The relationship between the law of the European Union and the law of its Member States - a norm-based conceptual framework

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Interrelations between EU law and domestic law – Concept of a norm-based compound structure – Intertwinement of legal norms and legal orders – Combined normativity – Multi-level structure within the legal norms – Primacy, supremacy and ranking of EU law and domestic law – Structural principles guiding the relationship between EU law and domestic law – Principles of uniformity and constitutional identity

Introduction

The law of the European Union and the domestic law of its Member States are closely intertwined in various and manifold ways. This is, for instance, the case when EU directives are implemented by member states or when domestic law is interpreted in conformity with EU law standards. However, what exactly is the specific nature of the mutual impact of both bodies of law on the norms involved? Considering the intense and increasingly complex interrelation of EU law and domestic law, this question requires a fresh look. Is there, for example, supremacy of one of the legal orders, as the case law of the European Court of Justice and of some domestic constitutional courts seems to suggest? Do constitutional law standards coexist on a heterarchical basis in a pluralistic setting or are they part of a rank relationship? What role does the increasingly prominent concept of constitutional identity play? And how should conflicts between norms be resolved?

This paper addresses the relationship between the law of the European Union and the law of its Member States from the perspective of a theory of legal norms.

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Traditionally, the conceptualisation of this relationship has been characterised by an approach that chooses the involved legal *orders* as its primary object of reference. What has been discussed is, for instance, whether legal *orders* are autonomous or mutually dependent, or whether there is a hierarchy or a pluralist coexistence of legal *orders*.[1] In this regard, this paper suggests an analytical and normative shift: from the legal order as a whole to the individual legal norms. It suggests concentrating on the specific interacting legal norms in order to understand the interrelation of both the individual legal norms and the legal orders concerned. The reason is that the intertwinement of legal *orders* happens through the intertwinement of their *norms*.

This paper aims to reconceptualise the intertwinement of legal orders in the European context and to address conflicts of norms based on this fresh approach. In view of this, the claim of this paper is threefold: first, it holds that the intertwinement at the level of the individual legal norms has not been sufficiently conceptualised. Often, although the existence of the phenomenon of intertwinement is acknowledged, the analysis does not delve into the specific forms of intertwinement and their structural consequences at the level of legal theory. This paper will do so by suggesting how a more nuanced understanding of intertwinement could be achieved. Second, the paper asserts that the understanding of this intertwinement at the level of the norm is necessary to conceptualise the interrelations of norms and the resolution of potential conflicts. A norm-based approach facilitates overcoming a perspectivist approach, which focuses on how one legal order perceives its relationship with another legal order. It allows conflicts of norms to be resolved based on a holistic understanding of both the nature of the conflicting norms and the legal tools for resolving them. Third, the paper claims that the existing intertwinement requires differentiated and to some extent flexible solutions when it comes to addressing the question of rank. Such solutions can be achieved when structural principles such as the principles of uniformity and guaranteed constitutional identity are taken into account.

To spell out these claims, the paper is structured as follows: the second part outlines why a norm-based conceptual framework for the European context is needed. The third part sketches what a norm-based conceptual framework might look like regarding the relationship between EU law and domestic law. It

[1] E.g. C. Richmond, 'Preserving the Identity Crisis: Autonomy, System and Sovereignty in European Law', 16 *Law and Philosophy* (1997) p. 377; T. Schilling, 'The Autonomy of the Community Legal Order: An Analysis of Possible Foundations', 37 *Harvard International Law Journal* (1996) p. 389; A. Peters, 'Rechtsordnungen und Konstitutionalisierung: Zur Neubestimmung der Verhältnisse', *ZÖR* (2010) p. 3; N.W. Barber, 'Legal Pluralism and the European Union', 12 *ELJ* (2006) p. 306; W. Schroeder, *Das Gemeinschaftsrechtssystem* (Mohr Siebeck 2002).

highlights the structures which emanate from the legal norms involved and their interplay. It introduces the concept of a norm-based compound structure, constituting an analytical and normative framework for the manifold phenomena of interrelations between EU law and domestic law. The fourth part considers the question of rank more closely. It offers a normative approach to resolving conflicts between legal norms based on the structural principles guiding the relationship between EU law and domestic law. In this regard, the principle of uniformity and the principle of guaranteed constitutional identity is of primary importance. Based in particular on the constitutional identity aspect, a differentiated way of addressing conflicts of norms is suggested.

Need for a norm-based conceptual framework for the European context

Before sketching out the norm-based conceptual framework that this paper proposes, this section highlights the two key reasons why such a framework is needed. The traditional concepts that deal with the relationship between EU law and domestic law are characterised by a system-related focus. EU law and domestic law as legal *orders* constitute the object of the analysis, whereas the individual legal norms composing these orders are not given the analytical importance that they deserve. This has led to an understanding of the relationship between EU law and domestic law that is predominantly 'perspectivist' and absolute.

Adopting a norm-based conceptual framework allows us to overcome this perspectivism. The relationship between EU law and domestic law has traditionally been perceived from only one perspective: the perspective of either the EU legal order or the domestic legal orders. Every legal order initially carves out legal structures to address the existence of external norms and their potential impact. In this context, courts – constitutional courts in particular – have played a decisive role.[2] Although such perspectivist approaches can be internally coherent, they are not able to capture the relationship between EU law and domestic law comprehensively. Perspectivist approaches bear the risk of contradictory claims – a risk that has in fact materialised.[3] From the perspective of EU law, EU law

[2] A few classic landmark decisions involving perspectivist approaches are: ECJ 15 July 1964, Case 6/64, *Costa* v *ENEL*; ECJ 17 December 1970, Case 11/70, *Internationale Handelsgesellschaft*; ECJ 9 March 1978, Case 106/77, *Simmenthal II*; Polish Constitutional Court, decision of 11 May 2005, Case K 18/04; Czech Constitutional Court, decision of 8 March 2006, Case Pl. US. 50/04; German Constitutional Court, decision of 30 June 2009, Case 2 BvE 2/08; Spanish Constitutional Court, declaration of 13 December 2004, Case DTC 1/2004; Belgian Council of State, decision of 5 November 1996, Case n. 62.922; Italian Constitutional Court, decision of 18 December 1973, Case n. 183/1973; Lithuanian Constitutional Court decision of 14 March 2006, Joint Cases 17/02-24/03-22/04; French Conseil d'État, decision of 3 December 2001, Case n. 226514.

primacy of application is absolute and does not acknowledge any exceptions; it is based on the broader supremacy claim that EU law – and not domestic law – gets to define what the relationship between the two is and to impose its view on domestic law. Most domestic constitutional courts have adopted a more nuanced approach with regard to the primacy of application, grounded however on a conceptual supremacy claim of domestic constitutional law.[4] Without such a supremacy claim, the constitutional-identity reservation and the human-rights reservation that many domestic constitutional courts have developed would not be possible. These contradictory claims can affect the functioning of the individual approaches.[5] This is graphically illustrated by the absolute primacy claim of EU law that conflicts with various domestic constitutional reservations. Such opposing claims go against the idea of an *integrated* community of law.[6] Taking rule of law considerations into account, the addressees of EU law and domestic law should be able to refer to general standards on how to resolve conflicts of norms.

Perspectivism also poses a conceptual problem: when the relationship between two sets of norms is primarily shaped with reference to only one of these sets of norms, the conceptual basis for a solution that claims to be valid for both is weak. Such an approach always amounts to imposing the view of one legal order on the other. In order to create a legal basis for the relationship between legal orders, one perceived as legitimate by all legal orders involved, the relationship cannot be unilaterality shaped by one legal order. A perspectivist approach thus should be replaced by a 'holistic cognitive frame'[7] that includes both EU law and domestic law at the analysis stage, and not only with regard to its targeted effect. The norm-based conceptual framework suggested in this paper allows for such a broader point of reference and thus a correspondingly broad effect.

[3] For a detailed analysis of the EU law and the domestic law perspective, *see* D. Burchardt, *Die Rangfrage im europäischen Normenverbund* (Mohr Siebeck 2015) p. 66-147.

[4] On European jurisprudence being 'locked in sterile opposition', F. Giorgi and N. Triart, 'Judges, Community Judges: Invitation to a Journey through the Looking-glass – On the Need for Jurisdictions to Rethink the Inter-systemic Relations beyond the Hierarchical Principle', 14 *ELJ* (2008) p. 693 at p. 694. Talking about a 'conflit radical', D. Ritleng, 'Le principe de primauté du droit de l'Union', 41 *RTDE* (2005) p. 285 at p. 293.

[5] S. Besson, 'How international is the European legal order?', 5 *NoFo* (2008) p. 50 at p. 60. Arguing against perspectivism, A. Tietje, 'Autonomie und Bindung der Rechtsetzung in gestuften Rechtsordnungen', 66 *VVDStRL* (2007) p. 45 at p. 51.

[6] Opposing claims have been qualified as 'inimical to the very spirit of integration' by J. Baquero Cruz, 'The Legacy of the Maastricht-Urteil and the Pluralist Movement', 14 *ELJ* (2008) p. 389 at p. 415.

[7] M. Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State', in J. Dunoff and J. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law and Global Governance* (Cambridge University Press 2009) p. 258 at p. 310.

Second, a norm-based conceptual framework is needed in order to provide differentiated solutions. An *order*-related approach aims at answering questions concerning the relationship between EU law and domestic law uniformly for the whole order in an absolute manner. According to such an approach, EU law and domestic law can only interrelate as integral legal orders, with one legal order as a whole relating to the other legal order as a whole. The result is an either-or scheme of opposing absolutisms, with the supremacy claim *either* of EU law *or* of domestic law coming out on top. This allows only partially, or not at all, for a differentiated relationship between EU law and domestic law. It does not sufficiently allow consideration of the extent to which it is possible to resolve conflicts in an integrative manner, taking a genuine 'as well as' approach instead of the underlying 'either/or' approach. Neither the multi-dimensional nature of legal norms and orders nor their interrelations are fully taken into account by such an 'either/or' approach. A more fruitful way to conceptualise the relationship between EU law and domestic law would be to frame the relationship between legal norms stemming from them by taking a norm-based rather than a system-based approach. Instead of primarily looking at the legal orders and then deducing the consequences for conflicting legal norms, it is suggested here to primarily analyse the relationship between legal norms. The consequences for the legal orders involved follow from this relationship. This inversion is the core of the norm-based conceptual framework presented in this paper.

Outline of a norm-based conceptual framework for the European context

Before discussing the specific characteristics of the interrelations of *norms* within the legal space formed by EU law and domestic law, the general characteristics defining the normative set-up of multi-level constitutionalism is addressed as a starting point. This allows us to highlight how these more general characteristics are concretely reflected within the individual norms and their interrelations.

General characteristics of multi-level constitutionalism

The norm-based conceptual framework suggested in this paper is closely related to, and builds on, concepts that theorise the relationship between different legal orders under the premise of constitutionalisation. Constitutional pluralism[8] and

[8] E.g. Kumm, *supra* n. 7; N. MacCormick, 'Risking Constitutional Collision in Europe?', 18 *Oxford Journal of Legal Studies* (1998) p. 517; M.P. Maduro, 'Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism', in Dunoff and Trachtman, *supra* n. 7, p. 356; N. Walker, 'The Idea of Constitutional Pluralism', 65 *MLR*

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multi-level constitutionalism[9] stand out when it comes to taking interrelations between EU law and domestic law seriously. These approaches in their various forms have established a holistic perception of EU law and domestic law as an analytical entity: EU law and domestic law should be analysed together and not separately when it comes to determining the relationship between them. Such a holistic perspective does not necessarily imply classical monism.[10] Rather, the starting point of the analysis is pluralist in nature: it acknowledges the coexistence of independent law-making entities, which create norms that are then able to interrelate across legal orders.

These approaches have demonstrated that the European compound structure (*Verbund*)[11] is characterised in its very essence by the coexistence of different elements, which from the perspective of a classically statist model of the EU seem to be contradictory and even incompatible. These elements can be defined by three apparent dichotomies: (1) autonomy and intertwinement; (2) dependency and complementarity; and (3) hierarchy and heterarchy.

With regard to the first dichotomy, the point of departure is the element of *autonomy*. The European legal space does not constitute a monistic unit. Rather, the individual domestic legal orders, as well as the EU legal order, keep their original autonomy. The autonomy addressed here can be defined as original or theoretical,[12] considering that none of these legal orders can convincingly be described as having been derived from the other;[13] they do not mutually constitute

(2002) p. 317; N. Walker, 'Sovereignty and Differentiated Integration in the European Union', 4 *ELJ* (1998) p. 355.

[9] *See* e.g. F. Mayer and M. Wendel, 'Multilevel Constitutionalism and Constitutional Pluralism', in M. Avbelj and J. Komárek (eds.), *Constitutional Pluralism in the European Union and Beyond* (Oxford University Press 2012) p. 127; I. Pernice, 'The Treaty of Lisbon: Multilevel constitutionalism in action', 15 *Columbia Journal of European Law* (2009) p. 349. *See also* R. Barents, 'The Fallacy of European Multilevel Constitutionalism', in Avbelj and Komárek ibid., p. 153.

[10] This (mis)understanding seems to be at the basis of the critical consideration by M. Avbelj, 'Questioning EU Constitutionalism', 9 *German Law Journal* (2008) p. 1 at p. 19-20. On the compound idea being an ordering and organisational concept, E. Schmidt-Aßmann, 'Einleitung', in E Schmidt-Aßmann and B. Schöndorf-Haubold (eds.), *Der Europäische Verwaltungsverbund* (Mohr Siebeck 2005) p. 1 at p. 7.

[11] In German scholarship on EU law, the term 'Verbund' (compound) has been used in various contexts including with regard to the interrelation of constitutions, administrative actors and structures and of constitutional courts. E.g. I. Pernice, 'Europäisches und nationales Verfassungsrecht', 60 *VVDStRL* (2001) p. 148; Schmidt-Aßmann, *supra* n. 10; A. Voßkuhle, 'Der europäische Verfassungsgerichtsverbund', *NVwZ* (2010) p. 1.

[12] Schilling, *supra* n. 1; Peters, *supra* n. 1, p. 31 ff.

[13] For such attempts, *see* e.g. Richmond, *supra* n. 1; W. Grussmann, 'Grundnorm und Supranationalität', in T. von Danwitz et al. (eds.), *Auf dem Weg zu einer Europäischen Staatlichkeit* (Boorberg 1993) p. 47. Critical Burchardt, *supra* n. 3, p. 156-168.

their basis of validity in the Kelsenian sense.[14] Yet the element of autonomy alone does not paint the full picture. These legal orders are intertwined by the interrelations between their norms. As a result, their autonomous nature is only relative. The legal orders have opened themselves up and become permeable[15] in order to allow external elements to interact with internal norms. The individual norms engage in an interplay not only linking them occasionally but creating a permanent interconnection between the legal orders. Therefore, the *intertwinement* is situated both at the level of the legal norms and at the level of the legal orders, with the latter being a consequence of the former.[16] This is not accidental, but expresses a systemic design. Both elements, autonomy and intertwinement, are mutually dependent: without legal orders being originally autonomous, the legal norms constituting the compound structure would not be able to interrelate;[17] conversely, without intertwinement, the individual legal orders could not uphold their autonomy while remaining part of the compound structure.

The second conceptual pair is dependence and complementarity.[18] Multiple legal norms formally stemming from different legal orders can be substantially dependent on each other. This *dependence* occurs when a legal norm has to fulfil certain conditions stemming from both its legal order of origin and external influences. For instance, a domestic norm transposing an EU directive is (partially) dependent on EU law; general principles of EU law are partially dependent on domestic law. This aspect is developed further below. Here, it suffices to mention that the existing links of dependence between individual norms reflect the more structural dependencies at the level of the legal orders. Furthermore, legal norms can – without being formally or substantively dependent on other norms – *complement* each other. This can be witnessed at the level of norm application, for instance when domestic norms are interpreted in accordance with EU law. Another element of complementarity is cooperation which has been central to compound-related concepts of constitutional and administrative matters.[19]

[14] On the cognitive nature of the kelsenian approach, *see* Richmond, *supra* n. 1, p. 408.

[15] M. Wendel, *Permeabilität im europäischen Verfassungsrecht* (Mohr Siebeck 2011) p. 8.

[16] This link is also expressed both by the terms 'bridging mechanism' and 'métissage': Walker, *supra* n. 8, p. 375; I. Raducu and N. Levrat, 'Le métissage des ordres juridiques européens', 43 *Cahiers de droit européen* (2007) p. 111. On 'interlegality': B. de Sousa Santos, 'Law: A Map of Misreading. Towards a Postmodern Conception of Law', 14 *Journal of Law and Society* (1987) p. 279 at p. 298.

[17] That is the reason for this concept to be grounded on legal pluralism; *see* Mayer and Wendel, *supra* n. 9, p. 133.

[18] Pernice, *supra* n. 11, p. 175; *see also* C. Calliess, *Die neue Europäische Union nach dem Vertrag von Lissabon* (Mohr Siebeck 2010) p. 69.

[19] E.g. G. Sydow, *Verwaltungskooperation in der Europäischen Union* (Mohr Siebeck 2004) p. 118 ff.

Lastly, the compound structure of the European legal space is characterised by coexisting hierarchical and heterarchical elements. This is reflected by the conception of multi-level structures within the EU.[20] The 'level' terminology contains a certain hierarchical connotation. The allegorical element of *hierarchy* is the primacy claim attributed to EU law by the European Court of Justice. The *heterarchical* element is expressed, inter alia, when the 'polycentric structure' or the shared sovereignty amongst the constitutional levels is emphasised.[21] Horizontal networks of administrative cooperation show a similar orientation.[22] Details of this coexistence will be highlighted in the fourth part of this paper.

The norm-based conceptual framework suggested here refers to all these characteristics for the compound structure of the EU, yet without confining itself to the limits of concepts such as multi-level constitutionalism. Rather, the paper will shed more nuanced light on the design of the normative structure of the European legal space.

Specific characteristics of the norm-based compound structure

The general characteristics of a compound structure like the one formed by EU law and domestic law only serve to describe the features of the interrelating legal orders in broad terms. They reflect the more specific normative structures created by the interplay of legal norms. In order to get to the bottom of these general features, this section considers the emerging structures more closely. It highlights that the interrelations between EU law and domestic law constitute a compound structure that is expressively norm-related. The general characteristics of this European compound structure (autonomy and intertwinement, dependency and complementarity, hierarchy and heterarchy) resonate within the individual legal *norms* and their relationship to each other.

Combined normativity

The first structural element characteristic of the compound structure is the phenomenon of combined normativity. This results from a legal pluralist set-up: different domestic and European legislatures coexist and create norms both independently of each other and in mutual cooperation.[23] As a consequence, legal

[20] E.g. Pernice, *supra* n. 9, p. 379 ff.

[21] E.g. T. Kingreen, 'Grundfreiheiten', in A. von Bogdandy and J. Bast (eds.), *Europäisches Verfassungsrecht*, 2nd edn (Springer 2009) p. 705 at p. 725; Pernice, *supra* n. 11, p. 175.

[22] T. Siegel, *Entscheidungsfindung im Verwaltungsverbund* (Mohr Siebeck 2009) p. 37 ff, p. 320 ff.

[23] Besson, *supra* n. 5, p. 54; Wendel, *supra* n. 15, p. 14. More generally N. MacCormick, 'Beyond the Sovereign State', 56 *MLR* (1993) p. 1; J.H.H. Weiler, 'The Reformation of European Constitutionalism', 35 *JCMS* (1997) p. 97; P. Eleftheriadis, 'Begging the Constitutional Question', 36 *JCMS* (1998) p. 255.

norms of different formal origins claim validity and applicability in a parallel manner. This is an element of the autonomy of legal orders. The 'parallel normativity' is, however, only the first step. Some norms are formally as well as substantively determined by different origins. For instance, a 'domestic' norm created in the implementation of an EU directive as well as a 'European' norm shaped as a general principle of law combine both EU-law and domestic-law elements. In such cases, when aspects of different origins are fused, a 'combined normativity' is created.[24] This transcends the traditional understanding of separate law-creating entities, of one legal norm being created by only a single legislature.

The combined normativity that can be witnessed in the European context has a formal and a substantive dimension. The *formal dimension* relates to the process of norm-creation. From a classically Kelsenian perspective, a legal norm can only be considered to validly exist if it is created according to the standards set by a specific legal order.[25] In a norm-based compound structure, however, a more open model of normativity is in place. Elements of the process of norm-creation can stem from different legal orders. This approach does not amount to dissolving the connection between a norm and a legal order or to creating an entirely new third category of norms beside domestic and EU law norms. Rather, combined normativity emphasises that the link between a norm and a legal order is not always exclusive; multiple links can coexist. A norm can be both domestic and European in nature.

In order to understand the combined nature of normativity, it is important to keep in mind that one legal norm can be derived from another in different ways: with regard to competences, a norm can determine whether a law-making entity is competent to create another norm, i.e. whether it *can* do so. In addition, by creating an imperative, a norm can determine whether a law-making entity *shall* create another norm. Now, it is possible that one norm sets the imperative *and* creates the competence – but this can also be done by two different norms. For instance, when an EU directive is implemented, the competence for law-making is attributed by domestic constitutional law, whereas the imperative order regarding the 'if' and 'how' of the law-making primarily stems from EU law. The formally domestic norm *had* to be created in order to fulfil the EU law obligation; at the same time, its creation was *enabled* by the domestic legal framework.[26] Another

[24] Using the term 'normes métisses', Raducu and Levrat, *supra* n. 16, p. 113.

[25] H. Kelsen, 'Der Begriff der Rechtsordnung', in Hans R. Klecatsky et al. (eds), *Die Wiener Rechtstheoretische Schule* (vol. 2, 1968) p. 1395 and p. 1400. *See also* M. Jestaedt, 'Der Europäische Verfassungsverbund', in R. Krause et al. (eds.), *Recht der Wirtschaft und der Arbeit in Europa* (Duncker & Humblot 2004) p. 637 and p. 658. Similarly, the approaches by Hart and Raz are order-related as well: a principle of authoritative recognition determines whether a legal norm belongs to a specific legal order and therefore whether it is valid. *See* J. Raz, *The Concept of a Legal System* (Oxford University Press 1970) p. 190; H.L.A. Hart, *The Concept of Law* (Clarendon Press 1965) p. 92 at p. 97 ff.

example of norms derived both from domestic and EU law are general principles of law. Whereas the element of competence can be linked to Article 19(1) TEU, the imperative element of norm creation is situated within domestic law.[27]

The result of this process of norm creation is a norm-based intertwinement. That which is created during the process of implementation is not merely a legal norm of a domestic law nature. Taking the impact of implementation on the resulting norm seriously requires going beyond the formal origin of the norm. A legal norm of a *hybrid* legal nature is created.[28] Its character is hybrid in the sense that the resulting legal norm is composed by both domestic and European elements of legal normativity: at face value, the norm is of domestic origin since it has been set by the domestic legislature. However, its character cannot be reduced to that origin. Analytically, it must be taken into account that the creation of this domestic norm has been triggered by a norm of EU law.

The *substantive dimension* of combined normativity relates to the content of a legal norm and its effect. The content of a norm can be defined by norms stemming from different legal orders, thereby creating a substantially hybrid norm and, therefore, a substantive dimension of intertwinement. The most prominent example is, once again, the implementation of directives into domestic law. In this context, the EU law norm can directly determine the content of the norm formally stemming from domestic law. Depending on whether the directive allows leeway for implementation, the content is partially or entirely pre-determined. Consequently, the resultant norm is a combination of European and domestic normative input. Thus, the legal norm is hybrid in the sense that it is composed of substantive elements stemming from both domestic and European law.

A second example of hybrid norm content follows from norm interpretation. Be it the interpretation of domestic law in line with EU law[29] or of EU law in line

[26] Some constitutional courts of the Member States have hinted at such a differentiated understanding of norm-creation in the European context, *see* e.g. the Czech Constitutional Court in its decision of 8 March 2006 – Pl. US. 50/04, part VI. A: '(T)he Constitutional Court cannot entirely overlook the impact of Community law on the formation, application, and interpretation of national law, all the more so in a field of law where the creation, operation, and aim of its provisions is immediately bound up with Community law. In other words, in this field the Constitutional Court interprets constitutional law taking into account the principles arising from Community law'.

[27] However, there can be disagreement about whether an imperative set by an EU law norm requires an 'enabling' basis of competence stemming from domestic law or whether this competence is rather part of the EU norm.

[28] It should be stressed that it is the actual legal norm and not 'merely' the legal space which is characterised by hybridity. On the 'hybridity of legal spaces': P. Schiff Berman, 'Global Legal Pluralism', 80 *Southern California Law Review* (2007) p. 1155.

[29] On this mechanism, *see* K. Lenaerts and T. Corthaut, 'Of birds and hedges: the role of primacy in invoking norms of EU law', 31 *ELRev* (2006) p. 287 at p. 292 ff; ECJ 10 April 1984, Case 14/83, *Von Colson and Kamann* v *Land Nordrhein-Westfalen*, para. 26; ECJ 10 April 1984, Case 79/83,

with domestic constitutional law[30] – domestic law and EU law both influence the content of the norm as it is applied. During the process of application, a normative element is added to the content of the norm. The original content is opened up to external influences and complemented or even modified by it.[31] The resulting normative conglomerate is an expression of complementarity in the European compound structure. Conversely, EU law is dependent on the application of domestic law if it aims at influencing domestic norms through interpretation. Inter-order interpretation thus reflects both complementarity and dependency.

General principles of law are a third example of combined substantive normativity and hybrid norm content. This is a concept developed by the European Court of Justice in order to fill in existing normative gaps in EU law.[32] Using the instrument of evaluative legal comparison, the Court extracts the common normative substrate from the totality of relevant domestic norms; it then forms the corresponding EU law norm on that basis. Thus, the domestic law norms exercise an indirect normative effect. The combined domestic normative imperatives are transformed into an EU law norm, as reflected in Article 6(3) TEU. The court is bound by the normative imperative of taking domestic law into account while concretising it into an EU law norm[33] and adapting it to the standards set by the overall framework of EU law.[34] This mechanism fulfils an integrative function and realises substantive complementarity.[35]

Dorit Harz v *Deutsche Tradax GmbH*, para. 26. The legal basis for an obligation to an interpretation of domestic law in line with EU law can be seen in Art. 4(3) TEU and Art. 288 TFEU and is complemented in some domestic legal orders by a constitutional obligation of this kind. *See* e.g. Czech Constitutional Court, decision of 3 May 2006, Pl. ÚS 66/04, para. 61: 'A constitutional principle can be derived from Article 1 para. 2 of the Constitution, in conjunction with the principle of cooperation laid down in Article 10 of the EC Treaty, according to which domestic legal enactments, including the constitution, should be interpreted in conformity with the principles of European integration and the cooperation between Community and Member State organs'.

[30] *See* A. Peters, *Elemente einer Theorie der Verfassung Europas* (Duncker & Humblot 2001) p. 289 ff. With respect to the EU Charter of Fundamental Rights, Art. 52(4) explicitly stipulates an interpretative obligation. For a general obligation regarding the whole of EU law, the discussed foundations include Art. 4(2) and (3) TEU, Art. 5(3) TEU, Art. 19(1) TFEU as well as Art. 167(1) and (4) TFEU.

[31] On this effect, *see also* Raducu and Levrat, *supra* n. 16, p. 118; S Oeter, 'Rechtsprechungskonkurrenz zwischen nationalen Verfassungsgerichten, Europäischem Gerichtshof und Europäischem Gerichtshof für Menschenrechte', 66 *VVDStRL* (2007) p. 361 at p. 382.

[32] ECJ 12 July 1957, Joint Cases 7/56 and 3/57 - 7/57 *Algera and Others* v *Assemblée commune*.

[33] On the necessity of concretisation, *see* Wendel, *supra* n. 15, p. 542.

[34] As Advocate General Roemer has put it: '[A] process of assessment in which above all the particular objectives of the Treaty and the peculiarities of the Community structure must be taken into account': Opinion of 13 July 1971, Case 5/71, *Schöppenstedt*.

In sum, several observations can be made on combined normativity. First, combined normativity reflects multiple elements. It is an expression both of the dependence and the complementarity of legal norms in the interplay between domestic law and EU law. Legal norms complement each other, for instance in the context of the interpretation of domestic law in line with EU law. In other circumstances, they even depend on each other, as in the case of the implementation of EU directives. Second, combined normativity shows that the intertwinement of legal orders takes place at the level of the legal norms. Not only the legal orders as systemic entities but even their very components, the legal norms, are intertwined with regard to their creation and content. Third, combined normativity causes traditional lines between legal orders to be blurred. The hybrid nature of many norms in the European legal space bear witness to that. Fourth, such hybrid norms make strict hierarchies between norms impossible. Hierarchies generally require linear relationships of derivation which are not always present in a compound structure.

Multi-level structure within the legal norms

Beside combined normativity, the European legal space is characterised by a multi-level structure within the legal norms. Not only the compound of legal orders as a whole but also the very norms have different dimensions which can be described as multi-level. It is submitted here that these dimensions create a 'horizontal set of orders', with every legal norm being part of both orders. One of these 'horizontal' orders is related to the validity of legal norms, the other to their application. Both orders have different elements and structures and are determined by different parameters. Accordingly, in varying contexts, norms and their relationships are not always determined by the same parameters. Considering the multi-level structure within the norms allows overcoming legal *orders* as the only point of reference for understanding the relations between norms. Norms are not merely grouped into 'norms belonging to a domestic legal order' and 'norms belonging to the EU legal order'; they are also part of the 'horizontal' orders of norm application and of norm validity.

This differentiation between validity and application of legal orders is present in the case law of various courts in the European context. A prominent example in this regard is the decision of the Spanish Constitutional Court of 13 December 2004 on the compatibility of the Treaty establishing a Constitution for Europe with the Spanish constitution.[36] Here, the court based its distinction between

[35] On this integrative function, *see* C. Sobotta, *Transparenz in den Rechtsetzungsverfahren der Europäischen Union* (Nomos 2001) p. 305.

[36] Spanish Constitutional Court, declaration DTC 1/2004 of 13 December 2004. Critical of this distinction, Baquero Cruz, *supra* n. 6, p. 415.

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primacy and supremacy[37] on the different orders regarding application and validity when it stated: 'Supremacy and primacy are categories which are developed in differentiated orders. The former, in that of the application of valid regulations; the latter, in that of regulatory procedures'. Similar differentiations have been made by the Polish and the German constitutional courts[38] and the European Court of Justice.[39]

The 'horizontal' ordering structure concerning the *validity* of legal norms is based on a concept of validity that is partially abstracted from the legal order.[40] As described above, various law-making entities coexist on an equal basis and cause legal norms to be considered valid both in their legal order of origin and in external legal orders. Thus, the effect of a norm is not exclusively on the group of addressees belonging to the legal order of origin; that group includes external addressees. However, this is only true once the initial existence of a norm has been determined. The initial questions of whether a norm can at all enter the validity-related ordering structure and which is the yardstick of the norm's existence is characterised by a strong emphasis on autonomy: whether a norm stemming from one legal order is considered valid or whether it should be abrogated is only determined by reference to that legal order's norms. This exclusive yardstick for abrogation emphasises the self-referential nature of legal orders. For the secondary law of the EU, the European Court of Justice has formulated this as follows: 'Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law'.[41] This shows that, although EU law norms can be determined by domestic law in certain contexts, the immediate yardstick for their continuously binding force is exclusively the EU legal framework. Only EU law rules decide whether or not a norm of EU law origin is valid in this sense.

This emphasis on autonomy is grounded on the 'destructive' connotation of the abrogation yardstick – as compared to the 'constructive' orientation of aspects pertaining to the creation or interpretation of norms. An abrogation through external norms would be perceived as interference, not as complementation of the original legal framework.[42] As a consequence, the abrogation yardstick of *domestic*

[37] *See* on this distinction M. Avbelj, 'Supremacy or Primacy of EU Law – (Why) Does it Matter?', 17 *ELJ* (2011) p. 744.

[38] Polish Constitutional Court, decision of 11 May 2005, K 18/04; German Constitutional Court, decision of 30 June 2009, 2 BvE 2/08, para. 334.

[39] ECJ 22 October 1998, Joint Cases C-10/97 to C-22/97, *Ministero delle Finanze* v *IN.CO.GE. '90*, para. 21.

[40] Jestaedt, *supra* n. 25, p. 658.

[41] *Internationale Handelsgesellschaft*, *supra* n. 2, para. 3.

law is also exclusively determined by its respective domestic law framework. Corresponding with that which is claimed by EU law, domestic law too has its own autonomous yardstick. This leads to parallel standards within the compound structure. Whether a norm of domestic law origin is valid or should be abrogated is only determined by the relevant domestic rules; EU law has no say in that. Accordingly, the European Court of Justice has explicitly rejected the idea that the primacy of EU law as understood by the Court could affect the validity of domestic legal norms.[43] This guarantees that, in the overall compound structure, the element of intertwinement is counterbalanced by the element of autonomy.

To a certain extent, however, there is a counterweight to the predominance of the autonomy element within the 'horizontal' ordering structure of norm validity. Through the mechanism of direct effect, the self-referentiality of legal orders is attenuated. In this paper, 'direct effect' refers to the abstract normative force exercised by EU law in the domestic legal orders and not (yet) to the immediate invocability by the addressees of the norms as expressed here by the term 'direct applicability'.[44] Allowing EU law to have a normative impact on domestic law without an act of transformation,[45] direct effect helps to overcome the strictly limited effect of a norm linked to a legal order. Legal norms can have a legal effect outside their order of origin. Consequently, the point of reference for the effect of a legal norm is no longer exclusively its respective legal order; instead, the compound structure, as a whole, functions as the point of reference. Without giving up the relative autonomy of the participating legal orders, the norm-based compound structure serves as a 'bridge' upon which the external effect of norms is grounded.[46] At the structural level, this represents a major element of the intertwinement of legal orders.

The second 'horizontal' ordering structure concerns the *application* of legal norms. Applying a norm means actualising its normative claim in the specific context of the case at hand. Prima facie, the compound structure allows for norms to interrelate at the level of norm application in a way that is independent of their original legal orders. Only in case of conflict can the origin once again become relevant (see below). The components of this application-related order are the principles of direct applicability, uniform application of norms, and equivalence.

[42] On a concept of autonomy related to the freedom of interference from external norms, *see* Peters, *supra* n. 30, p. 274 ff.

[43] *Ministero delle Finanze* v *IN.CO.GE. '90*, *supra* n. 39, para. 21.

[44] It should be noted, however, that the terms 'direct effect' and 'direct applicability' are used by some authors in the inverse sense. This paper opts for a use of these terms that better reflects their content. On the problematic terminological blurriness, *see also* Wendel, *supra* n. 15, p. 377.

[45] *Simmenthal II*, *supra* n. 2, para. 14/16.

[46] *See also* Besson, *supra* n. 5, p. 62-63.

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The principle of direct applicability of EU law, based on the case law of the European Court of Justice in the *Van Gend en Loos* decision,[47] is decisive. It enables the relevant EU law norms to enter into a relationship with domestic norms at the level of norm application. The groups of addressees of EU law and domestic law are somewhat harmonised. This is a crucial step for an application-related interrelation of norms and for the intertwinement of domestic law and EU law. However, EU law is of course only directly applicable if it contains clear and unconditional obligations for the Member States or individuals. This highlights the need for a norm-based understanding of the relationship between EU law and domestic law – the nature of every individual norm determines both its effect and its interaction with other norms. In addition, the conditionality of direct applicability reflects the fact that there is no absolute and comprehensive intertwinement of EU law and domestic law; rather, this intertwinement is only one element among others of the compound structure. Direct applicability can be understood as the expression of a structural principle of uniformity (described in the fourth part below) which has an only relative effect and can be balanced with other structural principles.

The principle of uniform application of norms reflects the high harmonising tendency characteristic of norm application in the compound structure. The European Court of Justice has established the principle that all norms of EU law have to be applied and interpreted throughout the entire European legal space in a uniform manner.[48] This is based on the idea that all EU citizens should be treated equally regarding the application of the law.[49] A parallel concept exists in domestic legal orders when it comes to the uniform application of domestic law within the respective legal order, guaranteed by the harmonising case law of supreme and constitutional courts. This parallelism enables domestic and EU law to form a 'horizontal' ordering structure related to the application of norms. However, this uniformity is again not absolute, as demonstrated by directives that leave leeway in implementation, by enhanced cooperation (Article 20 TEU, Article 326 ff TFEU), and by the protection clauses concerning domestic law-making (e.g. Articles 114(10) and 191(2) TFEU).[50]

The principle of equivalence relates more strongly to domestic legal orders. It aims at harmonising domestic facts and circumstances. '[T]he rules and

[47] ECJ 5 February 1963, Case 26/62, *Van Gend en Loos*.

[48] ECJ 21 February 1991, Joint Cases C-143/88 and C-92/89, *Zuckerfabrik Süderdithmarschen*, para. 26; ECJ 5 March 1996, Joint Cases C-46/93 and C-48/93, *Brasserie du pêcheur*, para. 33. Barents even describes the uniform applicability as 'raison d'être' of EU law, *see* R. Barents, *The Autonomy of Community Law* (Kluwer 2004) p. 183.

[49] ECJ 6 June 1972, Case 94/71, *Schlüter and Maack*, para. 11.

[50] *See also* P. Huber, 'Differenzierte Integration und Flexibilität als neues Ordnungsmuster der Europäischen Union?', 31 *EuR* (1996) p. 347.

procedures laid down by national law must not have the effect of making it virtually impossible to implement Community regulations and national legislation must be applied in a manner which is not discriminatory compared to procedures for deciding similar but purely national disputes'.[51] In this context, EU law is not the tool for, but rather the object of, harmonisation. EU law and domestic law should be applied without differentiation. Prima facie, the principle of equivalence and the principle of uniform application have opposite effects: equivalence with domestic standards results in a diversified procedural landscape for EU law. However, this is not contradictory because a harmonisation of this procedural aspect is not intended. Rather, the principle of equivalence offers a considerable advantage for the 'horizontal' ordering structure related to norm application. Based on this, EU law norms are embedded consistently into the normative context of norm application in a specific case.[52] The uniformity of the domestic legal order is guaranteed as there is no special procedural framework for EU law. Thus, the application of all norms (of either domestic or EU origin) is harmonised for this legal order. For those tasked with applying the law in a domestic legal order, the standards for norm application appear unified. Consistency as an element of uniformity is hence one of the defining features of the application of norms in the European context.

In sum, these components show that the 'horizontal' ordering structure concerning the application of legal norms is defined by a high level of uniformity, without that uniformity being absolutely determinative. This insight is important for constructing a framework that addresses the question of conflicts between norms in the European compound structure. Such a framework is discussed in the following section.

Rethinking the 'rank' between EU law and domestic law

After considering, in the previous part of the paper, the relationship between legal norms in the European compound structure, this part takes a fresh look at the question of a potential ranking of EU law and domestic law. It highlights how the question of rank can be addressed in the light of a norm-related approach and how conflicts of norms can be resolved in a norm-based compound structure. The compound structure has both an analytical and a normative dimension;[53] this part of the paper implements the latter. It draws on principles that structure the totality of norms stemming from different legal orders – in particular, the principle of

[51] ECJ 21 September 1983, Joint Cases 205/82 -215/82, *Deutsche Milchkontor GmbH*, para. 19.

[52] Raducu and Levrat, *supra* n. 16, p. 135.

[53] On the normative dimension of multilevel constitutionalism, Mayer and Wendel, *supra* n. 9, p. 138.

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uniformity and the principle of guaranteed constitutional identity – and uses them to offer normative guidance for resolving conflicts of norms.

A norm-based approach to the rank question: point of departure

Rather than thinking about a potential rank between legal orders and norms as a pre-existing reality, one should conceive of this issue as a process of constructing the relationship between norms and orders. In the absence of an absolute or intrinsic rank between legal orders, a ranking of legal norms can be constructed by following an evolutionary process. Norms enter into a concretely ranked relationship for a specific case at hand when a conflict between them is resolved in favour of one of the norms involved. Such a concretely ranked relationship can be constructed in various ways including using structural principles like the ones suggested below. Structural principles can rank norms – those principles, however, are not hierarchically ordered and relate to each other by balancing. This method emphasises ranking as a process; one that involves hierarchical as well as heterarchical elements.[54]

The elements described in the third part of this paper have important consequences for the process of constructing a rank between individual norms in particular cases. First, the *multi-level structure within the norms* establishing two different 'horizontal' ordering structures related to the validity and the application of norms shows that it is only at the level of application that conflicts of norms need to be resolved. Consequently, the parameters of the application-related ordering structure – first and foremost the element of *uniformity* – are predominant when it comes to resolving conflicts of norms. Inversely, the validity-related ordering structure remains unaffected by such a process of application-related ranking.[55] Its effects are confined to the specific norm application at hand. Also, situating norm conflicts at the level of norm application means that only such norms which are actually part of the application-related

[54] By accepting the ranking dimension as one of the components of the relationship between EU law and domestic law, the approach suggested in this paper takes an explicitly different stance from those approaches to legal pluralism that categorically deny the possibility of hierarchical elements, *see* G. Itzcovich, 'Legal Order, Legal Pluralism, Fundamental Principles. Europe and Its Law in Three Concepts', 18 *ELJ* (2012) p. 358 at p. 370.

[55] This corresponds to the concept of 'EU law primacy' as developed in an application-related manner by the ECJ and taken up by some domestic constitutional courts. *See* e.g. Estonian High Court, opinion Nr. 3-4-1-3-06 of 11 May 2006, para. 16; German Constitutional Court, decision of 6 July 2010, 2 BvR 2661/06, para. 53; Spanish Constitutional Court, decision of 13 December 2004, DTC 1/2004; Czech Constitutional Court, decision of 8 March 2006, Pl. US. 50/04, part VI. A; Polish Constitutional Court, decision of 11 May 2005, K 18/04, paras. 4.2, 6.4, 10.2; Lithuanian Constitutional Court, decision of 14 March 2006, Joint Cases 17/02-24/03-22/04, section III, para. 9.4.

ordering structure can enter into conflict: for EU law, direct applicability is required.[56]

Second, the element of *combined normativity* affects how or whether an individual norm is attributed to hierarchically related groups of norms. The substantive interrelations of legal norms make it impossible to establish purely formal hierarchies of orders. Bearing in mind the normative intertwinement, norms formally stemming from different orders cannot be ranked exclusively with respect to their system of origin. Instead, a more flexible and differentiated approach is required in order to reflect the specificities of each norm and each interrelation. It is critical to consider that the immediate objects of conflict are specific norms and not legal orders. It is the specific content of individual norms that might be divergent, not the entirety of the legal orders concerned. A focus on the legal order is, therefore, neither necessary nor helpful. On the contrary, this would cement the idea of monolithic blocs that are not only impermeable but also opposed to each other.

With regard to resolving conflicts of norms, existing conflict rules must, at a minimum, be applied in a way that takes into account that a considerable number of norms within the European compound structure are of a hybrid nature. Especially when a hybrid norm results from a process of implementation, the ranking in a situation of conflict should not exclusively relate to the formal nature of the norm. If, for example, a domestic norm that implements an EU law norm conflicts with a 'purely' domestic norm, the conflict resolution has to take the hybrid nature of the former into account. This might result in the hybrid norm trumping – because of its EU law element – a conflicting domestic norm that formally would be hierarchically superior by purely domestic standards. Likewise, the hybrid but formally domestic norm could, in another constellation of conflicting norms, trump an EU law norm on the basis of the consideration that the content of the hybrid norm reflects an EU law norm that might be considered superior to the latter EU law norm.

However, as all these scenarios presume the existence of a conflict rule, it is crucial to first consider what actually guides or should guide the resolution of conflicts in the European context. This question is answered in the following section.

[56] There is a controversy as to whether the primacy of EU law requires direct applicability. However, this debate relates to diverging concepts of what primacy actually means. E.g. contra: Lenaerts and Corthaut, *supra* n. 29, p. 290 ff; pro e.g.: T. Kruis, *Der Anwendungsvorrang des EU-Rechts in Theorie und Praxis* (Mohr Siebeck 2013) p. 49-50.

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Structural principles as basis for conflict resolution

The approach suggested in this paper uses structural principles as a point of reference for resolving conflicts between legal norms. The term 'structural principles' refers to those principles that structure the totality of norms stemming from different legal orders. In other words, they are not principles only stemming from, and having effect in, one single legal order. More precisely, they are not merely principles of EU law, such as the EU law principle of primacy. Rather, they reflect the interplay of all legal norms originating from the intertwined legal orders and thus are, to an extent, 'meta-principles'. They are, however, neither detached from nor independent of the domestic and EU legal orders. Rather, they are rooted *in* these legal orders; their normative origin is in EU law *and* domestic law. In this capacity, structural principles can serve as a common and holistic basis for the resolution of conflicts between norms stemming from these different orders. They allow for the necessary flexibility required by the heterogenic European compound structure and the corresponding qualitative plurality of conflict situations. They also permit the gradual harmonisation of concrete conflict resolution based on common standards.

In the European context, this paper argues that one can recognise two specific structural principles which are better suited to the particularities created by the intertwinement of domestic law and EU law than other more general principles:[57] the *principle of uniformity* and the *principle of guaranteed constitutional identity*. These principles need to be interlinked. In the interest of differentiated conflict resolution, this should be done by considering the cooperation aspect to be one of the characteristic elements of multilevel constitutionalism.

Principle of uniformity

The principle of uniformity aims at optimising legal uniformity and homogeneity within the European compound structure. It is especially reflected by the legal mechanisms of direct and uniform application of EU law. As described above, law application in the European context is guided by the premise of uniformity. Uniformity also plays a crucial role during law making when it aims at harmonising legal standards.[58] Uniformity is intended to guarantee the equal treatment of all EU citizens within the EU, emphasising the perspective of the legal subjects by its reference to non-discrimination and legality.[59] Thus, the

[57] For more general approaches based on structural principals, Besson, *supra* n. 5, p. 65; M. Kumm, 'Rethinking Constitutional Authority: On the Structure and Limits of Constitutional Pluralism', in Avbelj and Komárek, *supra* n. 9, p. 39 at p. 55 ff. For a discussion of why principles such as legality, subsidiarity, human rights protection and democracy do not provide sufficient guidance in the European constitutional setting, *see* D. Burchardt, *Die Rangfrage im europäischen Normenverbund* (Mohr Siebeck 2015) p. 266-276.

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principle of legality constitutes one of the foundations of structural uniformity. It requires, inter alia, that the application of norms should be as consistent as possible. According to this requirement, the interrelations of norms, in general, should be guided by the consideration of consistency. Decisions about the application of norms should be taken in a way that is consistent with previous decisions.[60] However, the principle of uniformity is not an absolute feature of the European legal space.[61] Rather, it is open to balancing with other structural principles.

In the event of conflicting legal norms, the principle of uniformity is of eminent importance for establishing the relationship between norms in a specific case. It can be used as a basis for formulating a concrete standard for the ranking of conflicting norms. If conceived as a structural principle, the principle of uniformity requires the individual relationships of norms to be streamlined in terms of uniformity: *the individual legal norms have to be scrutinised with regard to what positive effect they can have for uniformity*. (It should be noted that uniformity here refers to uniformity within the compound structure as a whole and not merely within one of the participating legal orders.) If the result of this scrutiny is diverging from one of the norms affecting uniformity more positively than the other norm, the norm with the higher potential for homogeneity should be applied. Put differently, it is suggested here that the principle of uniformity requires the following: *the norm that allows for a more comprehensive uniformity of application within the European compound structure should prevail*.

As a result, hierarchical relationships between groups of norms arise. For norms that are formally of EU law origin, one can generally assume that they have a high potential for uniformity.[62] These norms are not only substantially inspired by the objective of harmonisation, but they are also able to guarantee uniformity by means of the mechanisms of direct effect and applicability. For domestic law

[58] On the link between the uniformity principle and harmonisation, *see also* G. van der Schyff, 'The Constitutional Relationship between the European Union and its Member States: The Role of National Identity in Article 4(2) TEU', 37 *ELRev* (2012) p. 563 at p. 582.

[59] On the aspect of uniform effect and application of law as guarantee for the equality of legal subjects, *see* M. Nettesheim, 'Der Grundsatz der einheitlichen Wirksamkeit des Gemeinschaftsrechts', in A. Randelzhofer et al. (eds.), *Gedächtnisschrift Grabitz* (CH Beck 1995) p. 447 at p. 448 ff.

[60] M.P. Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action', in N. Walker (ed.), *Sovereignty in Transition* (Hart 2003) p. 501 at p. 527.

[61] On such an absolute understanding of the unity of EU law being 'the very essence' of EU law, *see* Barents, *supra* n. 48, p. 213-214.

[62] This aspect is also reflected in the order of 23 November 2016, n. 24/2017 of the Italian Constitutional Court: 'The primacy of EU law (…) reflects the conviction that the objective of unity, within the context of a legal order that ensures peace and justice between nations, justifies the renunciation of areas of sovereignty, even if defined through constitutional law'.

norms, this is generally not the case as their immediate effect is limited to a single legal order. Thus, most scenarios involving cross-order conflicts of norms will have the traditionally established outcome: a norm with a formal origin in EU law will prevail vis-à-vis a norm of formally domestic origin. The application of the EU law norm guarantees the broader application of the same standard, whereas the application of the domestic norm would be confined to its 'own' domestic legal order.

Taking the hybrid nature of many norms within the European compound structure into account, the norm-specific rank relationship can, however, also be developed more fully: for instance, a formally domestic norm transposing an EU directive can prevail vis-à-vis a 'purely' domestic norm, the reason being that the element of uniformity is more pronounced in the former than in the latter, taking into account its origin in the directive and the harmonisation purpose behind it. A number of domestic constitutional courts have in fact taken the hybrid nature of norms stemming from the implementation of EU directives seriously. The Estonian and the German constitutional courts have decided that those norms are in general not objects of constitutional review unless the directive has given some leeway of implementation.[63] A similar approach is taken by the French Conseil Constitutionnel[64] and Conseil d'État.[65] The latter reviews those norms only in cases in which the content of the relevant constitutional law provision is not already guaranteed by EU law itself. This approach embraces normative intertwinement not only with regard to the object of review but also with regard to its yardstick. The European Court of Justice, as well, has developed case law that explicitly takes the intertwinement characteristic of the compound structure into account: at least in principle, it accepts a cumulative fundamental rights review at the domestic and the EU law level wherever norms resulting from a process of implementing EU directives are involved.[66]

In comparison to other approaches attempting to justify the primacy of EU law, the principle of uniformity has one decisive advantage. It takes all elements of the compound structure, all perspectives of the individual legal orders, into account. Doing so, it does not risk following an 'aggressively purposive'[67]

[63] Estonian Constitutional Court, decision n. 3-3-1-33-06 of 5 October 2006; German Constitutional Court, decision of 13 March 2007, BvF 1/05, para. 69. A slightly different approach that, however, takes the hybrid nature of norms resulting from the implementation of directives into account, can be found in the jurisprudence of the Lithuanian Constitutional Court, decision of 8 May 2007, Case 47/04, section II.

[64] Conseil Constitutionnel, decision of 10 June 2004, n. 2004-496 DC, considérants 8-9.

[65] Conseil d'État (Ass.), decision of 8 February 2007, n. 287110.

[66] ECJ 26 February 2013, Case C-617/10, *Åkerberg Fransson*, para. 29; ECJ 26 February 2013, Case C-399/11, *Melloni*, para. 60.

[67] Kumm, *supra* n. 57, p. 45.

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approach like the one adopted by the European Court of Justice. The uniform application of legal norms throughout all participating legal orders is a consideration that transcends adopting a merely functional European perspective. Rather, it reflects the normative link between the EU and the Member States. The principle of uniformity as understood here is not limited by a self-referential, order-specific narrative that only takes the perspective of one legal order into account.[68] Whereas a perspectivist approach only refers to the uniformity of the EU legal order, the uniformity addressed by this paper is a holistic concept, the compound structure as a whole being the point of reference. The holistic nature of the principle of uniformity understood as a structural principle stems from its foundation in both European and domestic law. The fact that the principle often plays out in favour of the European law norm when it is used for ranking norms therefore does not affect the holistic nature of the principle. What is important is that both the perspective of the EU and the perspective of the Member States on what the interplay of norms should look like are taken seriously. At the domestic level, constitutional provisions and the case law of constitutional and supreme courts in particular offer valuable components for the construction of this interlinkage.[69]

Principle of guaranteed constitutional identity

The second structural principle suggested here to guide the interrelations between legal norms in the European context is the principle of guaranteed constitutional identity.[70] During recent years, constitutional identity has become the primary

[68] On the critique of a self-referential approach, *see* Burchardt, *supra* n. 3, p. 152-154, p. 179-181.

[69] Domestic law provisions of that kind are, for instance, Art. 88-1 of the French Constitution, Art. 29(4) n 4 and 5 of the Irish Constitution, Art. 7(5) and (6) of the Portuguese Constitution, Art. 23 of the German Constitution, article E of the Hungarian Constitution, Art. 143 of the Croatian Constitution, the Constitutional Act of the Republic of Lithuania on membership of the Republic of Lithuania in the European Union; rudimentarily also chapter 10, Art. 6 of the Swedish constitutional act 'Instrument of Government', Art. 4(3) of the Bulgarian Constitution.

[70] For the scholarly debate about constitutional identity, *see* e.g. L. Besselink, 'National and Constitutional Identity before and after Lisbon', 6 *Utrecht LR* (2010) p. 36; J.M. Beneyto and I. Pernice (eds.), *Europe's Constitutional Challenges in the Light of the Recent Case Law of National Constitutional Courts* (Nomos 2011); P. Faraguna, 'Constitutional Identity in the EU–A Shield or a Sword?', 18 *German Law Journal* (2017) p. 1617; T. Konstadinides, 'Constitutional Identity as a Shield and as a Sword: The European Legal Order within the Framework of National Constitutional Settlement', 13 *Cambridge Ybk European Legal Studies* (2010-2011) p. 195; Z. Körtvélyesi and B. Majtényi, 'Game of Values: The Threat of Exclusive Constitutional Identity, the EU and Hungary', 18 *German Law Journal* (2017) p. 1721; K. Kovács, 'The Rise of an Ethnocultural Constitutional Identity in the Jurisprudence of the East Central European Courts', 18 *German Law Journal* (2017) p. 1703; X. Millet, *L'Union européenne et l'identité constitutionnelle des États membres* (LGDJ 2013); M. Polzin, 'Constitutional Identity as a Constructed Reality and a Restless Soul', 18 *German Law*

point of reference both in scholarly writing[71] and in the case law of domestic courts[72] when it comes to finding a legal basis for exceptions to the EU law claim of absolute primacy.[73] Although the notion of constitutional identity has been phrased in different manners, and has been used as a political tool by member states in some cases more prominently than in others, the developing narrative reflects a common constitutional consideration.[74] The claim of the absolute primacy of EU law is challenged more often and openly than before. This is due to the fact that, unlike some domestic reservations related to the general human rights protection at the EU level, constitutional identity is primarily applied on a case-by-case basis. It not only refers to a general standard of protection but also to the relationship between norms in an individual case. In this regard, the predominant way the notion is presently used is as a 'sword' to resolve specific norm conflicts in favour of domestic law rather than as a 'shield' against further integration through the adoption of primary European law.[75]

However, the structural principle of guaranteed constitutional identity as understood here is not to be equated with individual domestic concepts of constitutional identity. Instead, it has a European and a domestic dimension and its normative basis is both EU law and domestic law. As a structural principle, it

Journal (2017) p. 1595; J.-H. Reestman, 'The Franco-German Constitutional Divide – Reflections on National and Constitutional Identity', 5 *EuConst* (2009) p. 374; A. Saiz Arnaiz and C. Alcoberro Llivina (eds.), *National Constitutional Identity and European Integration* (Intersentia 2013); T. Wischmeyer, 'Nationale Identität und Verfassungsidentität. Schutzgehalte, Instrumente, Perspektiven', 140 *Archiv des öffentlichen Rechts* (2015) p. 415.

[71] E.g. Kumm, *supra* n. 7, p. 303; A. von Bogdandy and S. Schill, 'Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty', 28 *CMLR* (2011) p. 1417; criticising these approaches van der Schyff, *supra* n. 58, p. 572-573; *see also* Advocate General Maduro, Opinion 8 October 2008, Case C-213/07, *Michaniki*, paras. 32-33. Critical on Art. 4(2) TEU as limit to primacy, M. Claes, 'National Identity: Trump Card or up for Negotiation?', in Saiz Arnaiz and Alcoberro Llivina, *supra* n. 70, p. 109.

[72] *See* e.g. German Constitutional Court, order of 15 December 2015, 2 BvR 2735/14; French Conseil Constitutionnel, decision of 27 July 2006, n. 2006-540 DC, considérant 19; Polish Constitutional Court, decision of 24 November 2010, K 32/09, section 2.1; Czech Constitutional Court, decision of 26 November 2008, Pl. US. 19/08; Italian Constitutional Court, order of 23 November 2016, n. 24/2017, §6; Hungarian Constitutional Court, decision of 30 November 2016, 22/2016. (XII. 5.) AB; in an obiter dictum: Belgian Constitutional Court No. 62/2016, 28 April 2016, B.8.7.

[73] The ECJ, however, has been reluctant to refer to the concept of national identity although it had been discussed in the respective Opinions of the Advocate Generals: judgment of 16 June 2015, Case C-62/14, *Gauweiler*; judgment of 13 March 2017, Case C-157/15, *Samira Achbita*; judgement of 5 December 2017, Case C-42/17, *Taricco II*.

[74] On the rising approach of an 'ethnocultural' constitutional identity in East Central Europe, *see* Kovács, *supra* n. 70.

[75] On using constitutional identity as a 'shield or a sword', *see* Faraguna, *supra* n. 70; Konstadinides, *supra* n. 70.

refers to all legal norms originating from the intertwined legal orders in the European compound structure and to their interplay. Understood in this way, this principle reflects the abstract idea of a protected constitutional core that emanates from European and domestic constitutional orders. Such a holistic understanding of constitutional identity emphasises that this principle is open to balancing with other principles and to the process of optimisation attached to that balancing.[76] Unlike national identity in Article 4(2) TEU and domestic concepts of constitutional identity, which are often considered to be of an absolute nature,[77] the structural principle of guaranteed constitutional identity does not constitute an absolute limit. Rather, it only prohibits disproportionate encroachments on domestic constitutional identity by EU law.[78] As a holistic principle, its effects cannot be determined only from the perspective of a single legal order.[79] Rather, domestic law and EU law combined shape both its content and its effects. This prevents unilateral use or misuse of the concept of constitutional identity by the actors of one legal order.[80]

In substance, this principle requires guaranteeing the constitutional identity of all legal orders that are part of the European compound structure. Consequently, it

[76] Von Bogdandy and Schill, *supra* n. 71, p. 1441; van der Schyff, *supra* n. 58, p. 579 ff; similar Advocate General Maduro, Opinion in *Michaniki*, *supra* n. 71, at para. 33; as well as Kumm, *supra* n. 7, p. 303. On the French conception of a relative constitutional identity *see* Reestman, *supra* n. 70, p. 388.

[77] On an exclusively domestic law-related argumentation for the absolute nature of constitutional identity, see German Constitutional Court, Order of 14 January 2014 - 2 BvR 2728/13, at para. 29: 'Since Art. 79 sec. 3 GG also sets an "ultimate limit" … to the applicability of Union law within the German jurisdiction under the Basic Law, the principles which are stipulated therein may not be balanced against other legal interests …'.

[78] Critical about an absolute limit: Advocate General Cruz Villalón, Opinion in *Gauweiler*, *supra* n. 73, at para. 59: '[I]t seems to me an all but impossible task to preserve this Union, as we know it today, if it is to be made subject to an absolute reservation, ill-defined and virtually at the discretion of each of the Member States, which takes the form of a category described as "constitutional identity"'. Similarly, Advocate General Kokott pointed out in his Opinion in *Samira Achbita*, *supra* n. 73, at para. 32: 'The European Union's obligation under Article 4(2) TEU to respect the national identities of its Member States does not in itself support the inference that certain subject areas or areas of activity are entirely removed from the scope of Directive 2000/78. … National identity does not therefore limit the scope of the Directive as such, but must be duly taken into account in [its] interpretation'. *See also* Advocate General Bot in Opinion of 18 July 2017, Case C-42/17, *Taricco II*, para. 180.

[79] The holistic nature of this structural principle differs from approaches that suggest an EU law principle of constitutional identity, *see* Millet, *supra* n. 70, part 2.

[80] Unilaterally focused on the European perspective: M. Wendel, 'Lisbon before the Courts: Comparative Perspectives', in J.M. Beneyto and I. Pernice (eds.), *Europe's Constitutional Challenges in the Light of the Recent Case Law of National Constitutional Courts* (Nomos 2011) p. 65 at p. 103. On the problematic use of the concept by Hungary, *see* G. Halmai, 'National(ist) constitutional identity? Hungary's road to abuse constitutional pluralism', EUI Working Paper LAW 2017/08.

concerns both the identity of the constitutional fabric of the EU and the identity of the constitutional systems of the Member States.[81] In a compound structure, the essentials of all participating legal orders have to be respected. As Miguel Poiares Maduro has put it: there is 'the requirement […] that any legal order (national or European) must respect the identity of the other legal orders; its identity must not be affirmed in a manner that either challenges the identity of the other legal orders or the pluralist conception of the European legal order itself.'[82] With reference to the individual legal norm, this means that a norm can both reflect the identity of its 'own' constitutional order and affect the identity of another legal order. Both these dimensions have to be taken into account when determining the relationship between legal norms stemming from different legal orders.

Compared to the first structural principle (principle of uniformity), the principle of guaranteed constitutional identity has an opposing orientation. Whereas the principle of uniformity sets a general standard guiding the interrelation of norms, this second principle serves as a corrective to the individual rank relationship established by the principle of uniformity. Whereas the latter orients the relationship between norms in favour of a primacy of the EU law norm, the constitutional identity of a domestic legal order embodied in a specific domestic law norm can be an obstacle to that primacy. In such cases, the two structural principles (uniformity and guaranteed constitutional identity) conflict. This conflict can be resolved by a mutual 'relativisation' and optimisation of both principles. In particular, this entails a substantive relativisation of the primacy claim of EU law. However, given the merely relative effect of both principles, the aspect of constitutional identity will not be able to prevail under all circumstances. Rather, it needs to be reconciled with the principle of uniformity, thereby allowing the optimisation of both principles. This requires a more differentiated conflict resolution.

The principle of guaranteed constitutional identity is a genuine reflection of the compound structure of the European legal space. On the one hand, it safeguards elements specific to a certain legal order, which expresses the order's relative

[81] On the question of an EU constitutional identity, *see* W. Sadurski, 'European Constitutional Identity?', EUI Working Paper LAW No. 2006/33. On the idea of a European compound structure of identity formed by the EU and its Member States, *see* E. Pache, 'Europäische und nationale Identität: Integration durch Verfassungsrecht?', 117 *DVBl* (2002) p. 1154 at p. 1167.

[82] Maduro, *supra* n. 60, p. 526. A similar approach is taken by the Polish Constitutional Court regarding its reservation for constitutional identity (although primarily with regard to the relationship amongst Member States), *see* K 32/09 (Lisbon Treaty), decision of 24/11/2010, section 2.1: 'The idea of confirming one's national identity in solidarity with other nations, and not against them, constitutes the main axiological basis of the European Union, in the light of the Treaty of Lisbon'.

autonomy. It is a 'principle that protects the diversity' in the EU.[83] At the same time, it contributes to replacing the traditional understanding of absolute autonomy and to establishing a relative and norm-based ranking of legal norms. On the other hand, the principle of guaranteed constitutional identity is not isolated but can interact with other structural principles, thus becoming an element of complementarity and intertwinement. When it is integrated into a differentiated model of conflict resolution, it interconnects both the concerned groups of norms and the relevant actors.

Differentiated conflict resolution

When weighing the principles of uniformity and guaranteed constitutional identity, norm-applying actors should consider the aspect of cooperation – one of the characteristic elements of multi-level constitutionalism reflecting complementarity. The norm-based compound structure created by EU and domestic law enables and requires a cooperative framework in which the relevant European and domestic actors can contribute to achieving a differentiated approach to resolving conflicts of norms. Such a differentiated approach can be attained in various ways.

In the interest of balancing the opposing structural principles appropriately, a relationship involving ranking should, first of all, differentiate regarding the nature of the EU law norms against which the identity argument is addressed. In this respect, the first differentiation that necessarily comes to mind is the one between EU primary and secondary law.[84] This refers to the idea that the law-making and law-applying actors in the European and domestic legal orders are responsible for guaranteeing respect for the constitutional identity of both their own legal order and the other legal orders affected by their actions. Member States have the responsibility to ensure that their 'own' constitutional identity remains unaffected and to take the necessary initiatives required by their constitutions. However, this is not possible to the same extent with regard to EU primary and secondary law. Whereas secondary law can generally be created against the will of a minority of Member States, Article 48 TEU requires unanimity for treaty making and treaty amendments.[85] As a consequence, one can (and should) presume that the EU primary law does not run counter to the constitutional identity of the domestic legal orders, given that the Member States consented to it during the process of norm creation. During the legislative process of primary law creation, the Member

[83] On the necessity to respect such principles that protect diversity, *see* A. von Bogdandy, 'Grundprinzipien', in von Bogdandy and Bast, *supra* n. 21, p. 13 at p. 52 ff; Tietje, *supra* n. 5, p. 51.

[84] Similarly, van der Schyff, *supra* n. 58, p. 582.

[85] On the secondary law-making procedures, B. de Witte, 'Legal Instruments and Law-Making in the Lisbon Treaty', in S. Griller and J. Ziller (eds.), *The Lisbon Treaty* (Springer 2008) p. 79 at p. 97.

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States have sufficient instruments to ensure that the normative content of EU primary law does not run counter to the imperative standards of their domestic constitutional frameworks.[86] This presumption addresses the Member States as unitary actors (as is often the case in the EU law context). This means that, although domestic actors within a state might have diverging opinions on constitutional identity issues, this is an internal matter only. What counts is the *possibility* for the Member States to intervene. Thus, once the law-making process has been completed, the element of domestic constitutional identity retreats into the background. As a result, the standard set by the principle of uniformity should remain untouched in this context: the primacy of EU primary law over domestic law should be absolute. Even if a Member State has failed to ensure respect for its constitutional identity (although it had the possibility to do so during the law-making procedure), the rules of EU primary law will trump any conflicting domestic law norm. As respect for the domestic constitutional identity can be guaranteed differently, the principle of uniformity is able to prevail in situations of norm conflict. Conversely, no presumption of this kind exists for EU secondary law. Here, a cooperative approach requires that constitutional identity considerations are taken into account by all actors when applying secondary law.

The only situation that could potentially rebut the presumption regarding primary law relates to the interpretation given to a primary law norm by the European Court of Justice. If a Member State argues that during the law-making process the concrete meaning given to a norm by the Court was impossible to predict and, therefore, it was impossible for the Member State to ensure its constitutional identity during that process, the principle of guaranteeing constitutional identity could be revived. In such exceptional circumstances, the presumption that a primary law norm trumps a conflicting domestic law norm could, therefore, be rebutted.

A similar differentiation based on the consent given by the Member States during the law-making process has also been adopted by the French Constitutional Court. In its case law, it initially develops a reservation concerning the primacy of EU law in cases in which the French constitutional identity is affected. It then, however, modifies this reservation and declares it to be inapplicable whenever the French constitutional legislature has consented to the EU law norm in question.[87] This case law relates to the responsibility for guaranteeing France's 'own' constitutional identity and deduces from this responsibility the limited invocability of the identity argument vis-à-vis the

[86] On mechanism of taking constitutional identity into account during EU law creation, *see* Millet, *supra* n. 70, part 2.

[87] Conseil Constitutionnel, decision of 9 June 2011, n. 2011-631 DC, para. 45.

primacy claim of EU law. This case law is a first step towards a method of differentiation like the one suggested in this paper.

The second type of differentiation suggested here asks how intensely the constitutional identity is affected in a specific situation. Given that the principle of guaranteed constitutional identity is oriented towards correcting – in exceptional circumstances – the ranking of norms established by the principle of uniformity, a certain intensity of the way in which a specific component of constitutional identity is affected should be required for this principle to prevail. When an element belonging to the constitutional identity of a domestic legal order is merely touched upon, this cannot be sufficient grounds to challenge the 'normal' ranking of norms established by the principle of uniformity. If the constitutional identity is affected to a considerable degree, only then can it alter the structures of the norm relationships. Such a requirement of intensity prevents one legal order from invoking its constitutional identity against the constitutional identity of the other legal order in a disproportionate manner.[88] Invoking the constitutional identity should fall under the requirement of proportionality. First, this might contribute to restraining political use or abuse of the concept and to assuring that actors invoke the identity argument in a cooperative manner. Second, it guarantees that the structural principles of uniformity and constitutional identity are balanced in a way that leads to their respective optimisation.[89]

The suggested intensity-related differentiation with regard to the effect of the principle of guaranteed constitutional identity can be linked to the case law of the European Court of Justice. Although the court has not yet addressed constitutional identity explicitly, the decisions in *Omega*[90] and *Michaniki*[91] can be taken as a point of reference for a differentiated approach. They indicate a non-absolute invocability of arguments grounded on domestic constitutional identity.[92] In comparison, the Court attributes a different weight to arguments of domestic constitutional law depending on how prominent the relevant constitutional rule or principle is for its respective domestic legal order. In the more recent *Taricco II* case, the court also emphasises the importance of the constitutional principle at stake in that case.[93] While this might indicate that, here again, the weight of the Member State's argument is based on how prominent the domestic constitutional norm is, the court, however, leaves open the extent to

[88] *See* on this aspect, Maduro, *supra* n. 60, p. 526.

[89] R. Alexy, *Theorie der Grundrechte* (Suhrkamp 1985) p. 71 ff.

[90] ECJ 14 October 2004, Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs*.

[91] ECJ 16 December 2008, Case C-213/07, *Michaniki*.

[92] Besselink, *supra* n. 70, p. 48-49; O. Pollicino, 'New Emerging Judicial Dynamics of the Relationship Between National and the European Courts after the Enlargement of Europe', 29 *YEL* (2010) p. 65 at p. 95-96.

[93] ECJ 5 December 2017, Case C-42/17, at 51.

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which this prominence specifically influences the decision. A more explicit reference to an intensity-related differentiation was made in *Sayn-Wittgenstein*[94] and *Runevič-Vardyn*.[95] Recognising the republican form of government in Austria as well as the official language of Lithuania as elements of national identity in the sense of Article 4(2) TEU, the Court differentiated between domestic constitutional norms of greater and lesser importance and between the intensity by which the respective domestic national identity is affected. An intensity-related differentiation is thus not foreign to the case law of the European Court of Justice.[96]

If the aspect of constitutional identity is to have an impact on specific relations between norms, it has to be determined what constitutional identity actually is and of which concrete elements it is composed. Given that these elements originate from a specific legal order, one possible approach would be to have exclusively the actors belonging to the respective legal order determine the content of constitutional identity. Constitutional norms, as well as the case law of the constitutional courts, would then constitute the main point of reference. As a consequence, the Member States could unilaterally determine the content of what constitutes an exception to the primacy of EU law. That is the approach taken by several constitutional courts in this matter.[97]

However, in the context of applying the principle of guaranteed constitutional identity, the compound structure formed by EU law and domestic law should be taken into account. The elements that belong to the constitutional identity of a specific legal order should be concretised by both EU and domestic actors.[98] A unilateral determination of what constitutional identity means is not compatible with this approach. Along these lines, Advocate General Cruz Villalón has warned against an absolute reservation of constitutional identity 'virtually at the discretion of each of the Member States'.[99]

Constitutional identity applied as an element of norm-based intertwinement requires that all concerned legal orders be involved. For the relevant actors, this

[94] ECJ 22 December 2010, Case C-208/09, *Sayn-Wittgenstein*, in particular paras. 92 ff.

[95] ECJ 12 May 2011, Case C-391/09, *Runevič-Vardyn*, paras. 83 ff.

[96] Other decisions on this issue include ECJ 12 June 2014, Case C-156/13, *Digibet and Albers*, at para. 34; ECJ 16 April 2013, Case C-202/11, *Anton Las* v *PSA Antwerp NV*, at para. 26.

[97] *See* e.g. Italian Constitutional Court, order of 23 November 2016, n. 24/2017; German Constitutional Court, order of 15 December 2015, 2 BvR 2735/14, in particular paras. 40-50; order of 14 January 2014, 2 BvE 13/13, at 29

[98] On involving the ECJ in this determining process, *see also* Claes, *supra* n. 71, p. 109; C. Grewe, 'Methods of Identification of National Constitutional Identity', in Saiz Arnaiz and Alcoberro Llivina, *supra* n. 70, p. 37.

[99] Advocate General Cruz Villalón, Opinion of 14 January 2015, Case C-62/14, *Gauweiler et al.*, at p. 59. A similar approach is taken by Advocate General Bot, Opinion in *Taricco II*, *supra* n. 78, at 180.

entails a cooperative approach. As a first step, the prima facie concretisation should be generally carried out by domestic actors, the reason being that the legal order whose constitutional identity is affected is, of course, better situated to specify the content of the constitutional identity of a certain legal order. However, as a second step, it is both conceptually required and practically feasible to complement the domestic determination with a European equivalent. The content of domestic constitutional identity should be determined primarily by domestic actors – but in the framework of EU law. A possible mechanism could be to use a 'plausibility check' as a follow-up at the level of EU law. This would limit the risk of Member States engaging in a too extensive or not sufficiently justified interpretation of constitutional identity.[100] Taking up, for instance, the aspect of intensity mentioned above, one of the roles at the European level could be to check whether the argument of the domestic actors is plausible, i.e. that the constitutional identity of their legal order is in fact affected to a considerable degree. By installing this kind of plausibility check, the intensity-related differentiation and the element of control at the EU level could be combined. This would provide an additional element of restraint regarding the potential political use or abuse of the concept of constitutional identity. What is more, such a complementary model would properly reflect the idea of dialogue[101] between the different legal orders and their respective actors, an idea that defines the existing European compound structure and that is preferable to a narrative of 'rebellion'[102] or 'resistance'[103] on the part of domestic courts.

A further argument for a cooperative approach is provided by looking closely at the norms involved in a particular conflict. In the case of a conflict between an EU norm reflecting uniformity and a norm reflecting domestic constitutional identity, an additional internal EU norm conflict occurs between the EU norm reflecting the principle of uniformity and Article 4(2) TEU.[104] Hence, the conflict, in fact, involves a multipolar relationship between a domestic norm and various EU law norms. As the relationship is not merely internal to either the EU or domestic legal

[100] Regarding Art. 4(2) TEU, some have even claimed that only elements of national identity which respect the fundamental values of the EU can be considered under European law, *see* J.-P. Jacqué, 'L'évolution des rapports entre le droit de l'Union et le droit national du point de vue de l'Union', in J. Schwarze (ed.), *Das Verhältnis von nationalem Recht und Europarecht im Wandel der Zeit* (tome 1, Nomos 2012) p. 33 at p. 36.

[101] Also emphasising dialogue in this context, Claes, *supra* n. 71.

[102] A. Arnull and D. Wyatt, *European Union Law*, 5th edn (Sweet & Maxwell 2006) p. 142.

[103] Concurring opinion by Judge Béla Pokol to Hungarian Constitutional Court Decision 22/2016 (XII. 5.) AB: 'the constitutional courts' abstract right of *resistance* against the legal acts of the Union' (emphasis added).

[104] On this aspect of the conflict, *see also* Spanish Constitutional Court, declaration of 13 December 2004, DTC 1/2004.

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order, the conflict should not be resolved exclusively by either domestic or European norm applying bodies. In particular, it would be too one-sided to deduce from the European Court of Justice's interpretative competence with respect to Article 4(2) TEU a unilateral capacity to resolve such conflicts. Rather, the multipolar nature of the norm conflict should translate into a cooperative relationship between European and domestic courts and other norm applying bodies.[105] A unilateral decision risks having the involved structural principles not being balanced sufficiently.[106] It should be kept in mind that only a combination of both principles, uniformity and guaranteed constitutional identity, can set the framework for resolving specific conflicts of norms.

Conclusion

The paper has highlighted how the often-claimed intertwinement of EU and domestic law plays out in detail. It has suggested a way to conceptualise the specific forms of intertwinement and their structural consequences at the level of legal theory. It has shown how elements of autonomy *and* intertwinement, of heterarchy *and* hierarchy, can coexist. Further, the paper has demonstrated how a norm-based approach to the relationship between EU and domestic law can contribute to overcoming a perspectivist approach. The concept of a norm-based compound structure introduced in this paper embraces a holistic understanding of both the nature of the legal norms contained in the compound structure and the legal tools to resolve conflicts between those norms. This approach contributes to strengthening the analytical and normative framework for understanding the interrelations between norms. Especially in situations of conflicting norms in an inter-order dimension, the compound structure provides for structural principles – the principles of uniformity and guaranteed constitutional identity – which should be used to enable holistic and differentiated conflict resolution. This offers a balanced approach to address the claims of supremacy and constitutional identity lodged by the actors in the European constitutional setting.

[105] Some suggest an 'Identity Committee' as ad hoc body in cases concerning constitutional identity, *see* J. Villotti, 'National Constitutional Identity and the Legitimacy of the European Union – Two Sides of the European Coin', 18 *ZEuS* (2015) p. 475.

[106] On this danger, *see also* Pollicino, *supra* n. 92, p. 97.

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