



ARTICLES

THE IDENTITY OF UNION LAW IN PRIMACY: PIERCING THROUGH *EURO BOX PROMOTION AND OTHERS*

FERDINAND WEBER*

TABLE OF CONTENTS: I. Clear occasions. – II. Confirmation and advancement of rule of law value-dogmatics. – II.1. Voluntariness of accession, pre-legal normativity of values. – II.2. Updating the dogmatic of self-assertion under the rule of law. – II.3. Conclusion: working with protection obligations while restraining from intervening in the constitutional conflict. – III. Reconceptualizing unrestricted primacy. – III.1. The traditional basis. – III.2. First addition: elements of international law to strengthen primacy? – III.3. Second addition: equality through primacy, subordination through self-obligation. – III.4. Conclusion: “normed” primacy as a result of selective listening. – IV. Conclusion: Union law’s identity between dialogical crisis containment and constitutional monologue.

ABSTRACT: The Grand Chamber’s judgment of 21 December 2021 on rule of law deficits in Romania underlines the vulnerability of the Union’s legal order. The facts of the case vividly demonstrate once again that its weak spot is spread across the national judicial systems of the Member States. The European Court of Justice (ECJ) opposes the developments by further strengthening the values while underlining special obligations Romania entered into upon accession. Of central importance beyond that are the Court’s first additions to the long standing reasoning on Union Law’s unrestricted primacy. The argumentation resembles a closing figure which is supposed to resolve the irreconcilable claims of final authority in favour of Union law. The attempt turns out to be unconvincing because the constitutional foundations of the integration process and its plurality of actors are selectively ignored.

KEYWORDS: rule of law crisis – value constitutionalism – primacy of European Union Law – constitutional reservations – *Euro Box Promotion and Others* – Romania.

* Research assistant, Georg-August-University Göttingen, fweber1@jura.uni-goettingen.de. A slightly shorter German version of this *Article* has already been published. See F Weber, ‘Die Identität des Unionsrechts im Vorrang’ (2022) *JuristenZeitung* 292-301.



I. CLEAR OCCASIONS

The Grand Chamber's judgment¹ responds to five references for preliminary rulings, four from the *Înalta Curte de Casație și Justiție*, the Romanian High Court of Cassation and Justice, and one from the *Tribunalul Bihor*, the Regional Court in Bihor. Four cases were based on criminal proceedings against high officials for bribery, VAT fraud, and corruption as well as money laundering offences related to projects financed by non-reimbursable Union funds.² One case was based on disciplinary proceedings against a judge at the Bucharest Court of Appeal, leading to his exclusion from the judiciary by decision of the Chamber for Judges hearing disciplinary matters of the Superior Council of Magistracy. It became pending before the High Court of Cassation and Justice after the judge lodged an appeal.³ Against other judges involved in the mentioned criminal cases, disciplinary proceedings were initiated *after* they had filed their references for preliminary rulings.⁴ In other words, the struggle to curb the abuse of political power in Romania is in full swing. In this struggle, the Romanian judiciary is inevitably a party.

The requests for preliminary rulings, submitted between May and November 2019, shed light on events that got only minor public attention compared to those in Poland and Hungary. Already in May 2021, the ECJ found Romanian laws tightening the personal liability for judges and prosecutors concerning "miscarriages of justice" and disciplinary measures undermining the independence of the judiciary to be incompatible with Union law. In its ruling, the Court emphasized the support given by Union institutions in establishing an independent judiciary in Romania since accession and affirmed, against the Romanian Constitutional Court, that the primacy of Union law also prevails against constitutional norms interpreted by the latter.⁵

In a follow-up decision from June 2021, the Romanian Constitutional Court prohibited the lower courts from examining the conformity of national norms with Union law it already found them to be in conformity with the Constitution of Romania, citing the Romanian constitutional identity.⁶ The occurrences found their way into a rule of law report of

¹ Case C-357/19 *Euro Box Promotion and Others* ECLI:EU:C:2021:1034.

² One of the accused persons was a minister at the time of the alleged offences, another was successively mayor, senator and minister, another held parliamentary and ministerial positions at the time of the offences; one constitutional proceeding leading to the annulment of decisions of the High Court of Cassation and Justice was initiated by the President of the Chamber of Deputies, against whom criminal proceedings were also pending before the High Court of Cassation and Justice at the time, see *ibid.* paras 59, 93, 95 and 104.

³ For the facts described up to this point cf. *ibid.* paras 2 and 81-83.

⁴ *Ibid.* para. 261; the Romanian Judicial Inspectorate has initiated disciplinary proceedings against the referring judge of the Bihor Regional Court for failure to comply with the judgments of the Constitutional Court addressed in the questions referred, *ibid.* para. 80.

⁵ Case C-83/19 *Asociația "Forumul Judecătorilor din România"* ECLI:EU:C:2021:393 paras 49-51, 179 ff., 219, 222, 239 ff. and 242-252.

⁶ For a critical account on the concept, see RR Cosmin, 'Constitutional Signs of Identity in Pre- and Post-Communist Romania' (2020) *Analele Universitatii din Bucuresti Seria Drept* 54, 74 ff.; other contributions

the Commission.⁷ Two days after the publication of the Court's judgment *Euro Box Promotion and Others*, the Romanian Constitutional Court defended its case law in a press release and stated that the observance of the principle of primacy as read by the ECJ requires a constitutional amendment.⁸ Until then, the judgment cannot be implemented.

The events are taking place in a "constitutional state under construction" since accession.⁹ At the same time, they are part of a larger development. Decisions of the ECJ and the European Court of Human Rights (ECtHR) are increasingly disregarded.¹⁰ During the French presidential election campaign announcements of activating a "constitutional shield" against supranational court decisions appeared¹¹ and in Poland a politically overturned

show that the issue won't be settled by the rejecting the whole concept, cf. M Guțan, 'The Infra-Constitutionality of European Law in Romania and the Challenges of the Romanian Constitutional Culture' in R Arnold (ed.), *Limitations of National Sovereignty through European Integration* (Springer 2016) 141 and 156-161; on the reception of Union law and the relationship between the Constitutional Court and the High Court of Cassation and Justice see B Selejan-Guțan, *The Constitution of Romania: A Contextual Analysis* (Hart Publishing 2016) 38-40, 191-193, 253 ff.

⁷ Romanian Constitutional Court decision of 8 June 2021 390/2021 regarding the exception of unconstitutionality of the provisions of arts 88(1)-88(9) of Law No 304/2004 on judicial organization, and of the Government Emergency Ordinance No 90/2018 on measures to operationalise the Section for the investigation of offences in the Judiciary para. 74-76; Communication SWD(2021) 724 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 20 July 2021 on the rule of law situation in Romania 22-23.

⁸ Romanian Constitutional Court, press release of 23 December 2021 penultimate and last paragraph (excerpt): "We emphasise that the decisions of the Constitutional Court are and remain generally binding, in accordance with Article 147(4) of the Constitution. [...] In practice, the effects of this judgment can only occur after a revision of the Constitution in force, which, however, cannot be done by law, but exclusively on the initiative of certain legal entities, in accordance with the procedure and conditions of the Romanian Constitution itself" (own translation) available at www.ccr.ro; cf. also the ECJ's latest decision concerning Romania, case C-430/21 RS ECLI:EU:C:2022:99.

⁹ For monitoring bodies involved, see *Asociația "Forumul Judecătorilor din România"* cit. para. 49, 158.

¹⁰ Cf. A Hofmann, 'Resistance against the Court of Justice of the European Union' (2018) IJLC 258, 263-267; for the older example of the Working Time Directive F Weber, 'Überstaatlichkeit als Kontinuität und Identitätszumenung' (2018) *Jahrbuch des öffentlichen Rechts* 237, 284; concerning case C-673/16 *Coman and Others* ECLI:EU:C:2018:385 cf. Resolution 2021/2679(RSP) of the European Parliament of 14 September 2021 on the rights of LGBTIQ persons in the EU para. 10; concerning case C-490/20 *V.M.A. v. Bulgaria* ECLI:EU:C:2021:1008 cf. F Michl, 'Verwandschaft zum Zwecke der Freizügigkeit' (2021) *Verfassungsblog verfassungsblog.de*; on Hungary in detail Z Szente, 'Challenging the Basic Values: Problems in the Rule of Law in Hungary and the Failure of the EU to Tackle them' in A Jakab and D Kochenov (eds), *The Enforcement of EU Law and Values* (Oxford University Press 2017) 456-475; on the non-compliance with ECHR provisional measures (such as ECtHR press release v. 28.9.2021, ECHR 281 (2021)) by Polish authorities cf. M Górczyńska, J Białas and D Witko, 'Legal Analysis of the Situation the Polish-Belarusian Border, Situation on: 9 September 2021' (2021) Helsinki Foundation of Human Rights 2: "According to them, it is not possible because migrants are in the territory of Belarus".

¹¹ With further references F Weber, 'Status, Accountability and Community after 9/11' (2021) *Verfassungsblog verfassungsblog.de*.

constitutional court declared decisions of the ECJ and ECtHR partially inapplicable.¹² Strasbourg and Luxembourg, semantically and functionally upgraded to “two senates of *one* European constitutional jurisdiction”,¹³ are under pressure from political hijacked courts. Supporting them is beyond question. At the same time, abandoning critical case law analysis wouldn’t be an appropriate scholarly reaction. When the ECJ compensates the lack of strong political responses through case law, its critical monitoring is necessary. Against this background, the ruling will be examined in its immediate and wider contexts.

II. CONFIRMATION AND ADVANCEMENT OF RULE OF LAW VALUE-DOGMATICS

II.1. VOLUNTARINESS OF ACCESSION, PRE-LEGAL NORMATIVITY OF VALUES

The Court's central reminder is well known and repeated specifically with relation to Romania, following the Grand Chamber ruling from May 2021: Member States acceding to the Union have “freely and voluntarily” entered into the obligation to respect the values enshrined in art. 2 TEU, as stated by art. 49 TEU. The commitment to share, preserve and promote those values at the same time marks the premise on which the mutual trust between Member States “is based”.¹⁴ The entire transnational mechanism of the Union legal order, as expressed in the Treaties’ different policy areas, in other words, builds on this active living of the Union’s values.

The core feature of this “value constitutionalism”,¹⁵ understood as the foundation of the integration process, is the simultaneity of legal and extra-legal normativity. The Court itself establishes these two dimensions in its reasoning: respect for the values enshrined in art. 2 TEU is “a *precondition* for the accession to the European Union of any European state applying to become an EU member” and, after accession, “a *condition* for the enjoyment of all of the rights deriving from the application of the Treaties to that Member

¹² Polish Constitutional Tribunal judgment of 7 October 2021 K 3/21, cf. on this Editorial, ‘Sovereign within the Union? The Polish Constitutional Tribunal and the Struggle for European Values’ (2021) European Papers www.europeanpapers.eu 1117-1118; Polish Constitutional Tribunal judgment of 24 November 2021 K 6/21 concerning the ECtHR point III(3)(2)(2); for summaries of the changes cf. ECtHR *Xero Flor sp. z o. o./v. Poland* n. 4907/18 [7 May 2021] paras 289 ff.; *Reczkowicz v. Poland* n. 43447/19 [22 July 2021] paras 240 ff.; ECtHR *Dolińska-Ficek and Ozimek v. Poland* App n. 49868/19 and 57511/19 [8 November 2021] paras 329 ff.; R Spano, ‘The Rule of Law as the Lodestar of the European Convention on Human Rights: The Strasbourg Court and the Independence of the Judiciary’ (2021) ELJ 1, 13 ff.

¹³ This juristic metaphor originates from A v Bogdandy and C Krenn, ‘EuGH und EGMR: zwei Senate einer europäischen Verfassungsgerichtsbarkeit’ in A v Bogdandy, C Grabenwarter and PM Huber (eds), *Ius Publicum Europaeum Vol VII* (C F Müller 2021) ch. 118, summarising para. 94 (author’s translation).

¹⁴ See already *Asociația “Forumul Judecătorilor din România”* cit. para. 160; *Euro Box Promotion and Others* cit. para. 160, quotations from there.

¹⁵ For a detailed account see F Schorkopf, ‘Value Constitutionalism in the European Union’ (2020) GLJ 956, 963-964, who sees the possibility of an emerging “core of European sovereignty” through this jurisprudence.

State".¹⁶ Respect for the values of art. 2 TEU thus precedes and sustains the enactment of treaty rights and obligations as a condition of their activation. Legal and extra-legal normativity go hand in hand. Without a certain level of a "good" *pre-Union* legal order, or at least the plausible prospect of its achievability, no aspirant to accession will even be given the opportunity to enter into a binding value commitment under Union law.¹⁷ This is vividly illustrated by the example of Romania.

II.2. UPDATING THE DOGMATIC OF SELF-ASSERTION UNDER THE RULE OF LAW

Already in the aforementioned judgment of May 2021, the Grand Chamber ruled that Decision of 13 December 2006 from the Commission establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, which *inter alia* allows the Commission to issue recommendations, is binding in the sense of art. 288(4) TFEU. In accordance with the principle of loyal cooperation under art. 4(3) TEU, Romania must take due account of the issued recommendations to address the benchmarks enshrined in the decision, all aiming at institution-building, thus strengthening the rule of law.¹⁸ Thus, Romania may not adopt or maintain any measures that jeopardize the goals to be achieved.¹⁹ The Grand Chamber confirms this reading once more²⁰ and, with reference to the Accession Act and a monitoring report from the Commission, underlines that immediate dangers, *i.e.* deficiencies in the area of justice and corruption, persisted at the time of accession.²¹ The institutional monitoring of Romania thus also reflects a difference compared to other Member States, made visible by the Grand Chamber's reasoning. At the same time, the jurisprudence triggered by the Polish rule of law crisis is confirmed, according to which art. 19(1)(2) TEU – as an expression of the value of the rule of law in art. 2 TEU – leads to the application of art. 47(2) of the Charter of Fundamental Rights of the European Union (CFR) without examining the Charter's activation requirements as set out in art. 51(1) CFR.²²

¹⁶ *Asociația "Forumul Judecătorilor din România"* cit. para. 161-162; the latter quotation firstly appeared in case C-896/19 *Repubblika* ECLI:EU:C:2021:311 para. 63; in the decision to be discussed here *Euro Box Promotion and Others* cit. paras 161 and 168, emphasis added.

¹⁷ Differently *A v Bogdandy*, *Strukturwandel des öffentlichen Rechts* (Suhkamp Verlag 2022) 155, apparently without the opportunity to take note of the Court's last judgments.

¹⁸ Details in Decision 2006/928/EC of the Commission of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption.

¹⁹ *Asociația "Forumul Judecătorilor din România"* cit. paras 149, 163, 166-178.

²⁰ *Euro Box Promotion and Others* cit. 174-175.

²¹ *Ibid.* paras 158 and 188 on the "specific obligations [...] assumed by that Member State at the conclusion of the accession negotiations on 14 December 2004".

²² *Asociația "Forumul Judecătorilor din România"* cit. para. 186-200 on the one hand, *Euro Box Promotion and Others* cit. 220 on the other; for criticism cf. F Weber, 'Kompetenzfusion durch Bürgerschaft. Die föderale Logik in der Rechtsprechung des EuGH zur Unionsbürgerschaft' (2022) *Der Staat* 297, 309-310.

The Grand Chamber refines this jurisprudence against the relevant background, the protection of the Union's financial interests. Due to their clear and precise wording and their unconditionality, the Court already granted direct effect to the benchmarks in Annex of Decision 2006/928 in May 2021.²³ The ECJ now extends this to art. 19(1)(2) TEU in conjunction with art. 325(1) TFEU,²⁴ which only becomes understandable against the background of the complex argumentation structures that the Court developed on judicial independence since the *Associação Sindical dos Juizes Portugueses* judgment and subsequent case law, especially concerning Poland.²⁵ Considering art. 325(1) TFEU, two aspects deserve to be highlighted. Firstly, according to the Grand Chamber, the term "financial interests" of the Union is not limited to revenue made available to the Union budget, but also expenditure covered by the Union budget. Secondly, not only loss-provoking acts but also attempted acts are covered by its scope.²⁶

The fundamental rights-conclusion then comes as a consequence on the Court's remarks considering direct effect. National criminal proceedings dealing with offences relating to the financial interests of the Union are to be qualified as an implementation of Union law within the meaning of art. 51(1) CFR, first sentence, even though Union law "does not, as it currently stands, provide for rules governing the organisation of justice in the Member States and, in particular, the composition of the panels hearing cases in matters of corruption and fraud".²⁷ In other words, if the obligation to achieve the results laid down in, *inter alia*, art. 325(1) TFEU (combating fraud etc. directed against the Union's financial interests by 'deterrent' measures that provide effective protection) is materially affected,²⁸ the Charter, namely the right to an independent and impartial tribunal in art. 47(2)(1) CFR, becomes applicable. Even if, for example, Germany does not face similar rule of law deficits, the simultaneous application of the Charter – for the offences touching the scope of art. 325(1) TFEU – and the fundamental rights of the Basic Law (for other offences) would be at issue simultaneously in the context of one criminal court procedure.

Nevertheless, the ECJ refrains from further examining Romanian disciplinary law against art. 47(2)(1) CFR (judicial independence). The incompatibility of national disciplinary measures under Union law which are initiated due to non-compliance with decisions

²³ *Asociația "Forumul Judecătorilor din România"* cit. para. 249.

²⁴ *Euro Box Promotion and Others* cit. para. 253; the decisions referred to by the Court here only describe the elements of unconditionality and clear and precise obligations without expressly deciding on their direct effect as a consequence; on art. 325(1) and (2) TFEU see already case C-105/14 *Taricco and others* ECLI:EU:C:2015:555 paras 51; case C-42/17 *M.A.S. and M.B.* ECLI:EU:C:2017:936 para. 38-40.

²⁵ Case C-64/16 *Associação Sindical dos Juizes Portugueses* ECLI:EU:C:2018:117; on this and the first of the cases concerning Poland F Schorkopf, 'Europäischer Kontitutionalismus oder die normative Behauptung des "European way of life"' (2019) NJW 3418, 3419-3421.

²⁶ *Euro Box Promotion and Others* cit. para. 183 and 187.

²⁷ For the statement on art. 51(1) CFR in *Euro Box Promotion and Others*. cit. para. 204, the quotation *ibid.* para. 180; on art. 49 CFR see already *M.A.S. and M.B.* cit. para. 52.

²⁸ For a dense discussion of its case law on this point see *Euro Box Promotion and Others*. cit. para. 181 ff.

of the national constitutional court, despite Union law requiring it, already results from art. 2 in conjunction with art. 19(1)(2) TEU and Decision 2006/928. In the Grand Chamber's words, a separate Charter examination "could only substantiate" this outcome.²⁹ The doubling of standards due to the operationalization of norms containing institutional tasks (art. 19(1)(2) TEU) becomes particularly tangible in this section.

II.3. CONCLUSION: WORKING WITH PROTECTION OBLIGATIONS WHILE ABSTAINING FROM INTERVENING IN THE CONSTITUTIONAL CONFLICT

Overall, the case did not pose any difficulties for the Grand Chamber. Upon accession, Romania committed itself to measures going back to the 1995 Convention on the Protection of the European Communities' financial interests (PFI Convention).³⁰ In this respect, one of the Court's main findings is not surprising: art. 325(1) TFEU in conjunction with art. 2 PFI convention and Decision 2006/298 preclude national rules or practices that create a risk of impunity for serious fraud or corruption offences to the detriment of the Union's financial interests through an interplay of constitutional court decisions, back-referrals, extraordinary legal remedies and absolute limitation periods for prosecution.³¹ The capacity for referral (art. 267 TFEU) may under no circumstances be subject to disciplinary measures. Moreover, constitutional obligations for lower courts to follow decisions of the national constitutional court are permissible under Union law (only) *as long as* the constitutional court's independence from legislative and executive powers is guaranteed, pursuant to art. 2 and art. 19(1)(2) TEU.³²

Although the Court emphasizes that the above mentioned norms do not require "Member States to adopt a particular constitutional model governing the relationship and interaction between the various branches of the State",³³ the potential for developing overarching federal obligations in all policy areas – including those remaining within the competence of the Member States in accordance with the principle of conferral (art. 5(2) TEU) – shines through. The case law of the German Federal Constitutional Court (BVerfG), which traces both reason and limit of the primacy-principle back to the order to apply the

²⁹ *Ibid.* paras 242-243.

³⁰ In detail, *ibid.* paras 1-11; on the Convention and Directive 1371/2017 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law cf. C Waldhoff, 'Art. 325' in C Calliess, M Ruffert (eds), *EUV/AEUV Kommentar* (C.H. Beck 2022) para. 4; F Weber, 'Effektive Steuerbetrugsbekämpfung im Unionsrecht und nationalen Recht' (2020) DÖV 62, 64 ff.

³¹ *Euro Box Promotion and Others* cit. paras 198-203 on the limitation problem and para. 213, on art. 325(1) TFEU while citing the principles of proportionality, equivalence and effectiveness, see paras 192-194; art. 325 TFEU represents a catch-up codification of ECJ case-law, see C Waldhoff, 'Art. 325' cit. para. 6; on the problem of limitation see already *Taricco and others* cit. para. 47.

³² *Euro Box Promotion and Others* cit. paras 227 and 230; *RS* cit. paras 87-93.

³³ Cf. *Euro Box Promotion and Others* cit. para. 229.

law given by the Act Approving the Treaty, sees its scope coupled to the transferred competences in conformity with the constitution.³⁴ It has rejected overarching constructions and did explicitly include the value clause in its rejection.³⁵ The Court's reasoning dissolves this connection.

With regard to the Romanian Constitutional Court, the ECJ's reasoning remains cautious, despite the hints delivered by the referring courts. The latter noted that the Constitutional Court is institutionally not a part of the Romanian judicial system, has been politically staffed and exceeded its competences several times by encroaching ordinary jurisdiction.³⁶ Against this, the ECJ abstractly states that the independence of courts in the meaning of art. 19(1)(2) TEU must be ensured by rules which dispel "any reasonable doubt, in the minds of individuals, as to the imperviousness of the body in question to external factors and its neutrality with respect to the interests before it".³⁷ A negative test or outcome with a view to the Romanian Constitutional Court is not spoken out. On the contrary, the Grand Chamber does not see any indication that it would not meet these requirements and rejects the raised objections. The burden of proof is noticeably shifted towards the referring courts, which would have been obliged to make considerably more factual submissions.³⁸ Denying the independence of national constitutional courts can, beyond clear-cut cases, indeed hardly be of interest for the ECJ because it would reduce communication channels even further. However, a tougher stance could follow in the infringement proceedings initiated one day after this judgement concerning the above-mentioned judgements from the Polish Constitutional Tribunal.³⁹

³⁴ See German Federal Constitutional Court (BVerfG) judgment of 22 October 1986 2 BvR 197/83 *Solange II* p. 375; BVerfG judgment of 8 April 1987 2 BvR 687/85 *Kloppenburger-Beschluß* p. 244; BVerfG judgment of 12 October 1993 2 BvR 2134 *Treaty of Maastricht* p. 188; BVerfG judgment of 30 June 2009 2 BvR 1010 *Treaty of Lisbon* p. 399; BVerfG judgment of 19 July 2011 1 BvR 1916/09 *Anwendungserweiterung* p 98; BVerfG decision of 13 February 2020 BvR 739/17 *Einheitliches Europäisches Patentgericht* para.115; BVerfG judgment of 5 May 2020 2 BvR 859/15 *PSPP* p. 151 para. 234; BVerfG decision of 27 April 2021 2 BvR 206/14 *Tierarzneimittel* para. 38.

³⁵ BVerfG decision of 22 November 2001 2 BvB 1, 2, 3/01 *NPD-Verbotsverfahren I/Vorabentscheidungsersuchen* p. 219: "There is no general binding of the Member States to the constitutional provisions of Union and Community law" references omitted, author's translation; BVerfG *Treaty of Lisbon* cit. p. 397: "The values of Art. 2 TEU-Lisbon, which are already partly contained as principles in the current art. 6 (1) TEU, do not provide the European integration association with any competence, so that the principle of limited individual authorisation continues to apply in this respect as well".

³⁶ *Euro Box Promotion and Others* cit. para. 215.

³⁷ *Ibid.* para. 225. Para. 224 emphasises an external aspect (full autonomy, absence of hierarchical subordination and de facto pressure from third parties) and an internal aspect (impartiality through objective distance from the parties to the dispute).

³⁸ *Ibid.* para. 232-237: no substantiated evidence that judgments of the Constitutional Court would have been handed down in a context that would give rise to reasonable doubts.

³⁹ Polish Constitutional Tribunal K 3/21 cit. and judgment K 6/21 cit.; European Commission, *Rule of Law: Commission launches infringement proceedings against Poland for violations of EU law by its Constitutional Tribunal* (22 December 2021) ec.europa.eu; the infringement proceedings against the Federal Republic of

III. RECONCEPTUALIZING UNRESTRICTED PRIMACY

The Court could have left the remaining questions about the principle of primacy unanswered for several reasons.⁴⁰ Immediately before, it found a separate examination of art. 47(2)(1) CFR to be unnecessary in view of the results already achieved through art. 2 and 19(1)(2) TEU (cf. section II.2, last paragraph). A reference to the principle of primacy was also already made, during the remarks on art. 325(1) TFEU, art. 2 PFI Convention and Decision 2006/928.⁴¹ Moreover, the fact that primacy, as read by the ECJ, precludes

“legislation of a Member State having constitutional status, as interpreted by the constitutional court of that Member State, according to which a lower court is not permitted to disapply of its own motion a national provision falling within the scope of Decision 2006/928, which it considers, in the light of a judgment of the Court, to be contrary to that decision or the the second subparagraph of art. 19 (1) TEU”

was underlined by the Grand Chamber – precisely regarding the Romanian Constitutional Court – just before, in May 2021.⁴² In other words: another engagement just seemed redundant. The nevertheless started attempt to resolve the open question of “final authority”⁴³ with – for the first time since *Costa/ENEL* – new arguments in favor of unrestricted primacy, turns out to weaken the concept as such.

III.1. THE TRADITIONAL BASIS

The starting point marks familiar ground. The Grand Chamber states, “in its settled case-law on the EEC Treaty, the Court has previously *held* that, unlike standard international treaties, the Community Treaties established a *new* legal order, which is integrated into the legal systems of the Member States on the entry into force of the Treaties and which are binding on their courts”.⁴⁴ The second emphasis here is to indicate that formulations from the sem-

Germany concerning the BVerfG's *PSPP* judgment, on the other hand, were discontinued about three weeks before the Grand Chamber issued its judgment, European Commission, *December infringements package: key decisions* ec.europa.eu.

⁴⁰ *Euro Box Promotion and Others* cit. para. 68, question 3, concerning preliminary reference C-357/19, para. 103, question 3 concerning preliminary reference C-811/19 and para. 111, question 3 concerning preliminary reference C-840/19; the questions in para. 68 and 111 are as follows: “Must the primacy of Europe Union law be interpreted as permitting a national court to disapply a decision of the constitutional court delivered in a case relation to a constitutional dispute, which is binding under national law?”.

⁴¹ Explicitly *Euro Box Promotion and Others* cit. para. 212.

⁴² *Asociația "Forumul Judecătorilor din România"* cit. para. 252.

⁴³ On it cf. C Calliess and A Schnettger, ‘The Protection of Constitutional Identity in a Europe of Multi-level Constitutionalism’ in C Calliess and G van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2020) 348 and 357.

⁴⁴ *Euro Box Promotion and Others* cit. para. 245.

inal *van Gend en Loos* and *Costa/E.N.E.L.* judgments are taken up, albeit other language versions are more clear in combining them.⁴⁵ The first emphasis is intended to underline that the Court itself assumes an act of judicial decisionism which it continues not to underpin with legal-historical material because the latter provides equivalent evidence for other classifications of the Treaties.⁴⁶ The traditional starting point tips near circular reasoning when it finally states: "Thus, in the judgment of 15 July 1964, *Costa* [...], the Court laid down the principle of the primacy of Community law, which is understood to enshrine the precedence of Community law over the law of the Member States."⁴⁷

Judicially developed primacy justifies precedence, one reads, unconvincingly, with the French version using *primauté* and *prééminence* while the German version doesn't distinguish terminologically at all, strengthening the impression of circularity even more.⁴⁸ Beyond semantic subtleties,⁴⁹ the void of a sustainable justification remains, as historical classifications showed early on.⁵⁰ The postulate of *unrestricted* primacy remains, at this level of reasoning, the central normative dogma of the Union legal order – you either believe or not.

This view is supported by the classic reference to the *consequences* of divergent views (*lex posterior*-principle, imminence of legal fragmentation)⁵¹ – a problem no less familiar in international law, which has its own claim of "supremacy" (art. 27 Vienna Convention on the

⁴⁵ Cf. in the cited cases *Van Gend en Loos* ("new legal order of international law") and *Costa/E.N.E.L.* ("own legal system") and compare the more combining German and French version of *Euro Box Promotion and Others* cit. para. 245, emphasis added: "*neue eigene Rechtsordnung*" and "*un nouvel ordre juridique propre*" ("new own legal order").

⁴⁶ For a division of those involved in the integration process into "delegations and federal constitutionalists" see F Schorkopf, 'Value Constitutionalism in the European Union' cit. 957-958; for a differentiation into "federal constitutionalists", "traditionalists" and representatives of a "structural congruence" see B Davies, 'Resistance to European Law and Constitutional Identity in Germany: Herbert Kraus and *Solange* in its Intellectual Context' (2015) *ELJ* 434, 441-456; according to H Delfs, *Komplementäre Integration* (Mohr Siebeck 2015) 324-327, the lines of argumentation of the ECJ and the BVerfG both partly contradict the history of the origins of the Treaties of Rome in terms of European law.

⁴⁷ *Euro Box Promotion and Others* cit. para. 246.

⁴⁸ *Ibid.* in the respective language versions, the German translation goes: "Somit hat der Gerichtshof im Urteil vom 15. Juli 1964, *Costa* [...], den Grundsatz des Vorrangs des Gemeinschaftsrechts entwickelt, der den Vorrang dieses Rechts vor dem Recht der Mitgliedstaaten begründet".

⁴⁹ For attempts to sort the differing terminology see M Avbelj, 'Supremacy or Primacy of EU Law: (Why) Does it Matter?' (2011) *ELJ* 744-754; T Tuominen, 'Reconceptualizing the Primacy-Supremacy Debate in EU Law' (2020) *Legal Issues of Economic Integration* 245, 246-249.

⁵⁰ Exemplary voices in F Weber, 'Überstaatlichkeit als Kontinuität und Identitätszumutung' cit. fn 54 at p 249 fn 54.

⁵¹ *Euro Box Promotion and Others* cit. para. 246; U Haltern, *Europarecht Band II* (Mohr Siebeck 2017) para. 1275: "functional necessity" (author's translation).

Law of Treaties), only without the special normative expectation of self-enforcing precedence, as contained in Union law's primacy-principle.⁵² The only difference, according to the ECJ's reasoning, lies in the assertion that Union law *has been incorporated by* the Member States *into* their legal systems, *i.e.* is an integral part of them, has somehow taken a place similar to a hierarchy, which is why national law is subordinate in unavoidable collisions. In other words, the primacy of Union law lives from a certain perception of federal unity, which must be believed because it can, to this day, only be weakly substantiated from the treaties.⁵³ This belief is difficult to achieve in its absoluteness because the incorporation-postulate *into* the legal systems of the Member States isn't free from contradictions when taking into account older and more recent decisions on the concept of autonomy, *i.e.* the independence of Union law *vis-à-vis* national law and international law alike.⁵⁴ If the jurisprudence boils down to an outwardly dualistic, inwardly monistic approach⁵⁵ the ECJ doesn't do much different than national constitutional courts in federal *states*.

The Court's subsequent attempt to establish a firm connection between constitutional semantics,⁵⁶ which it underlaid the Treaties itself, and the principle of primacy, doesn't match either. Constitutional semantics found their way into case law in 1977 at the latest, independently of the principles of direct applicability and primacy.⁵⁷ Their conflation is a later product of the Court's jurisprudence. The traditional line of reasoning

⁵² M Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers 2009) 369, para. 12: "Article 27 expresses the principle that on the international level international law is supreme. [...] this has less to do with any monist v. dualist doctrinal victory than with the practical function of the provision to support *pacta sunt servanda*. Indeed, any other rule would undermine the performance of treaties"; K Schmalenbach, 'Article 27' in O Dörr and K Schmalenbach (eds), *Vienna Convention on the Law of Treaties* (Springer 2018) 493, para. 16: "Art. 27 does not prohibit invoking internal law *stricto sensu* but declares the objection legally irrelevant for the purpose of Art. 26. In other words: deviating internal law is not internationally recognized as a valid justification for non-performance" (emphasis in the original).

⁵³ Cf. R Dehousse, *The European Court of Justice* (Palgrave 1998) 38: "[...] Court derived its judgment from the objectives of the treaty, as set out in the preamble and the institutional structure of the Community. [...] The textual arguments offered to justify its conclusion are rather vague"; A Stone Sweet, 'Constitutional Dialogues in the European Community' in AM Slaughter, A Stone Sweet and JHH Weiler (eds), *The European Court and National Courts – Doctrine and Jurisprudence* (Hart Publishing 1998) 305 and 308: "In declaring the doctrines of supremacy and direct effect, the Court had, after all, radically rewritten the Treaties (the Treaties contain neither supremacy clause nor textual support for the direct effect of Treaty provisions and directives)".

⁵⁴ *Euro Box Promotion and Others* cit. para. 247, referring to Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454 para. 170; for an older decision, see case C-13/61 *De Geus en Uitdenbogerd v Bosch and Others* ECLI:EU:C:1962:11 para. 47 ff.: national law and Community constitute "two separate and distinct legal orders".

⁵⁵ A Bergmann, *Zur Souveränitätskonzeption des Europäischen Gerichtshofs* (Mohr Siebeck 2018) 198.

⁵⁶ Opinion 1/91 *Accord EEE* ECLI:EU:C:1991:490 para. 21.

⁵⁷ The adoption of constitutional semantics did not begin, as is regularly assumed, with case C-294/83 *Les Verts v Parliament* ECLI:EU:C:1986:166 para. 23 ("basic constitutional Charter"; on the French version and the reduced meaning of "charte constitutionnelle" see C Möllers, 'Pouvoir Constituant–Constitution–Constitutionalisation' in A v Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (Hart CH Beck Nomos 2010) 169, 189-190), but with Opinion 1/76 *Laying Up-Fund* ECLI:EU:C:1977:63 ECR 741, in which the

thus appears shaky overall. Maybe it is this – for decades repeated but in its absoluteness in the end unconvincing – baseline of argumentation that fuelled the Court's motive to add additional arguments with a view to the increasing rule of law-crises.

III.2. FIRST ADDITION: ELEMENTS OF INTERNATIONAL LAW TO STRENGTHEN PRIMACY?

The recourse to international law-patterns to substantiate the *special* features of Union law which distinguish it from the former is already remarkable in its constructive design. The Grand Chamber adopts an argument which was formulated by President Lenaerts in 2020, in the wake of the German Federal Constitutional Court's PSpP ruling.⁵⁸ According to it, the Member States themselves confirmed the special features of the Union legal order the Court repeatedly "held" for two reasons: firstly, "by the ratification, without reservation, of the Treaties amending the EEC Treaty", and secondly – argumentatively separated ("and") – "in particular the Treaty of Lisbon", because the conference of representatives of the Governments of the Member States "was keen to state expressly, in its Declaration No 17 concerning primacy, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon [...] that, in accordance with settled case-law of the Court, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of the Member States, under the conditions laid down by that case-law".⁵⁹

This addition stands in fundamental contradiction to the traditional starting point mentioned above. The thesis that, with the entry into force of the Treaties of Rome "unlike standard international treaties, the Community Treaties established a new legal order, which is integrated into the legal systems of the Member States"⁶⁰ is incompatible with a later reservation of recognition. The justification switches from a transformative postulate to a "delegationist reading", according to which everything is open until the ratification of the first amendment treaty and thus – classic international law – dependent on the behavior of the contracting parties. This weakens the Court's own starting point. Additionally, the Grand Chamber must ignore striking aspects of integration history that point to the opposite direction, like the proposal to include a primacy clause vis-à-vis national constitutional law in the Merger Treaty drawn up in 1965.⁶¹ That didn't happen. The

impairment of the structure and tasks of the institutions by an international treaty was regarded, with reference to the Treaty's preamble and art. 3 ff. EEC, as incompatible with "the constitution of the Community" (in French "la constitution de la Communauté"; in the reasoning *ibid.* para. 12, only "internal constitution"/"constitution interne").

⁵⁸ K Lenaerts, 'No Member State is More Equal than Others: The Primacy of EU Law and the Principle of the Equality of the Member States before the Treaties' (8 October 2020) Verfassungsblog verfassungsblog.de, 11 days before an ECJ delegation visited the BVerfG in Karlsruhe.

⁵⁹ *Euro Box Promotion and Others* cit. para. 248; *RS* cit. para. 49.

⁶⁰ *Euro Box Promotion and Others* cit. para. 245.

⁶¹ M Zuleeg, 'Die Kompetenzen der Europäischen Gemeinschaften gegenüber den Mitgliedstaaten' (1971) *Jahrbuch des öffentlichen Rechts* 1, 30-32, referring to H Lesguillons, *L'Application d'Un Traité-Fondation: Le Traité Instituant La C.E.E.* (Pichon&Durand-Auzias 1968) 279-282; conversely, Ernst Wohlfarth, *inter*

attempts of the Commission and the European Parliament to promote a constitutional reading of the treaties rather prove that there was no acceptance.⁶² Instead, the ratification of the Merger Treaty was linked with the Luxembourg compromise in order to mark a boundary against such extensive ideas.⁶³

If one nevertheless follows the Court's line of argumentation experimentally, the recourse to Declaration No. 17 would become superfluous. Unrestricted primacy would already have become a legal reality through lack of opposition from the Member States, in the terminology of international law *acquiescence*.⁶⁴ Another circumstance proves to be decisive. To make its result appear plausible, the Grand Chamber has to ignore the supremacy clause provided for in the Treaty establishing a Constitution for Europe (TCE), which was not only limited to the "competences conferred on it", *i.e.* the Union (arts I-6 TCE), but dropped for the Lisbon Treaty. Only setting this aspect aside enables the Court to conceal that it, despite the obvious lack of political will of the actors referred to, the governments, to introduce a *limited* primacy clause at all, imputes the political will to accept *unlimited* primacy of Union law.⁶⁵ In international law, to remain on the level entered into by the Court, such a move would appear as an ineligible attempt to rewrite a treaty

alia a member of the drafting group of the Treaties of Rome, argued in a commentary on the EEC Treaty that there was no reservation in favour of member state constitutional law in the Treaties; on this cf. H Delfs, *Komplementäre Integration* cit. 324-327.

⁶² H von der Groeben, 'Walter Hallstein as President of the Commission' in W Loth, W Wallace and W Wessels (eds), *Walter Hallstein: The Forgotten European?* (Palgrave Macmillan 1998) 95, 104; P Bajon, 'Renaissance eines "vergessenen Europäers". Erinnerungen an Walter Hallstein' in M Bachem-Rehm, C Hiepel and H Türk (eds), *Teilungen Überwinden* (De Gruyter 2014) 481, 487; L van Middelaar, 'Spanning the River: The Constitutional Crisis of 1965-1966 as the Genesis of Europe's Political Order' (2008) *EuConst* 98, 110, 117-118; instructive J White, 'Theory Guiding Practice: The Neofunctionalists and the Hallstein EEC Commission' (2003) *JElH* 111, 123-130; A Vauchez, *Brokering Europe* (Cambridge University Press 2015) 43-56, 79, especially 135-138, 144-146 and 177-180; M Rasmussen and D Sindbjerg Martinsen, 'EU Constitutionalisation Revisited: Redressing a Central Assumption in European Studies' (2019) *ELJ* 251, 257-270.

⁶³ Cf. JM Palayret, 'De Gaulle Challenges the Community: France, the Empty Chair Crisis and the Luxembourg Compromise' in JM Palayret, H Wallace and P Winand (eds), *Visions, Votes and Vetoes* (Peter Lang 2006) 45, 49, 62-66, 72-77; NP Ludlow, 'De-Commissioning the Empty Chair Crisis: The Community Institutions and the Crisis of 1965-66' in JM Palayret, H Wallace and P Winand (eds), *Visions, Votes and Vetoes* cit. 79, 84-86; NP Ludlow, *The European Community and the Crises of the 1960s* (Routledge 2007) 120-123.

⁶⁴ On this figure as a special form of recognition MN Shaw, *International Law* (Cambridge University Press 2017) 66-68; W Heintschel von Heinegg, 'Ungültigkeit von Verträgen und Fortfall der Vertragsbindung' in K Ipsen, *Völkerrecht* (C H Beck 2019) ch. 18, para. 109.

⁶⁵ Art. I-6 TCE 1; the clause would thus have contributed nothing to the problem of "final authority" when it comes to the vertical delimitation of competences, cf. Conseil Constitutionnel decision of 19 November 2004 n. 2004-505 DC *On the Treaty Establishing a Constitution for Europe* para. 12-13; E Di Salvatore, 'The Supremacy of European Law in the Treaty Establishing a Constitution for Europe in the Light of Community Experience' in HJ Blanke and S Mangiameli (eds), *Governing Europe under a Constitution* (Springer 2006) 375, 377; cf. also U Haltern, 'Revolutions, Real Contradictions, and the Method of Resolving them: The Relationship between the Court of Justice of the European Union and the German Federal Constitutional Court' (2021) *I-Con* 208, 223.

by one of its organs, moreover one of the most thinly democratically equipped ones.⁶⁶ Finally, declarations can only be used as an instrument to interpret *agreed* norms (art. 31(2)(a) VCLT),⁶⁷ not to enforce *postulated* contents of an unwritten norm on which the treaties are deliberately silent after the failure of the TCE.

The literature repeatedly highlighted why the ECJ's jurisprudence wasn't opposed by the governments, which had long been the decisive actors in the Council. It was supportive in preserving and enforcing hard-won compromises on secondary law,⁶⁸ without accepting unrestricted primacy.⁶⁹ Exempting Member State executives from constitutional obligations in this multi-level game was just as little intended as the abandonment of the concept of understanding the autonomy of Union law as granted and guaranteed, taking place within a delegated framework. For the German Federal Constitutional Court, this dialectical harmony of support and reservation can be traced back to the decisions from the Second Senate from July 1967 and the First Senate from October 1967, the year the Merger Treaty came into force – more than three years before the extension of the primacy claim over national constitutional law.⁷⁰ While the Second Senate considered a review of secondary law and primary law via the German treaty ratification-act to be permissible under the Basic Law, the First Senate recognized the autonomy of Union law *in the delegated framework*.⁷¹

⁶⁶ Contrasting J Klabbers, *An Introduction to International Organizations Law* (Elgar 2015) 63; LE Popa, 'The Holistic Interpretation of Treaties at the International Court of Justice' (2018) *ActScandJurisGent* 249, 317: "It is to be reminded that the application of the effectiveness principle aids the interpreter to identify *what the parties to a treaty have agreed, and not what the interpreter thinks that they should have agreed*" emphasis in the original.

⁶⁷ Declarations don't fall under the ambit of art. 51 TEU; on the above cf. O Dörr, 'Art. 51' in E Grabitz, M Hilf and M Nettesheim, *Das Recht der Europäischen Union* (C H Beck 70th supply May 2020) para. 5; O Dörr, 'Article 31' in O Dörr and K Schmalenbach (eds), *Vienna Convention on the Law of Treaties* cit. para. 63 ff.

⁶⁸ P Craig, 'EU Membership: Formal and Substantive Dimensions' (2020) *CYELS* 1, 17: "Normative supranationalism, fuelled through direct effect, helped to prevent the stagnation of Community law during the period of Community malaise, when decisional supranationalism, through the Council, was difficult"; JHH Weiler, 'The Transformation of Europe' (1991) *YaleLJ* 2403, 2425; U Haltern, *Europarecht Band II* cit. para. 1060.

⁶⁹ R Dehousse, *The European Court of Justice* cit. 142; see also A Jakab, *European Constitutional Language* (Cambridge University Press 2016) 114-116.

⁷⁰ Case C-11/70 *Internationale Handelsgesellschaft* ECLI:EU:C:1970:114 para. 3; M Claes and B de Witte, 'Rollen der nationalen Verfassungsgerichtsbarkeit im europäischen Rechtsraum' in A v Bogdandy, C Grabenwarter and PM Huber (eds), *Ius Publicum Europaeum Vol VII* cit. chapter 121 para. 20: "The doctrine of primacy, which the Court of Justice established as early as 1964 in *Costa v. ENEL*, did not require a direct reaction on the part of the constitutional courts. The obligation established by the ECJ concerned only the ordinary national courts, which, following that decision, no longer had to apply domestic law contrary to Community law" (author's translation).

⁷¹ In response to a referral order from a lower court of November 1963 BVerfG decision of 5 July 1967 2 BvL 29/63 *EWG-Recht* 146, 152; BVerfG decision of 18 October 1967 1 BvR 248/63 *EWG-Verordnungen* 296: "The EEC Treaty constitutes, as it were, the constitution of this Community. The legal provisions enacted by the Community institutions *within the framework of their competences under the Treaty*, the 'secondary Community law', form a legal order of their own, the norms of which are neither international law nor national law of the Member States", emphasis added, author's translation.

Lower court classifications were observed in detail.⁷² The line of jurisprudence has since been continued,⁷³ and in mutual stimulation with the ECJ.⁷⁴ The conceptual middle way of "relative autonomy" can also be found in other Member State legal systems.⁷⁵

By focusing on the executives, the Court attempts to lever its normative objective with an alleged pattern of argumentation from international law that focuses on executive acts in addition to acts of ratification. However, the equation of Member States with their governments has long been rejected, and rightly so, because it fails to capture the complexity of the Union legal order.⁷⁶ For decades, national high courts and constitutional courts have been involved in its dynamics,⁷⁷ controlling executive activities. Treaty law itself in numerous places recognizes that the member states, thus their institutions,

⁷² For an analysis of the decision of the Rhineland-Palatinate Regional Court (Neustadt a. d. Weinstraße) leading to BVerfG *EWG-Recht* cit. and in comparison with other Member State's innerjudicial processes in this regard cf. H Lesguillons, *L'Application d'Un Traité-Fondation: Le Traité Instituant La C.E.E.* cit. 234-244.

⁷³ BVerfG judgment of 29 May 1974 BvL 52/71 *Solange I* 279, 281; *Solange II* cit. 375; *Kloppenburger-Beschluß* cit. 242; *Treaty of Maastricht* cit. 182-184; *Treaty of Lisbon* cit. 346, 381; BVerfG judgment of 6 July 2010 2 BvR 2661/06 *Honeywell/Mangold* 301-305; BVerfG judgment of 15 December 2015 2 BvR 2735/14 *Identitätskontrolle* 335; BVerfG judgment of 6 November 2019 1 BvR 276/17 *Right to be forgotten II* 235; *PSPP* cit. 90-93; BVerfG judgment of 1 December 2020 2 BvR 1845/18 *Romania II* 199.

⁷⁴ For the protection of fundamental rights B Davies, 'Internationale Handelsgesellschaft and the Miscalculation at the Inception of the ECJ's Human Rights Jurisprudence' in F Nicola and B Davies (eds), *EU Law Stories* (Cambridge University Press 2017) 157, 158: "The miscalculation rested on the misperception that the German judiciary would happily accept the extension of the supremacy of Community law over national constitutional principles and structures that *Internationale* proposed. In fact, the German Constitutional Court (BVerfG) rejected the *Internationale* doctrine when the lower national court, here the Frankfurt Administrative Court, re-referred the case within its domestic hierarchy after receiving the ECJ's opinion in 1970". And *ibid.* 176: "If pursuing 'ever closer union' had become a key part of the ECJ's identity, then equally safeguarding the national constitutional rights catalogue was the BVerfG's equivalent"; see also M Claes and B de Witte, 'Rollen der nationalen Verfassungsgerichtsbarkeit im europäischen Rechtsraum' cit. para. 42 fn 64; on the *Kloppenburger-Beschluß* see U Haltern, *Europarecht Band II* cit. para. 1111-1116.

⁷⁵ The term "*relative Autonomie*" is borrowed from H Delfs, *Komplementäre Integration* cit. 326; for comparative perspectives see M Claes, 'Constitutionalizing Europe at its Source: The "European Clauses" in the National Constitutions: Evolution and Typology' (2005) YEL 81, 107; M Wendel, *Permeables Verfassungsrecht* (Mohr Siebeck 2011) 401 ff.; J Masing, 'Verfassung im internationalen Mehrbenensystem' in M Herdegen and others (eds), *Handbuch des Verfassungsrechts* (CH Beck 2021) ch. 2, para. 101-105; U Haltern, *Europarecht Band II* cit. para. 1260-1279.

⁷⁶ In the context of the former art. 235 EEC Treaty cf. JHH Weiler, 'The Transformation of Europe' cit. 2452: "The general assumption that unanimity sufficiently guarantees the Member States against abusive expansion is patently erroneous. First, it is built on the false assumption that conflates the government of a state with the state".

⁷⁷ U Haltern, *Europarecht Band II* cit. para. 1081: "Since 1967, the argumentation to conceptualise the national consent law as a decisive legal application order and ground of validity in the sense of the 'bridging theory' has been a topos that runs like a red line through the jurisprudence of the BVerfG (and other national courts [...])" (author's translation).

are bound by their constitutional rules.⁷⁸ The fact that reactions of member state constitutional courts have been priced in beforehand⁷⁹ turns the targeted reduction of the chosen perspective into an easy to see through self-constraint.

The German Federal Constitutional Court's assessment of Declaration No. 17 underlines the contrast. It emphasizes that a declaration, made by the executive after the deliberate deletion of an initially envisaged and *limited* primacy clause, can in no way support the reversal of the vertical constitutional architecture of the Union.⁸⁰ In other words, references to Declaration No. 17 in order to push through unrestricted primacy are irrelevant since the Lisbon decision, *i.e. before* the Amendment Treaty entered into force. The ratification act doesn't change the location of the declaration outside the treaty framework either (art. 51 TEU).⁸¹ From this point of view, invoking it only contrasts a divergence in normative evaluation. Constitutionally, the ECJ, if its argumentation were to be taken seriously, would step outside the framework of constitutional authorization carrying art. 19 TEU.⁸² This is made clear by another consideration: if the German Parliament cannot grant the Union blanket authorizations for constitutional reasons, the executive cannot give the ECJ *carte blanche* on the scope of the primacy doctrine by means of a simple declaration in the first place.⁸³

⁷⁸ This is already mentioned by M Zuleeg, 'Die Kompetenzen der Europäischen Gemeinschaften gegenüber den Mitgliedstaaten' cit. 30; today cf. art. 48(6), art. 49 and art. 42(2)(3) TEU; art. 218(8), 262, 311(3) TFEU and Recital 1 of Protocol No. 1 on the role of national parliaments in the European Union [2012].

⁷⁹ On the position of ECJ Judge Alberto Trabucchi, who was involved in the *van Gend en Loos* case, see M Rasmussen, 'Law Meets History: Interpreting the *Van Gend en Loos* Judgment' in F Nicola and B Davies (eds), *EU Law Stories* (Cambridge University Press 2017) 103, 116: "He advised that the primacy of European law should wait 'pour le moment' because of the constitutional difficulties this would impose on Italy and Germany".

⁸⁰ BVerfG *Treaty of Lisbon* cit. 401-402: "In this respect, it is insignificant whether the primacy of application, already recognised for Community law [...] is provided for in the Treaties themselves or in Declaration No. 17 annexed to the Final Act to the Treaty of Lisbon. [...] As regards public authority exercised in Germany, the primacy of application only reaches as far as the Federal Republic of Germany approved this conflict of law rule and was permitted to do so", references omitted; BVerfG decision of 23 June 2021 2 BvR 2216/20 *Eilanträge EPGÜ-ZustG II* para. 76: "Neither the Treaty on European Union nor the Treaty on the Functioning of the European Union contain an express guarantee specifying the precedence of application (*Anwendungsvorrang*) accorded to EU law. [...] there was no agreement among the contracting parties to expressly recognise an absolute and unconditional precedence in this respect. [...] It was on this basis that Member States had no constitutional objections to Declaration No. 17", references omitted.

⁸¹ Cf. the differentiation in the Act Approving the Amendment Treaty, its two protocols, eleven further protocols and the "adopted declarations", which are divided into joint and unilateral ones, art. 1 Sentence 1 of the Act on the Treaty of Lisbon of 13 December 2007, Bundesgesetzblatt 2008 II, 1038 and 1147 ff.

⁸² On this BVerfG *PSPP* cit. 92-96.

⁸³ Cf. BVerfG judgment of 30 July 2019 2 BvR 1685/14 *European Banking Union* 288 para. 121 with further references; the Federal Government relativises Declaration No. 17 by citing the BVerfG's case law itself in the Explanatory Memorandum to the Second Act Approving the European Patent Court Agreement, cf. Bundestags-Drucksache 19/22847 of 25 September 2020, 10.

An interim result can be noted: the invocation of Declaration No. 17 remains coupled to divergent understandings of Union law's ground of validity (*Geltungsgrund*) and must be rejected as a strategic argument. The recourse (or relapse) to international law-patterns tries to decide a complex problem, the deliberate non-decision on the vertical constitutional architecture between Union and member states, with an auxiliary argument under international law, although, according to the ECJ, this legal order has dedicated itself precisely to the ambition of being more than a "standard" organization under international law.⁸⁴ The reference to an "empirical and normative reality of the European Union today" doesn't add a legal argument but describes *one* holistic perception of the problem in general.⁸⁵

III.3. SECOND SUPPLEMENT: EQUALITY THROUGH PRIMACY, SUBORDINATION THROUGH SELF-OBLIGATION

Slightly downgraded in its intended weight ("It must be added") follows a second addition which also upgrades a presidential argument to a position of the Court.⁸⁶ It reads: the Union can respect the "equality of the Member States before the Treaties" as laid down in art. 4(2)(1) TEU besides their national identity "only if the Member States are unable, under the principle of the primacy of EU law, to rely on, as against the EU legal order, a unilateral measure, whatever its nature".⁸⁷

The reasoning is stunning. Even in the Court's own jurisprudence (at least so far), primacy does not rule out non-compliance with Union law, triggering infringement proceedings, just as a breach of obligations under international law leads to state liability. Art. 4(2), first sentence, TEU formulates a duty, incumbent on all *Union organs*, to respect the equality of the Member States before the Treaties. The obligation is not dependent on the absence of unilateral deviations by Member State institutions. The Grand Chamber does not establish a connection. Thus, it remains unclear how Union institutions can be prevented from *their* legal duty to respect the equality of Member States by unilateral acts of the latter. If one applies the criteria of direct effect to this obligation – clear and precise wording, unconditionality – one is led to the conclusion that the Grand Chamber puts an additional condition into the norm that is neither visible in its wording nor plausibly extractable methodologically. The Grand Chamber just puts its desired outcome – the acceptance of unrestricted primacy – into an *unconditional* legal obligation directed at *Union organs*. Explanations on the understanding of equality would have been helpful

⁸⁴ Cf. the distinction from international treaties which "only" pursue the application of free trade and competition rules in Opinion 1/91 cit. paras 16-18.

⁸⁵ Quote from R Schütze, 'Models of Democracy: Some Preliminary Thoughts' (EUI Working Papers LAW 2020/08) 20, as well as 50; cf. A Bobić, 'Constructive Versus Destructive Conflict: Taking Stock of the Recent Constitutional Jurisprudence in the EU' (2020) CYELS; U Haltern, 'Revolutions, Real Contradictions, and the Method of Resolving Them' cit. 212-215.

⁸⁶ K Lenaerts, 'No Member State is More Equal than Others' cit.

⁸⁷ *Euro Box Promotion and Others* cit. para. 249.

at this point, but are likely to have been omitted because it would have become clear that the violation of Union law by unilateral deviations is simply to be addressed by infringement proceedings.⁸⁸ Only by omitting this can the two-sentence passage, which doesn't include further references, conceal the fact that the Grand Chamber plays a rhetorical ploy to assert its understanding of primacy through the principle of equality by *one* of the legal systems involved: equality through primacy as *the* normative reality of Union law but only *one* normative reality in the *Verbund*.⁸⁹

If one further thinks about the brief passage, the formula reads: the unconditional acceptance of primacy is the only way to enable the Union institutions to respect the equality of the member states. What is needed is an act of treaty-fulfilling subordination which the Federal Republic of Germany (for example), according to the German Federal Constitutional Court, isn't even capable of for constitutional reasons.⁹⁰ Until this happens, *argumentum e contrario* and in view of the various constitutional reservations of the highest courts of the member states, a continued state of self-inflicted inequality – up to this point – floats in the normative realm of Union law, as read by the ECJ. The fact that the fulfilment of a legal obligation by Union organs can be made impossible by the Member States *normatively* is, as far as one can see, a singular finding.

A step back from this unconvincing equation of unity (through primacy) with equality lets the deeper fundament of primacy's fragile validity shine through: the political will of its legal normativity.⁹¹ The Court can demand value convergence and unrestricted primacy without being able to guarantee them as quasi-constitutional prerequisites (*Verfassungsvoraussetzungen*) of the Union legal order's specialty or even supplement political communities that have to support it.⁹²

⁸⁸ Precisely this argumentation can therefore, since decades, be found in infringement proceedings: case C-39/72 *Commission v Italy* ECLI:EU:C:1973:13 para. 24-25.

⁸⁹ A Bobić, 'Constructive Versus Destructive Conflict' cit. 65: "However, the position of the Court of Justice as the 'high federal court' in the EU is but one reality; national courts performing constitutional review have developed a reality of their own, supported by jurisprudence that at times outright contradicts that of the Court of Justice. Thus, federalism cannot capture the EU without being stretched beyond recognition".

⁹⁰ BVerfG *Treaty of Lisbon* cit. 401-402, decision of 23 June 2021 2 BvR 2216/20 *Eilanträge EPGÜ-ZustG* II para. 76.

⁹¹ Cf. JHH Weiler, 'Federalism without Constitutionalism: Europe's *Sonderweg*' in K Nicolaidis and R Howse (eds), *The Federal Vision* (Oxford University Press 2001) 54, 68: "They accept it as an autonomous voluntary act, endlessly renewed on each occasion, of subordination, in the discrete areas governed by Europe to a norm which is the aggregate expression of other wills, other political identities, other political communities. [...] When acceptance and subordination is voluntary, and repeatedly so, it constitutes an act of true liberty and emancipation from collective self-arrogance and constitutional fetishism: a high expression of Constitutional Tolerance".

⁹² Cf. J Bast and AK Thiruvengadam, 'Origins and Pathways of constitutionalism' in P Dann and A Thiruvengadam (eds), *Democratic Constitutionalism in India and the European Union* (Elgar 2021) 75, 102: "It is difficult to predict in which direction the Rule of Law Crisis in the EU will develop; a short-term solution is not in sight. As of now, it has not caused an institutional crisis at the EU level but it demonstrates the

III.4. CONCLUSION: "NORMED" PRIMACY AS A RESULT OF SELECTIVE LISTENING

A procedural consequence is also noteworthy. The Court treats the principle of primacy, on the basis of the questions referred,⁹³ not just as a constitutive element of Union law's supranationalism, a characteristic of its norms, but as a norm that can be referred itself.⁹⁴ Every court in the Member States can thus submit questions on primacy as such. Together with the value-jurisprudence, which already extends into Member States' spheres of competence, this – from the perspective of the German Federal Constitutional Court – leads to a detachment from the constitutional command which legitimizes the application of Union law in the first place.⁹⁵ For it is "ultimately for the Court to clarify the scope of the principle of the primacy of EU law in the light of the relevant provisions of that law; that scope cannot turn on the interpretation of provisions of EU law by a national court which is at odds with that of the Court".⁹⁶ More clearly than before, the ECJ builds a loyalty bridge to the courts of instance, equally bypassing supreme courts that are deformed contrary to the rule of law as well as constitutionally impeccably composed courts that are just dogmatically recalcitrant. In this way, it will surely be avoided that deranged constitutional systems and "constitutional courts operating as an arm of the executive" of the Member States can influence and partake in shaping the content of the values enshrined in art. 2 TEU and, through them, the entire Union legal order.⁹⁷

But can this closing figure for the benefit of European constitutional law claim legitimacy? And how does the German federal government's executive promise to do everything

extent to which the supranational project relies on *constitutional preconditions* at the national level which the EU itself, let alone its Court, cannot ensure." (emphasis added); see also C Möllers, *The European Union as a democratic federation* (Klaus Bittner 2019) 124-128.

⁹³ *Euro Box Promotion and Others* cit. para. 68, 103 and 111.

⁹⁴ *Ibid.* para. 263: "In the light of all the foregoing considerations, the [...] question[s] [...] must be answered to the effect that [...] the principle of primacy of EU law is to be interpreted as [...]"; this is relatively new, for example case C-585/18 *A.K.* ECLI:EU:C:2019:982 para. 171; case C-824/18 *A.B.* ECLI:EU:C:2021:153 para. 150; *Asociația "Forumul Judecătorilor din România"* cit. para. 252; case C-920/19 *Fluctus s.r.o. and Others* ECLI:EU:C:2021:395 para. 60; case C-439/19 *Latvijas Republikas Saeima* ECLI:EU:C:2021:504 para. 137; case C-107/19 *Dopravní podnik hl. m. Prahy* ECLI:EU:C:2021:722 para. 49; case C-360/20 *Ministerul Lucrărilor Publice, Dezvoltării și Administrației* ECLI:EU:C:2021:856 para. 40; previously cf. case C-573/17 *Popławski* ECLI:EU:C:2019:530 para. 109; case C-378/17 *Minister for Justice and Equality* ECLI:EU:C:2018:979 para. 52; case C-409/06 *Winner Wetten GmbH* ECLI:EU:C:2010:503 para. 69.

⁹⁵ BVerfG *Solange II* cit. 375; *Kloppenburger-Beschluß* cit. 244; *Treaty of Maastricht* cit. 188; *Treaty of Lisbon* cit. 399; *Anwendungserweiterung* cit. 98; PSPP cit. 151 para. 234; *Einheitliches Europäisches Patentgericht* cit. para. 115; *Tierarzneimittel* cit. para. 38.

⁹⁶ *Euro Box Promotion and Others* cit. para. 254.

⁹⁷ A v Bogdandy, C Grabenwarter and PM Huber, 'Verfassungsgerichtsbarkeit im europäischen Rechtsraum' in A v Bogdandy, C Grabenwarter and PM Huber (eds), *Ius Publicum Europaeum Vol VII* cit. ch. 126, para. 42-43 (author's translation).

in its power to prevent future *ultra vires* findings by the BVerfG relate to this goal?⁹⁸ Even if it must not to be read as, in the event of another conflict, announcing a *packed court*, cleansed of dogmatic uncomfortable figures, quandaries remain which are attributable to the ECJ's unrestricted primacy claim.

The aim of this section was to make the Grand Chamber's statements visible as the result of a (very) selective listening. The meaning of constitutional reservations from impeccably composed constitutional or high courts, embedded in functioning constitutional states, remains alien to the ECJ. The idea that every power exercising institution needs balancing counterweights is relegated to the background – although it is indisputable that the Union's legal order is not self-sustaining.⁹⁹ Unsuspecting Governments rely heavily on the ECJ, and the Court can be sure of their support. A picture in need of balancing accompaniment by other unimpaired high courts cannot paint itself any clearer.

IV. CONCLUSION: UNION LAW'S IDENTITY BETWEEN DIALOGICAL CRISIS CONTAINMENT AND CONSTITUTIONAL MONOLOGUE

No one can dislike the Court for defending the Union legal order against interventions from judicial bodies under political influence or in the state of institutional dismantling. The Grand Chamber succeeds with ease in this case due to Romania's commitments

⁹⁸ On 2 December 2021, the Commission closed the infringement proceedings against the Federal Republic of Germany because of the *PSPP* ruling of the Federal Constitutional Court, *inter alia*, for the following reason: "Third, the German government, explicitly referring to its duty of loyal cooperation enshrined in the Treaties, commits to use all the means at its disposal to avoid, in the future, a repetition of an 'ultra vires' finding, and take an active role in that regard" cf. European Commission, *December infringements package: key decisions* cit.; the transmission of such a formulation is denied by the Federal Government with reference to Declaration No. 17 and the possibility of *ultra vires* findings by the BVerfG in Bundestags-Drucksache 20/290 of 17 December 2021, 10-11; cf. also Bundestags-Drucksache 20/658 of 14 February 2022, 2.

⁹⁹ On the idea of an institutional counterweight U Haltern, *Europarecht Band II* cit. para. 1042; the fact that constitutional reservations with regard to European integration *can* lead to a restraint in policy-making - M Wendel, 'The Fog of Identity and Judicial Contestation: Preventive and Defensive Constitutional Identity Review in Germany' (2021) EPL 465, 475-476: "In fact, the fog of identity unduly constrains the democratic process with regard to European integration in the basis of a provision that had once been framed in order to prevent a backslide into dictatorship" – is not a phenomenon limited to European policy and would have to be consistently brought into play against any constitutional court's cassation competences. The regularly cited aim of art. 79(3) Basic Law to protect against executive totalitarianism within the country, which is undoubtedly correct in terms of drafting history, also ignores its role in the integration process. The norm was regarded as limiting the influence of Community law early, cf. H Delfs, *Komplementäre Integration* cit. 326-327; according to K Zweigert, 'Der Einfluss des Europäischen Gemeinschaftsrechts auf die Rechtsordnungen der Mitgliedstaaten' (1964) *RebelsZ* 601, 640 fn 134, the restriction of art. 24(1) Basic Law by the eternity clause was the prevailing doctrine, which proves not more than the Basic Law also is a "living constitution" whose norms, like the primary law of the Union or the law of the ECHR, develop contextually. Dynamic-transformative changes are, in other words, not a privilege reserved for inter- and supranational legal orders; cf. S Baer, 'Wie viel Vielfalt garantiert/erträgt der Rechtsstaat?' (2013) *RuP* 90, 91: "Article 79 (3) GG sets substantive limits to transnational norm pluralism" (author's translation).

made upon accession. Criticism of dogmatic constructions such as “value constitutionalism”¹⁰⁰ or reasoning for unrestricted primacy, on the other hand, is part of a European legal scholarship that retains a critical perspective notwithstanding crises and thinks beyond individual cases, to which dogmatic constructions are always limited initially.¹⁰¹

The ECJ’s case law can certainly be read as the judicial development of a constitutional core laid down in art. 2 TEU.¹⁰² Assuming that the multiple rule of law problems will be managed, the more stimulating question is that of the identity of the legal systems involved. The Court recently spoke of the Union’s values as an “integral part of the very identity of the European Union as a common legal order”.¹⁰³ Member state’s constitutional identities and Union law’s “national identity” clause in art. 4(2)(1) TEU have been investigated for years. In ascertaining their difference¹⁰⁴ and elaborating on balancing-mechanisms, one can see attempts of preventively proceduralizing the diverging positions on Union law’s legal source, being present in the background,¹⁰⁵ without being able to conceptually overcome that divergence.¹⁰⁶

¹⁰⁰ F Schorkopf, ‘Value Constitutionalism in the European Union’ cit. 963-964.

¹⁰¹ Cf. K F Gärditz, ‘Glaubwürdigkeitsprobleme im Unionsverfassungsrecht’ (2020) EuZW 505-508; deficits of disciplinary distance to the subject matter are made out in different aspects from J Komárek, ‘Freedom and Power of European Constitutional Scholarship’ (2021) EuConst 422, 426, 429, 440-441; A Albi, ‘Erosion of Constitutional Rights in EU Law: A Call for “Substantive Co-operative Constitutionalism”’ (2015) ICL Journal 151, 152-158; C Möllers, ‘Fragmentierung als Demokratieproblem?’ in C Franzius, FC Mayer and J Neyer (eds), *Strukturfragen der Europäischen Union* (Nomos 2010) 150, 156; F Schorkopf, ‘Selbstverständnis und Perspektiven der Europarechtswissenschaft’ (2020) Jahrbuch des öffentlichen Rechts 527, 536-538; U Haltern, ‘Europarecht und ich’ cit. 440-469; J Masing, ‘Verfassung im internationalen Mehrbenensystem’ cit. para. 119.

¹⁰² A v Bogdandy, *Strukturwandel des öffentlichen Rechts* cit. 158-162, there “European constitutional core” (author’s translation).

¹⁰³ Case C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2022:97 para. 232; case C-157/21 *Poland v Parliament and Council* ECLI:EU:C:2022:98 para. 264; for an analysis of these judgments cf. F Weber, ‘The Pluralism of Values in an Identity-Framed *Verbund*: Federal Belonging in the European Union after the *Rule of Law Conditionality* Judgments’ (2022) ELRev 514-533.

¹⁰⁴ PM Huber and A Paulus, ‘Cooperation of Constitutional Courts in Europe’ in M Andenas and D Fairgrieve (eds), *Courts and Comparative Law* (Oxford University Press 2015) 281, 287: “The task of guarding the integrity of the Basic Law belongs to the Federal Constitutional Court and is not the same as the obligation of the Court of Justice of the European Union under the first sentence of Art. 4 sec. 2 of the TEU to give regard to the national identity, which is understood more broadly by the Member States”; A Paulus and JH Hinselmann, ‘International Integration and its Counter-Limits’ in C A Bradley (ed.), *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford University Press 2019) 411, 428; C Grabenwarter and others, ‘The Role of the Constitutional Courts in the European Judicial Network’ (2021) EPL 43, 51-58.

¹⁰⁵ See A Schnettger, ‘Article 4(2) TEU as a Vehicle for National Constitutional Identity in the Shred European Legal System’ in C Callies and G van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2020) 348.

¹⁰⁶ On art. 4(2)(1) TEU PM Huber, ‘Verfassungsgerichtsbarkeit und Politik im europäischen Rechtsraum’ in A v Bogdandy, C Grabenwarter and PM Huber (eds), *Ius Publicum Europaeum Vol VII* cit. ch. 123 para. 80: “Legal ground reference to national constitutional law” (author’s translation); conflict resolution via art. 4(2) TEU did, so far, institutionally run towards the ECJ, see C Walter and M Vordermayer, ‘Verfassungsidentität als Instrument richterlicher Selbstbeschränkung in transnationalen Integrationsprozessen’ (2015) Jahrbuch des öffentlichen

Studies on constitutional identities share a starting point with social science studies. Identity may be formed while being exposed to and individually select external elements from ones social environment, but always from within oneself. Interference by third parties in identity building-processes is excluded. It is a matter of subject formation and self-reflection which is to be distinguished from communicative acts between different subjects.¹⁰⁷

This puts the ECJ's selective argumentation in a new light. For the Court, the Union legal order finds its constitutional identity in unrestricted primacy, formed with isolated set pieces taken from the integration process (above, section III.1-3). Primacy is the inaccessible element that categorically excludes co-formative voices of third parties. This realization, fuelled by the Grand Chamber's decision, is significant for two reasons. First, the rigidity of the Court's jurisprudence on this point can be fitted into an analytical framework that is already known for Member States. It is not a singularity in the *Verbund* between the Union and its member states.

Secondly and more important, an insight fed by the observation of member state concepts on constitutional identity becomes fruitful: the distinction between content determination and the absoluteness of its protection. Content determination is, as mentioned,¹⁰⁸ a closed process. However, the scope of protection is by no means absolute in all legal systems and can only be overcome through a new constitution, as in the case of the German Federal Constitutional Court's concept based on the eternity-clause in art. 79(3) Basic Law.¹⁰⁹ Realizing this fact leads to the insight that there are no European identity-assertions which are more similar in their absoluteness than those of the ECJ and the German Federal Constitutional Court. The difference lies in the fact that the channel of communication to the ECJ is open, if only to be able to avoid violations through corrections of its jurisprudence, whereas there is no reverse communication channel.¹¹⁰ The Court is left with only one possibility, the visible recognition of identity-relevant objections within its own case by case-

Rechts 129, 132 ff.; A Schnettger, 'Article 4(2) TEU as a Vehicle for National Constitutional Identity in the Shred European Legal System' cit. 9, 30, 33-34; M Claes and B de Witte, 'Rollen der nationalen Verfassungsgerichtsbarkeit im europäischen Rechtsraum' cit. para. 82-84; therefore proposing a "reverse referral procedure" *de lege ferenda* (art. 267(a) TFEU) PM Huber, 'Verfassungsgerichtsbarkeit im europäischen Rechtsraum' cit. para. 81.

¹⁰⁷ G van der Schyff, 'Member States of the European Union, Constitutions, and Identity' in C Calliess and G van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2020) 305, 328: "developing identity is by the very nature of the topic something 'personal'"; A Schnettger, 'Article 4(2) TEU as a Vehicle for National Constitutional Identity in the Shred European Legal System' cit. 9, 10-11, 14.

¹⁰⁸ *Euro Box Promotion and Others* cit. para. 254.

¹⁰⁹ Comparative G van der Schyff, 'Member States of the European Union, Constitutions, and Identity' cit. 305, 342-345; critical C Walter, 'Wohin steuern die Ultra-vires- und die Identitätskontrolle? Eine Zwischenbilanz anhand der Entscheidungen des Bundesverfassungsgerichts im PSP-Verfahren' (2021) 211, 216-217.

¹¹⁰ As far as can be seen, for the first time in BVerfG decision of 14 January 2014 2 BvR 2728/13 *OMT/Preliminary Reference* 384-385 para. 27; for a classification of the concept of constitutional identity in Member State constitutional law and the principle of primacy of Union law as mutual "primacy claims" cf. C Walter, 'Wohin steuern die Ultra-vires- und die Identitätskontrolle?' cit. 211, 219, author's translation; cf. also F Weber, 'The Pluralism of Values in an identity-framed *Verbund*' cit. 525-526.

reasoning.¹¹¹ Quite a few voices see deficits here that are detrimental to the concern of equal cooperation in the European constitutional court network.¹¹²

The question thus is: when does the ECJ leave the phase of sealed identity-formation and enters into the phase of genuine identity negotiation? Identities that do not change don't exist. Dogmatically, the consideration of important *particular* identity objections is already possible, via art. 4(2)(1) TEU. Their recognition must not be understood as a breach of the basically accepted¹¹³ primacy principle, but as a built in-exception into Union law's claim to unity, in other words an exception *in Union law itself*.¹¹⁴ In engaging this possibility lies the key for reducing reservations from constitutional court that are adherents in the struggle to preserve the rule of law in Europe. The ECJ cannot be exempted from the thesis which says that there can be no absolute "guardians of the grail of constitutional identity" in integration communities.¹¹⁵ None other than Walter Hallstein early on advocated for the establishment of stable and durable communication channels between the courts.¹¹⁶

¹¹¹ See now *RS* cit. para. 69-70; PM Huber, 'Verfassungsgerichtsbarkeit und Politik im europäischen Rechtsraum' cit. para. 81, refers to an already possible involvement of national supreme and constitutional courts through the Court's Rules of Procedure; cf. also *A v Bogdandy and S Schill*, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' (2011) *CMLRev* 1417, 1449.

¹¹² A Schnettger, 'Article 4(2) TEU as a Vehicle for National Constitutional Identity in the Shred European Legal System' cit. 35-37, especially 35: "A purely rhetorical reference to Article 4(2) TEU is not enough, considering the importance that many Member States attach to the protection of their constitutional identities. If the ECJ does not forward convincing and verifiable reasons for its statements, its judgments will likely lose persuasiveness and give rise to national presumptions favouring the protection of constitutional identity over the primacy of EU law"; M Guţan, 'The Infra-Constitutionality of European Law in Romania and the Challenges of the Romanian Constitutional Culture' 161; M Claes and B de Witte, 'Rollen der nationalen Verfassungsgerichtsbarkeit im europäischen Rechtsraum' cit. para. 51: "The ECJ must show – more than has been the case so far – that it understands the arguments of the constitutional courts and seriously addresses their concerns" (author's translation); PM Huber, 'Verfassungsgerichtsbarkeit und Politik im europäischen Rechtsraum' cit. paras 78-81; J Larik and R Bruggemann, 'The Elusive Contours of Constitutional Identity: Taricco as a Missed Opportunity' (2020) *Utrecht Journal of International and European Law* 20, 24-25, 30-31.

¹¹³ BVerfG *PSPP* cit. para. 111: "If any Member State could readily invoke the authority to decide, through its own courts, on the validity of EU acts, this could undermine the precedence of application accorded to EU law and jeopardise its uniform application. Yet if the Member States were to completely refrain from conducting any kind of *ultra vires* review, they would grant EU organs exclusive authority over the Treaties even in cases where the EU adopts a legal interpretation that would essentially amount to a treaty amendment or an expansion of its competences"; U Haltern, 'Revolutions, Real Contradictions, and the Method of Resolving them' cit. 210-211, 215-219 and 223-225.

¹¹⁴ For such an understanding, which excludes from the outset a case of collision leading to precedence of application, A Schnettger, 'Article 4(2) TEU as a Vehicle for National Constitutional Identity in the Shred European Legal System' 32-34.

¹¹⁵ Cf. (only) with regard to the Member States, C Walter and M Vordermayer, 'Verfassungsidentität als Instrument richterlicher Selbstbeschränkung in transnationalen Integrationsprozessen' 165-166 (author's translation).

¹¹⁶ Following art. 82(4) *Gesetz über das Bundesverfassungsgericht*, as a constant duty to include, even if only with consultative effect W Hallstein, 'Europapolitik durch Rechtsprechung' in H Sauer mann and E J Mestmäcker (eds), *Wirtschaftsordnung und Staatsverfassung, Festschrift für Franz Böhm zum 80. Geburtstag* (Mohr Siebeck 1975) 205, 223-225.

