1 The Constitutional Boundaries of European Fiscal Federalism

This chapter introduces and establishes the constitutional boundaries of European fiscal federalism which are the object of this book:

> [1.3.1] The first constitutional boundary of European fiscal federalism studied in this book is Member State fiscal sovereignty. Fiscal sovereignty, broadly defined, refers to the exclusive competences of national legislative organs for economic and fiscal policy as they are charged with those competences by the *pouvoir constituent*. Economic and fiscal policy competences comprise the 'core of parliamentary rights in democracy' and a material limit of 'constitutional identity' in Europe's twenty-eight constitutional democracies.[1] According to European constitutional identity and *Kompetenz-Kompetenz* jurisprudence, a deprivation of fiscal sovereignty would require Member States to repudiate encroaching EU law (refusing to apply the offending EU instrument) or withdraw from the Union altogether.[2] This chapter tests the veracity of this constraint as a constitutional boundary of EU fiscal federalism and extracts three tests for evaluating whether a proposed legal model infringes Member State fiscal sovereignty. These are: no unlawful *restrictions* on fiscal sovereignty;[3] no unlawful *conferral* or delegations of fiscal sovereignty;[4] and no structural *impairments* of fiscal

[1] *Euro Rescue Package (Germany)* [101], [104].
[2] See *Lisbon (Germany)* [240]; *Gauweiler Decision (Germany)* [174], [205]–[211]; *Weiss Decision (Germany)* [101], [104], [115]–[119], [163], [227], [234] and cases cited above, in Methods and Introduction, n 37.
[3] See Section 1.3.1.1, n 482 and Section 1.3.1.2.
[4] See Section 1.3.1.1, n 483 and Section 1.3.1.3.

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sovereignty through financial dispositions of structural significance to budgetary autonomy.[5]

[1.3.2] The second constitutional boundary is comprised of the fundamental guiding principles of price stability, sound public finances and a sustainable balance of payments enshrined in the mandate for EMU under Article 119(3) TFEU. It is these principles which form the basis of Member State (in particular, German) acts of accession, and it is these principles to which the entire legal architecture of EMU under Articles 119–127 TFEU is attuned.

However, before the constitutional boundaries which bear upon the field of fiscal federalism can be established, it must first be established that there are, indeed, constitutional boundaries which constrain the expansion of the EU legal order as a whole. This is so because, as a matter of pure EU law, the boundaries of the EU legal order are limitless in their potential. The scope of EU law is set out by the Treaties, and there are no substantive constraints on the amendment of those Treaties.[6] From the internal perspective of the EU legal order, any model of federalism is compatible with EU law *de lege ferenda* upon the flourish of twenty-seven (formerly twenty-eight) pens.

Then, once a competence has been conferred on the Union, the ECJ has, since *Costa* v. *ENEL* and *Internationale Handelsgesellschaft*, declared that EU law has absolute primacy over all constitutional laws and structures of the Member States.[7] National law must be interpreted in conformity with EU law,[8] and, where they are in conflict, EU law must prevail.[9] Secondary instruments such as regulations,[10] directives[11] or decisions[12] will prevail over national constitutional or statute law, even if the national law is later in time.[13] The CJEU is the sole arbiter of the legality

[5] See Section 1.3.1.1, n 484 and Section 1.3.1.4.

[6] Outside of the amending procedures, the CJEU has declined to review the substantive legality of Treaty amendments. See Case 43/75 *Defrenne* v. *Sabena* [1976] ECR 455 [58]; Case C-253/94 P *Roujansky* v. *Council* [1995] ECR 1-7; EU:C:1995:4, [11].

[7] Case 6/64 *Costa* v. *Enel* [1964] ECR 585; EU:C:1964:66; Case 11/70 *Internationale Handelsgesellschaft MbH* [1970] ECR 1125; EU:C:1970:114, 1135.

[8] Case 14/83 *Von Colson* v. *Land Nordrhein-Westfalen* [1984] ECR 1891; EU:C:1984:153; Case C-106/89 *Marleasing SA* [1990] ECR I-4135; EU:C:1990:395.

[9] Case 106/77 *Simmenthal SpA* [1978] ECR 629; EU:C:1978:49.

[10] Case 84/71 *Marimex* v. *Ministero delle Finanze* [1972] ECR 89; EU:C:1972:14.

[11] Case 158/80 *Rewe-Handelsgesellschaft Nord* v. *Kiel* [1981] ECR 1805; EU:C:1981:163.

[12] Case 130/78 *Salumificio de Cornuda* v. *Amministrazione delle Finanze dello Stato* [1979] ECR 867; EU:C:1979:60.

[13] Joined Cases C-46/93, C-48/93 *Brasserie du Pêcheur SA* v. *Germany and R* v. *SST*, *ex parte Factortame* [1996] ECR I-1029; EU:C:1996:79, [24]–[36].

of all EU measures, and it reserves for itself final authority to deliver binding rulings on the compatibility of EU law with fundamental rights and principles.[14] As Claes so puts it, EU law requires national courts 'to refrain from enforcing the constitutional provisions that they have a sword duty to uphold and protect, in favour of any act of Community law, whatever its rank or content'.[15]

Constituent within this supremacy claim is what is referred to in this study as the claim of 'absolute' supremacy: Not only does the CJEU determine the status and effect of EU law *within* its established competences (ordinary supremacy), but the CJEU is the final arbiter of the boundaries between Member State and EU competence (absolute supremacy).[16]

The question for the architects of EU fiscal federalism is whether this provides a true account of European constitutional law, or whether national legal orders are indeed capable of imposing constitutional constraints upon the selection of fiscal federalism models for the EU. In pursuit of that question, this chapter evaluates the competing claims of EU and Member State constitutionalism against three approaches to the validity of law in European legal theory:[17] Pure (Kelsenian) constitutional theory;[18] normative constitutional pluralism;[19] and (Hartian) legal positivism.[20]

[14] Joined Cases C-188 & 189/10 *Melki and Abdeli* [2010] ECR I-05667; EU:C:2010:206, [54]. Case C-399/11 *Melloni* v. *Ministerio Fiscal* EU:C:2013:107, [58]–[59].

[15] Monica Claes, *The National Courts' Mandate in the European Constitution* (Hart, 2006), 387.

[16] See, distinguishing between 'ordinary' and 'absolute' supremacy: *European Arrest Warrant (Czech Republic)* Pl ÚS 66/04; [2007] 3 CMLR 24 (*Ústavní Soud*) [53] 'refus[ing] to recognise the ECJ doctrine insofar as it claims absolute primacy of EC law'; *Lisbon (Germany)* [306]–[308], '[Germany] does not recognise an absolute primary of application of Union law'.

[17] On the use of legal theory to explain certain outcomes, see: DJ Galligan, 'Legal Theory and Empirical Research' in Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010), 981–982, 984–993.

[18] Hans Kelsen, *Pure Theory of Law* (2nd ed., Lawbook Exchange Ltd., 2002), 1–58, 70–101. For the application of pure law in comparative theory: Mark Tushnet, 'Comparative Constitutional Law' in Mathias Reimann and Reinhard Zimmerman (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2008), 1244–1246.

[19] This is necessary because the same normative claim may be valid in distinct systems despite different pure constitutional criteria for validity. See Tushnet, 'Comparative Constitutional Law', 1230; Neil MacCormick, 'Beyond the Sovereign State' (1993) 56 MLR 1, 8–9; Margaret Davies, 'Legal Pluralism' in Cane and Kritzer (eds), *Empirical Legal Research*, 805–825; and sources cited below, Section 1.1.3 in particular n 71.

[20] See HLA Hart, *The Concept of Law* (2 ed., Oxford University Press, 1994), 92–107 on 'rules of recognition', 'rules of change' and 'rules of adjudication'. An empirical approach to legal positivism seeks to determined which laws will apply, and when. See: Tushnet,

Section 1.1 begins by familiarizing the reader with European constitutional theory and the competing claims of Member State and EU constitutionalism. What is normatively at stake in this dispute is the locus of sovereignty and therefore the question of *Kompetenz-Kompetenz* – that is, who is the ultimate arbiter of which competences have and have not been conferred on the Union. The analysis seeks to inform the architects of fiscal federalism on where they should look for an authoritative description of what is and is not safe constitutional ground when selecting from models known to fiscal federalism theory. Section 1.1 sets out the background explaining why this book finds it necessary to look to both EU and Member State law in doing so.

Section 1.2 shows that national constitutional orders profess to impose two types of limitation on EU law: First, Member State courts profess that they have the jurisdiction to assert, through treaty ratification and *ultra vires* review, what powers they have and have not conferred on the Union – the so-called *Kompetenz-Kompetenz*. Second, Member State courts assert that their own state 'constitutional identities' determine the absolute limits of conferral and application of Union law – the so-called 'constitutional identity' review jurisdiction.[21] Section 1.2 evaluates the veracity of these claims as a matter of pure constitutional law, as normative legal principle, and as a positivist statement of law. It finds that, by all three approaches, these jurisdictions provide a valid description of the limits of the EU legal order for the purposes of this study. Of the twenty-eight Member States surveyed in this book, all assert *Kompetenz-Kompetenz* and twenty-four have developed a body of jurisprudence surrounding 'constitutional identity' – a set of constitutive principles so integral to the constitutive nature of the state that they are beyond the reach of the national (and European) legislator.

'Comparative Constitutional law', 1225, 1230–1234; David Law, 'Constitutions' in Cane and Kritzer (eds), *Empirical Legal Research*, 388. In the context of legal pluralism, see sources cited below, Section 1.1.3, n 76.

[21] See also Hinarejos, 'Constitutional Limits', 263; Peter M Huber, 'The Rescue of the Euro and its Constitutionality' in Wolf-Georg Ringe and Peter M Huber (eds), *Legal Challenges in the Global Financial Crisis: Bail-outs, the Euro and Regulation* (Hart 2014), 11–14; Chiti and Pedro, 'Constitutional Implications', 698; Tobias Lock, 'Why the European Union Is Not a State' (2010) 5 EuConst 407; Mark Dawson and Floris de Witte, 'Constitutional Balance in the EU after the Euro-Crisis' (2013) 76 MLR 817; Ingolf Pernice, 'Domestic Courts, Constitutional Constraints and European Democracy: What Solution for the Crisis?' in Maurice Adams, Federico Fabbrini and Pierre Larouche (eds), *The Constitutionalization of European Budgetary Constraints* (Hart 2014), 297–318; Alina Kaczorowska, *European Union Law* (3rd ed., Routledge, 2013), 239.

Section 1.3 conducts the main task of this chapter: To identify those constitutional boundaries which bear upon the field of fiscal federalism. It sets out those principles and tests which constitutional courts (and this book) will apply to novel legal apparatus in the field of fiscal federalism.

1.1 An Introduction to European Constitutionalism

1.1.1 European Monist Federalism and the Principle of Supremacy

The European Union is founded on the principle of democracy.[22] An essential precept common to the legal heritage of the Member States is that the bearer of sovereignty is the people.[23] Under European 'social contract' theories of constitutionalism, the locus of sovereignty is indivisible.[24] At the base of every legal order is a historically first constitution – a revolutionary act – which is enacted by the *pouvoir constituent originaire* in a manner different from that prescribed by any prior constitution. This is Kelsen's 'basic norm' (or *Grundnorm*) which forms the basis for the legal system.[25] Under European constitutional theory a 'Union of States' must, therefore, either be a 'confederation' (under which participants retain their character as sovereign states) or a sovereign 'federal state' (under which powers are devolved by the central government).[26] In a conflict of norms, only one institution can have the ultimate claim to empowerment by the *pouvoir constituent*.[27] Schütze explains:

> Within this European tradition, 'federalism' came thus to refer to the constitutional devolution of power within a sovereign *nation.* A federation was a Federal *State*.[28]

Coloured by this tradition, European constitutionalism from the 1960s treated the residual existence of Member State sovereignty as

[22] Art. 10 TEU.
[23] See FH Hinsely, *Sovereignty* (2nd ed., Cambridge University Press, 1986), 37–41 on the *imperium populi Romani*. Seventeenth-century natural theory then led to 'social contract' theories of popular sovereignty which rejected the Roman distinction between the origins of sovereignty (in the people) and its exercise (by the state): Jean-Jacques Rousseau, *The Social Contract* (Penguin Classics, 1968); John Locke, *Two Treatises on Civil Government* (Routledge, 1884).
[24] Schütze, *EU Law* (2015), 50.
[25] Kelsen, *Pure Theory of Law*.
[26] Schütze, *EU Law* (2015), 52.
[27] Theodor Schilling, 'The Autonomy of the Community Legal Order: An Analysis of Possible Foundations' (1996) 37 Harv Int'l LJ 389', 391–393.
[28] Schütze, *EU Law* (2015), 50.

incompatible with EU federalism. The object of European law, namely, 'to substitute a common and uniform European law for the divergences and conflicts of national bodies of legislation',[29] required early European jurists to free it from the obvious criticism that there could be no such thing as an autonomous legal order superior to the Member States.[30] As Schütze so puts it, '[i]t became the task of European scholarship to make the "Federal State" look like its unitary sisters [. . .] through feats of legal "reasoning"'.[31]

In *Van Gend en Loos*, and *Costa* v. *ENEL*, the ECJ famously stated that through 'the establishment of institutions *endowed with sovereign rights*' the Community constituted an 'autonomous legal order' stemming from 'an independent source of law'.[32] By asserting that ratification of the Treaties was a constituent act, a historically-first basic norm for a 'constitutional charter based on the rule of law',[33] the ECJ fashioned a constitutional basis for a 'federal-type structure' in Europe.[34] From this 'federal type' constitution, the ECJ asserted itself to be the final arbiter of what powers have and have not been conferred on the Union.[35]

Under this 'absolute' conception of supremacy, Member State *Kompetenz-Kompetenz* has been criticized as an 'anachronistic idea' invoked under the 'guise of protecting democracy'.[36] Judge Schiemann, for example, has reduced the defence of Member State sovereignty to 'much the same instinctive defensive reactions as asking questions about a man's virility'.[37]According to scholars such as Habermas and Pernice, 'National Courts are not authorised to monitor

[29] Pierre Pescatore, 'International Law and Community Law – A Comparative Analysis' (1970) 7 CMLR 167, 170.

[30] Matthias Kumm, 'Who is the Final Arbiter of Constitutionality in Europe?' (1999) 36 CMLR 351, 355.

[31] Schütze, *EU Law* (2015), 51.

[32] Case 26/62 *Van Gend en Loos* [1963] ECR 1; EU:C:1963:1, 12 (emphasis added); *Costa* v. *ENEL*, 594.

[33] Case 294/83 *Parti ecologiste, 'Les Verts'* v. *European Parliament* [1986] ECR 1357; EU: C:1986:166, [23]; Case 1/91 *Opinion on the European Free Trade Agreement (EFTA)* [1991] I-06079; EU:C:1991:490, [21].

[34] Eric Stein, 'Lawyers, Judges and the Making of a Transnational Constitution' (1981) 75 Am J Comp L 1. Koen Lenaerts, 'The Basic Constitutional Charter of a Community Based on the Rule of Law' in Loïc Azoulay Miguel Poiares Maduro (ed.), *The Past and Future of EU Law* (Hart, 2010), 295.

[35] Case 314/85 *Foto-Frost* v. *Hauptzollamt Lübeck-Ost* [1987] ECR 4199; EU:C:1987:452, [15].

[36] Jo Murkens, '"We Want Our Identity Back" – The Review of National Sovereignty in the General Federal Constitutional Court's Decision on the Lisbon Treaty' (2010) 10 PL 530, 542.

[37] Konrad Schiemann, 'Europe and the Loss of Sovereignty' (2007) 56 Int'l & Comp LQ 475, 476.

the limits of the transfer of national sovereign rights to the European level'.[38] This is so 'even in the case of a conflict with the very substance of fundamental rights' and even if EU law is 'found to violate such fundamental rights or to be *ultra vires*'.[39]

There is no explicit Treaty basis for this doctrine. It is based on two doctrinal justifications in ECJ jurisprudence – one pure constitutional and one normative.

The first (pure constitutional) justification holds, in essence, that the conferral of powers by the '*peoples* of Europe' (Articles 1, 3(1) TEU) adds up to much the same thing as a single '*people* of Europe', and the supremacy of EU law now derives from an autonomous source of legitimation that supersedes the national impulse to clutch back disputed territory. This can be seen in the 'sovereignty building' cases since the 1960s, wherein the ECJ justified supremacy by a direct connection between the peoples and the Union.[40] The European Parliament now provides a direct connection between a constituent people and EU law, not intermediated by national authorities.[41] The supremacy of EU law is founded on 'a common decision of the *peoples* of the Member States' that cannot be questioned by national courts.[42]

The second justification for supremacy is a normative one: the effective and uniform application of EU law.[43] This is most forcefully expressed when it is couched in terms of the rule of law,[44] legal certainty,[45] or the coherence of the EU legal order.[46] On this teleology, a failure to secure the uniformity and effectiveness of any EU law is an existential threat to the entire EU legal order as a whole.[47] This concern

[38] Jürgen Habermas, *The Crisis of the European Union: A Response* (Polity Press, 2012), 25.
[39] Ingolf Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?' (1999) 36 CMLR 703, 719.
[40] *Costa* v. *ENEL*, 593; *Van Gend en Loos*, 12; Opinion C-2/13 *Opinion on Accession of the EU to the ECHR* EU:C:2014:2454, [157].
[41] Pescatore, 'Comparative Analysis', 170; Armin von Bogdandy and Jurgen Bast, 'The European Union's Vertical Order of Competences: The Current Law and Proposals for its Reform' (2002) 39 CMLR 227, 237.
[42] Pernice, 'Multilevel Constitutionalism', 719 (emphasis added).
[43] *Simmenthal* [24]; Case 34/73 *Variola* [1973] ECR 992 [15].
[44] *Costa* v. *ENEL*, 594.
[45] *Foto-Frost* [15]–[19].
[46] Case 473/93 *Commission* v. *Luxembourg* [1996] ECR I-3207 [38].
[47] Pescatore, 'Comparative Analysis', 167, 181; Koen Lenaerts, 'Federalism: Essential Concepts in Evolution – the Case of the European Union' (1997) 21 Fordham Int'l Law J 746, 777; R Daniel Kelemen, 'The Uses and Abuses of Constitutional Pluralism' (2019) 21 CYELS 59, 62–63.

has animated ECJ jurisprudence since *Internationale Handelsgesellschaft*, where it held:

> [T]he law stemming from the Treaty, an independent source of law, cannot [be] overridden by rules of national law, however framed [. . .] without the legal basis of the Community itself being called into question.[48]

1.1.2 The Federation of Sovereign States

In proclaiming autonomy and supremacy over all constitutional law, Europe's judges enunciated a form of 'federalism'. However, the inability to reconcile this with European constitutional theory meant, as Schütze writes, 'In the absence of a federal theory beyond the State, European thought invented a new word – supranationalism – and proudly announced the European Union to be *sui generis*.'[49]

Yet while this '*sui generis*' claim pretended to reconcile two separate, sovereign constitutional orders, the hierarchy it enunciated was, in fact, a unitary monist legal order.[50] This was so because the ECJ 'arrogated to itself the ultimate authority to draw the line between Community law and national law'.[51] By denying the *peoples* of the Member States the final say over which powers they had or had not conferred on the Union, it denied the sovereignty of those peoples and in fact subjugated them under a unitary legal order.[52] As the Italian *Corte constituzionale* noted, the ECJ 'certainly considers that the source of legal norms of the Community and that of each Member State are founded on a single system'.[53]

This led to irreconcilable tensions with persisting Member State sovereignty at the boundaries of EU law.

First, the declaration that the EU derived from its own autonomous *Grundnorm* didn't simply deprive the Member States of their own. EU constitutionalism had not emerged from an act of a European *people*, but from the acts of public authorities – 'governments, legislatures, courts(!)'.[54] Applying basic principles of constitutional theory, scholars found that it

[48] *Internationale Handelsgesellschaft* [3]; *Costa* v. *ENEL*, 594.
[49] Schütze, *EU Law* (2015), 44. E.g. *EU Accession to the ECHR* [157].
[50] Kumm, 'Final Arbiter', 353–362; Pernice, 'Multilevel Constitutionalism', 712; Henry Schermers and Denis Waelbroeck, *Judicial Protection in the European Union* (6th ed., Kluwer Law International 2001), 160–164.
[51] Stein, 'Transnational Constitution', 1.
[52] Neil MacCormick, 'The Maastricht-Urteil: Sovereignty Now' (1995) 1 ELJ 259, 263–264.
[53] *Granital SpA* v. *Amministrazione Finanziaria dello Stato (Italy)* Judgment 170/1984; [1984] I Giur It 1521, in Oppenheimer, *The Cases* (Vol 1) 643, 651.
[54] JHH Weiler, 'Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision' (1995) 1 ELJ 219, 220.

was 'difficult – if not impossible to accept that "the founding treaties as well as each amendment agreed upon by the governments" appear as the *direct expression* of the corresponding will of the peoples of the Union'.[55] National constitutional courts agreed.[56] The EU was not a sovereign federal state,[57] but a federation of sovereign states (*Staatenverbund*) to which sovereign powers are delegated.[58] The German,[59] French,[60] Italian[61] and Spanish[62] constitutional courts all denied the autonomous 'sovereignty'

[55] Schütze, *EU Law* (2015), 56.

[56] *Treaty Establishing a Constitutional Treaty (France)* Decision 2004-505 DC; ECLI:FR:CC:2004:2004505DC, [9]–[11]: the EU 'retains the nature of an international treaty' and 'has no effect upon the existence of the French Constitution and the place of the latter at the summit of the domestic order'. *Lisbon (Latvia)* [16.3]: 'exercise of power by the Union appears not as the will of a single sovereign'. *Accession Treaty (Poland)* [6], 'It is insufficiently justified to assert that [EU institutions] are "supranational oganisations" – a category that the Polish Constitution, referring solely to an "international organisation," fails to envisage.' See also *Hausgaard (Denmark)* [32]; *Carlsen (Denmark)* [35]–[36]; *Ajos (Denmark)*, 442 excerpted below, Section 1.2.1.3, n 232; *Constitutional Treaty (Spain)* [3]–[4]; *Frontini (Italy)* [7]; *Taricco II Reference (Italy)* [2]; *ERDF (Portugal)*, 687–688; *European School* v. *Hermans-Jacobs and Heuvelmans-van Iersel (Belgium)*, Case 12/94 (*Cour d'arbitrage*), in Oppenheimer, *The Cases* (Vol II) 155, [B.4] excerpted below, Section 1.2.1.1, nn 98, 118 and above, in Methods and Introduction, n 25; *Thoburn* v. *Sunderland (UK)* [69] excerpted below, n 300; *Opinion on the Constitutional Treaty (Finland)*, PeVL 36/2006 vp (*Perustuslakivaliokunnan*); *Amending Article 125 (Lithuania)*, III [6.2.3]; *Lisbon I (Czech Republic)* [132], [139]; *Lisbon II (Czech Republic)* Pl ÚS 29/09 (3 November 2009) (*Ústavní Soud*) [136], [150], [170]; *Lisbon (Hungary)* [I]V.2(3); *Article E(2) of the Fundamental Law (Hungary)* Decision 22/2016 (XII 5) AB (*Magyarország Alkotmánybírósága*) English version at: www.mkab.hu accessed 3 June 2020, [32]; *ESM (Estonia)* [223]; *Auxiliary Activities in the Public Sector (Croatia)* [45] excerpted below, at n 167; *Data Retention (Slovakia)*, PL ÚS 4/09 (26 January 2011) (*Ústavný Súd*) [69] excerpted below, n 232; *Decision 80/2014 (Romania)* [450]–[456] excerpted below, n 319; *Decision 3/2004 EU Amendments (Bulgaria)*, [V.1] excerpted below, n 57; *Slovene National Holding Company Act (SNHCA) (Slovenia)* U-II-1/12, U-II-2/12; ECLI:SI:USRS:2012:UII112, (*Ustavno Sodišče*) [22]; *Crotty (Ireland)*, 758–759, 767 excerpted below, Section 1.2.1.1, nn 140–142; *Karella (Greece)* [10]; *Decision 2011/199/EU (Poland)* [6.3.3] excerpted below, Section 1.2.1, n 83.

[57] *Weiss Decision (Germany)* [111]: 'the EU has not evolved into a federal state'. *Constitutional Treaty (Slovakia)*, 35–38: the EU is not a 'state union'. *Lisbon I (Czech Republic)* [132]: 'if the Union does not have the competence-competence, it cannot be considered either a kind of federal state or special entity'. *Decision 3/2004 EU Amendments (Bulgaria)*, SG No 61 of 13 July 2004 (Конституционен съд) V.1. 'The European Union is neither a federation nor any other form of government.'

[58] *Lisbon (Germany)* [205]; *Hausgaard* v. *Prime Minister (Denmark)* (Case 199/2012); [2014] 3 CMLR 16 (*Højesteret*) [32] the EU is 'an organisation consisting of independent, mutually obliged States functioning based on powers delegated by each Member State'.

[59] *Brunner (Germany)* [43]–[46], [60].

[60] *Elections to the European Parliament (France)* Decision 76–71 [1978] 74 ILR 527; ECLI:FR:CC:1976:7671DC, [2]–[4].

[61] *Frontini* v. *Ministero delle Finanze (Italy)*, Judgment 183/1973; [1974] 2 CMLR 372.

[62] *Re Electoral Law (Spain)* DTC 28/1991; ECLI:ES:TC:1991:28, [4].

claim of the European Parliament in their earliest encounters with it. The EU (including its parliament) was not founded by a *pouvoir constituent originaire*, but bound within competences set by international treaty.[63]

Second, the institutions of the EU were not wholly supranational,[64] not wholly unknown to international law as claimed,[65] and those aspects which were supranational were not wholly democratic. The sole institution intended to embody a European people, the European Parliament, is bestowed with the weakest influence on the programme of legislation.[66] How could it be accepted that each EU norm is the direct expression of a European people, and yet, 'the Community legislator does not receive any direct electoral mandate'?[67]

Third, given the constitutional basis of conferral, 'nearly all of the appellate courts balk at the claim of the ECJ that the European Treaties are the constitutions of an autonomous legal order'.[68] As will be shown, all twenty-eight Member State courts have come to assert that EU law takes effect not as an autonomous constitutionalism, but as a normative principle of national constitutional law. The *Brunner (Germany)* decision is perhaps the best known in that regard:

> Germany is one of the 'Masters of the Treaties', which have established their adherence to the Union Treaty [. . .] but could also ultimately revoke that adherence by a contrary act. The validity and application of European law in Germany depends on the application-of-law instruction of the Accession Act.[69]

This assertion deprived autonomous European unitarism of its descriptive power because, as Maduro admits, 'a different perspective is taken by national legal orders and national constitutions [requiring] a conception of the law which is no longer dependent upon a hierarchical construction'.[70]

[63] Maria Cahill, 'Subverting Sovereignty's Voluntarism: Pluralism and Subsidiarity in Cahoots' in Gareth Davies and Matej Avbelj (eds), *Research Handbook on Legal Pluralism and EU Law* (Elgar, 2018), 22, 28.

[64] Council and Commissioners hold their positions 'only by reference to the place they hold according to state-systems of law'. MacCormick, 'Maastricht-Urteil', 264.

[65] 'Law-making' treaties are not unknown to international law, and supremacy is a well-established principle of international law. Weiler, 'Demos', 220.

[66] Dieter Grimm, 'Does Europe Need a Constitution?' (1995) 1 ELJ 282, 294–296.

[67] Koen Lenaerts, 'Constitutionalism and the Many Faces of Federalism' (1990) 38 Am J Comp L 205, 231.

[68] Schilling, 'Autonomy', 397. See further sources below, nn 244–247.

[69] *Brunner (Germany)* [55].

[70] Miguel Poiares Maduro, 'Europe and the Constitution: What If This Is as Good as It Gets?' in Weiler and Wind (eds), *European Constitutionalism*, 95. See also: Weiler, '*Sonderweg*', 13.

1.1.3 Constitutional Pluralism

Constitutional pluralism may now be said to have several strands, but the central tenet is that it departs from the Kelsenian emphasis on the locus of sovereignty in exchange for a normative conception of overlapping and interacting heterarchical (not hierarchical) claims.[71] Constitutional pluralism accepts that neither authority – EU or Member State courts – can abandon the legal order they have been charged to protect.[72] The benefit is that, in allowing theorists to 'escape from the idea that all law must originate in a single power source',[73] it 'suggests that conflicts between the [ECJ] and national constitutional courts should be resolved through mutual accommodation rather than through uncompromising assertions of primacy'.[74]

While not all can agree that pluralism justifies the competing claims of European and national constitutionalism, there are few who disagree that it describes them.[75] The virtue of constitutional pluralism lies in its ability to describe what courts *will* do, rather than what they should do as a matter of doctrinal principle.

In that respect, constitutional pluralism contains an inextricable (but oft-unacknowledged) thread of (Hartian) legal positivism.[76] This is so because not all constitutional disputes will be resolved through normative dialogue and, eventually, an irreconcilable conflict will arise.[77] Where it does, the methods constitutional pluralism has devised to resolve conflicts of law become little more than normative criteria for

[71] See: MacCormick, 'Maastricht-Urteil', 264; Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 65 MLR 317; Miquel Poiares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in Neil Walker (ed.), *Sovereignty in Transition* (Hart, 2003), 501; Julio Baquero Cruz, 'The Legacy of the Maastricht-Urteil and the Pluralist Movement' (2008) 14 ELJ 389; Kumm, 'Constitutional Supremacy'; Pernice, 'Multilevel Constitutionalism'. See further the collections of papers in Gráinne De Búrca and JHH Weiler (eds), *The Worlds of European Constitutionalism* (Cambridge University Press, 2012); Matej Avbelj and Jan Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012); Davies and Avbelj (eds), *Handbook on Legal Pluralism*.

[72] Neil MacCormick, *Questioning Sovereignty* (Oxford University Press, 1999), 118.

[73] MacCormick, 'Beyond the Sovereign State', 8.

[74] Kelemen, 'Uses and Abuses', 60.

[75] Miguel Poiares Maduro, 'Three Claims of Constitutional Pluralism' in Avbelj and Komárek (eds), *Constitutional Pluralism*, 67, 70.

[76] Mark Jones, 'The Legal Nature of the European Community: A Jurisprudential Analysis using HLA Hart's Model of Law and a Legal System' (1984) 17 Cornell Int'l LJ 1; MacCormick, 'Beyond the Sovereign State', 8–9; Schilling, 'Autonomy', 399–401; Pavlos Eleftheriadis, 'The EU's Relationship to International Law: Lessons from Brexit' in Davies and Avbelj (eds), *Handbook on Legal Pluralism*, 369.

[77] Cahill, 'Subverting Voluntarism', 24.

identifying which rule will in fact be recognized and applied in the positivist sense.

In that regard, the reality that matters for this book is that, whether one adopts a Kelsenian, normative or Hartian approach, Member States will often have the 'final say' as arbiters of the boundaries of EU law.[78] When applying MacCormick's pluralist approach, 'what matters [. . .] is that a conflict rule must be valid from the vantage point of the norm taken as reference point of the legal system in order to be regarded as a rule of that legal system'.[79] On this approach, there are few jurists who would credibly argue that a declaration of invalidity by, say, the BVerfG with regard to the PSPP, or a European arrest warrant, would be ignored by German institutions, bound by the German constitution, for a normative claim by the CJEU that another rule should be applied.[80]

This now seems accepted by Europe's judges as an empirical matter, even if it is not admitted as a matter of doctrine. As Judge Maduro observes, while the doctrinal position is that EU law is the higher law, 'National law still holds a veto power over EU law, and that is important even when it is not used'.[81] Judge Lenaerts observes:

> Day after day [. . .] the [ECJ] must win the trust of Member States and national supreme courts as the 'ultimate judicial umpire' of [Union] competences [. . .] The conceptual reason for this is rather straightforward: the Member States – and not the people as such – hold the *Kompetenz-Kompetenz* as makers of the constitution.[82]

1.2 The Constitutional Boundaries of the EU Legal Order

1.2.1 Member State Kompetenz-Kompetenz

The first limit imposed by national constitutional orders on EU law is that of competence. Member States profess to retain for themselves the competence to decide on competences – the so-called *Kompetenz-Kompetenz*.[83]

[78] Pernice, 'Multilevel Constitutionalism', 714; Schilling, 'Autonomy', 399–401; Bruno De Witte, 'Sovereignty and European Integration: The Weight of Legal Tradition' in JHH Weiler, Anne-Marie Slaughter and Alec Stone Sweet (eds), *The European Courts and National Courts: Doctrine and Jurisprudence* (Hart Publishing, 1998), 147.

[79] Arthur Dyevre, 'European Integration and National Courts: Defending Sovereignty under Institutional Constraints?' (2013) 9 EuConst 139, 147.

[80] Maduro, 'Europe and the Constitution', 96.

[81] Maduro, 'Europe and the Constitution', 95, 97–98.

[82] Lenaerts, 'Essential Concepts', 778, 787.

[83] See, for example: *Weiss Decision (Germany)* [102]: 'The Basic law [. . .] prohibits conferring upon the [EU] the competence to decide on its own competences (*Kompetenz-Kompetenz*).'

This is asserted in two ways: Through judicial *ultra vires* review by national courts (the judicial *Kompetenz-Kompetenz*), and through the act of treaty ratification itself (the so-called legislative *Kompetenz-Kompetenz*).[84]

Such *ultra vires* review jurisdictions are based on intuitive logic: Under Articles 4(1), 5(1) and 5(2) TEU the limits of Union competence are governed by the principle of conferral, and under Articles 48(4) TEU, 49 TEU, 54 TEU and 357 TFEU, the EU acquires its competences when the Treaties are 'ratified by the High Contracting parties *in accordance with their respective constitutional requirements*.'[85] This means that – supreme and legitimate within its bounds though it may be – there are nonetheless boundaries of the Union legal order beyond which the states are sovereign, and Member State constitutional law is the reference point for what those boundaries are.[86] Thus, Article 263 TFEU grants the CJEU jurisdiction to hear claims for lack of competence, but national courts have not-infrequently pointed-out that the same confederate foundations which constrain the EU legal order also apply to its court – the CJEU itself is a creature of the Treaties bound within its competences (and capable of acting *ultra vires*).[87] In *Brunner (Germany)*, the BVerfG held:

> [I]f European institutions or agencies were to treat or develop the Union Treaty in a way that was no longer covered by the Treaty in the form that is the basis for the Act of Accession [. . .] German state organs would be prevented for constitutional reasons from applying them in Germany. Accordingly, the [BVerfG] will review legal instruments of European institutions and agencies to see whether

Lisbon I (Czech Republic) [132], [145]: 'the Union does not have competence-competence'. *Lisbon (Latvia)* [18.3]; *Decision 2011/199/EU (Poland)* [6.3.3] Member States 'maintain "the competence of competences"'. See further cases cited above, n 56.

[84] *Lisbon I (Czech Republic)* [132]: 'the legislative competence-competence remains with the member states'. See Jo Shaw, 'Europe's Constitutional Future' (2005) 1 PL 132, 142.

[85] Art. 48(4) TEU (ordinary revision procedure); Art. 49 TEU (accession procedure); Art. 54 TEU (TEU ratification); Art. 357 TFEU (TFEU ratification).

[86] Grimm, 'Need a Constitution?', 287–288.

[87] *Slovak Pensions XVII (Czech Republic)* PL ÚS 5/012 (*Ústavní Súd*) English version at: www.usoud.cz accessed 28 May 2019, 12–13; *Weiss Decision (Germany)* [116]–[119], [154]–[157], [163], [234]; *Carlsen (Denmark)* [33]; *Hausgaard (Denmark)* [32]–[40]; *Danski Industri (DI) (Ajos A/S)* v. *Estate of Rasmussen* (Case 15/2014); [2017] 2 CMLR 14 (*Højesteret*), 444; *MAS and MB (Taricco II Judgment) (Italy)* Judgment 115/2018 (31 May 2018) (*Corte constituzionale*) [9], [12]; *Decision 80/2014 (Romania)* [458]; *Pham* v. *SSHD (UK)* [2015] UKSC 19; [2015] 2 CMLR 1414, [58]; *Society for the Protection of Unborn Children Ltd. (SPUC)* v. *Grogan I* [1989] 1 IR 753 (Supreme Court), 765 and 770; *Melloni* v. *Ministerio Fiscal (Spain)* DTC 26/2014; ECLI:EC:TC:2014:26, [3]–[4]; *Constitutional Treaty (Spain)* [4]; *Lisbon (Latvia)* [18.3], [18.7]; *Accession Treaty (Poland)* [16], 'The interpretation of Community law performed by the ECJ should fall within the scope of functions and competences delegated to the Communities by its Member States.'

they remain within the limits of the sovereign rights conferred on them or transgress them.[88]

If that is so, the architects of EU fiscal federalism cannot rely on the authority of the ECJ alone to secure the good functioning of models that stretch the interpretation of EU competences, or depend on legal machineries placed beyond them.[89] As Irish Supreme Court Judge Charleton so puts it: 'Cleary, the issue of what powers have been transferred remains a matter of German law for which only German courts have competency.'[90] The purpose of this Section 1.2.1 is therefore to evaluate this claim as a valid constitutional, normative and positivist description of the limits of EU law for the purposes of this book.

1.2.1.1 Pure Constitutional Evaluation of Member State *Kompetenz-Kompetenz* Adjudication

As a matter of pure constitutional law, the EU acquires its competences when the Treaties are ratified by the Member States in accordance with their respective constitutional requirements.[91] The EU does not exist independently of the Treaties, and has no competences by right. The Union is 'thus *not* "national" – that is: sovereign – in scope'.[92] As the BVerfG has stated, 'sovereignty under international law and public law requires independence from an external will precisely for its constitutional foundations'.[93] Other constitutional courts (including, at times, the ECJ)[94] arrive at similar evaluations of EU 'sovereignty'.[95] As constitutional courts have been keen to assert, it is the Member States which are the 'Masters of the Treaties'.[96]

Without the limits of conferral, entering into the European Union would have been unconstitutional in all twenty-eight of Europe's constitutional

[88] *Brunner (Germany)* [49], [68].
[89] See, for example, *Weiss Decision (Germany)*, excerpted in Methods and Introduction, n 59; Section 1.2.1.1, at n 104; and Section 1.2.1.3, at n 241.
[90] Peter Charleton and Angelina Cox, 'Accepting the Judgements of the Court of Justice of the EU as Authoritative' (2016) 23 MJ 1, 207.
[91] Arts. 4(1), 5(1)–(2), 48(4), 49, 54 TEU; Art. 357 TFEU.
[92] Schütze, *EU Law* (2015), 61.
[93] *Lisbon (Germany)* [207].
[94] *EU Accession to the ECHR*, [156].
[95] See cases cited at nn 56, 96.
[96] *Brunner (Germany)* [55]; *Lisbon (Germany)* [207], [247], [274]; *Weiss Decision (Germany)* [111], [157]; *Lisbon I (Czech Republic)* [146]; *Lisbon (Poland)* [3.8]; *Maastricht (Spain)* [4]; *TCSG (Belgium)*, B.8.7; *Ajos (Denmark)*, 444.

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democracies (with one qualification)[97] reviewed in this chapter. The EU's powers are carved-out from Member State constitutions and, *nemo plus iuris*, none of Europe's constitutional democracies allow the disposition of the constitutional amending power by conferring *Kompetenz-Kompetenz* on the Union.[98] *Maastricht (Spain)* is characteristic:

> [T]he Spanish parliament can grant or transfer the exercise of 'powers derived from the Constitution', but cannot dispense with the Constitution itself, contravening or permitting the contradiction of its provisions. The possibility of amending the Constitution is not a 'power' whose exercise can be granted.[99]

In any event, Articles 48(4) TEU, 49 TEU, 54 TEU and 357 TFEU are quite clear on the manner of democratic legitimation for the acquisition of competence: the Treaties must be ratified by the Member States '*in accordance with their respective constitutional requirements*'. If supremacy is 'founded on a common decision' by a European *people*, then that 'common decision' was to resolve – by writing Articles 5 TEU, 48(4) TEU, 49 TEU, 54 TEU and 357 TFEU into the Treaties – that the EU cannot extend its own powers through any act not in accordance with Member State constitutional requirements. Thus, even if one accepts the pure

[97] In the Netherlands and Luxembourg courts are prohibited from reviewing the constitutionality of international treaties. This has led to a debate over whether EU law could apply outside the constitutional empowerment. See sources cited below, Section 1.2.1.1, at nn 174–181.

[98] See, for example, *Carlsen (Denmark)* [15]: the Danish Constitution 'precludes that it can be left to the international organisation to make its own specification of its powers'. *Lisbon (Poland)* [2.2]: 'Within the meaning of the Constitution, it is possible to confer competences "in relation to certain matters" which excludes conferral of competence to determine competences.' *Lisbon I (Czech Republic)* [145]: 'if the Union could change its competences at will, independently of the signatory countries, then by ratifying the [Lisbon Treaty] the Czech Republic would violate [. . .] the Constitution.' *European Schools (Belgium)* [B.4]: 'having forbidden the legislature to pass rules contrary to those referred to by [the] Constitution, may not be supposed to have authorised the same legislature to do so indirectly through the assent given to an international Treaty'. See further *Lisbon (Germany)*, excerpted below, Section 1.2.1.1, at n 182; *Crotty (Ireland)*, 783 excerpted below, Section 1.3.1, at n 462; *Elections to the EP (France)* [2]–[4]; *TCSG (Belgium)*, B.8.5 excerpted above, in Methods and Introduction, n 25; *Maastricht (Spain)* [4]; *Amending Article 125 (Lithuania)* [2]; *ESM (Estonia)* [223]; *Constitutional Treaty (Slovakia)*, 35–38; Ch 10§6 of Sweden's Instrument of Government, discussed below, Section 1.2.1.1, at nn 121–125 and Section 1.2.2.1 at nn 332–335; *Decision 80/2014 (Romania)* [456] excerpted below, n 319; *Decision 3/2004 EU Amendments (Bulgaria)* [V.1] discussed below, Section 1.2.1.1 at nn 151–153; *Fiscal Balance Act 2012 (Slovenia)* U-I-146/12; ECLI:SI:USRS:2013:UI14612, [32]–[33] excerpted below, at n 154; *HS2 Action Alliance Ltd.* v. *SST (UK)* [2014] UKSC 3; [2014] 1 WLR 324, [79]; *Constitutional Treaty (Finland)*, 3; *Karella (Greece)* [10] excerpted below, n 132; *ERDF (Portugal)*, 687–688; *Lisbon (Hungary)* [I]V.2(3).

[99] *Maastricht (Spain)* [3c], [4].

constitutional justification for supremacy – that the conferral of powers by the '*peoples* of Europe' adds up to much the same thing as a single constitutional '*people* of Europe' – it remains that this legitimation can only ever flow *within* the limits of the EU's conferred powers.[100] As asserted by the Spanish *Tribunal Constitucional*:

> [T]he primacy set forth *according to the Treaty* [. . .] is reduced expressly to the exercise of competences attributed to the European Union [. . .] it is not a primacy with a general scope. [. . .] Therefore, the primacy operates with regard to the competences transferred to the Union by the sovereign will of the State [. . .] the competences whose exercise is transferred to the [EU] could not, *without a breakdown of the Treaty itself*, act as a foundation for the production of Community regulations whose content was contrary to the values, principles or fundamental rights of our Constitution.[101]

'Absolute' supremacy, however, implies something different. It implies that the Union may acquire competences other than in the manner provided by Articles 48(4), 49 and 54 TEU or 357 TFEU – that is, other than an act of ratification in accordance with constitutional law. This is because a well-meaning but erroneous ECJ *intra vires* ruling on an act outside EU law would effect a misappropriation of state power which nobody – neither the '*peoples*' nor a '*people* of Europe' – has voted to confer on the Union.[102] Moreover, because supremacy applies within the scope of EU competence, the misappropriation of this 'new' EU competence permanently switches the power to determine law in that area from the Member State to the Union.[103] As the BVerfG warned in *Weiss (Germany)*:

> 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.[104]

For this reason, the German BVerfG has long held that it has an *ultra vires* review jurisdiction to decide whether the EU has stepped over the

[100] *Lisbon (Germany)* [216], [307]–[308]; *Constitutional Treaty (Spain)* [3]; *Elections to the EP (France)* [2]–[4].
[101] *Constitutional Treaty (Spain)* [3] (emphasis added).
[102] *Lisbon (Germany)* [214].
[103] Derrick Wyatt, 'Is the European Union an Organisation of Limited Powers?' in Catherine Barnard, Anthony Arnull, Michael Dougan and Eleanor Spaventa (eds), *A Constitutional Order of States?* (Hart, 2011), 5.
[104] *Weiss Decision (Germany)* [111].

boundaries given to it.[105] According to that Court, an act of EU law that is manifestly outside the scope of competences, or an expansive interpretation of EU law that is 'structurally significant' to the allocation of competences in a manner 'equivalent to an extension of the Treaty [. . .] would not produce any binding effects for Germany'.[106]

It is far from alone.

In **Italy**, the *Corte constituzionale* exercises *Kompetenz-Kompetenz* control over EU law under its '*controlimiti*' (counter-limits) doctrine.[107] EU law is not autonomous, but is 'founded upon [. . .] Article 11(2) of the Constitution'.[108] It is only '*within those areas in which the organs of the Community are competent*' that 'the Community rule takes precedence' over any rule of national law.[109]

In **France**, the *Conseil Constitutionnel* exercises *a priori* constitutional control over acts of conferral,[110] and the *Conseil Constitutionnel*,[111] *Conseil d'État*[112] and *Cour de Cassation*[113] exercise *a posteriori* control of secondary law in excess of the constitutional authorization.[114] Article 54 of the

[105] *Brunner (Germany)* [49]; *Lisbon (Germany)* [314]; *Honeywell (Germany)* (2 BvR 2551/06): BVerfGE 126, 286; [2011] 1 CMLR 33, [32], [48]–[51]; *ESM I (Germany)* [193]; *ESM II (Germany)* [160]; *Gauweiler Reference (Germany)* [20]–[26]; *Gauweiler Decision (Germany)* [161]–[163]; *Weiss Decision (Germany)* [110–112].

[106] *Brunner (Germany)* [49]. *Manifestly* in violation of competences will be assessed by reference to CJEU case law on manifest and grave disregard for the limits of discretion: Case C-472/00 *Commission* v. *Fresh Marine* [2003] ECR I-7541; EU:C:2003:399, [26]. *Structurally significant* means 'highly significant in the structure of competences [with] regard to the principle of conferral'. *Euro Rescue Package (Germany)* [99]–[100].

[107] If EU law exceeds the *controlimiti*, it ceases to produce effects in the Italian legal order: *Talamucci (Italy)*, 393: *Frontini (Italy)* [3]; *Granital (Italy)* [7]; *Fragd* v. *Amministrazione Delle Finanze Dello Stato (Italy)*, Case 232/1989; [1990] 93 ILR 538, 657; *President of Council of Ministers* v. *Sardinian Region (Sardinian Taxes)* Judgment 102/2008 (13 April 2008) available at www.cortecostituzionale.it accessed 18 May 2016, [8.2.8.1] and cases cited below, n 291.

[108] *Frontini (Italy)* [7].

[109] *Frontini (Italy)* [8] (emphasis added).

[110] *Maastricht I (France)* [34], [44]–[50]; *Treaty of Lisbon (France)* Decision No 2007-560 DC; ECLI:FR:CC:2007560DC, [9]; *Constitutional Treaty (France)* [7], [24], [29].

[111] *Confidence in the Digital Economy (France)* Decision No 2004-496 DC; ECLI:FR:CC:2004:2004496DC, [7]; *Act on Electronic Communications (France)* Decision No 2004-497 DC; ECLI:FR:CC:2004:2004497DC, [18]; *Bioethics Act (France)* Decision No 2004-498; ECLI:FR:CC:2004:2004498DC, [4]; and cases cited below, n 294.

[112] *Nicolo (France)* [1989] *RTDE* 771; *Minister of the Interior* v. *Cohn-Bendit (France)* [1979] *RGDIP* 832; [1980] 1 CMLR 543; *Sarran, Levacher et autres (France)* [1998] RFDA 1081; *Arcelor Atlantique et Lorraine (France)* [2007] 2 CMLR 28. See Claudina Richards, 'Sarran et Levacher: Ranking Legal Norms in the French Republic' (2000) 25 EL Rev 192.

[113] *Administration des Douanes* v. *Cafes Jaques Vabre (France)* [1975] 2 CMLR 336, [4]; *Mlle Fraisse (France)* Decision No 99-60274; *Dalloz* 2000, 965 Note B.

[114] See further Claudina Richards, 'The Supremacy of Community Law before the French Constitutional Court' (2006) 31 EL Rev 499, 511; Stefan Theil, 'What Red Lines, if Any,

Constitution contains a *nemo plus iuris* rule,[115] pursuant to which EU law cannot run counter to an 'express contrary provision' of the Constitution, unless the constituting power consents thereto.[116]

In **Belgium** the *Cour constitutionnelle* and *Conseil d'État* locate authority for the supremacy of EU law in Article 34 of the Belgian Constitution.[117] This does not allow the disposition of *Kompetenz-Kompetenz*, and there is no basis for the application of EU law outside the national constitutional empowerment.[118]

In **Denmark**, an open-ended conferral, or the assumption of powers not specified in the Accession Act (including by judicial interpretation) would violate the Section 20 of the Constitutional act of Denmark.[119] The *Højesteret* (Supreme Court) retains a powerful *ultra vires* jurisdiction: CJEU interpretations 'must not result in the widening of the scope of Union powers' and 'it is for the Danish courts to decide whether EU acts exceed the limits for the surrender of sovereignty which has taken place by the Accession Act'.[120]

Do the Lisbon Judgments of the European Constitutional Courts Draw for Future EU Integration?' (2014) 15 German LJ 599, 612–613; Jans-Herman Reestman, 'The Franco-German Constitutional Divide: Reflections on National and Constitutional Identity' (2009) 5 EUConst 267, 390.

115 *Treaty of Maastricht II (France)* Decision No 93-312 DC; ECLI:FR:CC:192:92312DC, [9]–[10].

116 *Immigration, Integration and Nationality Act (France)* Decision No 2011-631 DC; ECLI:FR:CC:2011:2011631DC, [45] and sources cited above, n 111. Since *Société de l'information (France)* Decision No 2006-540 DC; ECLI:FR:CC:2006:2006540DC, [19], the *Conseil Constitutionnel* has held that Art. 88-1 grants consent for supremacy over ordinary constitutional provisions, save that EU law cannot 'run counter to a rule or principle inherent to the constitutional identity of France'. See also sources cited below, Section 1.2.2.1, nn 292–294. However, it remains that only in the absence of a constitutional conflict does it fall to the CJEU to resolve the conflict: *Confidence in the Digital Economy (France)* [7] and cases cited above, n 111.

117 *European School (Belgium)* [B.4]; *Minister for Economic Affairs* v. *SA Fromagerie Franco-Suisse (Le Ski)* [1971] *Jornal des Tribunauz* 460; [1972] CMLR 330 (*Cour de Cassation*), 261; Case 62/922 *Orfinger* v. *Belgium (Minister for Civil Service)* [1997] *Journal des Tribunaux* 254 (*Conseil d'Etat*), in Oppenheimer, *The Cases* (Vol II) 162, 165–166, 188.

118 *European School (Belgium)* [B.4]: 'Article 34 provides a constitutional basis for the institutional mechanism established by the Treaty [. . .] Nevertheless this provision determines neither those competences which may be transferred nor their limits.' *TCSG (Belgium)* [B.8.5], [B.8.7]. See Claes, *National Courts*, 199–204, 242–243, 490, 506–513, 639–645; Philippe Gérard and Willem Verrijdt, 'Belgian Constitutional Court Adopts National Identity Discourse' (2017) 13 Eur Const Law Rev 182, 187–189.

119 *Carlsen (Denmark)* [33]; *Hausgaard (Denmark)* [32].

120 *Hausgaard (Denmark)* [46], [41]. See also *Ajos (Denmark)*, 442; Ulla Neergaard and Karsten Engsig Sørensen, 'Activist Infighting among Courts and Breakdown of Mutual Trust?' (2017) 36 Yearb Eur Law 275, 296.

In **Sweden**, the *Högsta Domstolen* (Supreme Court) and *Högsta förvaltningsdomstolen* (Supreme Administrative Court) derive authority for the direct effect,[121] indirect effect[122] and supremacy of EU law[123] from Chapter 10§6 of the Instrument of Government – not autonomous EU constitutionalism.[124] As Lebeck explains, a 'legal act or decision from an EC/EU institution that exceeds the powers that have been delegated to the EC/EU would be *ultra vires* and hence not be valid law in the Swedish legal order'.[125]

In the **United Kingdom**, the permissible scope of application of EU law was a function of the interpretation of the European Communities Act 1972,[126] and the UK courts retained an *ultra vires* jurisdiction to determine 'whether the European Communities Act 1972 or any successor statute conferred any authority on the Court of Justice to exercise [. . .] jurisdiction' over issues outside the scope of authority so provided.[127]

In **Spain**, the *Tribunal Constitucional* distinguishes between the *primacía* of EU law afforded by Section 93 of the Spanish Constitution (allowing EU law to supersede conflicting national law), and the *supremacía* of the Constitution itself (which both determines the status of EU law in the national order, and subjects it to integral constitutional guarantees).[128] In *Constitutional Treaty (Spain)* it held: 'the primacy set

[121] *VK (Church Tax) (Sweden)*, Case 2471/94; RA 1997 ref 56 (*Regeringsrätten*) available at: https://lagennu/dom/ra/1997:6 accessed 4 July 2016.

[122] *Klippan Company (Sweden)*, Case 3356/94; RA 1996 ref 57 (*Regeringsrätten*) available at: https://lagennu/dom/ra/1996:57 accessed 4 July 2016; *PH (Motor Vehicles Sales Tax) (Sweden)*, Case 329/99; RA 20000 ref 27 (*Regeringsrätten*) available at: https://lagennu/dom/ra/2000:27 accessed 4 July 2016.

[123] *Lassagard (Sweden)*, Case 210/1997; RA 1997 ref 65 (*Högsta domstolen*) in Oppenheimer, *The Cases* (Vol I) 428; *SO Buss i Sollentuna AB (Sweden)*, Case 2195/95; RA 1997 ref 82 (*Regeringsrätten*) available at: https://lagennu/dom/ra/1997:82 accessed 4 July 2016.

[124] Ch 10§6 Instrument of Government. See also below, Section 1.2.2.1, at nn 332–336. See: Joakim Nergelius, 'The Constitution of Sweden and European Influences' in Anneli Albi and Samo Bardutzky (eds), *National Constitutions in European and Global Governance* (Springer 2019), 319–320.

[125] Carl Lebeck, 'Supranational Law in a Cold Climate: European Law in Scandanavia' (2010) 4 Sant'Anna Legal Studies 2, 13. See further sources cited below, Section 1.2.2.1, nn 332–336.

[126] *HS2 (UK)* [79] excerpted below, n 228; *R (Miller)* v. *Secretary of State for Exiting the EU* [2017] UKSC 5; [2018] AC 61, [65]–[67]. European Communities Act, 1972 c. 68, s. 2 and European Union Act, 2011 c. 12, s. 28 govern the supremacy of EU law. These were repealed by the European Union (Withdrawal) Act 2018, c. 16, though at the time of writing their effects had been saved by the European Union (Withdrawal Agreement) Act, 2020 c. 1.

[127] *G1* v. *SSHD (UK)* [2012] EWCA Civ 867; [2013] QB 1008, [43]; *Pham* v. *SSHD (UK)* [58].

[128] *Maastricht (Spain)* [3c], [4]; *Constitutional Treaty (Spain)* [2], [4].

forth for the Treaty and its resulting legislation [. . .] is reduced expressly to the exercise of the competences attributed to the European Union [. . .] by the sovereign will of the State'.[129]

In **Portugal**, the supremacy of EU law derives from Articles 7(6) and 8 (4) of the Portuguese Constitution, and the *Tribunal Constitucional* has held since *ERDF (Portugal)* that 'there can be no exercise of the regulatory power without some basis in a *lex anterior*'.[130]

In **Greece**, the Council of State (Συμβούλιο της Επικρατείας) locates constitutional authority for EU law in Article 28 of the Hellenic Constitution – not autonomous EU law.[131] In *Karella (Greece)*, the Council of State confirmed that the EU's powers are constrained by the act of conferral, and the act of conferral is constrained by the Constitution.[132]

In the **Czech Republic**, the *Ústavní Soud* (Constitutional Court) retains ultimate jurisdiction to determine 'whether an act of the Union has exceeded the limits [of powers] which the Czech Republic transferred to the EU under Art. 10a of the Constitution'.[133]

In **Poland**, Article 90(1) of the Constitution permits Poland to 'delegate' competences only 'in relation to certain matters', and the *Trybunał Konstytucyjny* (Constitutional Court) retains jurisdiction to 'assess whether or not, in issuing particular legal provisions, the Community legislative organs acted within the delegated competences'.[134] Should they exceed them, 'the principle of the precedence of Community law fails to apply with respect to such provisions'.[135]

In **Latvia**, EU competences are legitimated by Article 68 of the Constitution, which allows Latvia to 'delegate a part of its State

[129] *Constitutional Treaty (Spain)* [3].

[130] *ERDF (Portugal)*, 687–688. See also *Cadima (Portugal)*, Case 12 381-36 052 (*Tribunal de Relação de Coimbra*), in Oppenheimer, *The Cases* (Vol 1) 675, 679–680.

[131] *Banana Market (Greece)*, Case 815/1984 in Oppenheimer, *The Cases* (Vol I) 576, 578; *Mineral Rights Discrimination (Greece)*, Case 2152/1986 in Oppenheimer, *The Cases* (Vol I) 581, 583; *Real Property Acquisition (Greece)*, Case 43/1990 in Oppenheimer, *The Cases* (Vol I) 589, 589; *Athens Paper SA (Greece)* Decision 161/2010, ECLI:EL:COS:2010:0115A16101E3166, [6]. See further below, Section 1.2.2.1, n 329.

[132] *Karella (Greece)* [10], 'the primacy of the EEC Treaty [is] subject to certain conditions for the possibility of conferring [. . .] those powers provided for in the Constitution'.

[133] *Lisbon I (Czech Republic)* [139]. See also *Lisbon II (Czech Republic)* [136], [150], [170]; *Sugar Quotas III (Czech Republic)* [106].

[134] *Accession Treaty (Poland)* [15]. See also *Lisbon (Poland)* [2.2] excerpted above, n 98; *Decision 2011/199/EU (Poland)* [3.2], [6.3.1]; *Representation in the European Council (Poland)* Kpt 2/08 in Biblioteka Trybunału Konstytucyjnego, *Selected Rulings* (Vol LI) 122, [5.8]; *Brussels Regulation (Poland)* [1.5], [2.2] *et seq*; *European Arrest Warrant (Poland)* P 1/05 in Biblioteka Trybunału Konstytucyjnego, *Selected Rulings* (Vol LI) 41, [9].

[135] *Accession Treaty (Poland)* [15].

institution competences',[136] and the *Satversmes tiesa* (Constitutional Court) denies EU *Kompetenz-Kompetenz*.[137]

In **Lithuania**, the *Konstitucinis Teismas* (Constitutional Court) denies EU *Kompetenz-Kompetenz*[138] and asserts its jurisdiction to 'guarantee the supremacy of the constitution in the legal system as well as constitutional legality' in the context of the EU.[139]

In **Ireland**, Article 29.4.6 of the Constitution grants constitutional supremacy to EU law within the scope of the act of ratification, but the Supreme Court holds that this is only so *provided* that future expansions or amendments of EU law 'did not alter the essential scope or objectives of the Union'.[140] Article 29.4.6 does not allow the state to dispose of *Kompetenz-Kompetenz*.[141] EU law 'has immunity but only if [the act of ratification] does not go outside the terms of the licence granted by [Article 29.4.6]', failing which 'such acts of the institutions of the Community as depend on [the act of ratification] for their

[136] The 'ordinary' supremacy of EU law within its competences is accepted on this basis: *Convention on International Marine Traffic (Latvia)*, Case 2004-01-06 (7 July 2004) English version at: www.satv.tiesa.gov.lv accessed 17 July 2016, 10; *Riga Land Use Plan (Latvia)*, Case 2007-11-03 (17 January 2008), in *Selected Case-Law of the Constitutional Court of the Republic of Latvia: 1996-2017* (*Satversmes tiesa*, 2018), [24.2].

[137] *Lisbon (Latvia)* [11.1], 'the constitutional Court has the duty to ensure supremacy of the Satverseme', and [17–18.3] the constitution guarantees the people not only 'the right to the last word' but also the 'right to the first word' on competence. See: Tatjana Evas, *Judicial Application of European Union Law in Post-Communist Countries: The Cases of Estonia and Latvia* (Routledge 2016), 42; Kristïne Krüma and Sandijs Statkus, 'The Constitution of Latvia – a Bridge between Traditions and Modernity' in Albi and Bardutzky (eds), *National Constitutions*, 959–960.

[138] *Amending Article 125 (Lithuania)* III [6.2.3]: '[T]he Constitutional Act of Membership [. . .] establishes, *inter alia*, the constitutional grounds of the membership in [. . .] the European Union. If such constitutional grounds were not consolidated in the Constitution, [Lithuania] would not be able to be a full member of the European Union.'

[139] *On applying to the Court of Justice (Lithuania)*, Case 47/04 (8 May 2007) English version at: www.lrkt.lt/lt/en/ accessed 3 July 2016, [I.1] (see also [II.3]). See further cases cited below, n 318.

[140] *Crotty (Ireland)*, 767. The European Communities Act 1972 (No 27/1972) (Ireland) is the 'conduit pipe' through which EU law enters Irish law: *Tate* v. *Minister for Social Welfare (Ireland)* [1995] 1 IR 418; [1995] 1 CMLR 825 (High Court), [41]. See further William Phelan, 'Can Ireland Legislate Contrary to European Community Law?' (2008) 33 EL Rev 530, 537.

[141] *Crotty (Ireland)*, 767 'to construe [Article 29.4.6] as an open-ended authority to agree, without further amendment of the Constitution, to any amendment of the Treaties would be too broad'. See further DR Phelan and Anthony Whelan, 'National Constitutional Law and European Integration' (1997) 6 IJEL 24, 28; Phelan, *Revolt or Revolution*, 338–339.

status in domestic law would lose that status and would be of no effect in domestic law'.[142]

The position is similar in **Austria**, where the Constitutional Court (VfGH) derives authorization for the supremacy of EU law from the Act on Accession of Austria (AAA), enacted by the 'total revision' procedure under Article 44(3) of the Austrian Constitution in 1993.[143] However, the 1993 'total revision' does not cover future expansions of the EU legal order, and the EU does not have *Kompetenz-Kompetenz*.[144]

In **Estonia**, the Constitution of Estonia Amendment Act (CEAA) provides that the Constitution will be applied 'without prejudice to the rights and obligations arising from the Accession Treaty'.[145] However, as the *Riigikohus* (Supreme Court) has held, this applies only 'within the spheres' of EU competence,[146] and 'does not authorise the integration process of the [EU] to be legitimised or the competences of Estonia to be delegated to the [EU] to an unlimited extent'.[147] A 'more extensive delegation of the competence of Estonia to the European Union' requires further consent from the Estonian people (by referendum).[148]

In **Romania**, the *Curtea Constituţională* (Constitutional Court) distinguishes between the 'priority' or 'precedence' of EU law over legislation and the 'supremacy' of the Constitution (which both determines the

[142] *Crotty (Ireland)*, 758–759.

[143] *Natural Mineral Water (Austria)*, Case QZ V 136/94 in Oppenheimer, *The Cases* (Vol I) 133; *Tourism Promotion Tax (Austria)*, Case G 2/97 in Oppenheimer, *The Cases* (Vol I) 137, 142; *Telecom Control Commission (Austria)*, Case B 1625/98 (24 February 1999); *Tyrolian Provincial Allocation Office*, Case GZ-B 2477/05 in Oppenheimer, *The Cases* (Vol I) 135. See Art. 44(3) Austrian Federal Constitution (*Bundeskanzleramt*) English translation at:www.ris.bka.gv.at accessed 6 June 2015. Since 2008 lesser treaty amendments that do not affect the Constitution's Basic Principles have been possible with a 2/3 majority in both houses under Article 50 of the Constitution.

[144] Stefan Griller, 'Introduction to the Problems in the Austrian, the Finnish and the Swedish Constitutional Order' in Alfred E Kellermann, Jaap W de Zwaan and Jenö Czuczai (eds), *EU Enlargement: The Constitutional Impact at EU and National Level* (TMC Asser Press 2001), 148–150; Nigel Foster, *Austrian Legal System & Laws* (Cavendish 2003), 144; Christoph Grabenwarter, 'National Constitutional Law Relating to the EU' in Armin Von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (2nd ed., Hart, 2011), 85, 98; Claes, *National Courts*, 163; Nigel Foster, *Foster on EU Law* (4th ed., Oxford University Press 2013), 153.

[145] The Constitution of the Republic of Estonia Amendment Act RT I 2003, 64, 429, s. 2. *ESM (Estonia)* [223].

[146] *Interpretation of the Constitution (Estonia)*, Case 3-4-1-3-06 (11 May 2006) (*Riigikohus*) [16].

[147] *ESM (Estonia)* [222].

[148] *ESM (Estonia)* [223].

effect of EU law and prevails over it).[149] This precludes EU *Kompetenz-Kompetenz*. EU law is derived from Article 148 of the Constitution (which permits 'exercising' 'certain powers' with other states), and EU acts are 'norms interposed within the constitutionality control'.[150]

In **Bulgaria**, the Constitutional Court (Конституционен съд) holds that the supremacy of EU law is justified because 'the institutions of the European Communities act within their competences [which are] subject to ratification'.[151] Authorization for conferral is 'not unlimited',[152] and the EU can only acquire powers through acts of the people, 'at their own will, through the National Assembly elected by them'.[153]

In **Slovenia**, the *Ustavno Sodišče* (Constitutional Court) holds that EU law becomes 'internal constitutional principles that have the same binding effect as the Constitution' by virtue of Art. 3a of the Slovenian Constitution – it is neither autonomous nor constitutionally supreme.[154] In *SNHCA (Slovenia)*, the Court declined to endorse EU supremacy over the Constitution and described *Kompetenz-Kompetenz* as a permanent constraint on conferral.[155]

In **Slovakia**, the *Ústavný Súd* (Constitutional Court) holds that EU law has the status of international treaties under Article 7(2)[156] or 7(5)[157] of the Constitution (or both), meaning EU law does not have *Kompetenz-Kompetenz* and is subject to the Constitution.[158] In *Constitutional Treaty*

[149] *Decision 148/2003 On the legislative proposal to amend the Constitution (Romania)*, *Monitorul Oficial al României* No 317 of 16 April 2003: Member states 'agreed to situate the *acquis Communautaire* [. . .] on an intermediate position between the Constitution and other law'. See also *Decision 80/2014 (Romania)* [453]–[460] excerpted below, n 319.

[150] *Decision 80/2014 (Romania)* [453]–[460].

[151] *Decision 3/2004 EU Amendments (Bulgaria)* V.1.

[152] *Decision 7/2018 on Mixed EU Treaties (Bulgaria)* [3.1].

[153] *Decision 3/2004 EU Amendments (Bulgaria)* V.1.

[154] *Fiscal Balance Act 2012 (Slovenia)* [32]–[33]. *Electronic Communications Act (Slovenia)* U-I-65/13; ECLI:SI:USRS:2014:UI6513, [6]–[7]; *AA Company* v. *Maribor Higher Court Ruling (Slovenia)* U-I-186/04; ECLI:SI:USRS:2004:Up32804, [10].

[155] *SNHCA (Slovenia)* [20]–[23], [41]–[42], [53]. The constitution prevents the state from transferring sovereignty: *Vatican Agreement (Slovenia)* [22]–[24].

[156] *Health Insurance (Slovakia)* PL ÚS 3/09 (26 January 2011), V[3.4].

[157] *Data Retention (Slovakia)* [69] excerpted below, n 232.

[158] Art. 7(5) of the Constitution of the Slovak Republic (Verejny Ochranca Práv, 2016) gives human rights treaties primacy over 'laws', and Art. 7(2) states EU norms 'shall have precedence over *laws* of the Slovak Republik'. 'Laws' does not include the Constitution (Art. 84(4)) and laws are subject to constitutional review (Art. 125(1)(a)). See *Constitutional Treaty (Slovakia)*, 35–38; *Data Retention (Slovakia)* [62], [70]–[71]. See further Frank Hoffmeister, 'Constitutional Implications of EU Membership' (2007) 3 CYELP 59, 85–86.

(Slovakia), the Court denied the EU was a 'state union' with *Kompetenz-Kompetenz*.[159]

In **Finland**, constitutional review is exercised by the *Perustuslakivaliokunnan* (Constitutional Committee), which holds that neither the Act of Accession nor Sections 94–95 of the Constitution (the bases for conferral and application of EU law) can endanger the democratic foundations of the Constitution, in particular *Kompetenz-Kompetenz*.[160] As Ojanen observes, 'the Committee's message is that *Kompetenz-Kompetenz* remains – and should continue to remain, in the hands of Finland'.[161]

The Constitution of **Malta** states that Parliamentary legislation made in conformity with international/EU obligations are 'Subject to the provisions of [the Maltese] Constitution',[162] and an amendment to Malta's constitutional supremacy clause (Article 6) could not be achieved.[163] Thus, as Xuereb explains, because the authority for EU law must 'take the form of an Act of Parliament passed in virtue of the Constitution', the Constitutional Court (*Qorti Kostituzzjonali*) retains the 'final say' on the scope and effect of EU law within the constitutional system.[164]

[159] *Constitutional Treaty (Slovakia)*, 35–38.

[160] *Opinion 30/2001 on the Nice Treaty (Finland)*, PeVL 38/2001 vp; *Constitutional Treaty (Finland)*, 3; *Opinion on the ERM (Finland)*, PeVL 3/1996 vp. Act 1540/94 of the Statutes of Finland (Finland Act of Accession) (Suomen säädöskokoelma), provided for EU supremacy by derogation from the Constitution since *VAT Deduction Rights (Finland)* Decision of 31 December 1996 (*Korkein hallinto-oikeus*) in Oppenheimer, *The Cases* (Vol II) 193. However, as a dualist country, all constitutional acts must be given force through an act of ratification, and further transfers of power that contain provisions of a 'legislative nature' or are 'otherwise significant' occur by 2/3 majority under ss. 94–95 of the Constitution. See: Griller, 'Problems', 166–167; Tuomas Ojanen and Janne Salminen, 'Finland' in Albi and Bardutzky (eds), *National Constitutions*, 363–373 and below, Section 1.2.2.1, nn 357–360.

[161] Tuomas Ojanen, 'EU Law and the Response of the Constitutional Law Committee of the Finnish Parliament' (2007) 52 Scan Stud L 204, 219.

[162] Art. 65, Constitution of Malta (Ministry for Justice, 2020) accessible at: https://legislation.mt/eli/const/eng/pdf accessed 9 July 2020.

[163] Frank Hoffmeister, 'Constitutional Implications of EU Membership: A View from the Commission' (2007) CYELP 59, 67.

[164] Peter Xuereb, 'The Constitution of Malta' in Albi and Bardutzky (eds), *National Constitutions*, 145. Although the *Qorti Kostituzzjonali* has declared itself the 'guardian of the Constitution' (*Mintoff in the name of Alternattiva Demokratika* v. *Broadcasting Authority (Malta)* (31 July 1996)) and has jurisdiction declare 'the unconstitutionality of laws' (*Vasallo* v. *Prime Minister (Malta)* (27 February 1978)), unconstitutional laws remain valid until repealed by Parliament. Thus, Parliament may have the final say: John Stanton, 'The Constitution of Malta: Supremacy, Parliament and the Separation of Powers' (2019) 6 JICL 47.

In **Croatia**, the supremacy of EU law is derived from Articles 141–143 and 145 of the Croatian Constitution, not autonomous EU constitutionalism.[165] Under Article 2 of the Constitution, Croatia 'retain[s] its sovereign right to decide upon the powers to be so delegated',[166] and the *Ustavni sud* (Constitutional Court) holds that 'the Constitution is, by its legal nature, supreme to EU law'.[167]

In **Hungary**, the *Magyarország Alkotmánybírósága* (Constitutional Court) has asserted judicial *Kompetenz-Kompetenz* under the sovereignty provisions of both the 1989 Constitution and the 2011 Fundamental Law.[168]

In **Cyprus**, the *Ανώτατο Δικαστήριο* (Supreme Court) derives the supremacy of EU law from Article 1A of the Constitution,[169] a constitutional exceptive clause introduced in 2006 after the Supreme Court ruled EU law could not prevail over conflicting Constitutional provisions.[170] However, this does not confer *Kompetenz-Kompetenz*. Under the Cypriot Constitution, treaties 'shall only be operative and binding on the Republic when approved by a law made by the House of Representatives',[171] and the Constitution remains 'the supreme law of the Republic'.[172] Consequently, 'any delegation of transfer of competences is

[165] *Z et ors. (Croatia)*, Revt 249/14-2 (9 April 2015) (*Vrhovni sud*). Art. 143 permits conferral by treaties 'concluded and ratified in accordance with the Constitution' once an association with the EU is passed by a 2/3 majority in Parliament and a referendum (Art. 142), whereupon they 'shall be a component of the domestic legal order', 'shall have primacy over domestic law' (Art. 141), and shall be 'equal to the exercise of rights under Croatian law' (Arts. 145).

[166] Art. 2 of the Constitution of the Republic of Croatia (Consolidated Text) English translation at: www.sabor.hr/files/uploads/CONSTITUTION_CROATIA.pdf accessed 15 June 2020. See Iris Goldner Lang, Zlata Durdević and Mislav Mataija, 'Constitution of Croatia' in Albi and Bardutzky (eds), *National Constitutions*, 1147.

[167] *Auxiliary Activities in the Public Sector (Croatia)* [45]; *Referendum on Amendment to the Roads Act (Croatia)* U-VIIR-1158/2015 (21 April 2015), [60].

[168] Under the 1989 Constitution: *Lisbon (Hungary)* [2.2]–[2.5]; *The Europe Agreement* Decision 30/1998 (VI25) (English version at: www.mkab.hu/admin/data/file/672_17_2004.pdf accessed 3 June 2015, [V.3]. Under the 2011 Fundamental Law: *Article E(2) (Hungary)* [46], [54].

[169] *Michaelides* v. *AG (Cyprus)*, Civil Appeal 221/2013 (2 September 2013) (*Ανώτατο Δικαστήριο*) available at: www.cylaw.org accessed 18 July 2016; *President* v. *House of Representatives (Cyprus)* [2009] 3 CLR 648 (*Ανώτατο Δικαστήριο*).

[170] *Attorney General* v. *Constantinou (Cyprus)* [2005] 1 CLR 1356; [2007] 3 CMLR 42.

[171] Art. 169 Constitution of the Republic of Cyprus (Πρόεδρος της Κυπριακής Δημοκρατίας, President of the Republic of Cyprus, 2015).

[172] Art. 179(1) of the Cypriot Constitution. The constitution also contains an expansive eternity clause (Art. 182(1)). In practice, the Supreme Court has tended to either interpret national implementing laws in conformity with the ECHR and the constitution, or ignore conflicting EU law altogether. See: *Koutselini-Ioannidou* v. *Cyprus*, Cases 740/2011-

understood as an expression of the will of the sovereign state and as a matter of choice'.[173]

In **Luxembourg** and the **Netherlands**, national courts are prohibited from reviewing the constitutionality of acts ratifying international treaties, and international law prevails over constitutional law.[174] This has led to a debate over whether EU law would apply even if the constitutional bases for conferral were abolished – *idem est*, 'the Dutch constitution is entirely irrelevant in that regard'.[175] However, this would seem to be overstated. In both countries the constitutional supremacy of EU law cannot arise unless ratified by special majorities in accordance with the constitution.[176] Besselink, Claes and De Witte point out that the early decisions of the *Hoge Raad*[177] and *Raad van State*[178] derived authority to disapply national law from the Dutch Constitution, and there is little to have altered this position.[179] The position is similar in Luxembourg, where the special ratification

587/2012 (7 October 2014); *Alexandrou (Cyprus)* [2010] 1 CLR 17; *Charalambos* v. *Cyprus*, Cases 1480–1484/2011 et al. (11 June 2014). Cf: *Christodoulou (Cyprus)* [2013] 3 CLR 427, per Erotokriou.

[173] Constantinos Kombos and Stéphanie Laulhé Shaelou, 'The Cypriot Constitution under the Impact of EU Law: An Asymmetrical Formation' in Albi and Bardutzky (eds), *National Constitutions*, 1382, 1394, 1387–1389.

[174] Art. 120 of the Constitution of the Kingdom of the Netherlands (Ministry of the Interior and Kingdom Relations, 2008) available at: www.government.nl accessed 20 June 2016 prohibits judicial review of treaties, and unconstitutional treaties can be ratified by a 2/3 majority in the Houses of the States (Art. 91(3)). In Luxembourg, Art. 95ter of the Constitution prohibits judicial review of treaties, and international treaties have prevailed over national law since *Chambres des Métiers* v. *Pagani (Luxembourg)* [1954] *Pas Lux* 150 (*Cour de Cassation*) in Oppenheimer, *The Cases* (Vol 1) 671. See further Kaczorowska, *EU Law* (2013), 256; Claes, *National Courts*, 531–532, 243.

[175] Monica Claes and Bruno De Witte, 'Report on the Netherlands' in JHH Weiler, Anne-Marie Slaughter and Alec Stone Sweet (eds), *The European Courts and National Courts: Doctrine and Jurisprudence* (Hart 1998), 183.

[176] Arts. 9(1), (3) of the Dutch Constitution. Arts. 37, 49*bis*, 114(2) of the Luxembourg Constitution. See: Bruno De Witte, 'Direct Effect, Primacy and the Nature of the Legal Order' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU law* (2 ed., Oxford University Press 2011), 199; Claes, *National Courts*, 206, 218–219.

[177] *Bosch GmbH* v. *De Geus en Uitdenbogerd (Netherlands)* (Case 13/61) [1965] NILR 318 in Oppenheimer, *The Cases* (Vol I) 672.

[178] *Metten* v. *Minister van Financiën (Netherlands)* [1995] NJB-katern 545 (7 July 1996) in Oppenheimer, *The Cases* (Vol 2) 401.

[179] Claes and De Witte, 'The Netherlands', 184–190; Leonard Besselink, 'Curing a "Childhood Sickness"? On Direct Effect, Internal Effect, Primacy and Derogation from Civil Rights' (1996) 3 MJ 165; Claes, *National Courts*, 206. See also, Franz Mayer, 'Multilevel Constitutional Jurisdiction' in Von Bogdandy and Bast (eds), *European Constitutional Law*, 85; Leonard Besselink and Monica Claes, 'The Netherlands' in Albi and Bardutzky (eds), *National Constitutions*, 189–193.

procedure in Article 114(2) of the Constitution was necessary to ensure the constitutionality of the Maastricht Treaty,[180] and 'the [Luxembourg] *Chambre* is clearly the holder of revision power'.[181]

In sum, as a matter of pure constitutional law, no Member State accepts the absolute supremacy of EU law over the *Kompetenz-Kompetenz*. In all Member States, EU acts not conferred in accordance with the constitution are, in principle, invalid in the national legal order without (at minimum) parliamentary ratification or constitutional amendment. As the BVerfG concludes:

> The 'Constitution of Europe', international treaty law or primary law, remains a derived fundamental order [. . .] according to the principle of conferral, without the possibility for the European Union of taking possession of *Kompetenz-Kompetenz*.[182]

1.2.1.2 Normative Evaluation of Member State *Kompetenz-Kompetenz* Adjudication

This section evaluates competing *normative* claims over *Kompetenz-Kompetenz* adjudication. This is necessary because 'absolute' EU supremacy over *Kompetenz-Kompetenz* adjudication also relies upon a normative claim: That is, even if national courts retain formal authority over the status of EU law under constitutional law, they must accept that the 'effectiveness and uniformity of EU law' is of such normative importance that the constitutional authorization for EU law will always outweigh *any* conflicting constitutional norms – even those which constrain the act of ratification.[183] Take, for example, the apocryphal statement of EU supremacy by Pernice:

> A residual control of the Court of Justice by national Constitutional courts in cases of *continuous and evident violations of fundamental rights or [ultra vires acts]* as an element of balance of powers is excluded, since [. . .] non-application of Community law in one Member State would jeopardize the status of legal equality of the Union citizens which is the foundation of its functioning.[184]

[180] Georges Friden, 'Ratification Processes of the Treaty on European Union: Luxembourg' (1993) 18 EL Rev 241. See also Claes, *National Courts*, 218–219.

[181] Jörg Gerkrath, 'The Constitution of Luxembourg in the Context of EU and International Law as "Higher Law"' in Albi and Bardutzky (eds), *National Constitutions*, 226–227.

[182] *Lisbon (Germany)* [207], [215].

[183] Stephen Weatherill, *Law and Integration in the European Union* (Oxford University Press, 1995), 106; Christiaan Timmermans, 'Publication Review: The Worlds of European Constitutionalism' (2014) 10 EuConst 349, 352.

[184] Pernice, 'Multilevel Constitutionalism', 727 (emphasis added).

Suffice it here to state that this normative claim is not accepted in any of the constitutional courts catalogued in this book.[185] When the Union acquires its competences upon ratification by the Member States 'in accordance with their respective constitutional requirements',[186] the supremacy of EU law is secured within the constitutional order because conferral cannot be done in such a way that it would violate or vitiate conflicting norms in the constitution. As the Spanish *Tribunal Constitucional* so puts it, 'public authorities are no less subject to the Constitution when they act in the international or supranational relations than when they exercise their competences *ad intra*'.[187] The principle that emerges here is that national courts cannot hold the 'effectiveness and uniformity' of EU law over the constitutional boundaries of conferral, because the EU is a derived legal order circumscribed by constitutional norms exerted on conferral itself.[188] From this common foundation, Member States evince three approaches to situating the normative supremacy of EU law within the constitution.[189]

In a first group of countries, consisting of France (to 2006),[190] Denmark,[191] Greece,[192] Spain,[193] the Czech Republic,[194] Poland,[195] Slovenia,[196] Slovakia,[197] Romania,[198] Bulgaria,[199] Latvia,[200] Malta,[201]

[185] See also Claes, *National Courts*, 261: 'None of the constitutional courts has accepted the unconditional supremacy of Community law,' and sources below, nn 244–247.
[186] Arts. 48(4), 49, 54 TEU and 357 TFEU.
[187] *Maastricht (Spain)* [1].
[188] See De Witte, 'Direct Effect', 201–202 and cases cited below, n 403.
[189] Grabenwarter, 'Constitutional Law', 85–91 similarly classifies the Member States by these three approaches (though several are classified differently).
[190] See sources cited above, nn 110–116 and below, nn 292–294.
[191] See Section 1.2.1.1, nn 119–120 on s. 20 of the Danish Constitution.
[192] See sources above, nn 131–132 and below, nn 327–329 on Art. 28 of the Hellenic Constitution.
[193] See Section 1.2.1.1, nn 128–129 on s. 93 of the Spanish Constitution.
[194] Arts. 10a (the basis for conferral) and 1(2) (observation of obligations resulting from international law) of the Constitution of the Czech Republic 1993 (English translation available at: www.constituteproject.org accessed 9 July 2016) grant supremacy over statutes, but not constitutional law: *Lisbon I (Czech Republic)* [85]; *EAW (Czech Republic)* [78]. See Zdenek Kühn, 'The Czech Republic' in Albi and Bardutzky (eds), *National Constitutions*, 798.
[195] Art. 91 of the Constitution grants EU law the same rank as international agreements: *Accession Treaty (Poland)* [5]–[6]; *Lisbon (Poland)* [2.1].
[196] See Section 1.2.1.1, nn 154–155 and Section 1.2.2.1, nn 325–326 on Art. 3a of the Slovene Constitution.
[197] See Section 1.2.1.1, nn 156–159.
[198] See Section 1.2.1.1, nn 149–150 and Section 1.2.2.1, n 319.
[199] See below, Section 1.2.2.1, nn 322–323.
[200] See above, Section 1.2.1.1, n 137.
[201] See above, Section 1.2.1.1, nn 162–164.

Croatia[202] and Lithuania,[203] the constitutional basis for EU law is subject to a *nemo plus iuris* rule which prevents the state from conferring the competence to exercise its powers in a manner contrary to the constitution. Provisions of the constitution in conflict with the treaty must be amended and, if they cannot be so amended, the treaty (or the application thereof) will be unconstitutional.[204]

In a second group of countries, consisting of Germany,[205] Italy,[206] France (from 2006),[207] the UK,[208] Ireland,[209] Portugal,[210] Austria,[211] Sweden,[212] Estonia,[213] Finland,[214] Belgium[215] and Hungary,[216] the constitutional empowerment for EU law *does* apply irrespective of conflicting constitutional law, either by derogation or by an extraordinary instrument that bestows heightened rank on EU law. However, EU law does not take effect autonomously, and the derogation does not apply to important constitutional principles which are either beyond the reach of the legislator, or anyways always of greater normative weight than the effectiveness of EU law. This model includes, for example,

[202] See above, Section 1.2.1.1, n 167.
[203] See above, Section 1.2.1.1, nn 138–139.
[204] For example, *Maastricht I (France)* [14]; *Maastricht (Spain)* [3](a)–(c), [4]; *Lisbon (Latvia)*, 53; *Vatican Agreement (Slovenia)* [23].
[205] See sources cited below, Section 1.3.1.1, in particular nn 509–511, on Art. 23 of the German Basic Law.
[206] See Section 1.2.1.1, nn 107–109 and Section 1.2.2.1, nn 289–291 on the '*controlimiti*' doctrine.
[207] See *Société de l'information (France)* and annotation above, n 116. See further, Section 1.2.2.1 at nn 292–294.
[208] See Section 1.2.1.1, at nn 126–127 on the European Communities Act 1972 and Section 1.2.2.1, at nn 300–304 on parliamentary sovereignty.
[209] See Section 1.2.1.1, nn 140–142, and Section 1.2.2.1, nn 343–345 on Art. 29.4.6 of the Irish Constitution.
[210] See Section 1.2.2.1, nn 305–308, on Arts. 7(6), 8(4) and 288 of the Portuguese Constitution.
[211] See Section 1.2.1.1, nn 143–144 and Section 1.2.2.1, nn 349–351, on the AAA and Article 44(3) of the Austrian Constitution.
[212] See Section 1.2.1.1, nn 121–125 and Section 1.2.2.1, nn 332–336 on Ch 10§6 Instrument of Government.
[213] See Section 1.2.2.1, nn 346–348.
[214] See Section 1.2.1.1, nn 160–161, and Section 1.2.2.1, nn 357–360 on ss. 1, 94(3) of the Finnish Constitution.
[215] See Section 1.2.1.1, nn 117–118 and Section 1.2.2.1, nn 309–310 on Art. 34 of the Belgian Constitution.
[216] See Section 1.2.2.1, nn 340–341 on the 'Europe Clauses' of the 1989 and 2011 constitutions.

British parliamentary sovereignty,[217] the Italian *controlimiti* doctrine[218] and the German 'eternity clause'.[219] This model can be seen at work in such cases as *Grogan (Ireland)*,[220] or *Taricco II (Italy)*,[221] where normatively important constitutional principles trounced the imperative of the 'effectiveness and uniformity' of EU law.

In a third group of countries, consisting of the Netherlands, Luxembourg and Cyprus, EU law is normatively supreme over the constitution because judicial review of the EU Treaties is precluded by the constitution. However, even then it seems EU law is not normatively supreme over democracy: The EU can have no powers without a legislative act of conferral made in accordance with the constitution.[222]

Whatever group they fall into, all of these jurisdictions have two features in common. First, no Member State accepts that the 'uniformity and effectiveness' of EU law is of such normative importance that it prevails over constitutional control of *Kompetenz-Kompetenz*. As Member State courts have been keen to point out, the 'effectiveness and uniformity' of EU law *within* its competences cannot depend on the appropriation of national powers *outside* them.[223] For this reason, according to the BVerfG, *ultra vires* review does not 'factually contradict' supremacy,[224] and 'a substantial risk to the uniform application of [EU] law does not result'.[225]

The second thing they have in common is that acts of conferral are made of the same fabric as the constitution from which they have been

[217] See below, Section 1.2.2.1, nn 300–304.
[218] See Section 1.2.1.1, nn 107–109 and Section 1.2.2.1, nn 289–291.
[219] See Section 1.2.2.1, n 287 and Section 1.3.1.1.
[220] *Grogan I (Ireland)*, 765 excerpted below, Section 1.2.2.2 at n 401.
[221] *Taricco II Reference (Italy)* [4]: 'EU law and the judgments of the Court of Justice [. . .] for the purposes of its uniform application cannot be interpreted as requiring a Member State to give up the supreme principles of its constitutional order.' See also *Taricco II Judgment (Italy)* [5] excerpted further below, Section 1.2.2.3, at n 447.
[222] See sources cited above, Section 1.2.2.1, at nn 169–181.
[223] *Taricco II Reference (Italy)* [4]: 'there is no requirement whatsoever for uniformity across European legal systems regarding [supreme principles of national law] which [do] not directly affect either the competences of the Union or the provisions of EU law'. *Weiss Decision (Germany)* [113]: 'If the CJEU crosses the limit [of competence], its actions are no longer covered by the mandate conferred in Art. 19(1) TEU in conjunction with the domestic Act of approval.' *Constitutional Treaty (Spain)* [4]: '*supremacía* [of the constitution] and *primacía* [of EU law] are categories which are developed in differentiated orders'. See also *Accession Treaty (Poland)* [17]; *Lisbon (Poland)* [2.1]–[2.2] *et seq*; *Re Lisbon (France)* [8]–[9]; *Sugar Quotas III (Czech Republic)*, 486–486 (at [A-3B]); and sources cited below, nn 395–398.
[224] *Lisbon (Germany)* [216], [316].
[225] *R* v. *Oberlandesgericht (Germany)* [46].

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cut – they can have no 'extra-constitutional' properties other than those ascribed by the constitution.[226] In virtually all Member States, a conflict between EU law and the constitution from whence it has been carved is either 'infra-constitutional' – that is, the EU law is not of constitutional rank at all;[227] or 'intra-constitutional' – a clash between two national constitutional provisions: the one authorizing EU law and whatever one is in conflict with it.[228] The EU provision is given a higher or lower normative weight in a conflict depending on which country and which values are concerned, but in all instances the consequence of EU law spilling over into conflict with another constitutional provision is, as the Spanish Court puts it, 'a fact which must be considered as established from the perspective of [national] law',[229] and a matter of 'the selection of the rule to be applied'.[230]

1.2.1.3 Positivist Evaluation of Member State *Kompetenz-Kompetenz* Adjudication

This brings us to a positivist consideration of *Kompetenz-Kompetenz* adjudication. If the absolute supremacy of EU acts, as interpreted by the ECJ,

[226] *Solange II (Germany)* (2 BvR 197/83): BVerfGE 73, 339 (*Bundesverfassungsgericht*) [I]I(1)(b); *Crotty (Ireland)*, 783 excerpted below, n 372; *Constitutional Treaty (Spain)* [3] excerpted below, Section 1.2.2.1 at n 297.

[227] See, for example: *Accession Treaty (Poland)* [1] 'The norms of the Constitution, being the supreme act which is an expression of the National's will, would not lose their binding force [. . .] by the mere fact of an irreconcilable inconsistency [with] any Community provision.' *On limitation of rights of ownership (Lithuania)*, Cases 17/02, 24/02, 06/03, 22/04 (14 March 2006) English version at: www.lrkt.lt/lt/en/ accessed 3 July 2016 (*Konstitucinis Teismas*) [9.4] 'In the event of collision of legal norms, [EU law] shall have supremacy over laws and other legal acts [. . .] save the Constitution itself.' See also *Decision 148/2003 (Romania)* excerpted above, n 149; *Belmonte* v. *Fels Werker SA (Spain)* DTC 41/2001; ECLI:EC:TC:2002:41, [2]; *Amendment to the Roads Act (Croatia)* [60] excerpted above, at n 167; *Lisbon (Latvia)* [11.1] excerpted above, Section 1.2.1.1, n 138.

[228] *HS2 (UK)* [79]: 'the supremacy of EU law [is not determinative in a conflict with another statute] since the application of that doctrine in our law itself depends on the 1979 Act [. . .] a conflict between a constitutional principle [and EU law] has to be resolved by our courts [. . .] under the constitutional law of the United Kingdom'. See also *SNHCA (Slovenia)* [3]–[6], [20]–[22], [51]–[54]; *Grogan I (Ireland)*, 765 excerpted below, Section 1.2.2.2 at n 401; *Société de l'information (France)* [19]; *Sugar Quotas III (Czech Republic)* [106]; *Taricco II Reference (Italy)* [4]; *Michaniki (Greece)* Decision 3470/2011; ECLI:EL:COS:2011:1104A347002E7710, [9] and sources cited below, n 329.

[229] *Canary Islands Customs Regulation (Spain)*, DTC 4524/1989 in Oppenheimer, The Cases (Vol I) 694, 697.

[230] *Electoral Law (Spain)* [5]. This is so even in Luxembourg, Netherlands and Cyprus where the Treaties are not reviewable because of *national constitutional law*: Claes, *National Courts*, 159, 206; Xavier Groussot, 'Supr[i]macy *à la Française*: Another French Exception' (2008) 27 YEL 89, 99 at footnote 47.

is to be accepted as the rule of recognition for identifying which models of fiscal federalism are implementable in the EU, it must *in fact* provide an authoritative and reliable account of what is and is not safe constitutional ground to install legal instruments of public economics. This is particularly so when dealing with such things as temperamental bond markets and the politico-economic incentives of restive electorates. Certainty, expansive *intra vires* rulings of the ECJ over such instruments cannot be so constitutionally fraught that they risk destabilizing the entire fiscal architecture each time they are issued.

In that regard it must be recalled that, in all Member States, the constitutional authorization for the application of EU law is a legislative instrument enacted under a specific constitutional window.[231] Debates about whether it is legitimate for national courts to conduct *ultra vires* review are, first and foremost, debates about national constitutions.[232] Given this is so, a coercive approach to imposing supremacy in areas considered outside the boundaries of conferral is, with certainty, counterproductive to the goal of effectiveness and uniformity in the EU legal order.[233] As Kumm notes, 'The likelihood that all laws will in fact be applied throughout the community will decrease as the probability that a particular law will be struck down on constitutional grounds by a national court increases.'[234] Judge Maduro concurs:

> A hierarchical alternative imposing a monist authority of European law and its judicial institutions over national law would be difficult to impose in practical terms and could undermine the legitimacy basis on which European law has developed.[235]

[231] Grabenwarter, 'Constitutional Law', 94; Monica Claes, 'The "European Clauses" in the National Constitutions: Evolution and Typology' (2005) 24 YEL 81.

[232] *Ajos (Denmark)*, 442, 'The question of whether a rule of EU law can be given direct effect in Danish law, as required under EU law, turns first and foremost on the Law on accession by which Denmark acceded to the European Union.' *Data Retention (Slovakia)* [69] 'The position of the founding EU Treaties in the Slovak legal order is governed by Art. 1(2) and Art. 7(5) of the Constitution.' See also *HS2 (UK)* [79] excerpted above n 228; *RSI Residency Requirement (Portugal)* (Case 136/2014) Judgment 141/2015 (*Tribunal Constitucional*), [6]; *Amending Article 125 (Lithuania)* III [6.2.3] excerpted above, n 138. For this point: Mattias Kumm, 'Rethinking Constitutional Authority' in Avbelj and Komárek (eds), *Constitutional Pluralism*, 50.

[233] Damian Chalmers, 'Judicial Preferences and the Community Legal Order' (1997) 60 MLR 165, 180; Albi, 'Supremacy of EC Law', 29.

[234] Kumm, 'Final Arbiter', 359.

[235] Maduro, 'Europe and the Constitution', 97. Similarly: Koen Lenaerts, 'The Principle of Democracy in the Case Law of the European Court of Justice' (2013) 62 ICLQ 271, 280.

Such admissions align with statements of law from the Member States – 'absolute' supremacy cannot be applied as the rule governing the validity of contested acts without jeopardizing the integrity of the Union itself.[236] The BVerfG states:

> [I]t is not enough simply to speak of the 'precedence' of Community law over national constitutional law in order to justify the conclusion that Community law must always prevail over national constitutional law because, otherwise, the Community would be put in question.[237]

For the architects of fiscal federalism, it would be foolish to proceed on the cheerful basis that Member States daren't apply the jurisdictions they have set out, just to preserve the good functioning of some ideal model that impinges the boundaries of competence. Attempts to assert 'absolute' supremacy over *Kompetenz-Kompetenz* adjudication have provoked several of these jurisdictions – with immediate and deleterious effects on the uniformity and effectiveness of EU law.

Perhaps most recently, in *Ajos (Denmark)*, the *Højesteret* refused to disapply national employment legislation as directed by the ECJ in *Ajos (CJEU)*,[238] holding that ECJ case law on age discrimination was itself *ultra vires* the Danish act of accession.[239] In *Gauweiler (Germany)* the BVerfG inveighed against a permissive interpretation of ECB competence by the ECJ and placed six conditions on the operation of a (technically supreme) EU law bond-buying programme.[240] In *Weiss (Germany)* the BVerfG held that the ECJ's permissive interpretation of the same competence in *Weiss (CJEU)* 'manifestly exceeded the judicial mandate conferred upon the CJEU in Art. 19(1) TEU' such that 'the CJEU Judgment itself constitutes an *ultra vires* act and thus has no binding effect [in Germany]'.[241]

Even where such outright conflicts are avoided through subtler shades of interpretive disobedience, the jurisprudence cited in this chapter is replete with examples of EU law bending around constitutional guarantees at the margins of competence.[242] As the BVerfG

[236] *Constitutional Treaty (Spain)* [3] excerpted above, Section 1.2.1.1 at n 101; *Taricco II Reference (Italy)* [6] excerpted below, Section 1.2.2.1 at n 368.
[237] *Internationale Handelsgesellschaft MbH (Solange I) (Germany)* (2 BvL 52/71) BVerfGE 37, 272; [1974] 2 CMLR 540, [21].
[238] Case C-441/14 *Danski Industri (DI) (Ajos A/S)* v. *Estate of Rasmussen* EU:C:2016:278, [25], [37].
[239] *Ajos (Denmark)*, 443–444.
[240] *Gauweiler Decision (Germany)* [205]–[207].
[241] *Weiss Decision (Germany)* [143], [116]–[119], [146], [154]–[157], [163], [234].
[242] See examples cited below, nn 411–430. See further House of Lords European Union Committee 6th Report of Session 2003–2004: The Future Role of the European Court of Justice (2004 HL 47), [65] per Paul Craig.

observed in *R* v. *Oberlandsgeright (Germany)* (citing 27 judgments from ten countries):

> The overwhelming majority of the constitutional and supreme courts of other Member States shares for their respective sectors in the view of the [BVerfG] that the (application) primacy of Union law is not unlimited, but that are drawn to it by the national (constitutional) limits.[243]

Legal scholars trawling the case law make similar observations. Woods and Watson find that 'all the constitutional courts of the Member States regard themselves as having the power to review the boundary of EU competence'.[244] Surveys by Grabenwarter,[245] Claes,[246] Kumm and others reach similar conclusions: 'National Constitutional Supremacy is a legal rule that governs practice as a matter of fact, and that is all there is to it.'[247]

1.2.2 Member State Constitutional Identity

The second constitutional boundary imposed on the EU legal order is an absolute one: Not only have some powers not been conferred on the EU, but some constitutional powers or principles can *never* be transferred to the Union or vitiated by conflicting EU law. These are typically referred to as the limits of 'constitutional identity' – inalienable, inviolable structures or principles so integral to the constitutional order that they either cannot be formally altered by the amending power at all; or otherwise impose material constraints that cannot be released without effecting a 'total revision' or legal revolution that would result in a different constitutional system – a different constitutional identity.[248] Constitutional identity principles ensure that amendments and evolutions of constitutional law remain within

[243] *R* v. *Oberlandesgericht (Germany)* [I](2)(c). See also: *Sugar Quotas III (Czech Republic)*, VI(A) (citing 7 judgments from 4 countries); *Article E(2) (Hungary)* [34] (citing 28 judgments from 11 countries).

[244] Lorna Woods and Philippa Watson, *Steiner & Woods EU Law* (12th ed., Oxford University Press 2012), 103.

[245] Grabenwarter, 'Constitutional Law', 94.

[246] Monica Claes, 'The Primacy of EU Law in European and National Law' in Anthony Arnull and Damian Chalmers (eds), *The Oxford Handbook of European Union Law* (Oxford University Press, 2015), 178, 198–199.

[247] Kumm, 'Constitutional Supremacy', 269. See also, Kaczorowska, *EU Law* (2013), 256; Dyevre, 'Defending Sovereignty?', 147; Denis Preshova, 'Battleground or Meeting Point? Respect for National Identities in the European Union – Article 4(2) of the Treaty on European Union' (2012) 8 CYELP 267, 280.

[248] 'Constitutional identity' may derive from unamendable or material constraints. The doctrine of unwritten material constraints is often traced to *Kesavandanda Bharati* v.

the framework of the constitution and consistent with its foundational principles. They may often be recognized apart from 'ordinary' constitutional principles by their various functions: preserving popular or state sovereignty,[249] safeguarding the distinction between constitution-making and constitution-amending authority[250] and setting limits on the disposal of state competences and the supremacy of EU law.[251]

The unamendable 'eternity clause' in the 1949 German Basic Law is the most notorious in this respect, but many other constitutional courts and committees have also asserted some 'inviolable core' integral to the constitution. The Belgian *Cour constitutionnelle*,[252] the Bulgarian Конституционен съд (Constitutional Court),[253] the Croatian *Ustavni Sud*,[254] the Czech *Ústavní Soud*,[255] the Danish *Højesteret*,[256] the Estonian *Riigikohus*,[257] the Finnish *Perustuslakivaliokunnan*,[258] the Austrian *Verfassungsgerichtshof*,[259] the French *Conseil Constitutionnel*,[260] the Greek Συμβούλιο της Επικρατείας (Council of State),[261] the Hungarian

Kerala (India) AIR 1973 SC 1461 (Supreme Court), at [208] and [159], where the constitutional amending power was found not to include the 'basic structure' of the constitution. The doctrine is now widespread in constitutional democracies. See Richard Albert, 'Constitutional Handcuffs' (2010) 42 Ariz St L J 663; Yaniv Roznai, 'Unconstitutional Constitutional Amendments – The Migration and Success of a Constitutional Idea' (2013) 61 Am J Comp L 657; Richard Albert, 'The Expressive Function of Constitutional Amendment Rules' (2013) 59 McGill LJ 225; Yaniv Roznai, *Unconstitutional Constitutional Amendments* (Oxford University Press 2017), 8–9, 151.

[249] Sources *ibid* and Josê Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain' in Calleiss and Van der Schyff (eds), *Constitutional Identity*, 272.

[250] Roznai, 'Migration and Success', 664; Kriszta Kovács, 'Changing Constitutional Identity via Amendment' in Paul Blokker (ed.), *Constitutional Acceleration within the European Union and Beyond* (Routledge, 2018), 197, 201–202.

[251] Constitutional identity may perform some of these functions, and not others. See Kriszta Kovács, 'The Rise of an Ethnocultural Constitutional Identity in the Jurisprudence of the East Central European Courts' (2017) 18 German LJ 1703, 1706–1707 on Hungary, which has been unable to erect material identity constraints against predations by the state through formal amendments.

[252] See below, Section 1.2.2.1 at nn 309–310.

[253] See below, Section 1.2.2.1 at nn 322–324.

[254] See below, Section 1.2.2.1 at n 321.

[255] See below, Section 1.2.2.1 at nn 311–312.

[256] See below, Section 1.2.2.1 at n 298.

[257] See below, Section 1.2.2.1 at n 348.

[258] See below, Section 1.2.2.1 at nn 357–360.

[259] See below, Section 1.2.2.1 at nn 349–351 on Art. 44(3) and the fundamental principles of the Austrian Constitution.

[260] See below, Section 1.2.2.1 at nn 292–294.

[261] See below, Section 1.2.2.1 at nn 327–331.

Magyarország Alkotmánybírósága,[262] the Irish Supreme Court,[263] the Italian *Corte constituzionale*,[264] the Latvian *Satversmes Tiesa*,[265] the Lithuanian *Konstitucinis Teismas*,[266] the Polish *Trybunał Konstytucyjny*,[267] the Portuguese *Tribunal Constitucional*,[268] the Romanian *Curtea Constituțională*,[269] the Slovak *Ústavný Súd*,[270] the Slovenian *Ustavno Sodišče*,[271] the Spanish *Tribunal Constitucional*,[272] the Swedish *Konstitutionsutskottet*,[273] the UK Supreme Court[274] and the German BVerfG[275] have all asserted that some constitutional powers or principles cannot be disposed-of under the national constitution or vitiated by conflicting EU law, either *de lege lata* or at all.[276]

The 2010 Polish *Tribunal Konstytucyjny* encapsulates the jurisprudence thusly:

> Constitutional identity is a concept which determines the scope of excluding – from the competence to confer competences – the matters which constitute [. . .] 'the heart of the matter', i.e., are fundamental to the political system of a given state.[277]

For the architects of European fiscal federalism, this presents a dilemma. This is so because, under Article 4(2) TEU, the Union itself is under a duty to 'respect the national identities of its Member States', and the ECJ disavows the interpretation that this allows constitutional

[262] See below, Section 1.2.2.1 at nn 341–342 under the 1989 Constitution and 2011 Fundamental Law.
[263] See below, Section 1.2.2.1 at nn 343–345.
[264] See Section 1.2.1.1 at n 107 and Section 1.2.2.1 at nn 289–291.
[265] See below, Section 1.2.2.1, nn 313–315.
[266] See below, Section 1.2.2.1, nn 316–318.
[267] See below, Section 1.2.2.1, nn 337–338.
[268] See below, Section 1.2.2.1, nn 305–308.
[269] See below, Section 1.2.2.1, n 319.
[270] See below, Section 1.2.2.1 at nn 353–356.
[271] See below, Section 1.2.2.1 at nn 325–326.
[272] See below, Section 1.2.2.1 at nn 295–297.
[273] See below, Section 1.2.2.1 at nn 332–336.
[274] See below, Section 1.2.2.1 at nn 301–304.
[275] See below, Section 1.2.2.1 at n 287 and Section 1.3.1.1. on Arts. 79(3) and 23 of the German Basic Law.
[276] In the remaining countries, the Netherlands, Luxembourg, Cyprus and Malta, the author did not identify sufficient case law to establish constitutional identity reserves against EU law for the purposes of this book. However, the Cypriot constitution contains unamendability provisions which reflect its bi-communal identity, and although the Netherlands and Luxembourg are not generally thought to have substantive reserves which cannot be conferred, it is clear that both states retain *Kompetenz-Kompetenz*.
[277] *Lisbon (Poland)* [2.1].

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identities to limit the scope of EU law.[278] As Judge Lenaerts has written, 'There simply is no nucleus of sovereignty that the Member States can invoke, as such, against the Community' – even when the Treaty 'expressly acknowledges the existence of residual powers for the Member States'.[279] Instead, the ECJ has interpreted *national identity* under Article 4(2) as encompassing an open-ended list of cultural, social or legal values not common enough to be 'general principles' on their own right into a single principle that Lenaerts calls 'value diversity' – over which the CJEU then has jurisdiction.[280] 'National identity' includes 'constitutional identity'.[281] In the eyes of EU law, national identity is no different than other 'legitimate aims' whose purpose is, as stated in *Cassis*, 'not to reserve certain matters to the exclusive jurisdiction of the Member States' but to restrict derogations to the extent justified against the objectives of EU law.[282] On this reading, Article 4(2) TEU does not brace the containment walls of EU competence – it subsumes those boundaries within the EU legal order and gives the ECJ jurisdiction to examine their merit.

Member State *constitutional identity* and CJEU *national identity* jurisdictions therefore profess to govern the same thing, but draw very different red lines around the contours of EU competence. What the architects of fiscal federalism must determine is whether – as the ECJ maintains – it is the sole and final arbiter of what is or is not an infringement of constitutional identity, capable of 'ousting' the jurisdictions of national courts;[283] or whether it is national courts that will determine what the ultimate boundaries of the EU legal order (and EU fiscal federalism) will be.

1.2.2.1 Pure Constitutional Evaluation of Constitutional Identity Review

The first task must be to compare the pure constitutional authority for these jurisdictions. The constitutional basis for the CJEU's *national*

[278] See Armin Von Bogdandy and Stephan Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' (2011) 48 CMLR 1417, 1441; Elke Cloots, *National Identity in EU Law* (Oxford University Press, 2015), 190–191; and sources cited cases below, nn 386–389.

[279] Lenaerts, 'Many Faces', 220–221.

[280] Koen Lenaerts, 'How the ECJ Thinks: A Study on Legitimacy' (2013) 36 Forham Int'l LJ 1302, 1327.

[281] Case C-213/07 *Michaniki* EU:C:2008:544 (Opinion of AG Maduro), [31].

[282] Case 120/78 *Rewe-Zentral AG* v. *Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649, [5]. See: *Michaniki (AG Maduro)* [32].

[283] Case C-409/06 *Winner Wetten* [2010] ECR I-08015; EU:C:2010:503, [67].

identity jurisdiction is Article 4(2) TEU – a provision of EU law. Introduced at Maastricht to reassert 'that the external limit on the exercise of the Union's conferred powers are the fundamental constitutional structures of the Member States',[284] it reads:

> The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.[285]

Member State *constitutional identity* jurisdictions, by contrast, derive from constitutional provisions and principles which bind acts of conferral *outside* the EU legal order *before* they become EU law, and therefore define what may never be conferred on the Union and is therefore outside the EU legal order altogether.[286]

In **Germany**, the precedence of EU law is 'limited by the Basic Law's constitutional identity that, according to Art. 23(1) in conjunction with Art. 79(3) [BL] is neither open to constitutional amendments nor to European integration'.[287] Those articles, the so-called 'eternity clause' (Article 79(3) BL) and the constitutional safeguard clause (Article 23(1) BL), entrench the highest principles of the German state from constitutional change by amendment or conferral.[288]

In **Italy**, the *Corte constituzionale* has held since 1973 that 'fundamental principles of the Italian Constitution' impose *controlimiti* (counterlimits) to the entry of EU law, and that the Italian Court would 'always control the continuing compatibility of the Treaty with fundamental principles'.[289] A violation of these principles by EU law will result in its

[284] Preshova, 'Battleground or Meeting', 274–276. See also, Von Bogdandy and Schill, 'Absolute Primacy', 1425; Reestman, 'Franco-German Divide', 269.

[285] Ex Art. F(1), *Treaty on European Union* [1992] OJ C 191/1 read: 'The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy.'

[286] See, for example, *Taricco II Reference (Italy)* [8], excerpted below, at n 398; *Taricco II Judgment (Italy)* [8]: 'the constitutional identity of the Republic of Italy [. . .] falls outside the substantive scope of EU law'.

[287] *R* v. *Oberlandesgericht (Germany)* [41]. See also *Solange I (Germany)* [22]; *Brunner (Germany)* [52]; *Lisbon (Germany)* [194], [216], [221], [306]–[308]; *Honeywell (Germany)* [40]; *Euro Rescue Package (Germany)* [99]–[101]; *ESM I (Germany)* [150], [193]; *Anti-terror Database (Germany)* [91]; *Gauweiler Reference (Germany)* [25]–[27]; *Gauweiler Decision (Germany)* [120]; *Weiss Decision (Germany)* [101], [104], [115], [117], [163], [227].

[288] See below, Section 1.3.1.1, and cases cited.

[289] *Frontini (Italy)* [21]. See also, *Granital (Italy)* [7]; *Fragd (Italy)*, 545 excerpted below, Section 1.2.2.2, at n 400; *Sardinian Taxes Reference (Italy)* Order 103/2008 (13 February 2008) www.cortecostituzionale.it accessed 18 May 2016, [6]–[7], [8.2.8.1]; *GP et al.* v. *Avellino and Leonforte (Direct Effect of the ECHR) (Italy)* Judgment 349/2007 English version at:

invalidity,[290] or, if the Treaty is itself is in conflict with the Constitution, 'the radical and disruptive remedy of withdrawal from the European Union'.[291]

In **France**, the '*identité constitutionnelle de la France*' is assimilated to the '*conditions essentielles d'exercise de la souveraineté*',[292] and the '*structures constitutionnelles*' of the indivisible, secular, democratic and social Republic.[293] The 'ordinary' supremacy of EU law is derived from Articles 55, 88–1 and 88–2 of the Constitution, but the French Constitution remains 'at the pinnacle of the national legal order' and does not permit ratification of EU law that 'calls into question the rights and freedoms guaranteed by the Constitution or runs contrary to the essential conditions for the exercise of national sovereignty'.[294]

In **Spain**, the *Tribunal Constitucional* recognizes an 'essential nucleus of powers',[295] which impose 'material limits imposed on the transfer [to the EU] itself'.[296] Said material limits are understood as 'the sovereignty of the State, or our basic constitutional structures and of the system of fundamental principles and values set forth in our Constitution, [including] fundamental rights'.[297]

www.cortecostituzionale.it accessed 22 April 2016, [6.1]; *UN Convention (Italy)* Judgment 238/2014 English version at: www.cortecostituzionale.it accessed 22 June 2016, [3.2]; *Taricco II Reference (Italy)* [2].

290 See cases cited above, Section 1.2.1.1, n 107.

291 *Talamucci (Italy)*, 393. See also *Taricco II Reference (Italy)* [2].

292 *Liberté d'association (France)* Decision No 71-44 DC; ECLI:FR:CC:1971:7144DC; *Elections to the EP (France)* [2]–[4].

293 *Constitutional Treaty (France)* [1]–[7], [10], [18]–[22], [24]. For a full account, see François-Xavier Millet, 'Constitutional Identity in France: Vices and – Above All – Virtues' in Calleiss and Van der Schyff (eds), *Constitutional Identity*, 134.

294 *CETA (France)* [10]–[11]. See further *Société de l'information (France)* [19]; *Immigration, Integration and Nationality Act (France)* [44]–[45]; *Genetically Modified Organisms (GMOs) (France)* Decision No 2008-564 DC; ECLI:FR:CC:2008:2008564DC, [42]–[44]; *Betting and Gambling Sector (France)* Decision No 2010-605 DC; ECLI:FR:CC:2010:2010605DC, [17]–[19] *Personal Data Protection Law (2018) (France)* Decision No 2018-765 DC; ECLI:FR:CC:2018:2018765DC, [3].

295 *Maastricht (Spain)* [3c].

296 *Constitutional Treaty (Spain)* [3]. See further *Asepesco (Spain)* DTC 64/1991; ECLI:ES:TC:1991:74, [4]; *Rudolfo et al.* v. *FOGASA (Spain)* Decision 180/1993 in Oppenheimer, *The Cases* (Vol I) 707; *Belmonte* v. *Fels Werker (Spain)* [2]; *Resolution of Catalonia 1/XI (Spain)* DTC 259/2015; ECLI:ES:TC:2015:259, [5]–[7]; *Catalonia Referendum Act (Spain)* DTC 114/2017; ECLI:ES:TC:2017:114, [5]. For a full account, see Fernando Castillo de la Torre, 'Opinion 1/2004 on the Treaty Establishing a Constitution for Europe' (2005) 42 CMLR 1169, 1186; Pérez de Nanclares, 'Spain'.

297 *Constitutional Treaty (Spain)* [3]–[4]. See also, *Melloni (Spain)* [3].

In **Denmark**, the *Højesteret* has held since *Carlsen (Denmark)* that 'no transfer of powers can take place to such an extent that Denmark can no longer be considered an independent state' or undermine the 'democratic system of government',[298] and the *Højesteret* rejects the claim that EU supremacy ousts the 'Danish court's testing of the constitutionality of acts and EU Acts'.[299]

In the **United Kingdom**, constitutional identity inheres in the doctrines of parliamentary sovereignty,[300] the rule of law, legality and constitutional statutes.[301] The supremacy of EU law was effected by treating the European Communities Act 1972 as one such constitutional statute, but parliamentary sovereignty is 'fundamental to the United Kingdom's constitutional arrangements' and 'EU law can only enjoy a status in domestic law which that principle allows'.[302] ECJ rulings were not to be interpreted so as to 'question the identity of the national constitutional order',[303] or exert jurisdiction over 'issues integral to the identity of the nation state'.[304]

In **Portugal**, the fundamental principles of the Portuguese Constitution are entrenched by an unamendability clause (Article 288), and Articles 7(6) and 8(4) of the Constitution contain constitutional safeguard clauses that condition EU law on 'respect for the fundamental principles of a democratic state based on the rule of law'.[305] The *Tribunal Constitucional* 'has never accepted the supremacy of EU law over the Constitution', and the prevailing view is that Articles 7(6) and

[298] *Carlsen (Denmark)* [35]–[36]. See also, *Hausgaard (Denmark)* [32]; *Ajos (Denmark)*, 442 excerpted above, n 232.

[299] *Hausgaard (Denmark)* [42]. See further Helle Krunke, 'The Danish Lisbon Judgment' (2014) 10 EuConst 542, 556–558; Oliver Garner, 'Editorial: The Borders of European Integration on Trial in the Member States' (2017) 9 Eur J Legal Stud 1, 7.

[300] *Thoburn* v. *Sunderland (UK)* [69]: 'There is nothing [. . .] which allows the [ECJ] or any other institutions of the EU, to touch or qualify the conditions of Parliament's legislative supremacy in the United Kingdom. [. . .] The British Parliament has not the authority to authorise any such thing [. . .] it cannot abandon its sovereignty.'

[301] Paul Craig, 'Constitutional Identity in the United Kingdom' in Calleiss and Van der Schyff (eds), *Constitutional Identity*, 288–298, 297–298. Legislation is read subject to a principle of legality which cannot be impliedly overridden: *R* v. *SSHD, ex parte Simms (UK)* [2000] 2 AC 115. Constitutional statutes may not be impliedly repealed or amended without an express enactment by parliament: *Thoburn* v. *Sunderland (UK)* [62]–[63]. Parliament may not have authorized the abrogation of these principles by the European Communities Act: *HS2 (UK)* [207].

[302] *Miller (UK)* [67].

[303] *HS2 (UK)* [110]–[111], [201]–[209].

[304] *Pham* v. *SSHD (UK)* [58]; *G1* v. *SSHD (UK)* [43].

[305] Constitution of the Portuguese Republic (7th Revision, *Tribunal Constitucional,* 2005) English version at: www.tribunalconstitucional.pt accessed 6 June 2020.

8(4) provide a basis to review EU law against its fundamental principles.[306] Most recently, in its conditionality case law, the *Tribunal Constitutional* identified a 'hard core' of the rule of law and annulled measures it considered were 'binding on the Portuguese State [as] legal instruments [of] European Union law',[307] holding:

> [B]inding or not [. . .] in a multilevel Constitutional system, in which several legal orders interact, internal legal norms cannot breach the Constitution [. . .] European Union law itself establishes that the Union respects the national identity of its Member States, reflected in the fundamental political and constitutional structures of each of them (see Article 4(2) TEU).[308]

In **Belgium**, the *Cour constitutionnelle* holds that 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 protection offered by the Constitution'.[309] As Gérard and Verrijdt encapsulate: the Court 'forbids attributions of powers to the EU, and the application thereof by the EU organs, insofar as they encroach upon Belgian national identity or the basic values of constitutional rights protection'.[310]

In the **Czech Republic**, the *Ústavní Soud* has held since *Sugar Quotas* that 'the essential attributes of a democratic state governed by the rule of law [. . .] remain beyond the reach of the Constituent Assembly itself' and that 'should developments in the EC, or the EU, threaten the very essence of state sovereignty of the Czech Republic or the essential attributes of a democratic state governed by the rule of law, it will be necessary to insist that these powers be once again taken up by the Czech Republic's state bodies'.[311] In the event of a lesser but clear

[306] Francisco Pereira Coutinho and Nuno Piçarra, 'Portugal: The Impact of European Integration and the Economic Crisis on the Identity of the Constitution' in Albi and Bardutzky (eds), *National Constitutions*, 601–602, 624.

[307] *State Budget 2012 (Portugal)* (Case 40/12) Judgment 353/2012, [3] and cases cited below, Chapter 7, Section 7.5, n 320.

[308] *Special Sustainability Contribution (Portugal)* [25]; *Pay Cuts 2014-2018 (Portugal)* (Case 818/14) Judgment 574/2014, [12].

[309] *TCSG (Belgium)*, B.8.7.

[310] Gérard and Verrijdt, 'National Identity Discourse', 189. See also Elke Cloots, 'Constitutional Identity in Belgium' in Calleiss and Van der Schyff (eds), *Constitutional Identity*, 65.

[311] *Sugar Quotas III (Czech Republic)* [A-3B]. On the attributes of the democratic state governed by the rule of law (Arts. 1 and 9(2) of the Constitution) see: *Act on the Lawlessness of the Communist Regime (Czech Republic)*, Pl ÚS 19/93 (*Ústavný Súd*) English version at: www.usoud.cz accessed 12 July 2019; *Euro-amendment (Czech Republic)*, Pl ÚS 36/01 (*Ústavný Súd*) available at: www.usoud.cz accessed 12 July 2019; *Melčák (Czech Republic)*, Pl ÚS 27/09 (10

conflict with EU law, 'the constitutional order of the Czech Republic, in particular, its material core, must take precedence'.[312]

In **Latvia**, the *Satversmes tiesa* holds that 'National identity of the Member States is an essential basis of the EU',[313] and the fundamental principles of the *Satversme* (Constitution) place an ultimate stop on the conferral and application of EU law – including the duty of conforming interpretation.[314] The fundamental principles of the *Satversme* 'cannot be infringed by introducing amendments to the Satversme' and delegation of competencies to the EU 'cannot exceed the rule of law and the basis of an independent, sovereign and democratic republic based on the basic rights'.[315]

In **Lithuania**, Article 1 of the Constitutional Act on Membership (Lithuania) allows Lithuania to 'share with or entrust' state competences, but only with a Union that 'respects the national identity and constitutional traditions of its Member States'.[316] As interpreted by the *Konstitucinis Teismas*, the Lithuanian constitutional identity comprises the independent democratic republic, encompassing the independence of the state, democracy, the republic, innate human rights and freedoms,[317] and the supremacy of the constitution over EU law itself.[318]

September 2009) (*Ústavný Súd*); *Lisbon II (Czech Republic)* [111]–[113], [136], [150]; David Kosar and Ladislav Vyhnánek, 'Constitutional Identity in the Czech Republic' in Calleiss and Van der Schyff (eds), *Constitutional Identity*, 28.

312 *Lisbon I (Czech Republic)* [85].

313 *Lisbon (Latvia)* [14], [16.3].

314 *Riga Land Use Plan (Latvia)* [24.2], [25.4]: 'Latvian law must be interpreted so as to avoid any conflicts with the obligations of Latvia towards the European Union, *unless the fundamental principles incorporated in the Satverseme are affected*.' (Emphasis added) See also *On Prevention of Money Laundering (Latvia)*, Case 2008-47-01 (28 May 2009) English version at: www.satv.tiesa.gov.lv/wp-content/uploads/2008/11/2008-47-01_Spriedums_ENG.pdf accessed 13 June 2020, [15.2]. On the fundamental principles entrenched by Article 77 of the Latvian Constituion, see: Krüma and Statkus, 'Constitution of Latvia', 951.

315 *Lisbon (Latvia)* [17].

316 Arts. 1–2, Constitutional Act on Membership of the Republic of Lithuania in the European Union of 13 July 2004 (Lithuania) English version accessible at: www.lrs.lt accessed 14 June 2020. See Irmantas Jarukaitis and Gintaras Švedas, 'The Constitutional Experience of Lithuania in the Context of European and Global Governance Challenges' in Albi and Bardutzky (eds), *National Constitutions*, 1005–1007.

317 *Amending Article 125 (Lithuania)* III [2], [4], [6.1]–[6.4].

318 *On organising and calling referendums*, Case 16-29/2004 (11 July 2014) English version at: www.lrkt.lt/lt/en/ accessed 3 July 2016, [2.4]; *On limitation of rights of ownership (Lithuania)* [9.4]; *On the status of the national broadcaster (Lithuania)*, Case 30/03 (21 December 2006) English version at: www.lrkt.lt/lt/en/ accessed 3 July 2016, [IV], [1.1]; *On elections to the European Parliament (Lithuania)*, Case 26/2009 (9 November 2010) English version at: www.lrkt.lt/lt/en/ accessed 3 July 2016, [III]; *On measures to enhance the financial stability of*

In **Romania**, the *Curtea Constituțională* holds that the 'supreme values' of the Constitution entrenched by its unamendability clause (Article 152), in particular the rule of law and the supremacy of the Constitution, impose permanent constraints on the supremacy of EU law.[319]

In **Croatia**, the *Ustavni sud* holds that 'the Constitution is, by its legal nature, supreme to EU law',[320] and amendments to the constitution by referendum cannot alter 'the structural characteristics of the Croatian constitutional state, or in other words, of its *constitutional identity*, including the highest values of the constitutional order of the Republic of Croatia (Article 1 and Article 3 of the Constitution)'.[321]

The Constitutional Court of **Bulgaria** (Конституционен съд) holds that EU law becomes part of Bulgarian law only in so far as it is 'in compliance with the provided conditions' of the Constitution, and that Bulgaria's 'constitutional identity is preserved' in participation in the EU.[322] Constitutional identity finds *locus* in Article 158 of the Constitution, the onerous 'Grand National Chamber' revision procedure that entrenches 'the people's sovereignty, supremacy of the Constitution, political pluralism, separation of powers, rule of law and judicial independence' from amendment.[323] In particular, under the

banks (Lithuania), Cases 2/2012, 9/2012, 12/2012 (5 July 2013) English version at: www.lrkt.lt/lt/en/ accessed 3 July 2016; and cases above, nn 138–139.

[319] *Decision 80/2014 (Romania)* [453]–[460]: the Romanian Court is the 'guarantor for the supremacy of the Constitution' and 'the Constitution is the expression of the will of the people and cannot lose its binding force only by the existence of a discrepancy between its provisions and those of Europe [. . .] accession to the European Union cannot affect the supremacy of the Constitution'. See also: *Decision 148/2003 (Romania)* excerpted above n 149; *Decision 871/2010 (Romania) Monitorul Oficial al României* No 871 of 25 June 2010; *Decision 668/2011 (Romania) Monitorul Oficial al României* No 487 of 8 July 2011; *Decision 137/2010 (Romania) Monitorul Oficial al României* No 182 of 22 March 2010; *Decision 1249/2010 (Romania) Monitorul Oficial al României* No 764 of 16 November 2010. See further Viorica Vita, 'The Romanian Constitutional Court and the Principle of Primacy' (2019) 16 German LJ 1623, 1655–1657.

[320] *Auxiliary Activities in the Public Sector (Croatia)* [45]; *Amendment to the Roads Act (Croatia)* [60].

[321] *Auxiliary Activities in the Public Sector (Croatia)* [33.4]; *Referendum on Definition of Marriage (Croatia)*, U-VIIR-164/2014 (13 January 2014) (*Vrhovni sud*), [10]; *Notification on Definition of Marriage (Croatia)* [6]. See: Jurij Toplak and Djordje Gardasevic, 'Concepts of National and Constitutional Identity in Croatian Constitutional Law' (2017) 42 RCEEL 263; Lang et al., 'Constitution of Croatia', 1147.

[322] *Decision 7/2018 on Mixed EU Treaties (Bulgaria)* [3.1].

[323] Decision 3/2004 EU Amendments (Bulgaria), IV, V.I. See also Decision 3/2003 Form of State Structure and Government (Bulgaria), SG No 36 of 18 April 2013, [1]–[3]; Decision 8/2005 Amendments Affecting the Judiciary (Bulgaria), SG No 74 of 13 September 2005. See further Martin Belov, 'Constitutional Courts as Ultimate Players in Multilevel

'democratic constitutional model' of Bulgaria, the National Assembly must retain the 'basic powers [. . .] assigned by the Constitution'.[324]

In **Slovenia**, EU law is given an equivalent (but not superior) rank to the Constitution,[325] and both sovereignty and the *pravna drźava* (state governed by the rule of law) limit the permissible transfer of powers under Article 3a of the Constitution (the basis for conferral).[326]

In **Greece**, acts of conferral are constrained by both a constitutional safeguard clause (Article 28(3)) and an unamendability clause (Article 110(1)) which place the Parliamentary Republic, the powers of the state and basic civil and political rights beyond amendment or conferral.[327] The Council of State has sometimes been at pains to interpret the Hellenic Constitution in conformity with EU law,[328] but it has also formally denied the supremacy of EU law over it.[329] In *DI.KATSA (Greece)* the Council of State resolved a conflict with EU law in favour of the Constitution, concluding that it was 'clearly necessary for the preservation of the national identity',[330] and in *Jus Soli (Greece)* it asserted that Article 4(2) TEU guaranteed respect for national identity in Article 1 (3) of the Constitution (as interpreted by the Council of State).[331]

In **Sweden**, Chapter 10§6 of the Instrument of Government states that conferral must not affect the Basic Principles of the Form of Government, and that EU membership is presupposed on an equivalent level of fundamental rights protection to the Swedish Constitution and the ECHR.[332] The clause was modelled after Germany's 'constitutional

Constituent Power Games: The Bulgarian Case' in Martin Belov (ed.), Courts, Politics and Constitutional Law (Routledge, 2020), 165–169.

[324] *Decision 3/2004 EU Amendments (Bulgaria)*, V.1.

[325] *European Communities Association Agreement (Slovenia)*, RM-1/97; ECLI:SI:USRS:1997: Rm197, [12] and cases above, n 154.

[326] *SNHCA (Slovenia)* [20]–[22], [41]–[42], [49], [51]–[54]; *Vatican Agreement (Slovenia)* [22]–[24]. See further Samo Bardutzky, 'The Future Mandate of the Constitution of Slovenia: A Potent Tradition Under Strain' in Albi and Bardutzky (eds), *National Constitutions*, 701–703 and 892–894.

[327] Art. 28 of the Constitution is read as an implicit rejection of absolute supremacy. See Grabenwarter, 'Constitutional Law', 91; Panos Kapotas, 'Greek Council of State Judgment 3470/2011' (2014) 10 Eur Const Law Rev 162, 168–171. See further Xenophon Contiades, Charalambos Papacharalambous and Christos Papastyliano, 'The Constitution of Greece: EU Membership Persectives' in Albi and Bardutzky (eds), *National Constitutions*, 663.

[328] *Michaniki (Greece)* [9].

[329] *DI.KATSA (Greece)* [4]–[16]; *Karella (Greece)* [10]. *Athens Paper (Greece)* [11].

[330] *DI.KATSA (Greece)* [16].

[331] *Jus Soli (Greece)* Decision 260/2013; ECLI:EL:COS:2013:0204A46010E6342, [6].

[332] Ch 10§6, the Constitution of Sweden: The Fundamental Laws and the Rikstag Act (*Sveriges Rikstag,* 2016). The Basic Principles (Ch 1 Instrument of Government) include

identity' jurisprudence,[333] and 'implies a serious reservation against the principle of supremacy'.[334] According to the Constitution Committee (*Konstitutionsutskottet*), law-making powers conferred on the EU cannot modify fundamental principles of Sweden's constitutional system.[335] The *Högsta Domstolen* has not openly invalidated EU law on this basis, but it has treated national implementations of EU law as purely internal law and interpreted them in conformity with basic principles, even though this has appeared *prima facie* contrary to EU law.[336]

In **Poland**, the *Trybunał Konstytucyjny* has long asserted an 'untouchable material core' inherent in the Polish constitutional identity.[337] In *Lisbon (Poland)*, it held:

> The Constitutional Tribunal shares the view expressed in the doctrine that the competences, under the prohibition of conferral, manifest about a constitutional identity [. . .] the following should be included among the matters under the complete prohibition of conferral: decisions specifying the fundamental principles of the Constitution and decisions concerning the rights of the individual which determine the identity of the state, including, in particular [. . .] human dignity and constitutional rights [. . .] statehood [. . .] democratic governance [. . .] the rule [of] law [. . .] social justice [. . .] and the prohibition to confer the power to amend the Constitution and the competence to determine competences.[338]

Although long asserted against external predations by international law, since 2015 executive reforms aimed at undermining the Polish judiciary under the guise of a political 'constitutional identity' narrative have instead appeared to work 'in violation of clear constitutional standards and in conflict with their interpretation laid down in the

popular sovereignty, parliamentary government, the rule of law, equality, liberty, freedom of expression, Rikstag competences over state funds and Monarchy. For a full account: Nergelius, 'Constitution of Sweden', 324.

333 Nergelius, 'Constitution of Sweden', 319.

334 Griller, 'Problems', 173.

335 *Konstitutionsutskottet*, *Constitutional amendments before swedish membership of the European Union* (Report 1993/94 KU21 available at: wwwriksdagense/sv/dokument-lagar/arende/betankande/grundlagsandringar-infor-ett-svenskt-medlemskap-i_GH01KU21 1993).

336 *AA* v. *Strix Television et al. (Sweden)*, Case 33134/00; NJA 2002 314, available at: https://lagennu/dom/nja/2002s314 accessed 4 July 2016. Cf: *Ne bis in idem I (Sweden)*, Case B4946-12; NJA 2013 502, available at: https://lagennu/dom/nja/2013s502 accessed 4 July 2016. See Angelica Ericsson, 'The Swedish De Bis in Idem Saga – Painting a Multi-Layered Picture' (2014) 17 Europarättslig tidskrift 54.

337 *Accession Treaty (Poland)* [1], [2.1], [8], [12]–[14], [18]; *Decision 2011/199/EU (Poland)* [3.2], [6.3.1] excerpted above, in Methods and Introduction, n 25.

338 *Lisbon (Poland)* [2.1].

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case law of the Constitutional Tribunal, the Supreme Court and the legal doctrine that has developed since the adoption of the 1997 Constitution of the Republic of Poland'.[339]

In **Hungary**, the *Magyarország Alkotmánybírósága* enunciated a material form of constitutional identity constraint under the 'European clauses' of both the 1989 Constitution (Article 2/A)[340] and the 2011 Fundamental Law (Article E (2)).[341] However, the absence of any procedural entrenchment provisions in the Constitution (all constitutional provisions are formally amendable with the same 2/3 majority) has left it comparatively defenceless against internal predations by the Hungarian executive.[342]

In **Ireland**, the Supreme Court holds that Article 29.4.6 of the Constitution (the basis for conferral) does not bestow a power on state institutions to dispose of their own competences or 'qualify, curtail or inhibit the existing sovereign power',[343] and in *Grogan (Ireland)*, the Court rejected the supremacy of EU law over fundamental constitutional guarantees.[344] As Cahill concludes: The Supreme Court will

[339] Małgorzata Gersdorf, 'Opinion on the White Paper on the Reform of the Polish Judiciary' (*First President of the Supreme Court of Poland*, 2018) https://archiwumosiatynskiego.pl/images/2018/04/Supreme-Court-Opinion-on-the-white-paper-on-the-Reform-of-the-Polish-Judiciary.pdf accessed 12 June 2020. See also, *Constitutional Tribunal Act (Poland)*, K 39/16 (11 August 2016) (*Trybunal Konstytucyjny*). See further Laurent Pech and Kim Land Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 CYELS 3; Wojciech Sadurski, 'Polish Constitutional Tribunal under PiS: From an Activist Court, to a Paralysed Tribunal, to a Government Enabler' (2019) 11 Hague J Rule Law 63, 75.

[340] Under the 1989 Constitution, the *Magyarország Alkotmánybírósága* held Article 2/A could not be interpreted in a way that would 'deprive the sovereignty and rule of law of their substance' and implied a *nemo plus iuris* rule that prevented conferral unless Hungarian constitutional guarantees were respected: *Lisbon (Hungary)* [V.2.3]; *Europe Agreement (Hungary)* [V.3] excerpted further above, n 168; *Agricultural Surplus Stocks (Hungary)* Decision 17/2004 (V 25) ABIV1 English version at: www.mkab.hu accessed 3 June 2015, [IV.1], [IV.4]. See: Wojciech Sadurski, '"Solange, Chapter 3": Constitutional Courts in Central Europe' (2014) 14 ELJ 1, 10.

[341] *Article E(2) (Hungary)* [46]–[49], [54], [59]–[69]. See: Gábor Halmai, 'Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E (2) of the Fundamental Law' (2018) 43 RCEEL 23; Timea Drincóczi and Agnieszka Bień-Kacała, 'Illiberal Constitutionalism: The Case of Hungary and Poland' (2019) 20 German LJ 1140, 1153–1158.

[342] The *Magyarország Alkotmánybírósága* enunciated a material jurisdiction over amendments to the basic structure of the Constitution in *Transitional Provisions of the Fundamental Law (Hungary)* Decision 45/2012 (XII 29) accessible at: https://hunconcourt.hu/uploads/sites/3/2017/11/en_0045_2012.pdf accessed 11 June 2019, III [6], IV [7], but this was undone by a retaliatory amendment that prohibited review of amendments on substantive grounds. See: Kovács, 'Changing Constitutional Identity'.

[343] *Crotty (Ireland)*, 783.

[344] *Grogan I (Ireland)*, 695–770, excerpted below, in Section 1.2.2.2 at nn 399, 401. See further *Attorney General* v. *X (Ireland)* [1992] IESC 1; [1992] 1 IR 1; *Minister for Justice* v. *Tobin*

'defend the Irish constitutional legal order on almost exactly the same terms as the constitutional courts in other Member States'.[345]

In **Estonia**, the CEAA grants supremacy over Estonian law,[346] including constitutional law,[347] but this is only so 'provided that the fundamental principles of [the Constitution] are respected'.[348]

In **Austria**, the Basic Principles of the Austrian Constitution (democracy, the Republic, the federal state and the rule of law) 'are considered to form a constitutional core that may not be limited by EU law' and 'present limitations to European integration'.[349] If EU law is in conflict with Basic Principles, the VfGH 'has to [. . .] declare that the relevant rules of EU law are not applicable in Austria [. . .] [t]hey have to be regarded as void acts'.[350] *ESM (Austria)* and *TSCG (Austria*) indicate that a conferral of economic competences on EU institutions would contradict the Basic Principles.[351]

In **Slovakia**, Articles 7(2) and 7(5) of the Constitution grant EU supremacy over 'laws',[352] but amendments to grant supremacy over 'constitutional law' or the 'transfer a part of the exercise of its

(No 1) (Ireland) [2008] IESC 3; [2008] 4 IR 42; *Minister for Justice* v. *Tobin (No 2) (Ireland)* [2012] IESC 37; [2012] IR 147.

345 Maria Cahill, 'Constitutional Exclusion Clauses, Article 29.4.6, and the Constitutional Reception of European Law' (2011) 34 DULJ 74, 95.

346 *Ministry of Agriculture Tax Notice*, Case 3-3-1-74-05 (25 April 2006) (*Riigikohus Halduskelleegium*) [12]; *Constitutionality of the Local Government Council Election Act*, Case 3-4-1-1-05 (19 April 2005) (*Riigikohus põhiseaduslikkuse järelevalve kolleegium*) [49]; *Hadleri Toidulisandite AS*, Case 3-3-1-33-06 (5 October 2006) (*Riigikohus Halduskelleegium*).

347 *Interpretation of the Constitution (Estonia)* [15]–[16] (cf: Kõve J [2]–[3], Kergandberg J [2]–[3]).

348 *ESM (Estonia)* [222]. See also, *Makkar (Estonia)*, Case 3-2-1-71-14 (15 December 2015) (*Riigikohus*) [81]. The fundamental principles include sovereignty, human dignity, democracy, the rule of law, the social state and the Estonian identity. See: Madis Ernits et al., 'The Constitution of Estonia: The Unexpected Challenges of Unlimited Primacy of EU Law' in Albi and Bardutzky (eds), *National Constitutions*, 887.

349 Georg Lienbacher and Matthias Lukan, 'Constitutional Identity in Austria' in Calliess and Van der Schyff (eds), *Constitutional Identity*, 43–44, 56. See further Grabenwarter, 'Constitutional Law', 85; Konrad Lachmayer, 'The Constitution of Austria in International Constitutional Networks' in Albi and Bardutzky (eds), *National Constitutions*, 1274–1276; Foster, *Austrian Legal System*, 144; and sources cited above, n 144.

350 Lienbacher and Lukan, 'Austria', 57–58.

351 In *ESM (Austria)*, Case SV 2/12; ECLI:AT:VFGH:2013:SV2.2012 the VfGH upheld ratification of the TESM under Art. 9(2) (ratification of non-EU treaties not affecting the Basic Principles) as being sufficiently 'specific and limited' because it provided for a capped amount of financial contribution. *A contrario*, an open-ended transfer of the power over financial dispositions would affect the Basic Principles. See further, Section 7.3.2.4, at nn 182–186, on *TSCG (Austria)*, Case SV 1/13; ECLI:AT:VFGH:2013:SV1.2013.

352 See above, n 158.

sovereignty' were rejected.[353] The *Ústavný Súd* has held that Slovakia 'can only enter into a state union [. . .] in which there is no violation of [the Constitution], in particular Art. 1 [the sovereign democratic state governed by the rule of law]',[354] and that 'the referential framework of constitutional review remains limited to the norms of the Slovak constitutional order' even after accession to the EU.[355]As Kovacs concludes, it is clear that Court 'has the power to review EU law if this is indispensable to protect the constitutional identity of the country'.[356]

In **Finland**, the *Perustuslakivaliokunnan* holds that EU law cannot affect the democratic foundations of the sovereign republic under Section 1 of the Constitution,[357] and Section 94(3) now contains a constitutional safeguard clause that constitutionalizes this interpretation.[358] Under this constraint, the *Perustuslakivaliokunnan* has found that Finland cannot confer its competence for controlling financial liabilities on an international body voting by QMV,[359] and EU law cannot weaken domestic standards of fundamental rights.[360]

From this tour it is clear that, as a matter of pure constitutional law, the CJEU's 'national identity' jurisdiction under Article 4(2) TEU does not, and could not, grant jurisdiction over the grounds for constitutional identity review that bind acts of conferral in any of these countries. For Member State constitutional courts, therefore, Article 4(2) TEU is merely ratificatory of 'the thrust of the jurisprudence of numerous

[353] Zuzana Vikarská and Michal Bobek, 'Slovakia: Between Euro-Optimism and Euro-Concerns' in Albi and Bardutzky (eds), *National Constitutions*, 845, 880.

[354] *Constitutional Treaty (Slovakia)*, 35–38.

[355] *Data Retention (Slovakia)* [76] and [62]. See also: *Tax Office Košice IV (Slovakia)*, II ÙS 501/2010-94, [20].

[356] Kovács, 'Ethnocultural Identity', 1711.

[357] *Opinion on the ESM (Finland)*, PeVL 13/2012 vp – HE 34/2012 vp; *Opinion on the Treaty of Lisbon (Finland)*, PeVL 13/2008 vp; *Constitutional Treaty (Finland)*. See further above, Section 1.2.1.1, n 160 and Niilo Jääskinen, 'The Application of Community Law in Finland: 1995–1998' (1999) 36 CMLR 407.

[358] Section 94(3) states that 'An international obligation shall not endanger the democratic foundations of the Constitution.' See further Griller, 'Problems', 149, 166–168; Ojanen and Salminen, 'Finland', 280.

[359] *Opinion on the ESM (Finland)*, PeVL 1/2011 vp – U 6/2011 vp; *Opinion on the ESM (Finland)*, PeVL 22/2011 vp – U 27/2011 vp; *Opinion on the ESM (Finland)*, PeVL 25/2011 vp; *Opinion 13/2012 on the ESM (Finland)*. See: Päivi Leino and Janne Salminen, 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' (2013) 9 Eur Const Law Rev 451.

[360] *Opinion on the EU's Future (Finland)*, PeVL 25/2001 vp – E 27/2001 vp. See Ojanen and Salminen, 'Finland', 397; Juha Lavapuro, Tuomas Ojanen and Martin Scheinin, 'Rights-Based Constitutionalism in Finland and the Development of Pluralist Constitutional Review' (2011) 9 I Con 505, 515.

domestic constitutional courts on the relationship between EU law and national constitutional law'.[361] The Spanish *Tribunal Constitucional*, for example, has stated that 'the limits referred to by the reservations of said constitutional justifications now appear proclaimed unmistakeably by the Treaty'.[362] Numerous other courts have cited Article 4(2) TEU as though it was merely ratificatory of their own constitutional identity jurisdictions.[363]

This is so because the interpretation of constitutional identity involves the interpretation of national constitutional laws, and the CJEU lacks jurisdiction to do so under Article 19 TEU.[364] As a matter of law, it is blind to the 'identities' which it professes to define respect for. Indeed, the ECJ has itself accepted (though not always)[365] that only national courts can define what comprises national identity.[366] Yet, as Preshova points out, this is not enough: it remains that when deciding the weight of such claims in a conflict with EU law, the ECJ will still 'enter into a forbidden zone of determining the content and scope of the constitutional identity of a Member State. This is in essence contrary to Article 19 TFEU and also contrary to its duty to respect Article 4(2) TEU'.[367] As the *Corte constituzionale* has emphasized:

> There would be no respect if the requirements of unity demand the cancellation of the very core of values on which the Member State is founded. [. . .] Otherwise, the European Treaties would seek, in a contradictory fashion, to undermine the very constitutional foundation of which they were born by the wishes of the Member States. [. . .] It is therefore reasonable to expect that [. . .] the European court will [leave] to the national authorities the ultimate assessment concerning compliance with the supreme principles of the national order.[368]

[361] Von Bogdandy and Schill, 'Absolute Primacy', 1419.
[362] *Constitutional Treaty (Spain)* [3].
[363] *Lisbon (Poland)* [2.1]; *Lisbon (Germany)* [216]–[217]; *Taricco II Judgment (Italy)* [11]; *Taricco II Reference (Italy)* [6]; *Special Sustainability Contribution (Portugal)* [25] and *Pay Cuts 2014-2018 (Portugl)* [12]; *Jus Soli (Greece)* [6]; *Lisbon (Latvia)* [16.3]–[17].
[364] Case 27/74 *Demag* v. *Finanzamt Duisburg-Sud* [1974] ECR 1037; EU:C:1974:104, [8]; Case C-177/94 *Perfili* [1996] ECR I-161, [9]; Case C-515/08 *Dos Santos Palhota & Others* [2010] ECR I-9133; EU:C:2010:589, [18].
[365] Case C-393/10 *O'Brien* v. *Ministry of Justice* EU:C:2012:110, [49]; Case C-58/13 *Torresi* v. *Ordine degli Avvocati di Macerata* EU:C:2014:2088, [58]; Case C-399/11 *Melloni* v. *Ministerio Fiscal* EU:C:2012:600 (Opinion of AG Bot), [140]–[141].
[366] Case C-36/02 *Omega Spielhallen-und Automatenaufstellungs-GmbH* v. *Bonn* [2004] ECR I-9509; EU:C:2004:614, [31]; Case C-53/04 *Marrosu and Sardino* v. *Aziedna ospidaliera Ospedale* [2006] ECR I-7213 (Opinion of AG Maduro), [40].
[367] Preshova, 'Battleground or Meeting', 296.
[368] *Taricco II Reference (Italy)* [6].

The interpretation of national identity under Article 4(2) TEU therefore does not provide an authoritative description of the boundaries of constitutional identity for the purpose of this study. The CJEU has no pure legal authority to interpret or loosen the bounds of constitutional identity by extra-constitutional interpretation.[369] Whatever authority the CJEU has under Articles 19 and 4(2) TEU, it can only ever be derived authority from constitutional organs which themselves are subject to constitutional identity constraints on their conferring power.[370]

1.2.2.2 Normative Evaluation of Constitutional Identity Review

Pure constitutional claims aside, EU and national law also field competing normative descriptions of what values constitute constitutional identity, and subsequently what weight should be ascribed to them when they are in conflict with EU law. Normative disputes most frequently arise where the EU discovers itself to possess principles mirroring constitutional identity principles in national law, but these are interpreted differently, with a different rank, standard or content to the equivalent norm in national law. In particular, EU iterations of such norms can be subserviated to competing objectives of EU law – typically, the 'effectiveness' and 'uniformity' that justifies the supremacy of otherwise mundane acts of EU law. Member State constitutional identities cannot.

In that respect, although heterogeneous in specificity and entrenchment, Member State constitutional identities show a 'remarkable convergence' on two core normative principles:[371]

> **Constitutional Democracy**, sometimes derived from popular sovereignty and sometimes from parliamentary or national sovereignty, is the basic principle of all Member State constitutions. The primary condition is that state law-making institutions remain accountable by election to the people in the manner specified in the constitution. Under all constitutional identity jurisdictions in this book, no state institution may validate an exercise of public power that is not democratically legitimated in the manner *specified in the constitution*. All, including the most basic among them, preclude a disposition of the *Kompetenz-Kompetenz*. The most developed, such as the German 'eternity'

[369] *Lisbon (Germany)* [155].
[370] Ernits et al., 'Constitution of Estonia', 941.
[371] Von Bogdandy and Schill, 'Absolute Primacy', 1432. See also Giovanni Piccirilli, 'The "Taricco Saga": The Italian Constitutional Court Continues Its European Journey' (2018) 14 ECL Rev 814, 826.

clause, entrench a specific formula for democracy: they require, in essence, that *x* powers can only be exercised by *y* institutions according to *z* formula, and these components themselves are not amendable.

The Rule of Law requires that constitutional organs comply with substantive limits on state power inscribed in the constitution. This means that legislative and executive organs cannot transfer the power to act free from the constitution to the Union, because they are not empowered to act free from the constitution themselves.[372]

That these two principles can be essentially encapsulated as the definition of constitutional democracy is perhaps not surprising. And yet, the tension that arises whenever the ECJ interprets 'national identity' under Article 4(2) as having a different normative content or weight than national law seems to be a continuous source of surprise for Europe's jurists. Indeed, some judges and scholars have poured scorn on the notion that the shape of the Union's competences is constrained by the shape of national constitutional identities.[373] The ECJ itself is under the duty to 'respect' national identities but has, by many accounts, made a hash of it.[374] The ECJ has often refused to weigh constitutional identity considerations, even when flagged by AG Opinions,[375] or the Member States themselves,[376] and has sometimes dismissed or flatly ignored assertions from governments – and even constitutional courts – that some principle or other is part of the national identity.[377] Despite several AG Opinions, Article 4(2) TEU was not cited in a single ECJ decision from its introduction in 1992 until after the rejection of the Constitutional

[372] *Crotty (Ireland)*, 783: 'It is not within the competence of the Government, or indeed of the Oireachtas, to free themselves from the constraints of the Constitution [. . .] [t]hey are both creatures of the Constitution and are not empowered to act free from the restraints of the Constitution.'

[373] Pescatore, 'Comparative Analysis', 181; Case C-62/14 *Gauweiler* v. *Bundestag* EU:C:2015:7 (Opinion of AG Cruz-Villalón), [59]–[60] excerpted below, at n 392 and sources cited above, Section 1.1.1, nn 36–39.

[374] See, for example, *Melloni (Spain)* [3]: 'equivalence and sufficiency in [constitutional] protection [. . .] only becomes clear [. . .] when there is an underlying legitimate trust in Community institutions and other Member States.' See also Murkens, 'Want Our Identity Back', 532.

[375] Case C-160/03 *Kingdom of Spain* v. *Eurojust* [2005] ECR I-2077; EU:C:2004:817 (Opinion of AG Maduro), [24]; *Marrosu and Sardino* [40]; Case C-135/08 *Rottman* v. *Freistaat Bayern* EU:C:2009:58 (Opinion of AG Maduro), [23]–[25]. See Leonard Besselink, 'National and Constitutional Identity Before and After Lisbon' (2010) 6 Utrecht L Rev 36, 41.

[376] Case C-364/10 *Hungary* v. *Slovakia* EU:C:2012:630; *Italy* v. *Commission* EU:C:2013:116.

[377] Case C-42/17 *MAS and MB (Taricco II) (Opinion of AG Bot)* EU:C:2017:564, [169]–[187]; Case C-42/17 *MAS and MB (Taricco II)* EU:C:2017:936 (no mention of constitutional identity in judgment); *Gauweiler (CJEU)* (constitutional identity concerns raised by the BVerfG in its preliminary reference unaddressed) and cases cited above, n 365.

Treaty in 2008.[378] In the entire history of EU integration, just once has the ECJ found that a conflict between a fundamental constitutional right and an EU law compatible with the Charter could be decided in favour of the former.[379] As Judge Pescatore has written, the teleology of CJEU interpretation is integration:

> [T]he interpretation of Community Law depends not on the idea of maintaining an equilibrium which has been reached but on the vision of a European unity which is to be built.[380]

Accordingly, the EU courts are seen to have 'laboured in the field of doctrine to extend the Community's competences',[381] to have 'stretch[ed] their competences to the outermost limits [to] bring home the reality of European integration',[382] and to evince a school of thought that 'no opportunity should be missed of moving the Community caravan forward, if necessary by night marches'.[383] Criticisms of a 'dialogue among the deaf' and a 'lack of respect for the constitutional traditions of the Member States' have been levelled against the ECJ where integral constitutional principles have been placed faithfully before it.[384]

Under Article 4(2) TEU, there is no recognition of inalienable constitutional reserves of sovereignty outside the legal order which can be invoked against the expansion of EU law.[385] In all cases, 'identity' claims will be assimilated as 'legitimate aims' pursuant to a recognized EU derogation (and then subserviated to EU legislation under the proportionality test);[386] or they will be assimilated as indistinguishable from

[378] Preshova, 'Battleground or Meeting', 284.
[379] Clara Rauchegger, 'National Constitutional Rights and the Primacy of EU Law: *M.A.S.*' (2018) 55 CMLR 1521.
[380] Pescatore, 'Comparative Analysis', 174.
[381] Kumm, 'Final Arbiter', 359.
[382] Wyatt, 'Limited Powers?', 20.
[383] Alan Dashwood, 'The Limits of European Community Powers' (1996) 21 EL Rev 113. See also JHH Weiler, 'The Transformation of Europe' (1990–1991) 100 Yale LJ 2403, 2434–2435.
[384] Leonard Besselink, 'The Parameters of Constitutional Conflict after Melloni' (2014) 39 EL Rev 531, 549; Elke Cloots, 'Germs of Pluralist Judicial Adjudication' (2010) 47 CMLR 645, 663.
[385] Lenaerts, 'Many Faces', 220–221.
[386] *Case 473/93 Commission* v. *Luxembourg* [35]; Case C-213/07 *Michaniki AE* EU:C:2008:731, [61]; *Omega* [36]; Case C-341/05 *Laval un Partneri Ltd.* v. *Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767; EU:C:2007:809, [87], [91]–[92]; C-438/05 *Viking Line ABP* [2007] ECR I-10779; EU:C:2007:772, [85]–[90]; Case C-208/09 *Sayn-Wittgenstein* v. *Landeshauptmann von Wien* [2010] ECR I-13693; EU:C:2010:806, [93]; Case C-391/09 *Runevič-Vardyn* [2011] ECR I-03787, [83]–[96]; Case C-202/11 *Anton Las* v. *PSA Antwe.rp* (Opinion of AG Jääskinen), [58]–[61].

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EU norms – such as the protection of language or other fundamental values of the *Union* (and then interpreted in conformity with the EU law iteration).[387] So, for example, in *Melloni*, it was accepted that the right to a fair trial under the Spanish Constitution could constitute national identity, but it was denied that it could be given a stricter interpretation than under the EU Charter.[388] In *Michaniki*, AG Maduro explained:

> [N]ational constitutional rules can be taken into consideration to the extent that they fall within the discretion available to the Member States [. . .] *within the limits fixed by the principle and the [instrument of EU legislation] itself*.[389]

In short, constitutional identity is limited by the objectives of EU law, not the other way around.

The case for accepting this privileging of EU law over constitutional identity is normative: Member States must privilege the 'uniformity and effectiveness' of EU law over 'constitutional identity' claims, else the EU legal order will break down.[390] The danger is what Kumm refers to as the 'Cassandra scenario' – constitutional identity review would cast the EU into inter-statal anarchy, threatening over sixty-eight years of peace and cooperation.[391] In *Gauweiler* v. *Bundestag*, AG Cruz-Villalón opined:

> [I]t seems to me an all impossible task to preserve *this* Union, as we know it today, if it is to be made subject to an absolute reservation, ill-defined and virtually at the discretion of each of the Member States, which takes the form of a category described as 'constitutional identity' [. . .] Such a 'reservation of identity', independently formed by the competent – often judicial – bodies of the Member States would very probably leave the EU legal order in a subordinate position.[392]

With respect, however, it is difficult to see why this is so, and virtually no constitutional court has accepted this normative justification over constitutional identity. For two reasons.

[387] *Sayn-Wittgenstein* [84]; *Omega* [33]–[34]; *Anton Las (AG Jääskinen)* [58]–[59]; Case C-556/10 *Italy* v. *Commission* EU:C:2012:528 (Opinion of AG Kokot), [87]; *Runevič-Vardyn* [83]–[96]. See also: Brady Gordon, 'A Sceptical Analysis of the Enforcement of ISDS Awards in the EU Following the Decision of the CJEU on CETA' (2020) 5(1) EILA Rev 92, 130.

[388] *Melloni (AG Bot)* [139]–[142]. *Melloni* [58]–[59]; Gordon, 'A Sceptical Analysis', 130.

[389] *Michaniki (AG Maduro)* [33] (emphases added). See also *Michaniki* [63].

[390] *Costa* v. *ENEL*, 594; *Internationale Handelsgesellschaft* [3] excerpted above, Section 1.1.1, at n 48.

[391] Kumm, 'Final Arbiter', 375. See, for example, Groussot, 'Supr[i]macy', 103; Pescatore, 'Comparative Analysis', 170–176.

[392] *Gauweiler (AG Cruz-Villalón)* [59]–[60].

First, as Judge Kõve of the *Riigikohus* so puts it, 'absolute' supremacy would appear to 'overestimate the theory'.[393] Participation in *this* Union as we know it today simply does not entail 'supranational "access" to the Member States' legal orders' outside its competences – particularly when no such authorization is even possible under many constitutions.[394] That sort of 'in for a penny, in for a pound' argument has been dismissed as disingenuous and undemocratic.[395] As the *Trybunał Konstytucyjny* has pointed out, 'it is impossible in a democratic state ruled by law to create presumed competences'.[396] The BVerfG agrees: 'integration into a free community neither requires submission removed from constitutional limitation and control nor the forgoing one's own identity'.[397] The *Corte constituzionale* explains:

> [W]hilst the aim of the [*Corte constituzionale*] is to preserve the constitutional identity of the Republic of Italy, it does not however compromise the requirements of uniform application of EU law [because it] does not result from an alternative interpretation of EU law, but exclusively from the fact, which in itself *falls outside the substantive scope of EU law*, that the Italian legal system [. . .] subjects [criminal offences] to the principle of legality.[398]

Second, constitutional courts anyway doubt the normative superiority of a principle of legal ordering where the only inviolable principle is the effectiveness of executive-made law.[399] In *Fragd*, for example, the *Corte constituzionale* stated that compared to the infringement of a fundamental principle, 'concerns of uniform application of Community law and

[393] *Interpretation of the Constitution (Estonia)* per Kõve J, [3].
[394] *Lisbon (Germany)* [318] and [204], [239].
[395] *Vatican Agreement (Slovenia)* [23]–[24]; *Taricco II Reference (Italy)* [4]–[6] excerpted above, nn 221, 223; *Ajos (Denmark)*, 442–444, excerpted above, n 232; *Amending Article 125 (Lithuania)*, III [2], [4], [6]–[6.2.3]; *Weiss Decision (Germany)* [111]; *Constitutional Treaty (Slovakia)*, 35–36; *Decision 3/2004 EU Amendments (Bulgaria)*, V.1; *Thoburn* v. *Sunderland (UK)* [69] excerpted above, n 300; *HS2 (UK)* [110]–[111], [201]–[207] and [78]–[79], excerpted above n 228; *Crotty (Ireland)*, 767 and 758–759 excerpted above, n 372 and in Methods and Introduction, n 25; *Constitutional Treaty (Spain)* [3]; *Asepesco (Spain)* [4]; *Elections to the EP (France)* [2]–[4]; *Melloni (Spain)* [3], [4], [7].
[396] *Lisbon (Poland)*, ground 2.4.
[397] *Lisbon (Germany)* [204].
[398] *Taricco II Judgment (Italy)* [8] (emphasis added). See also *Taricco II Reference (Italy)* [8] 'the primacy of EU law is not called into question because [constitutional identity] is extraneous to EU law'.
[399] *Grogan I (Ireland)*, 769: 'it cannot be one of the objectives of the [EC] that a member state should be obliged to permit activities which are clearly designed to set at nought the constitutional guarantees for the protection within the State of a fundamental human right'. See, similarly: *Taricco II Judgment (Italy)* [5] below, excerpted below, Section 1.2.2.3, at n 447.

legal certainty did not have any overriding force'.[400] Likewise, in *Grogan (Ireland)* the Irish Supreme Court stated:

> Where an injunction is sought to protect a constitutional right, the only matter which could properly be capable of being weighed in a balance against it would be another constitutional right [. . .] there can be no question of a possible or putative right which might exist in European law as a corollary to a right to travel so as to avail of services, counterbalancing [that right] as a matter of convenience.[401]

Simply put, Member State constitutional courts do not weigh EU laws and constitutional identity norms in accordance with the normative weight the ECJ ascribes to them.[402] The architects of EU fiscal federalism can place no stock in the claim that the 'effectiveness and uniformity' of EU law will impel constitutional courts to accept intrusions on constitutional identity in order to accommodate some ideal institutional model. They are not authorized to decide that EU objectives should persist while national constitutional guarantees should perish.[403]

1.2.2.3 Positivist Evaluation of Constitutional Identity Review

Finally, the merits for accepting the absolute supremacy of EU law as a positivist statement of the law governing the boundaries of 'constitutional identity' are dubious. This was demonstrated in recent cases such as *Weiss (Germany)*,[404] *Slovak Pensions XVII (Czech Republic)*,[405] *R* v.

[400] *Fragd (Italy)* 653–662.
[401] *Grogan I (Ireland)*, 765 (see also n 399).
[402] De Witte, 'Direct Effect', 201–202 and sources above, nn 244–247.
[403] See, for example, *Lisbon (Germany)*, [217] 'the finding of a violation of constitutional identity is incumbent on the federal Constitutional Court alone'. *UN Convention (Italy)* [3.2]: 'The examination [of constitutionality] is a task of the constitutional judge alone [. . .] any different solution goes against the exclusive competence given by the Constitution to this Court.' *Special Sustainability Contribution (Portugal)* [25]: 'it is an undeniable task of the Portuguese Constitutional Court to exercise the competence that Art. 221 of the Constitution confers on it.' *Decision 3/2004 EU Amendments (Bulgaria)*: EU accession cannot affect the 'democratic constitutional model' including the 'functions assigned by the Constitution to the [. . .] Constitutional Court'. See also *Decision 80/2014 (Romania)* [456] excerpted above, Section 1.2.2.1, at n 319; *HS2 (UK)* [201]–[209], [110]–[111]; *Grogan I (Ireland)*, 765; *Re Lisbon (France)* [7]–[9]; *Melloni (Spain)* [3]; *Constitutional Treaty (Spain)* [4]; *Amendment to the Roads Act (Croatia)* [60]; *Data Retention (Slovakia)* [62] excerpted above, Section 1.2.2.1, at n 355.
[404] *Weiss Decision (Germany)* [118].
[405] *Slovak Pensions XVII (Czech Republic)* excerpted below, at n 451.

Oberlandesgericht (Germany),[406] *Ajos (Denmark)*,[407] *Taricco II (Italy)*,[408] and *HS2 (UK)*,[409] where national courts *in fact* invalidated or disapplied ECJ rulings, and these decisions were *in fact* taken as an authoritative statement of law by the legal system.

Indeed nearly every constitutional court – even the most communautaire among them – has invalidated or interpreted EU law in conformity with the boundaries of national constitutional identities, rather than the other way around. If this has averted newsworthy open conflicts most of the time, it has nonetheless led to a diffusive realm of 'parallel' interpretations where EU law is nonetheless invalidated or warped against the shape of constitutional identities. This can be seen in, *inter alia*, *Constitutional Treaty (France)*,[410] *EM Eritrea (UK)*,[411] *Gauweiler (Germany)*,[412] *HS2(UK)*,[413] *Anti-terror Database (Germany)*,[414] *Pham* v. *SSHD (UK)*,[415] *AAA* v. *Strix (Sweden)*,[416] *Constantinou (Cyprus)*,[417] the Portuguese financial conditionality cases,[418] *Grogan (Ireland)*,[419] *ESM (Estonia)*,[420]

[406] *R* v. *Oberlandesgericht (Germany)* excerpted above, Section 1.2.2.1, at n 287.

[407] *Ajos (Denmark)*, 441: 'it is not possible to interpret para 2.a(3) of the Law on salaried employees as then in force in accordance with the Employment Directive [. . .] as interpreted by the Court of Justice.'

[408] *Taricco II Judgment (Italy)* [5], [8], [12] excerpted below, Section 1.2.2.3, at n 447.

[409] *HS2 (UK)* [78]–[79], [110]–[111], [201]–[207]. See also *Pham* v. *SSHD (UK)* [58].

[410] *Constitutional Treaty (France)* [16], [18] (interpreting the EU Charter in conformity with, *inter alia*, French secularity). See: Millet, 'Constitutional Identity in France', 149.

[411] *R (EM (Eritriea))* v. *SSHD (UK)* [2014] UKSC 12; [2014] 2 WLR 409, interpreting Joined Cases C-411/10, C-493/10 *R (NS (Afghanistan))* v. *SSHD* EU:C:2011:865, on Art. 4 of the EU Charter in conformity with the ECHR and Human Rights Act 1998, rather than the other way around.

[412] *Gauweiler Decision (Germany)* [205]–[207] (placing six conditions on the application of the ECB's OMT programme).

[413] *HS2 (UK)* [110]–[111], [201]–[209] (refusing to submit a preliminary reference on the compatibility of a hybrid bill process with EU law and reading ECJ jurisprudence in conformity with a constitutional statute, rather than the other way around).

[414] *Anti-terror Database (Germany)* [91].

[415] *Pham* v. *SSHD (UK)* [54]–[55] (treating the ECJ's *Rottman* decision as *ultra vires* and reading it in conformity with respect for national constitutional identity, rather than the other way around).

[416] *AA* v. *Strix (Sweden)* (declining to submit a preliminary reference and treating an EU norm in conflict with freedom of expression as purely national law).

[417] *Constantinou (Cyprus)* (implementation of EAW Framework Decision unconstitutional).

[418] *Special Sustainability Contribution (Portugal)* [25] excerpted above, Section 1.2.2.1, at n 308 and cases cited below, Chapter 7, Section 7.5, n 320.

[419] *Grogan I (Ireland)*, 765 excerpted above, Section 1.2.2.2, at nn 399 and 401.

[420] Although not an EU institution, in *ESM (Estonia)* the *Riigikohus* considered the ESM a creature of the EU for the purposes of constitutional law and nonetheless read limits into the capital call provisions of the ESM which were not read by the ECJ.

Sugar Quotas III (Czech Republic),[421] *EAW (Poland)*,[422] *Riga Land Use (Latvia)*,[423] *Data Retention (Romania)*,[424] *Telecommunications Market Act (Finland)*,[425] *Money Laundering (Belgium)*,[426] *DI.KATSA (Greece)*,[427] *Auxiliary Activities in the Public Sector (Croatia)*,[428] *Agricultural Surplus Stocks (Hungary)*,[429] and *Taricco II (Italy)*,[430] where courts exercised a sort of 'reverse-Simmenthal' supremacy or studiously ignored conflicting interpretations of EU law entirely.

Article 4(2) TEU may therefore be said to constitute a 'material' (merely persuasive) competence to blunt an EU measure before it protrudes over the boundaries of the EU legal order into constitutional identities, but it is clear it does not have 'formal' authority – Member States do not accept the supremacy of the ECJ's assessment over their own.[431] To the contrary, where the CJEU has asserted itself over constitutional identity adjudication, the jurisdiction has proven so constitutionally fraught that its very use is prejudicial the integrity of the European legal order (it should not be forgotten that it was precisely that phenomenon in *Internationale Handelsgesellschaft* which provoked the birth of 'constitutional identity' jurisprudence in the first place).[432]

[421] *Sugar Quotas III (Czech Republic)* excerpted above, Section 1.2.2.1, at n 311.
[422] *EAW (Poland)* (invalidating the national implementation of the EAW Framework Decision).
[423] *Riga Land Use Plan (Latvia)* excerpted above, n 314.
[424] *Decision 1258/2009 Data Retention I (Romania) Monitorul Oficial al României* No 798 of 23 November 2009 (*Curtea Constituțională*) English translation available at: www.legi-internet.ro accessed 5 July 2016 (Directive 2004/24/EC declared unconstitutional without addressing validity under EU law). Similarly: *Procurement Complaints (Romania)* Decision No 569 of 17 May 2008 (*Curtea Constituțională*) English translation available at: www.legi-internet.ro accessed 5 July 2016. See Vita, 'Romanian Constitutional Court', 1649.
[425] *Opinion on the Telecommunications Market Act (Finland)*, PeVL 5/2001 vp – HE 73/2000 vp, 2–3.
[426] *Money Laundering (Belgium)*, Case 10/2008 (23 January 2008) (*Cour constitutionelle*). See also, *Bressol (Belgium)*, Case 89/2011 (31 May 2011) (*Cour constitutionelle*). For comment: Patricia Popelier and Catherine Van de heyning, 'The Belgian Constitution' in Albi and Bardutzky (eds), *National Constitutions*, 1233.
[427] *DI.KATSA (Greece)* [10] (interpreting Directive 89/48 in conformity with respect for Art. 16(5) of the Constitution).
[428] *Auxiliary Activities in the Public Sector (Croatia)* [45] and *Amendment to the Roads Act (Croatia)* [60], declining to consider compatibility of measures with EU law because 'the Constitution is, by its legal nature, supreme to EU law'.
[429] *Agricultural Surplus Stocks (Hungary)*, treating the implementation EU law as purely national law and interpreting it in conformity with constitutional guarantees. See Sadurski, 'Solange, Chapter 3' for comment.
[430] *Taricco II Reference (Italy)*, excerpted below, at n 446.
[431] Schilling, 'Autonomy', 407.
[432] Groussot, 'Supr[i]macy', 99.

Most recently, the rather transparent attempt to absorb constitutional identities into the EU legal order under Article 4(2) TEU is credited with provoking the emergence of new 'constitutional identity' jurisprudence in Belgium,[433] and the recentralization of overlapping EU Charter/constitutional claims in the Constitutional Courts of Italy and Austria.[434] In Austria, the VfGH recently asserted that the interpretation of EU rights 'must heed the constitutional traditions of the Member States and therefore the distinct characteristics of the rule of law in the Member States'.[435] In Italy, the *Corte constituzionale* recently reasserted its jurisdiction to 'ensure that the rights [under the EU Charter] are interpreted in a way consistent with constitutional traditions'.[436]

Prior to that, the straight assertion of supremacy over constitutional identity in *Akerberg Fransson (CJEU)*[437] and *Melloni (CJEU)*[438] provoked a broader rebellion to EU supremacy in *Melloni (Spain)*,[439] *Taricco II (Italy)*,[440] *R* v. *Oberlandesgericht (Germany)*,[441] *Anti-terror Database (Germany)*[442] and *HS2 (UK)*,[443] where constitutional courts attacked the ECJ's reasoning and reasserted their own supreme constitutional principles over EU law.[444]

In *R* v. *Oberlandesgericht (Germany)*, the BVerfG explicitly rebuffed *Melloni* under its *Solange I (Germany)* jurisdiction, overturning a decision of a lower court even though 'the [lower] Court's decision is determined by Union law' and the ECJ had 'specifically ruled' that execution of a

[433] Gérard and Verrijdt, 'National Identity Discourse', 192–193; Cloots, 'Constitutional Identity in Belgium', 70–71.

[434] S Giuseppe Martinico and Giorgio Repetto, 'Fundamental Rights and Constitutional Duels in Europe: An Italian Perspective on Case 269/2017 of the Italian Constitutional Court and Its Aftermath' (2019) 15(4) Eur Const Law Rev 731, 732 and 746; Gallo, 'Challenging EU Constitutional Law'.

[435] *Fengije and Jie (Austria)*, Cases U466/11–18, U1836/11–13; ECLI:AT:VFGH:2012: U466.2011, [7.3.3], English version at: www.vfgh.gv.at/downloads/VfGH_U_466-11__U_1836-11_Grundrechtecharta_english.pdf accessed 12 June 2020, [59].

[436] *Supervisory Authority for Competition and the Market (AGCM) (Italy)* Judgment 269/2017 (9 June 2019), English version at: www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_269_2017_EN.pdf accessed 13 December 2020, [5.2].

[437] *Akerberg Fransson* [20]–[21].

[438] *Melloni* [58]–[59]; *Melloni (Opinion of AG Bot)* [140]–[141].

[439] *Melloni (Spain)* [3] (refuting supremacy over the 'material limits' of constitutional identity and reasserting its right to a higher level of protection higher than the Charter, *contra Melloni*). See further Besselink, 'Parameters of Constitutional Conflict', 531.

[440] *Taricco II Reference (Italy)* [8]–[9].

[441] *R* v. *Oberlandesgericht (Germany)* [78]–[84] above, Section 1.2.2.1 at n 287.

[442] *Anti-terror Database (Germany)* [88]–[89], [91].

[443] *HS2 (UK)* [110]–[111] (see also [201]–[209]).

[444] See Valsamis Mitsilegas, 'Trust' (2020) 21 German LJ, 69.

warrant could not be conditional on compliance with constitutional law.[445]

Melloni also received a drubbing under the *controlimiti* doctrine in *Taricco II (Italy)*, forcing the CJEU into a *volte-face* after the *Corte constituzionale* held, again *contra Melloni*, that 'the Italian Constitution construes the principle of legality in criminal matters more broadly than European law',[446] and an ECJ interpretation of the TFEU contrary to that standard 'therefore may not be permitted, even in light of the primacy of EU law'.[447]

Similarly, in *Anti-terror Database (Germany)*, the BVerfG refused to submit a preliminary reference as obliged by the ECJ's *Akerberg Fransson* decision (seen by some as an extension of EU competence) and appeared to state that *Akerberg Fransson* was itself *ultra vires* and inapplicable in Germany:

> The ECJ's decision in the case *Akerberg Fransson* [. . .] must not be read in a way that would view it as an apparent *ultra vires* act [. . .] in a way that questioned the identity of the Basic Law's constitutional order.[448]

The UK Supreme Court followed suit in *HS2 (UK)*, where it refused to submit a reference on the compatibility of a 'Hybrid Bill' process with EU law, and held that 'a decision of the [ECJ] should not be read by a national court in a way that places in question the identity of the national constitutional order'.[449]

More recently, in *Ajos (Denmark)*, a unanimous decision of the *Højesteret* refused to disapply a provision of domestic legislation as directed by the ECJ because to apply the principle of age discrimination 'as interpreted by the EU Court of Justice' would be *contra legem.*[450]

In 2012, the straight application of supremacy to Czechoslovakian dissolution arrangements in *Landtová* v. *Česká správa socialního zabezpečení* provoked a constitutional identity ruling by the *Ústavní Soud* so vociferous it bears full repetition here:

> [The *Ústavní Soud*] expected that [. . .] the ECJ would familiarize itself with the [. . .] constitutional identity of the Czech Republic, which it draws from the common

[445] *R* v. *Oberlandesgericht (Germany)* [76], [82].
[446] *Taricco II Reference (Italy)* [2], [8].
[447] *Taricco II Judgment (Italy)* [5].
[448] *Anti-terror Database (Germany)* (Case 1 BvR 1215/07) ECLI:DE:BVerfG:2013: rs201304241bvr121507, English version at www.bundesverfassungsgericht.de accessed 18 June 2020, [88]–[89], [91].
[449] *HS2 (UK)* [110]–[111] (see also [201]–[209]).
[450] *Ajos (Denmark)*, 441.

constitutional tradition with the Slovak Republic [*idem est*] a completely idiosyncratic and historically-created situation that has no parallel in Europe. [. . .]

The failure to distinguish legal relationships arising from the dissolution of a state with a uniform social security system from legal relationships arising from the free movement of persons in the European Communities [. . .] is a failure to respect European history; it is comparing matters that are not comparable. For this reason it is not possible to apply European law [. . .] it is not possible to do otherwise than to find [. . .] that an act *ultra vires* has occurred.[451]

As the European Law Journal editors wryly point out, EU primacy vis-à-vis the national *pouvoir(s) constituant(s)* grants the ECJ 'a power that perhaps can only exist as long as it is not made use of'.[452]

A power that can 'perhaps exist as long as it is not made use of' cannot offer an authoritative statement of law for the purposes of this study. Constitutional courts have stated (and demonstrated) that legal architectures will be invalidated if they exceed EU competence or intrude on constitutional identities, and this study must take them at their word. Member State *Kompetenz-Kompetenz* and constitutional identity jurisprudence provides a valid constitutional, normative and positivist descriptions of the limits of the EU legal order for the purposes of this study on fiscal federalism.

1.3 The Constitutional Boundaries of European Fiscal Federalism

The conclusion that Member State *Kompetenz-Kompetenz* and constitutional identity jurisprudence provides a valid description of the constitutional boundaries of the EU legal order means the architects of fiscal federalism cannot look solely to EU law, as interpreted by the CJEU, as the ultimate constraint on European fiscal federalism. Member State constitutional courts impose constraints not only on the current boundaries of EU law *lex lata*, but also on potential expansions of EU law and revisions of the EU Treaties *de lege ferenda*.[453] The question of whether a specific fiscal federalism model might 'work' in the EU must heed these

[451] *Slovak Pensions XVII (Czech Republic)*, 12–13. See Case C-399/09 *Landtová* v. *Česká správa socialního zabezpečení* [2011] ECR I-05573; EU:C:2011:415.

[452] Agustin José Menéndez, 'Editorial: A European Union in Constitutional Mutation' (2014) 20 ELJ 127, 133.

[453] Pernice, 'Domestic Courts', 298, 303.

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fundamental constitutional limits of European integration in national constitutional law. That being so, the remainder of this chapter will attempt to specify the precise substantive boundaries which will impinge upon the selection of fiscal federalism systems in the EU.

1.3.1 *Fiscal Sovereignty*

The first boundary is Member State fiscal sovereignty. This principle is implicitly but plainly impressed upon the allocation of competences in economic policy (Articles 2(3) and 5(1) TFEU) and the substantive provisions governing public finance (Articles 121–126 TFEU). Under those articles, the EU has no competence in economic and fiscal policy.[454] The Union competence under these articles is 'mere coordination',[455] limited to providing 'a framework to coordinate these policies to a certain degree'.[456] This is not a mere reflection of good administration under the principle of subsidiarity (though it undoubtedly coheres with that principle).[457] As the BVerfG so puts it, fundamental decisions on public finance and expenditure are 'a fundamental part of the ability of a constitutional state to democratically shape itself', 'the core of parliamentary rights in democracy' and 'an essential manifestation of constitutional democracy'.[458]

This marks an immutable boundary of the EU legal order. Not only has economic and fiscal policy not been conferred on the Union, but, according to the BVerfG, it cannot ever be so conferred without abrogating the national constitutional identity and violating the 'eternity clause' (Article 79(3)) of the 1949 German Basic Law.[459] In *Lisbon (Germany)*, it held:

> A transfer of the right of the Bundestag to adopt the budget and control its implementation by the government [would] violate the principle of democracy [. . .] in its essential content.[460]

Numerous other courts have drawn similar boundaries around national fiscal sovereignty. In *Lisbon (Poland)* the *Trybunał Konstytucyjny* held that the conduct of 'independent financial, budget and fiscal policies' is one

[454] See above, Methods and Introduction at n 24.
[455] Fabbrini, 'Paradox', 5.
[456] Hinarejos, 'Constitutional Limits', 244.
[457] European Commission, 'Towards a Stability Pact' (Note for the Monetary Committee) II/011/96-EN, 10 January 1996, 14, excerpted below, Chapter 2, Section 2.2.4, at n 100.
[458] *Euro Rescue Package (Germany)* [107], [127].
[459] *Lisbon (Germany)* [228], [232]; *Euro Rescue Package (Germany)* [121]–[127]; *ESM I (Germany)* [195]–[196]; *ESM II (Germany)* [161]–[165]; *Gauweiler Reference (Germany)* [28]; *Gauweiler Decision (Germany)* [211]–[214]; *Weiss Decision (Germany)* [101], [104], [115], [117], [163], [227].
[460] *Lisbon (Germany)* [228].

of the 'attributes of sovereignty' comprising Poland's constitutional identity.[461] In *Crotty (Ireland)* the Irish Supreme Court stated that the freedom to form economic policy 'is just as much a mark of sovereignty' as the freedom to legislate itself, such that the desire to 'qualify, curtail or inhibit the existing sovereign power [. . .] is not within the power of the Government itself'.[462] In *Collins (Ireland)* the High Court held that 'Budgetary allocation is a fundamental responsibility which [the] Constitution cast upon the Daíl [. . .] This constitutional responsibility may under no circumstances be abrogated, whether by statute, parliamentary practice or otherwise.'[463] In *TSCG (France)* the *Conseil Constitutionnel* held that Articles 120–126 TFEU did not 'infringe the essential conditions for the exercise of national sovereignty' because they did 'not result in the transfer of any powers over economic or fiscal policy'.[464] In *TSCG (Belgium)*, the *Cour constitutionnelle* held that public finance measures belong to the 'democratically elected legislative assembly, solely competent for this purpose' and '[i]t is therefore up to the respective parliaments to exercise this budgetary competence'.[465] The Spanish *Tribunal Constitucional* holds that budgetary autonomy is the essence of 'the ability to self-government, expressed especially in the possibility of developing [a region's] own policies or matters within their range of competence'.[466] In Sweden, parliamentary fiscal competences are listed among the Basic Principles in Chapter 1 of the Instrument of Government excluded from conferral under Chapter 10§6.[467] In Lithuania the *Konstitucinis Teismas* holds that decisions concerning state loans and liabilities 'may be adopted by the Seimas only [. . .] an institution [which] may neither transfer nor waive these powers. Such powers may neither be changed nor limited by law'.[468]

[461] *Lisbon (Poland)*, 200. See also: *Decision 2011/199/EU (Poland)*, 4.1.3 and 7.3.
[462] *Crotty (Ireland)*, 783.
[463] *Collins* v. *Minister for Finance* [2013] IEHC 530, [95]–[98].
[464] *Treaty on Stability, Coordination and Governance (TSCG) (France)* Decision No 2012-653 DC; ECLI:FR:CC:2012:2012652DC, [16], [30]–[31].
[465] *TCSG (Belgium)* [B.8.3]. In that case the court found that the TSCG did not infringe the budgetary competences of the legislator because [B.6.6.] it does not impinge on 'the substantive choices that the respective authorities can make in the political fields assigned to them' and [B.8.8] 'do[es] not [. . .] obligate the contracting states, which may freely choose their corrective measures'.
[466] *Parliament of Catalonia* v. *State Solicitor (Law 18/2001) (Spain)*, DTC 134/2011; ECLI:ES:TC:2011:134, [8](a).
[467] Ch 1§4: 'The Rikstag enacts the laws, determines State taxes and decides how State funds are to be employed.' See Section 1.2.2.1 at nn 332–336 on Ch 10§6 and the Basic Principles.
[468] *On the reorganisation of joint stock companies (Lithuania)*, Cases 29/98-16/99-3/2000 (18 October 2000), IV[7].

In *EFSF (Slovenia)*, the *Ustavno Sodišče* held that 'the fundamental power of the National Assembly [. . .] to decide on state revenue and expenditure' fell under the 'principle of a state governed by the rule of law and the principle of the legality of the operation of the state administration' (Slovene constitutional identity) and so could not be delegated to another institution, including the executive.[469] In Latvia the *Satversmes tiesa* holds that, 'the law on the state budget is an important function of the *Saeima*, which it fulfils as an institution directly responsible to the people of Latvia'[470] and 'solely the legislator can take decisions concerning the state budget' under the basic principles of the democratic state.[471] In Croatia, the *Ustavni sud* holds that 'the exclusive authorities of the Government and the Croatian Parliament concerning issues relevant for the State Budget' are part of the 'constitutional identity' beyond the reach of amendment by referendum.[472]

In a string of 2011 rulings on the constitutionality of the EFSF/ESM legal frameworks before the Irish Supreme Court,[473] the German BVerfG,[474] the Austrian VfGH,[475] the Finnish *Perustuslakivaliokunnan*,[476] the Polish *Trybunał Konstytucyjny*,[477] the

[469] *EFSF (Slovenia)* U-I-178/10, UL 12/2011; ECLI:SI:USRS:2011:UI17810, [24]–[25].

[470] *2011 State Budget Subprogram 23.00.00 (Latvia)*, Case 2011-11-01 (3 February 2012) English version at www.satv.tiesa.gov.lv/wp-content/uploads/2011/05/2011-11-01_Spriedums_ENGpdf accessed 13 June 2020, [10].

[471] *Judges' Remuneration (Latvia)*, Case 2009-11-01 in *Selected Case-Law of the Constitutional Court of the Republic of Latvia: 1996-2017* (*Satversmes tiesa*, 2018), [8.1]. See also: *Old Age Pension (Latvia)*, Case 2009-43-01 *in Selected Case-Law of the Constitutional Court of the Republic of Latvia: 1996-2017* (*Satversmes tiesa*, 2018), [30.1]: International commitments cannot 'replace the rights [. . .] and also the duty [on the *Saeima*] to decide on all substantial matters' relating to loans and financial dispositions – such issues 'had to be decided by the legislator itself'.

[472] *Auxiliary Activities in the Public Sector (Croatia)* [33.4]; *Amendment to the Roads Act (Croatia)*.

[473] *Pringle* v. *Government of Ireland (Ireland)* [2012] IESC 47; [2012] 7 JIC 3101, [8.14]: Spending obligations 'must come from funds already committed by Ireland (with the approval of the Dáil)'.

[474] *ESM I (Germany)* [211]–[222]; *ESM II (Germany)* [161]–[162] excerpted below, Section 1.3.1.2, at n 516.

[475] *ESM (Austria)* [3.5.3], 'the National Council decided that the Republic of Austria should accede to the Treaty and therefore assume obligations which are defined and limited', and [4.4.3] the TESM does not 'set out an unlimited liability for making supplementary payments'.

[476] *Opinion 25/2011 on the ESM (Finland)*; *Opinion 13/2012 on the ESM (Finland)*: Art. 3 of the Constitution ('the legislative powers are exercised by the Parliament, which shall also decide on State finances') is within the 'democratic foundations of the Constitution' which EU obligations cannot endanger under Art. 94 of the Constitution.

[477] *Decision 2011/199/EU (Poland)* [4.1.3], [6.3.1]–[6.3.3], [7.3].

Estonian *Riigikohus*[478] and the Slovenian *Ustavno Sodišče*,[479] the legality of the EFSF or ESM were predicated on the conclusion that financial commitments were capped to the extent of the parliamentary authorization, so the agreements did not entail an open-ended transfer of fiscal sovereignty. In *ESM (Estonia)* the *Riigikohus* explained:

> The sovereignty of the people gives rise to the sovereignty of the state and thereby all state institutions obtain their legitimation from the people. [. . .] One element of the state's sovereignty is its financial sovereignty, which contains taking decisions on budgetary matters and on the assumption of financial obligations for the state.[480]

In all countries which have had occasion to pronounce on the matter in the context of EU integration, parliamentary control over fiscal policy is what separates a (constitutional) exercise of sovereignty from an (unconstitutional) abrogation of constitutional identity.[481]

1.3.1.1 Three Tests for Fiscal Sovereignty

This book extracts three tests for evaluating whether a proposed legal arrangement coheres with the limits of Member State fiscal sovereignty under European constitutional identity case law:

[1.3.1.2] A *restriction* on budgetary sovereignty must not 'fetter the budget legislature to such an extent that the principle of democracy is violated', i.e., 'with the effect that it or a future Parliament can no longer exercise the right to decide the budget on its own';[482]

[478] *ESM (Estonia)* [105]–[106], [144]: 'the maximum limit of Estonia's [budgetary] obligations [. . .] cannot be changed without the consent of Estonia and without amending the Treaty'.

[479] *EFSF (Slovenia)* [24]–[25]: 'The constitutional requirement for the adoption of a law on the basis of which the state may borrow needs to be understood as a requirement that (future) obligations be precise or at least determinable [. . .] a decision on borrowing is always adopted by the National Assembly itself and [it] does not transfer this decision with general and unlimited authority'.

[480] *ESM (Estonia)* [127].

[481] Tuori and Tuori, *Eurozone Crisis*, 195 notes: 'Fiscal competences [. . .] have historically lain at the very core of the parliamentary regime and [. . .] constituted the vital pillars of representative democracy and parliamentary control over government.'

[482] *Euro Rescue Package (Germany)* [104]. See also, *ESM I (Germany)* [195]; *Lisbon (Poland)* [2.1]; *Joint stock companies (Lithuania)* IV[7] excerpted above, at n 468; *TCSG (Belgium)* [B.6.6] and [B.6.8.] excerpted above, at n 465; *Auxiliary Activities in the Public Sector (Croatia)* [33.4] (constitutional referendum bill unconstitutionally constrains legislative competences in issues relevant for the State Budget); *TSCG (France)* [30]–[31] (economic programmes under TSCG do not violate national sovereignty because 'such a programme does not have any binding consequences under national law'); *Crotty (Ireland)*, 783: fiscal policy is one of the areas of sovereignty where 'the State's organs

[1.3.1.3] A *delegation* of budgetary decision-making must not compromise the principle that 'the [national] Parliament remains the place in which autonomous decisions on revenue and expenditure are made';[483] and

[1.3.1.4] A finite financial *disposition* must not be of structural significance to the Parliament's right to decide on the budget such that it causes an irreversible prejudice to future majority decisions and cannot be reversed by an equivalent action by the Parliament in the future. The test applied is that 'the democratic process remains open and that legal re-evaluations may occur on the basis of other majority decisions and that an irreversible legal prejudice to future generations is avoided'.[484]

Although the burgeoning Member State case law on these principles appears remarkably convergent thus far, it must be said that these tests are quarried, first and foremost, from the leading German jurisprudence, and it is that jurisprudence which this section will expound upon to explain these tests. This is so for two reasons.

cannot contract to exercise in a particular procedure their policy-making roles or in any way to fetter powers bestowed unfettered by the Constitution' (further excerpted above, at n 462).

[483] *Euro Rescue Package (Germany)* [124]. See also, *TCSG (Belgium)* [B.8.3.] excerpted above, at n 465; *Pringle* v. *Ireland (Ireland)* [8.14] excerpted above, n 473; *Collins (Ireland)* excerpted above, at n 463; *TSCG (France)* excerpted above, at n 464; *Lisbon (Poland)* [2.1]; *Decision 2011/199/EU (Poland)* [4.1.3] and [7.3]; *Joint stock companies (Lithuania)* IV[7] excerpted above, at n 468; *EFSF (Slovenia)* [24]–[25]; *Judges' Remuneration (Latvia)* [8.1] and cases excerpted above, at nn 470–471; *Auxiliary Activities in the Public Sector (Croatia)* [33.4]; *ESM (Austria)* [104]–[105] excerpted above, n 475; *Opinion 13/2012 on the ESM (Finland)* excerpted above, n 476; *Opinion on the Six Pack (Finland)*, SuVL 11/2010 vp (Article 126 TFEU not an adequate legal basis for economic policies with a significant impact on Parliament's budgetary powers); *ESM (Estonia)* [127] excerpted above, at n 480; *EFSF (Slovenia)* [24]–[25] (further excerpted above, Section 1.3.1 at n 479) 'the fundamental power of the National Assembly [. . .] to decide on state revenue and expenditure' cannot be delegated – 'a decision on borrowing is always adopted by the National Assembly itself'.

[484] *ESM II (Germany)* [173]. See also *Pringle* v. *Ireland (Ireland)* [8.14] excerpted above, n 473; *Opinion 25/2011 on the ESM (Finland)*; *Opinion 13/2012 on the ESM (Finland)*; *ESM (Estonia)* [105]–[106], [144] excerpted above, n 478; *ESM (Austria)* excerpted above, n 475; *TCSG (Belgium)* [B.6.6.], 'Annual approval of the budget does not prevent parliaments from entering into multi-year commitments, provided these commitments are considered each year in the estimation and authorisation.' *EFSF (Slovenia)* [24]–[25]: the competence for state revenue and expenditure implies 'an upper limit that, despite the absence of an explicit constitutional provisions on a borrowing ceiling' means the legislature may not deplete or pledge the financial resource 'to a degree it would jeopardise the democratic life of the state'.

First, much of the legal architecture at issue in this book derives directly from German constitutional constraints. Price stability (Article 127(1) TFEU), the prohibition on monetary financing (Article 123 TFEU), the 'no bailout' rule (Article 125 TFEU) and the fiscal governance rules (Articles 121–126 TFEU) are 'parallel provisions' to the German Basic Law, and 'permanent constitutional requirements of German participation in the monetary union'.[485]

Second, the 'eternity clause' that grounds the German 'constitutional identity' jurisdiction is unusually strong and well-defined compared to other 'identity' provisions in Europe. It is the high-water mark of constitutional identity in Europe – and it is unamendable. While novel instruments proposed for EU fiscal federalism may trespass on constitutional identity in any number of countries, they will most likely cross the limits of Article 79(3) BL first. Article 79(3) states:

> Amendments of this Constitution affecting the division of the Federation into *Länder*, their participation in principle in the legislative process, or the basic principles laid down in Articles 1 [Human Dignity] and 20 [Democratic and Social Federal State] shall be inadmissible.

This provision is a permanent feature of German – and European – constitutional heritage. It is, according to the BVerfG, an indelible consequence of history – 'a reaction to the historical experience of a creeping or abrupt erosion of the free substance of a democratic fundamental order'.[486] It permanently shields the highest constitutional principles of the German state – human dignity (Article 1 BL)[487] and the basic principles of the democratic social and federal State (Article 20 BL)[488] – from constitutional change.

Fiscal sovereignty falls primarily within the protection of the basic principles of the democratic and social federal state under Article 20. Article 20 states, in part:

> (1) The Federal Republic of Germany is a democratic and social federal state.

[485] *ESM I (Germany)* [203].
[486] *ESM I (Germany)* [203].
[487] *Solange I (Germany)* [4]: 'The part of the Basic Law dealing with fundamental rights is an inalienable, essential feature of the valid Basic Law.'
[488] *Lisbon (Germany)* [192]: 'The principle of democracy may not be weighed against other legal interests; it is inviolable.'

(2) All state authority emanates from the people. It is exercised by the people through elections and voting and by specific organs of the legislature, the executive power and the judiciary.[489]

The principles of popular sovereignty and constitutional democracy in Article 20(2) secure the constitutional link between the act of voting in elections and the exercise of state power. As stated by the BVerfG: 'Article 20(2) sentence 2 guarantees in conjunction with art.79(3) that the exercise of state duties and the exercise of state powers can be traced back to the people of the state and are accounted for *vis-à-vis* the people.'[490]

This is in turn given substance by the right to vote in Article 38.[491] Article 38 states, in part:

(1) The deputies to the German House of Representatives [*Bundestag*] are elected in general, direct, free, equal and secret elections. They are representatives of the whole people not bound by orders and instructions, and subject only to their conscience.
(2) Anyone who has attained the age of eighteen years is entitled to vote; anyone who has attained majority is eligible for election.

The right to elect the *Bundestag* under Article 38(1) is a right to elect a parliament that remains accountable to the people which elect it.[492] This precludes legal commitments entered into by treaty 'if the result of this is that the people's democratic self-government is permanently restricted in such a way that central political decisions can no longer be made independently'.[493] In *ESM (Germany)*, the Court held:

A necessary condition for the safeguarding of political latitude in the sense of the core of identity of the constitution (art.20(1)-(2), art.79(3) BL) is that the budget legislature makes its decisions on revenue and expenditure free of other-directedness on the part of the bodies and of other Member States of the European Union and remains permanently 'the master of its decisions'.[494]

[489] Basic Law for the Federal Republic of Germany (Deutscher Bundestag, 2019) English translation available at: www.btg-bestellservice.de/pdf/80201000.pdf accessed 5 October 2020.
[490] *ESM II (Germany)* [234]. See also, *Weiss Decision (Germany)* [99].
[491] *Euro Rescue Package (Germany)* [120]; *Lisbon (Germany)* [151], [184]–[187]; *Weiss Decision (Germany)* [99].
[492] *Parliamentary Rights to Information (ESM and Euro Plus Pact) (Germany)* (2 BvE 4/11): BVerfGE 131, 151, English version at: www.bundesverfassungsgericht.de accessed 24 May 2020, [113]; *Brunner (Germany)* [35]; *Weiss Decision (Germany)* [99].
[493] *Euro Rescue Package (Germany)* [98], [101].
[494] *ESM I (Germany)* [197].

Any break in the 'chain of legitimation' between the right to vote under Article 38(2) and the exercise of state power under Article 20 will *prima facie* constitute an infringement of German constitutional identity under Article 79(3). If voters are no longer able to exercise the right to vote under Article 38(2) BL; if the right to vote is to be exercised by a method of voting other than the formula described in Article 38(1); if votes are no longer connected to the autonomous *Bundestag* in Article 38 (1); or if the *Bundestag* no longer possesses the substance of the power to rule through conferral or 'other-directedness' (Article 20(2) BL) – then the chain of legitimation will be broken.[495] What is guaranteed under the German Constitution is not just 'democracy' in an openly defined or purely formal sense.[496] It is 'self-determination in the exercise of public power' through a *specific* democratic formula.[497] It is the *substance of the power to rule*:

> Article 38 [BL] protects the citizens with a right to elect the *Bundestag* from a loss of *substance of their power to rule*, which is fundamental to the structure of a constitutional state, by far-reaching or even comprehensive transfers of duties and powers of the *Bundestag,* above all to supranational institutions.[498]

Under Article 79(3) BL, the basic principles and constituent structures of the democratic social and federal state are inviolable.[499] They may not be weighed against any other legal interests (including the mandate of peace and integration and the constitutional principle of the openness towards EU law);[500] they cannot be narrowed or disposed of by constitutional amendment;[501] and they cannot be weighed against the 'constructive force of the mechanism of integration'.[502] They cannot be transcended in the name of public good under a Schmittian state of exception,[503] and so cannot be interpreted in the light of *effet utile* or *ultima ratio* justifications seen to underlie recent EU crisis measures – no

[495] *Brunner (Germany)* [4]–[5], [172], [341]; *Euro Rescue Package (Germany)* [98], [102], [120]; *ESM II (Germany)* [224], [230], [235]; *Lisbon (Germany)* [225]–[228]; *Weiss Decision (Germany)* [98]–[99].
[496] *Weiss Decision (Germany)* [99].
[497] *ESM I (Germany)* [192].
[498] *Brunner (Germany)* [4]–[5].
[499] *Lisbon (Germany)* [192]–[194].
[500] *Brunner (Germany)* [182]; *Lisbon (Germany)* [192]–[193].
[501] *Euro Rescue Package (Germany)* [101]; *ESM II (Germany)* [159].
[502] *Lisbon (Germany)* [214].
[503] Carl Schmitt, Political Theology: Four Chapters on the Concept of Sovereignty (MIT Press 1985), 5.

matter how meritorious.[504] As the BVerfG has stated, Article 79(3) does not require 'cases of imminent totalitarian seizure of power' for it to be exceeded.[505] Indeed, it is precisely that argument which Article 79(3) is meant to guard against.[506] In *Lisbon (Germany)*, the BVerfG held:

> The principle of democracy may not be weighed against other legal interests; it is inviolable. The constituent power of the Germans which gave itself the Basic Law wanted to set an insurmountable boundary to any future political development. Amendments to the Basic Law affecting the principles laid down in art.1 and art.20 of the Basic Law shall be inadmissible (art.79.3 of the Basic Law).[507]

How, then, is EU legislation to be squared with that formula? EU Parliamentary elections are not taken in the general, direct, free and equal manner prescribed by Article 38(1) BL; it is not the German people in Article 38(2) BL which exercise state power through the *Bundestag* in Article 38(1); and the European Parliament, the Council and the Commission are not the legislature and executive in Article 20(2) BL.[508]

The answer is that, within the context of the EU, constitutional identity is safeguarded by Article 23(1) BL. It states:

> To realize a unified Europe, Germany participates in the development of the European Union which is bound to democratic, rule of law, social, and federal principles as well as the principle of subsidiarity and provides a protection of fundamental rights essentially equivalent to that of this Constitution. The federation can, for this purpose and with the consent of the Senate [*Bundesrat*], delegate sovereign powers. Article 79(1) & (3) is applicable for the foundation of the European Union as well as for changes in its contractual bases and comparable regulations by which the content of this Constitution is changed or amended or by which such changes or amendments are authorized.[509]

This constitutional safeguard clause creates an 'exception' for democratic opinion-forming in ways different to that envisioned under Article 38 BL, but this only 'applies as far as the limit of the inviolable constitutional identity' of which Article 20 and its machinery (Article

[504] Paul Craig, 'Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications' in Adams, Fabbrini and Larouche (eds), *Constitutionalization of European Budgetary Constraints*, 27.
[505] *Euro Rescue Package (Germany)* [10].
[506] Weiler, 'Demos', 236: 'Is it not just a little bit like the Weimer elections which democratically approved a non-democratic regime? Is it not the task of a constitutional court to be a counter balance to such self-defeating democratization?'
[507] *Lisbon (Germany)* [192].
[508] *Parliamentary Information (ESM & EPP) (Germany)* [96].
[509] German Basic Law (Deutscher Bundestag, 2019).

38) are a part.[510] In short, powers conferred on the union can be conferred up to the hilt of Article 79(3), but no further. In *Lisbon (Germany)*, the BVerfG explained:

> The empowerment to embark on European integration permits a different shaping of political opinion-forming than the one determined by the Basic law for the Constitutional order. This applies *as far as the limit of the inviolable constitutional identity* (art.79.3). [. . .] The minimum standard protected by art.79.3 of the Basic Law must not fail to be achieved even by Germany's integration into supranational structures.[511]

In *Lisbon (Germany)*, the BVerfG enumerated a list of inalienable, essential powers so 'particularly sensitive for the ability of a constitutional state to democratically shape itself' that they comprise the substance of self-government and fall under the umbrella of the eternity clause.[512] These included fiscal competences, criminal law, monopoly of force, social living conditions, and decisions of cultural importance, such as family, education and religion.[513] Fiscal policy was among the most important of those powers. The BVerfG held:

> Particularly sensitive for the ability of a constitutional state to democratically shape itself are [. . .] fundamental fiscal decisions on public revenue and public expenditure. [. . .] A transfer of the right of the Bundestag to adopt the budget and control its implementation by the government [would] violate the principle of democracy and the right to elect the German *Bundestag* in its essential content if the determination of the type and amount of the levies imposed on the citizen were supranationalised to a considerable extent. The German Bundestag must decide, in an accountable manner vis-à-vis the people, on the total amount of the burdens placed on citizens. The same applies correspondingly to essential state expenditure. In this area, the responsibility concerning social policy in particular is subject to the democratic decision-making process, which citizens want to influence through free and equal elections. [. . .] What is decisive, however, is that the overall responsibility, with sufficient political discretion regarding revenue and expenditure, can still rest with the German Bundestag.[514]

From this and the case law which follows, this book extracts three ways by which fiscal sovereignty may be denuded in violation of Articles 38, 20 and 79(3) BL.

[510] *Lisbon (Germany)* [195]–[196].
[511] *Lisbon (Germany)* [205], [225].
[512] *Lisbon (Germany)* [225]–[228].
[513] *Lisbon (Germany)* [225]–[228].
[514] *Lisbon (Germany)* [228]–[232].

1.3.1.2 Unlawful Restrictions on Fiscal Sovereignty

The first way in which the principle of democracy might be denuded is through formal *restrictions* on parliamentary budgetary powers, 'with the effect that it or a future *Bundestag* can no longer exercise the right to decide the budget on its own'.[515] As representatives of the people under Article 38(1), not bound by any orders or instructions, the *Bundestag* 'must retain control of fundamental budgetary decisions even in a system of intergovernmental administration'.[516] If the German *Bundestag* were to find itself in the role of 'mere subsequent enforcement', it could 'no longer exercise its overall budgetary responsibility'.[517] In *Euro Rescue Package*, the BVerfG stated:

> [F]undamental decisions on public revenue and public expenditure are part of the core of parliamentary rights in democracy. Article 38.1 excludes the possibility of depleting the legitimation of state authority and the influence on the exercise of that authority provided by the election by fettering the budget legislature to such an extent that the principle of democracy is violated.[518]

It should be emphasized that it is not, from the outset, undemocratic for the budget-setting executive to be fettered by a particular fiscal policy. In *ESM II*, the BVerfG accepted that a commitment to a particular fiscal policy may be made through agreeing corresponding obligations under international law.[519] The test for evaluating whether a fetter on budgetary autonomy amounts to an unconstitutional deprivation of sovereignty is whether control over that policy is relinquished, such that the fetter is not reversible by an equivalent act of the *Bundestag* in the future.[520] The test applied is that 'the democratic process remains open and that legal re-evaluations may occur on the basis of other majority decisions and that an irreversible legal prejudice to future generations is avoided'.[521]

1.3.1.3 Unlawful Conferral of Fiscal Sovereignty

The second way the substance of the power to rule might be depleted is through delegation or conferral of the powers of the parliament

[515] *ESM I (Germany)* [195]. See also, *ESM II (Germany)* [161]; *Weiss Decision (Germany)* [101].
[516] *ESM II (Germany)* [162].
[517] *ESM I (Germany)* [195]; *ESM II (Germany)* [161]–[162].
[518] *Euro Rescue Package (Germany)* [104].
[519] *ESM II (Germany)* [168]–[170].
[520] *Euro Rescue Package (Germany)* [124], [127].
[521] *ESM II (Germany)* [173].

itself.[522] The budgetary powers still exercised by the parliament must not be depleted to such a degree that the right to make legal re-evaluations of budgetary policy under Articles 38 and 20 BL is rendered meaningless.[523] The test in that regard is the same: A violation of the principle of democracy will occur 'if the German *Bundestag* relinquishes is parliamentary budget responsibility with the effect that it or a future *Bundestag* can no longer exercise the right to decide on the budget on its own responsibility'.[524] In *Euro Rescue Package*, the BVerfG held:

> The relevant factor for adherence to the principles of democracy is whether the German Bundestag remains the place in which autonomous decisions on revenue and expenditure are made, even with regard to international and European commitments.[525]

First and most obviously, this means the parliament cannot confer its competence in budgetary policy. A violation of the principle of democracy would occur if 'the type and amount of the levies imposed on the citizen were supranationalised to a considerable extent and thus the *Bundestag* would be deprived of its right of disposal'.[526]

Second, Articles 38 and 20 BL cannot simply be got-around by signing over the common finances of the citizenry by blank cheque. The *Bundestag* may not transfer its budgetary responsibility through 'imprecise authorisations' or mechanisms with 'incalculable burdens' that are tantamount to accepting liability for decisions by free will of other states.[527] The BVerfG has explicitly precluded the 'transfer union' or 'liability community' and instruments of loss-sharing in which budgetary dispositions are no longer determined by the autonomous exercise of the free will of the *Bundestag* in the manner required by Article 38 BL.[528] In *Euro Rescue Package*, the Court held:

> The *Bundestag* may not transfer its budgetary responsibility to other actors by means of imprecise budgetary authorisations. In particular it may not, even by statute, deliver itself up to any mechanisms with financial effect which [. . .] may result in incalculable burdens with budget relevance without prior mandatory consent, whether these are expenses or losses of revenue. [. . .] The *Bundestag*

[522] *ESM I (Germany)* [195]; *ESM II (Germany)* [161]–[165]; *Weiss Reference (Germany)* [129]; *Weiss Decision (Germany)* [101], [104].
[523] *Lisbon (Germany)* [151], [186].
[524] *Euro Rescue Package (Germany)* [121].
[525] *Euro Rescue Package (Germany)* [124].
[526] *Euro Rescue Package (Germany)* [126]. See also, *Weiss Reference (Germany)* [129].
[527] *ESM I (Germany)* [196]; *ESM II (Germany)* [163]; *Weiss Decision (Germany)* [227].
[528] See cases cited in Methods and Introduction, n 61.

must specifically approve every large-scale measure [...] involving public expenditure on the international or European level.[529]

1.3.1.4 Unlawful Impairments of Fiscal Sovereignty

Finally, even a finite disposition must not be so large that the *Bundestag* is no longer able to conduct economic policy on its own responsibility.[530] The right to vote under Article 38 would be as equally meaningless if the *Bundestag* elected to give over the entire endowment of the citizenry, in one lump sum, as it would be if it signed up to open-ended authorizations.

However, on this limb, the BVerfG exercises a high degree of curial deference where finite dispositions are concerned. The test applied to finite dispositions is a 'manifest overstepping of ultimate limits'[531] – that is, whether the amount of the disposition is 'of structural significance for parliament's right to decide on the budget, for example by giving guarantees the honouring of which may endanger budget autonomy'.[532]

In monetary terms, the Court has refrained from putting a number on this 'ultimate limit', but it seems nothing short of over half the federal budget will do. In *Euro Rescue Package (Germany)*, the pledging of a sum 'far greater than the largest federal budget item' and 'substantially exceeding half of the federal budget' did not deprive the *Bundestag* of its autonomy.[533] In *ESM I*, budget commitments of €190,024,800,000 (approximately 50% of all central government expenditure) did not exceed the legislature's margin of appreciation, so long as it did not constitute an open-ended commitment and did not deprive the parliament of the ability to shape the economic and social life of the state.[534]

There is a ceiling to this, however. In *Weiss (Germany)*, the BVerfG held that risk-sharing through the PSPP, 'which amounts to more than EUR 2 trillion [...] would affect the limits set by the overall budgetary responsibility of the German *Bundestag* [...] and be incompatible with Art. 79(3)'.[535]

[529] *Euro Rescue Package (Germany)* [125]–[128].
[530] *Euro Rescue Package (Germany)* [107]; *Weiss Decision (Germany)*, [227].
[531] *Euro Rescue Package (Germany)* [131]; *ESM II (Germany)* [174].
[532] *ESM I (Germany)* [198].
[533] *Euro Rescue Package (Germany)* [135].
[534] *ESM I (Germany)* [200], [240]; *ESM II (Germany)* [185].
[535] *Weiss Decision (Germany)* [227].

1.3.1.5 Permissible Limitations on Fiscal Sovereignty

From this case law, this book extracts the above-noted three tests (listed at the start of Section 1.3.1.1) for determining whether fiscal sovereignty is infringed under the leading German constitutional identity jurisprudence. This does not mean that the contours of other countries' jurisdictions are not lurking just behind.[536] However, given that the German tests are likely to remain the leading tests in this area, it is useful to highlight some room for manoeuvre through permissible limitations on fiscal sovereignty under these tests. Contrary to how Article 79(3) BL is sometimes perceived, 'constitutional identity' does not mean that all the core constitutional powers are absolutely and forever entombed at national level, with no capacity for delegation. There are three limits on the jurisdiction.

First, the words 'particularly sensitive' in *Lisbon (Germany)* indicate that not all 'state-founding elements' are included in the list of competences listed in that decision, and not all intrusions to that list will violate Article 79(3).[537] It is only if the competence is both particularly sensitive *and* the formula for democratic legitimation specified in the constitution is structurally compromised that constitutional identity is infringed.[538] For example, the expansion of QMV under the Lisbon Treaty did not infringe constitutional identity because the scope of conferral was controlled under Article 23 BL, and the essential powers under the umbrella of Article 20 were still exercised in accordance with Article 38 BL.[539]

Second, the enumeration of constitutional identity competences in *Lisbon (Germany)* does not mean that those core competences can never be delegated; it means that they cannot be conferred or delegated in a manner which breaks the chain of legitimation under the German constitution. There is a difference. For example, automatic budgetary liability under the 'capital calls' provisions of the ESM Treaty did not violate Article 38 BL, because the voting formula gave Germany an effective veto over each new disposition to the ESM. Similarly, monetary policy is lawfully conferred on the ECB because the conditions which apply to the ECB under Article

[536] It is clear the principles of budgetary autonomy 'should essentially have a very similar substance throughout the 28 Member States of the EU'. Ernits et al., 'Constitution of Estonia', 939.
[537] Preshova, 'Battleground or Meeting', 283.
[538] *Lisbon (Germany)* [242]–[245], [327].
[539] *Lisbon (Germany)* [250]–[253].

127 TFEU are the same as those that apply to the *Bundesbank* under Article 88 BL, so no usurpation of fiscal competence could occur.[540] The essential staple is that delegation is permitted, as long as this does not change the substance of the guarantee itself.[541]

Third, not all encroachments on 'state founding' powers will constitute a violation of democracy in its essential content.[542] For fiscal policy, this will only occur where a fiscal policy decision is not reversible by an equivalent action by the *Bundestag* and the degree of the infringement is of structural significance to Parliament's right to decide on the budget.[543] So, for example, we know from *Weiss (Germany)* that €2 trillion is too much, but in *ESM (Germany)*, the Court applied a test of proportionality and a margin of discretion to huge sums – approximately 50% of all central government expenditure – without this constituting a complete failure of budgetary autonomy.

1.3.2 Price Stability and Fiscal Discipline

The second constitutional boundary of European fiscal federalism pursued in this book is comprised of the fundamental guiding principles of price stability, sound public finances and a sustainable balance of payments binding on the mandate for EMU under Article 119(3) TFEU. These are the principles of the '*Stabilitätsgemeinschaft*' or 'Stability Community,' which limit the mandate for monetary union and define the decentralized model of fiscal federalism inscribed in the Treaties. Article 119(3) TFEU reads:

> These activities [economic and monetary policy] of the Member States and the Union shall entail compliance with the following guiding principles: stable prices, sound public finances and monetary conditions and a sustainable balance of payments.

The first principle is price stability. Price stability is the first constitutional principle of EMU and the sole objective of EU monetary policy competence.[544]

[540] *Brunner (Germany)* [96]; *Weiss Reference (Germany)* [126]; *Weiss Decision (Germany)* [143].
[541] The same approach applies to human rights: *Solange II (Germany)*; *Banana Market (Germany)* (2 BvL 1/97) BVerfGE 102, 147 English version at www.bundesverfassungsgericht.de accessed 18 June 2014.
[542] Dieter Grimm, 'Defending Sovereign Statehood against Transforming the Union Into a State' (2009) 5 EuConst 369. See, for example, *Honeywell (Germany)* [50].
[543] *ESM II (Germany)* [235].
[544] See Chapter 2, Section 2.2.1 and sources cited.

The second and third guiding principles, sound public finances and sustainable balance of payments, are principles of fiscal and economic policy – competences of the Member States.

Sound public finances means that Member States must run a sound fiscal policy that avoids excessive public debts or sovereign defaults with adverse spillovers on monetary policy.

Sustainable balance of payments means they must run a sound economic policy so that the external deficit of the country as a whole does not become unsustainable, impoverishing the country and leading to the same result.

Hereafter, this book generally refers to these two principles together under the single term 'fiscal discipline'.[545]

These principles, price stability and fiscal discipline, inform the entire legal architecture of fiscal federalism under Articles 119–127 TFEU. The design of this architecture is discussed in Chapter 2, but it is sufficient to remark here that the principles of the *Stabilitätsgemeinschaft* are a constitutional stipulation of the EU's conferred competence in monetary policy and economic coordination. As stated in *Brunner (Germany)*:

> Article [119 TFEU] sets up the guiding principles for member-States' activities the maintenance of price stability, sound public finances and monetary conditions, and a sustainable balance of payments. [. . .] This conception of the currency union as a community based on stability *is the basis and subject-matter of the German Act of Accession.* If the monetary union should not be able to develop on a continuing basis [. . .] within the meaning of the agreed mandate for stabilization, it would be abandoning the Treaty conception.[546]

The fundamental principles of the *Stabilitätsgemeinschaft* have been linked by the BVerfG to the independence of the ECB,[547] price stability,[548] the prohibition on monetary financing,[549] the 'no bailout' clause[550] and the Stability and Growth Pact.[551] In particular, the BVerfG has warned that the principles of *Stabilitätsgemeinschaft* would be violated – in turn

[545] As noted in Methods and Introduction, n 21, this book follows the approach of EU policy documents in using the terms 'economic' and 'fiscal' policy interchangeably to describe the use of government revenue, debt or expenditure to influence the economy.
[546] *Brunner (Germany)* [89]–[90] (emphasis added).
[547] Art. 130 TFEU. *ESM I (Germany)* [203]; *Weiss Reference (Germany)* [103].
[548] Art. 127 TFEU. *Brunner (Germany)* [89]–[90].
[549] Art. 123 TFEU. *Gauweiler Reference (Germany)* [32]; *Weiss Reference (Germany)* [68], [78].
[550] Art. 125 TFEU. *Euro Rescue Package (Germany)* [129].
[551] Art. 121, 126 TFEU. *ESM I (Germany)* [203].

violating Articles 20 and 79(3) of Germany's constitutional identity – if the Union should become a 'liability community' through the 'direct or indirect communitarisation of state debts'.[552]

This section will explain how these principles reflect deeper constitutional boundaries underlying the EU legal order as a whole.

1.3.2.1 Price Stability

Under Articles 3(1)(c), 119(2) and 127 TFEU, and Articles 2–3 and 17 to 24 of the Statute of the ESCB, the ECB's monetary policy competence and all of the ECB's instruments are bound to the primary objective of price stability (defined as 2% inflation by the ECB Governing Council). Subject to that objective, it may also 'support' economic policies which contribute to the aims of the Union, but it can pursue none of its own.[553]

This, too, is a restriction carved directly from the German Basic Law.[554] Article 88 BL states:

> The Federation establishes a note-issuing currency bank as the *Bundesbank*. Its tasks and powers can, in the context of the European Union, be transferred to the European Central Bank which is independent and primarily bound by the purpose of securing stability of prices.[555]

Article 88 permits conferral of monetary competence on the ECB only in *so far as* it remains independent and bound to price stability. Unlike the Bank of Canada,[556] the Bank of England[557] or the United States Federal Reserve,[558] for example, the ECB can have no mandate for financial stability. Not because the EU legislator would not allow it, but because the German Basic Law does not allow the German legislator to confer it.

Since *Brunner* v. *EU Treaty (Germany)*, the primacy of price stability has been central to the constitutionality of Germany's ongoing participation in the EMU under Article 79(3)BL.[559] The BVerfG has held, for instance, that 'The Union Treaty governs the monetary union as a community

[552] *ESM I (Germany)* [203] and cases cited above, in Methods and Introduction, n 61.
[553] Tolek Petch, 'The Compatibility of Outright Monetary Transactions with EU Law' (2013) 7 LFMR 13, 14.
[554] *Brunner (Germany)* [85]; *Gauweiler Reference (Germany)* [32]; *Weiss Decision (Germany)* [143].
[555] German Basic Law (Deutscher Bundestag, 2019).
[556] *Bank of Canada Act*, R.S.C. 1985 c.B-2, preamble and s. 11.
[557] Bank of England Act 1998 c. 11, s. 11.
[558] Federal Reserve Act of 1913, ch 6, 38 Stat. 251, codified at 12 USC. ch 3, s. 2A
[559] *Brunner (Germany)* [85].

which is *permanently obliged* to maintain stability and, in particular, to *guarantee* the stability of the value of the currency.'[560] A development contrary to that mandate would violate the conditions subject to which monetary policy was conferred, mandating 'withdrawal from the Community in the event of the community based on stability failing to materialise'.[561]

Article 88 BL is not, in and of itself, part of the German constitutional identity shielded by the eternity clause in Article 79(3) BL. Article 88 could be amended and it would pose no further constraint on conferral. An ordinary breach of that provision will first fall to BVerfG's *ultra vires* review jurisdiction, under which the BVerfG will afford a margin of appreciation to an *ultra vires* act unless it is 'structurally significant' to the division of competences.[562]

However, Article 88 does shield other constitutional provisions which *are* linked to Article 79(3) BL. These are, specifically, the right to property under Article 14 (protected by Article 1 BL), which guards against the expropriation of value from money-holders through inflation; and the basic principles of the democratic state under Article 20 BL, which protects the constituent power against unauthorized or open-ended financial dispositions.[563]

The reason Article 88 shields these principles is that, unlike federal banks in Canada, the United States or Switzerland, the funding structure of the ECB has the potential to circumvent parliamentary control of budgetary policy. This is because the ECB is financed by all EMU Member States in accordance with the ESCB capital key. This is unlike the Bank of Canada, the United States Federal Reserve and the Swiss National Bank, which are not financed by the contributions of their provinces, states or cantons. When the United States Federal Reserve conducts bond purchase operations, for example, it purchases the bonds of a separate *federal* treasury, independently of state treasuries. The bonds are not guaranteed by any state governments, and so 'The Fed is not bailing out a cash-strapped country [and] distributing risks among the taxpayers with an excellent credit rating.'[564] In the United

[560] *Brunner (Germany)* [89] (emphasis added).
[561] *Brunner (Germany)* [89].
[562] See above, n 106.
[563] *Weiss Decision (Germany)* [98]–[115], [222]–[228]. Pernice, 'Multilevel Constitutionalism', 721.
[564] Editorial, 'Bundesbank President on ECB Bond Purchases: Too Close to State Financing Via the Money Press' *Der Spiegel* (29 August 2012).

States, 'the printing presses cannot be used to provide particular states or regions with credit at below-market interest rates',[565] and purchases of public sector securities 'do not lead to redistributional effects among the individual states of the US'.[566]

In the EU, by contrast, deliberately targeting the bonds of, say, Greece would use taxpayer contributions from all countries to assume risks incurred by one country and, as the *Bundesbank* states: 'Monetary policymakers have no authorisation to redistribute such risks or burdens among the taxpayers of various euro-area countries.'[567] Because the *Bundestag* backstops the *Bundesbank*, an expenditure campaign by the ECB for an economic objective – like bond market stability or staving off state defaults – would commit parliamentary funds to an economic policy without a parliamentary vote. For this reason, a violation of Articles 123 or 127 TFEU will not only be *ultra vires* Article 88 BL, but may constitute a structurally significant infringement of constitutional identity.[568]

1.3.2.2 Fiscal Discipline: Sound Budgetary Policies and a Sustainable Balance of Payments

In the field of economic policy, the principles of 'fiscal discipline' – sound budgetary policy and a sustainable balance of payments – manifest in the legal architecture under Articles 119–126 TFEU. That architecture is examined in Chapter 2, however it suffices to state here that the model entrenches independent financial liability and the budgetary autonomy of national parliaments. For this reason, these provisions are also constitutional stipulations of Germany's participation in EMU. As stated in *Weiss Reference (Germany)*:

> The current European integration agenda is based on an understanding of the monetary union as a community of stability; for [Germany], this is an essential prerequisite for its membership in the monetary union. Most notably, this safeguards the German *Bundestag's* overall responsibility for the budget.[569]

[565] Sinn, *Euro Trap*, 5–6.
[566] Dietrich Murswiek, 'ECB, ECJ, Democracy and the Federal Constitutional Court' (2014) 15 German LJ 147, 150.
[567] Deutsche Bundesbank, 'Monthly Report: August 2011' (2011) 63 Deutsche Bundesbank Monthly Report 165.
[568] *Gauweiler Reference (Germany)* [43]; *Gauweiler Decision (Germany)* [188]; *Weiss Decision (Germany)* [98]–[99], [110], [116], [157]–[159].
[569] *Weiss Reference (Germany)* [68], [103].

It should be emphasized here, too, that while fiscal discipline and Articles 121–126 TFEU safeguard the German constitutional identity, 'not every single manifestation of the stability community is guaranteed by [Article 20 BL] in conjunction with art.79(3)'.[570] Violations are first and foremost a matter of *ultra vires* review, not constitutional identity, unless it *also* violates one of the tests set out in Section 1.3.1 of this book.

In practice, however, it may make no difference how many lines are crossed since a violation of the *Stabilitätsgemeinschaft* that results in automatic financial liability or deprives parliamentary control over fiscal policy will also lead to a violation of Articles 38, 20 and 79(3) BL, and the consequences of both *ultra vires* and identity review are invalidity.[571] So, for example, as a matter of economics, a failure to achieve budgetary discipline implies monetary financing or debt mutualization, and this offends the right to property (Article 14 BL) and the right to vote (Article 38 BL), which *are* part of the constitutional identity in conjunction with Article 1 BL (Human Dignity) and Article 20 BL (Basic Principles), and are *not* amendable under Article 79(3) BL. Hence, even if no individual act of fiscal indiscipline will vitiate the *Stabilitätsgemeinschaft*, the overall system of fiscal federalism chosen for the EMU must be based on fiscal discipline and individual financial responsibility if it is to ultimately remain within its constitutional boundaries. However, unless the three tests set out in Section 1.3.1 are also met, the test applied here is different: It is whether the Union violated the 'community based on stability (*Stabilitätsgemeinschaft*) [that] is the basis and subject-matter of the German Act of Accession [. . .] within the meaning of the agreed mandate for stabilisation'.[572]

1.4 Conclusions: Permanent Constraints on European Fiscal Federalism

The constitutional boundaries extracted in this chapter are real, they are permanent, and they exert real positive force on the boundaries of EU law. Constitutional courts have stated (and demonstrated) that nascent machineries of fiscal federalism will be invalidated if they trespass

[570] *ESM I (Germany)* [204].
[571] *ESM I (Germany)* [203]–[205]; *Weiss Decision (Germany)* [116]–[119], [154]–[157], [163], [234].
[572] *Brunner (Germany)* [90].

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on constitutional fiscal sovereignty or exceed the boundaries of conferral, and this study must take them at their word. This conclusion derives from three cumulative analyses.

[1.1] First, the EU is a 'federation of states', possessed of a top-down federal hierarchy with a legal supremacy greater than any individual expression of Member State sovereignty on one hand, yet on the other hand derived from the confederate authority of national orders which sanction its reach. However, the reality that concerns this book is that, whether one adopts a Kelsenian, normative or positivist approach, national constitutions (as interpreted by national constitutional courts) remain the reference point for validity of law in Member State legal systems.

[1.2] In the EU, national constitutional orders profess to impose two limits on the EU's conferred powers: First, that they have the jurisdiction to assert, through Treaty ratification and *ultra vires* review, what powers they have and have not conferred on the Union – the so-called *Kompetenz-Kompetenz*. Second, that their own 'constitutional identity' principles determine the absolute limits of Union law. These assertions pose a valid constitutional, normative and positivist description of the limits of the EU legal order.

[1.3] Under these jurisdictions, two substantive constitutional boundaries will bear upon any model of European fiscal federalism. [1.3.1] The first is Member State fiscal sovereignty. Not only have parliamentary competences in economic and fiscal policy not been conferred on the Union, but, according to the BVerfG, they cannot ever be so conferred without abrogating the 'Basic Principles' of the 'Democratic State' (Article 20) and violating the 'eternity clause' (Article 79(3)) of the 1949 German Basic Law. Numerous other constitutional courts have drawn similar boundaries around fiscal sovereignty.[573] The tests applied by this book in that regard are:

> [1.3.1.2] No unlawful *restrictions* of fiscal sovereignty: A restriction on budgetary sovereignty must not 'fetter the budget legislature to such an extent that the principle of democracy is violated', that is, 'with the effect that it or a future Parliament can no longer exercise the right to decide the budget on its own';[574]

[573] See above, Section 1.3.1, nn 459–480, Section 1.3.1.1, nn 482–484.
[574] *Euro Rescue Package (Germany)* [104] and sources cited above, Section 1.3.1.1, n 482.

[1.3.1.3] No unlawful *conferral* of fiscal sovereignty: A delegation or conferral of financial competences must not compromise the principle that 'the [national] Parliament remains the place in which autonomous decisions on revenue and expenditure are made';[575] and

[1.3.1.5] No structural *impairments* of fiscal sovereignty: even a finite financial disposition must not structurally impair the parliament's right to decide on the budget and shape the economic and social life of the state in the future.[576]

[1.3.2] The second constitutional boundary is comprised of the fundamental guiding principles of price stability and fiscal discipline (sound budgetary policy and sustainable balance of payments) impressed upon the architecture in Articles 119–127 TFEU. Articles 119–127 TFEU are not in themselves part of Member State 'constitutional identity'; however, the architecture of the *Stabilitätsgemeinschaft* indirectly shields basic principles of the democratic state (Article 20 BL) and human dignity (Article 1 BL), which *are* part of the constitutional identity shielded by the German 'eternity clause' and are *not* amendable, *lex lata* or *de lege ferenda*.

Having identified these principles underlying the boundaries of the EU legal order in economic and monetary policy, Chapter 2 will seek to examine how they inhere in the legal architecture inscribed in the EU Treaties as a matter of EU law.

[575] *Euro Rescue Package (Germany)* [124] and sources cited above, Section 1.3.1.1, n 483.
[576] *ESM II (Germany)* [173] and sources cited above, Section 1.3.1.1, n 484.