

The Primacy of EU Law and the Polish Constitutional Law Judgment



The Primacy of EU Law and the Polish Constitutional Law Judgment

Abstract

This study was commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE Committee. It analyses the consequences of the judgment of the Polish Constitutional Tribunal for the legal relationship between Poland and the EU, compares it to the case law of other Member States' highest courts and makes policy recommendations on how to deal with the judgment.

This document was requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs.

AUTHORS

Niels PETERSEN, University of Münster
Patrick WASILCZYK, University of Münster

ADMINISTRATOR RESPONSIBLE

Mariusz MACIEJEWSKI

EDITORIAL ASSISTANT

Sybille PECSTEEN de BUYTSWERVE

LINGUISTIC VERSIONS

Original: EN

ABOUT THE EDITOR

Policy departments provide in-house and external expertise to support EP committees and other parliamentary bodies in shaping legislation and exercising democratic scrutiny over EU internal policies.

To contact the Policy Department or to subscribe for updates, please write to:

Policy Department for Citizens' Rights and Constitutional Affairs

European Parliament

B-1047 Brussels

Email: poldep-citizens@europarl.europa.eu

Manuscript completed in May 2022

© European Union, 2022

This document is available on the internet at:

<http://www.europarl.europa.eu/supporting-analyses>

DISCLAIMER AND COPYRIGHT

The opinions expressed in this document are the sole responsibility of the authors and do not necessarily represent the official position of the European Parliament.

Reproduction and translation for non-commercial purposes are authorised, provided the source is acknowledged and the European Parliament is given prior notice and sent a copy.

© Cover image used under licence from Adobe Stock.com

CONTENTS

LIST OF ABBREVIATIONS	5
EXECUTIVE SUMMARY	6
1. The PCT Judgment	7
2. The case law of the PCT on the primacy of EU law	7
3. The primacy of EU law in comparative perspective	8
4. Primacy and Judicial Dialogue	9
5. Normative assessment and practical consequences	9
6. Recommendations	9
1. INTRODUCTION	11
2. THE JUDGMENT OF THE POLISH CONSTITUTIONAL TRIBUNAL	13
2.1. Background of the judgment	13
2.1.1. Polish legislative context	14
2.1.2. Decisions of the Court of Justice concerning the Polish reform of the judiciary	16
2.2. Content of the judgment	20
2.2.1. Polish constitutional framework	21
2.2.2. First constitutional violation	21
2.2.3. Second constitutional violation	24
2.2.4. Third constitutional violation	24
2.3. Consequences of the judgment for Polish courts and administrative agencies	26
3. THE PRIOR CASE LAW OF THE POLISH CONSTITUTIONAL TRIBUNAL	29
3.1. The sovereign and democratic functioning of the Polish state	30
3.2. The protection of constitutional identity as ongoing control	31
3.3. Primacy of EU law and constitutionality review in practice	31
3.4. The position of the PCT judgment in the case law of the Polish Constitutional Tribunal	34
4. THE PRIMACY OF EU LAW IN COMPARATIVE PERSPECTIVE	36
4.1. The case law of the CJEU	36
4.2. The Primacy of EU Law in other EU Member States	40
4.2.1. Austria	40
4.2.2. Belgium	41
4.2.3. Czech Republic	43
4.2.4. Denmark	44
4.2.5. France	46
4.2.6. Germany	49

4.2.7. Hungary	55
4.2.8. Italy	58
4.2.9. Netherlands	60
4.2.10. Romania	61
4.2.11. Conclusion	63
4.3. Judgment K3/2021 in the context of the comparative experience	64
5. PRIMACY AND JUDICIAL DIALOGUE	66
5.1. How Judicial Dialogue Works in the EU	67
5.2. Preconditions for Judicial Dialogue	68
5.3. Conclusion	69
6. THE NORMATIVE ASSESSMENT OF THE PCT JUDGMENT AND THE CONSEQUENCES OF THE DECISION	71
6.1. Normative assessment under EU Law	71
6.2. Consequences of the decision	72
7. RECOMMENDATIONS	74
REFERENCES	77

LIST OF ABBREVIATIONS

CCC	Czech Constitutional Court
CCH	Constitutional Court of Hungary
CJEU	Court of Justice of the European Union
EC	European Communities
ECB	European Central Bank
ECHR	European Convention of Human Rights
ECR	European Court Reports
ECtHR	European Court of Human Rights
EU	European Union
EuCHFR	EU Charter of Fundamental Rights
GDPR	General Data Protection Regulation
GFCC	German Federal Constitutional Court
HFL	Fundamental Law of Hungary
KRS	<i>Krajowa Rada Sądownictwa</i>
PCT	Polish Constitutional Tribunal
PSPP	Public Sector Purchase Programme
SCDK	Danish Supreme Court
SIOJ	Section with exclusive competence to investigate criminal offences committed within the judicial system
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

EXECUTIVE SUMMARY

Background

On 7 October 2021, the Polish Constitutional Tribunal (PCT) issued an *Assessment of the conformity to the Polish Constitution of selected provisions of the Treaty on European Union* (Ref. No. K 3/21) (in the following: judgment of the PCT or PCT judgment). In this judgment, it declared that several provisions of the EU treaties violated the Polish Constitution and were thus inapplicable in Poland. This judgment is part of a few recent judgments by highest courts in EU Member States that refuse to apply the principle of primacy of EU law. However, the judgment of the PCT goes beyond previous judgments by not only refusing to follow a judgment of the Court of Justice in a concrete situation, but by declaring the incompatibility of provisions of the EU treaties with the Polish Constitution in the abstract. This study will focus both on the consequences of this decision for the legal relationship between Poland and the EU as well as on the significance for the principle of primacy within the EU legal order.

Aim

The present study puts the judgment of the PCT in context, compares it to similar decisions of highest courts of other Member States, assesses the consequences of the decision and makes recommendations. In particular, the study has the following aims:

- It analyses and explains the judgment of the PCT.
- It examines the principle of primacy of EU law in comparative perspective, focusing both on the CJEU and the constitutional and supreme courts of selected Member States.
- It focuses on the role that doctrines like the *ultra vires* review and the constitutional identity reservation are playing in the case law of Member States' highest courts in establishing exceptions to the principle of primacy.
- It analyses the concept of judicial dialogue and analyses how this concept can explain why the PCT failed to cooperate with the Court of Justice in its judgment.
- It makes a normative assessment of the PCT judgment under the EU legal order.
- It assesses the consequences of the judgment both for the EU legal order as well as for the Polish legal order.
- It makes recommendations to limit the negative consequences of the judgment.

Results

The principle of primacy of EU law has, for a long time, been an important building block of EU law. However, it has recently come under pressure from supreme and constitutional courts of several Member States. Most recently, the judgment of the Polish Constitutional Tribunal has denied primacy to certain provisions of the EU treaty. This potentially has severe consequences for the EU legal order and sets a negative precedent with regard to the primacy of EU law.

1. The PCT Judgment

On 7 October 2021, the Polish Constitutional Tribunal (PCT) issued a judgment, holding that several provisions of the Treaty on European Union (TEU), which enabled national courts to uphold the primacy of EU law and its effective judicial protection as required by Art. 19(1), para. 2 TEU, were incompatible with the Polish Constitution. This judgment has to be seen in the wider context of the reforms of the Polish judiciary after 2016 and the reaction of the Court of Justice of the EU (CJEU) to these reforms. In several decisions, the Court of Justice had found that aspects of the judicial reforms in Poland, such as the establishment of a Disciplinary Chamber at the Supreme Court or the lack of judicial review for judicial appointments, were incompatible with several provisions of the EU treaties, in particular Art. 19 TEU. The Court of Justice argued that the challenged elements of the Polish judicial reforms endangered the independence of Polish judges. Furthermore, the Court of Justice asked Polish courts to disapply provisions of domestic Polish law to the extent that they violated Art. 19 TEU. In reaction to these judgments, the Polish Prime Minister filed a motion to the PCT, asking the latter to assess the compatibility of certain parts of the EU treaties with the Polish Constitution.

In its judgment, the PCT indeed found such incompatibilities. In particular, it found three violations of the Polish Constitution caused by several provisions of the TEU which enabled national courts to uphold the primacy of EU law and its effective judicial protection as required by Art. 19(1), para. 2 TEU:

Firstly, the Constitutional Tribunal found that an understanding of Art. 1 read in conjunction with Art. 4 (3) TEU which required or authorised Polish adjudicative bodies to issue decisions which disregarded the Polish Constitution or to apply laws which contravened the Polish Constitution to be in breach of Arts. 2, 7, 8 (1) in conjunction with 8 (2), 90 (1) and 91 (2), as well as 178 (1) of the Polish Constitution.

Secondly, the Constitutional Tribunal interpreted Art. 19 (1), second paragraph, read in conjunction with Art. 4 (3) TEU to require or authorise Polish adjudicative bodies to apply laws which were previously declared unconstitutional by the Constitutional Tribunal. The PCT held that the mentioned provisions of the TEU violate Arts. 2, 7, 8 (1) in conjunction with 8 (2) and 91 (2), 90 (1), 178 (1) as well as 190 (1) of the Polish Constitution.

Thirdly, the Constitutional Tribunal considered Art. 19 (1), second paragraph, read in conjunction with Art. 2 TEU, which allow Polish courts to review the independence of judges appointed directly by the President of the Republic or by request of the National Council of the Judiciary (*Krajowa Rada Sądownictwa*, hereinafter *KRS*), to be incompatible with Arts. 8 (1) in conjunction with 8 (2), 90 (1), 91 (2), 144 (3) 17 as well as 186 (1) of the Polish Constitution.

2. The case law of the PCT on the primacy of EU law

We identify two diverging trends in the previous case law of the PCT on the primacy of EU law. After accession to the EU, the PCT generally had a cooperative stance towards EU integration. While the Court adopted certain reservations and argued that EU law should not violate the Polish constitution, it painstakingly tried to avoid conflicts between the EU treaties and the constitution. In one case, it successfully urged the legislature to change the constitution in order to avoid such a conflict. This changed in 2020, when the PCT took a more confrontational position. In one judgment, it ruled that the Supreme Court did not have the competence to disapply domestic statutes in order to implement decisions of the CJEU. In another decision, the PCT argued that a decision of the Court of Justice, in which the latter had imposed interim measures, was inapplicable in the Polish legal order because it was *ultra vires* and violated the Polish Constitution. Consequently, the PCT judgment seems to be a logical continuation of this recent, confrontational position of the PCT.

3. The primacy of EU law in comparative perspective

If we analyse the treatment of the principle of primacy, the Court of Justice has formally insisted on the absolute primacy of EU law over the domestic law of the Member States since *Costa v. ENEL* and continuously reaffirmed this principle in several cases. According to the Court of Justice, primacy extends even to the constitutions of Member States. However, if we look more closely, we see that the Court of Justice has shown a considerable degree of flexibility when implementing this principle. The Court has accepted that certain fundamental principles of national constitutions can justify limitations of fundamental freedoms. Furthermore, it has adapted and changed its own case law in order to ease concerns of Member States' courts. Most prominently, it introduced a fundamental rights jurisprudence in the 1970s after pushback from the constitutional courts in Germany and Italy. Finally, it has sometimes refrained from giving detailed guidelines in how to apply EU law in concrete cases, giving domestic courts flexibility in its application to the concrete set of facts.

When it comes to the highest courts of Member States, the approaches regarding the principle of primacy are not always uniform. The most influential court is probably the German Federal Constitutional Court (GFCC), which has generally accepted primacy, but developed three exceptions. The two most important exceptions are the constitutional identity reservation, according to which EU legal acts are inapplicable within the German legal order to the extent that they violate the German constitutional identity, and the *ultra vires* exception, according to which EU legal acts are not applied within the German legal order to the extent that they are not covered by the EU competences. In particular, the last exception recently gained prominence, when the Constitutional Court declared that the *Weiss* decision of the Court of Justice concerning the PSPP policy of the European Central Bank (ECB) was *ultra vires*. However, despite the PSPP judgment, the GFCC has generally exercised restraint in applying these reservations. The PSPP case is the only case, in which the GFCC has denied the primacy of EU law in a concrete case.

Beyond Germany, the study also analysed the practice of nine selected Member States' highest courts, the constitutional courts of Austria, Belgium, the Czech Republic, France, Hungary, Italy, and Romania, as well as the Supreme Courts in Denmark and the Netherlands. Except for the Dutch Supreme Court and Council of State and the Austrian Constitutional Court, all courts have developed exceptions to the principle of primacy of EU law similar to the ones adopted by the GFCC. Most courts have recognized a constitutional identity exception, while others have also introduced an *ultra vires* review. In most cases this has not led to a denial of primacy in a concrete case. However, there are a few exceptions. The Hungarian and the Romanian Constitutional Courts have recently taken a rather confrontational turn, sceptical of EU integration. Furthermore, the Danish Supreme Court and the Czech Constitutional Court also have denied primacy to EU law in individual cases. However, the latter two decisions have remained singular events and have not led to a general denial of the primacy of EU law.

Comparing these approaches of different Member States' highest courts, the judgment of the PCT stands out. It does not deny primacy in a concrete, narrow situation, but expresses a broad rejection of the principle of primacy. Furthermore, most other judgments denying primacy have not abandoned general cooperation with the Court of Justice. Even the much-criticized judgment of the GFCC contained some dialogical elements. By contrast, the PCT only pays lip-service to judicial dialogue. In fact, the judgment is so broad and vague that it is difficult to see how the court intends to cooperate with the Court of Justice in the future.

4. Primacy and Judicial Dialogue

Judicial dialogue emerges in a multi-level system of governance when courts on different levels insist on the ultimate decision-making authority in theory, but respect the position of the other courts in practice. Federal courts, like the Court of Justice, will insist on primacy, but show flexibility when implementing the principle, signalling respect to state or national courts. National courts, on the other hand, will usually carve out reservations to primacy, but only apply these reservations in exceptional circumstances. If courts respect these principles, usually a stable equilibrium emerges, in which courts influence each other without taking positions that are unacceptable for the other level. We argue that such an equilibrium emerges when courts are interdependent on each other. The Court of Justice is usually dependent on domestic courts to implement its decisions. At the same time, domestic courts have to fear backlash from the political branches if they refuse cooperation and if there is a strong political commitment towards EU integration. The latter is precisely lacking in Poland. While the Polish government values membership in the EU, it often refuses to cooperate. For this reason, the PCT does not have to fear any reactions from the Polish government if it refuses to cooperate with the Court of Justice. To the extent that the Polish judge rapporteur refers to the judicial dialogue between the PCT and the Court of Justice, this reference seems to be mere lip-service. Therefore, it is rather to the contrary: If the PCT undermined the judicial reforms in Poland by cooperating with the Court of Justice, it would have to fear political backlash from the government.

5. Normative assessment and practical consequences

We argue that the judgment clearly violates EU law. The principle of primacy of EU law has long been an integral principle of the *acquis communautaire* that was accepted by the Republic of Poland when the latter acceded to the EU. Furthermore, the judgment cannot be justified by referring to the protection of national identity in Art. 4 TEU. The interpretation of Art. 4 TEU is the ultimate domain of the Court of Justice. In addition, regardless of how Polish constitutional identity is actually defined, it is difficult to see how the judgments of the Court of Justice regarding the judicial reforms in Poland could violate the latter.

The consequences of the judgment for the Polish legal order are severe. The judgment tries to thwart efforts by the Court of Justice to disapply many problematic aspects of the Polish judicial reform that seriously endanger the independence of judges and ultimately effective judicial implementation of EU law in Poland. This could cause a significant chilling effect for Polish judges who might, in fear of disciplinary sanctions, refrain from referring cases to the CJEU through the preliminary reference procedure according to Art. 267 TFEU and thereby from applying EU law in the future. Even beyond the relations between Poland and the EU, the judgment sets a problematic precedent. While most courts will not follow the PCT because it is considered to be politically captured, the judgment might be relied on by courts in Member States, in which governments are sceptical of EU cooperation.

6. Recommendations

We recommend that the European Commission makes use of the conditionality mechanism that was introduced in Regulation 2020/2092, according to which the EU can withhold certain funds that are supposed to be paid to Poland. We find that the requirements of Regulation 2020/2092 are fulfilled as the judicial reforms in Poland and the judgment of the PCT endanger the independence of courts. Judicial independence, in turn, is an important element in ensuring a proper use of the EU budget in Poland. Furthermore, the most recent international developments do not speak against making use of the conditionality mechanism. While Poland has done a remarkable and commendable job in hosting

refugees from Ukraine, this does not mitigate the Polish government's attack on judicial independence that is supported by the PCT judgment. Instead, these issues should be treated separately. It is possible to support Poland generously concerning its hosting of Ukrainian refugees, while still imposing sanctions under Regulation 2020/2092 for the PCT judgment. Furthermore, recent Polish draft legislation that is supposed to change the design of the disciplinary chamber does not sufficiently remedy the deficiencies of the Polish reform of the judiciary that are reinforced by the PCT judgment. Therefore, the draft legislation even if successful would not justify to refrain from using the conditionality mechanism of Regulation 2020/2092. Finally, we also recommend taking the next step in the procedure against Poland under Art. 7 TEU.

1. INTRODUCTION

KEY FINDINGS

The principle of primacy of EU law has, for a long time, been an important building block of EU law. However, it has recently come under pressure from supreme and constitutional courts of several Member States. Most recently, the judgment of the Polish Constitutional Tribunal has denied primacy to certain provisions of the EU treaty. This potentially has severe consequences for the EU legal order and sets a negative precedent with regard to the primacy of EU law.

The principle of primacy of EU law over the domestic law of Member States has, for a long time, been an important building block of the EU legal order. Conceived by the Court of Justice in *Costa v. ENEL* in 1964,¹ it has served to ensure the coherent and uniform application of EU law in all Member States. However, the principle has recently come under pressure from Member States' highest courts. In 2020, the German Federal Constitutional Court (GFCC) issued a judgment according to which the Court of Justice had acted *ultra vires* by accepting the PSPP policy of the European Central Bank (ECB) to be consistent with EU primary law.² This judgment sent shockwaves through Europe and led to a controversial discussion about the merits and limits of the primacy of EU law.³ The recent judgment of the Polish Constitutional Tribunal (orig. *Trybunał Konstytucyjny*, hereinafter Constitutional Tribunal or PCT) follows this trend.⁴ The Polish judgment potentially has severe negative consequences for the Polish legal order and sets a further unfortunate precedent for the defiance of the primacy of EU law by Member States' highest courts. For this reason, we will study the judgment, its context, and its consequences in more detail.

This study consists of seven parts. After this introduction, the second part will discuss the PCT judgment in more detail. For this purpose, we will first set the scene by describing the context of the judgment, in particular the controversial reforms of the Polish judiciary and the judgments of the Court of Justice of the European Union (CJEU) in reaction to these reforms. These developments led directly to the judgment of the PCT, whose reasoning and consequences will then be described in more detail. The third part assesses the judgment with regard to the previous case law of the PCT. It will describe that the case law evolved in two phases. Initially, the PCT was cooperative and largely recognized the primacy of EU law. However, it has taken a more confrontational stance recently, even before the most recent judgment.

¹ Case 6/64, *Costa v. ENEL*, 15 July 1964, EU:C:1964:66.

² BVerfGE 154,17.

³ See only the earlier study by one of the authors of this study: Niels Petersen and Konstantin Chatziathanasiou, *Primacy's Twilight? On the Legal Consequences of the Ruling of the Federal Constitutional Court of 5 May 2020 for the Primacy of EU Law*, AFCO Committee (2021) (with further references).

⁴ *Assessment of the conformity to the Polish Constitution of selected provisions of the Treaty on European Union* (Ref. No. K 3/21), Judgment in the name of the Republic of Poland, 7 October 2021 (in the following: PCT judgment or judgment of the PCT). The references to the judgment are based on *Press Release after the Hearing: Assessment of the Conformity to the Polish Constitution of Selected Provisions of the Treaty on European Union*, 7 October 2021, Website of the Constitutional Tribunal, available at <https://trybunal.gov.pl/en/news/press-releases/after-the-hearing/art/11664-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej>.

The fourth part then gives a comparative perspective to the primacy of EU law. It first discusses the case law of the Court of Justice, before analysing the case law of the highest courts of several individual Member States. This comparative study suggests that domestic courts have not accepted the primacy of EU law unconditionally. Instead, many have developed reservations, such as constitutional identity or *ultra vires* reservations. Nevertheless, these reservations are rarely used, and, in general, we can observe a dialogue – even if not always harmonious – between domestic courts and the Court of Justice. By contrast, the PCT judgment contains an all-out repudiation of the principle of primacy of EU law. On this basis, a constructive dialogue with the Court of Justice is hardly imaginable.

The fifth part looks closer at the concept of judicial dialogue. In particular, it describes how judicial dialogue works and under which conditions a constructive dialogue between courts is likely to evolve. This analysis shows that the conditions for a constructive dialogue are not present in the current situation in Poland. Usually courts have incentives to cooperate if there is a strong political commitment to EU integration. Such a commitment for a cooperative integration is currently lacking in Poland. Instead, the PCT is doing the bidding of the Polish government by issuing judgments denying the primacy of EU law.

The sixth part contains a normative assessment of the PCT judgment and an assessment of its consequences. Normatively, the judgment clearly violates EU law. In terms of consequences, the judgment potentially has a significant chilling effect on judges in Poland who wish to initiate preliminary reference procedures to the Court of Justice. This, in turn, might seriously disrupt the implementation of EU law in Poland. The seventh part, finally, concludes with two recommendations. On the one hand, we recommend to the European Commission to make use of Conditionality Regulation 2020/2092 in order to put pressure on Poland to bring its justice system into compliance with the requirements established by the Court of Justice. On the other hand, we recommend European institutions to take the next step in the procedure against Poland under Art. 7 TEU.

2. THE JUDGMENT OF THE POLISH CONSTITUTIONAL TRIBUNAL

KEY FINDINGS

The PCT judgment has to be seen in the wider context of the reforms of the Polish judiciary after 2016 and the reaction of the Court of Justice of the EU (CJEU) to these reforms. In several judgments, the Court of Justice had found that aspects of the judicial reforms in Poland, such as the establishment of a Disciplinary Chamber at the Supreme Court or the lack of judicial review for judicial appointments, were incompatible with several provisions of the EU treaties, in particular Art. 19 TEU, because they endangered the judicial independence of Polish judges. Furthermore, the Court of Justice asked Polish courts to disapply provisions of domestic Polish law to the extent that they violated Art. 19 TEU. These judgments of the Court of Justice prompted the Polish Prime Minister to file a motion to the PCT, asking the latter to declare certain parts of the EU treaties incompatible with the Polish constitution. This motion led to the PCT judgment, holding that several provisions of the EU treaty, which enabled national courts to uphold the primacy of EU law and its effective judicial protection as required by Art. 19 (1), para. 2 TEU, were incompatible with the Polish constitution.

2.1. Background of the judgment

The PCT judgment has to be seen in the wider context of the reforms of the Polish judiciary after 2016 and the reaction of the Court of Justice of the EU (CJEU) to these reforms. It is a response to a series of judgments issued by the Court of Justice of the European Union (hereinafter CJEU) regarding the reform of the Polish judiciary. This reform, which was initiated in 2016, had a substantive impact on the operation and composition of Polish courts by introducing multiple amendments to the statutory rules of these courts.⁵ These amendments remodelled the courts' composition and design, and increased the disciplinary responsibility of judges. Moreover, they introduced changes to the statutory rule of the National Council of the Judiciary (*Krajowa Rada Sądownictwa*, hereinafter *KRS*), a judicial body established by the Polish Constitution aimed at ensuring the independence and impartiality of the judiciary.⁶ These led to a change of its membership as well as the corresponding nomination procedure, which made the body more susceptible to the influence of the legislature.

The Polish reform agenda of the judiciary has raised concerns about the effectiveness of judicial protection of EU law in Poland. Reacting to this development, the Court of Justice has repeatedly declared that the design and operation of Polish courts did not meet the requirements of effective

⁵ Wojciech Sadurski, *Poland's Constitutional Breakdown* (2019); Bogumił Szmulik and Jarosław Szymanek, *Legal Dispute over the Judiciary in Poland* (2020).

⁶ For this reason, the *KRS* was granted the power of proposal to the President of the Republic regarding the appointment of judges, as well as the authority to conduct disciplinary proceedings and define the disciplinary responsibility of judges. Ultimately, the purpose of the existence of the *KRS* was the guarding of the judiciary from political influence, cf. Sławomir Patyra, 'Krajowa Rada Sądownictwa w Polsce', 119 *Przegląd Prawa i Administracji* (2020) 123, at 133.

judicial protection established under Art. 19 (1), second paragraph TEU.⁷ In particular, the Court of Justice found that the reform of the judiciary undermined the independence and impartiality of national courts. When Polish courts initiated preliminary reference procedures regarding the content of Art. 19 (1), para. 2 TEU, the Court of Justice argued that Polish courts were authorised to disapply legislative acts which were contributing to the ineffective judicial protection of EU law.⁸ Furthermore, the Court of Justice authorized Polish courts to apply rules predating the reform of the judiciary to fully ensure that the standard of Art. 19 TEU is met.

2.1.1. Polish legislative context

In 2016, the Polish legislature initiated its reform of the judiciary. Since then, it has introduced multiple amendments to the operation and organization of courts and tribunals in the country. The reform mainly comprises amendments to courts' and tribunals' statutory rules, without changing the general structure of the judiciary as established under the Polish Constitution.⁹ Numerous changes to the operation of courts as governed by their rules of procedure and to the disciplinary responsibility of judges as well as to the rules on the appointment of judges create a complex web of amendments. Only a combined review of all these changes allows us to fully assess the reform's effects on the operation of the judiciary in Poland and to understand the content of judgment K 3/21. In the following the most prominent amendments to the operation of Polish national courts are sketched to better comprehend the individual proceedings in front of the Court of Justice dealing with the reform. The corresponding case law of the Court of Justice developed as a response to it and ultimately has had a substantial influence on the content of judgment K 3/21.¹⁰

The reform of the Polish judiciary started with the amendment of the rules governing the appointment and terms of service of justices of the Constitutional Tribunal, as well as the rules of procedure of the Constitutional Tribunal in the end of 2015.¹¹ In the beginning of 2016, these changes were complemented by amendments to the Prosecution Act, which led to a restructuring of the offices of the public prosecutor, including its supervision by the Prosecutor General. On an institutional level, the amended Prosecution Act henceforth allowed for the merger of the position of Minister of Justice and the Prosecutor General. This has resulted in an accumulation of far-reaching judicial competences in the person of the Minister of Justice. In this context, the original requirement pursuant to which the Prosecutor General had to serve at least ten years as prosecutor or criminal judge to be eligible for this position was removed.¹² At the same time, public prosecutors could be subjected to disciplinary

⁷ Case C-619/18, *Commission v Poland (Independence of the Supreme Court)*, 24 June 2019, EU:C:2019:531; Case C-192/18, *Commission v Poland (Independence of Ordinary Courts)*, 5 November 2019, EU:C:2019:924; Case C-791/19, *Commission v Poland*, 15 July 2021, EU:C:2021:596.

⁸ Joined Cases C-585/18, C-624/18; C-625/18, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, 19 November 2019, EU:C:2019:982; Case C-824/18, *A.B. and Others (Appointment of Judges to the Supreme Court – Actions)*, 2 March 2021, EU:C:2021:153.

⁹ Sadurski, *supra* note 5, at 4.

¹⁰ To simplify the illustration of the process of the reform of the Polish judiciary, only the initial amendments to the statutory rules are being considered in this study. These initial amendments have given rise to the proceedings in front of the CJEU and to the development and precision of its doctrine on the effective judicial protection of EU law under Art. 19 (1), para. 2 TEU. Please note that the initial changes to the national courts' organization introduced by the reform of the Polish judiciary were revoked or modified to a very limited extent. It is the understanding of the authors of this study that the structural problems resulting from the initial amendments to the Polish judiciary still persist.

¹¹ Ustawa z dnia 19 listopada 2015 r. o zmianie ustawy o Trybunale Konstytucyjnym, 2015, 1928; Ustawa z dnia 22 grudnia 2015 r. o zmianie ustawy o Trybunale Konstytucyjnym, 2015, 2217; Ustawa z dnia 22 lipca 2016 r. o Trybunale Konstytucyjnym, 2016, 1157.

¹² Ustawa z dnia 28 stycznia 2016 r. Prawo o prokuraturze, 2016, 177, Articles 1 § 2 and 75.

proceedings initiated by the General Prosecutor's Office. Such disciplinary proceedings could lead to the suspension of a public prosecutor.

In mid-2017, these measures were supplemented by modifications to the organization of ordinary courts, administering administrative, civil, penal, and military disputes. Amendments were made to the terms of office of already appointed judges by lowering the retirement age to 65 years.¹³ Judges interested in remaining active above their retirement age, were required to request a permission from the Minister of Justice to continue their service.¹⁴ Moreover, the Minister of Justice was granted extensive rights concerning the organizational structure of the ordinary courts: The Minister was granted the authority to remove or reinstate presidents of these courts. Before the reform, the appointment and removal of presidents of the courts was only possible if their fellow judges agreed. After the reform, a removal could only be vetoed if the KRS opposed it with a two-thirds majority.¹⁵ Further changes adopted in end-2017, granted the Minister of Justice authority to appoint a so-called Disciplinary Prosecutor who could initiate disciplinary hearings against judges.¹⁶ During such disciplinary proceedings, accused judges had only limited rights of defence, and the proceedings could also be continued in their absence.¹⁷

With the same act, changes to the statutory rules of the Supreme Court were introduced.¹⁸ These lowered the retirement age of Supreme Court judges to 65 years. Supreme Court judges wishing to remain in office beyond their retirement age could stay on with the approval of the President of the Republic, who would have to seek the opinion of the KRS on this matter.¹⁹ It was not clear whether the KRS opinions were binding. In addition, the President of the Republic was granted the authority to prolong Supreme Court judges' terms of office twice, for a period of three years, after they had reached the retirement age. Moreover, the reform created additional chambers at the Supreme Court. It established, on the one hand, the Disciplinary Chamber in charge of administering disciplinary proceedings on Supreme Court judges as well as appeals on disciplinary proceedings for all other judges of the ordinary courts, and, on the other hand, the Extraordinary Review and Public Affairs Chambers authorized to overturn case law established by the Supreme Court. The Disciplinary Chamber was equipped with a separate secretariat and a separate presiding judge. These modifications to the organizational structure of the Supreme Court largely isolated the Disciplinary Chamber from judicial scrutiny of the Supreme Court and its Chief Justice.²⁰ Additionally, the modifications to the structure of the Supreme Court ensured that the disciplinary proceedings for judges which generally consist of two instances, were to be held at the newly created Disciplinary Chamber at least in the second instance. Furthermore, the autonomy of the chamber was strengthened by exempting its judgments from review by a different pool of judges serving at the Supreme Court. Furthermore, the vacant seats that occurred because of the creation of the disciplinary chamber were filled with newly appointed judges to the Supreme Court on proposal of the recently reformed KRS.

¹³ Ustawa z 16 listopada 2016 r. o zmianie ustawy o emeryturach i rentach z Funduszu Ubezpieczeń Społecznych oraz niektórych innych ustaw 2017, 38, Article 7 amending Articles 69 § 1, 100 § 1 and §§ 4a and 4b of the Law on the Common Courts System.

¹⁴ Ustawa z dnia 12 lipca 2017 r. o zmianie ustawy - Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw, 2017, 1452, Article 1 (26) adding Art. 69 § 1b and 3 to the Law on the Common Courts System.

¹⁵ *Id.*, Article 1 (7) amending Art. 27 of the Law on the Common Courts System.

¹⁶ Ustawa z dnia 8 grudnia 2017 r. o Sądzie Najwyższym, 2018, 5, Article 108 (19) adding Art. 112b to the Law on the Common Courts System.

¹⁷ *Id.*, Article 108 (23) adding Art. 115a to the Law on the Common Courts System.

¹⁸ *Id.*, Articles 1–103.

¹⁹ *Id.*, Articles 37, 38.

²⁰ *Id.*, Article 100.

Consequently, judges appointed to the Disciplinary Chamber had not served as judges at the Supreme Court before. Finally, the President of the Republic and the Minister of Justice had the authority to appoint a special Disciplinary Prosecutor on a case-by-case basis for disciplinary proceedings involving judges.²¹

Simultaneously with the modifications of the rules of procedure of the Supreme Court, the Polish legislature also revised the laws governing the *KRS*.²² The *KRS* is envisaged under the Polish Constitution as a judicial entity overseeing the appointment of judges as well as imposing disciplinary measures on judges. According to Art. 179 of the Polish Constitution, the President of the Republic appoints judges based on proposals provided by the *KRS*. The terms of office of previously elected *KRS* Members were shortened to allow for the appointment of a completely newly composed *KRS*. The appointment of new *KRS* members took place following an amended voting procedure. Whereas the original appointment procedure of *KRS* members required that a large majority of them were elected by peer judges from different branches of the ordinary courts, the new procedure introduced a nomination procedure which required their appointment of the Members by the lower chamber of the Polish parliament, the *Sejm*.²³ Because of the significantly modified appointment procedure for *KRS* Members combined with the re-composition of the entire *KRS*, it has been argued that the whole *KRS* has become more susceptible to the influence of the legislature.²⁴ This has led to a significantly increased influence of the legislature on the judicial branch.²⁵

2.1.2. Decisions of the Court of Justice concerning the Polish reform of the judiciary

Because of the above-described, sweeping reform of the Polish judiciary, there was an increasing fear that the independence and impartiality of the Polish judiciary would be significantly impaired.²⁶ Specifically, the Court of Justice was called upon multiple times to decide whether the reform had a negative impact on the independence and impartiality of Polish courts, leading to findings of violations of Arts. 2 and 19 TEU.²⁷ In this context, the Court of Justice held that Polish courts could disapply certain amendments introduced through the reform if they violated the standard of effective judicial protection prescribed by Art. 19 (1), para. 2 TEU.²⁸ The Court of Justice found that almost the entirety of the amendments introduced by the Polish legislature violated EU guarantees of judicial independence. It held that the amendments to the Polish courts' statutory rules violated the independence and impartiality of the judiciary, the right to a fair trial, the principle that legal disputes have to be reviewed by a tribunal *established by law*, and the principle of sincere cooperation between

²¹ *Id.*, Article 76 §§ 9–10.

²² Ustawa z dnia 8 grudnia 2017 r. o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw, 2018, 3.

²³ *Id.*, Article 1 (1).

²⁴ Piotr Uziębło, 'Kilka uwag o 'reformowaniu' Krajowej Rady Sądownictwa', 8 *Kwartalnik Stowarzyszenia Sędziów Polskich 'IUSTITIA'* (2017).

²⁵ Michał Ziółkowski, 'Two Faces of the Polish Supreme Court After "Reforms" of the Judiciary System in Poland: The Question of Judicial Independence and Appointments', 5 *European Papers* (2020) 347, at 348–351.

²⁶ Cf. Activation of the procedure under Art. 7 (1) TEU against Poland by the European Commission on the infringement of the *rule of law* principle on December 20, 2017, COM(2017) 835 final, or the activities at the Council of Europe, e.g. *Report by Nils Muižnieks Commissioner for Human Rights of the Council of Europe*, CommDH(2016)23 (2016), as well as the judgments issued by the ECtHR, Case 4907/18, *Xero Flor w Polsce Sp. z o.o. v. Poland*, 7 May 2021, CE:ECHR:2021:0507JUD000490718; Case 26691/18; 27367/18, *Broda and Bojara v. Poland*, 29 June 2021, CE:ECHR:2021:0629JUD002669118; Case 43447/19, *Reczkowicz v. Poland*, 22 July 2021, CE:ECHR:2021:0722JUD004344719; Case 49868/19; 57511/19, *Dolińska-Ficek and Ozimek v. Poland*, 8 November 2021, CE:ECHR:2021:1108JUD004986819; Case 1469/20, *Advance Pharma Sp. z o.o. v. Poland*, 3 February 2022, CE:ECHR:2022:0203JUD000146920.

²⁷ Case C-619/18, *Commission v Poland*, *supra* note 7; Case C-192/18, *Commission v Poland*, *supra* note 7; Case C-791/19, *Commission v Poland*, *supra* note 7.

²⁸ Joined Cases C-585/18, C-624/18; C-625/18, *A. K. and Others*, *supra* note 8; Case C-824/18, *A.B. and Others*, *supra* note 8.

national courts and the CJEU regarding the interpretation and enforcement of EU law.²⁹ Because Poland refrained from bringing its national laws into conformity with the demands of the Court of Justice, the latter mandated that Polish courts disregard the amendments introduced in the reform in order to prevent any reduction of the level of protection and enforcement of EU law.³⁰

The Court of Justice repeatedly noted that individuals must be granted access to independent courts and tribunals. It argued that this principle comprised an *external*, as well as an *internal component*. Under the *external component*, EU Member States were required to ensure that their national courts can operate autonomously, that is, without being exposed to “external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions”³¹. One vital aspect of the *external component* of the principle of the independence of the judiciary is the irremovability of judges which protects judges against their removal from office.³²

Conversely, under the *internal component*, EU Member States have the duty to design the judicial system in a manner which guarantees “objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law”.³³ The Court of Justice argued that national courts of EU Member States’ need to comply with these requirements as soon as they have the competence to adjudicate matters in the fields covered by EU law.³⁴

The Court of Justice found several elements of the Polish reform of the judiciary to be incompatible with Art. 19 (1), para. 2 TFEU, as they could not “dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it”.³⁵ In *Commission v Poland (Independence of the Supreme Court)*, the Court of Justice found that the lowering of the retirement age for Supreme Court judges raised serious concerns regarding the principle of irremovability of judges.³⁶ Although it acknowledged that the irremovability of judges was not an absolute legal principle and that EU Member States may have legitimate reasons to make amendments to the terms of office of national judges, any changes had to have a legitimate objective and comply with the principle of proportionality.³⁷ The Polish government had argued that the changes sought to bring the retirement age at the Supreme Court into line with the general retirement age and to improve the age structure of the Supreme Court judges sitting in office. The Court of Justice rejected these arguments. Considering the absence of transitory rules and the introduction of a mechanism under which the President of the Republic had discretion to prolong the terms of individual judges, it found that the reform gave the impression that Polish legislature aimed at “side-lining a certain group of judges of that court.”³⁸

In *Commission v Poland (Independence of Ordinary Courts)*, the Court of Justice held that the statutory changes concerning the ordinary courts, lowering the retirement age and granting the Minister of

²⁹ Case C-619/18, *Commission v Poland*, *supra* note 7; Case C-192/18, *Commission v Poland*, *supra* note 7; Case C-791/19, *Commission v Poland*, *supra* note 7.

³⁰ Joined Cases C-585/18, C-624/18; C-625/18, *A. K. and Others*, *supra* note 8; Case C-824/18, *A.b. and Others*, *supra* note 8.

³¹ Case C-619/18, *Commission v Poland*, 24 June 2019, *supra* note 7, at 72.

³² *Id.*, at 75.

³³ *Id.*, at 73.

³⁴ *Id.*, at 50.

³⁵ *Id.*, at 74.

³⁶ *Id.*, at 78.

³⁷ *Id.*, at 91.

³⁸ *Id.*, at 82.

Justice authority to continue a judges' term of office, violated Art. 19 (1), para. 2 TEU.³⁹ It found that the amended rules on the ordinary courts granted the Minister of Justice such extensive discretion that it undermined the principles of judicial independence and of the irremovability of judges. In particular, the indefinite character of the amended rules created a situation for judges approaching the retirement age in which they could be subject to external pressure.⁴⁰

Finally, in *Commission v Poland (Disciplinary Regime for Judges)*, the Court of Justice found the establishment of the Disciplinary Chamber at the Supreme Court to violate Art. 19 (1), para. 2 TEU and to be incompatible with the independence and impartiality of judges.⁴¹ This violation was due to multiple factors, namely "the particular context and objective circumstances in which the Disciplinary Chamber was created, the characteristics of that chamber, and the way in which its members were appointed".⁴² This included the modified appointment procedure for KRS Members as well as the resulting appointment practice by the KRS regarding the new judges that were appointed to the Disciplinary Chamber. According to the Court of Justice, these circumstances could create doubts as to the impartiality and independence of the Disciplinary Chamber itself.⁴³

The Court of Justice cited several reasons: first, it was concerned with the lack of independence and impartiality of the newly created Disciplinary Chamber.⁴⁴ Second, the Court found that the excessively broad provisions regulating judges' disciplinary liability could be used to exert pressure and a "deterrent effect"⁴⁵ on judges when interpreting EU law. Therefore, these provisions increased the probability that the content of the disciplinary chamber's decisions could be unduly influenced by the legislature. Third, the Court took issue with the discretion assigned to the President of the Disciplinary Chamber to select and designate the composition of the bench on a case-by-case basis for each disciplinary proceeding. This was contrary to the requirement that a tribunal had to be *established by law*.⁴⁶ The Court of Justice considered the entire disciplinary regime could lead judges "to fear, if they rule in a particular way in the cases before them, that disciplinary proceedings will be brought against them."⁴⁷

Requests for preliminary rulings have equally played an important role in the case law of the Court of Justice regarding the reform of the Polish judiciary. Polish national courts addressed the Court of Justice multiple times for the purpose of interpreting the content of Arts. 2, 4 and 19 (1), para. 2 TEU, as well as Arts. 47 and 51 (1) of the Charter of Fundamental Rights of the European Union. However, the Court of Justice limited itself to reviewing cases where "a connecting factor between that dispute and the provisions of EU law" was sufficiently visible.⁴⁸

³⁹ *Supra* note 7. Moreover, the Court of Justice also clarified that the differentiated retirement ages for male (65 years) and female judges and prosecutors (60 years) constituted a prohibited discrimination based on sex in matters of equal payment of wages in violation of Art. 157 TFEU and Arts. 5(a) and 9(1)(f) of Directive 2006/54/EC.

⁴⁰ *Id.*, at 119.

⁴¹ Case C-791/19, *Commission v Poland*, *supra* note 7.

⁴² *Id.*, at 112.

⁴³ *Id.*, at 84.

⁴⁴ *Id.*, at 113.

⁴⁵ *Id.*, at 157.

⁴⁶ *Id.*, at 176.

⁴⁷ *Id.*, at 213.

⁴⁸ Joined Cases C-558/18 and C-563/18, *Miasto Łowicz and Prokurator Generalny Zastępowany Przez Prokuraturę Krajową, Formerly Prokuratura Okręgowa w Płocku v Skarb Państwa – Wojewoda Łódzki and Others*, 26 March 2020, EU:C:2020:234, at 48. See also Case C-62318, *Prokuratura Rejonowa w Słubicach v BQ*, 6 October 2020, EU:C:2020:800, at 30.

In *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, the Court of Justice was concerned with the newly established Disciplinary Chamber at the Supreme Court.⁴⁹ As the judges of the Disciplinary Chamber were all newly appointed to the Supreme Court, it was uncertain whether the Disciplinary Chamber was sufficiently independent and impartial as to provide a ruling based on Art. 9(1) of Council Directive 2000/78/EC, a provision prohibiting the discrimination on grounds of age in employment and occupation matters. The applicants in the original case were judges appealing against decisions of the KRS concerning their retirement age. Their appeals were lodged at a chamber of the Supreme Court which was originally charged with employment matters before the creation of the autonomous Disciplinary Chamber. This chamber then requested a preliminary ruling. The Court of Justice held that the referring court had to make an assessment regarding the legality of the Disciplinary Chamber, taking into account all relevant aspects of the then ongoing reform of the Polish judiciary.⁵⁰ If the referring chamber came to the conclusion that the Disciplinary Chamber violated the requirements under Art. 19 (1), para. 2 TEU and Art. 47 of the Charter, it had to apply former procedural laws in order to ensure that the jurisdiction was executed by a judicial body meeting these requirements.⁵¹

The case *A.B. and others (Appointment of Judges to the Supreme Court – Actions)* concerned changes to the rules on the appointment procedure to the Supreme Court which effectively made the judicial review of the appointment process impossible.⁵² The referral was made by the Supreme Administrative Court of Poland, which had been asked to review appointment decisions by the KRS. In a preceding judgment, the PCT had decided that the Supreme Administrative Court was not authorized to carry out the review of the appointment procedure and therefore required it to suspend the procedure and consequently to refrain from a preliminary reference procedure to the Court of Justice. The Supreme Administrative Court still made the request to the Court of Justice, which held that the absence of any judicial review regarding the appointment of judges to the Supreme Court, including the inability of national courts to request a preliminary ruling from it, possibly violated the principle of sincere cooperation of national courts with the CJEU contained in Arts. 267 TFEU, Art. 4 (3), as well as the principles of the rule of law and independence of the judiciary in Arts. 2 and 19 (1), para. 2 TEU. The Court of Justice required the Supreme Administrative Court to disapply the procedural provisions of the Polish statutes if it found that they indeed violated EU law in order to uphold the principle of primacy of EU law.⁵³ Furthermore, the Court of Justice emphasized that an EU Member State could not “make amendments to its national legislation the specific effects of which are to prevent requests for a preliminary ruling addressed to the Court from being maintained after they have been made, and thus to prevent the latter from giving judgment on such requests, and to preclude any possibility of a national court repeating similar requests in the future”.⁵⁴

Finally, the Court of Justice imposed, on several occasions, interim measures to prevent the further deterioration of the independence and impartiality of the judiciary in Poland.⁵⁵ In the still pending case *Commission v Poland*, the Court granted interim measures regarding the suspension of the activity of the Disciplinary Chamber of the Supreme Court, the suspension of the law establishing the disciplinary

⁴⁹ Joined Cases C-585/18, C-624/18; C-625/18, *A. K. and Others*, *supra* note 8.

⁵⁰ *Id.*, at 153.

⁵¹ *Id.*, at 171.

⁵² Case C-824/18, *A.B. and Others*, 2 March 2021, *supra* note 8.

⁵³ *Id.*, at 148.

⁵⁴ *Id.*, at 95.

⁵⁵ Case C-619/18 R, *Commission v Poland - Order of the Court - Application for Interim Measures Under Article 279 TFEU*, 17 December 2018, EU:C:2018:1021; Case C-791/19 R, *Commission v Poland - Order of the Court - Application for Interim Measures Under Article 279 TFEU*, 8 April 2020, EU:C:2020:277.

liability of judges for examining the compliance of courts and judges with their independence and impartiality, the suspension of the law prohibiting national courts to carry out an assessment of the independence and impartiality of tribunals under Art. 19 (1), para. 2 TEU and the suspension of the law which grants exclusive jurisdiction to the Extraordinary Review and Public Affairs Chambers to examine complaints over the independence and impartiality of judges.⁵⁶

2.2. Content of the judgment

Because of the case law developed by the Court of Justice, the Polish government was facing a situation in which it became likely that national courts disappplied the amendments introduced in the reform of the Polish judiciary: on the one hand, such a course of action was mandated by the Court of Justice; on the other hand, in disapplying the amendments introduced under the reform of the judiciary, national courts could ensure that Poland complied with its obligations under Art. 19 (1), para. 2 TEU. Against this backdrop, the Polish Prime Minister filed a motion to the PCT to issue a judgment on the compatibility of EU law with the Polish Constitution on 30 September 2021. The operative part of the judgment was issued and proclaimed on 7 October 2021 by the Constitutional Tribunal. Until now, however, the grounds of judgment have not been issued. All observations regarding the content of the decisions are therefore based on the operative part and the oral explanation given by the Judge Rapporteur Bartłomiej Sochański after the proclamation of the operative part.⁵⁷ Moreover, the oral annotations included equally the two dissenting opinions provided by the judges Piotr Pszczółkowski and Jarosław Wyrembak.⁵⁸

The Constitutional Tribunal found in its judgment three violations of the Polish Constitution caused by several provisions of the TEU which enabled national courts to uphold the primacy of EU law and its effective judicial protection as required by Art. 19 (1), para. 2 TEU.

Firstly, the Constitutional Tribunal found that an understanding of Art. 1 read in conjunction with Art. 4 (3) TEU which required or authorised Polish adjudicative bodies to issue decisions which disregarded the Polish Constitution or to apply laws which contravened the Polish Constitution to be in breach of Arts. 2, 7, 8 (1) in conjunction with 8 (2), 90 (1) and 91 (2), as well as 178 (1) of the Polish Constitution.

Secondly, the Constitutional Tribunal interpreted Art. 19 (1) read in conjunction with Art. 4 (3) TEU to require or authorise Polish adjudicative bodies to apply laws which were previously declared unconstitutional by the Constitutional Tribunal. The PCT held that the mentioned provisions of the TEU violate Arts. 2, 7, 8 (1) in conjunction with 8 (2) and 91 (2), 90 (1), 178 (1) as well as 190 (1) of the Polish Constitution.

Thirdly, the Constitutional Tribunal considered Art. 19 (1), para. 2 read in conjunction with Art. 2 TEU, which allow Polish courts to review the independence of judges appointed directly by the President of the Republic or by request of the KRS, to be incompatible with Arts. 8 (1) in conjunction with 8 (2), 90 (1), 91 (2), 144 (3) 17 as well as 186 (1) of the Polish Constitution.

These findings that certain provisions of the TEU violated the Polish Constitution are premised on an understanding pursuant to which the PCT has ultimate authority to safeguard Poland's constitutional

⁵⁶ Case C-204/21 R, *Commission v Poland*, 14 July 2021, EU:C:2021:593.

⁵⁷ This explanation is mostly identical with the English translation of the Constitutional Tribunal's press release regarding the judgment: *Press Release after the Hearing*, *supra* note 4.

⁵⁸ *Spisane motywy ustne decyzji Trybunału Konstytucyjnego z 7 października 2021 (sygn. akt K 3/21)*, Archiwum Osiatyńskiego, available at <https://archiwumosiatsynskiego.pl/archiwum/trybunal-konstytucyjny-decyzja-z-7-pazdziernika-2021-k-3-21-spisane-motywy-ustne/>.

identity, which also comprises the organization of national courts. For this reason, the Constitutional Tribunal did not see any necessity to make a preliminary reference to the Court of Justice regarding the content of the addressed provisions. In this context, the Judge Rapporteur stated:

“The Constitutional Tribunal did not see it justified to make a referral for a preliminary ruling to be issued by the CJEU, deeming that there was no useful purpose and no need to present the CJEU with issues concerning the conformity of the norms of the TEU with the Polish Constitution. The CJEU has exclusive jurisdiction to provide an interpretation of EU law, whereas the Constitutional Tribunal is the court of the last word with regards to the conformity of any norms, including EU norms, with the Constitution of the Republic of Poland.”⁵⁹

2.2.1. Polish constitutional framework

The provisions of the Polish Constitution that were identified to be infringed by EU law in the PCT judgment comprise regulations on the fundamental organization of the Polish state. These are namely the principle to be a democratic state ruled by law and implementing the principles of social justice (Art. 2), the principle that organs of the Polish state are bound by the rule of law (Art. 7), the hierarchy of sources of law, according to which the Constitution takes precedence over all other laws and regulations (Art. 8 (1)), the direct applicability of the Constitution (Art. 8 (2)), the competence of the Polish state to adopt international treaties and delegate authority to international institutions (Art. 90 (1)), the position of international agreements within the hierarchy of sources of law binding on the organs of the state (Art. 91 (2)), the authority of the President to appoint judges (Art. 144 (3) 17), the independence of judges and their obligation to comply with the Constitution (Art. 178 (1)), the function of the KRS to ensure the independence of the judiciary (Art. 186 (1)), and the provision on the effects of judgments of the Constitutional Tribunal (Art. 190 (1)).

2.2.2. First constitutional violation

Concerning the first violation of the Polish Constitution by Arts. 1 and 4 (3) TEU, the judgment contains the following operative finding:

“Article 1, first and second paragraphs, in conjunction with Article 4(3) of the Treaty on European Union [...], in so far as the European Union, constituted by equal and sovereign States and forming an “ever closer union among the peoples of Europe”, whose integration – taking place on the basis of EU law and through its interpretation by the Court of Justice of the European Union – is reaching a ‘new stage’ in which:

a) bodies of the European Union shall act beyond the competences delegated by the Republic of Poland in the Treaties,

b) The [Polish] Constitution is not the supreme law of the Republic of Poland, having primacy of validity and application,

c) The Republic of Poland cannot function as a sovereign and democratic state

- is incompatible with Articles 2, 8 and 90(1) of the Constitution of the Republic of Poland.”⁶⁰

Regarding this first violation of the Polish constitution, the Judge Rapporteur established the ultimate authority of the Polish Constitutional Tribunal to review legal acts under EU law and judgments of the

⁵⁹ Press Release after the Hearing, *supra* note 4, at I.4.

⁶⁰ PCT, *Sprawa K 3/21*, 7 October 2021, at 1.

Court of Justice. According to the Judge Rapporteur, the authority of the Constitutional Tribunal to review legal acts under EU law and judgments of the Court of Justice is grounded on three premises, namely the development of *ultra vires* legal acts of EU institutions in the form of case law of the CJEU, the impossibility to integrate such *ultra vires* legal acts into the Polish legal order due to the hierarchy of laws within the Polish legal system according to which the constitution has the supreme position and establishes the outer limit regarding the integration of international law within the Polish legal system, particularly, if a lack of democratic legitimacy of these rules has been identified. In this context, the Judge Rapporteur argued that:

"International agreements ratified with prior consent granted by statute, such as the Treaty on European Union (hereinafter: the TEU, the Treaty), are placed in that hierarchy below the Constitution, which is the supreme law in the Polish system of the sources of law. Constituting part of that system from the moment of its ratification and publication in the Journal of Laws, an international agreement must remain consistent with the Constitution. Thus, in the hierarchy of the sources of law, the TEU occupies a position that is lower than that of the Constitution, and just as any ratified international agreement, and just as any part of the Polish legal system, the TEU must be consistent with the Constitution."⁶¹

The Judge Rapporteur stressed the competence of the Constitutional Tribunal to verify compliance of international treaties, including the EU treaties, with the Polish Constitution as an equally well-established practice by naming a series of previous judgments of the PCT that supposedly contained the same understanding:

"The scope of competence delineated in such a way also comprises conducting a review of constitutionality with regard to the treaties of EU primary law, which constitute international agreements (similar views were presented in the Constitutional Tribunal's judgments ref. nos.: K 18/04 and K 32/09, SK 45/09 and P 7/20; as well as its decision ref. no. P 37/05; by contrast, in the judgment ref. no. U 2/20, the Tribunal examined the conformity of the norms of Polish law to an EU-Treaty norm, nota bene also Article 4(3) of the Treaty.)"⁶²

Judge Rapporteur Sochański referred particularly to judgment K18/04 and the comparative experience in Germany and Denmark:

"In its judgment of 11 May 2005, ref. no. K 18/04, [...] the Constitutional Tribunal stated that the boundaries of the integration (i.e. the close union) would be crossed if the scope of the conferral of competences would prevent the Republic of Poland from functioning as a sovereign and democratic state. By taking such a stance in 2005, the Constitutional Tribunal stressed that its stance, in principle, remained concurrent with the stances taken by the Federal Constitutional Court of Germany and the Supreme Court of the Kingdom of Denmark. [...]"⁶³

The Judge Rapporteur continued by stating that the Polish Constitution was unable to integrate *ultra vires* international legal acts within the domestic legal system due to the substantive requirements on the hierarchy of laws within the Polish state:

"A distinction between the area of conferred competences and those exclusively reserved for the EU Member States is also essential for specifying the boundaries of the so-called principle of the primacy of EU law. It is obvious that, in the light of Article 91 of the Constitution, EU law is applied [in oral annotations the Judge Rapporteur added: and not on the basis of case law] directly,

⁶¹ Press Release after the Hearing, *supra* note 4, at I.1.

⁶² *Id.*, at I.2.

⁶³ *Id.*, at II.8.

taking precedence in the case of a conflict with statutes, only within the scope of the conferred competences, which was deemed a number of times by the Constitutional Tribunal in its judgments ref. nos. K 18/04 and K 32/09, and more recently in the case ref. no. P 7/20.

Consent to the situation where an international organisation – including the European Union and its authorities – would create norms with regard to the Republic of Poland outside the realm of conferred competences and the declaration of their precedence not only before statutes but also before the Constitution would mean the loss of sovereignty on the part of Poland. The Constitutional Tribunal categorically stated that no authority of the Republic of Poland may accept such a state of affairs.”⁶⁴

In the same vein, Judge Rapporteur Sochański added that the powers conferred to the European Treaties reached their outer limits, with

“the obligation to respect the constitutional identity and the fundamental functions of the state (Art. 4(2) of the TEU), and moreover within the limits arising from the principles of proportionality and subsidiarity (Art. 5(1) of the TEU).

Any provisions created outside those limits do not constitute binding international law for the Republic of Poland, which is referred to in Article 9 of the Constitution.

14. What also delineates the boundary of the conformity of the process of European integration with the Constitution is the democratic legitimacy of EU authorities, which was aptly pointed out by the Constitutional Tribunal in its judgment of 11 May 2005, ref. no. K 18/04. Indeed, the democratic legitimacy of EU authorities as regards enacting legal norms which are binding in the Republic of Poland exists only to the extent to which the Polish sovereign (the Polish nation) grants consent thereto. It should indeed be borne in mind that – in principle – Polish citizens, similarly to the citizens of the other EU Member States, have no influence over the appointment of EU executive authorities and judges selected to the CJEU.”⁶⁵

In this context, it appears that the doubts of the Constitutional Tribunal over the Court of Justice’s perceived deficit in judicial independence compared to the Polish constitutional standards played another factor for finding a violation of the Polish Constitution by the provisions of the TEU:

“What lingers as a side remark to the above statements is an obvious doubt arising from the course of the Tribunal’s hearing held on 30 September 2021, namely the doubt as to what extent the CJEU remains an independent court in the light of the Polish constitutional standards, and in particular in the context of appointing judges to the CJEU by executive authorities, or even considering the unlimited number of terms of office that may be served by one judge of the CJEU. Contrary to the above, the Polish Constitution, in its Article 179, provides that judges shall be appointed for an indefinite period, whereas Article 180(1) thereof ensures that judges shall not be removable. By contrast, judges of the Constitutional Tribunal may be appointed – on the basis of Article 194(1) of the Constitution – only for one term of office of 9 years. This entails that Polish judges do not have to aim to please executive authorities for the purpose of being reappointed.”⁶⁶

⁶⁴ *Id.*, at II.11; II.12.

⁶⁵ *Id.*, at II.13; II.14.

⁶⁶ *Id.*, at I.5.

2.2.3. Second constitutional violation

The operative part of the judgment on the second constitutional violation resulting from Art. 19 (1), para. 2 TFEU reads as follows:

"2. The second subparagraph of Article 19 of the Treaty on European Union in so far as, in order to ensure effective legal protection in areas governed by Union law, it confers the competence to national courts (ordinary courts, administrative courts, military courts and the Supreme Court) to

a) omitting the provisions of the Constitution in the process of adjudication, is found inconsistent with Article 2, Article 7(1), 2(1)8 and 1 Article 178(1)90 of the Constitution,

*b) adjudication on the basis of regulations that are no longer in force, have been repealed by the Sejm or have been deemed unconstitutional by the Constitutional Tribunal, is found inconsistent with Art. 2, Art. 7 and Art. 8 (1), Art. 90 (1), Art. 178 (1) and Art. 190 (1) of the Constitution."*⁶⁷

The Judge Rapporteur argued that Court of Justice – independent of the legal nature of precedents of the CJEU – did not have the authority to determine the organisation of courts in Poland. He found that Art. 90 (1) of the Constitution formed part of Polish constitutional identity so that competences in this respect could not be transferred to international institutions.⁶⁸ At the same time, the Judge Rapporteur also alleged that the Court of Justice had acted *ultra vires* in its interpretation of Art. 19 (1) TEU:

*"Deriving the competence to review the functioning and organisational structure of a judicial system in an EU Member State from Article 19(1), second subparagraph, of the TEU constitutes an example of creating new competences on the part of the CJEU."*⁶⁹

2.2.4. Third constitutional violation

The third constitutional violation identified by the PCT reads:

"3. The second subparagraph of Article 19(1) and Article 2 of the Treaty on European Union in so far as, in order to ensure effective legal protection in areas governed by Union law and to guarantee the independence of judges, conferring to national courts (ordinary courts, administrative courts, military courts and the Supreme Court) the competence to

a) control the legality of the procedure for the appointment of a judge, including the review of the legality of the act of appointment of a judge by the President of the Republic of Poland, are inconsistent with z Art. 2, Art. 8 (1), Art. 90 (1) and Art. 179 in conjunction with Art. 144 (3) 17 of the Constitution,

b) control of the legality of a resolution of the National Council of the Judiciary containing a request to the President to appoint a judge, are inconsistent with Art. 2, Art. 8 (1), Art. 90 (1) and Art. 186 (1) of the Constitution,

*c) of the national court's finding that the process of appointment of a judge is flawed and, as a result, refusing to recognise as a judge a person appointed to judicial office in accordance with Article 179 of the Constitution, are incompatible with Art. 2, Art. 8 (1), Art. 90 (1) and Art. 179 in conjunction with Art. 144 (3) 17 of the Constitution."*⁷⁰

⁶⁷ PCT, *Sprawa K 3/21*, *supra* note 60, at 2.

⁶⁸ *Press Release after the Hearing*, *supra* note 4, at III.17.

⁶⁹ *Id.*, at III.18.

⁷⁰ PCT, *Sprawa K 3/21*, *supra* note 60, at 2.

The Judge Rapporteur argued that the understanding of the rule of law as developed through the case law of the Court of Justice amounted to a violation of the Polish Constitution because the organisational structure of Polish courts was not covered by the provisions of Arts. 1 and 2 TEU.⁷¹ He emphasized that the independence of judges could by no means be ascertained in an abstract and general manner as done by the Court of Justice:

“The principle of the rule of law does not specify a way of appointing judges, but requires that they be independent and impartial. However, the said independence is not inextricably linked with the way of appointing a judge and it may not be examined *ex ante* as well as *in gremio*, i.e. before an appointment is made to the office of judge and with regard to all judges without distinction. The independence of a judge is linked with a specific case on which the judge is adjudicating. The Constitution of the Republic of Poland, similarly to earlier constitutions, formulates the framework of the legal guarantees for the independence of judges. Those constitutional standards may not be replaced with the CJEU’s interpretative guidelines.”⁷²

The Judge Rapporteur added:

“Indeed, the Polish Constitution provides in its Article 2, Article 45, Article 78 and Article 176(1) for a much higher standard of the protection of the right to an impartial and independent court than do EU legal provisions, including Article 47 of the Charter of Fundamental Rights of the European Union or Article 6(1) and Article 13(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms. Therefore, there is room for sincere and mutual cooperation between the European Union and Poland [the Judge Rapporteur added in its oral annotations: a sincere dialogue between the Constitutional Tribunal and the CJEU.]”⁷³

Having uncovered seemingly different appreciations of the independence of judges in Poland by the Court of Justice and the Constitutional Tribunal, the Judge Rapporteur discarded the significance of a legal collision between both bodies and legal regimes and called for a dialogue between them:

“In the doctrine of law, with reference to the jurisprudence of the Constitutional Tribunal, at times it is asserted that in the case of recognising an irremovable conflict between EU law and the Polish Constitution, the following consequences are possible: amending the Constitution; changing EU law; or leaving the EU. Such an assertion may only be deemed admissible in academic rhetoric. Above all, an irremovable conflict occurs very rarely, if it at all exists outside of the theory of law. In the event of a conflict of norms [the Judge Rapporteur stated in its oral annotations: a collision between norms developed by human beings], what is necessary is a mutual, sincere dialogue, which constitutes an obligation arising from the principle of loyalty, which is characteristic for European legal culture.”⁷⁴

Despite the rhetoric of dialogue, the Judge Rapporteur nevertheless stressed the ultimate authority of the PCT to interpret the Polish Constitution and the effect of EU law within the Polish legal order:

“It should be underlined that the Constitutional Tribunal occupies a special position within the Polish system of supreme public authorities; by safeguarding the Polish Constitution – a legal act that constitutes the foundation of the Polish normative system, the Tribunal safeguards the

⁷¹ *Id.*, at III.19.

⁷² *Press Release after the Hearing*, *supra* note 4, at III.19; III.20.

⁷³ *Id.*, at III.20.

⁷⁴ *Id.*, at IV.21.

rudiments of legal security and order, and thus the sovereignty of the Polish state, at least in the normative dimension.

[...]

As any EU law being hierarchically subordinate to the Constitution of the Republic of Poland falls within the scope of the jurisdiction of the Constitutional Tribunal, it should be stated that not only normative acts within the meaning set out in the CJEU's case law, but also the CJEU's case law itself will – as part of the EU normative order, and from the point of view of its conformity with the highest legal act in Poland – be subject to assessment by the Tribunal.”⁷⁵

Finally, the Judge Rapporteur sent a warning towards the Court of Justice:

“In the light of the principle of sincere cooperation, dialogue, mutual respect and mutual support, the Tribunal refrains from executing the said constitutional competence. However, if the practice of the CJEU's progressive activism – which consists, in particular, in interfering with the exclusive competences of Polish state authorities, in undermining the position of the Constitution as the supreme law in the Polish legal system, in challenging the fact that the judgments of the Constitutional Tribunal are of universally binding application and are final, and ultimately in questioning the status of judges of the Tribunal – is not refrained from, the Tribunal does not rule out that it will resort to exercising the said competence and will subject the CJEU's rulings to direct assessment of their conformity to the Constitution, including their elimination from the Polish legal order.”⁷⁶

2.3. Consequences of the judgment for Polish courts and administrative agencies

The contentious matter of the PCT judgment is extremely extensive, which allowed the PCT to rule that certain provisions of EU primary law were unconstitutional as was their application by domestic courts. These findings blend in with the generally confrontational approach of the Polish government towards the Court of Justice, as the government reacted to the case law of the latter by extending the disciplinary responsibility of judges lately. According to the new rules, any actions or omissions which may prevent or significantly impede the functioning of courts or the public prosecutor's office, as well as actions which question the existence of the official status of a judge or a public prosecutor, the validity of the appointment of a judge or a public prosecutor, or the legitimacy of the constitutional body of the Republic of Poland constitute a disciplinary offense.⁷⁷ This may well cover requests for preliminary rulings from the Court of Justice or the implementation of a review of the impartiality and independence of the judiciary in line with the requirements established in the case law of the Court of Justice regarding Art. 19 (1), para. 2 TEU.⁷⁸

Yet, as can be deduced from the explanations of the Judge Rapporteur, the reasoning of the judgment remains mostly formal in nature. To the extent that the PCT derived substantive legal concepts from the Polish constitution, the latter remained mostly ambiguous. This vagueness will very likely impede

⁷⁵ *Id.*, at IV.22.

⁷⁶ *Id.*

⁷⁷ Obwieszczenie Marszałka Sejmu Rzeczypospolitej Polskiej z dnia 18 listopada 2020 r., 2021, 66, Article 137 adding an explicit list of offences to Art. 137 § 1 of the Law on the Public Prosecutor's Office.

⁷⁸ Nina Półtorak, 'Kilka uwag o skutkach wyroku Trybunału Konstytucyjnego w sprawie K 3/21 dla stosowania prawa unijnego przez polskie sądy', *Europejski Przegląd Sądowy* (2021).

any dialogue with the Court of Justice as requested by the Constitutional Tribunal and thus turns the allusion to the concept of dialogue into empty rhetoric. In particular, the explanations do not contain a substantive assessment of the precise reasons for why the Court of Justice's case law transgresses the latter's competences, let alone an alternative interpretation of the principles of rule of law and effective judicial protection under the Polish Constitution which leads to incompatibilities with Art. 19 (1), para. 2 TEU. Rather, the judgment constitutes a blanket refusal of the primacy of EU law. Furthermore, the concept of the Polish constitutional identity as an outer limit for the legal integration into EU law remains mostly without substance, as the Court has not identified any criteria for determining this constitutional identity. Instead, the Court relies on a mere assertion in this respect. In this context, the PCT argued that the Court of Justice applied an erroneous legal standard in assessing independence and impartiality of the Polish judiciary in the abstract. It added that instead the legal test should always take place on a case-by-case basis. However, it did not clarify what abstract institutional guarantees are in its view encompassed by Art. 19 (1), para. 2 TEU to ensure that independence and impartiality of the judiciary is ensured.

Finally, this absence of substantive arguments for the denial of primacy of EU law unveils the primary intention of the judgment: it is intended to effectively obstruct the disapplication of national rules by national courts for the purpose of complying with the requirements of effective legal protection under Art. 19 (1), para. 2 TEU.⁷⁹ This is expressed by the finding that any disapplication of national rules constitutes a constitutional violation, which amounts to a complete denial of the primacy of EU law.

In practice, the PCT judgment will most probably have a severe curtailing effect on the application of EU law within the Polish legal order. Polish courts will lose their ability to review the appointment of judges by the President of the Republic or the independence and impartiality of the judiciary in light of the selection process carried out by the KRS. It has been argued that national courts intending to initiate a preliminary reference regarding Art. 19 (1), para. 2 TEU to the Court of Justice will have to ask the PCT to make a finding that the directed question does not violate the constitution after the judgment.⁸⁰ Considering that the PCT argued in its first finding that the practice and case law of the CJEU constitute *ultra vires* acts altogether, this effect might extend to all disputes involving the interpretation and application of EU law.⁸¹

As a consequence, the judgment aggravates the pressure that is exercised on judges by the disciplinary responsibility. Pursuant to its logic, judges can become subject to disciplinary proceedings even more easily, should they attempt to implement the doctrine of the Court of Justice regarding Art. 19 (1), para. 2 TEU by disapplying national legislation endangering the independence of Polish judges. This could ultimately lead to judges being removed from their office for complying with EU law. This severely aggravates the already existing chilling effect caused by the disciplinary mechanism. As noted by Judge Pszczółkowski in the explanation of his dissenting opinion:

“Both the proposal of the Prime Minister and the judgment of the Constitutional Tribunal are intended to have the internal effect of preventing the courts from applying the interpretation of European Union rules laid down by the Court of Justice of the European Union [...]”⁸²

⁷⁹ Cf. Peter von Feldmann, 'Inhalt Und Kritik, Hintergrund Sowie Europapolitische Folgen Des Polnischen Verfassungsgerichtsurteils Vom 7. Oktober 2021', 2021 *Deutsch-Polnische Juristen-Zeitschrift* 4, at 6.

⁸⁰ Półtorak, *supra* note 78, at 14.

⁸¹ *Id.*

⁸² *Spisane motywy ustne decyzji Trybunału Konstytucyjnego z 7 października 2021 (sygn. akt K 3/21)*, *supra* note 58.

He added:

“What I am concerned about is the risk of the Constitutional Tribunal ruling passed today being misused to have a chilling effect on judges by initiating disciplinary proceedings.”⁸³

However, other commentators have argued that the PCT judgment could have no practical consequences on domestic courts.⁸⁴ This argument is mainly based on the broadness of the disputed matter, which has been considered to be overly ambiguous and therefore insufficiently covered by the Constitutional Tribunal's legal mandate.⁸⁵ Furthermore, it is claimed that the judgment is based on a procedural error because of the contested appointment of judges to the Constitutional Tribunal, which would equally prevent the judgment from deploying any legal effect.⁸⁶

⁸³ *Id.*

⁸⁴ Włodzimierz Wróbel, 'Skutki rozstrzygnięcia w sprawie K 3/21 w perspektywie Sądu Najwyższego i sądów powszechnych', *Europejski Przegląd Sądowy* (2021).

⁸⁵ Monika Florczak-Wątor, '(Nie)skuteczność wyroku Trybunału Konstytucyjnego z 7.10.2021 r., K 3/21 : ocena znaczenia orzeczenia z perspektywy prawa konstytucyjnego', *Europejski Przegląd Sądowy* (2021).

⁸⁶ Wróbel, *supra* note 84, at 24–25.

3. THE PRIOR CASE LAW OF THE POLISH CONSTITUTIONAL TRIBUNAL

KEY FINDINGS

In the case law of the PCT regarding EU integration, we identify two diverging trends. After accession to the EU, the PCT generally had a union-friendly position towards EU integration. While the Court adopted certain reservations and argued that EU law should not violate the Polish constitution, it painstakingly tried to avoid conflicts between the EU treaties and the constitution. This changed in 2020, when the PCT adopted a more confrontational approach. In one judgment, it ruled that the Supreme Court did not have the competence to disapply domestic statutes in order to implement decisions of the CJEU. In another decision, the PCT argued that a decision of the Court of Justice, in which the latter had imposed interim measures, was inapplicable in the Polish legal order because it was *ultra vires* and violated the Polish constitution. Consequently, the PCT judgment seems to be a logical continuation of this more confrontational approach of the PCT.

The Polish Constitutional Tribunal has developed quite a rich case law on the relationship between EU law and domestic Polish law – dating back mostly to the time before the start of the contested judicial reforms in 2016. In particular, judgment K 18/04 is of major importance.⁸⁷ It has been characterized as generally introducing a *union-friendly* interpretation of the Polish constitution, resulting in the general acceptance of the primacy of EU law.⁸⁸ Nevertheless, the PCT has introduced certain reservations regarding the primacy of EU law in judgment K 18/04 and its subsequent jurisprudence. However, it has never found these reservations to apply until very recently.

Generally, Art. 90 (1) of the Polish Constitution allows the delegation of competences to international organizations:

“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.”

Moreover, Art. 91 (3) of the Polish Constitution generally establishes the direct applicability and primacy of international law in the domestic legal order

“If an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws.”

While the primacy of EU law has generally not been contested regarding statutes of sub-constitutional nature, there has been a debate regarding the status of EU law *vis-à-vis* constitutional provisions, since Art. 8 (1) of the Polish Constitution sets out that “The Constitution shall be the supreme law of the Republic of Poland.” Considering this tension, the PCT originally sought to develop a doctrine which allows to respect the primacy of EU law even in the area of constitutional provisions without violating the principle established under Art. 8 (1) of the Polish Constitution.

⁸⁷ Adam Łazowski, 'Accession Treaty – Polish Constitutional Tribunal: Conformity of the Accession Treaty with the Polish Constitution. Decision of 11 May 2005.', 3 *European Constitutional Law Review* (2007) 148.

⁸⁸ *Id.*, at 162.

3.1. The sovereign and democratic functioning of the Polish state

In judgment K 18/04, the PCT identified the principles for sovereign and democratic functioning of the Polish state as fundamental constraints regarding the conferral of competences to EU institutions.⁸⁹ When analysing the conformity of the Treaty of Accession to the EU, the PCT developed the general requirement that the Polish legislature was prevented to transfer competences to EU institutions which would make the sovereign and democratic functioning of the Polish state impossible.

This premise of a sovereign and democratic functioning led the PCT to formulate an understanding of two separate legal regimes applicable in the jurisdiction of the Polish state, namely the national and EU legal regime. Consequently, competences of the Polish legislature that were conferred to the EU had only been delegated, but did not vanish because of this act. In the event of a conflict between EU law and the Polish constitution, the constitution would therefore prevail:

“Such a contradiction [between EU law and Polish constitutional law] may by no means be resolved in the Polish legal system by acknowledging the superiority of the Community norm in relation to the constitutional norm. Nor could it lead to the loss of binding force of a constitutional norm and its replacement by a Community norm, or to the limitation of the scope of application of that norm to an area not covered by the regulation of Community law.”⁹⁰

Should EU institutions interpret EU law in a way irreconcilable with the Polish constitution, the remaining sovereign and democratic functioning of the Polish state could call for either the amendment of the constitution itself, the amendment of the EU treaties or – as *ultima ratio* – the withdrawal of Poland from the EU to align the Polish legal system with the requirements established by the constitution.⁹¹ However, back at the time, the belief was that this was not to happen in the near future, given that

“[...] the primary law of the European Union, in its objectives and axiological layer, coincides with the postulations of the Constitution. In principle, the common system of universal goals, especially in the matter of human rights, of both legal orders relevant here creates the possibility of harmonious resolution of possible conflicts between the primary law of the EU and the provisions of the Constitution”⁹²

Consequently, according to the understanding of the Constitutional Tribunal technically speaking the primacy of EU law regarding constitutional provisions would have to be achieved indirectly, by applying an interpretative standard which would ensure the substantive primacy of EU law in the areas of competences transferred to EU institutions.

But the PCT also established a second reservation regarding the primacy of EU law. In the event that EU law did not contravene the sovereign and democratic functioning of the Polish state, the PCT nevertheless argued that the primacy of EU law did not apply if the “delegated powers [...] have [not been] exercised [...] in accordance with the principles of subsidiarity and proportionality. If this framework is exceeded, acts (rules) adopted outside it do not enjoy the primacy of Community law”.⁹³

⁸⁹ PCT, *Sprawa K 18/04*, 11 May 2005, at III.4.5.

⁹⁰ *Id.*, at II.6.4.

⁹¹ “In such a situation, it would be up to the Polish legislator to decide either to amend the Constitution, or to bring about changes in Community regulations, or - ultimately - to withdraw from the European Union. Such a decision should be taken by the sovereign, i.e. the Polish Nation, or by a body of state authority which, in accordance with the Constitution, can represent the Nation.” *Id.*, at III.6.4.

⁹² Cf. statement by the Prosecutor General in front of the PCT in *Id.*, at I.3.1.

⁹³ *Id.*, at III.10.2.

Yet, the Constitutional Tribunal also held that it did not have the power to review the jurisprudence of the Court of Justice for purposes of assessing it under the conditions resulting from the Polish Constitution.⁹⁴

3.2. The protection of constitutional identity as ongoing control

Following the judgment K 18/04, the Constitutional Tribunal added the concept of the protection of *constitutional identity* as another limitation of the primacy of EU law in judgment K 32/09. This concept went beyond the concept of the sovereign and democratic functioning of the Polish state as it required that certain values and legal institutions of the Polish domestic order remained unaltered within the process of EU legal integration. The PCT specified these values and legal institutions as:

“[...] non-transferable competencies, [...] includ[ing] the provisions that define the main principles of the Constitution, as well as the provisions concerning the rights of the individual that determine the identity of the state, including in particular the requirement to ensure the protection of human dignity and constitutional rights, the principle of statehood, the principle of democracy, the principle of the rule of law, the principle of social justice, the principle of subsidiarity, as well as the requirement to ensure a better implementation of constitutional values and the prohibition on transferring the constitutional power and the competence to create competences”⁹⁵

In this sense the Constitutional Tribunal alluded to the possibility that it would remain competent to review the actual use of the competences transferred onto the EU institutions but only if it

“manifest[s] itself in the form of specific regulations subject to review by the Constitutional Tribunal under Article 188 of the Constitution. Conclusions relating to the potential application of the Treaty in a manner contrary to the Treaty go beyond the cognition of the Constitutional Tribunal.”⁹⁶

3.3. Primacy of EU law and constitutionality review in practice

Despite these reservations, the Constitutional Tribunal engaged largely in a *union-friendly*⁹⁷ interpretation of the Polish constitution, ensuring the general application and validity of EU law.⁹⁸ Starting point of this *union-friendly* interpretation was judgment K 11/03 in which the PCT had to decide about the conformity of the national referendum concerning the accession to the EU.⁹⁹ The Court argued that

⁹⁴ *Id.*, at III.9.3.

⁹⁵ PCT, *Sprawa K 32/09*, 24 November 2010, at III.2.1.

⁹⁶ *Id.*, at III.2.6.

⁹⁷ For a detailed overview over the *union-friendly* interpretative approaches by the Constitutional Tribunal which allowed for a non-confrontational approach of the Tribunal towards EU law, cf. Florczak-Wątor, *supra* note 85, at 5–6.

⁹⁸ Magdalena Brodawska, 'Zasada Pierwszeństwa Prawa Unii Europejskiej Jako Przedmiot Zainteresowania Polskiego Trybunału Konstytucyjnego', *Koło Naukowe Prawa Europejskiego, Wydział Prawa i Administracji, Uniwersytet Warszawski* (2012), at 34–35.

⁹⁹ PCT, *Sprawa K 11/03*, 27 May 2003.

“the interpretation of the legislation in force should take into account the constitutional principle of favouring the process of European integration and cooperation between states (cf. the Preamble and Article 9 of the Constitution).”¹⁰⁰

This principle had been reasserted by the PCT in subsequent cases. In judgment P 1/05, the PCT assessed whether the national statute implementing the European Arrest Warrant (2002/584/JHA) was in conformity with Art. 55 (1) of the Polish Constitution. The latter provision prohibited the extradition of Polish nationals. This was in conflict to the requirements of the European Arrest Warrant which required the extradition even of nationals. The PCT found that the implementing statute violated Art. 55 (1) of the Polish constitution, only to insist that the legislature should adopt an amendment to the Polish Constitution which would result in the alignment of Poland's obligation under EU law. The constitutional amendment was adopted afterwards.¹⁰¹

In judgment P 37/05, the PCT refused to give a ruling on the conformity of a national tax law with EU law.¹⁰² Instead, it required the referring national court to direct its question to the Court of Justice by making a request for a preliminary ruling. It held that the assessment of the conformity of national regulations with EU law was exclusively a matter of the ordinary courts and not of the PCT, directing all ordinary courts to cooperate with the Court of Justice.¹⁰³ Equally, in judgment Pk 03/08, the PCT declared that a request for a preliminary ruling to the CJEU would be in conformity with the constitutional requirement of a fair and swift trial under Art. 45 (1) of the Polish Constitution.¹⁰⁴ Furthermore, in judgment SK 45/09, the Constitutional Tribunal strengthened the authority of the CJEU. In integrating the position of the GFCC in *Solange II*, the Constitutional Tribunal limited the availability of individual constitutional complaints to cases in which the complaining party could demonstrate that the protection of its individual rights was not sufficiently guaranteed by the CJEU.¹⁰⁵ In judgment K 61/13, the PCT itself requested a preliminary ruling on the Council Directive 2006/112/EC on the common system of value added tax.¹⁰⁶

This *union-friendly* approach of the Constitutional Tribunal appears to have ended with the judgment U 2/20 in 2020.¹⁰⁷ In this case, the PCT had to review a decision of the Supreme Court which found multiple infringements of the principle of independence and impartiality of the judiciary following the prior preliminary ruling of the Court of Justice in *A. K. and Others*.¹⁰⁸ The PCT held that the Supreme Court's decision clearly violated Arts. 2 and 45 of the Polish Constitution because it prevented appointed judges from carrying out their tasks.¹⁰⁹ According to the PCT, this amounted to a breach of the principle of adjudication by a court or tribunal established by law. Particularly, it argued that the provisions of the Polish Constitution afforded the same level of protection as Arts. 2 and 19 (1), para. 2 TEU as well as Art. 47 of the Charter.¹¹⁰ However, it did not provide any arguments for this assertion and

¹⁰⁰ *Id.*, at III.16.

¹⁰¹ Anna Sledzińska-Simon and Michał Ziółkowski, *Constitutional Identity of Poland: Is the Emperor Putting on the Old Clothes of Sovereignty?*, SSRN Scholarly Paper, ID 2997407 (2017), at 2.

¹⁰² PCT, *Sprawa P 37/05*, 19 December 2006, at III.3 and III.4.

¹⁰³ Półtorak, *supra* note 78, at 17.

¹⁰⁴ PCT, *Sprawa Kp 3/08*, 18 February 2009.

¹⁰⁵ PCT, *Sprawa SK 45/09*, 16 November 2011, at III.8.4 and 8.5.

¹⁰⁶ PCT, *Sprawa K 61/13*, 7 July 2015, at 13.

¹⁰⁷ Florczak-Wątor, *supra* note 85, at 5.

¹⁰⁸ Polish Supreme Court, *Uchwała Składu Połączonych Izb: Cywilnej, Kamej oraz Pracy i Ubezpieczeń Społecznych Sądu Najwyższego*, BSA I 4110 1/20, 23 January 2020.

¹⁰⁹ PCT, *Sprawa U 2/20*, 20 April 2020, at III, 4.3.

¹¹⁰ *Id.*

did not request a preliminary ruling on this matter.¹¹¹ Instead, it considered itself to be the Tribunal “of the last word”.¹¹²

In judgment Kpt 1/20, the PCT found that the Supreme Court had no competence to develop interpretations of national regulations which had an effect on the composition of the KRS.¹¹³ This judgment was directed against a decision of the Supreme Court in which the latter aimed to ensure the effective independence and impartiality of the judiciary in accordance with Art. 19 (1), para. 2 TEU as mandated in by the Court of Justice in *A. K. and Others*. The Constitutional Tribunal argued that the interpretative activity of the Supreme Court was a threat to the judicial system, creating uncertainty to legal affairs in the state. It held that this undermined the principle of “the protection of confidence in the State and the rule of law”.¹¹⁴ For the same reasons, the Constitutional Tribunal argued that the Supreme Court had no authority to review the procedure for the appointment of judges as executed by the President.

Finally, in judgment P 7/20, the PCT carried out its first *ultra vires* control of the interim measures ordered in the Court of Justice proceedings in *European Commission v Republic of Poland*.¹¹⁵ Pursuant to the order of the Court of Justice, the Disciplinary Chamber of the Supreme Court was, *inter alia*, prohibited to continue its activities. The Constitutional Tribunal made a two-pronged argument.¹¹⁶ On the one hand, it found that these interim measures were not covered by the competences of the Court of Justice. On the other hand, the PCT held that the interim measures violated the Polish Constitution because they created legal uncertainty.

Regarding the finding that the Court of Justice acted outside its conferred competences, the Constitutional Tribunal explained that Art. 19 (1), para. 2 TEU,

“in particular, has the meaning that Member States, including the Republic of Poland, undertake to protect effectively the rights in areas covered by EU law, but this obligation does not extend to the specific design of the judiciary, still less to the competence to control the design of the judiciary. This area of matters is not one of the ‘fields covered by Union law’.”¹¹⁷

The PCT also elaborated on the concept of constitutional identity and found that the interim measures ordered by the CJEU violated the Polish Constitution. According to the Constitutional Tribunal, the interim measures

“encroach in a clear and substantial manner on constitutional regulation, thus violating the Polish constitutional identity, of which the Polish judiciary is an immanent part. No authority can exempt Polish citizens, and in particular Polish judges, from the obligation to apply the Polish Constitution.”¹¹⁸

The PCT concluded that the interim measures, as well as the corresponding case law of the Court of Justice regarding the independence and impartiality of the judiciary as enshrined in Art. 19 (1), para. 2

¹¹¹ *Id.*, at III, 4.2. On the forgone possibility of the PCT to take into account EU law as well as case law of the Court of Justice and the ECHR, cf. Anna Rakowska-Trela, ‘Niezależność sądu i niezawisłość sędziego powołanego z udziałem KRS w kształcie ustalonym nowelizacją z 8 grudnia 2017 r. – przegląd orzecznictwa’, 93 *Acta Universitatis Lodzensis. Folia Iuridica* (2020) 75, at 84–86.

¹¹² PCT, *Sprawa U 2/20*, *supra* note 109, at III.4.2.

¹¹³ PCT, *Sprawa Kpt 1/20*, 28 January 2020, at 2.

¹¹⁴ *Id.*, at 4.

¹¹⁵ Case C-791/19, *Commission v Poland*, *supra* note 7.

¹¹⁶ *Sprawa P 7/20*, 14 July 2021, at III.6.7.

¹¹⁷ *Id.* at para III.6.7

¹¹⁸ *Id.*, at III 6.8.

TEU created uncertainty as to the responsible court or tribunal established by law to adjudicate specific matters.¹¹⁹ Therefore, it could not be reconciled with various provisions of the Polish Constitution.¹²⁰ However, the PCT did not elaborate how this principle applied to judges facing disciplinary charges as for these procedures the composition of the Disciplinary Chamber was decided on a case-by-case basis. Concerning the alleged chilling effect of the Disciplinary Chamber on Polish judges, the Constitutional Tribunal merely stated that it had not yet received any constitutional complaints by judges in this matter.

3.4. The position of the PCT judgment in the case law of the Polish Constitutional Tribunal

The PCT judgment is a logical continuation of the PCT's recent *confrontational turn*. But even compared to previous judgments which the Court had issued since 2020, the PCT judgment stands out since it directly deals with EU primary law and concluded that the latter violated the Polish Constitution. It also marks the first time in which the PCT declared itself competent to review the case law of the CJEU.¹²¹ The Court made two principal arguments: On the one hand, it found that the organization of courts and the appointment of judges was an area of state policy which could by no means be transferred to EU institutions because of its importance for the *constitutional identity* of Poland. The mere conferral of these competences was deemed unconstitutional. On the other hand, the case law of the Court of Justice on Art. 19 (1), para. 2 TEU was found to violate the sovereign and democratic functioning of the Polish state in the fashion already established under judgment P 7/20.

The interpretations of *constitutional identity* and the sovereign and democratic functioning of the Polish state in the PCT judgment as noted by the Judge Rapporteur greatly depart from the understanding of these concepts developed in judgment K 18/04. According to the original understanding of these terms, the Polish government would have had three ways of action available, should EU law prove to be irreconcilable with the Polish constitution, namely, to aim for an amendment of the constitution, an amendment of the EU treaties or to withdraw from the EU. Especially, the first option would have required the PCT to engage in a discussion on the extent and the limits of the independence and impartiality of national courts and judges within the Polish constitutional order.

It is noteworthy that the approach diverges from the logic established in judgment K 18/04, pursuant to which the Polish Constitution could have been violated by a generally prohibited conferral of competence to the EU because it prevented the sovereign and democratic functioning of the Polish state. Such a scenario would have resulted in a plain finding that the conferral was inadmissible. Alternatively, the conferral of competences to EU institutions could have been found generally admissible under the requirements of the Polish constitution, resulting in a situation in which the sovereign and democratic functioning of the Polish state was not impaired. In this case, the legal reasoning of the PCT would have only allowed to ascertain whether the CJEU was either providing for interpretations irreconcilable with the Polish constitution, in particular the *constitutional identity*, or transgressing its entrusted competences *ultra vires*. In the former scenario, after identifying the specific constitutional provision against which the interpretation of the CJEU ran counter, the Constitutional Tribunal would have had to contemplate the three courses of action sketched in judgment 16/04. In

¹¹⁹ *Id.*, at III, 6.8.

¹²⁰ *Id.*, at III 6.10.

¹²¹ Jakub Jaraczewski, 'Gazing into the Abyss: The K 3/21 decision of the Polish Constitutional Tribunal' *Verfassungsblog: On Matters Constitutional*, 12 October 2021, available at https://intr2dok.vifa-recht.de/receive/mir_mods_00011283.

the latter scenario, the identification of the exact act of transgression would have been necessary with the possibility to declare the primacy of EU law inapplicable for this specific limited area of competences. This method of the PCT was lately characterized as “blurring” the differentiation between a non-existing competence of EU institutions to impinge on Poland’s constitutional identity and its authority to disapprove measures which endanger the observation of the rule of law as well as the tripartite separation of powers in Poland.¹²²

At the same time, the PCT judgment reproduces a pattern that is well-known from other judgments rendered after the *confrontational turn* of the PCT. The Court emphasizes rather formal aspects regarding the primacy of EU law and its position to validate EU legal acts for the Polish domestic legal order, instead on clarifying the substantive content of the principle of the independence and impartiality of the judiciary, both contained in EU primary law and the Polish Constitution. This is particularly remarkable as the principle of *constitutional identity* in judgment K 32/09 departed from an understanding to safeguard *more* protection of Polish citizens’ constitutional rights in an environment of “axiological sameness, equivalence or convergence”.¹²³ However, the way in which the concept is put to practice by the Constitutional Tribunal marks a paradigm shift because the concept is now used as a defence against any substantive discussion of judicial protection afforded in Poland and the concept contemplated by the PCT. Its substantive content remains mostly obscure. It testifies to a reinstatement of a covert sovereignty discussion in which the contested principle does not require legal justification by the Constitutional Tribunal.¹²⁴

¹²² Von Feldmann, *supra* note 79, at 5.

¹²³ Sledzinska-Simon and Ziolkowski, *supra* note 101, at 21.

¹²⁴ Regarding the two different possibilities of either opening up towards or cutting off a substantive discussion by using the concept of constitutional identity, cf. *id.*

4. THE PRIMACY OF EU LAW IN COMPARATIVE PERSPECTIVE

KEY FINDINGS

In a comparative analysis, we examine the position of the Court of Justice and selected Member States' highest courts towards the primacy of EU law. We argue that the Court of Justice, while formally insisting on the absolute primacy of EU law, has shown considerable flexibility in applying the principle of primacy in practice, taking into account concerns of Member States' constitutional and supreme courts. In return, Member States' courts have generally accepted the principle of primacy of EU law. At the same time, they have also carved out exceptions, like the constitutional identity reservations or *ultra vires* reviews. Yet, most of the time, they have not made use of these exceptions. While there are a few cases, where courts have denied the primacy of EU law in concrete cases, these decisions represent rather singular instances of defiance, but not a general refusal to cooperate with the Court of Justice. In this respect, the PCT judgment has a different quality because it represents an all-out denial of the primacy of EU law, encompassing the relevant provisions of the EU treaty as well as the corresponding case law developed by the Court of Justice.

This part will put the Polish judgment into the broader context of the judicial discussion on the primacy of EU law. It will first set out the position of the Court of Justice. While the Court of Justice has, in principle, insisted on the absolute primacy of EU law over the legal systems of the Member States, a closer analysis shows that the Court has often shown considerable flexibility to acknowledge and take into account legitimate concerns by highest courts of Member States. Second, the study analyses the approaches of different Member States' constitutional and supreme courts. The approaches taken by Member States' courts vary to a great extent. While some courts have accepted the primacy of EU law almost unconditionally, others have shown significant reservations. There have also been instances, in which Member States courts have openly defied the primacy of EU law. However, we argue that the defiance by the Polish Constitutional Tribunal reaches a new quality.

4.1. The case law of the CJEU¹²⁵

The Court of Justice has always claimed ultimate authority in determining the relationship between EU and domestic law. In this context, it has always insisted on the absolute primacy of EU law over the laws of Member States in order to safeguard the unity and coherence of the EU legal order. This principle was established in the landmark cases of *van Gend en Loos* and *Costa v. ENEL*, in which the Court developed the fundamental doctrines of direct effect and primacy of EU Law.¹²⁶ The Court of Justice has confirmed these doctrines in later cases. Notably, it argued in *Internationale Handelsgesellschaft* that EU law enjoyed primacy even *vis-à-vis* fundamental rights guaranteed in national constitutions.¹²⁷

¹²⁵ This part has been adopted from the earlier study Petersen and Chatziathanasiou, *supra* note 3, and slightly modified and updated.

¹²⁶ Case 26/62, *van Gend en Loos*, 5 February 1963, EU:C:1963:1; Case 6/64, *Costa v. ENEL*, *supra* note 1.

¹²⁷ Case 11/70, *Internationale Handelsgesellschaft*, 17 December 1970, EU:C:1970:114, at para. 3. See also Case 106/77, *Simmenthal*, 9 March 1978, EU:C:1978:49, paras. 21-26; Case 149/79, *Commission v. Belgium*, 26 May 1982, EU:C:1982:195; Joined Cases C-46 & 48/93, *Brasserie du Pêcheur and Factortame II*, 5 March 1996, EU:C:1996:79; Case C-473/93, *Commission v. Luxembourg*, 2 July 1996, EU:C:1996:263, para. 38; Case C-213/07, *Michaniki*, 16 December 2008, EU:C:2008:731, paras. 62-69.

The Court of Justice has frequently reaffirmed this principle of absolute primacy of EU law in its subsequent case law.¹²⁸

Despite the apparent rigor of the doctrine of primacy of EU law, the Court of Justice has allowed some flexibility to Member States' courts and often acknowledged the concerns of the latter.¹²⁹ This flexibility is sometimes reflected in the doctrine. In the following, we would like to showcase two doctrinal tools which the Court of Justice uses to grant flexibility to Member States' courts. First, the Court of Justice acknowledges that fundamental constitutional principles of the Member States can serve as legal interests to justify restrictions of the EU fundamental freedoms; and second, it grants discretion to Member States' courts regarding the evaluation of the circumstances of the specific case in the preliminary reference procedure.

The Court of Justice has acknowledged in its jurisprudence that fundamental principles of domestic constitutions have to be taken into account when analyzing the justification of restrictions of the EU fundamental freedoms. Such fundamental principles can consist of the national identity of Member States as well as the protection of fundamental rights.¹³⁰ In *Commission v. Luxembourg*, the Court of Justice argued that "the preservation of the Member States' national identities is a legitimate aim respected by the Community legal order".¹³¹ However, in the concrete case, it nevertheless found that it was disproportionate to deny public sector jobs in the field of education to foreign nationals. Instead, the Court held that ensuring that the respective candidates fulfilled all conditions required for recruitment could have preserved the national identity as effectively.¹³²

In the case of *Sayn-Wittgenstein*, the Court also addressed the possibility to restrict fundamental freedoms through concerns of national identity.¹³³ The case concerned a decision of Austrian authorities refusing to acknowledge the noble title of an Austrian national who had been adopted by a German with a noble name. The applicant claimed that this refusal violated her freedom of movement. However, the Court of Justice held that Austria's law abolishing the nobility and prohibiting its nationals to acquire titles of nobility was justified as a means to pursue a goal central to Austrian national identity.¹³⁴

In *Omega*, the Court of Justice acknowledged that fundamental values enshrined in the national constitution could justify restrictions of fundamental freedoms.¹³⁵ The case concerned a prohibition to operate a 'laserdrome' issued by the German administrative authorities. In the laserdrome, players could simulate war games with sub-machine-gun-type laser targeting devices and sensory tags recording whether a player had been shot. The applicant argued that the prohibition violated the freedom to provide services guaranteed by Art. 56 TFEU because the equipment was provided by a UK company under a franchising contract. The German authorities and the German Federal Administrative

¹²⁸ See recently, e.g., Joined Cases C-585/18 *et al.*, *A.K. and Others*, *supra* note 8, at paras. 157-58; Joined Cases C-511/18, C-512/18, C-520/18, *La Quadrature du Net*, 6 October 2020, EU:C:2020:791, at paras. 214-19; Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19, C-397/19, *Asociația 'Forumul Judecătorilor Din România'*, 18 May 2021, EU:C:2021:393, at paras. 242-248.

¹²⁹ See Niels Petersen, 'Karlsruhe's Lochner Moment? A Rational Choice Perspective on the German Federal Constitutional Court's Relationship to the CJEU after the PSPP Decision', 21 *German Law Journal* (2020) 995 at pp. 999-1001.

¹³⁰ See Armin von Bogdandy and Stephan W. Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty', 48 *Common Market Law Review* (2011); Monica Claes, 'The Primacy of EU Law in European and National Law', in Damian Chalmers and Anthony Arnall (eds.), *The Oxford Handbook of European Union Law* (2015) 178 at p. 187.

¹³¹ Case C-473/93, *Commission v. Luxembourg*, *supra* note 127 at para. 35.

¹³² *Id.*

¹³³ Case C-208/09, *Sayn-Wittgenstein*, 22 December 2010, EU:C:2010:806.

¹³⁴ *Id.*, at paras. 92-93.

¹³⁵ Case C-36/02, *Omega*, 14 October 2004, EU:C:2004:614, at para. 32.

Court argued that the prohibition was justified because the shooting simulation offered by the applicant violated the principle of human dignity in the German Constitution. The Court of Justice accepted the argument of the Federal Administrative Court and held that the restriction of the freedom to provide services was justified.¹³⁶ In its reasoning, the Court of Justice referred explicitly to the level of protection of human dignity prevailing in Germany.¹³⁷

Another doctrinal tool of the Court of Justice to give flexibility to Member States' courts is to grant discretion to Member States' courts regarding the evaluation of the circumstances of the specific case. The Court achieves this goal by limiting the reach of its decisions in the preliminary reference procedure. Under Art. 267 TFEU the Court of Justice has to give an abstract opinion about the interpretation of the EU treaties. By contrast, it is not asked to decide the case at issue. Because of this procedural feature of the preliminary reference procedure, the Court can vary the level of guidance it gives to national courts when applying EU law to the concrete case. The less guidance the Court of Justice gives, the greater the discretion of the Member States' courts.

The Court of Justice's controversial *Åkerberg Fransson* judgment illustrates this mechanism well.¹³⁸ The referring Swedish court had asked the Court of Justice whether EU fundamental rights had to be taken into account in a criminal case concerning tax fraud. In the underlying case, a Swedish fisher had failed to fully declare his income for tax purposes. For this reason, the Swedish tax authorities had imposed an administrative penalty on him. In addition, he was put on trial for tax fraud before Swedish criminal courts. In the criminal proceedings, he argued that a criminal penalty in addition to the administrative sanction would violate the principle of *ne bis in idem* guaranteed by the EU Charter of Fundamental Rights (EUCFR).

The Court of Justice argued in its judgment that EU fundamental rights were applicable in the case.¹³⁹ Part of the withheld taxes were value added taxes (VAT). The ECJ deemed criminal sanctions to be part of the Member States' obligations to ensure a correct collection of VAT under Art. 273 of Council Directive 2006/112/EC of November 2006 and to counter illegal activities affecting the financial interests of the EU under Art. 325 TFEU.¹⁴⁰ Therefore, the ECJ argued that Sweden implemented EU law when prosecuting tax fraud cases involving VAT so that the EU Charter of Fundamental Rights was applicable.¹⁴¹ However, the Court of Justice showed restraint when applying the prohibition of *ne bis in idem* in Art. 50 EUCFR to the concrete facts of the case. It argued that it was up to the referring Swedish court to determine whether the administrative sanction imposed by the Swedish tax authorities was actually a criminal penalty in the sense of Art. 50 EUCFR.¹⁴² This tendency to defer the application of EU fundamental rights in the concrete case to Member States' courts can also be observed in other contexts. For example, the Court of Justice has argued that it is up to Member States' courts to resolve conflicts between the protection of privacy and the freedom of expression in the context of the General Data Protection Regulation (GDPR).¹⁴³

The preceding discussion of the case law of the Court of Justice has shown that the ECJ has developed certain doctrinal instruments to give Member States' courts a certain amount of discretion and to take

¹³⁶ *Id.*, at para. 39.

¹³⁷ *Id.*

¹³⁸ Case C-617/10, *Åkerberg Fransson*, 26 February 2013, EU:C:2013:105.

¹³⁹ *Id.*, at paras. 17-27.

¹⁴⁰ *Id.*, at paras. 25-26.

¹⁴¹ *Id.*, at para. 27.

¹⁴² *Id.*, at paras. 36-37.

¹⁴³ Cases C-73/07, *Satakunnan Markkinapörssi and Satamedia*, 16 December 2008, EU:C:2008:727, at para. 54; C-345/17, *Buivids*, 14 February 2019, EU:C:2019:122, at para.50.

their interests seriously. However, the Court of Justice's accommodation of Member States' courts goes beyond what is reflected explicitly in the doctrine. Instead, the Court of Justice sometimes implicitly adjusts its own jurisprudence in order to take concerns of Member States' courts into account.

Most famously, the Court of Justice developed a fundamental rights jurisprudence under the pressure of Member States' courts.¹⁴⁴ After the foundation of the European Communities, the Court of Justice had initially resisted the introduction of fundamental rights into the EC legal order.¹⁴⁵ However, when constitutional courts of the Member States resisted, the Court of Justice changed course. Pre-empting judgments of the German Federal Constitutional Court¹⁴⁶ and the Italian Constitutional Court,¹⁴⁷ the Court of Justice held that fundamental rights "form an integral part of the general principles of law" in *Internationale Handelsgesellschaft*.¹⁴⁸ In its subsequent case law, the Court of Justice progressively developed its fundamental rights jurisprudence,¹⁴⁹ which prompted the German Federal Constitutional Court to give up its initial resistance.¹⁵⁰

A more recent example of the Court of Justice's flexibility is the series of *Taricco* cases.¹⁵¹ The cases concerned overly short limitation periods for VAT fraud in Italy. The accused in the original procedure had committed VAT fraud, but could not be convicted because of the short limitation period and a cap concerning the time for which the limitation period could be interrupted.¹⁵² The Court of Justice argued that short limitation periods violated Art. 325 TFEU, according to which Member States have an obligation to refrain from actions negatively affecting the financial interests of the EU, if the Member State court found that the short limitation period had the consequence that the accused escaped criminal punishment in a considerable number of cases.¹⁵³ The Court added that a retroactive disapplication of the limitation clause would not violate the prohibition of retroactive criminal sanctions guaranteed by Art. 49 EUChFR.¹⁵⁴ The Court referred, *inter alia*, to the case law of the European Court of Human Rights (ECtHR), according to which the retroactive extension of the limitation clause did not violate Art. 7 of the European Convention of Human Rights (ECHR).¹⁵⁵

When the case reached the Italian Constitutional Court, the latter took issue with the retroactive disapplication of the limitation clause.¹⁵⁶ The Italian court argued that, according to its longstanding jurisprudence, limitation clauses were part of substantive criminal law so that the prohibition of retroactive application of criminal sanctions also covered limitation clauses in Italian law. Therefore, it

¹⁴⁴ See Mattias Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty', 11 *European Law Journal* (2005) 262, at 294–295.; John Henry Dingfelder Stone, 'Agreeing to Disagree: The Primacy Debate Between the German Federal Constitutional Court and the European Court of Justice', 25 *Minnesota Journal of International Law* (2016) 127, at 135; Ulrich Haltern, *Europarecht, Vol. II: Rule of Law, Verbunddogmatik, Grundrechte* (3rd ed., Mohr Siebeck 2017), at 1403.

¹⁴⁵ Case 1/58, *Stork*, 4 February 1959, EU:C:1959:4; Joined cases 36-38/59 & 40/59, *Ruhrkohlen-Verkaufsgesellschaft*, 15 July 1960, EU:C:1960:36.

¹⁴⁶ BVerfGE 37, 271 – *Solange I*.

¹⁴⁷ Corte costituzionale, 183/1973, *Frontini*, 27 December 1973, IT:COST:1973:183, as translated by Gerhard Bebr, 'A Critical Review of Recent Case Law of National Courts', 11 *Common Market Law Review* 408 (1974).

¹⁴⁸ Case 11/70, *Internationale Handelsgesellschaft*, *supra* note 127, at para. 4.

¹⁴⁹ Case 4/73, *Nold*, 24 September 1975, EU:C:1975:114, at paras. 13-14; Case 44/79, *Hauer*, 13 December 1979, EU:C:1979:290, at paras. 14-15.

¹⁵⁰ BVerfGE 73, 339 – *Solange II*.

¹⁵¹ On the *Taricco* cases, see Matteo Bonelli, 'The Taricco Saga and the Consolidation of Judicial Dialogue in the European Union', 25 *Maastricht Journal of European and Comparative Law* (2018) 357, at 357. See further below, 3.3.6.

¹⁵² Case C-105/14, *Taricco*, 8 September 2015, EU:C:2015:555.

¹⁵³ *Id.*, at paras. 47-52.

¹⁵⁴ *Id.*, at paras. 54-57.

¹⁵⁵ *Id.*, at para. 57.

¹⁵⁶ Corte costituzionale, Order no. 24/2017, 23 November 2016, IT:COST:2017:24.

initiated a second preliminary reference procedure. It asked the Court of Justice to reconsider its interpretation of Art. 49 EUChFR, arguing that a retroactive disapplication of the limitation clause violated the prohibition of retroactive application of criminal sanctions in Art. 25 of the Italian Constitution.

In its response to the preliminary reference request of the Italian Constitutional Court, the Court of Justice acknowledged the concerns of the latter.¹⁵⁷ It argued that the retroactive disapplication of the limitation clause had to comply with the principles of foreseeability, precision, and non-retroactivity.¹⁵⁸ Therefore, if the retroactive disapplication of the limitation clause led to uncertainty in the Italian legal system, the Italian Constitutional Court was not obliged to disapply the Criminal limitation provisions at issue.¹⁵⁹ Consequently, the Court of Justice showed flexibility to accommodate the concerns of the Italian Constitutional Court.

The preceding analysis demonstrates that the Court of Justice has shown a considerable amount of flexibility when it comes to the preservation of constitutional values important to domestic legal orders, despite insisting on the primacy of EU law. This flexibility takes various forms. The Court of Justice recognizes that the protection of these values can justify restrictions of fundamental freedoms, and it grants Member States' courts discretion when applying abstract legal standards to the concrete case at hand. Finally, it even revises its own jurisprudence in order to take serious concerns of Member States' courts into account. However, it is important to note that the Court of Justice still claims ultimate authority in determining which Member States' concerns are worthy of being taken into account when determining possible conflicts with EU law. Furthermore, all discussed judgments concern the accommodation of constitutional values of Member States. By contrast, we cannot observe similar decisions when it comes to the interpretation of the competences of the EU or its institutions.

4.2. The Primacy of EU Law in other EU Member States

This section describes the different approaches of Member States' highest courts to the primacy of EU law. The analysis will show that these approaches vary to quite a significant extent. While some courts have accepted primacy almost unconditionally, others have voiced reservations. The analysis will focus on certain selected legal orders of EU Member States in alphabetical order.

4.2.1. Austria

The Austrian Constitutional Court (*Verfassungsgerichtshof*) has largely accepted the primacy of EU law.¹⁶⁰ In several cases, the Constitutional Court has also explicitly acknowledged the primacy of EU law *vis-à-vis* the Austrian Constitution.¹⁶¹ For example, the Court has accepted state liability for the violation of EU law by the legislature in conformity with the case law of the Court of Justice,¹⁶² even though Art.

¹⁵⁷ Case C-42/17, *M.A.S.*, 5 December 2017, EU:C:2017:936.

¹⁵⁸ *Id.*, at para. 51.

¹⁵⁹ *Id.*, at para. 59.

¹⁶⁰ For a detailed discussion of the primacy of EU law in the Austrian legal order, see Theo Öhlinger and Michael Potacs, *EU-Recht und staatliches Recht: die Anwendung des Europarechts im innerstaatlichen Bereich* (7th ed. 2020), pp. 85-95.

¹⁶¹ See, e.g., Verfassungsgerichtshof, *B1625/98*, VfSlg 15277/1998, 3 October 1998, AT:VFGH:1998:B1625.1998; Verfassungsgerichtshof, *A23/00 Ua*, VfSlg 16107/2001, 6 March 2001, AT:VFGH:2001:A23.2000; Verfassungsgerichtshof, *G113/08*, VfSlg 18642/2008, 5 December 2008, AT:VFGH:2008:G113.2008; Verfassungsgerichtshof, *U466/11 Ua*, VfSlg 19632/2012, 14 March 2012, AT:VFGH:2012:U466.2011.

¹⁶² Cases C-6/90 and 9/90, *Francovich*, 19 November 1991, ECLI:EU:C:1991:428; Case C-46/93 and C-48/93, *Brasserie du Pêcheur*, *supra* note 127.

23 of the Austrian Constitution, in principle, excludes state liability for unlawful legislative conduct.¹⁶³ However, Austrian legal scholarship discusses one narrow exception to the absolute primacy of EU law. According to the prevailing opinion in the Austrian legal academy, the primacy of EU law should not apply to the six fundamental principles of the Austrian Constitution (*Grundprinzipien* or *Baugesetze*), which are either explicitly mentioned in Arts. 1 and 2 of the Constitution or derived through constitutional interpretation.¹⁶⁴ These six principles are the principle of democracy, the republican principle, i.e. that the position of the head of state is not hereditary, the federal principle, the guarantee of the separation of powers, the rule of law principle, and the liberal principle, i.e. the guarantee of individual fundamental rights. These fundamental constitutional principles can only be changed through a referendum.¹⁶⁵ This exception, according to which the primacy of EU law does not apply to the six fundamental principles of the Austrian Constitution is similar to the constitutional identity reservation established by the German Federal Constitutional Court, even though the latter is probably broader in its scope. However, the Austrian Constitutional Court has, as of yet, not explicitly dealt with this question.

4.2.2. Belgium¹⁶⁶

Similar to the Austrian Constitutional Court, the Belgian Constitutional Court has largely accepted the primacy of EU law.¹⁶⁷ However, this acceptance of primacy is not completely unconditional. Instead, the Court has recently expressed some reservations in a decision from 2016 that concerned litigation against the EU's 2012 Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (Fiscal Stability Treaty).¹⁶⁸ Several societal groups were concerned that the ratification of the Fiscal Stability Treaty and the adherence to its budgetary restrictions would prohibit Belgium from fulfilling its constitutional obligations in the area of social rights. However, the Belgian Constitutional Court denied these societal groups standing, arguing that they were affected too indirectly.¹⁶⁹ It also held that the budgetary autonomy of the Belgian Parliament was not violated, as parliamentarians retained their liberty to draw up and approve a budget.¹⁷⁰

Nevertheless, the Belgian Constitutional Court also delivered an *obiter dictum* on Article 34 of the Belgian Constitution that can be understood as a reference to some of the exceptions developed by the German Federal Constitutional Court. It held that

“[w]hen approving a treaty which [attributes new competences to EU institutions], the legislature must respect Article 34 of the Constitution. By virtue of that provision, the exercising

¹⁶³ VfSlg 16107/2001, *supra* note 161.

¹⁶⁴ Öhlinger and Potacs, *supra* note 160, at p. 89.

¹⁶⁵ See Art. 44 para 3 of the Austrian Constitution.

¹⁶⁶ This part has been adopted from the earlier study Petersen and Chatziathanasiou, *supra* note 3, but it has been modified and updated.

¹⁶⁷ Philippe Gérard and Willem Verrijdt, 'Belgian Constitutional Court Adopts National Identity Discourse: Belgian Constitutional Court No. 62/2016, 28 April 2016', 13 *European Constitutional Law Review* (2017) 182, at 192.

¹⁶⁸ Belgian Constitutional Court, No. 62/2016, 28 April 2016.

¹⁶⁹ See Luc Lavrysen et al., 'Developments in Belgian Constitutional Law: The Year 2016 in Review', 15 *International Journal of Constitutional Law* (2017) 774, at 779; Gérard and Verrijdt, *supra* note 167, at 186.

¹⁷⁰ Lavrysen et al., *supra* note 169, at 779: “Nonetheless, the Court considered whether the challenged acts interfered with any other aspect of the democratic rule of law which would be so essential that its protection is in the interest of all citizens. Parliament is indeed the only constitutional body empowered to not only approve the annual budgets but also to set medium-term budgetary objectives. It can enter into such commitments by way of a treaty. When parliamentarians do approve a treaty, however, they may not violate constitutional guarantees. Although the Stability Pact makes provision for detailed targets and deficit reduction, it leaves national parliaments entirely at liberty as to how they draw up and approve budgets.”

of specific powers can be assigned by a treaty or by a law to institutions of public international law. While these institutions may subsequently decide autonomously about how they exercise these competences, Article 34 of the Constitution cannot be interpreted as granting an unlimited licence to the legislature, when approving that treaty, or to the said institutions, when exercising their attributed powers. Article 34 of the Constitution does not allow a discriminating derogation to the national identity inherent in the fundamental structures, political and constitutional, or to the basic values of the protection offered by the Constitution to all legal subjects.”¹⁷¹

The Constitutional Court explicitly refers to the protection of national identity. Yet, there is also an implicit reference to a possible *ultra vires* review. As Philippe Gerard and Willem Verrijdt elaborate, the *ultra vires* review can “be read in the statement that the EU organs may not use the attributed powers as an ‘unlimited licence (...) when exercising their attributed powers’.”¹⁷² At the same time, the emphasis by the Court on the principle of conferral and the powers that are conferred based on Article 34 of the Constitution imply the possibility of an *ultra vires* review.¹⁷³

The judgment can be considered a warning to the Belgian national legislature and an invitation to a dialogue with the Court of Justice.¹⁷⁴ By contrast, the threat to the coherence of the EU legal order is limited. The decision concerned the ratification of an intergovernmental treaty. While a negative decision would have been inconvenient for the political response to the sovereign debt crisis, it would not have posed a challenge to the primacy of EU law because Member States courts are free to declare a new treaty or a treaty amendment incompatible with the domestic constitution without violating the principle of primacy.¹⁷⁵ Furthermore, the Belgian Constitutional Court has not specified the exact conditions, under which an *ultra vires* review or a national identity review would be possible or even successful. Consequently, it is rather a signal that the Court wants to leave its options open, but it does not pose an immediate threat to the primacy of EU law.

Instead, in a recent high-profile case, the Constitutional Court has reaffirmed its general commitment to the primacy of EU law. In Case 57/2021 from 22 April 2021, the Court has struck down Belgian legislation that required a generalized and undifferentiated storage of data relating to electronic communication.¹⁷⁶ It argued that the measure violated EU fundamental rights and EU data protection law after the Court of Justice had taken a corresponding decision in the preliminary reference procedure *La Quadrature du Net*.¹⁷⁷ The Belgian Constitutional Court did not question the implementation of this decision in Belgium on the basis of the primacy of EU law. Instead, it applied the normative requirements established by the Court of Justice without any reservations. This contrasts to the approach taken by the French *Conseil d'Etat*, which established a security exception to the primacy of EU law in the French parallel case giving rise to the Court of Justice preliminary reference procedure.¹⁷⁸

¹⁷¹ Belgian Constitutional Court, 28 Apr. 2016, No. 62/2016, at B.8.7. (see also the translation by Gérard and Verrijdt, *supra* note 167, at 186); the official German version is available at <https://www.const-court.be/public/d/2016/2016-062d.pdf>.

¹⁷² Gerard and Verrijdt, *supra* note 167, at 187.

¹⁷³ *Id.* at 187: “*ultra vires* review is inherently present in the logic of a limited attribution of powers based on a constitutional provision.”

¹⁷⁴ *Id.*, at 188.

¹⁷⁵ 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’, 23 *Maastricht Journal of European and Comparative Law* (2016) 151.

¹⁷⁶ Belgian Constitutional Court, No. 57/2021, 22 April 2021.

¹⁷⁷ Cases C-511/18 *et al.*, *La Quadrature du Net*, *supra* note 128.

¹⁷⁸ See *infra* 5.2.6.

4.2.3. Czech Republic

Up until now, the Czech Constitutional Court (*Ústavní soud*, hereinafter CCC) has taken a generally affirmative stance towards the primacy of EU law, without accepting the unconditional supremacy of EU law in the domestic legal order.¹⁷⁹ In particular, the CCC interprets constitutional law in light of EU law.¹⁸⁰ Simultaneously, the CCC has, so far, understood the Integration Clause under Art. 10a of the Czech Constitution, which provides for the conferral of powers to international organizations or institutions, to “open[...] up the national legal order to the operation of Community law, including rules relating to its effects within the legal order of the Czech Republic”.¹⁸¹ Thereby, it clarified that directly applicable acts of EU law were immediately effective in the Czech legal order and did not require any review of their constitutionality protecting the role of the Court of Justice as exclusively competent court to interpret EU law.¹⁸² At the same time, however, the CCC also established an inviolable core of the Czech constitution. It argued that the direct applicability of EU law found its limits where “the very essence of state sovereignty of the Czech Republic or the essential attributes of a democratic state governed by the rule of law” were affected.¹⁸³ Should EU legislative acts violate these principles, the national entities, including the CCC, would have to reassert their authority to protect the Czech constitution.¹⁸⁴ This accommodating approach towards EU law was confirmed in the *European Arrest Warrant* judgment, in which the Court interpreted the prohibition to extradite Czech nationals contained in the Czech constitution in a manner which did not result in an incompatibility of the corresponding EU regulation with the Czech constitution.¹⁸⁵ An important exception from this accommodating approach of the Czech Constitutional Court was the *Slovak Pensions* judgment from 31 January 2012:¹⁸⁶ This decision was a reaction to the *Landtová* judgment of the Court of Justice.¹⁸⁷ In *Landtová*, the Court had to deal with the practice of the Czech pension authority to grant supplemental pensions to Czech nationals if they had worked in Slovakia for a Czech enterprise, while withholding the supplemental pensions for Slovak nationals who had worked in the territory of the Czech Republic for a Slovak enterprise. It held that this practice ran counter to Council Regulation (EC) No 1408/71 as well as to the prohibition of discrimination on grounds of nationality guaranteed under the Freedom of Movement of Workers in Art. 45 TFEU.¹⁸⁸

In *Slovak Pensions*, the CCC argued that the Court of Justice had misinterpreted the scope of application of the relevant Council Regulation (EC) No 1408/71, which allowed it to find that the Court of Justice had acted *ultra vires*.¹⁸⁹ Despite this explicit rejection of the decision of the Court of Justice, most commentators have not seen a genuine threat in the decision for the CCC’s generally favourable stance

¹⁷⁹ For a detailed overview over the development of the legal doctrine accommodating the primacy of EU law, cf. Jiří Zemánek, ‘The Emerging Czech Constitutional Doctrine of European Law’, 3 *European Constitutional Law Review* (2007) 418.

¹⁸⁰ CCC, *Sugar Quotas III*, ÚS 50/04, 8 March 2006.

¹⁸¹ *Id.*, at VI.A-3).

¹⁸² Cf. Zemánek, *supra* note 179, at 425.

¹⁸³ CCC, *Sugar Quotas III*, *supra* note 180, at VI.B).

¹⁸⁴ *Id.*

¹⁸⁵ CCC, *European Arrest Warrant*, ÚS 66/04, 3 May 2006; Note that the PCT decided very differently regarding the equivalent prohibition in the Polish Constitution, see *supra* **Error! Reference source not found.** Cf. also David Sehnálek, ‘Normative Approach to the Interplay between the CCC and the CJEU/ECtHR: Judicial Dialogue or a Dictate?’, 2 *Law, Identity and Values* (2022) 203, at 216–217.

¹⁸⁶ CCC, *Slovak Pensions*, ÚS 5/12, 31 January 2012, at VII.2.

¹⁸⁷ Case C-399/09, *Landtová*, 22 June 2011, EU:C:2011:415.

¹⁸⁸ *Id.*, at paras. 42–49.

¹⁸⁹ CCC, *Slovak Pensions*, *supra* note 186, at VII.2.

concerning the supremacy of EU law.¹⁹⁰ Rather, the judgment of Czech Constitutional Court has been seen as a very crude reaction to the Czech Supreme Administrative Court's course of action, which refused to apply the Czech Constitutional Court's case law for years and used the initiation of the preliminary reference proceeding to counter the Constitutional Court by the use of EU law.¹⁹¹

In retrospect, this assessment still seems plausible as the Czech Constitutional Court has refrained from issuing another *ultra vires* decision vis-à-vis the Court of Justice. It appears that in its most recent case-law the CCC has rather continued its accommodating understanding of the primacy of EU law.¹⁹² In its *Consumer* judgment dealing with the compatibility of a public register of debtors with the General Data Protection Regulation No. 2016/679, the CCC held that "Union law is not a benchmark of constitutionality [...]", but subsequently reconfirmed the sole authority of the Court of Justice in providing interpretations on EU law.¹⁹³ In particular, the Court stated that "in order to achieve a so-called euroconformist interpretation of the contested regulation [...] it is only the Court of Justice that gives a binding interpretation of European Union law [...]"¹⁹⁴ Based on this premise, the CCC emphasised the dialogical element of its assessment and the importance of EU law conformity in stating that the "inability [of the contested regulation] to be interpreted in a manner compatible with EU law, which (if) it is also a deficit of constitutional dimension, leads to its annulment. [...]"¹⁹⁵

4.2.4. Denmark

It has been argued that a strong tradition of judicial self-restraint has prevented Danish courts in general and the Danish Supreme Court (Højesteret, hereinafter SCDK) in particular from engaging in a judicial dialogue with the Court of Justice for a long time. Consequently, the SCDK has started to establish reservations on the primacy of EU law within the Danish domestic legal order quite late.¹⁹⁶ In 1998, it carried out an assessment of the compatibility of Denmark's involvement in the EU with the Danish constitution.¹⁹⁷ In its *Maastricht Treaty* judgment, it held that the accession of Denmark to the Maastricht Treaty was generally covered by the integration clause in Section 20 of the Danish constitution.¹⁹⁸ This finding has been understood to uphold the primacy of EU law in principle.¹⁹⁹ Nonetheless, the SCDK also defined limitations. It established abstract restrictions of the competences of the Court of Justice to provide binding interpretations on EU law.²⁰⁰ In this context, the SCDK

¹⁹⁰ Note that the judgment of the Court of Justice in *Landtová* conflicted with the long-standing case law of the CCC which found the provision of supplement pensions to exclusively Czech nationals to be necessary for preventing a disadvantageous treatment compared with other Czech nationals, cf. Robert Zbiral, 'Czech Constitutional Court, Judgment of 31 January 2012, Pl. US 5/12. A Legal Revolution or Negligible Episode? Court of Justice Decision Proclaimed Ultra Vires', *Common Market Law Review* (2012) 1475, at 1477.

¹⁹¹ Cf. David Kosař and Ladislav Vyhnánek, 'Constitutional Identity in the Czech Republic: A New Twist on an Old-Fashioned Idea?', in Christian Calliess and Gerhard van der Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (2019) 85, at 105.

¹⁹² Cf. Sehnálek, *supra* note 185, at 216–217.

¹⁹³ CCC, ÚS 10/17, *Negative Register of Debtors (Consumers)*, 3 November 2020.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*, at VII.a/2.

¹⁹⁶ Jens Elo Rytter and Marlene Wind, 'In Need of Juristocracy? The Silence of Denmark in the Development of European Legal Norms', 9 *International Journal of Constitutional Law* (2011) 470, at 473–475.

¹⁹⁷ For a brief case review, cf., Sten Harck and Henrik Palmer Olsen, 'Decision Concerning the Maastricht Treaty. 1998 Ugeskrift for Retsvaesen, H 800', 93 *The American Journal of International Law* (1999) 209.

¹⁹⁸ Cf. *Id.*, at 212.

¹⁹⁹ Cf. *Id.*, at 213.

²⁰⁰ Cf. *Id.*

assumed the authority to carry out an *ultra vires* review of EU legal acts, including decisions of the Court of Justice. It argued that Danish courts

“cannot be deprived of their right to try questions as to whether an EC act of law exceeds the limits for the transfer of sovereignty made by the Act of Accession. Therefore, Danish courts must rule that an EC act is inapplicable in Denmark if the extraordinary situation should arise that with the required certainty it can be established that an EC act which has been upheld by the EC Court of Justice is based on an application of the Treaty which lies beyond the transfer of sovereignty according to the Act of Accession.”²⁰¹

This generally critical stance of the SCDK towards the primacy of EU law has been continued in its Lisbon Treaty judgment on 20 February 2013.²⁰² In the legal literature, the *ultra vires* control of the SCDK has been regarded as relatively more extensive compared to constitutional and supreme courts in other EU Member States, in particular, the GFCC, because it contained less conciliatory elements.²⁰³

In judgment 15/2014, the SCDK indeed refused to give effect to the interpretation of the Directive 2000/78 which prohibits discrimination on grounds of age as provided by the Court of Justice.²⁰⁴ This happened even though the SCDK had requested an interpretation of the Directive 2000/78 by initiating preliminary reference proceedings that lead to the *Ajos* judgment by the Court of Justice.²⁰⁵ In its preliminary reference request, the SCDK had asked the Court of Justice whether Directive 2000/78 would also apply in a dispute between private parties and whether the principles of legal certainty and the protection of protection of legitimate expectations under national law would allow domestic courts to disregard any violation of the principle prohibiting discrimination on grounds of age. The concrete case concerned the withholding of a severance payment to elderly employees. According to domestic regulations and established case law, employees who at the time of severance were simultaneously eligible for an old-age pension paid by the employer, could not claim the severance payment, irrespective of whether the pension would in fact be claimed by the employee.²⁰⁶ Pursuant to the preceding judgment *Ingeniørforeningen i Danmark* by the Court of Justice, such a practice constituted an age discrimination prohibited by Directive 2000/78 for elderly employees who wished to remain on the job market in disputes between a private and a public party.²⁰⁷ In *Ajos* the Court of Justice repeated this understanding and confirmed that it would equally be applicable in a dispute between private parties.²⁰⁸ Moreover, it held that the SCDK would have to disapply national regulations should it be unable to interpret them in a manner consistent with EU law.²⁰⁹ Despite the *Ajos* judgment, the SCDK refused to give effect to the Court of Justice’s interpretation of Directive 2000/78. It held that general legal principles of EU law, as developed under Art. 6(3) TEU by the Court of Justice, were not encompassed by the Danish Act of accession to the EU and therefore not directly applicable in

²⁰¹ Translation as provided by Sten Harck and Henrik Palmer Olsen, 'Decision Concerning the Maastricht Treaty. 1998 Ugeskrift for Retsvaesen, H 800', 93 *The American Journal of International Law* (1999) 209, at 93.

²⁰² SCDK, Judgment 199/2012, 20 February 2013, at 18.

²⁰³ Cf. Henrik Palmer Olsen, 'The Danish Supreme Court's Decision on the Constitutionality of Denmark's Ratification of the Lisbon Treaty', 50 *Common Market Law Review* (2013), at 1501–1503.

²⁰⁴ SCDK, Judgment 15/2014, 6 December 2016, English translation available at <https://domstol.dk/hoejesteret/decided-cases-eu-law/2016/12/the-relationship-between-eu-law-and-danish-law-in-a-case-concerning-a-salaried-employee/>.

²⁰⁵ Case C-441/14, *Ajos*, 19 April 2016, EU:C:2016:278.

²⁰⁶ For a detailed account of the legislative background of judgment 15/2014, cf. Helle Krunke and Sune Klinge, 'The Danish *Ajos* Case: The Missing Case from Maastricht and Lisbon', 2018 3 *European Papers - A Journal on Law and Integration* (2018) 157, at 159–162.

²⁰⁷ Case C-499/08, *Ingeniørforeningen i Danmark v Region Syddanmark*, 12 October 2010, EU:C:2010:600, at paras. 44–49.

²⁰⁸ Case C-441/14, *Ajos*, *supra* note 205, at para. 26.

²⁰⁹ *Id.*, at para. 43.

Denmark.²¹⁰ Consequently, the SCDK held that it would be acting “outside the scope of its powers as a judicial authority if it were to disapply the legislative provision in this situation.”²¹¹

Although the SCDK had previously developed an *ultra vires* doctrine regarding judgments of the Court of Justice, it did not explicitly rely on the latter in the judgment 15/2014. Rather, it based its reasoning on substantive arguments concerning the temporal scope of application of the Charter and the relevance of the character of the dispute as one between private parties.²¹² Therefore, its refusal to give effect to the judgment of the Court of Justice in *Ajos* has been said to be rooted in the SCDK's perception of its limited authority to overturn legislation.²¹³ After all, the SCDK has supposedly offered an alternative solution of the legal problem to the Court of Justice which would have prevented it from overturning domestic legislation violating EU law. Specifically, the SCDK had favoured a resolution of any prohibited age discrimination in which elderly employees could claim compensations from the Member State for not getting the severance payment that should have been paid to those who wished to remain active on the job market under EU law.²¹⁴

Until today, the SCDK's refusal to give effect to the interpretation of the Court of Justice has not been repeated. At the same time, its judgment 15/2014 has not been revised or narrowed down over time. Therefore, the original concern voiced after the issuance of the judgment 15/2014 persists since the SCDK might be able to strike down general principles of EU law based on its legal reasoning contained in judgment 15/2014 in the future.²¹⁵

4.2.5. France²¹⁶

French courts have quite a varied history when it comes to the relationship with the Court of Justice and the primacy of EU law. The relationship is complicated by the fact that the *Conseil constitutionnel*, the French Constitutional Court, and the *Conseil d'Etat*, the highest administrative court, which is not bound by decisions of the Constitutional Court have pursued different approaches. Initially, the *Conseil d'Etat* had refused to accept the primacy of EU law in the decision in *Syndicat général des fabricants de semoule de France* in 1968.²¹⁷ Meanwhile, the *Conseil constitutionnel* largely accepted the primacy of EU law over ordinary statutes.²¹⁸ In its 1992 decision on the Treaty of Maastricht, it held that the constitutional principle of *pacta sunt servanda* prohibited to declare an Act of Parliament, which made provisions for the implementation of a regulation, unconstitutional.²¹⁹

Further, in the wake of the ratification of the Treaty of Maastricht, Article 88-1 was introduced to the French Constitutions, which reads in its current form:

²¹⁰ SCDK, Judgment 15/2014, *supra* note 204, at para. 47.

²¹¹ *Id.*, at para. 48.

²¹² *Id.*, at paras. 47–48.

²¹³ Krunke and Klinge, *supra* note 206, at III.3.

²¹⁴ Cf. *Id.*, at 159.

²¹⁵ Ulla Neergaard and Karsten Engsig Sørensen, 'Activist Infighting among Courts and Breakdown of Mutual Trust? The Danish Supreme Court, the CJEU, and the *Ajos* Case', 36 *Yearbook of European Law* (2017) 275, at 308.

²¹⁶ This part has been adopted from the earlier study Petersen and Chatziathanasiou, *supra* note 3, but it has been significantly modified and updated.

²¹⁷ Conseil d'Etat, N° 62814, *Syndicat général des fabricants de semoule de France*, 1 March 1968, Recueil Lebon 1968, 149. See also Conseil d'Etat, N° 11604, *Cohn Bendit*, 22 December 1978, Recueil Lebon 1978, 524.

²¹⁸ See Jan Herman Reestman, 'France Conseil Constitutionnel on the Status of (Secondary) Community Law in the French Internal Order. Decision of 10 June 2004, 2004-496 DC', 1 *European Constitutional Law Review* (2005) 302, at 303.

²¹⁹ Conseil constitutionnel, 92-308 DC, 9 April 1992; Reestman, *supra* note 218, at 303.

“La République participe à l'Union européenne constituée d'Etats qui ont choisi librement d'exercer en commun certaines de leurs compétences en vertu du traité sur l'Union européenne et du traité sur le fonctionnement de l'Union européenne, tels qu'ils résultent du traité signé à Lisbonne le 13 décembre 2007.”²²⁰

While this provision was initially considered symbolic, the *Conseil constitutionnel* now utilizes it to derive a duty to implement EU secondary law. According to the *Conseil constitutionnel*, Article 88-1 acknowledges the primacy of EU law.²²¹ This implies that, if a statute merely reproduces an EU secondary norm, the *Conseil constitutionnel* refrains from reviewing it.²²² Thus, it acknowledges the jurisprudence of the Court of Justice that it is only for the CJEU to rule on the validity of EU secondary law.²²³ Meanwhile even the *Conseil d'Etat* has, in principle, accepted the primacy of EU law over ordinary French statutes.²²⁴

However, the primacy of EU law is not unconditional. Both courts have introduced reservations. The *Conseil constitutionnel* expressly reserves itself the right to conduct a constitutional identity review since a landmark decision in 2006.²²⁵ According to the Court, the “transposition of a Directive cannot run counter to a rule or principle inherent in the constitutional identity of France unless the Constituent power has agreed to the same”.²²⁶ Yet, what forms part of constitutional identity is seen as uncertain in the scholarly literature.²²⁷ *Prima facie*, the approach to constitutional identity review seems very similar to the identity review practiced by GFCC. Yet, there is one important difference. While in Germany the constitutional identity is predefined and is immune to constitutional amendment, constitutional identity concerns can be accommodated by the constituent power in France through a change of the constitution.²²⁸ For example, legislative acts that implement EU acts and fall into the scope of the constitutional provisions of Article 88-2 (European Arrest Warrant) or Article 88-3 (Municipal voting rights for EU citizens) are covered by the constituent power and thus not subject to identity review under any circumstances.²²⁹

²²⁰ Article 88-1: “The Republic shall participate in the European Union constituted by States which have freely chosen to exercise some of their powers in common by virtue of the Treaty on European Union and of the Treaty on the Functioning of the European Union, as they result from the treaty signed in Lisbon on 13 December, 2007.”

²²¹ Conseil constitutionnel, Decision no. 2004-505 DC, *Treaty establishing a Constitution for Europe*, 19 November 2004, at para. 13. For an English translation see <https://www.conseil-constitutionnel.fr/en/decision/2004/2004505DC.htm>.

²²² See only Conseil constitutionnel, Decision no. 2006-540 DC *Copyright and related rights in the information Society*, 27 July 2006, at para. 20. For an English translation see <https://www.conseil-constitutionnel.fr/en/decision/2006/2006540DC.htm>; see also Conseil constitutionnel, Decision no. 2008-564 DC, *Genetically Modified Organisms*, 19 June 2008, at para. 45. For an English translation see <https://www.conseil-constitutionnel.fr/en/decision/2008/2008564DC.htm>; see also François-Xavier Millet, ‘How Much Lenience for How Much Cooperation? On the First Preliminary Reference of the French Constitutional Council to the Court of Justice’, 51 *Common Market Law Review* (2014) 195, at 202.

²²³ Case C-314/85, *Foto-Frost*, 22 October 1987, ECLI:EU:C:1987:452.

²²⁴ See Chloé Charpy, ‘The Conseil d’Etat Abandons Its Cohn Bendit Case-Law’, Conseil d’Etat, 30 October 2009, Mme Perreux, 6 *European Constitutional Law Review* (2010) 123 (who also points to remaining divergences between the *Conseil d’Etat* and the Court of Justice).

²²⁵ Conseil constitutionnel, Decision no. 2006-540 DC, *Copyright and related rights in the information Society*, 27 July 2006, at para. 20. For an English translation see <https://www.conseil-constitutionnel.fr/en/decision/2006/2006540DC.htm>.

²²⁶ See Conseil constitutionnel, Decision no. 2010-605 DC, *Act pertaining to the Opening up to Competition and the Regulation of Online Betting and Gambling*, 12 May 2010, at para. 18. For an English translation see <https://www.conseil-constitutionnel.fr/en/decision/2010/2010605DC.htm>.

²²⁷ Millet, *supra* note 222, at 146.

²²⁸ On the differences and commonalities, see Jan-Herman Reestman, ‘The Franco-German Constitutional Divide: Reflection on National and Constitutional Identity’, 5 *European Constitutional Law Review* (2009) 374. See only Conseil constitutionnel, Decision no. 2006-540 DC, *supra* note 225, at para. 29; see further Millet, *supra* note 222, at 204.

²²⁹ Millet, *supra* note 222, at 216.

By contrast, the *Conseil d'Etat* has developed a different approach for the relationship between EU law and the French constitution.²³⁰ In its *Arcelor* decision, it has developed a two-step equivalency approach.²³¹ In the first step, it analyzes whether the provisions of the French Constitution whose violation has been invoked have an equivalent in EU law. If there is an equivalent standard of protection in EU law, the *Conseil d'Etat* interprets the constitutional provisions in light of the EU standards. In *Arcelor*, it held that the principle of equality had an equivalent in EU law.²³² However, if there is no equivalent standard in EU law, the *Conseil d'Etat* directly resorts to a review whether the challenged implementation of EU secondary law is in conformity with the French Constitution.²³³

This approach has significant potential for conflict. This was highlighted in a recent high-profile decision regarding the automatic and systematic retention of communication data for security purposes. In the preliminary reference procedure *La Quadrature du Net*, the Court of Justice had decided that the generalized and undifferentiated storage of data relating to electronic communication violated both the GDPR and certain EU fundamental rights.²³⁴ Unlike the Belgian Constitutional Court, which has accepted and implemented the decision of the Court of Justice, the French *Conseil constitutionnel* refused a full implementation of the decision.²³⁵ It argued that the French Constitution contained an obligation to “safeguard of the Nation’s fundamental interest”, including “the prevention to threats to public order, breaches to security of persons and goods, the fight against terrorism and investigations against criminal offences”.²³⁶ Because the EU legal order did not contain an equivalent protection, this principle of national security had to be taken into account when evaluating the challenged French data retention policy.²³⁷ At the same time, the *Conseil d'Etat* refused to review whether the judgment of the Court of Justice was *ultra vires*:

« En revanche, et contrairement à ce que soutient le Premier ministre, il n'appartient pas au juge administratif de s'assurer du respect, par le droit dérivé de l'Union européenne ou par la Cour de justice elle-même, de la répartition des compétences entre l'Union européenne et les Etats membres. Il ne saurait ainsi exercer un contrôle sur la conformité au droit de l'Union des décisions de la Cour de justice et, notamment, priver de telles décisions de la force obligatoire dont elles sont revêtues, rappelée par l'article 91 de son règlement de procédure, au motif que celle-ci aurait excédé sa compétence en conférant à un principe ou à un acte du droit de l'Union une portée excédant le champ d'application prévu par les traités. »²³⁸

Nevertheless, the decision is concerning because it establishes a very broad security principle, including investigations against criminal offences without any qualification. This creates significant potential for conflict between the French legal order and the primacy of EU law.²³⁹

²³⁰ See David Presslein, 'Liberté, Egalité, Identité: Der Conseil d'État und die französische Verfassungsidentität', *Verfassungsblog: On Matters Constitutional*, 25 March 2021, <https://verfassungsblog.de/liberte-egalite-identite/>.

²³¹ Conseil d'État, N° 287110, *Société Arcelor Atlantique et Lorraine*, 8 February 2007, FR:CEASS:2007:287110.20070208.

²³² *Id.*

²³³ *Id.*

²³⁴ Cases C-511/18 *et al.*, *La Quadrature du Net*, *supra* note 128.

²³⁵ Conseil d'État, N° 393099, 21 April 2021, FR:CEASS:2021:393099.20210421.

²³⁶ *Id.*, at para. 9

²³⁷ *Id.*, at para. 10.

²³⁸ *Id.*, at para. 8

²³⁹ See Paul Cassia, *Le Frexit sécuritaire du Conseil d'Etat*, Mediapart, 23 April 2021, <https://blogs.mediapart.fr/paul-cassia/blog/230421/le-frexit-securitaire-du-conseil-d-etat>; Shahin Vallée, 'A Securitarian Solange: France Has Launched a Cluster Bomb on the EU's Legal and Political Order', *Verfassungsblog: On Matters Constitutional*, 25 April 2021, <https://verfassungsblog.de/a-securitarian-solange/>.

Overall, the French courts have not developed an equally extensive doctrine as the German Federal Constitutional Court concerning reservations to the primacy of EU law. In particular, the *Conseil d'Etat* has recently explicitly refused to review whether decisions of the Court of Justice were *ultra vires*. However, both courts have identified parts of the French constitution that escape the primacy of EU law. The *Conseil constitutionnel* has adopted a concept of constitutional identity. However, the concept is still rather vague and has rarely been applied in practice. The *Conseil d'Etat* has developed a more far-reaching concept according to which legal acts of the EU have to be reviewed under the French Constitution if EU law does not contain concepts equivalent to the ones under the French Constitution. In particular, the recent establishment of the principle of the safeguard of the Nation's fundamental interest is a potentially broad concept that might lead to significant conflict with the European legal order.

4.2.6. Germany²⁴⁰

The German Federal Constitutional Court (GFCC) has developed quite a complex case law when it comes to the relationship of German domestic law and EU law, which has significantly influenced constitutional and supreme courts in many other EU Member States. In principle, the Federal Constitutional Court has accepted the primacy of EU law.²⁴¹ However, over the years, it has carved out three exceptions.²⁴² The oldest and most famous exception is the so-called *Solange* reservation, according to which the Court reserves itself the right to review EU legal acts on their conformity with fundamental rights. Secondly, the Court has established an exception for the preservation of German constitutional identity. The final exception is the *ultra vires* reservation.

The *Solange* reservation was developed by the Federal Constitutional Court in the early 1970s.²⁴³ The Court had concerns about the lack of fundamental rights protection in the European Communities. When an applicant brought a case in which he claimed that an EC regulation violated his fundamental rights under the German Constitution, the Court seized the opportunity to clarify the relationship between EU law and the German domestic legal order. In its *Solange I* judgment, it held that EC legal acts were reviewable on their conformity with German fundamental rights as long as there was no effective system of fundamental rights protection on the EC level.²⁴⁴ Yet, in the case at issue, it found that the challenged EC regulation did not violate German fundamental rights.

This decision led to two developments: On the one hand, the Federal Constitutional Court received a significant number of constitutional complaints invoking a fundamental rights violation by EC legal acts.²⁴⁵ On the other hand, the European Court of Justice continued to develop its fundamental rights jurisprudence which it had started in *Stauder*²⁴⁶ and *Internationale Handelsgesellschaft*.²⁴⁷ Because of these developments, the Federal Constitutional Court adapted its course in the so-called *Solange II*

²⁴⁰ This part has been adopted from the earlier study Petersen and Chatziathanasiou, *supra* note 3, and slightly modified and updated.

²⁴¹ See, e.g., BVerfGE 126, 286, at 301-302; BVerfGE 142, 123, at 187.

²⁴² On the case law of the German Federal Constitutional Court regarding the relationship between domestic law and EU law, see, generally, Sven Simon, *Grenzen Des Bundesverfassungsgerichts Im Europäischen Integrationsprozess* (2016); Niels Petersen, 'Germany', in Fulvio Maria Palombino (ed.), *Duelling for Supremacy: International Law vs. National Fundamental Principles* (2019) 89, at 90-96.

²⁴³ BVerfGE 37, 271 – *Solange I*, *supra* note 146.

²⁴⁴ *Id.*, at 285.

²⁴⁵ See Haltern, *supra* note 144, at 1103.

²⁴⁶ Case 29/69, *Stauder*, 12 November 1969, EU:C:1969:57.

²⁴⁷ Case 11/70, *Internationale Handelsgesellschaft*, *supra* note 127, at paras. 3-4.

judgment.²⁴⁸ It argued that the Court of Justice had developed a fundamental rights jurisprudence which guaranteed a sufficient level of fundamental rights protection on the European level. For this reason, it would refrain from reviewing EC legal acts on their consistency with German fundamental rights.²⁴⁹ However, it reserved itself the right to intervene if, in the future, the level of fundamental rights protection in the EC turned out to be insufficient.²⁵⁰

The *Solange II* reservation has never been invoked by the Constitutional Court. To the contrary, in recent years, the Court has rather voiced concerns that the fundamental rights jurisprudence of the Court of Justice was too extensive.²⁵¹ Furthermore, when in 2000, an applicant tried to challenge the constitutionality of the EC banana market regulation through the constitutional complaint procedure, the Federal Constitutional Court swiftly declared the application to be inadmissible.²⁵²

Therefore, one may have wondered whether the doctrine still has any practical relevance. However, two recent decisions of the first Senate of the Federal Constitutional Court have made some decisive modifications to the doctrine and thus breathed new life into it.²⁵³ Before we analyze these two decisions, it is necessary to look at one of the predecessors, the *European Arrest Warrant I* judgment that the Federal Constitutional Court delivered in 2005.²⁵⁴ In this case, the Court had to decide about the implementation of the Framework Decision on the European arrest warrant.²⁵⁵ In its judgment, the Court argued that the German legislature had to comply with German fundamental rights when it was implementing a legal act of the European Union to the extent that this legal act allowed for discretion regarding the implementation.²⁵⁶

This approach has recently been extended in a decision on “the right to be forgotten” from November 2019.²⁵⁷ The decision concerned the implementation of the General Data Protection Regulation (GDPR).²⁵⁸ The Constitutional Court reaffirmed its earlier jurisprudence in the *European Arrest Warrant* case and argued that the German authorities were bound by German fundamental rights to the extent that they had discretion in implementing EU law.²⁵⁹ However, the Court added that German fundamental rights had to be interpreted in light of the EU Charter if German authorities implemented EU law.²⁶⁰ Furthermore, the Court even reversed the *Solange* assumption and argued that the reference to German fundamental rights was not sufficient if there were indications that German fundamental rights did not provide an adequate level of protection.²⁶¹ According to the GFCC, the EU fundamental rights had to be directly taken into account in such a situation.²⁶² If the interpretation of EU

²⁴⁸ BVerfGE 73, 339 – *Solange II*.

²⁴⁹ *Id.*, 378-386.

²⁵⁰ *Id.*, 387.

²⁵¹ BVerfGE 133, 277, at 316.

²⁵² BVerfGE 102, 147 – *Banana Market Regulation*.

²⁵³ BVerfG, 1 BvR 276/17, 6 November 2019, NJW 2020.314 – *Right to be Forgotten II*.

²⁵⁴ BVerfGE 113, 273 – *European Arrest Warrant I*.

²⁵⁵ 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States - Statements Made by Certain Member States on the Adoption of the Framework Decision, O.J. L 190, 2002, p. 1.

²⁵⁶ BVerfGE 113, 273, at 300.

²⁵⁷ BVerfG, 1 BvR 16/13, 6 November 2019 – *Right to be forgotten I*.

²⁵⁸ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA Relevance), O.J. L 119, 2016, p. 1.

²⁵⁹ BVerfG, 1 BvR 16/13, *supra* note 254, at para. 45.

²⁶⁰ *Id.*, at para. 60.

²⁶¹ *Id.*, at paras. 67-69.

²⁶² *Id.*, at para. 72.

fundamental rights was unclear, German courts had to ask the Court of Justice for an interpretation by initiating a preliminary reference procedure.²⁶³

In a parallel decision that was issued on the same day, the Federal Constitutional Court also addressed the situation that German authorities acted on the basis of EU legal acts in fully harmonized areas.²⁶⁴ In this situation the GFCC reserved itself the right to review the acts of the German authorities on their conformity with EU fundamental rights.²⁶⁵ However, the Court affirmed that it would exercise this fundamental rights review “in cooperation with” the Court of Justice.²⁶⁶ If the interpretation of EU fundamental rights was unclear, it would initiate a preliminary reference procedure according to Art. 267 TFEU.²⁶⁷

The preceding discussion shows how the approach of the German Federal Constitutional Court has changed fundamentally when it comes to fundamental rights review of EU legal acts. Initially, the Court reserved itself the right to review every single EU legal act on its conformity with EU fundamental rights. Then, in *Solange II*, it argued that the EU fundamental rights protection was prevalent, but only under the reservation that the EU provided an adequate protection of fundamental rights. While the Court has not formally renounced the *Solange II* reservation,²⁶⁸ its existence is only of theoretical relevance after the two decisions concerning the right to be forgotten that were issued in November 2019.

The second reservation is the constitutional identity reservation. This reservation has its roots in the *Maastricht* judgment from 1993 on the constitutionality of the Treaty of Maastricht.²⁶⁹ The judgment concerned the German ratification of the treaty of Maastricht establishing the European Union that was signed by the Member States in 1992. The Court held that the European treaties could only be ratified if they complied with certain core principles of the German Constitution. The GFCC extended this approach in the *Lisbon* judgment that was issued in 2009, 16 years after *Maastricht*.²⁷⁰ Again, the Court had to review a change of the founding treaties of the EU. This time, however, it did not limit itself to the examination of the principle of democracy. Instead, it developed the concept of constitutional identity and identified certain core competences of the state which could not be transferred to the EU level even through a change of the founding treaties.²⁷¹ Yet again, the Court stopped short of declaring the Treaty of Lisbon unconstitutional.

Both the *Maastricht* and *Lisbon* judgments concerned the moment of transferring power to the EU level. Therefore, they did not come into conflict with the primacy of EU law because there is no legal obligation to ratify a change of the foundational treaties of the EU – however inconvenient a veto of the Constitutional Court may be politically. However, a possibility for conflict emerged with the next step of the Court in developing the doctrine – the *European Arrest Warrant II* case.²⁷² While avoiding an open conflict with the doctrine of primacy of EU law, the Court displayed the potential for such a conflict when it applied the constitutional identity doctrine to EU secondary law.

²⁶³ *Id.*

²⁶⁴ BVerfG, 1 BvR 276/17, *supra* note 253.

²⁶⁵ *Id.*, at para. 50.

²⁶⁶ *Id.*, at paras. 68-71.

²⁶⁷ *Id.*, at para. 70.

²⁶⁸ See *id.*, at paras. 47-48.

²⁶⁹ BVerfGE 89, 155 – *Maastricht*.

²⁷⁰ BVerfGE 123, 267 – *Lisbon*.

²⁷¹ *Id.*, at 344, 353-354, 359-363.

²⁷² BVerfGE 140, 317 – *European Arrest Warrant II*.

The case concerned the Framework Decision on the European arrest warrant. The applicant was a US citizen who had been criminally convicted *in absentia* in Italy. While the Court of Justice had argued in its *Melloni* judgment that such convictions *in absentia* did not impose a necessary barrier to extraditions under the European arrest warrant Framework Decision,²⁷³ the case before the Federal Constitutional Court differed in one significant dimension: The applicant plausibly denied having been informed that a criminal procedure against him was pending in Italy.

The GFCC argued in *European Arrest Warrant II* that the right to be heard in a criminal proceeding was covered by the guarantee of human dignity as guaranteed by Art. 1 of the German Constitution.²⁷⁴ Nevertheless, the GFCC did not find a violation of German constitutional identity in the case at hand. Instead, the GFCC argued that the Framework Decision could be interpreted in a way that was consistent with human dignity, i.e. that there was no obligation to extradite the applicant unless Italy gave a guarantee to repeat the taking of evidence in the criminal procedure.²⁷⁵ The Court of Justice confirmed the interpretation of the Framework Decision proposed by the German Federal Constitutional Court only a few months later in its *Aranyosi* judgment.²⁷⁶

In particular, the last judgment shows that the identity reservation can potentially come into conflict with the principle of primacy of EU law. However, the Federal Constitutional Court has avoided a conflict until now. In the one case where such a conflict might have occurred, the *European Arrest Warrant II* decision, the GFCC interpreted the EU legal act in a way that it was consistent with the requirements of human dignity – an interpretation that was later accepted by the Court of Justice.

The final and most controversial exception is the *ultra vires* exception. According to this doctrine, legal acts of the EU are not applicable within the German legal order if they violate the competences of the EU. The seminal decision on the *ultra vires* doctrine was the *Honeywell* decision.²⁷⁷ *Honeywell* addressed a fundamental tension that is implicit in the *ultra vires* construction: While it is, in principle, uncontroversial that only EU legal acts that are in conformity with EU primary law benefit of legal primacy, the controversy is centered on the question of who decides whether an EU act was within or outside of the EU's competences. According to the architecture of the EU treaty, the competence to interpret the EU treaties ultimately rests with the Court of Justice, which is expressed, in particular, by Art. 267 TFEU.

The *Honeywell* doctrine was an attempt of the Court to ease this conflict, i.e. to respect the primacy of the CJEU to interpret the EU's competences, while still claiming the ultimate authority on the matter. The question that was put before the Court was whether the *Mangold* judgment of the Court of Justice issued a few years earlier had been *ultra vires*.²⁷⁸ In *Mangold*, the Court of Justice had indirectly extended the applicability of the Employment Equality Framework Directive to the phase before the implementation deadline by resorting to the general principle of non-discrimination which formed part of EU law.²⁷⁹ In its ensuing *Honeywell* decision, the Federal Constitutional Court ceased the opportunity to specify the *ultra vires* doctrine. It held that an EU legal act could only be classified as *ultra vires* under three conditions: First, if there was a doubt about the interpretation of EU competences and their interpretation by the Court of Justice, the question had to be referred to the

²⁷³ Case C-399/11, *Melloni*, 26 February 2013, EU:C:2013:107.

²⁷⁴ BVerfGE 140, 317, at 341.

²⁷⁵ *Id.*, at 366-375.

²⁷⁶ Cases C-404/15 and C-659/15 PPU, *Aranyosi*, 5 April 2016, EU:C:2016:198.

²⁷⁷ BVerfGE 126, 286 – *Honeywell*.

²⁷⁸ Case C-144/04, *Mangold*, 22 November 2005, EU:C:2005:709.

²⁷⁹ *Id.*, at paras. 75-76.

Court of Justice in the context of the preliminary reference procedure.²⁸⁰ Without a decision of the Court of Justice, the GFCC may not set aside an EU legal act under the *ultra vires* doctrine.²⁸¹ Second, the violation of EU competences had to be *manifest*.²⁸² With this requirement, the Federal Constitutional Court acknowledged that there may be reasonable disagreement about the interpretation of legal norms, and the *ultra vires* reservation should only be used when a legal interpretation leaves the realm of the reasonable.²⁸³ Finally, the violation of competences has to be “highly significant in the structure of competences between the Member States and the Union with regard to the principle of conferral and to the binding nature of the statute under the rule of law.”²⁸⁴ In the concrete case, the GFCC ruled that the Court of Justice had still acted within its competences in *Mangold*, acknowledging that the latter had the power to interpret the EU treaties dynamically.²⁸⁵

In 2014, the GFCC invoked the *ultra vires* reservation in its OMT decision, which concerned the competences of the ECB.²⁸⁶ The decision dealt with an ECB policy announced in a press release, according to which the ECB reserved itself the right to purchase sovereign bonds of EU Member States on the secondary market.²⁸⁷ The ECB announcement came at the height of the European debt crisis. Even though no Member State bonds were ever purchased under the program, it achieved its purpose to reduce the spread of the government bonds within the Euro zone. Nevertheless, a group of interested German citizens and politicians challenged the OMT policy before the GFCC, after a similar attempt before the General Court had been considered inadmissible.²⁸⁸

The GFCC held that the case against the ECB was admissible and argued that the latter had violated its competences by announcing the OMT policy.²⁸⁹ In line with the requirement postulated in *Honeywell*,

²⁸⁰ BVerfGE 126, 286, at 304.

²⁸¹ *Id.*

²⁸² *Id.* (highlighted by the authors).

²⁸³ See BVerfGE 126, 286, at 307; 142, 123, at 201 (“objectively arbitrary”); BVerfGE 151, 202, at 300.

²⁸⁴ BVerfGE 126, 286, at 304.

²⁸⁵ *Id.*, at 305-307.

²⁸⁶ BVerfGE 134, 366 – *Outright Monetary Transactions I*.

²⁸⁷ ECB, Press Release on Technical features of Outright Monetary Transactions, reprinted in Case C-62/14, *Gauweiler*, EU:C:2015:400, 16 June 2015, at para. 4.

²⁸⁸ Case T-492/12, *von Storch*, 10 December 2013, EU:T:2013:702.

²⁸⁹ For academic comments on the decision, see, e.g., Udo Di Fabio, ‘Karlsruhe Makes a Referral’, 15 *German Law Journal* (2014) 107; Franz C. Mayer, ‘Rebels Without a Cause? A Critical Analysis of the German Constitutional Court’s OMT Reference’, 15 *German Law Journal* (2014) 111; Dietrich Murswiek, ‘ECB, ECJ, Democracy, and the Federal Constitutional Court: Notes on the Federal Constitutional Court’s Referral Order from 14 January 2014’, 15 *German Law Journal* (2014) 147; Jürgen Bast, ‘Don’t Act Beyond Your Powers: The Perils and Pitfalls of the German Constitutional Court’s Ultra Vires Review’, 15 *German Law Journal* (2014) 167; Klaus Ferdinand Gärditz, ‘Beyond Symbolism: Towards a Constitutional Actio Popularis in EU Affairs? A Commentary on the OMT Decision of the Federal Constitutional Court’, 15 *German Law Journal* (2014) 183; Matthias 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’, 15 *German Law Journal* (2014) 203; Karsten Schneider, ‘Questions and Answers: Karlsruhe’s Referral for a Preliminary Ruling to the Court of Justice of the European Union’, 15 *German Law Journal* (2014) 217; Alexander Thiele, ‘Friendly or Unfriendly Act? The “Historic” Referral of the Constitutional Court to the ECJ Regarding the ECB’s OMT Program’, 15 *German Law Journal* (2014) 241; Matthias Goldmann, ‘Adjudicating Economics? Central Bank Independence and the Appropriate Standard of Judicial Review’, 15 *German Law Journal* (2014) 265; Carsten Gerner-Beuerle, Esin Küçük and Edmund Schuster, ‘Law Meets Economics in the German Federal Constitutional Court: Outright Monetary Transactions on Trial’, 15 *German Law Journal* (2014) 281; Niels Petersen, ‘Karlsruhe Not Only Barks, But Finally Bites—Some Remarks on the OMT Decision of the German Constitutional Court’, 15 *German Law Journal* (2014) 321; Dagmar Schiek, ‘The German Federal Constitutional Court’s Ruling on Outright Monetary Transactions (OMT) – Another Step towards National Closure?’, 15 *German Law Journal* (2014) 329; Thomas Beukers, ‘The Bundesverfassungsgericht Preliminary Reference on the OMT Program: “In the ECB We Do Not Trust. What About You?”’, 15 *German Law Journal* (2014) 343; Asteris Pliakos and Georgios Anagnostaras, ‘Blind Date Between Familiar Strangers: The German Constitutional Court Goes Luxembourg!’, 15 *German Law Journal* (2014) 369; Matthias Wendel, ‘Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court’s OMT Reference’, 10 *European Constitutional Law Review* (2014) 263; Ingolf Pernice, ‘A Difficult Partnership between Courts: The First Preliminary Reference by the German Federal

the Court then initiated a preliminary reference procedure under Art. 267 TFEU.²⁹⁰ In the ensuing *Gauweiler* judgment, the Court of Justice rejected the argumentation of the Federal Constitutional Court and held that the OMT policy was in conformity with the ECB's competences.²⁹¹ In its final judgment regarding OMT, the GFCC generally accepted the interpretation of the Court of Justice.²⁹² While it raised certain doubts regarding the reasoning of the Court of Justice,²⁹³ it argued that the latter's judgment did at least not manifestly violate the EU treaties.²⁹⁴ In particular, the Federal Constitutional Court acknowledged that the Court of Justice's argumentation was in line with the wording of the EU treaties and its prior case law.²⁹⁵

The German Federal Constitutional Court came to a different result in the infamous *PSPP* judgment from 5 May 2020, in which it declared the Weiss judgment of the Court of Justice *ultra vires*.²⁹⁶ Even though, the Court of Justice (ECJ) had declared the Public Sector Purchase Programme (PSPP) to be compatible with the EU treaties in *Weiss*,²⁹⁷ the Federal Constitutional Court argued that the Court of Justice had acted outside its competences because it had not taken all relevant factors into account in its proportionality analysis and applied a too deferential standard of review.²⁹⁸ Furthermore, it also argued that the PSPP itself violated the EU treaties because the ECB had failed to justify the program sufficiently. Nevertheless, it gave the latter a three-month window to remedy this deficiency. When the ECB met the demand of the GFCC and performed the proportionality test regarding the PSPP program, the Federal Constitutional Court argued that this action had fulfilled the requirements established in the PSPP judgment so that the German Central Bank could continue to participate in the PSPP program.²⁹⁹

The preceding discussion has shown that the German Federal Constitutional Court has generally accepted primacy of EU legal norms even with regard to the German Constitution, but has also carved

Constitutional Court to the CJEU', 21 *Maastricht Journal of European and Comparative Law* (2014) 3; Berenike Schriewer, 'The German Federal Constitutional Court's First Reference for a Preliminary Ruling to the European Court of Justice German Practice', 57 *German Yearbook of International Law* (2014) 701.

²⁹⁰ See *supra*, note 280, and accompanying text.

²⁹¹ Case C-62/14, *Gauweiler*, *supra* note 287.

²⁹² BVerfGE 142, 123 – *Outright Monetary Transactions II*.

²⁹³ *Id.*, at 217-221.

²⁹⁴ *Id.*, at 221-228.

²⁹⁵ *Id.*, at 221.

²⁹⁶ BVerfGE 154, 17.

²⁹⁷ Case C-493/17, *Weiss*, 11 December 2018, EU:C:2018:1000.

²⁹⁸ For criticisms of the decision, see, e.g., 'Editorial Comments: Not Mastering the Treaties: The German Federal Constitutional Court's PSPP Judgment', 59 *Common Market Law Review* (2022); Stefanie Egidy, 'Proportionality and Procedure of Monetary Policy-Making', 19 *International Journal of Constitutional Law* (2021) 285; Franz C. Mayer, 'The Ultra Vires Ruling: Deconstructing the German Federal Constitutional Court's PSPP Decision of 5 May 2020', 16 *European Constitutional Law Review* (2020) 733 'To Boldly Go Where No Court Has Gone Before. The German Federal Constitutional Court's Ultra Vires Decision of May 5, 2020', 21 *German Law Journal* (2020) 1116; Martin Nettesheim, 'Das PSPP-Urteil des BVerfG – ein Angriff auf die EU?', *Neue Juristische Wochenschrift* (2020) 1631; Ingolf Pernice, 'Machtspruch aus Karlsruhe: „Nicht verhältnismäßig? – Nicht verbindlich? – Nicht zu fassen...“', *Europäische Zeitschrift Für Wirtschaftsrecht* (2020) 508; Niels Petersen, 'The PSPP Decision of the German Federal Constitutional Court and Its Consequences for EU Monetary Policy and European Integration', 2020 *Revue Trimestrielle de Droit Financier* 28; Sara Poli and Roberto Cisotta, 'The German Federal Constitutional Court's Exercise of Ultra Vires Review and the Possibility to Open an Infringement Action for the Commission', 21 *German Law Journal* (2020) 1078; Heiko Sauer, 'Substantive EU Law Review beyond the Veil of Democracy: The German Federal Constitutional Court Ultimately Acts as Supreme Court of the EU', 16 *EU Law Live* (2020) 2; Bernhard W. Wegener, 'Karlsruher Unheil – Das Urteil des Bundesverfassungsgerichts vom 5. Mai 2020 (2 BvR 859/15) in Sachen Staatsanleihekäufe der Europäischen Zentralbank', 55 *Europarecht (EuR)* (2020) 347; Mattias Wendel, 'Paradoxes of Ultra-Vires Review: A Critical Review of the PSPP Decision and Its Initial Reception', 21 *German Law Journal* (2020) 979. For an economists' critique see P. Bofinger, M. Hellwig, M. Hüther, M. Schnitzer, M. Schularick and G. Wolff, 'Gefahr für die Unabhängigkeit der Notenbank', *Frankfurter Allgemeine Zeitung*, 29 May 2020, p. 18.

²⁹⁹ BVerfG, NJW 2021, 2187.

out three exceptions. First, the *Solange* exception aims at safeguarding German fundamental rights. The Court reserves itself the right to intervene if fundamental rights should not be protected adequately on the EU level. In its more recent case law, the Court even applies European fundamental rights when reviewing measures of German authorities that have been determined by EU law, while generally accepting the primacy of the Court of Justice's interpretation in this field.

Second, the constitutional identity reservation aims at preserving certain fundamental values of the German constitution even against EU legal acts. This concerns, in particular, the principle of democracy and the guarantee of human dignity. Finally, the Federal Constitutional Court has developed an *ultra vires* review. While the purpose of the first two exceptions is the preservation of German constitutional values in the face of primacy of EU law, the *ultra vires* exception requires the interpretation of EU law itself. Therefore, it comes most clearly into conflict with the CJEU's ultimate authority to interpret EU law as guaranteed by Art. 267 TFEU.

For a long time, the Federal Constitutional Court has avoided an open conflict with the Court of Justice.³⁰⁰ Instead, it has tried to exploit grey areas in order to nudge the Court of Justice into particular directions. This concerns, e.g., the development of an EU fundamental rights jurisprudence in the 1970s³⁰¹ or the interpretation of the Framework Decision on the European arrest warrant in conformity with the guarantee of human dignity.³⁰² Potentially, the recent turn of the GFCC to review legal acts derived from EU law on their compatibility with EU fundamental rights is also a move to influence the interpretation of fundamental rights in the EU. Yet, the PSPP Judgment presents the first time that the GFCC enters into an open conflict with the Court of Justice, denying the primacy of the latter's decision. Still, it has to be noted that the decision, despite its fierce rhetoric, also contained some conciliatory elements. In particular, the GFCC allowed the ECB to 'remedy' the perceived deficiency of the PSPP policy and to continue it after it had accepted the proportionality assessment performed by the ECB. Furthermore, the Court has also shown a more cooperative approach in the aftermath of the decision, accepting the proportionality assessment of the ECB in reaction to the PSPP judgment³⁰³ and refusing to grant preliminary remedies against the Next Generation EU fund.³⁰⁴

4.2.7. Hungary

The far-reaching effects of the amendments to the Hungarian constitution – the Fundamental Law (hereinafter HFL) – in 2011, had an important impact on the approach and interpretative stance towards the primacy of EU law by the Hungarian Constitutional Court (*Magyarország Alkotmánybírósága*, hereinafter CCH).³⁰⁵ Most significantly, in the course of the amendment of the HFL in 2011, all prior case law of the CCH was invalidated, including the case law which generally upheld the primacy of EU law.³⁰⁶ In addition, the governing party has engaged intensely in court packing, thereby trying to ensure the CCH's support for its political agenda.³⁰⁷

³⁰⁰ See Petersen, 'Karlsruhe's Locher Moment? A Rational Choice Perspective on the German Federal Constitutional Court's Relationship to the CJEU after the PSPP Decision', 21 *German Law Journal* (2020) 998-999.

³⁰¹ See above, 3.1.

³⁰² See above, 3.2.2.

³⁰³ BVerfG, NJW 2021, 2187.

³⁰⁴ BVerfGE 157, 332.

³⁰⁵ Peter M. Huber, 'Europäische Verfassungs- und Rechtsstaatlichkeit in Bedrängnis', 56 *Der Staat* (2017) 389, at 390-391; Gabor Halmai, 'Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E (2) of the Fundamental Law', 43 *Review of Central and East European Law* (2018) 23, at 23-26.

³⁰⁶ Huber, *supra* note 305, at 390.

³⁰⁷ Halmai, *supra* note 305, at 25; Huber, *supra* note 305, at 391.

These efforts appear to have manifested with the CCH's judgment 22/2016 on 5 December 2016.³⁰⁸ The Hungarian commissioner for fundamental rights petitioned the CCH to deliver an abstract interpretation of the HFL regarding Council decision (EU) 2015/1601 which required the mandatory relocation of asylum seekers from Italy and Greece to Hungary.³⁰⁹ In this context, the CCH found the relocation requirement to violate fundamental rights protected under the HFL, in particular the guarantee of human dignity.³¹⁰ Moreover, it found the EU Council decision to be an *ultra vires* act which violated the EU integration clause in Article E) HFL, because it encroached on Hungary's sovereignty and constitutional identity.³¹¹

Regarding relocation requirement for asylum seekers into Hungary, the CCH argued that it could review any act of public authority to ascertain that it did not violate human dignity, or any other fundamental right protected under the HFL, making references to the *Solange* jurisprudence of the German Federal Constitutional Court.³¹² Based on this understanding, it found that the relocation requirement for asylum seekers would amount to their collective expulsion (into Hungary) and therefore violate Art. XIV HFL. The argumentation of the CCH was not well received in the legal literature. Some voices argued that it constituted a smokescreen to enforce the government's anti-immigration agenda.³¹³ After all, the reasoning in judgment 22/2016 did not align with the referenced *Solange* jurisprudence, which aimed at promoting higher standards than required under EU law, whereas the consequences of the judgment 22/2016 would result in lower protection of the to-be-resettled refugees.³¹⁴

Concerning the *ultra vires* control, the CCH based its findings on two principles, namely the protection of Hungary's sovereignty and its constitutional identity under Art. 4 (2) TEU to find that the resettlement requirement was unconstitutional. It understood the protection of Hungary's sovereignty to establish a requirement that all acts of public authority are ultimately controlled by the people, arguing that the Court itself was the defender of the people's rights in this regard.³¹⁵ In protecting Hungary's constitutional identity, the CCH declared that "the constitutional self-identity of Hungary is a fundamental value not created by the Fundamental Law – it is merely acknowledged by the Fundamental Law".³¹⁶ Therefore, it could not be waived through the adoption of any international agreement, such as the TEU. However, the CCH refrained from defining what constitutional identity encompassed. Instead, it stated that the concept did not consist of "static and closed values"³¹⁷ but would have to be defined on a case-by-case basis. Moreover, although the CCH understood the

³⁰⁸ CCH, HUN-2016-3-006, 22/2016, 5 December 2016, English summary available at <http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-2016-3-006>.

³⁰⁹ Council Decision (EU) 2015/1601 of 22 September 2015 Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and Greece, O.J. L 248, 2015, p. 80.

³¹⁰ Ágoston Mohay and Norbert Tóth, 'Decision 22/2016. (XII. 5.) AB on the Interpretation of Article E(2) of the Fundamental Law', 111 *American Journal of International Law* (2017) 468, at 468.

³¹¹ Halmai, *supra* note 305, at 33.

³¹² *Id.* Mohay and Tóth, *supra* note 310, at 472.

³¹³ Gábor Halmai, 'The Hungarian Constitutional Court and Constitutional Identity', *Verfassungsblog: On Matters Constitutional*, 10 January 2017, <https://verfassungsblog.de/the-hungarian-constitutional-court-and-constitutional-identity/>.

³¹⁴ Gábor Halmai, 'Constitutional Court Decision on the Hungarian Government's Constitutional Identity Defence, Constitutionalism and Politics', 11 January 2017, <https://blogs.eui.eu/constitutionalism-politics-working-group/constitutional-court-decision-hungarian-governments-constitutional-identity-defense/>.

³¹⁵ Mohay and Tóth, *supra* note 310, at 472.

³¹⁶ Translation as provided by *Id.*, at 471.

³¹⁷ Translation as provided by *Id.* See also the critique of this reasoning by Tímea Drinóczi, 'Hungarian Constitutional Court: The Limits of EU Law in the Hungarian Legal System', 11 *ICL Journal* (2017) 139, at 149.

constitutional identity also to be protected under the EU legal order, it did not attempt to initiate a preliminary reference procedure.³¹⁸

Judgment 22/2016 constitutes a turning point in the CCH's case law that had, up to then, generally been accommodating to the primacy of EU law. Even though the CCH had not explicitly acknowledged the primacy of EU law, it had engaged in an interpretation of HFL provisions that aimed to ensure their consonance with provisions of EU law. In this regard, the CCH recognized in its decision concerning the constitutionality of the Lisbon Treaty that the interpretation of EU law fell into the exclusive competence of the Court of Justice.³¹⁹ Moreover, it argued that the Lisbon Treaty did not impair Hungary's sovereignty because it "did not create a European superstate [but] was adopted and ratified by sovereign member states, agreeing to share partially their sovereignties by using the method of supranational cooperation".³²⁰

Whether the recent confrontational stance towards the primacy of EU law of the Constitutional Court has consolidated is not evident. The recent judgment X/477/2021 from 11 December 2021³²¹ concerned a petition by the Minister of Justice to provide an abstract interpretation on the constitutionality of the Hungarian border practice involving the mass deportation of refugees to Serbia. This practice had previously been declared incompatible with EU law by the Court of Justice because it prevented refugees from receiving a fair procedure regarding their asylum status.³²²

The Minister of Justice had argued that the defence of the Hungarian territory and its population were covered by the concept of constitutional identity. According to the Minister, the processing of asylum applications by refugees would allow foreigners to reside in the territory of Hungary and – due to ineffective deportation mechanisms – alter the original composition of the country's population. By invoking constitutional identity, the Minister of Justice effectively called for a suspension of the effect of the judgment of the Court of Justice in *European Commission v Hungary*.³²³ However, the CCH ruled that it was not competent to decide this matter because the Minister of Justice directed a petition to the Court for an abstract review of constitutionality, while the petition dealt with a specific question, making the request inadmissible in these specific proceedings. The Court argued that it could not "take a position on the question whether the petitioner's argument that as a consequence of the CJEU judgment foreign population may *de facto* become a part of the population of Hungary is correct; this is a matter to be judged by the body applying the law (and not by the Constitutional Court)".³²⁴ Thereby, the CCH did not seize the opportunity to fully endorse the primacy of EU law either as it solely dealt with "genuine issues of constitutional interpretation [...]".³²⁵ Although the CCH did not further escalate the conflict about the validity of the Court of Justice's judgment in *European Commission v Hungary*, it proved further insights on its understanding of constitutional identity. According to the CCH, constitutional identity is inextricably linked to the protection of human dignity of the people living in Hungary. Therefore, the protection of constitutional identity encompasses the defence of "[o]ne's traditional social environment, as a natural bond determined by birth [which] determines the

³¹⁸ Translation as provided by Mohay and Tóth, *supra* note 310, at 473.

³¹⁹ Cf. Halmai, *supra* note 305, at 23–24.

³²⁰ Mohay and Tóth, *supra* note 310, at 470.

³²¹ CCH, X/477/2021, 7 December 2021, English translation available at [http://public.mkab.hu/dev/dontesek.nsf/0/1dad915853cbc33ac1258709005bbb1a1/\\$FILE/x_477_2021_eng.pdf](http://public.mkab.hu/dev/dontesek.nsf/0/1dad915853cbc33ac1258709005bbb1a1/$FILE/x_477_2021_eng.pdf).

³²² Case C-808/18, *Commission v Hungary*, 17 December 2020, EU:C:2020:1029.

³²³ Cf. Kim Lane Scheppele, 'Escaping Orbán's Constitutional Prison: How European Law Can Free a New Hungarian Parliament', *Verfassungsblog: On Matters Constitutional*, 21 December 2021, <https://verfassungsblog.de/escaping-orban-s-constitutional-prison/>.

³²⁴ CCH, X/477/2021, *supra* note 322, at III, p. 9.

³²⁵ *Id.*, at III, p. 8.

development of a person's personality, the direction and framework of his or her identity, and as such, is to be assessed in the context of the quality of human life."³²⁶ Based on this understanding, the CCH stressed that a violation of the constitutional identity remained possible "if the content of identity is artificially and undemocratically altered by the State (or any other organisation other than the State)", alluding to the possibility that the admission of refugees for the processing of their applications for asylum may alter the population in Hungary.³²⁷ In the context of EU law, the CCH admitted that "that visas, immigration and asylum fall within the area of freedom, security and justice, an area in which is characterised by the Union having shared competences with the Member States".³²⁸ However, it also reiterated that these joint competences might be revoked from the EU if "securing the fundamental rights affected by the relevant competence or competences as well as the performance of the obligations of the State are impaired" and where the "the institutions of the European Union manifestly disregard their obligation to exercise a competence transferred for joint exercise"³²⁹ in accordance with the requirements under the integration clause contained in Art. E) HFL.

The side-stepping of the CCH concerning the question posed by the Minister of Justice has been interpreted as a signalling of its own independence to the government, after the profound amendments to the Hungarian constitution in 2011.³³⁰ Moreover, notwithstanding the rhetoric containing potential for a denial of validity of judgments of the Court of Justice in the future³³¹, judgment X/477/2021 has been generally seen as accepting the primacy of EU law.³³² Ultimately, it remains to be seen whether the CCH will take a more confrontational or reconciliatory path in its interaction with the Court of Justice in the future and how this will affect its acceptance of the primacy of EU law.

4.2.8. Italy³³³

The case law of the Italian Constitutional Court on the primacy of EU law has evolved quite significantly over the years.³³⁴ After initial resistance,³³⁵ the Constitutional Court has come to accept the primacy of EU law in principle. In particular, the Constitutional Court held that, if national legislation did not comply with EC law, ordinary courts could disapply it.³³⁶ However, the *Corte costituzionale* did not accept primacy without reservations. Instead, it developed its famous 'counter-limits' (*controlimiti*) doctrine, according to which primacy finds its limits in the "fundamental principles of [the Italian] constitutional order, or the inviolable rights of the human person."³³⁷ By focusing on the fundamental

³²⁶ *Id.*, at IV, p. 14.

³²⁷ *Id.*, at IV, p.15.

³²⁸ *Id.*, at IV, p. 25.

³²⁹ *Id.*, at IV, p. 26.

³³⁰ Scheppele, *supra* note 323, at 8–9.

³³¹ Daniel Thym, 'Never-Ending Story? Political Dynamics, Legislative Uncertainties, and Practical Drawbacks of the 'New' Pact on Migration and Asylum', in Daniel Thym (ed.), *Reforming the Common European Asylum System: Opportunities, Pitfalls, and Downsides of the Commission Proposals for a New Pact on Migration and Asylum* (2022) 11, at 21.

³³² Scheppele, *supra* note 324, at 8–9.

³³³ This part has been adopted from the earlier study Petersen and Chatziathanasiou, *supra* note 3, but it has been slightly modified.

³³⁴ For an excellent account, see Daniele Amoroso, 'Italy', in Fulvio Maria Palombino (ed.), *Duelling for Supremacy: International Law vs. National Fundamental Principles* (2019) 184, at 197–208.

³³⁵ Corte costituzionale, *Costa v ENEL*, 14/1964, 24 February 1964, IT:COST:1964:14, at para. 6.

³³⁶ Corte costituzionale, 170/1984, *Granital SpA v Amministrazione delle Finanze dello Stato*, 5 June 1984, IT:COST:1984:170; see Amoroso, *supra* note 334, at 198.

³³⁷ Corte costituzionale, 183/1973, *Frontini*, *supra* note 147. English version available in Bebr, *supra* note 147.

principles of the Italian constitutional order, the *controlimiti* doctrine is similar to the German constitutional identity reservation.

However, the *controlimiti* doctrine has remained largely theoretical until recently. The Constitutional Court has only once threatened to apply it.³³⁸ When the *Consiglio di Stato*, the Italian supreme administrative court, once made use of the doctrine, the Constitutional Court held that it was the only court entitled to do so.³³⁹ Therefore, some observers have even considered the doctrine dormant until it resurfaced in the recent, so-called *Taricco* saga.³⁴⁰

The *Taricco* cases concerned overly short limitation periods for VAT fraud in Italy. In the original procedure, the Tribunal of Cuneo submitted a preliminary reference to the Court of Justice. The accused had committed VAT fraud, but a conviction was not possible due to the short limitation period and a cap concerning the time for which the limitation period could be interrupted.³⁴¹ The Court of Justice found that such short limitation periods were contrary to Art. 325 TFEU, according to which Member States have an obligation to refrain from actions negatively affecting the financial interests of the EU, if the Member State court found that the short limitation period had the consequence that accused individuals escaped criminal punishment in a considerable number of cases.³⁴² Additionally, the Court of Justice held that a retroactive disapplication of the limitation clause would not violate the prohibition of retroactive criminal sanctions guaranteed by Art. 49 EU Charter of Fundamental Rights.³⁴³

Lower courts in Italy were concerned that this jurisprudence of the Court of Justice would conflict with the criminal law principles of legality and non-retroactivity, and asked the Constitutional Court to activate the counter-limits doctrine.³⁴⁴ However, the Constitutional Court only partially recognized these demands. On the one hand, the Constitutional Court took issue with the retroactive disapplication of the limitation clause.³⁴⁵ It argued that, according to its longstanding jurisprudence, limitation clauses were part of substantive criminal law so that the prohibition of retroactive application of criminal sanctions also covered limitation clauses in Italian law. But it did not immediately invoke the counter-limits doctrine. Instead, it submitted a second preliminary reference to the Court of Justice, asking it to reconsider its interpretation of Art. 49 EUChFR, as a retroactive disapplication of the limitation clause violated the prohibition of retroactive application of criminal sanctions in Art. 25 of the Italian Constitution. Further, the Court requested clarifications, as the Court of Justice had not elaborated on the precise meaning of the conditions under which limitations should be set aside with regard to the “seriousness” of VAT fraud.³⁴⁶

In its subsequent response, the *Taricco II* decision, the Court of Justice acknowledged the concerns of the Italian Constitutional Court and held that the retroactive disapplication of the limitation clause had

³³⁸ On the threat, see Amoroso, *supra* note 334, at 198..

³³⁹ Consiglio di Stato (Fifth Section), No. 4207, *Admenta Italia et al. v FEDERFARMA et al.*, 8 August 2005; Corte costituzionale, 454/2006, *Criminal proceedings against De Felice et al*, 13 December 2006, IT:COST:2006:454; see Amoroso, *supra* note 334, at 198–199.

³⁴⁰ Matteo Bonelli, 'The Taricco Saga and the Consolidation of Judicial Dialogue in the European Union: CJEU, C-105/14 Ivo Taricco and Others, ECLI: EU: C: 2015:555; and C-42/17 MAS., MB, ECLI: EU: C: 2017:936 Italian Constitutional Court, Order No. 24/2017', 25 *Maastricht Journal of European and Comparative Law* (2018) 357.

³⁴¹ Case C-105/14, *Taricco*, 8 September 2015, EU:C:2015:555.

³⁴² *Id.*, at paras. 47–52.

³⁴³ *Id.*, at paras. 54–57.

³⁴⁴ Amoroso, *supra* note 334, at 200; Davide Paris, 'Carrot and Stick: The Italian Constitutional Court's Preliminary Reference in the Case Taricco', 5 *Questions of International Law* (2017) 5, at 8.

³⁴⁵ Corte costituzionale, 24/2017, *supra* note 156.

³⁴⁶ Corte costituzionale, 24/2017, *Criminal proceedings against Mauro Bertoni et al.*; *Criminal proceedings against D.B.C. et al.*, 23 November 2016, IT:COST:2017:24.

to comply with the principles of foreseeability, precision, and non-retroactivity.³⁴⁷ Therefore, if the retroactive disapplication of the limitation clause led to uncertainty in the Italian legal system, the Italian Constitutional Court was not obliged to disapply the criminal limitation provisions at issue.³⁴⁸

Building on these arguments, the Italian Constitutional Court subsequently held that *Taricco* was inapplicable due to the constitutional requirements of legality in criminal law and the initial judgment's lack of precision. The handling of these preliminary references by the Italian Constitutional Court have been aptly described as a use of "carrot and stick".³⁴⁹ On the one hand, it used conciliatory language and opened avenues for cooperation, while on the other hand it threatened with defiance. Nevertheless, despite these challenges, the Italian Constitutional Court largely accepts the primacy of EU law and has, as yet, refrained from openly defying judgments of the Court of Justice.

4.2.9. Netherlands³⁵⁰

The Dutch legal order is, in principle, very open to international law. It is generally considered to follow a monist conception, according to which international law takes precedence over domestic law.³⁵¹ Furthermore, Dutch courts have followed the idea of a 'modest' constitution, which entails a lack of judicial review of legislative acts.³⁵² Thus, the Dutch courts have – unlike their counterparts on other Member States – not established constitutional safeguards against EU integration.³⁵³

Consequently, Dutch courts have largely accepted the direct effect and primacy of EU law.³⁵⁴ In fact, the openness of the Dutch legal order towards international law might even have been used to accelerate the development of the autonomous EU legal order as a whole. Historical research suggests that *Van Gend en Loos* was strategically litigated in the Netherlands.³⁵⁵ Art. 94 of the Dutch Constitution gives international treaties and decisions of international organizations primacy over the constitution. Still, as EU law is understood as an autonomous legal order, Art. 94 does not directly incorporate EU law.³⁵⁶ Instead, the direct applicability of secondary EU law derives directly from the Treaties and does

³⁴⁷ Case C-42/17, *M.A.S. (Taricco II)*, 5 December 2017, EU:C:2017:936, at para. 51.

³⁴⁸ *Id.*, at para. 59.

³⁴⁹ Paris, *supra* note 344, at 8.

³⁵⁰ This part has been adopted from the earlier study Petersen and Chatziathanasiou, *supra* note 3, but it has been slightly modified.

³⁵¹ Leonard Besselink and Monica Claes, 'The Netherlands: The Pragmatics of a Flexible, Europeanised Constitution', in Anneli Albi and Samo Bardutzky (eds.), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (T.M.C. Asser Press 2019) 179; André Nollkaemper and Rosanne van Alebeek, 'Netherlands', in Fulvio Maria Palombino (ed.), *Duelling for Supremacy* (2019) 255.

³⁵² Gerhard Van der Schyff, 'EU Member State Constitutional Identity: A Comparison of Germany and the Netherlands as Polar Opposites', 76 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2016) 167, at 176–177.

³⁵³ Besselink and Claes, *supra* note 351, at 188; van der Schyff, *supra* note 352, at 176.

³⁵⁴ Besselink and Claes, *supra* note 351, at 184.

³⁵⁵ Antoine Vauchez, 'The Transnational Politics of Judicialization. Van Gend en Loos and the Making of EU Polity', 16 *European Law Journal* (2010) 1, at 10: "Maybe because there was already a tradition of international lawyering in the Dutch bar, maybe because the 1956 constitutional reform had rendered its legal system compatible with the direct effect of international treaties, the Dutch section of the FIDE launched a working group in charge of identifying 'which dispositions of the Treaty establishing the EC are self-executing' (November 1961)."

³⁵⁶ See van der Schyff, *supra* note 352, at 181: "Art. 94 is therefore only relevant with regard to international law other than EU law, especially the European Convention on Human Rights and the International Covenant on Civil and Political Rights as essential elements of the country's constitutional."

not follow from a national act, as has been affirmed by the Council of State (*Raad van State*)³⁵⁷ and by the Supreme Court of the Netherlands (*Hoge Raad*).³⁵⁸

The prohibition of judicial review of the constitutionality of acts of Parliament or of Treaties is found in Art. 120 of the Dutch Constitution. This prohibition provided the (partial) basis for the District Court of The Hague when it rejected a case against the Netherlands' accession to the European Stability Mechanism that was based on an alleged infringement of the legislature's constitutional budgetary right. The District Court found to have no jurisdiction to review neither the constitutionality of an act of Parliament nor the associated democratic procedure.³⁵⁹

Instead, questions of delegating power to the EU are typically left to the political process and to the legislature. Art. 92 of the Constitution that provides for the delegation of powers to international institutions does not provide limitations, be it in form of a time limit or in form of a different qualification.³⁶⁰ Additionally, there is generally no concept of sovereignty in the Dutch Constitution that could impose limits to European integration.³⁶¹ As a consequence, the relationship to the EU and to EU law is regarded rather as a political than a legal question. Efforts to restrict EU integration instead rest on political opposition, as exemplified by the referendum on the EU Constitutional Treaty in 2005.³⁶² The Dutch experience thus provides a contrast to other Member States, where political scepticism towards EU integration is also expressed through legal challenges.

4.2.10. Romania

Romania is another jurisdiction where the Constitutional Court has recently started to defy the CJEU.³⁶³ The context is a justice reform that took a page out of the Polish and Hungarian playbooks.³⁶⁴ The reforms limited the prosecutorial and judicial anti-corruption powers and created a section with exclusive competence to investigate criminal offences committed within the judicial system (SIOJ), which had the potential to curtail the independence of Romanian judges severely.³⁶⁵ These reforms led

³⁵⁷ Raad van State, AB 1997, 117, Metten, 7 July 1995; see Maartje Verhoeven, *The Costanzo obligation: the obligations of national administrative authorities in the case of incompatibility between national law and European law* (2011) 60.

³⁵⁸ See Hoge Raad, Nr. 00156/04 E, 2 November 2004, NL:PHR:2004:AR1797: "3.6. The plea fails to recognize that a regulation adopted on the basis of the EC Treaty, such as the one at issue here, has effect under that treaty and not under any national act and is directly applicable in all Member States. This validity is not based on the system of art. 93 and 94 GW. The remedy is therefore defective."; Besselink and Claes, *supra* note 351, at 191.

³⁵⁹ The Hague District Court, Preliminary Judgment 6.6.2012, paras. 2.2, 3.2. et seq; see van der Schyff, *supra* note 352, at 178.

³⁶⁰ See *id.*, at 179: "This emphasis on the democratic process also explains Art. 92 of the Constitution that regulates the conferral of legislative, executive and judicial powers on international institutions by or pursuant to a treaty. The provision does not require a conferral to be for a specific period of time only, nor does the provision limit the type of power as to its character or range."; Besselink and Claes, *supra* note 351, at 189.

³⁶¹ See van der Schyff, *supra* note 352, at 178: "Dutch academics have discussed the concept of sovereignty in the context of EU law though, where they have usually indicated the need to think in terms of a limited or shared sovereignty in the European constitutional space, instead of proposing the concept as a limit to European integration in the mould of the Lisbon judgment."; see also Besselink and Claes, *supra* note 351, at 187.

³⁶² See van der Schyff, *supra* note 352, at 180; Besselink and Claes, *supra* note 351, at 189.

³⁶³ For an overview over the recent development in Romania, see, e.g., Madalina Moraru and Raluca Bercea, 'The First Episode in the Romanian Rule of Law Saga: Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397-19, Asociata Forumul Judecatorilor din Romania, and their follow-up at the national level', 18 *European Constitutional Law Review* (forthcoming 2022); Elena-Simina Tanasescu and Bianca Selejan-Gutan, 'A Tale of Primacy: The ECJ Ruling on Judicial Independence in Romania', *Verfassungsblog*, 2 June 2021, <https://verfassungsblog.de/a-tale-of-primacy/>; Bianca Selejan-Gutan, 'A Tale of Primacy Part II: The Romanian Constitutional Court on a Slippery Slope', *Verfassungsblog*, 18 June 2021, <https://verfassungsblog.de/a-tale-of-primacy-part-ii/>; Bianca Selejan-Gutan, 'A Tale of Primacy, part III: Game of Courts', *Verfassungsblog*, 17 November 2021, <https://verfassungsblog.de/a-tale-of-primacy-part-iii/>.

³⁶⁴ See, in particular, *supra* 2.1.1.

³⁶⁵ See Moraru and Bercea, *supra* note 363.

to several preliminary reference procedures to the Court of Justice, asking the latter whether these reforms were compatible with EU law. In *Asociata Forumul Judecatorilor din Romania*, the Court of Justice established several guidelines for national judges to assess the different elements of the judicial reforms and asked the domestic courts to disapply domestic laws that contradicted EU law.³⁶⁶

The Romanian Constitutional Court reacted to this judgment of the Court of Justice in Decision 390/2021 from 8 June 2021.³⁶⁷ The case before the Romanian Constitutional Court concerned the constitutionality of several provisions of the SIOJ. The Constitutional Court acknowledged that judges of domestic courts, in principle, have the competence to set aside domestic statutes that are not in conformity with EU law. However, relying on the doctrine of constitutional identity, it argued that “a national court does not have the power to analyse the conformity of a disposition of internal law, declared constitutional by virtue of Article 148 of the Constitution, with European law provisions”.³⁶⁸ As the Court reiterated the constitutionality of the SIOJ, which it had already confirmed in earlier decisions,³⁶⁹ this has the effect of shielding even ordinary statutes from the primacy of EU law.³⁷⁰ This judgment of the Constitutional Court potentially has a severe chilling effect on Romanian judges, as the non-compliance with judgments of the Constitutional Court is a reason for the initiation of a disciplinary proceeding.³⁷¹ Such disciplinary proceedings have already been initiated against judges having sought the preliminary ruling from the Court of Justice.³⁷²

Recently, the situation has even escalated further.³⁷³ In December 2021, the Court of Justice issued its preliminary ruling in the *Euro Box Promotion* case.³⁷⁴ The case concerned criminal proceedings against several high-level Romanian politicians close to the ruling party because of corruption. The Romanian Constitutional Court had declared that criminal convictions by the High Court of Cassation were unconstitutional because the High Court had decided in a composition not in line with national law.³⁷⁵ In the subsequent preliminary reference procedure, the Court of Justice argued that the infringements of national law regarding the composition of judges must not lead to impunity in cases where the financial interests of the EU are implicated.³⁷⁶ Furthermore, the Court of Justice added that it violated EU law if domestic courts could not deviate from decisions of the Constitutional Court in order to apply EU law without facing disciplinary proceedings.³⁷⁷ The reaction of the Romanian Constitutional Court was swift. On 23 December 2021, two days after the judgment of the Court of Justice, the Romanian Constitutional Court issued a press release.³⁷⁸ In the press release, the Court argued that the judgment

³⁶⁶ Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *Asociata Forumul Judecatorilor din Romania*, 18 May 2021, EU:C:2021:393.

³⁶⁷ Romanian Constitutional Court, Decision No. 390 of 8 June 2021 published in the Official Gazette of Romania No. 612 of 22 June 2021.

³⁶⁸ Cited after Selejan-Gutan, ‘A Tale of Primacy Part II’, *supra* note 363.

³⁶⁹ See Moraru and Bercea, *supra* note 363.

³⁷⁰ Selejan-Gutan, ‘A Tale of Primacy Part II’, *supra* note 363.

³⁷¹ Moraru and Bercea, *supra* note 363.

³⁷² Selejan-Gutan, ‘A Tale of Primacy Part II’, *supra* note 363.

³⁷³ See Bianca Selejan-Gutan, ‘A Tale of Primacy, part III’, *supra* note 363; Pawel Filipek and Maciej Tabarowski, ‘From Romania with Love: The CJEU confirms criteria of independence for constitutional courts’, *Verfassungsblog*, 14 February 2022, <https://verfassungsblog.de/from-romania-with-love/>.

³⁷⁴ Joined Cases C-357/19 and others, *Euro Box Promotion*, 21 December 2021, EU:C:2021:1034.

³⁷⁵ See Filipek and Tabarowski, *supra* note 373.

³⁷⁶ Joined Cases C-357/19 and others, *Euro Box Promotion*, *supra* note 374.

³⁷⁷ *Id.*

³⁷⁸ See Bianca Selejan-Gutan, ‘Who’s Afraid of the Big Bad Court?’, *Verfassungsblog*, 10 January 2022, <https://verfassungsblog.de/whos-afraid-of-the-big-bad-court/>. The press release can be found under <https://www.ccr.ro/comunicat-de-presa-23-decembrie-2021/>.

of the Court of Justice asking domestic courts to disapply provisions of domestic Romanian law could only be implemented after a revision of the Romanian Constitution.³⁷⁹ While this press release does not have a direct legal effect, it reminds judges of the spectre of a disciplinary proceeding for not complying with a decision of the Constitutional Court.

4.2.11. Conclusion

The analysis of the status of primacy of EU law in various jurisdictions of different Member States provides no uniform picture. Member States' highest courts have shown different levels of acceptance of the principle of primacy of EU law. However, there are a few common threads. First, all reviewed courts have, in principle, accepted the primacy of EU Law. Before the judgment of the Polish Constitutional Tribunal, no constitutional or supreme court in one of the Member States claimed the supremacy of the entirety of the respective constitution over EU law. Instead, courts have usually accepted the primacy of EU law over ordinary statutes and even the constitution, even if not unconditionally. Second, most Member States' highest courts have established exceptions to the primacy of EU law. These exceptions vary in their extent. Most courts have, at least, introduced a constitutional identity exception, according to which certain core elements of the constitution are immune to the primacy of EU law. The first court introducing such a constitutional identity exception was probably the Italian *Corte costituzionale* with its *controlimiti* jurisprudence. But many other courts have followed suit: the German Federal Constitutional Court has introduced a constitutional identity reservation, and also the French *Conseil constitutionnel* and the *Conseil d'Etat* have established similar concepts. Even courts that count as very integration friendly, such as the Belgian or the Austrian Constitutional Courts have at least alluded to the idea of a constitutional identity exception even if it has never become practically relevant up to date. However, the details and the extent to which these core constitutional principles escape the primacy of EU law vary significantly. The Romanian Constitutional Court has adopted an extremely extensive reading, according to which even ordinary statutes can form part of constitutional identity if their constitutionality has been approved by the Constitutional Court. Even though the French *Conseil d'Etat* was significantly less far-reaching, it has also developed a rather extensive understanding in its recent judgment from 21 April 2021, when it created a national security exception to the primacy of EU law.

The *ultra vires* doctrine constitutes another exception to the primacy of EU law that has been utilized by Member States' highest courts. According to this doctrine, an EU legal act or a decision of the Court of Justice do not enjoy primacy if they have been enacted outside of the competences conferred to the EU. This doctrine is highly problematic because one can reasonably disagree about the interpretation of legal norms and thus also the extent of EU competences. Therefore, it is unclear why Member States' courts should have a better (and not just a different) understanding of the extent of EU competences than the Court of Justice. In the reviewed jurisdictions, the adoption of the *ultra vires* doctrine has been more limited than the use of the constitutional identity reservation. The pioneer in this respect is probably the German Federal Constitutional Court, which has established and developed the doctrine in several judgments in the last 15 years. Some other courts have also adopted an *ultra vires* doctrine, notably, the Czech Constitutional Court, the Danish Supreme Court or the Constitutional Court of Hungary. However, many Member States' courts have, so far, refused to adopt an *ultra vires* reservation. Most notably, the French *Conseil d'Etat* has recently explicitly rejected the use of the doctrine even though the Counsel of the French government had urged it to adopt such a doctrine.³⁸⁰

³⁷⁹ See Selejan-Gutan, *supra* note 378.

³⁸⁰ Conseil d'État, N° 393099, *supra* note 235, at para. 8.

Nevertheless, the *ultra vires* doctrine is probably more dangerous to the primacy of EU law than the constitutional identity doctrine. The latter is used by constitutional courts to draw red lines to the Court of Justice, i.e. to signal which kinds of concerns are so important to domestic courts that they would risk a conflict over these issues. If this signaling is used sparingly, as it has mostly been in the past, it can be an instrument to foster a productive dialogue between domestic courts and the Court of Justice. For example, the Court of Justice probably would not have developed a fundamental rights jurisprudence in the late 1960s and 1970s without pressure by Member States' courts from Italy and Germany. Consequently, the mere fact that courts have established a constitutional identity exception, does not necessarily undermine the primacy of EU law and the coherence of the EU legal order. Constitutional identity only becomes a concern if the space that is claimed to belong to the untouchable constitutional core becomes too broad. This is, in particular, the case in Romania where the Constitutional Court argues that all statutes that have been found to comply with the Constitution by the Court, form part of the constitutional identity. Such an understanding that extends the concept of constitutional identity even to ordinary statutes totally undermines the concept of primacy. Furthermore, the recent judgment of the French *Conseil d'Etat* is of certain concern because the French court established a rather broad security exception. Whether it is indeed a serious concern for the primacy of EU law depends on how this security exception is concretized in future judgments.

Yet, the *ultra vires* doctrine is even more problematic. In this case, courts do not make a claim stemming from their own constitutional order over which they can claim to have the ultimate authority of interpretation. Instead, they assume the position of the Court of Justice and correct the latter in the interpretation of EU law. It is much more difficult for the Court of Justice to react appropriately to such a challenge because the Member State courts call the competence of the latter into question. This is illustrated by the recent PSPP judgment of the German Federal Constitutional Court, which argued that the *Weiss* decision of the Court of Justice was "methodologically unjustifiable", "simply incomprehensible" and "objectively arbitrary".³⁸¹ Unlike constitutional identity exceptions, *ultra vires* challenges do not offer the Court of Justice an easy off-ramp to change course while saving its face.

4.3. Judgment K3/2021 in the context of the comparative experience

The judgment of the Polish Constitutional Tribunal presents one of the most serious challenges to the primacy of EU law, yet. We have seen in the comparative analysis that most domestic constitutional and supreme courts have established reservations to the primacy of EU law. Some courts have even openly defied the Court of Justice and rejected the primacy of EU law in a concrete case. Notably, this has been the case for the decision of the Czech Constitutional Court regarding the *Landtová* judgment of the Court of Justice, the *Ajos* decision of the Danish Supreme Court, and the PSPP judgment of the German Federal Constitutional Court. Yet, with the notable exception of the Romanian Constitutional Court, no Member State's court has gone as far as the Polish Constitutional Tribunal.

The decision of the Czech Constitutional Court was limited to the narrow issue of Slovak pensions and due to a conflict with the Czech Supreme Administrative Court. It was a single issue, and the Czech Constitutional Court has not declared any subsequent decisions of the Court of Justice *ultra vires*. Similarly, the *Ajos* decision of the Danish Supreme Court concerned a very narrow matter of Danish labor law and has not created any systemic repercussions. A more far-reaching denial of the primacy of EU law has come from the German Federal Constitutional Court in its recent PSPP judgment. But even the PSPP judgment is much more restrained than the decision of the PCT. While the PSPP judgment

³⁸¹ *Id.*, at paras. 118, 133, 153.

had an enormous symbolic value and set a dangerous precedent for the denial of primacy of EU law, the immediate practical effects were actually quite limited. In particular, the Federal Constitutional Court did not require the German Bundesbank to stop participating in the PSPP program of the ECB. Instead, it gave the ECB the opportunity to remedy the perceived deficiency of the PSPP program by requiring a proportionality justification, and accepted the ECB's proportionality reasoning in a later decision.³⁸² Despite the fierce rhetoric, the PSPP judgment also contained reconciliatory elements and a path for de-escalating the conflict. Consequently, the judgment can still be seen as part of the judicial dialogue between domestic courts and the Court of Justice.

This is in stark contrast to the judgment of the PCT. While the PCT makes rhetorical allusions to a dialogue with the Court of Justice, it is unclear how such a dialogue can play out and how the conflict between the two courts can be de-escalated. Instead, the decision contains a wholesale repudiation of the principle of primacy of EU law.³⁸³ While the PCT refers to the doctrines of constitutional identity and *ultra vires* control that are also part of the jurisprudence of domestic constitutional and supreme courts of other Member States, such as the German Federal Constitutional Court, this reference seems to be mere lip-service. The PCT does not define the Polish constitutional identity or justify why the Polish court organization as spelled out in the Polish judicial reforms is part of this constitutional identity. Instead, one gets the impression that even ordinary statutes of the Polish legal system are considered to be part of the Polish constitutional identity, which makes a mockery of the concept.

Furthermore, the PCT asserts that the Court of Justice had acted *ultra vires* in interpreting Art. 19 TEU, but again does not justify – apart from very abstract considerations – why the Court of Justice had misinterpreted Art. 19 TEU. Considering this lack of justification and specification, it is difficult to see the dialogical element in the decision despite the Constitutional Tribunal's assertions to the contrary. Rather, the PCT seems willing to further escalate this conflict by suggesting that the CJEU would constitute a court which would not meet the standards of independence and impartiality set out in Polish Constitution. Furthermore, the PCT judgment has to be seen in light of the recent legislative changes, granting the controversial Disciplinary Chamber *de facto* the authority to suspend and dismiss judges if they initiate preliminary reference procedures to the Court of Justice. This creates a significant chilling effect and could seriously impair the primacy of EU law far beyond the issue decided in the judgment of the PCT.

³⁸² BVerfG, NJW 2021, 2187, *supra* note 299.

³⁸³ Cf. Alexander Thiele, 'Whoever Equals Karlsruhe to Warsaw Is Wildly Mistaken', *Verfassungsblog: On Matters Constitutional*, 10 Oct. 2021, <https://verfassungsblog.de/whoever-equals-karlsruhe-to-warsaw-is-wildly-mistaken/>.

5. PRIMACY AND JUDICIAL DIALOGUE

KEY FINDINGS

A judicial dialogue emerges in a multi-level system of governance when courts on different levels insist on the ultimate decision-making authority in theory, but respect the position of the other courts in practice. We argue that such an equilibrium emerges when courts are interdependent on each other. The Court of Justice is usually dependent on domestic courts to implement its decisions. At the same time, domestic courts have to fear backlash from the political branches if they refuse cooperation and there is a strong political commitment towards EU integration and cooperation. The latter is precisely lacking in Poland. While the Polish government values membership in the EU, it often refuses to cooperate. For this reason, the PCT does not have to fear any reactions from the Polish government if it refuses to cooperate with the Court of Justice. It is rather to the contrary: If the PCT undermined the judicial reforms in Poland by cooperating with the Court of Justice, it would have to fear political backlash from the government.

The relationship between the Court of Justice and the Member States' highest courts concerning the primacy of EU law has often been described as judicial dialogue.³⁸⁴ The main characteristic of judicial dialogue in the multilevel context is that the ultimate judicial authority is undefined.³⁸⁵ In practice, there is thus no clear hierarchy between the different levels of a multilevel legal system. At first sight, this seems to be at odds with the concept of primacy of EU law, and it seems to endanger the unity and coherence of EU law. However, if judicial dialogue works, we can observe an equilibrium between the Court of Justice and the Member States courts. In this equilibrium, each court claims ultimate authority, but still respects the authority of the other court and avoids an open conflict with the latter. In this part, we will have a closer look at the concept of judicial dialogue in the EU.

We should note, however, that the concept of judicial dialogue is not a normative concept, but rather an empirical or analytical concept that tries to *explain* the relationships between courts on different levels of a multilevel system of governance. It does not seek to justify deviations from the principle of primacy. To the contrary, Member States' courts are normatively required to apply EU law without exception.³⁸⁶ Nevertheless, the observational perspective underlying this chapter can give us reasons for why and to what extent Member States' courts – as shown in the previous chapter – deviate from the principle of primacy and information how an effective remedy might look like.

In the following, we will first explain the concept in more detail and highlight the doctrinal mechanisms that ensure the stability of the judicial equilibrium. Second, we will look at the preconditions for judicial

³⁸⁴ See, e.g., Francis G. Jacobs, 'Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice', 38 *Texas Int'l L.J.* (2003) p. 547; Giuseppe Martinico & Oreste Pollicino, *The Interaction between Europe's Legal Systems* (2012); Antonios Tzanakopoulos, 'Judicial Dialogue in Multi-Level Governance: The Impact of the Solange Argument', in Ole Kristian Fauchald and Andre Nollkaemper (eds.), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (2014) 185; Koen Lenaerts, 'Upholding the Rule of Law through Judicial Dialogue', 38 *Yearbook of European Law* (2019) 3.

³⁸⁵ 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', 36 *Common Market Law Review* (1999) 351, at 384.

³⁸⁶ See *infra*, 6.1.

dialogue. Third, we will analyse how and why the judgment of the Polish Constitutional Tribunal endangers this dialogue.

5.1. How Judicial Dialogue Works in the EU

In a multilevel system of governance, like the EU, courts at both the federal and the Member State level have strategies and doctrinal tools to pursue their interests, while respecting the counterpart at the other level and not endangering the stability of the equilibrium between the courts. For Member States courts, this means that they accept the primacy of EU law, in principle, but carve out exceptions, thus reserving themselves the right to exercise ultimate authority. The three exceptions developed by the German Federal Constitutional Court – the *Solange* reservation, the constitutional identity exception and the *ultra vires* reservation – illustrate these mechanisms well.

The *Solange* reservation was designed to put pressure on the Court of Justice regarding its fundamental rights jurisprudence. It warned the *Luxembourg* Court that Karlsruhe would enter the scene if there was no effective fundamental rights protection at the EU level. The constitutional identity exception was designed to issue a warning to the Court of Justice to respect certain fundamental constitutional values that are held dearly in the German constitutional order. Finally, the *ultra vires* reservation was a thinly veiled threat to the Court of Justice not to interpret EU competences too broadly.

Ideally, the Federal Constitutional Court would never make use of any of these exceptions. Instead, their main purpose was to influence the case law of the Court of Justice. But even the one instance where the Federal Constitutional Court finally made use of these instruments, the PSPP judgment of 5 May 2020, when Karlsruhe declared a judgment of the Court of Justice *ultra vires*, can still be interpreted in dialogical terms. The Court did not totally obstruct cooperation with the EU level and the working of the EU institutions. Despite denying the primacy of the judgment of the Court of Justice in *Weiss*, it preserved a pathway to remedy the conflict by allowing the ECB to continue its monetary policy if it only justified the policy through a proportionality assessment.³⁸⁷ When the ECB ultimately undertook such an assessment, the Federal Constitutional Court broadly accepted this assessment, choosing not to escalate the conflict.³⁸⁸

On the other side, the Court of Justice also has several instruments to add flexibility to the hierarchical rigidity of the primacy of EU law and to demonstrate respect to the highest courts of the EU Member States. We have already described these mechanisms in detail above.³⁸⁹ Therefore, we want to limit ourselves to a quick recapitulation at this point. First, the Court of Justice can take into account interests of Member States courts by acknowledging national identity or fundamental rights concerns as restrictions to EU fundamental freedoms. Second, the Court can grant discretion to Member State courts by refusing to decide on the details of cases at hand in the context of preliminary reference procedures. Certainly, the Court does not have the competence to take a final decision in the proceedings that are referred to it via Art. 267 TFEU, but it still has a discretion regarding the level of detail of its guidelines.³⁹⁰ Often, the Court uses this discretion to issue rather abstract guidelines which gives Member States' courts discretion in how to apply them to the facts of the case. Finally, it can

³⁸⁷ BVerfGE 154, 17, at para. 235.

³⁸⁸ BVerfG, NJW 2021, 2187, *supra* note 299.

³⁸⁹ See *supra*, 4.1.

³⁹⁰ Comp. e.g. Case C-617/10, *Åkerberg Fransson*, *supra* note 138 (where the Court grants significant deference to the referring court) with Case C-60/00, *Carpenter*, 11 July 2002, ECR I-2002, 6279 (where the court leaves little leeway to the referring domestic court).

implicitly adapt its jurisprudence or even change it in order to react to Member States' courts concerns – as it did for example by developing a fundamental rights jurisprudence in *Stauder* and *Internationale Handelsgesellschaft*.³⁹¹

5.2. Preconditions for Judicial Dialogue

While the previous section described how judicial dialogue is working in the EU, this section is concerned with the reasons for why such a dialogue has emerged.³⁹² Judicial dialogue is neither a natural state of affairs nor an inevitable development in multilevel systems of governance. Instead, it depends on certain preconditions. The main precondition for an emergence of judicial dialogue is that courts have incentives to cooperate because they are interdependent on each other. International courts are usually dependent on national courts because they cannot implement their own decisions. This is not different in the EU. The main procedural tool for implementing the primacy of EU law has always been the preliminary reference procedure. However, the Court of Justice depends on national courts to bring preliminary references to the court and to implement to decisions that the Court of Justice takes in these procedures.

By contrast, domestic courts are not directly dependent on the Court of Justice. While they are certainly legally bound by decisions of the Court of Justice, there are no direct sanctions if domestic courts do not comply with judgments of the Court of Justice. Even if non-compliance leads to an infringement procedure, potential penalties would be imposed on the concerned state and not directly on the defiant court.

However, domestic courts may be indirectly dependent. Despite elaborated institutional guarantees of judicial independence, courts are never fully shielded from outside pressure. Instead, they rely on other institutions to implement their decisions and may face political backlash from the legislature or the executive. The legislature may restrict the court's competences or alter the court's composition. The executive can pack the court with judges loyal to the government. Prominent examples are Roosevelt's Court packing plan³⁹³ or the attempt of Adenauer government in Germany to restrict the influence of the Federal Constitutional Court in the 1950s³⁹⁴. More recently, the assaults of the governments in Hungary and Poland on the independence of the respective constitutional courts have highlighted the vulnerability of the judicial branch.³⁹⁵ At the same time, courts are not totally dependent on the political branches either. But they need to find support if they want to challenge the latter. The most important power resource of courts is public legitimacy, i.e. acceptance by public opinion.³⁹⁶ If courts enjoy legitimacy, restricting their powers can be costly for the executive and the legislature.

³⁹¹ See *supra*, 5.1.

³⁹² This argument draws on Petersen, *supra* note 129, at 996–998.

³⁹³ See Marian Cecilia McKenna and Joseph McKenna, *Franklin Roosevelt and the Great Constitutional War: The Court-Packing Crisis of 1937* (2002).

³⁹⁴ See Richard Häußler, *Der Konflikt zwischen Bundesverfassungsgericht und politischer Führung: Ein Beitrag zu Geschichte und Rechtsstellung des Bundesverfassungsgerichts* (1994) 40–47; Heinz Laufer, *Verfassungsgerichtsbarkeit und politischer Prozess: Studien zum Bundesverfassungsgericht der Bundesrepublik Deutschland* (1968) 169–206.

³⁹⁵ See Sadurski, *supra* note 5; Kim Lane Scheppele, 'Understanding Hungary's Constitutional Revolution', in Armin von Bogdandy and Pál Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area* (2015) 124, at 124.

³⁹⁶ Georg Vanberg, *The Politics of Constitutional Review in Germany* (2004) 49–53; Christoph Engel, 'Delineating the Proper Scope of Government: A Proper Task for a Constitutional Court?', 157 *Journal of Institutional and Theoretical Economics* (2001) 187, at 213; Clifford James Carrubba, 'A Model of the Endogenous Development of Judicial Institutions in Federal

If we apply these considerations to the concept of judicial dialogue, domestic courts have incentives to cooperate with international courts if there is a strong political and societal commitment to international cooperation and European integration. If courts undermine European integration in such a setting, they may lose legitimacy and also face political backlash. This prospect has arguably constrained the German Federal Constitutional Court. In Germany, there is strong political support for European integration almost across the entire political spectrum. Furthermore, the EU still enjoys broad support among social elites whose opinion of the Constitutional Court is most critical for the latter's legitimacy. For this reason, the Federal Constitutional Court would probably always engage in judicial dialogue with the EU and avoid a total breakdown of judicial cooperation even if it has raised the stakes of failure with its recent PSPP judgment.

However, if we look at the Polish Constitutional Tribunal, the situation looks very different. The Polish government has only limited interest in cooperating with the EU in matters concerning the internal judicial organisation.³⁹⁷ Instead, it has recently openly challenged EU rulemaking in several respects. It currently pays 1 million EUR per day because it refuses to comply with infringement decisions of the Court of Justice.³⁹⁸ Consequently, the PCT currently does not have to fear any backlash from the Polish government if it denies primacy to EU law. It is rather to the contrary: The PCT is mostly a captured court, and by challenging and openly defying the Court of Justice, it does the bidding of the Polish government.³⁹⁹ This also means that there is no easy mechanism to bring the PCT into compliance with EU law. The concept of judicial dialogue presupposes that all parties have a fundamental interest in cooperating. If such an interest is present, the occasional frictions between courts can even be constructive and contribute to the development of EU law. However, if one party has no interest in cooperation, as is the case in Poland, judicial dialogue breaks down. The only possible pathway seems to be to increase the pressure on the Polish government, e.g. through the infringement procedure that the Commission has already initiated against Poland in this matter or through other measures, such as the use of the Conditionality mechanism or Art. 7 TEU, which we will discuss more in detail below.⁴⁰⁰

5.3. Conclusion

Not every challenge to the primacy of EU law endangers the unity and coherence of the EU legal system. Instead, it is often just an expression of judicial dialogue. This part has tried to demonstrate that a stable equilibrium between courts can emerge even in the absence of strict legal hierarchies as suggested by the absolute primacy of EU law. In practice, primacy was never accepted without reservations by national courts. Instead, the latter have carved out reservations, and the Court of Justice was flexible to accommodate fundamental interests of Member States' courts. Nevertheless, judicial dialogue presupposes a mutual interest of cooperation. Even if courts might differ on how to

and International Systems', 71 *The Journal of Politics* (2009) 55, at 65; Walter F. Murphy and Joseph Tanenhaus, 'Publicity, Public Opinion, and the Court', 84 *Northwestern University Law Review* (1989) 985.

³⁹⁷ See Stanisław Biernat, 'How Far Is It from Warsaw to Luxembourg and Karlsruhe: The Impact of the PSPP Judgment on Poland', 21 *German Law Journal* (2020) 1104, at 1111.

³⁹⁸ Zosia Wanat, 'Poland Hit with Record €1M Daily Fine in EU Rule-of-Law Dispute', *POLITICO*, 27 October 2021, available at <https://www.politico.eu/article/poland-record-1-million-euros-daily-fine-eu-rule-of-law-dispute/>.

³⁹⁹ The PCT is generally considered to be a captured court, see Sadurski, *supra* note 5, at 58-88; Wojciech Sadurski, 'Polish Constitutional Tribunal under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler', 11 *Hague Journal on the Rule of Law* (2019) 63; Mirosław Wyrzykowski, 'Experiencing the Unimaginable: The Collapse of the Rule of Law in Poland', 11 *Hague Journal on the Rule of Law* (2019) 417; Aleksandra Gliszczyńska-Grabias and Wojciech Sadurski, 'The Judgment That Wasn't (but Which Nearly Brought Poland to a Standstill): 'Judgment' of the Polish Constitutional Tribunal of 22 October 2020, K1/20', 17 *European Constitutional Law Review* (2021) 130, at 131-132.

⁴⁰⁰ See *infra*, 7.

adjudicate certain legal questions, their sense of cooperation ultimately prevails in order not to threaten the unity and coherency of EU law.

Yet, this stable equilibrium is endangered in the case of Poland for two reasons. First, the reason for the PCT judgment was the jurisprudence of the Court of Justice regarding the judicial reforms in Poland. The Court of Justice ruled that Polish courts had the competence to review the legality of the Disciplinary Chamber⁴⁰¹ and to disregard orders of the Constitutional Tribunal.⁴⁰² The decisions of the Court of Justice to a certain extent also concern the legitimacy of the PCT, which leads to the fierce resistance of the latter. But even more importantly, by defying the Court of Justice, the Constitutional Tribunal supports the general policy on the reform of the judiciary of the Polish government. This reform of the judiciary was one of the key achievements of the Polish government to cement its own power and to lessen the strictures that the rule of law can impose on governmental conduct.⁴⁰³ The government has good reason to fear the EU, and particularly the Court of Justice, as a veto player in its domestic political endeavour and has strong incentives to resist the primacy of EU law. For this reason, the PCT has become an active political player regarding the implementation of the reforms initiated by the Polish government by denying the primacy of EU law, and it has little incentive to change course as long as the current ruling party stays in power.

This is also expressed in the style of the PCT judgment. While previous judgments of courts of EU Member States defying the primacy of EU law were usually limited to a particular issue and often contained dialogical elements, the judgment of the PCT amounts to an all-out rejection of the primacy of EU law. For example, the German Federal Constitutional Court's PSPP judgment had a significant symbolical effect, but the practical consequences were rather limited. The Court only required an updated justification of the PSPP policy by the ECB and the accepted the latter without requiring the German Bundesbank to stop participating in the purchase of Member States' bonds under the program. By contrast, the PCT refers to judicial dialogue in its judgment, but merely pays lip-service to the concept. The reasoning is very abstract without highlighting potential for compromise, and the scope of the judgment in denying the primacy of EU law is very broad. Therefore, it is unlikely that the PCT and the Court of Justice will return to a constructive relationship of cooperation in the foreseeable future.

⁴⁰¹ Joined Cases C-585/18, C-624/18; C-625/18, *A.K. and Others*; *supra* note 8.

⁴⁰² Case C-824/18, *A.B. and Others*, *supra* note 8.

⁴⁰³ Maciej Taborowski *et al.*, 'Guest Editorial: A Potential Constitutional Moment for the European Rule of Law—The Importance of Red Lines', 55 *Common Market Law Review* (2018); Sadurski, *supra* note 5; Wyrzykowski, *supra* note 399.

6. THE NORMATIVE ASSESSMENT OF THE PCT JUDGMENT AND THE CONSEQUENCES OF THE DECISION

KEY FINDINGS

We argue that the PCT judgment clearly violates EU law. The principle of primacy of EU law has long been an integral principle of the *acquis communautaire* that was accepted by the Republic of Poland when the latter acceded to the EU. Furthermore, the judgment cannot be justified by referring to the protection of national identity in Art. 4 TEU. In a second section, we make an assessment of the consequences of the decision. The consequences for the Polish legal order are severe. The decision could cause a significant chilling effect for Polish judges who might in the future refrain from referring cases to the CJEU through the preliminary reference procedure according to Art. 267 TFEU. Even beyond the relations between Poland and the EU, the judgment sets a problematic precedent. While most courts will not follow the PCT because it is considered to be politically captured, it might be used by courts in Member States, in which governments are sceptical of EU cooperation.

6.1. Normative assessment under EU Law

Normatively, the PCT judgment clearly violates EU law. The principle of primacy of EU law has been developed by the Court of Justice in *Costa v. ENEL* and has been an integral part of EU law ever since.⁴⁰⁴ All new Member States, including Poland, have accepted this principle through their accession to the EU as part of the *acquis communautaire*.⁴⁰⁵ Moreover, the primacy of EU law has been acknowledged by Declaration No. 17 concerning primacy that was annexed to the Treaty of Lisbon.⁴⁰⁶

The PCT equally violates Art. 267 TFEU by effectively prohibiting Polish courts to follow judgments of the Court of Justice. According to this provision, domestic courts can refer questions concerning the interpretation of EU law to the Court of Justice. At the same time, it is generally accepted that judgments of the Court of Justice are binding on the Member States' courts.⁴⁰⁷ Consequently, domestic courts have an obligation to implement the judgments of the Court of Justice. Because of the primacy of EU law, which extends even to domestic constitutional law,⁴⁰⁸ domestic courts cannot refuse to implement a judgment of the Court of Justice based on the reason that it violates the domestic constitution. By denying domestic courts to implement decision of the Court of Justice which run counter to the decision of the PCT, the latter thus violates Art. 267 TFEU in combination with the principle of primacy of EU law.

⁴⁰⁴ Case 6/64, *Costa v. ENEL*, *supra* note 1. For recent cases reconfirming the principle, see, e.g., Joined Cases C-585/18 *et al.*, *A.K. and Others*, *supra* note 9, paras. 157–158; Joined Cases C-511/18 *et al.*, *La Quadrature du Net*, *supra* note 129, paras. 214–219; Joined Cases C-83/19 *et al.*, *Asociația "Forumul Judecătorilor din România"*, *supra* note 129, paras. 242–248.

⁴⁰⁵ Mattias Kumm and Victor Ferreres Comella, 'The Primacy Clause of the Constitutional Treaty and the Future of Constitutional Conflict in the European Union Symposium on the Proposed European Constitution: Part III: Institutions', 3 *International Journal of Constitutional Law* (2005) 473, at 478.

⁴⁰⁶ Declaration No. 17 concerning primacy, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, O.J. C 115, 2008, p. 344.

⁴⁰⁷ Case 29/68, *Deutsche Milchkontor*, 24 June 1969, EU:C:1969:27, at paras. 2–3.

⁴⁰⁸ Case 11/70, *Internationale Handelsgesellschaft*, *supra* note 128.

Certainly, Art. 4 (2) TEU protects the preservation of the national identity of the Member States. However, Poland cannot invoke Art. 4 (2) TEU in the current case. First, the ultimate authority to interpret Art. 4 (2) TEU rests with the Court of Justice and not with the Member States' highest courts. Furthermore, there is little evidence that the reform of the judiciary initiated by the Polish government is integral part of the Polish national identity. The PCT has not advanced any arguments why the Polish national identity comprises the structure of the judiciary as defined by the reforms of the Polish government. Furthermore, many of the problematic elements of the reform are not contained in the constitution, but in ordinary statutes. In addition, the dispute concerns changes in the institutional structure of the judiciary that were introduced quite recently. However, it is difficult to argue that such recent changes form part of the concept of national identity. Does this entail that the previous structure, which was in conformity with EU law, violated Polish constitutional identity? Finally, the reform of the judiciary is a project of the current government that is not supported by the Polish opposition. However, equating national identity with the interests of the ruling party would be a characteristic of authoritarian rule and not be compatible with the principle of democracy on which the EU is founded according to Art. 2 TEU.

6.2. Consequences of the decision

The practical consequences of the PCT judgment are two-fold. They concern, on the one hand, the Polish legal order, and on the other hand, the concept of primacy of EU law. In a certain way, the PCT judgment is a mirror image of the PSPP judgment of the German Federal Constitutional Court. While the latter had limited immediate practical effects, it had a significant symbolical and precedential value for the European legal order and the primacy of EU law.⁴⁰⁹ By contrast, the judgment of the PCT has a significant practical effect in the Polish legal order, while the precedential value for the concept of primacy seems to be slightly more limited, but still significant.

Concerning the former issue, the judgment of the PCT, refusing the implementation of the demands of the Court of Justice, is a significant building block supporting the Polish reform of the judiciary that aim at limiting the independence and impartiality of judges.⁴¹⁰ The precedential value of the PCT judgment for the EU legal order is probably less significant than the values of the PSPP judgment of the GFCC. The German Court is one of the most respected and powerful courts in Europe, and its doctrinal inventions have influenced and shaped the approach of other Member States' courts. For example, the *ultra vires* doctrine has been developed by the GFCC and inspired other courts to adopt similar doctrines. The Czech Constitutional Court referred to the GFCC in its *Slovak pensions* judgment,⁴¹¹ and also the PCT made reference to it in its judgment.⁴¹² Therefore, it was likely that the PSPP judgment of German Federal Constitutional Court had significant repercussions beyond the relationship between the GFCC and the Court of Justice.⁴¹³

This is different in the case of the Polish Constitutional Tribunal. The Polish court appears not to have the same authority as the German Federal Constitutional Court. Moreover, it is largely considered to be

⁴⁰⁹ Petersen and Chatziathanasiou, *supra* note 3.

⁴¹⁰ See above, 2.3.

⁴¹¹ See Georgios Anagnostaras, 'Activation of the Ultra Vires Review: The Slovak Pensions Judgment of the Czech Constitutional Court', 14 *German Law Journal* (2013) 959, at 966 (footnote 23).

⁴¹² *Press release after the hearing*, *supra* note 4, at 8.

⁴¹³ Petersen and Chatziathanasiou, *supra* note 3.

a captured court.⁴¹⁴ Therefore, it might be counterproductive for courts in other European Member States with a government favorable of EU integration to follow the example of the PCT or even to cite the latter approvingly. Nevertheless, it could still provide an example for some courts, in particular in Member States with governments skeptical of EU integration and cooperation with the EU, such as the Constitutional Courts of Hungary or Romania. For this reason, the judgment still establishes a problematic precedent, even if its effects on the EU legal order as a whole are probably more limited than the effects of the PSPP judgment of the GFCC.

⁴¹⁴ See *supra* note 399. The former President of the German Federal Constitutional Court, Andreas Voßkuhle, called the PCT “no longer a serious court, it is a puppet” in an interview with the German weekly *Die Zeit* from 13 May 2020. Cited after Biernat, *supra* note 397, at 1113. The interview can be found under Giovanni di Lorenzo and Heinrich Wefing, 'Erfolg ist eher kalt', *Die Zeit*, 13 May 2020, available at <https://www.zeit.de/2020/21/andreas-vosskuhle-ezb-anleihenkaeufer-corona-krise>.

7. RECOMMENDATIONS

KEY FINDINGS

We recommend that the European Commission makes use of the conditionality mechanism that was introduced in Regulation 2020/2092, according to which the EU can withhold certain funds that are supposed to be paid to Poland. We find that the requirements of Regulation 2020/2092 are fulfilled as the judicial reforms in Poland and the judgment of the PCT endanger the independence of courts which is an important element in ensuring a proper use of the EU budget in Poland. Furthermore, we also argue that recent national and international developments do not speak against making use of the conditionality mechanism. Moreover, we recommend that the European institutions take the next step in the procedure against Poland under Art. 7 TEU. Finally, we recommend to include the principle of primacy in EU primary law when the EU treaties are revised next time.

In reaction to the judgment of the PCT, we have two recommendations for the EU institutions. In particular, we recommend that the European Commission makes use of the measures provided for in Regulation 2020/2092.⁴¹⁵ This regulation allows the Commission to take measures for the protection of the Union budget in case the rule of law is breached. This also includes but is not limited to withholding the approval of payments to Poland under the European Recovery and Resilience Facility.⁴¹⁶ Recently, the Court of Justice has recognized that the regulation does not violate EU primary law.⁴¹⁷ According to Art. 3 (a) of Regulation 2020/2092, a breach of the rule of law also includes “endangering the independence of the judiciary”. As we have argued in this study, the PCT judgment gravely endangers the independence of the judiciary by failing to implement measures of the Court of Justice which are precisely targeted at protecting judicial independence.

Furthermore, this restriction of judicial independence is highly relevant for the proper use of EU funds in Poland. The use of funds must be reviewed by independent institutions. One of the main institutions ensuring the proper use of funds are courts. This is recognized by Art. 4 (2) (d) of Regulation 2020/2092, according to which effective judicial review of actions or omissions by the authorities implementing the Union budget or carrying out financial control is a necessary requirement for sound financial management of the Union budget. As we have seen in this study, the judicial reforms in Poland have created a Disciplinary Chamber at the Supreme Court, which is staffed with judges which were chosen because of their political leanings sympathetic to the government. This exercises a significant chilling effect on Polish judges deciding on matters with political importance. Therefore, it is possible that a judge deciding about the sound use of financial resources of the EU would not be completely independent in his or her decision. Furthermore, the political capture of the Constitutional Court itself and of the *KRS*, which is responsible for the nomination of judges to fill vacancies in the judiciary, has the consequence that political considerations play a greater role in the judicial nomination procedure

⁴¹⁵ Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a General Regime of Conditionality for the Protection of the Union Budget, O.J. L, 2020, p. 433. [hereinafter: Regulation 2020/2092].

⁴¹⁶ Art. 8 Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, O.J. L 57, 2021, p. 17.

⁴¹⁷ Cases C-157/21, *Poland v. Parliament and Council*, 16 Feb. 2022, EU:C:2022:98; C-156/21, *Hungary v. Parliament and Council*, 16 Feb. 2022, EU:C:2022:97.

and finally in judicial decision-making. This makes it more likely that judges will be appointed who have a favourable position towards the agenda of the Polish government and less likely to exercise an effective control of government action when it comes to the use of EU funds. Consequently, the conditions for using the measures comprised in Regulation 2020/2092 are fulfilled.

According to Art. 5 of Regulation 2020/2092, the Commission can take several measures, including the suspension of payments and commitments towards the Republic of Poland. Certainly, the exact choice of the measures to be taken lies in the discretion of the Commission. Legally, the Commission has to respect the principle of proportionality when imposing measures under Regulation 2020/2092, i.e., the severity of the measures has to be determined taking into account the severity of the violation of the independence of the judiciary in Poland.⁴¹⁸

There are two possible objections against using the conditionality mechanism against Poland. First, it is argued that Poland should not be sanctioned in a situation where it has welcomed and accommodated a huge number of refugees fleeing from the war in Ukraine. We certainly welcome and commend the enormous effort that Poland has undertaken in this respect. We also believe that Poland deserves generous support for its efforts in hosting Ukrainian refugees. Nevertheless, we are of the opinion that the two issues should be treated separately. That Poland's efforts are highly commendable and in the common European interest does not remedy the erosion of the rule of law that is caused by the judicial reforms that have been subject to the discussed judgments of the Court of Justice and the defiance of the primacy of EU law by the PCT. Consequently, any funds that are given to Poland in helping the state to cope with the welcoming and hosting of refugees should be targeted to this specific aim. However, this does not rule out withholding EU funds under Regulation 2020/2092 that are earmarked for other purposes.

Second, any efforts of the Republic of Poland to remedy the situation have to be effective and genuine. On 3 February 2022, President Duda has submitted a legislative proposal to the Parliament according to which the Disciplinary Chamber should be abolished.⁴¹⁹ Instead, disciplinary cases are supposed to be heard by 11 Supreme Court judges chosen through a draw. This reform was passed by the lower House of Parliament on 26 May 2022, but still has to be approved by the Senate, where approval is uncertain. While said changes would slightly ameliorate the situation, the fundamental deficiencies of the judicial reform would remain. Even the new Chamber hearing disciplinary cases potentially will persist to have a significant chilling effect on Polish judges. Furthermore, the threat of the Polish judicial reforms for the independence of judges is much more profound than the establishment of the Disciplinary Chamber even if the latter is the most salient expression. For example, in *A.B. and others*, the Court of Justice argued that the lack of a review procedure for judicial appointments by the *KRS* also violated Art. 19 (1), para. 2 TEU.⁴²⁰ Another problem is the political capture of the Constitutional Court, partly through illegal appointments. Finally, the case law of the Polish Constitutional Tribunal, including the denial of primacy of EU law resulting most certainly in the prohibition for domestic Polish courts to initiate a preliminary reference procedure, violates EU law. There is no sign that the PCT will soften its stance in the foreseeable future without significant pressure on the Polish government. This

⁴¹⁸ Art. 5 (3) Regulation 2020/2092.

⁴¹⁹ Prezydencki Projekt Zmiany Ustawy o Sądzie Najwyższym, 2022, available at https://www.prezydent.pl/storage/file/core_files/2022/2/4/6a67f1a18e270be295f6988e806f1cd2/inicjatywa%20Prezydenta%20ustawa%20o%20zmianie%20ustawy%20o%20SN.PDF.

⁴²⁰ Case C-824/18, *A.B. and Others*, *supra* note 9.

is underlined by the recent judgment K 7/21, holding that Art. 6 ECHR is incompatible with the Polish Constitution.⁴²¹

Certainly, it is difficult to evaluate a draft legislation that has not become law, yet. However, it is important to assess to what extent legislation, once it is put in place, indeed remedies the identified deficiencies. Furthermore, the denial of paying EU funds to Poland is not an all-or-nothing proposition. Instead, Art. 5 (3) of Regulation 2020/2092 requires a proportionality assessment before imposing measures under the regulation. Therefore, the Commission has the possibility to fine-tune its measures, i.e., to withhold funds only in part, which would be an appropriate action of Poland partially remedies the identified deficiencies in its justice system.

The second recommendation concerns the rule of law framework under Art. 7 TEU. We recommend to the Council to take the next step in the proceedings under Art. 7 TEU against Poland, which were initiated by the European Commission in December 2017 and backed by the European Parliament in March 2018.⁴²² In our opinion the Council should determine that there is a clear risk of a serious breach of the values referred to in Art. 2 TEU. As argued above, the PCT judgment enables and supports judicial reforms that seriously endanger judicial independence in Poland and thus breaches the rule of law principle enshrined in Art. 2 TEU.

Finally, we follow Professor Ziller's recent recommendation to explicitly codify the principle of primacy of EU law in the EU treaties should they be revised.⁴²³ While this would not change the legal situation – primacy is already part of the EU legal order –, it would make the principle more explicit and thus make violations of the principle even more salient.

⁴²¹ PCT, *Sprawa K 7/21*, 10 March 2022, available at <https://trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/art/11820-dokonywanie-na-podstawie-art-6-ust-1-z-d-1-ekpcz-przez-sady-krajowe-lub-miedzynarodowe-oceny-zgodnosci-z-konstytucja-i-ekpcz-ustaw-dotyczacych-ustroju-sadownictwa-wlasciwosci-sadow-oraz-ustawy-dotyczacej-krajowej-rady-sadownictwa>.

⁴²² See Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, COM(2017) 835 final, 2017/0360 (NLE); Commission Recommendation (EU) 2018/103 of 20 December 2017 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520, O.J. L 17, 2017, p. 50; European Parliament resolution of 1 March 2018 on the Commission's decision to activate Article 7(1) TEU as regards the situation in Poland, [2018/2541\(RSP\)](#).

⁴²³ Jacques Ziller, *La primauté du droit de l'Union européenne*, JURI Committee (2022), p. 39, available at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2022/732474/IPOL_STU\(2022\)732474_FR.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/732474/IPOL_STU(2022)732474_FR.pdf)

REFERENCES

- Amoroso, 'Italy', in Palombino (ed.), *Duelling for Supremacy: International Law vs. National Fundamental Principles* (2019) 184.
- Anagnostaras, 'Activation of the Ultra Vires Review: The Slovak Pensions Judgment of the Czech Constitutional Court', 14 *German Law Journal* (2013) 959.
- Bast, 'Don't Act Beyond Your Powers: The Perils and Pitfalls of the German Constitutional Court's Ultra Vires Review', 15 *German Law Journal* (2014) 167.
- Bebr, 'A Critical Review of Recent Case Law of National Courts', 11 *Common Market Law Review* (1974) 408.
- Besselink and Claes, 'The Netherlands: The Pragmatics of a Flexible, Europeanised Constitution', in Anneli Albi and Samo Bardutzky (eds.), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (2019) 179.
- Beukers, 'The Bundesverfassungsgericht Preliminary Reference on the OMT Program: "In the ECB We Do Not Trust. What About You?"', 15 *German Law Journal* (2014) 343.
- Biernat, 'How Far Is It from Warsaw to Luxembourg and Karlsruhe: The Impact of the PSpP Judgment on Poland', 21 *German Law Journal* (2020) 1104.
- Bogdanowicz *et al.*, 'Guest Editorial: A Potential Constitutional Moment for the European Rule of Law—The Importance of Red Lines', 55 *Common Market Law Review* (2018) 983.
- Bonelli, 'The Taricco Saga and the Consolidation of Judicial Dialogue in the European Union', 25 *Maastricht Journal of European and Comparative Law* (2018) 357.
- Bonelli, 'The Taricco Saga and the Consolidation of Judicial Dialogue in the European Union: CJEU, C-105/14 Ivo Taricco and Others, ECLI: EU: C: 2015: 555; and C-42/17 MAS., MB, ECLI: EU: C: 2017: 936 Italian Constitutional Court, Order No. 24/2017', 25 *Maastricht Journal of European and Comparative Law* (2018) 357.
- Brodawka, 'Zasada Pierwszeństwa Prawa Unii Europejskiej Jako Przedmiot Zainteresowania Polskiego Trybunału Konstytucyjnego', Koło Naukowe Prawa Europejskiego, Wydział Prawa i Administracji, Uniwersytet Warszawski (2012), available at https://repozytorium.amu.edu.pl/bitstream/10593/13548/1/03_BRODAWKA.pdf.
- Carrubba, 'A Model of the Endogenous Development of Judicial Institutions in Federal and International Systems', 71 *The Journal of Politics* (2009) 55.
- Cassia 'Le Frexit sécuritaire du Conseil d'Etat', *Mediapart*, 23 April 2021, available at <https://blogs.mediapart.fr/paul-cassia/blog/230421/le-frexit-securitaire-du-conseil-d-etat>.
- Chalmers, Arnull and Claes, 'The Primacy of EU Law in European and National Law', in Chalmers and Arnull (eds.), *The Oxford Handbook of European Union Law* (2015) 178.
- Charpy, 'The Conseil d'Etat Abandons Its Cohn Bendit Case-Law; Conseil d'Etat, 30 October 2009, Mme Perreux', 6 *European Constitutional Law Review* (2010) 123.
- 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', 23 *Maastricht Journal of European and Comparative Law* (2016) 151.
- Di Fabio, 'Karlsruhe Makes a Referral', 15 *German Law Journal* (2014) 107.

- Drinóczi, 'Hungarian Constitutional Court: The Limits of EU Law in the Hungarian Legal System', 11 *ICL Journal* (2017) 139.
- Egidy, 'Proportionality and Procedure of Monetary Policy-Making', 19 *International Journal of Constitutional Law* (2021) 285.
- Engel, 'Delineating the Proper Scope of Government: A Proper Task for a Constitutional Court?', 157 *Journal of Institutional and Theoretical Economics* (2001) 187.
- Filipek and Tabarowski, 'From Romania with Love: The CJEU confirms criteria of independence for constitutional courts', *Verfassungsblog*, 14 February 2022, <https://verfassungsblog.de/from-romania-with-love/>.
- Florczak-Wątor, '(Nie)skuteczność wyroku Trybunału Konstytucyjnego z 7.10.2021 r., K 3/21 : ocena znaczenia orzeczenia z perspektywy prawa konstytucyjnego', *Europejski Przegląd Sądowy* (2021), available at <https://ruj.uj.edu.pl/xmlui/handle/item/286625>.
- Gärditz, 'Beyond Symbolism: Towards a Constitutional Actio Popularis in EU Affairs? A Commentary on the OMT Decision of the Federal Constitutional Court', 15 *German Law Journal* (2014) 183.
- Gérard and Verrijdt, 'Belgian Constitutional Court Adopts National Identity Discourse: Belgian Constitutional Court No. 62/2016, 28 April 2016', 13 *European Constitutional Law Review* (2017) 182.
- Gerner-Beuerle, Küçük, and Schuster, 'Law Meets Economics in the German Federal Constitutional Court: Outright Monetary Transactions on Trial', 15 *German Law Journal* (2014) 281.
- Gliszczyńska-Grabias and Sadurski, 'The Judgment That Wasn't (but Which Nearly Brought Poland to a Standstill): Judgment of the Polish Constitutional Tribunal of 22 October 2020, K1/20', 17 *European Constitutional Law Review* (2021) 130.
- Goldmann, 'Adjudicating Economics? Central Bank Independence and the Appropriate Standard of Judicial Review', 15 *German Law Journal* (2014) 265.
- Halmai, 'Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E (2) of the Fundamental Law', 43 *Review of Central and East European Law* (2018) 23.
- Halmai, 'Constitutional Court Decision on the Hungarian Government's Constitutional Identity Defence, Constitutionalism and Politics', 11 January 2017, available at <https://blogs.eui.eu/constitutionalism-politics-working-group/constitutional-court-decision-hungarian-governments-constitutional-identity-defense/>.
- Halmai, 'The Hungarian Constitutional Court and Constitutional Identity', *Verfassungsblog: On Matters Constitutional*, 10 January 2017, available at <https://verfassungsblog.de/the-hungarian-constitutional-court-and-constitutional-identity/>.
- Haltern Ulrich, *Europarecht, Band II: Rule of Law – Verbunddogmatik – Grundrechte* (3rd ed. 2017).
- Harck and Olsen, 'Decision Concerning the Maastricht Treaty. 1998 Ugeskrift for Retsvaesen, H 800', 93 *American Journal of International Law* (1999) 209.
- Häußler, *Der Konflikt zwischen Bundesverfassungsgericht und politischer Führung: Ein Beitrag zu Geschichte und Rechtsstellung des Bundesverfassungsgerichts* (1994).
- Huber, 'Europäische Verfassungs- und Rechtsstaatlichkeit in Bedrängnis', 56 *Der Staat* (2017) 389.
- Jacobs, 'Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice', 38 *Texas Int'l L.J.* (2003) 547

- Jaraczski, 'Gazing into the Abyss: The K 3/21 decision of the Polish Constitutional Tribunal', *Verfassungsblog: On Matters Constitutional*, 12 October 2021, available at https://intr2dok.vifa-recht.de/receive/mir_mods_00011283.
- Kosař and Vyhnánek, 'Constitutional Identity in the Czech Republic: A New Twist on an Old-Fashioned Idea?', in Calliess and vander Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (2019) 85.
- Krunke and Klinge, 'The Danish Ajos Case: The Missing Case from Maastricht and Lisbon', 3 *European Papers* (2018) 157.
- 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', 15 *German Law Journal* (2014) 203.
- Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty', 11 *European Law Journal* (2005) 262.
- 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', 36 *Common Market Law Review* (1999) 351.
- Kumm and Comella, 'The Primacy Clause of the Constitutional Treaty and the Future of Constitutional Conflict in the European Union Symposium on the Proposed European Constitution: Part III: Institutions', 3 *International Journal of Constitutional Law* (2005) 473.
- Laufer, *Verfassungsgerichtsbarkeit und politischer Prozess: Studien zum Bundesverfassungsgericht der Bundesrepublik Deutschland* (1968).
- Lavrysen et al., 'Developments in Belgian Constitutional Law: The Year 2016 in Review', 15 *International Journal of Constitutional Law* (2017) 774.
- Łazowski, 'Accession Treaty – Polish Constitutional Tribunal: Conformity of the Accession Treaty with the Polish Constitution. Decision of 11 May 2005', 3 *European Constitutional Law Review* (2007) 148.
- Lenaerts, 'Upholding the Rule of Law through Judicial Dialogue', 38 *Yearbook of European Law* (2019) 3.
- Lorenzo and Wefing, 'Erfolg ist eher kalt', *Die Zeit*, 13 May 2020, available at <https://www.zeit.de/2020/21/andreas-vosskuhle-ebz-anleihenkaeufer-corona-krise>.
- Mayer, 'Rebels Without a Cause? A Critical Analysis of the German Constitutional Court's OMT Reference', 15 *German Law Journal* (2014) 111.
- Mayer, 'The Ultra Vires Ruling: Deconstructing the German Federal Constitutional Court's PSPP Decision of 5 May 2020', 16 *European Constitutional Law Review* (2020) 733.
- Mayer, 'To Boldly Go Where No Court Has Gone Before. The German Federal Constitutional Court's Ultra Vires Decision of May 5, 2020', 21 *German Law Journal* (2020) 1116.
- Martinico and Pollicino, *The Interaction between Europe's Legal Systems* (2012).
- McKenna and McKenna, *Franklin Roosevelt and the Great Constitutional War: The Court-Packing Crisis of 1937* (2002).
- Millet, 'How Much Lenience for How Much Cooperation? On the First Preliminary Reference of the French Constitutional Council to the Court of Justice', 51 *Common Market Law Review* (2014) 195.

- Mohay and Tóth, 'Decision 22/2016. (XII. 5.) AB on the Interpretation of Article E(2) of the Fundamental Law', 111 *American Journal of International Law* (2017) 468.
- Moraru and Bercea, 'The First Episode in the Romanian Rule of Law Saga: Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397-19, Asociata Forumul Judecatorilor din Romania, and their follow-up at the national level', 18 *European Constitutional Law Review* (2022) 82.
- Murphy and Tanenhaus, 'Publicity, Public Opinion, and the Court', 84 *Northwestern University Law Review* (1989) 985.
- Murswiek, 'ECB, ECJ, Democracy, and the Federal Constitutional Court: Notes on the Federal Constitutional Court's Referral Order from 14 January 2014', 15 *German Law Journal* (2014) 147.
- Neergaard and Sørensen, 'Activist Infighting among Courts and Breakdown of Mutual Trust? The Danish Supreme Court, the CJEU, and the Ajos Case', 36 *Yearbook of European Law* (2017) 275.
- Nettesheim, 'Das PSPP-Urteil des BVerfG – ein Angriff auf die EU?', *Neue Juristische Wochenschrift* (2020) 1631.
- Nollkaemper and van Alebeek, 'Netherlands', in Palombino (ed.), *Duelling for Supremacy: International Law vs. National Fundamental Principles* (2019) 255.
- Öhlinger and Potacs, *EU-Recht und staatliches Recht: die Anwendung des Europarechts im innerstaatlichen Bereich* (7th ed. 2020).
- Olsen, 'The Danish Supreme Court's Decision on the Constitutionality of Denmark's Ratification of the Lisbon Treaty', 50 *Common Market Law Review* (2013) 1489.
- Paris, 'Carrot and Stick: The Italian Constitutional Court's Preliminary Reference in the Case Taricco', 5 *Questions of International Law* (2017) 5.
- Patyra, 'Krajowa Rada Sądownictwa w Polsce', 119 *Przegląd Prawa i Administracji* (2020) 123.
- Pernice, 'Machtspruch aus Karlsruhe: „Nicht verhältnismäßig? – Nicht verbindlich? – Nicht zu fassen...“', *Europäische Zeitschrift für Wirtschaftsrecht* (2020) 508.
- Pernice, 'A Difficult Partnership between Courts: The First Preliminary Reference by the German Federal Constitutional Court to the CJEU', 21 *Maastricht Journal of European and Comparative Law* (2014) 3.
- Petersen, 'Germany', in Palombino (ed.), *Duelling for Supremacy: International Law vs. National Fundamental Principles* (2019) 89.
- Petersen, 'Karlsruhe Not Only Barks, But Finally Bites—Some Remarks on the OMT Decision of the German Constitutional Court', 15 *German Law Journal* (2014) 321.
- Petersen, 'Karlsruhe's Lochner Moment? A Rational Choice Perspective on the German Federal Constitutional Court's Relationship to the CJEU after the PSPP Decision', 21 *German Law Journal* (2020) 995.
- Petersen, 'The PSPP Decision of the German Federal Constitutional Court and Its Consequences for EU Monetary Policy and European Integration', 2020 *Revue Trimestrielle de Droit Financier* 28.
- Petersen Niels and Chatziathanasiou Konstantin, *Primacy's Twilight? On the Legal Consequences of the Ruling of the Federal Constitutional Court of 5 May 2020 for the Primacy of EU Law*, AFCCO Committee, 27 April 2021, available at [https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2021\)692276](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2021)692276).

- Pliakos and Anagnostaras, 'Blind Date Between Familiar Strangers: The German Constitutional Court Goes Luxembourg!', 15 *German Law Journal* (2014) 369.
- Poli and Cisotta, 'The German Federal Constitutional Court's Exercise of Ultra Vires Review and the Possibility to Open an Infringement Action for the Commission', 21 *German Law Journal* (2020) 1078.
- Półtorak, 'Kilka uwag o skutkach wyroku Trybunału Konstytucyjnego w sprawie K 3/21 dla stosowania prawa unijnego przez polskie sądy', 12 *Europejski Przegląd Sądowy* (2021) 12.
- Presslein, 'Liberté, Egalité, Identité: Der Conseil d'État und die französische Verfassungsidentität', *Verfassungsblog: On Matters Constitutional*, 25 March 2021, available at https://intr2dok.vifa-recht.de/receive/mir_mods_00010296.
- Rakowska-Trela, 'Niezależność sądu i niezawisłość sędziego powołanego z udziałem KRS w kształcie ustalonym nowelizacją z 8 grudnia 2017 r. – przegląd orzecznictwa', 93 *Acta Universitatis Lodzensis. Folia Iuridica* (2020) 75.
- Reestman, 'France Conseil Constitutionnel on the Status of (Secondary) Community Law in the French Internal Order. Decision of 10 June 2004, 2004-496 DC', 1 *European Constitutional Law Review* (2005) 302.
- Reestman, 'The Franco-German Constitutional Divide: Reflection on National and Constitutional Identity', 5 *European Constitutional Law Review* (2009) 374.
- Rytter and Wind, 'In Need of Juristocracy? The Silence of Denmark in the Development of European Legal Norms', 9 *International Journal of Constitutional Law* (2011) 470.
- Sadurski, *Poland's Constitutional Breakdown* (2019).
- Sadurski, 'Polish Constitutional Tribunal under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler', 11 *Hague Journal on the Rule of Law* (2019) 63.
- Sauer, 'Substantive EU Law Review beyond the Veil of Democracy: The German Federal Constitutional Court Ultimately Acts as Supreme Court of the EU', 16 *EU Law Live* (2020) 2.
- Scheppele, 'Understanding Hungary's Constitutional Revolution', in Armin von Bogdandy and Pál Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area* (2015) 124.
- Scheppele, 'Escaping Orbán's Constitutional Prison: How European Law Can Free a New Hungarian Parliament', *Verfassungsblog: On Matters Constitutional*, 21 December 2021, available at https://intr2dok.vifa-recht.de/receive/mir_mods_00011610.
- Schiek, 'The German Federal Constitutional Court's Ruling on Outright Monetary Transactions (OMT) – Another Step towards National Closure?', 15 *German Law Journal* (2014) 329.
- Schneider, 'Questions and Answers: Karlsruhe's Referral for a Preliminary Ruling to the Court of Justice of the European Union', 15 *German Law Journal* (2014) 217.
- Schnitzer *et al.*, 'Gefahr für die Unabhängigkeit der Notenbank', *Frankfurter Allgemeine Zeitung*, 29 May 2020, available at <https://zeitung.faz.net/faz/wirtschaft/2020-05-29/718c1aa2c02646120c1229e71d9533e5>.
- Schriewer, 'The German Federal Constitutional Court's First Reference for a Preliminary Ruling to the European Court of Justice German Practice', 57 *German Yearbook of International Law* (2014) 701.

- Sehnálek, 'Normative Approach to the Interplay between the CCC and the CJEU/ECtHR : Judicial Dialogue or a Dictate?', 2 *Law, Identity and Values* (2022) 203.
- Selejan-Gutan, 'A Tale of Primacy Part II: The Romanian Constitutional Court on a Slippery Slope', *Verfassungsblog*, 18 June 2021, <https://verfassungsblog.de/a-tale-of-primacy-part-ii/>
- Selejan-Gutan, 'A Tale of Primacy, part III: Game of Courts', *Verfassungsblog*, 17 November 2021, <https://verfassungsblog.de/a-tale-of-primacy-part-iii/>.
- Selejan-Gutan, 'Who's Afraid of the Big Bad Court?', *Verfassungsblog*, 10 January 2022, <https://verfassungsblog.de/whos-afraid-of-the-big-bad-court/>.
- Simon, *Grenzen des Bundesverfassungsgerichts im europäischen Integrationsprozess* (2016).
- Sledzinska-Simon and Ziółkowski, Constitutional Identity of Poland: Is the Emperor Putting on the Old Clothes of Sovereignty?, 5 July 2017, available at <https://papers.ssrn.com/abstract=2997407>.
- Stone, 'Agreeing to Disagree: The Primacy Debate Between the German Federal Constitutional Court and the European Court of Justice', 25 *Minnesota Journal of International Law* (2016) 127.
- Szmulik Bogumił and Szymanek Jarosław, *Legal Dispute over the Judiciary in Poland* (2020).
- Tanasescu and Selejan-Gutan, 'A Tale of Primacy: The ECJ Ruling on Judicial Independence in Romania', *Verfassungsblog*, 2 June 2021, <https://verfassungsblog.de/a-tale-of-primacy/>
- Thiele, 'Friendly or Unfriendly Act? The "Historic" Referral of the Constitutional Court to the ECJ Regarding the ECB's OMT Program', 15 *German Law Journal* (2014) 241.
- Thiele, 'Whoever Equals Karlsruhe to Warsaw Is Wildly Mistaken', *Verfassungsblog: On Matters Constitutional* 10 October 2021, available at https://intr2dok.vifa-recht.de/receive/mir_mods_00011269.
- Thym, 'Never-Ending Story? Political Dynamics, Legislative Uncertainties, and Practical Drawbacks of the 'New' Pact on Migration and Asylum', in Thym (ed.), *Reforming the Common European Asylum System: Opportunities, Pitfalls, and Downsides of the Commission Proposals for a New Pact on Migration and Asylum* (2022) 11.
- Tzanakopoulos, 'Judicial Dialogue in Multi-Level Governance: The Impact of the Solange Argument', in Ole Kristian Fauchald and Andre Nollkaemper (eds.), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (2014) 185.
- Uziębło, 'Kilka uwag o 'reformowaniu' Krajowej Rady Sądownictwa', 8 Kwartalnik Stowarzyszenia Sędziów Polskich 'IUSTITIA', 30 April 2017, available at <https://repozytorium.bg.ug.edu.pl/info/article/UOGa0a35acad23f42d8add4694c30306531/?ps=20&lang=en&pn=1&cid=9473>.
- Vallée, 'A Securitarian Solange: France Has Launched a Cluster Bomb on the EU's Legal and Political Order', *Verfassungsblog: On Matters Constitutional*, 25 April 2021, available at https://intr2dok.vifa-recht.de/receive/mir_mods_00010479.
- Van der Schyff, 'EU Member State Constitutional Identity: A Comparison of Germany and the Netherlands as Polar Opposites', 76 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2016) 167.
- Vanberg Georg, *The Politics of Constitutional Review in Germany* (2004).

- Vauchez, 'The Transnational Politics of Judicialization. Van Gend en Loos and the Making of EU Polity', 16 *European Law Journal* (2010) 1.
- Verhoeven, *The Costanzo obligation: the obligations of national administrative authorities in the case of incompatibility between national law and European law* (2011).
- Von Bogdandy and Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty', 48 *Common Market Law Review* (2011) 1417.
- Von Feldmann, 'Inhalt und Kritik, Hintergrund sowie europapolitische Folgen des polnischen Verfassungsgerichtsurteils vom 7. Oktober 2021', 2021 *Deutsch-Polnische Juristen-Zeitschrift* 4.
- Wanat, 'Poland Hit with Record €1M Daily Fine in EU Rule-of-Law Dispute', *POLITICO*, 27 October 2021, available at <https://www.politico.eu/article/poland-record-1-million-euros-daily-fine-eu-rule-of-law-dispute/>.
- Wegener, 'Karlsruher Unheil – Das Urteil des Bundesverfassungsgerichts vom 5. Mai 2020 (2 BvR 859/15) in Sachen Staatsanleihekäufeder Europäischen Zentralbank', 55 *Europarecht* (2020) 347.
- Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference', 10 *European Constitutional Law Review* (2014) 263.
- Wendel, 'Paradoxes of Ultra-Vires Review: A Critical Review of the PSPP Decision and Its Initial Reception', 21 *German Law Journal* (2020) 979.
- Wróbel, 'Skutki rozstrzygnięcia w sprawie K 3/21 w perspektywie Sądu Najwyższego i sądów powszechnych', 12 *Europejski Przegląd Sądowy* (2021) 19.
- Wyrzykowski, 'Experiencing the Unimaginable: The Collapse of the Rule of Law in Poland', 11 *Hague Journal on the Rule of Law* (2019) 417.
- Zbíral, 'Czech Constitutional Court, Judgment of 31 January 2012, Pl. US 5/12. A Legal Revolution or Negligible Episode? Court of Justice Decision Proclaimed Ultra Vires', 49 *Common Market Law Review* (2012) 1475.
- Zemánek, 'The Emerging Czech Constitutional Doctrine of European Law', 3 *European Constitutional Law Review* (2007) 418.
- Ziller, *La primauté du droit de l'Union européenne*, JURI Committee, May 2022, available at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2022/732474/IPOL_STU\(2022\)732474_FR.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/732474/IPOL_STU(2022)732474_FR.pdf)
- Ziółkowski, 'Two Faces of the Polish Supreme Court After "Reforms" of the Judiciary System in Poland: The Question of Judicial Independence and Appointments', 5 *European Papers* (2020) 347.

This study was commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE Committee. It analyses the consequences of the judgment of the Polish Constitutional Tribunal for the legal relationship between Poland and the EU, compares it to the case law of other Member States' highest courts and makes policy recommendations on how to deal with the judgment.
