader sense, between the different legal orders in Europe, constitutional pluralism paves the path for new narratives and perceptions of constitutional courts' place and role in European integration, above all, through providing normative justifications for new roles of constitutional courts which should serve the purpose of preventing irresolvable legal conflicts among the legal orders through instruments of mutual accommodation and respect. In any case, in order to have a constructive interplay between the legal orders and their respective institutions the main tenets of constitutional pluralism need to be abided by all of them, particularly constitutional courts and the CJEU. This is the main reason why the three new roles are analyzed through the prism of this theory under which specific guidelines are provided.

The first new role of constitutional courts is stemming from their specific deliberative nature and has to do with the procedural dimension of providing constitutional legitimacy to EU law. This legitimacy is provided by constitutional courts through both indirect and direct judicial dialogue. The former, even though often underestimated, has proven to be rather instrumental in this regard and has been the main avenue through which constitutional courts have been anchoring EU law and providing instruments for its direct implementation in national legal orders. When it comes to direct judicial dialogue, whilst the circle of constitutional courts that have entered at least once into a direct judicial dialogue with the CJEU has broadened lately, still constitutional courts are rather reluctant towards entering into such a dialogue and remain to have a cautious attitude. The direct judicial dialogue provides them with a possibility to feed constitutional principles directly to the CJEU which would induce it to deliver better reasoned decisions that would take the views of constitutional courts into serious consideration. Nevertheless, there are strong reasons why constitutional courts should continue to have a cautious stance towards the direct judicial dialogue particularly in situations in which irresolvable legal conflicts are imminent. In both forms of judicial dialogue constitutional courts have a specific input compared to other national institutions since they are able to provide clarity by channeling the dialogue, send credible warning signals over serious constitutional inconsistencies involving EU law and, as a result of their particular institutional design, have a higher level of political sensibility and prudence compared to ordinary courts. The latter could be easily recognized even in cases in which constitutional courts are not part

of the judicial dialogue but have nevertheless taken over the task of safeguarding that ordinary courts abide by their constitutional and EU duty to send preliminary references to the CJEU.

The second new role is of a substantive character. It was basically initiated by the introduction of the national identity clause in the Lisbon Treaty or more specifically its rediscovering. While there were many expectations over the scale of the impact of this clause, perhaps, its most important impact is related to the empowerment of constitutional courts to which it led. Namely, constitutional courts have taken the opportunity by linking this clause to the constitutional identity of the respective member states and developed their new role of protecting this identity in the EU. In this manner, the balance has slightly shifted in favor of constitutional courts which could be observed from two developments. Firstly, constitutional courts have utilized the constitutional identity to limit the absolute primacy of EU law, as proclaimed by the CJEU, by demarcating certain areas which are particularly sensitive to transfer and supranationalisation. Interestingly, through their case law on constitutional identity constitutional courts have tacitly embraced heterarchy and started departing from the traditional and anachronous doctrines which definitely needs to be furthered. Secondly, strengthening the limits of absolute primacy has encouraged constitutional courts to engage much more with EU law as well as to enter into direct judicial dialogue with the CJEU. The latter has intensified since the adoption of the Lisbon Treaty and with constitutional courts' case law on constitutional identity which has given them much needed leverage. However, in order for constitutional courts to represent a genuine constructive force in the EU they need to abide by the general tenets of constitutional pluralism that, at the same time, needs to be mirrored with the much required accommodation and respect by the CJEU which is still lacking.

The third new role of constitutional courts revolves around a multi-faceted jurisdictional issue over the review of the vertical division and exercise of competences in the EU. Reconfiguring the structure of the EU into a neo-federal paradigm, which couples the existing federal features of the EU with constitutional pluralism, provides a fertile ground for a strong case in favor of an external federal mandate of constitutional courts. Understood in this way, neo-federalism essentially disputes the existence of an outright supremacy of EU law and judicial supremacy of the CJEU which are common features within the context of federal states. Following this line of reasoning, this mandate of constitutional courts is exercised through the *ultra vires* review not only of EU acts, but also CJEU decisions. The main reasons behind the justification of the *ultra vires* review are rooted in the serious doubts over the effectiveness of both the political and judicial safeguards on the division and exercise of competences in the EU. The EWM has been basically toothless and the CJEU has continued to exercise a light-touch review of subsidiarity and proportionality. However, the way *ultra vires* review has been designed so far, above all by the FCC, demonstrates an obvious need for it to be recalibrated so it could prevent unwarranted centralization of powers while not unnecessarily jeopardizing the unity and coherence of EU law. Namely, both the procedural and substantive requirements behind the *ultra vires* review need to be adjusted but in a way that will preserve the credibility of this type of review. This is especially true when it comes to including the link between the conferral of powers and the principles of subsidiarity and proportionality that would cover the competence creep that occurs through a longer period of time.

Taking into consideration the arguments presented, this dissertation does not have the ambition to answer all the open questions regarding the relationship between constitutional courts and the CJEU and EU law. By employing an interdisciplinary approach linking different theories and notions it offers a new perspective and provides guidelines and suggestions for approaching the current and future challenges in this relationship, thus trying to pave a novel academic avenue to be further explored. In this sense, the dissertation attempts to mark the beginning of a new cycle of research and debate on this topic following the further development of the case law of both constitutional courts and the CJEU.

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